Before the Independent Hearings Panel
at Waimakariri District Council

under: the Resource Management Act 1991

in the matter of: Proposed private plan change RCP31 to the Operative Waimakariri District Plan

and: **Rolleston Industrial Developments Limited**
Applicant

Supplementary closing legal submissions for Applicant

Dated: 13 September 2023

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SUPPLEMENTARY CLOSING LEGAL SUBMISSIONS FOR APPLICANT

INTRODUCTION

1 These supplementary closing legal submissions are made on behalf of Rolleston Industrial Developments Limited (*RIDL*, the *Applicant*) in relation to its request (*PC31*) to the Waimakariri District Council (the *Council*) to change the Operative Waimakariri District Plan (the *District Plan*) to rezone approximately 156 hectares of rural zone land at Ōhoka.

2 At the reconvened hearing held on 11 September 2023, the Panel said that it would be assisted by hearing our legal argument as to why the Regional Council is interpreting the rules of the Canterbury Land and Water Regional Plan (*CLWRP*) incorrectly with respect to groundwater interception.

3 The Panel indicated that they were not satisfied that the consenting of stormwater infrastructure required for PC31 would not be prevented by a prohibited activity rule in the CLWRP.

4 It was apparent at the reconvened hearing that various issues with respect to groundwater interception may have become conflated and that various documents were not clear.

5 To date, the planning issues around stormwater and groundwater interception have not featured in any detail in the hearing process. As was advised in opening legal submissions it was and remains the Applicant's position that there is no need to even turn to the possible application of any prohibited activity rule(s) as the evidence is that the proposal has been designed to, avoid intercepting groundwater in the first place (i.e. beyond the construction phase for which a consenting pathway is expressly provided for). This is an approach being adopted by a number of developers across Canterbury.

6 Although the Applicant's primary position is there is 'no need to go there', in practice the current CLWRP rule issue needs to be approached on the basis that different aspects of the proposed stormwater infrastructure will engage different issues and rules.

7 These submissions, therefore, first approach the issues on a general basis before turning to the specific infrastructure proposed.

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8 The reason groundwater interception is potentially problematic is a result of the Regional Council's interpretation of the Court of

Appeal's recent decision in *Aotearoa Water Action Inc v Canterbury Regional Council* (the *AWA Decision*).[1]

9 The facts of the case are different to those here. The AWA Decision followed a judicial review of the Regional Council's decision to grant a new 'standalone' use alongside existing consents that authorised the take and use of water for different industrial purposes. The 'standalone' use consent was intended to enable the consent holders to use water previously consented for wool scouring for water bottling in the Christchurch-West Melton groundwater allocation zone (in effect without 'touching' the take).

10 The Court grappled with whether the grant of a 'standalone use' was open for the Regional Council to grant within the framework of the CLWRP.

11 The Court of Appeal held that:

11.1 The RMA does not prevent the Council from granting a separate consent for a use and a separate consent for a take. Whether or not that is possible in a given situation will depend on the terms of the regional plan and the controls it contains in relation to water.

11.2 In the case of the CLWRP different wording had been used across the various rules that addressed water. Some rules referred to the "*take and use*" of water, whereas other rules referred to the "*take or use*" of water. As the Court of Appeal advised:[2]

> "*But it does not necessarily follow from the drafting of ss 14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take. Whether or not that is possible will in our view depend on the terms of the regional plan and the controls it contains in relation to water. In this case, the LWRP as has been seen refers variously to "taking or use" and "taking and use". We consider the different wording is important and must have been intended. Thus, where the expression used is "taking or use of water" the plan contemplates that there might be an activity involving one or the other or both. Where the expression used is "taking and use" the intent appears to be that the activity will involve both.*"

11.3 The relevant rule in the AWA Decision was Rule 5.128 of the CLWRP that uses the expression "take and use". Given the use of the word "and" the Court concluded that this was deliberate and therefore Environment Canterbury could not

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[1] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325.

[2] At paragraph [113].

have lawfully granted a new 'standalone' use (i.e. as it was not entitled to consider the use independent from the take).

11.4 In respect of an alternative argument that was presented to the Court, the Court also concluded that it was not open to the Regional Council to utilise "catch-all" CLWRP Rule 5.6 to consider a stand-alone application for consent for only one of a "taking" or a "use" where ultimately the activity was still a "take and use".

12 As is consistent with the Court of Appeal's findings in its paragraph [113], it was careful to state that its decision was with reference to the specific context that was present before it, which was a proposal that involved both a take and use of water. Care should therefore be taken in any assumption that the AWA Decision has wider application.

13 The Court of Appeal ultimately set aside the Regional Council's decision to grant resource consent for a 'standalone' use of water for water botting activities.

14 We further note that the AWA Decision has been the subject of an appeal to the Supreme Court which has been heard, but a decision of the Supreme Court is not expected until sometime next year.

The Regional Council's subsequent interpretation of the CLWRP

The advice note

15 Following the AWA Decision released on 20 July 2022, the Regional Council issued a technical advice note on 19 August 2022 (the *Advice Note*) (**Appendix 1**) setting out its view on the repercussions of the AWA Decision for the interpretation of the CLWRP and therefore the way they will process resource consents related to water takes moving forward.

