BEFORE A COMMISSIONER APPOINTED BY THE OTAGO REGIONAL COUNCIL AND CENTRAL OTAGO REGIONAL COUNCIL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	applications by Cromwell Certified Concrete Limited for resource consents to expand Amisfield Quarry

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MEMORANDUM OF COUNSEL FOR CROMWELL CERTIFIED CONCRETE LIMITED

(HEARING DATE)

Dated: 16 November 2021

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MAY IT PLEASE THE COMMISSIONER:

Introduction

1 These applications (to deepen and expand the Amisfield Quarry) were lodged on 23 October 2020, almost 13 months ago.

2 While a notice of hearing has not yet been issued, the applications are scheduled to be heard on 15 December 2021.

3 On 11 November 2021, the usual directions for provision of the s42A report and exchange of evidence were made[1]:

(a) The s42A report must be provided by Tuesday 23 November 2021;

(b) The applicant's evidence must be provided by 30 November 2021; and

(c) Any expert evidence for the submitters must be provided by 7 December 2021.

4 This memorandum addresses a request[2] made by counsel for Amisfield Orchard Limited, Hayden Little Family Trust and Nicola and Bryson Clark (the Submitters) that the hearing be delayed until the first quarter of 2022.

5 That request is strongly opposed by the applicant.

6 For the hearing to be deferred, you would need to extend the statutory timeframe in which the hearing of the applications must be completed. The circumstances in which that may be done (and limits on the length of any extension) are set out in s37 and s37A of the Resource Management Act 1991 (RMA).

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[1] In accordance with the requirements of s103B RMA.
[2] By way of memorandum dated 11 November 2021.

Statutory Timeframe– Completion of Hearing

7 Section 103A(3) of the RMA requires that a hearing of applications for resource consents which have been limited notified must be **completed** within 45 working days of the close of submissions. This includes any working days during which a hearing is adjourned.

8 Whilst the scheduled hearing of these applications is close to Christmas, the 'working day' clock in the RMA does not stop until 20 December.

9 Submissions to the Central Otago District Council on this proposal closed on 25 May 2021. Submissions to the Otago Regional Council closed on (variously) 25 May 2021, 11 June 2021 and 15 June 2021[3].

10 On 15 June 2021, the applicant placed the applications on hold under s91A RMA to allow the applicant to consider the issues raised in submissions. Having done that (and having refined the proposal and developed proposed conditions as a result of matters raised in submissions), the applications were taken off hold on 11 November 2021.

11 Given these dates, unless the statutory timeframe for completion of the hearing is extended under s37 and s37A of the Act, the hearing (including any adjournment for the applicant's reply) is required to completed by 4 February 2021.

Extension of Hearing Timeframe – Sections 37 and 37A RMA

12 Under s37A(4) of the Act, a timeframe may be extended for up to twice the maximum period specified in the Act if either:

(a) special circumstances apply (including special circumstances existing by reason of the scale or complexity of the matter); **or**

[3] A notification decision on the applications to ORC was made on 20 April 2021. Notice of the applications was served on 27 April 2021. Those applications were then re-notified by the Council on 11 May 2021 due to incorrect information in the Council's GIS system. A further notification decision was then made identifying another affected party, with the deadline for the submission from that party being 15 June 2021.

(b) the applicant agrees to the extension;

and

(c) the authority has taken into account the matters specified in s37A(1), being:

(i) the interests of any person who, in its opinion, may be directly affected by the extension or waiver; and

(ii) the interests of the community in achieving adequate assessment of the effects of a proposal, policy statement, or plan; and

(iii) its duty under s21 of the Act to avoid unreasonable delay.

13 The applicant does not agree to the extension. Therefore, if you were minded to extend the timeframe for completion of the hearing, you would need to:

(a) be satisfied that special circumstances apply; **and**

(b) take into account the matters listed in s37A(1).

Special Circumstances

14 "Special circumstances" are not defined in the RMA. However in the context of public notification of resource consents, a special circumstance has been defined by the Court of Appeal as one which is "outside the common run of things which is exceptional, abnormal or unusual but may be less than extraordinary or unique" (*Far North District Council v Te Runanga-iwi o Ngati Kahu* [2013] NZCA 221).

