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

OPENING LEGAL SUBMISSIONS

INTRODUCTION

1. These opening legal submissions summarise the case for the Applicant, Jagger NZ Ltd. They are not intended to repeat the Applicant's evidence, but outline the legal framework the Panel must apply, and address the small number of issues still in contention.

2. There is no dispute that consent sought should be granted:

    a. The GWRC s42A report (prepared by Doug Fletcher, peer reviewed by Michelle Conland and Sonia Barker, and Approved by Alistair Cross) recommends that the consents "be granted for the reasons outlined in the report".

    b. The PCC s42A report (authored by Andrew Jones) also recommends that the consents "be granted".

3. The only expert evidence lodged was by NZTA, and it supports the grant of consent. Accordingly, and while the Panel must consider all

the evidence before it in support of the grant of consent, the proper focus of this hearing can be on the outstanding matters of detail and how they might impact on the conditions of consent.

STRUCTURE

4. The balance of these submissions are structured as follows:

   a. Background/context.

   b. Legal framework – a brief overview.

   c. Residual issues.

   d. Witnesses.

BACKGROUND

5. Context is important:

   a. The site has long been earmarked for residential development: since at least in early 2011, when a CDP was adopted by PCC, PCC at least has accepted that the land would be developed for residential use. Of course, resource consents need to be obtained in the usual way.

   b. The surrounding area up-catchment of Brookside has been consented and developed as envisaged by the CDP.

   c. The Applicant first looked at acquiring the site in 2014, and eventually did so in 2015. It has since spent some time working with its expert team to develop a responsible proposal – rather than rush in; while it would have preferred to have had its consents lodged and determined earlier, but has wanted to do the best job possible.

   d. The Applicant is a responsible developer with a proven track record – and is committed to delivering the development itself or through related companies.

e. The proposal is one for a Discretionary Activity overall – while, it can be declined – it can be said to one that is contemplated by the planning instruments; that is the frame of the relevant planning instruments, but which the Applicant made its investment decision (and "ordered its life").[1] The site is after all zoned Suburban by PCC.

LEGAL FRAMEWORK

6. The familiar requirements for you to consider in the exercise of your discretion comprise:

   a. Part 2 of the RMA (s104(1)).

   b. Any actual and potential effects on the environment of allowing the activity (s104(1)(a)).

   c. The relevant statutory instruments (s104(1)(b)).

7. **Part 2**: It is common to consider Part 2 as part of exercising an "overall broad judgement", after specific consideration of the effects and statutory instruments. Despite some suggestions to the contrary, the Supreme Court's decision in *NZ King Salmon*[2] does not prevent a consent authority from applying an overall broad judgment in considering a consent application.[3] This is not a "finely balanced" case, which turns on Part 2 considerations. That said, the enabling of people and communities to provide for their social and economic wellbeing are important considerations to be kept in mind when considering the application. It will provide 148 residential lots in an area where there is a clear need for additional housing, and against a wider government drive to keep housing affordable. Unreasonable conditions that put the project at risk, or might introduce significant

[1] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, per Elias CJ at Paragraph [10].
[2] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.
[3] *KPF Investments v Marlborough District Council* [2014] NZEnvC 152; and, in relation to a notice of requirement, *New Zealand Transport Agency v Architectural Centre Incorporated* [2015] NZHC 1991.

delays, need to be carefully considered: are they necessary, and could they be disproportionate to any benefit achieved?

8. **Effects/planning instruments**: Mr Holmes summarises the evidence on effects in his evidence, including by reference to the relevant planning instruments (in broad terms). There is a very large measure of agreement with the reporting officers. These submissions focus on few remaining residual issues, or specific legal matters that need to be addressed at this stage.

RESIDUAL ISSUES

Stream protection, planting and SEV/ECR issues

9. There is some disagreement between the Applicant's expert (Mr Christensen, of Cardno) and Mott MacDonald for GWRC as to the extent of bank stream protection required.

10. Mr Christensen and Cardno have take a design philosophy to minimise artificial erosion protection, except were necessary. Mott MacDonald appear to be taking a more "conservative" approach, that requires significantly more erosion protection. While that might be appropriate in circumstances where there is considerable risk (see e.g. Policy 52 of the RPS), and significant consequences of erosion, that is not the case here. Vegetation and natural banks (that would be removed in order to install artificial erosion protection) have not been unduly impacted by past flood events and there the proposal is not expected to exacerbate that.

11. Aside from the difference in philosophy and approach to risk, there are also consequences if additional vegetation is lost to artificial erosion control in terms of the SEV/ECR matters. In terms of what is presently proposed, the total impacted stream length is 973m (with 146m of in-stream works). That is roughly equivalent to the length of stream available **onsite** for restoration works – 986m.

12. So, **if** the additional stream erosion protection works were imposed, **and** that had the consequence of requiring further consideration of the ECR calculation to be undertaken – those additional works would

necessarily have to be **offsite**. While offsite mitigation can be taken into account, it is usually offered up by an applicant where they know that they can deliver it. Here, the Applicant has no certainty about its ability to deliver offsite stream works. It puts the Applicant at the mercy of third parties. That is unreasonable in the circumstances, including because:

a. The erosion protection works are not "required to avoid unacceptable risk" (Policy 52).

b. Even if it were reasonable to impose some additional erosion protection works, it does not follow that there must be additional stream offset planting. While that might be ideal, there is is no policy or statutory requirement to achieve no net loss.

c. Further, in this case, a requirement for additional stream works puts the Applicant at the mercy of a third party, with significant impacts on certainty, timing, and, in all likelihood, cost.

