

**BEFORE THE FRESHWATER HEARING PANEL CONVENED BY THE
CHIEF FRESHWATER COMMISSIONER**

IN THE MATTER of the Proposed Otago Regional
Policy Statement

AND

IN THE MATTER of the Re-notified Freshwater
Planning Instrument

SYNOPSIS OF LEGAL SUBMISSIONS ON BEHALF OF:

- 1. STRATH CLYDE WATER LIMITED, MCARTHUR RIDGE INVESTMENT GROUP LIMITED AND MOUNT DUNSTAN ESTATES LIMITED; and**
- 2. MCARTHUR RIDGE VINEYARD LIMITED**

(Submitter ID: FPI041)

Dated 6 September 2023

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Introduction

1. These legal submissions are presented on behalf of:
 - (a) Strath Clyde Water Limited, McArthur Ridge Investment Group Limited, and Mount Dunstan Estates Limited; and
 - (b) McArthur Ridge Vineyard Limited;

(Submitter ID: FPI041) – collectively referred to as **McArthur Ridge**¹ in these submissions.
2. The submission by McArthur Ridge addressed some matters of technical detail (for example, consistent use of defined terms) and other matters of greater, holistic importance to the activity of viticulture. To understand its submission and appearance at this hearing, essential context includes:
 - (a) McArthur Ridge relies upon water taken and used within the Manuherehia Rohe;
 - (b) McArthur Ridge uses that water for irrigation and frost protection of (currently) 184² ha of vineyard – at present its vines comprise approximately 9% of the total vineyard area in Central Otago, about 11% of the area of Pinot Noir in the Region and 13 – 20% of the Pinot Noir crop produced in Central Otago over the last 9 years;
 - (c) The particular characteristics of McArthur Ridge are such that neither helicopters or frost fans are apt to protect the vines from frost events. Application of water via overhead sprinklers is the only reliable and effective frost protection tool available;
 - (d) McArthur Ridge is affected by the *Clutha Mata-au FMU Vision* and, in turn, the 2050 date by which outcomes are to be achieved.
3. McArthur Ridge is fully cognisant there is another important planning instrument to follow, being the Regional Plan. However, it maintains the view the Regional Policy Statement could and should go further in:
 - (a) Identifying “viticulture” as a stand-alone use where appropriate, in recognition of the unusual (if not unique) relationship it has with water quantity, water

¹ For simplicity, this is the same abbreviation as used by the Reporting Officer.

² A further 54 ha has been prepared with irrigation infrastructure in place.

quality and the taiao generally – such relationship being very different from most other forms of agriculture prevalent in the Region;

- (b) Providing greater guidance as to how allocation choices will be made at the time they fall for consideration in lower-order planning instruments; and
 - (c) Committing to resolve the water woes of the Manuherehia Rohe in a shorter time-period than 2050.
4. In support of its submission McArthur Ridge has filed evidence from two experts who have amassed some 40 years of experience each, in their areas of expertise – Dr Jordan (viticulture) and Mr Johnson (planning). Mr Johnson will speak to the detail of the drafting he suggests and the proposed provisions affected by his recommendations. These legal submissions address the underlying considerations in a general way.

Specific mention of viticulture in appropriate provisions

5. Dr Jordan's evidence explains the very particular relationship viticulture has with both water quality, water quantity and our environment/taiao. The essential elements include:
- (a) A highly efficient use of water which is applied with precision to where it is needed;
 - (b) A relatively low demand for water – about 25% of that for pasture and 40% of that for other perennial crops (such as cherries);
 - (c) An inherent requirement for careful water use because both under- and over-irrigating can affect fruit quality and have significant commercial implications. Consequently, water is not used to produce as much crop as possible; rather it is the quality of the product that matters;
 - (d) Frost protection activities require water in the shoulder seasons, which do not coincide with times of peak summer demand. In addition, these episodes are relatively infrequent and for relatively short periods at a time;
 - (e) In some circumstances, frost protection by irrigation is the only option available to a vineyard;
 - (f) Insufficiency of water supply for either irrigation or frost fighting can cause devastating crop “failure” which cannot be ameliorated or remedied by the use

of other techniques – for example, in the way supplementary feed or de-stocking might be used by a pastoral farmer;