15 By way of a summary, the Submitters seek deferral of the hearing for the following reasons:

(a) They would like more time to consider the information which the applicant provided to the consent authorities on 11 November 2021, when the applications were taken off hold;

(b) The inability of their air quality expert to physically visit the site due to Auckland lockdowns;

(c) They are unsure whether OIO approval (which was needed for the applicant to purchase land on which the quarry is proposed to expand) has expired;

(d) They understand that the applicant is in process of applying for further consents in relation an alleged encroachment of the quarry onto Hayden Little Family Trust's land.

16 These reasons are not "outside the common run of things", nor are they "exceptional, abnormal or unusual". These applications are not unusual, in terms of their scale or complexity.

Further information provided to consent authorities

17 Section 91A(2) of the RMA provides for an applicant to place an application on hold following the close of submissions in order to consider matters raised in those submissions and refine its proposal accordingly. There a range of reasons for (and benefits of) giving an applicant that right, including:

(a) enabling the reporting officer to consider that information before receipt of the applicant's evidence and the hearing, and to seek further opinion if necessary;

(b) avoiding changes to an applicant's proposal being introduced in evidence or at a hearing, thereby giving all parties time to consider and respond to that information in evidence and before the hearing;

(c) assisting decision makers, consent authorities and submitters to better prepare for the hearing;

(d) reducing the length and cost of hearings by focusing on matters remaining in contention and conflicting opinions, thereby narrowing the scope of evidence presented.

18 The further information provided to the consent authorities on 10 and 11 November 2021 is neither substantial nor technical/complex, and consists entirely of information which the applicant need not have provided in advance, and could have instead included it in its expert evidence (which is not due to be provided until 30 November 2021).

19 The information provided on 10 and 11 November 2021 consists of a letter which clearly lists the refinements made to the proposal in response to submissions, supported by the following appendices:

(a) Appendix 1:Landscape Assessment Peer Review (2 page letter from David Compton-Moen, who has replaced Align as landscape advisor following Align's landscape expert being employed by a consent authority. The letter confirms Mr Compton-Moen's agreement with Align's assessment and recommends some further mitigation measures in response to submissions);

(b) Appendix 2: Air Quality Assessment Peer Review (6 page letter from Roger Cudmore, who has replaced Prue Harwood (Beca) as an air quality expert following Ms Harwood's retirement. The letter sets out Mr Cudmore's comments on Beca's report, and identifies further mitigation measures in response to submissions);

(c) Appendix 3: Draft Dust Management Plan (which will be attached to Mr Cudmore's evidence);

(d) Appendix 4: Economic Impact Assessment (a short report from Fraser Colegrave of Insight Economics). Mr Colegrave will be giving expert evidence for the applicant confirming the economic benefits of the proposal which were outlined in the AEE;

(e) Appendix 5: Analysis of groundwater and sediment samples requested by other submitters (6 page report from Mike Freeman). This data will be included in Mr Freeman's groundwater evidence;

(f) Appendix 6: Bond calculation methodology (3 page document, supplied in response to a request by the consent authorities setting out how the bond proposed by the applicant was calculated);

(g) Appendix 7: Amended Site Plan (1 page);

(h) Appendix 8: Extraction Plan (a 4 page document with images showing the expansion of the quarry over time, this supports the Dust Management Plan);

(i) Appendix 9: Cut and Cover Methodology for Expansion Land Access (2 page document with diagrams and photos showing how the culvert under the right of way will be formed);

(j) Appendix 10: Plans showing the location and design of the roadside sign in relation to the State Highway (requested by NZTA);

(k) Appendix 11: Draft consent conditions proposed by the applicant, which incorporate the further mitigation measures proposed to address concerns raised by submitters, and some of the conditions sought by submitters;

(l) Appendix 12: Letter from the Department of Conservation withdrawing their right to be heard on the applications (the Department's concerns have been addressed by the applicant's proposed conditions).

20 None of this information need have been provided until 30 November 2021, when the applicant's evidence is due.

Alleged Encroachment

21 By way of background, the 'encroachment' alleged in the submission by Hayden Little Family Trust relates to a quarry bund which is partly located on land which is now owned by the Trust.

22 The bund was formed almost 20 years ago, well before the Trust purchased the land in March 2018. Counsel is instructed that the

Trust was aware of the bund when it purchased the land, and that the applicant and the Trust had discussed undertaking a boundary adjustment in order to reflect the location of the bund, and planting and structures owned by the Trust located on the applicant's land.