16 The Advice Note "*outlines the approach Environment Canterbury will be taking to implementing [the AWA Decision].*" The Advice Note sets out the issue as follows:

16.1 there are a number of specific situations where the CLWRP contemplated a "take or use";

16.2 there have been applications lodged (and consented) for activities historically over the last decade that appeared to also fit into a "take or use" classification, but which did not appear to be managed under the existing rules (and it lists a number of examples, including stormwater treatment infrastructure that intercepts groundwater);

16.3 it appears the examples set out were previously consented through the default catchall rule 5.6 in the CLWRP as they are

not specifically for a "take and use" but rather, a "take or use" for which there are no specific rules;

16.4 the result of the AWA Decision, as advised by ECan (in its words) is that "*[t]he Court of Appeal has now said that this approach is not correct in some of the circumstances highlighted above. Where an activity to take and/or use water is to be consented under the CLWRP and is not managed under an activity specific rule (e.g. for community supply, dewatering etc.), it must be considered under the general "take and use" rules.*";

16.5 the general rules with respect to takes and uses of groundwater are rules 5.128-5.132 of the CLWRP, or relevant sub-regional rules where these prevail over the regional-wide rules.

17 If rules 5.128-5.132 of the CLWRP do in fact apply then, in some circumstances, this is likely to be problematic as they prohibit a "take and use" consent from being granted in over-allocated groundwater zones.[3] In this regard, most of Canterbury, and in particular the Waimakariri area, is fully or over-allocated.

18 The Advice Note then goes on to consider what repercussions this interpretation has for consents already granted, applications in progress, new activities/potential applications, and transfers of consent.

19 With respect to new activities in over-allocated zones, the Advice Note states that it will now typically be prohibited under the CWLRP to apply for a 'consumptive' take and use, and therefore no application can be made except for replacement of existing activities affected by the provisions of section 124-124C RMA.

20 Needless to say a number of property and infrastructure owners, Territorial Authorities and consultants have taken issue with the Regional Council's interpretation.

The mayoral forum presentation

21 On 8 December 2022, the Regional Council prepared a memorandum (the *Mayoral Forum Memorandum*) (**Appendix 2**) that was to be presented at the Mayoral Forum for Mayors and CEOs. This was accompanied by a PowerPoint presentation (the *PowerPoint*) (**Appendix 3**).

22 The Mayoral Forum Memorandum restates the Regional Council's view as set out in the Advice Note. It also appears to clarify why the Regional Council consider rules related to stormwater

[3] Refer conditions 2 and 3 of Rule 5.128 CLWRP, and Rule 5.130 CLWRP.

infrastructure have changed as a result (which was not necessarily obvious from the Advice Note):

> "*The Court of Appeal's decision directs that where the phrase "take and use" is included in the rule it applied to both takes and uses of water, even if only a "take" or a "use" applies. This means the "take" of water for a stormwater or drainage infrastructure must be put through the "take and use" framework. These rules prohibit infrastructure that permanently intercepts groundwater where the groundwater resource is considered fully- or over-allocated.*"

23 It is noted that the Mayoral Forum Memorandum and the PowerPoint both emphasise that the Regional Council has been working with applicants to amend their proposals so that they either:

23.1 are redesigned so as to not intercept groundwater (noting that the PowerPoint provides examples of how this has been done successfully to date); or

23.2 are framed in a manner which provides an alternative consenting pathway (such as the provisions for deemed permitted activities under the RMA).

24 The Mayoral Forum Memorandum concludes by stating that consent applicants (and in particular the District Councils) have been offered the opportunity to seek their own legal advice to demonstrate a pathway to allow applications to progress. If the Regional Council was convinced by and agreed with such advice, then there may be a pathway for consent.

25 It is noted that many developers have not sought to take up the invitation to provide their own advice and have simply opted to engineer their way around the legal problems, as the Applicant has done in this case and as contemplated in paragraph 23.1 above.

The Waimakariri District Council interpretation

26 Following the Mayoral Forum Memorandum, the Waimakariri District Council took up the opportunity to obtain legal advice which was obtained from Buddle Findlay (in conjunction with Christchurch City Council) (the *WDC Interpretation*).

27 The WDC Interpretation has been circulated widely (**Appendix 4**) and specifically covers the interpretation of the CLWRP as it applies to stormwater basins and sub-soil drainage infrastructure.

28 The WDC Interpretation also sets out the shared understanding between the District and Regional Councils:

> "*There is a shared understanding between CCC, WDC and ECan that outrightly prohibiting Stormwater Basin and Sub-Soil Drainage Activities in overallocated or fully allocated groundwater*

zones is an unintended and undesirable outcome, with numerous beneficial and critical/essential infrastructural projects capable of providing good environmental outcomes now unable to be progressed. For example, Stormwater Basins are critical for achieving the [C]LWRP's water quality and quantity outcomes, and prohibiting these cause material harm to the environment and communities. There is general agreement that a change to the [C]LWRP should be pursued so that such critical and essential projects are not prohibited."

29 The WDC Interpretation then goes on to recognise that a plan change is time-consuming, and that therefore the District Councils wish to investigate whether the Regional Council's interpretation of the CLWRP groundwater take and use provisions is correct, and whether stormwater basin and sub-soil drainage activities might be capable of being consented by alternative means (that would not be prohibited by the CLWRP).

30 The WDC Interpretation is in summary:

30.1 Stormwater basins and sub-soil drainage activities do not involve a "take and use" of groundwater, and therefore the prohibited activity rule does not apply as those activities involve "taking" only, with no intervening use by a person.