- (g) Vineyards require very little in the way of fertiliser inputs and produce little to no nutrient discharge;
 - (h) Put simply, viticulture has a very small environmental footprint but a very high sensitivity to insufficient water supply.
6. Dr Jordan explains the critical importance of Central Otago viticulture locally and nationally, economically and reputationally. New Zealand has an excellent reputation for its Pinot Noir internationally. The wineries of Central Otago are a local tourism asset.
 7. Central Otago is the 3rd largest grape producing area in the country after Marlborough and Hawkes Bay. The relevant regional planning provisions in Hawkes Bay and Marlborough specifically identify viticulture in their higher order provisions. *Vineyards are efficient water users ... but ... the vines have little elasticity or resilience to tolerate periods of sub-standard volumes of irrigation water.*³
 8. McArthur Ridge seeks specific mention of viticulture because it is so different from almost every other relevant form of *land-based primary production*⁴ in the Region and because McArthur Ridge understands there are likely to be some hard decisions facing the Region in the coming years. Its submission is predicated on the notion the RPS should be as helpful as it can be in assisting *decision-makers between now and when the over-allocation issue is addressed for Manuherekiā*⁵

Greater guidance on future allocation decisions

9. For all of the factual reasons explained by Dr Jordan and based on the expert opinion of Mr Johnson, McArthur Ridge persists in seeking some guidance in the RPS as to how competing interests for an over-allocated water resource might be resolved. The essence of the request can be found at paragraph 49 of Mr Johnson's evidence:

Optimise reliability of primary allocation, with priority give to water uses that generally:

³ Evidence of Dr David Jordan (27 June 2023) at [72].

⁴ Opening Statement of Felicity Boyd (28 August 2023) at page 85, Policy LF-FW-P7A-1(c).

⁵ Evidence of Richard Johnson (28 June 2023) at [52].

- (i) *Have a small environmental footprint in terms of greenhouse gas emissions, nutrient loss, sediment loss and microbial contaminant loss;*
 - (ii) *Use less water per hectare than other uses;*
 - (iii) *Provide greater economic return and associated employment per volume of water used at the time the allocation is being considered;*
 - (iv) *Are able to use less water at time that coincide with seasonal low flows.*
10. Mr Johnson explains his rationale for the suggested provision in several parts of his evidence, including paragraphs 50 to 52, which follow the suggested text.
11. Whilst the Council appears to argue against such an addition on the basis it is not allowed by the NPS⁶, the Council has not identified a specific provision in the NPS that such an inclusion would offend. It is submitted the wording suggested by Mr Johnson is general enough that it does not *pre-empt* or *gazump* anything that is to follow this process.
12. It is further submitted a provision of this kind would assist the RPS in more properly fulfilling the role it is expected to perform under the Resource Management Act, in that:
- (a) The RPS is the first and highest-order document into which some local flavour can be infused. It is appropriate for the Regional Council to start refining the NPS at the earliest opportunity and to the greatest extent the RPS is able and fit to do so;
 - (b) The Regional Plan is the next and only other RMA planning instrument that can address over-allocation of water in the Manuherekia Rohe. To leave everything for that Plan is both a tall-order and unnecessary. There is no reason why guidance on how to allocate water between activities cannot be provided at this juncture, so that a portion of the remaining task has a semblance of settled framework around it;
 - (c) A regional policy statement is mandatory for every region⁷. The purpose of a regional policy statement is to achieve the purpose of the Act by providing an

⁶ Referring here to the Legal Submissions on behalf of the Council (28 August 2023) at paragraphs 30 to 65.