23 The encroachment alleged by the Trust will be addressed in legal submissions and evidence for the applicant at the hearing of the applications. However for present purposes:

(a) Removal of the bund does not form part of the proposal to which these applications relate. The applicant has not lodged (and does not intend to lodge) any application for resource consent to remove the bund;

(b) For reasons which can be addressed in planning evidence, the bund is not considered to breach resource consents which were held at the time that the bund was formed (or granted later), and therefore retrospective resource consent authorising the bund is not required;

(c) If the Trust is of the view that the applicant is required to remove the bund from its land, that is a civil matter between the applicant and Trust, rather than one which can be addressed through this RMA process.

Section 91 RMA

24 Under s91 of the RMA, a consent authority can determine not to proceed with the hearing of an application if it considers (on reasonable grounds) that:

(a) Other resource consents will also be required **in respect of the proposal to which the application relates**; **and**

(b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those consents be made before proceeding further.

25 The proposal for which consents have been lodged is expansion of the existing quarry. Removal of the material placed on the Trust's

land in 2003 does not form part of the proposal. Therefore s91 does not apply.

Bundling

26 Bundling of resource consent applications is generally considered appropriate where the activities for which consents are being sought overlap to such an extent that they cannot be realistically or properly separated. If a decision is made that separate applications should be bundled, they are assessed together as a whole on the basis of the most stringent activity classification.

27 An application to remove the bund has not been lodged, therefore the issue of the bundling of such an application with the applications for the quarry expansion does not arise.

Site Visit

28 The memorandum for the Submitters states that:

(a) The Submitters air quality expert is based in Auckland and has therefore been unable to visit the site given current Covid-19 restrictions; and

(b) Under the current timetabling approach, it is uncertain whether its air quality expert (Mr Stacey) will be available for a site visit.

29 There is no information as to when Mr Stacey was engaged by the Submitters and whether he could have visited the site before the current Covid-19 restrictions were imposed. The Submitters could have engaged an alternative expert not affected by such restrictions.

30 Covid-19 related restrictions were first imposed in New Zealand on 23 March 2020 and been in place intermittently in varying forms in different parts of the country ever since. While the applicant has sympathy for Mr Stacey's position, unfortunately this is now the new 'norm' (and may be for some time) for many experts who are North Island based, as well as those who would usually wish to travel to/from or through Auckland for site visits and/or hearings.

31 Normal ways of working (including the manner in which hearings are held) have had to adapt in response to those restrictions. There are other means (such as drone footage and use of Google Earth and other aerial imagery) which can be used by an air quality expert to undertake the equivalent of a site visit. If it would be of assistance to Mr Stacey, the applicant is willing to take such footage and provide it to him if the Submitters do not have access to a drone.

32 There is also sufficient uncertainty around future Covid-19 restrictions and potential outbreaks (including in the South Island) that Mr Stacey may not be able to visit the site for some time, even if the hearing were to be deferred until the first quarter of 2022.

Overseas Investment Office (OIO) Approval

33 The applicant has been granted OIO approval for the purchase of a 9 ha block of land adjacent to the existing quarry site, on which the quarry is proposed to expand. The conditions of that approval previously required resource consents for the expansion to be obtained by October 2021. However the OIO has been informed that a hearing of the proposal is scheduled for 15 December and as a result, it intends to review matters at the end of January 2022.

34 This very clearly supports a need for the hearing to occur as scheduled on 15 December 2021, rather than deferral of the hearing as sought by the Submitters.

Matters Specified in s37A(1) RMA

The interests of any person who may be directly affected by the extension

35 The applicant would be significantly affected by any deferral of the hearing date until the first quarter of 2022, given the upcoming review by OIO at the end of January 2022.

36 If the hearing of the application is deferred and any extensions needed from the OIO cannot be obtained, the applicant would be forced to sell the land to which the OIO approval relates.

37 Deferral of the hearing may ultimately make the applications for resource consent (and the need for a hearing) redundant.

38 Further to this, Mr Cudmore has also advised counsel that he will be taking a sabbatical for up to 6 months in 2022. As described in paragraph 19(b) of this memorandum, Mr Cudmore has replaced Ms Harwood as an air quality expert, Ms Harwood having retired. It would be unreasonable for the applicant to need to engage a third air quality expert for the hearing.