30.2 The Regional Council has incorrectly interpreted the implications of the AWA Decision because:

(a) The AWA Decision does not require the CLWRP "take and use" groundwater rules (5.128-5.130) to apply to a proposal that genuinely involves only a take of groundwater and no associated use.

(b) The AWA Decision only makes it necessary for activities genuinely involving both a "take and use" of groundwater to have both the taking and use of water considered together under the "take and use" groundwater rules of the CLWRP, with no ability to grant a consent for a take separate from a use (or vice versa). However, the "take and use" rules do not apply to activities or proposals that do not involve both a taking and use, such as Stormwater Basin and Sub-Soil Drainage Activities where no "use" is involved.

(c) The AWA Decision supports a conclusion that rule 5.130 (being prohibited activity rule) only applies where the reality of a particular proposal involves both a taking and use of groundwater (e.g. a water bottling activity that requires both take and use), but not where a proposal genuinely involves only a "take" with no "use".

(d) The WDC Interpretation goes on to outline the legal submissions of each party in the Supreme Court case, and notes that no arguments were made for an interpretation of the "take and use" rules that requires those rules to apply to a genuine "take" only proposal (e.g. stormwater basin and sub-soil drainage activities) and that therefore it was highly unlikely that the Court had made a ruling to the effect of the Regional Council interpretation.

Our interpretation

31 We agree with the WDC Interpretation's reasoning as to why the Regional Council has wrongly interpreted the AWA Decision with respect to rules relating to the provision of stormwater infrastructure:

31.1 The AWA Decision found that where the expression "take and use" of water is used in the CLWRP, the intent is that the activity will (or must) involve both. The "take" and the "use" cannot be uncoupled.

31.2 Yet the Regional Council has taken the view that activities which only "take" water must now also be considered under the "take and use" rules. This goes against the clear findings of the AWA Decision that those rules only apply to activities which involve both "take and use" of water.

31.3 Under the AWA Decision, the "take and use" rules cannot apply to the interception of groundwater by stormwater infrastructure because those sorts of activities do not involve a "use" and are therefore not contemplated by those rules. Those rules provide that a "take and use" is prohibited in over-allocated groundwater zones, not a "take" in itself *per se*.

32 While the WDC Interpretation does not go on to specify what rules it considers would apply to a "take" only of this kind under the CLWRP, we understand it to be suggesting that the Regional Council can either process such activities under rules that refer to the "take or use", or alternatively go back to the status quo for processing such applications under the catch-all rule 5.6 of the CWLRP where there is no specific "take or use" rule for the activity.

33 We agree with the view that such applications should be processed under the CLWRP but also offer an alternative interpretation that this is because the activity is not actually a "take" (or "use") of water at all but rather simply a "diversion" of water:

33.1 Section 14 of the RMA sets out that no person "*may take, use, dam, or divert*" water in a manner that contravenes a regional rule unless the activity is expressly authorised by resource consent.

33.2 Consistent with previous decisions of the Environment Court, excavations that intercept groundwater amount to a **diversion** of water (rather than a take) under section 14 of the RMA.[4] As the Court in *Chatham Island Seafoods* (a similar 'groundwater interception' case) found:

> *"[35] We find that with the excavation of the channel and the pond, the water followed a path that was different from that preceding the excavation. The channel and excavation had the effect that groundwater was intercepted and collected in the excavation that would not have done if the work had not been done. The result is that water was turned aside and displaced to take a different position than it would if the excavation and channel had not been made, even though it ultimately passes through the beach wall.*
>
> *[36] We hold that this was a diversion of water to which section 14 applies."*

33.3 In this context we think the alternative (and better) to that provided in the WDC Interpretation is that:

(a) Rule 5.130, CLWRP only applies to the "*take and use*" of water, and expressly does not include the 'diversion' of water; and

(b) as there is no express rule in the CLWRP concerning the diversion of groundwater, this activity would require resource consent as a discretionary activity under the catch-all Rule 5.6 of the CLWRP.

33.4 On that basis resource consent could simply be sought as a discretionary activity for the diversion of water (and any wider allocation issues or prohibited activity status would not arise).

34 Further, even if either the WDC Interpretation, or our interpretation is not correct and rule 5.6 of the CLWRP cannot be relied on, then there is still a valid further alternative consenting pathway for the activity as a non-consumptive 'take and use' under Rules 5.131-5.132 of the CLWRP.

35 The interception of groundwater by stormwater infrastructure is inherently "non-consumptive" as it does not remove water from the overall system (because the water is not used).

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[4] *Chatham Islands Seafoods Ltd v Wellington Regional Council* EC Wellington A018/2004, 13 February 2004 at [36]; with reference to *Stewart v Kaniere Gold Dredging Ltd* [1982] 1 NZLR 329 at 337.

36 This makes sense even if there is no obvious or apparent associated use (at least for any proposal that does not rely on groundwater to for example 'dilute' contaminants). Rule 5.132, CLWRP simply provides:

> **5.132 The non-consumptive taking and use of ground water and associated discharge to groundwater that does not meet one or more of the conditions in Rule 5.131 is a discretionary activity.**

37 As to the relevance and applicability of this rule, we further note that the CLWRP includes reasoning as to why Rule 5.130 does not apply to non-consumptive takes. This is expressly recognised in Policy 4.58 of the LWRP:

> "*Non-consumptive groundwater takes, including the taking of heat from or adding heat to groundwater and any taking which in conjunction with other activities on a site results in a neutral or positive water balance, will not be subject to any groundwater allocation zone limits, and will generally be supported, provided the water either remains in the aquifer, or is returned to the same groundwater allocation zone within 24 hours and is protected from contamination, other than heat.*"

38 Accordingly, it is our interpretation that the activity (whether, as we assert, it is more correctly labelled as a 'diversion', or alternatively, a 'non-consumptive take and use' – or even if it is a take (as per the WDC Interpretation)) can properly be the subject of a resource consent application.