⁷ Section 60(1) of the Resource Management Act 1991.

overview of the resource management issues of the region and then policies and methods to achieve integrated management of a region's resources.⁸

- (d) As such, *the regional policy statement for a region is to be the heart of resource management in that region.*⁹ Regional¹⁰ and district¹¹ plans must give effect to a regional policy statement. Decision-makers on resource consent applications must have regard to them¹². Regional policy statements sit high in the RMA hierarchy of planning documents; in fact as high as a local document can be.
- (e) *To be of most benefit, a RPS (or plan) should not repeat or paraphrase the requirements of higher order documents but should interpret them into the regional (or local) context.*¹³ Here, McArthur Ridge urges the RPS to go further than just telling the reader over-allocation is to be phased out, by providing a bit more guidance on how that might be achieved.
- (f) Without specific reference to *viticulture* and without the additional clause suggested at Mr Johnson's paragraph 49:
 - (i) Mr Johnson deposes there would be insufficient direction *from [the RPS] to compare the benefits of water use or to assess whether the most efficient use of water will be consented.*¹⁴; and
 - (ii) Mr Johnson poses the question *Applicants will certainly demonstrate benefits for any particular use of water but how does that assist with phasing out or avoiding over-allocation when water is short if it has no comparative basis on which to make an allocation decision?*¹⁵

The resource consent process will not be able to assist with any decisions of this kind because of its "first-in first-served" regime, which precludes any opportunity to compare competing uses; and

- (g) The allocation of resource to specific activities is a function of regional councils.¹⁶ A geographically proximate example of this can be found in the Waitaki Catchment Water Allocation Regional Plan. While there are factual

⁸ Section 59 of the Resource Management Act 1991.

⁹ *North Shore City Council v Auckland Regional Council* (A70/94) at page 7.

¹⁰ Section 67(3)(c) of the Resource Management Act 1991.

¹¹ Section 75(3)(c) of the Resource Management Act 1991.

¹² Section 104(1)(b)(v) of the Resource Management Act 1991.

¹³ *Wairoa River Canal Partnership v Auckland Regional Council* 16 ELRNZ 152 at [12].

¹⁴ Evidence of Richard Johnson (28 June 2023) at [45].

¹⁵ Evidence of Richard Johnson (28 June 2023) at [45].

¹⁶ Sections 30(1)(fa) and (4) of the Resource Management Act 1991.

differences between the situation there and here, there are also material similarities – including Policy 12¹⁷ and the provision advanced by Mr Johnson.

13. In addition to the importance of the planning hierarchy and where the RPS sits in that, there is also an internal hierarchy of relevance. There is a logical cascade from the identified Issue through to an Objective that must give effect to the Act and the NPS, to policies and methods that must implement the provisions of a RPS. Mr Johnson refers to this linkage (or lack of) as a key element in his recommendation for the RPS to go further than currently proposed.¹⁸

Timeframe for resolution

14. The Officer Report notes the complexities associated with addressing over-allocation and the desire for a better information base.¹⁹ McArthur Ridge accepts those factors probably do exist but submits that is an issue common to many regions and not a reason not to try harder. Again, the Waitaki example has some pertinency here as does Canterbury, more holistically.
15. The situation in Otago was both ominous and looming from the time the RMA was enacted, which is when the mining privileges acquired the status of deemed resource consents that were to endue only until 2021. In the circumstances it is submitted to be incumbent on the Council to do the very best it can timing-wise and certainly better than almost 30 years – because in the meantime business certainty and confidence in viticulture may be eroded, to the detriment of the Region and the country.
16. Dr Jordan's evidence explains:
 - (a) The significant up-front investment viticulture requires;
 - (b) The long lead time to payback;
 - (c) The high downstream investment in wineries, bottling, bottle storage and wine business activities (roughly, for every \$1 spent in the vineyard asset you need \$4 for the winery asset); and
 - (d) Other than pulling the vines out, there is little flexibility of using the assets in an alternate way.