39 If the hearing does not proceed as scheduled, there is a risk that Covid-19 restrictions could change such that a physical hearing would no longer be possible, and counsel and experts may not even be able to access their offices. This would considerably disadvantage the applicant and all parties.

40 Counsel is instructed that the Submitters have been aware of this proposal well before the applications were lodged, and even before formal consultation on the proposal began in March 2020.

41 Counsel also understands that:

(a) Mrs Clark has been in regular email contact with the consent authorities (and Mr Whyte) regarding timeframes and other matters. The nature of the information to be provided by the applicant to the consent authorities on 10 and 11 November 2021 was communicated by Mr Whyte to Mrs Clarke well in advance, on 3 September 2021.

(b) Mr Whyte made Mr Malcolm Little, a representative of Amisfield Orchard Limited and Hayden Little Family Trust, aware of the likely evidence exchange timeframes and hearing date on 27 October 2021.

The interests of the community in achieving adequate assessment of the effects of a proposal

42 The consent authorities have engaged Mr Whyte, an experienced consultant planner, to process these applications as well as several technical experts (air, noise and groundwater) to provide advice in

relation to the proposal. Each Council has engaged air quality experts (Ms Deborah Ryan (PDP) is advising the District Council, while Mr Donovan Van Kekem (NZ Air) is advising the Regional Council).

43 Counsel understands that in addition to Mr Stacey, the Submitters are also intending to call:

(a) Mr Gerard O'Connell (a landscape witness with Rough & Milne, who is based in Wanaka); and

(b) Darran Humpheson (acoustics, based in Christchurch).

44 Given the number of experts involved, including for the consent authorities, assessment of the effects of the proposal will be more than adequate.

The duty to avoid unreasonable delay

45 Section 21 of the Act requires that persons who exercise or carry out functions, powers, or duties, or is required to do anything under the RMA for which no time limits are prescribed must do so as promptly as is reasonable in the circumstances. This section supplements the specific time limits set down in the Act for specific procedural steps and reflects the clear emphasis in the RMA on avoiding delays and its requirement for tight timeframes.

Conclusion

46 The matters raised by the Submitters do not equate to "special circumstances". Therefore there is no lawful basis for deferring the start of the hearing until the first quarter of 2022.

47 The applicant is entitled to refine its proposal and to propose consent conditions to respond to matters raised in submissions.

48 The information provided to the consent authorities in that regard is not substantially detailed or complex and need not have been provided in advance of evidence exchange. It has been provided several weeks in advance of the applicant's evidence, giving all

parties more time than they would otherwise have had to consider it before their evidence is due.

49 While Mr Stacey is not currently able to visit the site in person, this is unfortunately now a reality for resource management professionals affected by Covid-19 restrictions. If hearings were to be deferred to allow experts to visit a site when Covid-19 restrictions allow, hearings could potentially be delayed indefinitely.

50 Counsel for the Submitters may wish to address you further on s91 and OIO matters at the hearing. However removal of the bund does not form part of the proposal for which consents are sought and therefore s91 does not apply.

51 The conditions of the OIO approval very clearly support the hearing proceeding as scheduled. If the hearing is deferred, this may defeat the purpose for which resource consents have been sought, making these applications (in which the applicant has made a considerable investment) and the need for a hearing redundant altogether.

52 These applications have been on foot now for over a year. The RMA requires that applications be heard expeditiously (consistent with consent authorities' obligations to avoid unreasonable delays)[4].

53 Covid-19 related restrictions are currently such that the hearing can proceed on 15 December 2021 with Council officers, counsel, submitters and a majority of expert witnesses able to attend the hearing in person. Covid-19 related restrictions could remain the same (preventing Mr Stacey from visiting the site in person) or could possibly change in the first quarter of 2022 such that a physical hearing is no longer possible. While a fully virtual hearing could be held if required, this would pose significant difficulties for counsel and experts if they cannot access their offices (as was the case under previous Level 3 and 4 lockdowns).

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[4] Section 21 RMA. Section 18A(a) is also relevant and requires that person exercising functions under the Act must take all practicable steps to use "timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised".

54 The applicant therefore requests that you proceed with the hearing of these applications in accordance with the directions contained within your Minute dated 11 November 2021.

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Monique Thomas
Counsel for Cromwell Certified Concrete Limited

16 November 2021