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Otago Regional Council
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For: Dale Meredith/Tom De Pelsemaeker

By email

Dear Dale and Tom

Plan Change 5A: Tarras Creek Subcatchment

Introduction

1 I refer to your email of 12 April 2016.

Issue

2 In that email you advised that the Commissioners for Proposed Plan Change 5A (PC 5A) had requested legal advice on whether requests to include the Tarras Creek subcatchment in the Lindis catchment area, governed by the plan change, are within the scope of the plan change.

Background

3 Tarras Creek is a tributary of the Lindis River.

4 Originally, the Council proposed that the Tarras Creek subcatchment be included in the allocation and flow regime for the Lindis catchment.

5 However, on 1 April 2015, the Council announced that the Tarras Creek subcatchment would be excluded from the intended plan change.

6 As notified, PC 5A did not include the Tarras Creek subcatchment.

7 The definition and mapping of the Lindis catchment area is discussed in the Section 32 report¹.

8 Option 1 was to include the Tarras Creek catchment:

"The Tarras Creek sub catchment is considered an integral part of the Lindis River Catchment ...

¹ Page 10, Section 5.3.1

9 Option 2 is to exclude the Tarras Creek subcatchment:

“This option recognises that at low flows Tarras Creek does not contribute to the flows in the Lindis River and does not recharge the Lindis Alluvial Ribbon Aquifer. “

10 Option 2 was preferred².

11 At least six of the submitters have asked for the Tarras subcatchment to be included in the water management regimes to be established by PC 5A.

12 Further submissions were invited. Six further submissions were received. None responded to the Tarras Creek issue.

Legal framework

13 The legitimate scope of submissions and therefore the jurisdiction of the Council to amend a proposed plan change is a significant and often difficult issue, particularly if territorial extensions to the area covered by the plan change are requested.

14 The relief sought in a submission can only be entertained if it is “on” the plan change.

15 A series of High Court decisions has developed a two-fold test for determining when a submission is “on” a plan change³.

16 The test is first whether the submission addresses the change to the status quo contained in the proposed plan change, and, secondly whether there is a real risk that persons potentially affected by the change sought in the submission, have not had an opportunity of commenting on it.

17 Both parts of the test must be met. If not, the Commissioners have no jurisdiction to consider extending the plan change to include the Tarras Creek subcatchment.

18 The principles are summarised in Palmerston North City Council v Motor Machinists at paragraph [91]:

“[91] To sum up:

- (a) This judgment endorses the bipartite approach taken by William Young J in Clearwater v Christchurch City Council in analysing whether a submission made under sch 1, cl 6(1) of the Act is ‘on’ a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.*

² The footnote for discussion is Section 5.3.2. Preference Section 5.4

³ Clearwater Resort Limited v Christchurch City Council, High Court Christchurch, AP34/02, 14 March 2003; Option 5 Inc v Marlborough District Council (2009) 16 ELRNZ 1; Auckland Council v Byerley Park Limited [2014] NZRMA 124; Palmerston North City Council v Motor Machinists Limited [2014] NZRMA 519; Protect Pauanui Inc v Thames Coromandel District Council [2014] NZRMA 91; Federated Farmers of New Zealand (Incorporated) Mackenzie Branch v Mackenzie District Council [2015] NZRMA 52

- (b) *This judgment rejects the more liberal gloss placed on that decision by the Environment Court in Naturally Best New Zealand Ltd v Queenstown Lakes District Council, inconsistent with the earlier approach of the Environment Court in Halswater Holdings Ltd v Selwyn District Council and inconsistent with the decisions of this Court in Clearwater and Option 5 Inc v Marlborough District Council.*
- (c) *A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change. Robust, sustainable management of natural and physical resources requires notification of the s 32 analysis of the comparative merits of a proposed plan change to persons directly affected by those proposals. There is a real risk that further submissions of the kind just described will be inconsistent with that principle, either because they are unaccompanied by the s 32 analysis that accompanies a proposed plan change (whether public or private) or because persons directly affected are, in the absence of an obligation that they be notified, simply unaware of the further changes proposed in the submission. Such persons are entitled to make a further submission, but there is no requirement that they be notified of the changes that would affect them.*
- (d) *The first limb of the Clearwater test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be “on” the plan change, unless the change is merely incidental or consequential.*
- (e) *The second limb of the Clearwater test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.”*

Assessment

- 19 The definition of the Lindis catchment for the purpose of PC 5A, arises both out of the plan change itself and in the accompanying Section 32 report. A submission seeking to include the Tarras Creek subcatchment in the area managed by PC 5A appears to be “on” that plan change.
- 20 Passages in Palmerston City Council v Motor Machinists suggest that this might be too liberal an approach. Effectively, the Lindis catchment area is zoned as an area to

which particular allocation and minimum flow restrictions apply. For example, at paragraph [81], the Court said:

“One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be ‘on’ the plan change ... Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change.”

- 21 Paragraph [91] (d) of the judgment is to similar effect.
- 22 Inclusion of the Tarras Creek subcatchment in the PC 5A water management regime could not be classified as *“merely incidental or consequential”* and, the plan change does not alter the management regime in the Regional Plan: Water for the Tarras Creek water resource.
- 23 On the other hand, PC 5A deals with water, not land. Tarras Creek is within the geographical catchment of the Lindis River and is a tributary of that river. That inclusion or exclusion is discussed in the Section 32 report.
- 24 The definition of the Lindis catchment appears to me to be a live issue arising out of both the plan change itself and the accompanying Section 32 report. Submissions seeking to include the Tarras Creek subcatchment in the area managed by the plan change appear to be within the ambit of the plan change. The first limb of the test is met.
- 25 The second limb of the test is to determine whether or not the proposal for the inclusion of the Tarras Creek subcatchment in the Lindis catchment through submissions on PC 5A would disenfranchise persons who will be affected or who may be affected.
- 26 That question requires careful consideration. The High Court decisions have emphasised that the public notice of the receipt of submissions gives interested persons little warning of the content of submissions. In addition, rights to make further submissions are limited by clause 8 of the First Schedule of the RMA to any person representing a relevant aspect of the public interest or any person who has an interest in the proposed plan change greater than the interests of the public or the local authority itself.
- 27 I am advised by Council staff that some water takers in the Tarras Creek subcatchment are not directly nor indirectly participants in the PC 5A process. At least one had participated until the Council's decision not to include Tarras Creek in the area to be controlled by the proposed plan change.

Conclusion

28 While submissions seeking the inclusion of Tarras Creek might arguably satisfy the first part of the test, the second limb of the test is not met. There is a real risk that persons actually or potentially affected have been denied an opportunity to respond.

Wheretofrom here?

29 The views expressed in this opinion are necessarily provisional. They are based on the information which is currently available to me.

30 The issue raised by the Commissioners is a fundamental jurisdictional point.

31 The prudent course of action is to invite legal submissions from all parties on whether or not it is open to the Commissioners to consider submissions seeking to include the Tarras Creek subcatchment in the Lindis catchment area managed by the plan change. The Commissioners will then have the benefit of all views and not overlook any relevant matters.

Yours faithfully

ROSS DOWLING MARQUET GRIFFIN

Per

A handwritten signature in blue ink, consisting of a large, stylized 'A' followed by a horizontal line that curves upwards at the end.

A J Logan

Partner

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