39 For completeness, we note that there is further (i.e. fourth) fall back in that, the CLWRP also provides specifically for small takes of groundwater as a permitted or restricted discretionary activity under rules 5.113 to 5.114A of the CLWRP. For such takes there is no prohibited activity rule. These rules are referenced by ECan in its various documents as being a possible way through its own interpretation of the CLWRP (and, as a further fall back, would cover any smaller 'interception' in relation to PC31 such as small leaks over time into infrastructure as discussed below at paragraphs 57 to 61).

WHAT IS THE RISK OF GROUNDWATER INTERCEPTION BY SERVICE INFRASTRUCTURE FOR PC31?

40 The information contained in this section has been extrapolated from the evidence of the various experts and the relevant joint witness statement (*JWS*). **Mr O'Neill** and **Mr McLeod** have also carefully considered the material set out.

Interception during construction

41 There is no consenting issue with respect to the potential interception of groundwater during the construction of infrastructure.

42 There appears to have been some confusion between **Mr Roxburgh** and **Mr McLeod** as to what each other was saying with regard to the extent of interception during construction.[5] Mr Roxburgh has concerns regarding the ability to consent the interception of groundwater during construction.[6] This concern is unfounded, it has always been proposed that the appropriate consents for construction dewatering of groundwater would be applied for and could easily be obtained.[7]

43 Rule 5.119 of the CLWRP provides for the taking of groundwater for the purpose of dewatering for carrying out excavation, construction, maintenance and geotechnical testing and the associated use and discharge of that water as a permitted activity provided certain conditions can be met. Where one or more of those conditions cannot be met, the activity becomes a restricted discretionary activity under Rule 5.120. There are no prohibited activity rules related to the activity during the construction phase.

44 The Regional Council's interpretation of the CLWRP (set out above) is not concerned with dewatering during construction activities, but rather the 'permanent' interception of groundwater during the operation of stormwater infrastructure.

Stormwater detention basins

45 Regardless of the actual consenting position, it is important to again emphasis in relation to the basins that water is not being intercepted. **Mr O'Neill** has maintained throughout his evidence that the detailed design of the stormwater basins will be dependent on the outcomes of detailed groundwater testing and monitoring.[8] Where that detailed testing shows that the groundwater is at a level to ensure no interception with the basin, then that basin could be excavated up to a depth of 200mm. Where detailed testing shows that because of the groundwater levels, any excavation would have a risk of intercepting groundwater, then **Mr O'Neill** has demonstrated that there is a viable concept for constructing the

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5 Summary statement of Mr Roxburgh dated 8 August 2023 at [52]; Summary of evidence of Mr McLeod dated 4 August 2023 at [8].

6 Summary statement of Mr Roxburgh dated 8 August 2023 at [52].

7 Evidence of Mr O'Neill dated 6 July 2023 at [27], [34]; Summary of evidence of Mr O'Neill dated 3 August 2023 at [4.1].

8 Evidence of Mr O'Neill dated 6 July 2023 at [18]; Summary of evidence of Mr O'Neill dated 3 August 2023 at [9]-[10].

stormwater basins at existing ground level, along the fall of the site, using bunding.[9]

46 **Mr Wilkins** (for the Regional Council) in his summary of evidence accepts that this solution means the take and use of groundwater will not apply to the stormwater detention basins.[10] This is consistent with the dealings of developers with the Regional Council to date.

47 The JWS also records that all experts agree the stormwater detention can be constructed at existing ground level and that subdivision stage is appropriate for demonstrating a detailed development plan for the site with associated stormwater management solutions.[11]

48 That should effectively be the end of the matter.

49 For completeness it is noted that **Mr Roxburgh's** concern with the stormwater basins, having accepted **Mr O'Neill's** concept as being a viable one, appears to relate to the fact that there remains approximately 26 hectares of unattenuated area.[12] This is a different issue to consenting hurdles relating to the AWA Decision.

50 The JWS notes that at subdivision stage, the stormwater concept can be tested to ensure the risk of increasing downstream flows is adequately mitigated. And if the effects of the unattenuated area mean that they cannot be appropriately mitigated, then these can be developed to a lower density, or not at all, so that overall hydraulic neutrality for the development is ensured.[13] **Mr O'Neill** and **Mr McLeod** are confident that the full development can occur and achieve overall hydraulic neutrality such the lower density or no development of this area would not be required.

51 The issue is a planning one which is dealt with in the supplementary evidence of **Mr Walsh**,[14] in that the ODP ensures the outcome envisaged by the JWS with respect to ensuring hydraulic neutrality.

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9 Evidence of Mr O'Neill dated 6 July 2023 at [32]-[34], [53]; Summary of evidence of Mr O'Neill dated 3 August 2023 at [10].

10 Summary statement of Mr Wilkins dated 8 August 2023 at [5].

11 Joint witness statement dated 18 August 2023 at Table, Issue: Stormwater attenuation and ensure no increase in downstream effects, Key facts and assumptions and Agreed position columns.

