

MEMORANDUM

Date: 8 April 2022
To: Hilary Lennox and Joanna Gilroy
From: Michelle Mehlhopt

RM20.280 SMOOTH HILL LANDFILL – CONSIDERATION OF PERCEIVED RISKS

1. Dunedin City Council (**DCC**) have applied for various resource consents, RM20.280, from the Otago Regional Council (**ORC** or **Council**) in relation to Smooth Hill Landfill (**Proposal**). DCC’s application was publicly notified and has been scheduled for a hearing.
2. In preparation of the section 42A report for the hearing, you have asked us to what extent does the Council need to consider perceived risks, and potential impacts on community wellbeing and local businesses.

Consideration of perceived risks and potential impacts on community wellbeing and local businesses

3. When considering an application for resource consent, the consent authority must have regard to any actual and potential effects on the environment.¹
4. In relation to potential effects, section 3(e) and (f) of the Resource Management Act 1991 (**RMA**) identifies an effect can be "any potential effect" but must be either "of high probability" or "of low probability which has a high potential impact".
5. When considering what is an effect on the "environment", section 2 of the RMA defines the environment as including:
 - a) ecosystems and their constituent parts, including people and communities; and
 - b) all natural and physical resources; and
 - c) amenity values; and
 - d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters
6. Therefore, an effect on the environment may include an actual or potential effect on people and communities near the Proposal, or the social, economic, aesthetic, and cultural conditions which are enjoyed by people and communities.
7. However, perceptions of risk are not themselves effects on the environment. If adverse effects on the environment have been established and are well founded, it is the adverse effects, rather than the secondary or derivative results of them, that should be considered by the consent authority.² The Courts have considered whether fear or the perception of risk are an effect to be taken into account but found that fear or the perception of risk can only be given weight if it is reasonably based on real risk and plausible.³ The Courts do not consider there is a place for the Court (or

¹ RMA, s 104(1)(a).

² *Contact Energy Ltd v Waikato Regional Council* (2000) 6 ELRNZ 1 (EnvC) at [255].

³ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [193]; *Contact Energy Ltd v Waikato Regional Council* (2000) 6 ELRNZ 1 (EnvC) at [254]-[255]; *Living in Hope Inc v Tasman District Council* [2011] NZEnvC 157 at [192].

consent authority) to be influenced by the mere perception of risk which is not shown to be well founded.⁴

8. The Environment Court in *Shirley Primary School v Christchurch City Council* gave the following example:⁵

[190] In our view if a Council or the Court finds that there is an unacceptable risk of adverse physical health effects then it is likely to refuse consent anyway. If the risk is acceptable then the fears of certain members of the community or even of sufficient people to be regarded as a 'community' would be unlikely to persuade the Council or at least the Court that consent should be refused, because the individual's or the community's stance is unreasonable. It is not irrational as we shall explain later, but it is unreasonable.

9. Specifically, the Court has found that discomfort of individuals caused by a proposed activity to the mere presence of the activity does not amount to an adverse effect on amenity values.⁶ Therefore, purely because an individual or community is uncomfortable at the presence of the DCC's Proposal does not amount to an adverse effect, there needs to be a well-founded adverse effect for such discomfort.

Consideration of effects on property values

10. The Courts have specifically considered the issue of effects on property values when considering a resource consent application. Such effects are not relevant in assessing a resource consent application having already assessed the impact on amenity values, and a decrease in property values being the quantification of an adverse effect on amenity values (e.g. views).⁷ In some circumstances a valuation may be used to confirm a consent authority's opinion on the scale of an effect but not as an additional factor. If effects on property values were taken into account, this may lead to a double-weighting of effects, as a valuation is another expert opinion of the adverse effect being assessed by the Council.⁸
11. Decreases in property values reflect the effects of an activity on the environment and it is preferable to consider the effects directly, rather than the market's response to them which can be an imperfect measure of environmental effects.⁹

Conclusion

12. We trust the above advice assists. If you have any further questions or wish to discuss, do let us know.

Wynn Williams

⁴ *Contact Energy Limited v Waikato Regional Council* (2000) 6 ELRNZ 1 at [254].

⁵ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC).

⁶ *Living in Hope Inc v Tasman District Council* [2011] NZEnvC 157 at [124].

⁷ *Foot v Wellington City Council* EnvC Wellington W73/98, 2 September 1998 at [256]; applied in *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 137 at [57].

⁸ *Chen v Christchurch City Council* EnvC Christchurch C102/97, 26 September 1997 at page 18-19.

⁹ *Bunnik v Waikato District Council* EnvC Auckland A42/96, 24 May 1996 at page 6.