13. The Board of Inquiry dealing with Transmission Gully had this to say about ECR and no net loss [emphasis added]:

> *[459] We appreciate that a key element of the concept of no net loss is a detailed assessment of the ecological environment and the effects which a project might have on it, accompanied by a principled assessment quantifying the value of biodiversity offsets and the extent of gains which are required to offset losses in biodiversity. Much of the debate between the witnesses and the parties revolved around these matters and the issue of calculation of an ECR.*
>
> *[460] It was not apparent to us why these particular compensation ratios were promoted and it appeared that there may have been a certain rule of thumb element to their selection. Ultimately we do not consider that is of any great moment in our decision, even appreciating the need for there to be a principled approach to the quantification of biodiversity offsets. It is not necessary for us to specify appropriate offset mitigation ratios in reaching our decision. There are three reasons for that:*
>
> *[461] Firstly, none of the witnesses identified any universally accepted ratio for the calculation of mitigation for vegetation loss. It seems to us that **such a matter will always be open for debate and that ultimately the adequacy of mitigation proposed (whether biodiversity mitigation or otherwise) is always a matter which is subject to debate and determination by a consent authority**.*
>
> *[462] Secondly, while we recognise the desirability of achieving a situation of no net loss of biodiversity from a project, we do not believe that it is a requirement of RMA that no net loss be achieved*

> *in any given case. The principle of sustainable management requires a broad consideration of a range of sometimes competing factors.* ***A consent authority is entitled to conclude that consent ought to be granted to the proposal notwithstanding that all adverse effects of the proposal have not been avoided, remedied or mitigated. In other words there may be a net loss of some values or aspects of the environment. The significance of that loss and its weighting against the benefits of any given proposal is a matter to be determined by a consent authority applying section 5(2) RMA****.*

14. Mr Miller's evidence confirms the benefits of the mitigation proposed, and, notwithstanding that there is no need to achieve no net loss, that with the recommended "compensation", the result will be an "almost continuous vegetated riparian corridor through the site (excluding crossings) that will, in his view, "achieve no net loss of stream ecological value or function" [paragraph 111].

Single story and site coverage restrictions

15. Mr Jones and Mr Gray are seeking a requirement that all the dwellings be single level, and that "edge" lots be subject to a 40% site coverage limit.

16. The Applicant does not accept that as reasonable – it wishes to have greater flexibility at the later building design stage, including to respond to topographical requirements. The proposed restriction appears to be based on a "desktop" consideration of the difference between 40% and 45% (as sought) coverage – rather than taking a more fine grained approach to whether because of the proximity of an existing dwelling and its elevations, likely screening etc, there should be a departure from what the Applicant has sought.

17. Notwithstanding that it does not consider additional controls necessary, the Applicant has put forward a "compromise", whereby the perimeter sites could be subject to a single storey restriction with 45% coverage, or 35% coverage but with a 2 storey building.

Consent notices – pump station works, advice note to condition 102, and geotechnical matters

18. Consent notices, once registered on a title, impact on value; and potentially considerably. They should be used sparingly.

19. They can also only be used where "subdivision consent is granted subject to a condition is to be complied with on a continuing basis by the subdividing owner and subsequent owners" [section 221(1)].

Pump station works

20. The section 42A report in paragraph 6.200 proposes:

> *6.200 ... I recommend a consent condition to alert future lot owners of potential noise and odour issues be registered on titles of potentially affected lots by consent notice and advising of potential upgrade works by Wellington Water. ...*

21. The validity of the condition is highly questionable – there is no continuing obligation (like, say, planting requirements) that the consent notice relates to. Section 221 was not designed as a mechanism for giving general notice to future owners of possible works that might be undertaken in the vicinity. They have a responsibility to undertake their own due diligence.

22. In any event, the pump station works are likely to be completed well before development of the relevant lots.

Advice note to condition 102

23. An advice note has no legal effect, although it can affect interpretation, as well as influence expectations and Council behaviour, once consent is granted. Advice note 102 states:

> *Where the report identifies limitations, the General Manager Policy, Planning & Regulatory Services may require that a consent notice be imposed on Computer Freehold Register/s giving notice of the limitations or specific development requirements relating thereto. The costs associated with the preparation and registration of any consent notices are to be met by the consent holder.*

24. It is questionable whether a council officer can, after the grant of a consent, require a consent notice under section 221 under the authority of an advice note rather than a condition. Even if the advice note were a condition, it is unreasonable and unnecessary. If works later occur outside of what is identified in the relevant report, then that will be a breach of condition 102 itself.

Geotechnical matters

25. The same potential issues occur in respect of the suggested geotechnical advice notes, particularly where they seem to simply focus on giving notice of a potential for liquefaction. This is notwithstanding requirements in conditions (and commitment by the Applicant) to undertake appropriate investigations and earthworks, to be confirmed before section 224 approval.

Development/financial contributions

26. The draft development contribution agreement is due to be executed.

27. If it is not executed by the time of your decision, then any financial contribution condition should be made subject to the development contribution agreement being subsequently agreed and executed. That will avoid an unnecessary application under section 127 to remove the financial contribution requirement, that would be superseded by the development contribution agreement.

Witnesses

28. The Applicant will call:

    a. Mr Ray O'Callaghan - engineering

    b. Mr Kyle Christensen - flood and erosion

    c. Mr Tim Kelly - traffic (if needed)

    d. Mr Dean Miller - ecology

    e. Mr Bryce Holmes - planning evidence

DATED 5 April 2016

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