12 Joint witness statement dated 18 August 2023 at Table, Issue: Stormwater attenuation and ensure no increase in downstream effects, Disagreements.

13 Joint witness statement dated 18 August 2023 at Table, Issue: Stormwater attenuation and ensure no increase in downstream effects, Disagreements.

14 Supplementary evidence of Mr Walsh dated 5 September 2023 at [35]-[36].

Swales

52 With respect to kerb-side stormwater infrastructure, PC31 proposes swales along road corridors as a primary means of stormwater conveyance.

53 Concerns were raised that swales had the potential to intercept groundwater in a similar manner to the potential for the stormwater basins to intercept groundwater.[15]

54 As with the stormwater detention basins, detailed groundwater testing will be conducted to determine whether the groundwater levels mean that swales could intercept groundwater.[16] Swales will only be constructed where they would not intercept groundwater as informed by that detailed testing.

55 Where detailed testing shows that because of groundwater levels, any constructed swales could intercept the groundwater, then the experts have agreed in the JWS that the alternative kerb and channel design option could be used in such an instance to convey stormwater without interception of groundwater.[17] This is an option that can be adopted if there is any uncertainty or risk.

56 In relation to **Mr Roxburgh's** concern with respect to the possible 'soggy bottoms' of swales and the maintenance issues this causes for Council relate only to where swales have been constructed in a manner that intercepts groundwater.[18] As no swales are proposed to be constructed in a manner that they intercept groundwater (and where there is any risk, kerb and channel infrastructure will be used instead), this is not an issue for PC31.

Wastewater and stormwater pipe networks

57 With respect to the wastewater and stormwater pipe networks, the JWS acknowledges the potential for pipework to leak over the course of its operational life. While pipes are tested for water tightness at the time of construction, over years of operational life drainage networks can deteriorate and begin to leak.[19]

58 All of the experts for the JWS agreed that infiltration of groundwater into wastewater and stormwater pipe networks is endemic to all

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15 Summary statement of Mr Roxburgh dated 8 August 2023 at [36]; Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Key facts and assumptions column.

16 Evidence of Mr O'Neill dated 6 July 2023 at [18]; Summary of evidence of Mr O'Neill dated 3 August 2023 at [9]-[10].

17 Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Agreed position.

18 Summary statement of Mr Roxburgh dated 8 August 2023 at [37]; Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Key fact and assumptions column.

19 Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Key facts and assumptions column.

such networks and is not something that is managed by the enforcement duties of the Regional Council requiring consent.[20] The JWS acknowledges that such flows, if they eventuate, would be extremely small relate to the design flows of the system.[21] The permitted activity rule can be relied on as a backstop but developers have not done so to date.

59 We also refer back to the permitted activity rule in paragraph 39 which would cover any overly literal argument that leaks are in fact a take.

Raingardens and bioscapes

60 This infrastructure is proposed to be lined (or constructed using shallow pre-cast concrete chambers) so as to be watertight.[22]

61 **Mr Roxburgh's** concerns with respect to this infrastructure is that over time (i.e. the operational life of the infrastructure) there is a risk that water tightness may deteriorate and that the infrastructure may begin to leak. This is the same concern as that set out above with respect to the wastewater and stormwater pipe networks.

62 Again, all of the experts for the JWS agreed that infiltration of groundwater into wastewater and stormwater pipe networks is endemic to all such networks and is not something that is managed by the Regional Council as an enforcement issue or as requiring a water take consent. There is no reason why the Regional Council would not treat the same issue with respect to other aspects of stormwater infrastructure in the same manner.

Road subbase

63 The concern here is that the subbase for roads within the development may not be able to be drained which leads to stability and maintenance issues. **Mr Roxburgh** in his summary noted that if the roading sub-base contains excessive water (i.e. caused by a high water table without adequate drainage), the road can be at risk of slumping or a reduced life and that it is common for roading designs where there is a high groundwater table to include drainage of the roading sub-base.[23]

64 **Mr Wilkins'** concerns with respect to this issue was that it is difficult to replace excavated material with material that has the

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[20] Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Agreed position.

[21] Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Key facts and assumptions column.

[22] Evidence of Mr O'Neill dated 6 July 2023 at [9], [25], [27]; Summary of evidence of Mr O'Neill dated 3 August 2023 at [4.1].

[23] Summary statement of Mr Roxburgh dated 8 August 2023 at [53].

same permeability so as to not effect preferential groundwater flow paths.[24]

65 The summary of evidence of **Mr McLeod** states that this issue can be adequately mitigated through the use of engineered soils with low permeability or constructing "water stops" to avoid the short circuiting of groundwater through pavement layers.[25] **Mr McLeod** goes on to note that these methodologies are becoming common practice in Christchurch in conditions with high groundwater and springs, including in the recent Halswell Prestige subdivision in Halswell, and the Highsted and Tullet Park subdivisions in Casebrook.[26]

66 These methods have also been listed in the JWS as mitigations which will reduce the risk of interception of groundwater. The JWS goes on to state that there are pavement construction methodologies that can mitigate the effect of high groundwater on the structural performance of a road.[27] Again, these issues are being worked through with the Regional Council on other developments without triggering consenting issues.

