

BEFORE THE MANAWATŪ WHANGANUI REGIONAL COUNCIL

Under the Resource Management Act 1991

In the matter of an application by Horowhenua District Council (Applicant) to Manawātū Whanganui Regional Council to discharge stormwater, construct attenuation structures, and undertake earthworks, in an unnamed tributary to the Koputaroa Stream.

**MEMORANDUM OF COUNSEL ON BEHALF OF HOROWHENUA DISTRICT
COUNCIL**

30 April 2021

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MAY IT PLEASE THE COMMISSIONER:

1. This memorandum is filed on behalf of Horowhenua District Council (the '**Applicant**') in relation to the resource consent application by the Applicant for, inter alia, the discharge of stormwater, the construction of attenuation structures, and the undertaking of earthworks associated with those structures in an unnamed tributary of the Koputaroa Stream ('**Application**').
2. This memorandum is filed in response to:
 - (a) the memorandum of counsel for Manawatū Whanganui Regional Council ('**Horizons**') dated 23 April 2021; ('**First Memorandum**') and
 - (b) the memorandum of counsel for Horizons, dated 30 April 2021 ('**Second Memorandum**').
3. The Applicant notes the further reporting date of 14 May 2021 proposed in paragraph [11] of the Second Memorandum. The Applicant agrees with this proposal and will work constructively with Horizons to seek agreement as to appropriate timetabling steps for the Application.
4. Notwithstanding the above, there are matters arising from the First Memorandum which the Applicant wishes to address.

Error regarding wetland planting in the First Memorandum

5. Regretfully, the First Memorandum was only provided to the Applicant today (30 April 2021).
6. The First Memorandum included a factual error regarding the Application, stating that "*In respect of mitigation, the design has removed the wetland planted low flow channel and stormwater treatment for water quality purposes.*"
7. The Applicant confirms that the proposed planted wetland areas have not been removed from the Application (and have always been part of the Application).

Applicant's position as to scope

8. The First Memorandum refers to concerns of the s42A reporting officers about a potential issue relating to scope (and the Second Memorandum records that the s42A reporting officers continue to reserve their position on this issue).

9. The Applicant does not consider that the further information provided by it on 16 April 2021 (**'Further Information Response'**), which included updated modelling, effects assessment, and confirmation of the use Attenuation Areas 3 and 4 (**'Updated Application'**), gives rise to any issues as to scope.
10. It is common for changes to be proposed to a project after consent applications have been lodged with the relevant authority, as described in the often-cited passage of the Planning Tribunal in *Haslam v Selwyn District Council*:¹

"The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. ... In practice, the lodging of submissions and the presentation of opponents cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions."

11. In terms of changes to the activities for which consent is sought, the only changes in the Updated Application relate to minor increases in the excavated volumes for Attenuation Ponds 3 and 4. Otherwise, the Updated Application remedies incorrect peak flow information submitted in the Revised Assessment of Environmental Effects, submitted in June 2019 (**'June 2019 AEE'**).
12. Nevertheless, as relevant to case law on scope, the updates in the Updated Application are within the scope of the Application because they:
- (a) do not result in a significant difference in:
 - (i) the scale and intensity of the proposed activities; or
 - (ii) the character of the environmental effects;²
 - (b) are fairly and reasonably within the ambit and scope of the Application and do not result in what is in substance a different application;³ and

¹ *Haslam v Selwyn District Council* (1993) 1B ELRNZ 15 (PT) at 21.

² Test derived from *Atkins v Napier City Council* (2008) 15 ELRNZ 84 at [20] and [21].

³ Test derived from *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149; *Shell New Zealand Ltd v Porirua City Council* CA 57/05, 19 May 2005.

- (c) do not prejudice any person, including in respect of involvement in the consenting process.⁴
13. In particular, this is because, as explained in the Further Information Response:
- (a) there has been no change to the area of land which contributes stormwater to the system, or to the area of land which is proposed to be developed for residential use. The updates relate to previous underestimates of the inflow to Coley Pond and more accurate mapping of the catchment, and not to any physical change within the catchment area or to any change to the proposed area that will contribute to the system;
 - (b) the effect on the properties subject to Attenuation Areas 3 and 4 are as per the June 2019 AEE. The Attenuation Areas are within the same footprint area, are outside of the productive land uses of those properties and provide the same extent of beneficial access across the tributary in times of high flows / flood events. There are no effects of the works on properties beyond the immediately affected properties; and
 - (c) effects downstream of the Attenuation Areas are the same as assessed in the June 2019 AEE (ie less than minor) because the proposal ensures that the post-development peak flows are the same or less than the existing peak flows. This is because despite larger inflow volumes than assumed in the June 2019 AEE, the attenuation provided by Attenuation Ponds 3 and 4 will allow hydraulic neutrality to be achieved in respect of peak flows.
14. The Applicant will engage further with Horizons on these matters in advance of the proposed reporting date of 14 May 2021.

DATED this 30th day of April 2021



Mark Mulholland
Counsel for Horowhenua District
Council

⁴ Test derived from *Estate Homes*, above n 3, at [35]; *H.I.L. Ltd v Queenstown Lakes District Council* [2014] NZEnvC 45 at [42].