Before Hawkes Bay Regional Council and Hastings District Council

In the matter of	the Resource Management Act 1991
And	
In the matter of	Application by Hastings District Council and Napier City Council to Hawke's Bay Regional Council for resource consents authorising the operation of Area B at Ōmarunui Landfill (**consent application**)
And	
In the matter of	A notice of requirement by Hastings District Council to Hastings District Council for alteration of designation for the Ōmarunui Regional Landfill (**NoR**)

Supplementary Reply Submissions for Hastings District Council and Napier City Council

Dated 11 November 2021

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1. On 10 November 2021, the Applicants received a memorandum from counsel for Bearsley Farms Ltd (**BFL**), together with a Minute providing an opportunity for the Applicants to respond. I confirm BFL's memorandum had not previously been served on the Applicants.

2. The Applicants' response, which reflects expert input from Mr Bryce and Mr Hansford, is set out below, using BFL's headings and bullet points.

Stormwater

3. The Applicants' response to the lay evidence of Mr Bearsley on stormwater is set out in its expert evidence, particularly of Mr Hansford, and legal submissions.[1] Importantly, the only expert evidence before the Commissioners is that the contribution to flooding of BFL's land by the current proposal is negligible. BFL's request for further conditions needs to be assessed against that uncontested evidence.

4. In relation to the specific conditions now raised, the Applicants respond as follows.

[1] In particular, see Outline of Submissions for Applicants, at para 43; and Reply Submissions for Applicants, at 27-31.

Legal right to discharge – first bullet point

5. BFL's first request is that no stormwater discharge is to occur onto private land until the Consent Holder has secured a legal right to discharge on or across that land.

6. The Applicants strongly oppose such a condition on the following bases.

7. First, the Applicants already have the legal right to discharge stormwater over the Bearsley property, through the doctrine of natural servitude. The Bearsley property is lower land which is obliged to receive surface water falling from higher land. While there are exceptions to that doctrine, it is not considered any apply in the circumstances, and in any event, they require proof of damage to the lower land beyond what would occur through natural flow.[2] The evidence is that any additional flooding is negligible and there is no evidence that any such additional flooding would cause an adverse effect or amount to 'damage' in a civil sense. Additional security in that regard is provided by the condition offered by the Applicants to require stormwater flows to be restricted to pre-development levels up to a 20-year ARI event;

8. Secondly, and importantly, the question of any requirement for a property right is entirely separate from the Commissioners' task, which is to assess the applications sought under the Resource Management Act to authorise the extension of the Landfill. Should BFL genuinely consider that it has no obligation to accept stormwater flow from the higher Landfill site, then its proper recourse is in a civil claim, presumably in trespass, where it would need to prove the Landfill was causing a substantial and unreasonable interference with its right to use or enjoy its land.[3]

9. There are a number of issues of fact and law which would be relevant in any such proceeding which are not before the Commissioners. It would be inappropriate for the Commissioners to make any comment on those matters in their decision on the applications for consent.

10. That permission under the RMA and property rights are distinct matters is a well-known principle, supported by numerous cases. One example is *Action for Environment Inc v Wellington City Council* in which the High Court held:[4]

> [24] As both the Council and Wellington Badminton argued, the RMA, and in particular s 104, provide a code for the consideration of applications for

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2 *Barron v Louw* [2018] NZHC 2275 at [28] citing McMorland, *Hinde McMorland and Sim Land Law in New Zealand* at [6.017].

3 *Barron v Louw* [2018] NZHC 2275 at [25], citing Bill Atkin "Nuisance" in Todd (ed) *the Law of Torts in New Zealand*, 525 at 526.

4 [2013] NZRMA 196 (HC) (internal citations omitted).

> resource consents. Section 104, as enumerated in subsections (a), (b) and (c), sets out the matters which, here, the Environment Court was to have regard to. The general lawfulness of a proposed activity is not a matter referred to in s 104. Moreover, and as the Council and Wellington Badminton submitted, there is also clear authority that questions relating to the right to use land in a particular way, as a matter of private property rights, are not issues which are properly the concern of the Environment Court. As noted by the Environment Court in *Director-General of Conservation & Others v Marlborough District Council*:
>
> "Disputes about private property rights are outside the Environment Court's jurisdiction and are not generally considered in determining a resource application."
>
> [25] The Court of Appeal in *MacLaurin v Hexton Holdings Limited* has held that consent authorities are concerned with the effects of proposed activities, and not the nature of the applicant's legal rights or interests in the particular land.
>
> [26] *Auckland Volcanic Cones Society Inc v Transit NZ Limited* is authority of similar effect.