67 Further, the JWS records agreement between the experts that the potential for re-directing groundwater flows can be mitigated through appropriate design and construction of such infrastructure.[28]

68 **Mr Roxburgh's** also raises a consenting issue that would arise if the road subbase drainage solution intercepted groundwater.[29] Notably in the JWS, all experts agreed that if a consenting pathway provides for subsoil drainage, this would provide greater certainty as to the effectiveness of the mitigations.[30]

69 However, **Mr McLeod's** proposed mitigations (specifically the engineered soils) do not involve any drainage of water, rather they prevent the need for subsoil drainage by not allowing groundwater to disrupt the structural integrity of the road pavement. This is an increasingly common workaround being used by a number of developers in the Canterbury region to avoid the Regional Council's

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24 Summary statement of Mr Wilkins dated 8 August 2023 at [7].

25 Summary of evidence of Mr McLeod dated 4 August 2023 at [9].

26 Summary of evidence of Mr McLeod dated 4 August 2023 at [10].

27 Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Key fact and assumptions column.

28 Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Agreed position.

29 Evidence in chief of Mr Roxburgh dated 15 June 2023 at [45]; Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Disagreements.

30 Joint witness statement dated 18 August 2023 at Table, Issue: Interception of groundwater by infrastructure and potential effects, Disagreements.

interpretation of the groundwater rules post the AWA Decision. There are no known consenting barriers to these mitigations and the Regional Council is working proactively with developers on their designs to ensure the legal arguments are avoided.

70 We have also become aware that the Regional Council has recently (June 2023) granted consents[31] for subsoil drainage systems with respect to the Townsend Fields development in Rangiora. This development was within a high groundwater area and the consents were processed through the non-consumptive take and use of water rules in the CLWRP (discussed above at paragraphs 34 to 38). On this basis, it appears there is no consenting barrier to subsoil drainage solutions across the entire PC31 site.

CONCLUSION

71 The AWA Decision is not engaged.

72 As with many development in Canterbury, all aspects of the proposal have been designed to either entirely avoid the interception of groundwater or able to rely on a specific CLWRP rule (such as 5.119 for dewatering during construction) that is not in issue.

73 Even if wrong on the above (and the AWA Decision is engaged) then the Regional Council position is wrong on a number of grounds when applied to the PC31 context.

74 The first being the likelihood that any interception is not in fact a take but a divert (in accordance with longstanding Environment Court authority in the *Chatham Island case*) – or alternatively:

74.1 there is no use (and therefore Rule 5.6 will prevail); or

74.2 there is a non-consumptive take and use (for which a consulting pathway is expressly provided for under CLWRP Rules 5.131 and 5.132); or

74.3 there is a permitted activity (or restricted discretionary) pathway as a result of CLWRP Rules 5.113-5.114A.

75 Waimakariri District Council's own advice is similarly that the Regional Council has been wrong in its interpretation of the AWA Decision.

76 Finally, we also attach:

76.1 At **Appendix 5** a written record of the points **Mr Walsh** made at the reconvened hearing with respect to the risk of acting or not acting (status quo, PC31, and 'reduced option')

[31] CRC224991 and CRC235473.

as against the criteria to contribute to well-functioning urban environments in Policy 1; and

76.2 At **Appendix 6** a copy of the final ODP and provisions for PC31, including the correction **Mr Walsh** made orally at the reconvened hearing (shown in red).

Dated: 13 September 2023

_____

Jo Appleyard / Lucy Forrester
Counsel for the Applicant

Technical Advice Note

Implications of Court of Appeal Decision in *AWA v CRC* [2022] and next steps for Consents

19 August 2022

Disclaimer: *This memo does not constitute legal advice and should not be relied on as such.*

On 20 July 2022, the Court of Appeal released its decision of *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325. The key findings of that Court that affect consenting were:

- There is no reason, under s14 of the RMA, that the **take** [of water] must be read conjunctively with the **use** [of water]; but
- It does not necessarily follow that the Council can then grant a separate consent for a use and a separate consent for a take. This will depend on the relevant plan rule. A rule that uses the expression "take and use" indicates that the take and use of water must be considered conjunctively, while one that specifies the "take or use" indicates that separate consents can be envisioned.

This decision has implications for the ongoing implementation of the Canterbury Land and Water Regional Plan (LWRP)[1]. This Technical Advice Note outlines the approach Environment Canterbury will be taking to implementing the decision. It does not constitute legal advice and consent holders are encouraged to seek their own advice relevant to their own circumstances.

The LWRP rule framework

The LWRP envisions some situations where there is a take of water, but no associated use (or vice versa). These situations are addressed through provision of specific "take or use" rules (e.g. rules 5.121 (permitted) and 5.122 (discretionary) for the take or use of water from irrigation or hydroelectric canals, or from water storage facilities) to enable these activities to occur. Over the last decade of implementing the LWRP however, there have been applications lodged for other activities that appeared to also fit into a "take or use" classification (as they appeared to only require consent for either a take or a use), but which did not appear to be managed under the existing rules. This has included applications for:

- Stand-alone takes of water where there is no use (but typically with an associated discharge e.g. for:

[1] This advice is primarily written regarding implementation of the LWRP as that was the focus of the Court of Appeal decision. Implications for other plans are also briefly addressed below but may require further consideration based on the specific situation.