¹⁷ <https://www.ecan.govt.nz/your-region/plans-strategies-and-bylaws/waitaki-catchment-plan/>

¹⁸ Evidence of Richard Johnson (28 June 2023) at [42] to [44].

¹⁹ For example, [288] and [981] of the s42A Report (dated 2 June 2023).

17. Mr Johnson notes the uncertainty facing the industry in Central Otago if a degree of greater specificity is not included, which is then compounded by an aspiration of resolution as far out as 2050.²⁰ While it may be that hard decisions need to be made and hard-fought battles need to be endured and the science will be imperfect, McArthur Ridge submits it just needs to be done.

Dated 6 September 2023

Alanya Limmer

Counsel for Strath Clyde Water Limited, McArthur Ridge Investment Group Limited and Mount Dunstan Estates Limited; and McArthur Ridge Vineyard Limited

²⁰ Evidence of Richard Johnson (28 June 2023) at [61].

Policy 12

Cross-ref:

Objectives 1, 2, 3, 4 and 5

To establish an allocation to each of the activities listed in Objective 2 by:

- a. having regard to the likely national and local effects of those activities;
- b. reference to relevant national, regional and local plans and strategies;
- c. recognising the iconic nature of Lakes Tekapo, Pūkaki and Ōhau;
- d. recognising the importance of Lakes Tekapo, Pūkaki, Ōhau Ruataniwha, Benmore, Aviemore and Waitaki and their associated infrastructure to New Zealand's electricity system;
- e. recognising the importance of irrigation for agriculture and horticulture;
- f. considering the relative environmental effects of the activities including effects on landscape, water quality, mauri, and the beds of lakes and rivers;
- ga. reserving water within the Lower Waitaki for the enhancement of mahinga kai, and the associated tāngata whenua values and the augmentation of flows into Wainono Lagoon;
- g. assuming a high level of efficacy and technical efficiency;
- h. giving a preference to needs for water within the catchment; and
- i. expressing the allocation to activities in annual volumes:
 - upstream of the outlets of each of Lakes Tekapo, Pūkaki, and Ōhau;
 - upstream of Waitaki Dam;
 - downstream of Waitaki Dam but upstream of Black Point; and
 - downstream of Waitaki Dam but downstream of Black Point.

Explanation

One of the requirements of the Waitaki Act is that this Plan must provide for the allocation of water to activities. This policy describes the approach used to make allocations among the activities set out in Objective 2. These allocations apply, at the point that water is taken, to new and replacement consents from all water bodies including canals, and will require all consents to specify an annual volume. Within the Lower Waitaki River environmental flow regime, water has been allocated for activities that will enhance mahinga kai and therefore enhance the values held by tāngata whenua, both within and beyond the Waitaki catchment. Water has also been allocated for augmenting flows into the Wainono Lagoon. Any activity that falls outside the annual allocations set under this policy in Rule 6 will be a non-complying activity and must demonstrate the effect of granting the consent on the entitlements to other activities over the timeframe of the consent. Except as provided for under Policy 10, applications for resource consents are still required for taking or diverting water within the annual allocation volumes. These applications are subject to the other provisions of this Plan, and to the consideration of effects under the resource consent processes.

Policy 13

Cross-ref:

Objectives 1, 2, 3 and 4

In considering whether to grant or refuse consent to take, divert, dam or use water allocated to agricultural and horticultural activities, the consent authority will have regard to the extent to which exercise of the consent could result in the water quality objectives in the Natural Resources Regional Plan not being achieved.

Explanation

This policy recognises the importance of water quality considerations when allocating water to agricultural and horticultural activities and, in particular, to irrigation. The intensification of land use, including that arising from irrigation, increases the potential for adverse effects on water quality. The Waitaki catchment has some sensitive and pristine water bodies that have not, to date, had intensive land uses in their catchments. This policy links to the Natural Resources Regional Plan water quality chapter to ensure these matters are considered when deciding consents.