11. The Applicants therefore oppose the first requested condition on the basis both that it lacks any merit and that there is no jurisdiction to impose it.

Flow attenuation – second to fourth bullet point

12. The second, third and fourth bullet points of BFL's memorandum appear all to be directed to avoiding additional stormwater runoff over its land as a result of the Landfill extension.

13. This was addressed in the Applicants' Reply in that a condition has been offered requiring that the total stormwater flow to be discharged from the landfill property not exceed flows experienced at the property boundary prior to development of the Area B landfill for rain events up to the 5% AEP rainfall, or a 20-year ARI event.

14. The expert advice to the Applicants is that it is not feasible to maintain pre-development flows for the 100-year event. However, by definition, that type of event will occurs very rarely and in any event results in a negligible incremental effect.

15. Neither Mr Bryce nor Mr Hansford understood what was meant by the request that "*There shall be extended detention of the runoff from a rainfall event of more than 15 mm in an hour, or more than 55mm*". Presumably the object of the suggested condition is to avoid additional flows onto the BFL property, and that is achieved by the Applicants' proposed condition.

16. The Applicants have completed appropriate hydrological modelling and they do not agree that there is a proper effects-based basis for a requirement for further modelling as sought by BFL in its fourth bullet point.

17. In summary, the Applicants' suggested condition 16a is appropriate to mitigate risk that additional stormwater flow from the Landfill might give rise to an adverse effect on BFL's land. No further conditions are warranted on the evidence before the Commissioners.

Operation

18. BFL requests amendments to condition 26 of the Solid Waste consent / condition 9 of the Air Discharge consent for Area B Odour and Dust so that the "nominal" 150mm thickness of soil for daily cover is a "minimum" thickness, and that such soil must not include any waste. While there is no justification for the condition given, it is understood that its purpose relates to discouraging seagulls – although this is not clear and the causal link is not accepted by the Applicants.

19. The Applicants consider that reference to a "nominal" thickness is preferable to a "minimum" thickness, however is prepared to agree to that wording if the Commissioners consider it appropriate.

20. It is not practical to require the soil used for daily cover to exclude any waste. A small amount of waste is to be expected given that daily cover soil is re-used, being put in place at night and pulled back the next morning to allow filling to continue. The soil is then topped up with new material to replace soil left in place which results in any waste that has been picked up with the daily cover being diluted.

21. A requirement that daily cover soil contain no waste would essentially require that the full 150mm of cover could not be removed daily, and a layer of soil would need to stay in place to avoid picking up a small amount of waste. Cumulatively, this would mean significant amounts of soil would be retained in the landfill, meaning its capacity would be exhausted more quickly and Area C would likely need to be developed at an earlier date. The requested condition would result in inefficiencies which would result in an important physical resource being used at a quicker rate than necessary.

22. Given it is not clear what outcome is sought by the suggested condition, and in the absence of any evidence that the condition would achieve that outcome, it is submitted BFL's suggested change should not be made.

Monitoring

23. BFL has requested an additional condition as follows:

> Any communications from Bearsley Farms is to be recorded and included in the annual audit report. Any and all waste collected from Bearsley Farm's land is to be recorded and reported in the annual audit report.

24. There is no requirement for an 'annual audit report' so it is unclear exactly what is intended by this suggested condition. The closest requirement appears to be condition 20 of the Air Discharge consent for Area B Odour and Dust which provides:

> The consent holder shall provide to the Council an Annual report by 30 November each year providing the following:
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> …
>
> d) Results of quarterly reviews to be undertaken by the consent holder of complaints received in relation to discharges to air, trends in receipt of odorous waste and any measures implemented in response.

25. While this condition could specifically refer to odour complaints by Mr Bearsley, that is considered unnecessary in light of condition 22 which requires all odour complaints to be recorded, including the name of the complainant and details of the complaint.

26. The Operations and Maintenance Manual is required to include details of a "Complaints Register". The current provisions of the O&M Manual, provided as Appendix P of the AEE, address this matter in part 7, under 'Continuous Improvement Request System'. This requires complaints received to be reported annually to the Ōmarunui Landfill Joint Refuse Committee and as part of the Asset Management Annual Quality Report presented to the Management Team. The Applicants consider this is a sufficient and appropriate method for addressing complaints from BFL, as well as any other landowner.

27. If the Commissioners are minded to consider BFL should be given particular consideration as part of the complaints register and governance reporting, an advice note could be added to this effect, presumably to condition 3.5 of the Designation, which addresses 'Wind Blown Debris'.

Asher Davidson
11 November 2021