- Stormwater treatment wetlands intercepting high groundwater levels;
- On-going removal of 'nuisance' high groundwater levels (e.g. impacting on basements or other infrastructure);

- Stand-alone uses of water associated with existing (already consented) takes e.g.:
  - Same purpose, expansion of scope: expand existing uses while relying on existing consents to take and use water e.g. adding additional irrigation areas to existing irrigation consents within the allocation limit on that consent;
  - Different purpose, new use activity: change uses of water e.g. from irrigation to quarry dust suppression;
  - add extra uses (often to regularise activities such as unconsented dairy shed and stockwater takes that are occurring) – within the allocation limits on an existing water take and use (albeit for another purpose) consent;

- Miscellaneous situations, e.g.:
  - Where catchment plans have interacted with the LWRP to provide situations where catchment plan applied solely to the take of water (e.g. WRRP), and LWRP solely to the use of water;
  - Cross-jurisdictional situations where water was taken and used from another region subject to that region's plan requirements (e.g. West Coast) but was then used in Canterbury (e.g. Kiwirail Otira rail tunnel cleaning consents).

As these applications did not appear to be specifically for a "take and use", and as there was no specific "take or use" rule for these activities, they were addressed under the 'default' catch-all rule 5.6 of the LWRP (which was intended to cover unanticipated activities not managed under another rule). The Court of Appeal has now said that this approach is not correct in some of the circumstances highlighted above. Where an activity to take and/or use water is to be consented under the LWRP and is not managed under an activity specific rule (e.g. for community supply, dewatering etc.), it must be considered under the general "take and use" rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater, or a relevant sub-regional rule where it prevails over the regional-wide rules).

Repercussions for consents already granted under the old approach

Until the recent Court of Appeal decision, the High Court decision from 2020 was the 'law of the land', and supported the approach taken by Environment Canterbury regarding the use of rule 5.6 of the LWRP in the situations above.

While the Court of Appeal has now changed the approach that Environment Canterbury must take towards implementation of its plans going forward, Environment Canterbury has no power to revisit or cancel the grant of applications granted prior to the Court of Appeal decision. Resource consents granted under that approach are considered lawful unless they

are specifically challenged, and decision on those consents quashed by the Court (i.e. in the event there is a challenge to the grant of a consent under rule 5.6, if the challenge is successful the Court may or may not cancel the consent. This is likely to depend on the specific circumstances of the case).

As such, unless the consent is cancelled by the Court, applications to vary or 'renew' (i.e. applications made under s127, or affected by s124 through s124C) water permits granted under the previous approach should be processed under the relevant provisions of the RMA and LWRP. For example, an application to 'renew' an existing water permit for a 'stand-alone use' for dairy shed use, that is linked to an existing 'take and use' permit for irrigation, should be considered collectively as a combined take and use (affected by provisions of s124, s124A-C RMA) for all composite parts (i.e. as a take and use for irrigation and dairy shed use) under the relevant rule.

Repercussions for new activities / potential applications

In cases where there is allocation available (or where allocation can be made available, see below) there is unlikely to be an impediment to making an application for new activities. Rather than treating activities for a stand-alone "take" or "use", that is not already governed by a specific "take or use" rule (e.g. for takes from storage facilities), as discretionary under rule 5.6, those activities must be considered under the general "take and use" rule (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater, or a relevant sub-regional rule where it prevails).

In fully or over-allocated allocation zones however, it is typically prohibited under the Canterbury Land and Water Regional Plan (LWRP) to apply for a (consumptive) "take and use", and therefore no application can be made except for replacement of existing activities affected by the provisions of s124-124C (i.e. which are not increasing or changing in scope[2]).

In some situations, it may be possible for an applicant to surrender sufficient existing allocation to 'free up' space in an allocation block. Where this would bring the total cumulative allocation below the allocation limit, an application could then be made for the quantum of water available below the limit, subject to meeting the necessary conditions of the rule.

[2] The LWRP prohibits applications in fully or over-allocated water allocation zones for a 'take and use' of ground or surface water except for 'replacement' applications subject to the provisions of s124-124C. To be affected by s124-124C requires the activity to be the same as that already consented, e.g. where a consent for irrigation authorises a take and use at a particular rate and volume and over a particular area, an application can be made to replace that consent at the same rate, volume and area, but no application could be made to take the same quantum of water for a use over a larger area (or for a new use) as it would no longer be the same activity. As such, no application could be made until such time as the cumulative allocation was back below the limit set in the LWRP.

Site-to-site transfers (s136(2)(b)(ii))

In addition to the situations above, the Court of Appeal decision also appears to have repercussions for site-to-site transfers where the applicant *wishes to change the end use of water* (e.g. a transfer of an irrigation permit to another site for dust suppression).

While the LWRP rules provide for the transfer of a "take or use", the Court of Appeal has said "take and use" under the LWRP are inextricably linked and that, under the LWRP, it is not possible to apply for a stand-alone use or take (unless there is a specific "take or use" rule). While it is arguably possible to transfer a take, or a use, in isolation from the other aspect of an existing consent, in practice once transferred there is no mechanism to apply for the other component of an activity in a fully or over-allocated water allocation zone, i.e. if you applied to transfer a take to a new site, without the existing use, you couldn't then apply for a new use at the new site as it wouldn't be a replacement application affected by the provisions of s124-124C (as based on the Court of Appeal decision take and use are inextricably linked and s124-124C would apply to the activity as a whole, not the respective 'take' and 'use' components).

In practice therefore, most site-to-site transfers in over-allocated zones are effectively limited to transfers of both the take and use. The exception would be where the transfer would enable an activity managed under a "take or use" rule (or where it is not prohibited to apply for new allocation e.g. community supply).

Repercussions for applications in process

When considering applications for water permits already in process under the 'catch-all' rule 5.6, these will need to be reconsidered against the generic 'take and use' rules in the LWRP[3]. How those activities will need to be treated will depend on several factors.

The first step will be to determine if the application is for a new activity or whether it is considered a 'replacement' application (i.e. one where the take and use are affected by the provisions of s124-124C RMA).

Once that has been done, the possible resolutions will depend on where applications are situated, and the allocation status of the water resource. Table 1 (attached) provides an example of how this situation would resolve when activities currently being processed under rule 5.6 must now be considered under the region-wide take and use rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater). Where specific sub-regional rules prevail, these should be considered on a case-by-case basis.

[3] It is unlikely that any of these activities will fit under one of the specific 'take or use' rules, because if that had been the case, they should have already been classified under those rules. This should, however, be checked in each case.

In practice, most of these applications will need to be returned to an applicant so that they can re-consider their proposals to see if they can be structured or redesigned in such a way as to be able to be processed under the take and use rules as the scope of the application, if framed to be under rule 5.6, may not cover the required considerations under a "take and use" rule.

Other Regional Plans

This advice above is written regarding implementation of the LWRP and is not necessarily applicable to other Canterbury catchment-specific plans. These plans (e.g. the Waimakariri River Regional Plan (WRRP) or the Hurunui Waiau River Regional Plan (HWRRP)) have their own specific rules which need to be applied on a case-specific basis. The below discussion provides some guidance on how to apply those provisions considering the Court of Appeal decision.

The Hurunui and Waiau River Regional Plan (HWRRP) and the Waipara Catchment Environmental Flow and Water Allocation Regional Plan (Waipara Plan)

Like the LWRP, the HWRRP and the Waipara Plan include rules governing the "take and use" of water. In general applications should be therefore considered in the same way as the LWRP e.g. rule 6.1 of the the Waipara Plan refers to the *"take and use of groundwater"* [emphasis added], and as such take and use must be considered together.

This approach is complicated however, as some rules combine all four verbs (i.e. take, use, dam, divert) from section 14 of the RMA e.g. rule 2.3 of the HWRRP refers to the *"taking, diverting, using and discharging"* of surface water. In this situation, the rule should be read in a way that where consent is required for multiple activities (listed in the rule) to operate the proposal, then they should be applied for together under the rule. This includes situations where applicants may already hold one or more consents for part of a proposal (e.g. for an existing diversion or take), and want to change another aspect of the existing consent (e.g. a new use).

For example, if an activity required a resource consent for a take and discharge to operate e.g. for a stormwater wetland that intercepts groundwater), or a diversion and use (e.g. for in-stream hydroelectricity generation), then these activities should be applied for and considered together. Changes to part of an existing authorisation, e.g. an expansion of irrigated area without changing the take, would be required to be considered as a new application for the "take and use" of water, even though there is an existing take which is not changing.

Waimakariri River Regional Plan (WRRP) and the Opihi River Regional Plan (ORRP)

The WRRP seeks to manage *inter alia* water takes and uses affecting the Waimakariri River and its tributaries while the ORRP seeks the same for the Opihi River. Unlike the LWRP

however, the WRRP and ORRP separate the take and use activities into separate rules. For example:

- Rule 5.1 of the WRRP manages the taking of surface water or from hydraulically connected groundwater within the Waimakariri River Catchment "below Woodstock" but does not manage the use of water.

- Rule 5.2 manages the use (and diversion and damming) of water in the Waimakariri River or its tributaries, but does not manage the use of water outside these waterbodies.

Neither the WRRP or the ORRP manage the use of water outside the waterbodies. These uses were, prior to the LWRP, managed under a separate rule for the "use of water" the Natural Resources Regional Plan (NRRP). When the NRRP was replaced by the LWRP, the use rules were replaced by the current suite of "take and use" and "take or use" rules in the LWRP.

The LWRP states however that where the WRRP or ORRP manage the same activity, the specific catchment plan prevails. This creates an unusual situation where the WRRP and ORRP apply to the take and the in-stream use of water, but the LWRP applies to the out-of-stream use. This has, to date, been resolved by considering any out-of-stream use of water taken under the WRRP or ORRP under rule 5.6 of the LWRP.

In considering the application of the Court of Appeal decision this situation is factually different to the situation in *AWA v CRC* (which was specific to activities that would be covered by the "take and use" rules of the LWRP). In this situation the WRRP and ORRP have no equivalent "take and use" rules and do not cover out-of-stream uses at all. Equally the LWRP does not apply to takes managed under those plans (c.f. section 2.8 LWRP). As such, the LWRP "take and use rules" cannot apply and using rule 5.6 of the LWRP[4] to consider an out-of-stream "use" remains valid.

Pareora Catchment Environmental Flow and Water Allocation Regional Plan (PCFWARP) and the Waitaki Catchment Water Flow and Allocation Regional Plan (WCWARP)

Both the WCWARP and PCFWARP use "take or use" rules for consumptive takes of water. As such it is possible to continue to process separate take or use applications under these catchment plans.

[4] Where there is no relevant "take or use" rule in the LWRP

Table 1. Approach to dealing with applications in process under the LWRP for stand-alone 'takes' or 'uses' under rule 5.6 post Court of Appeal Decision in *AWA v CRC*. The table assumes there is no relevant 'take or use' rule and that the activity must be classified under the relevant region-wide 'take and use' rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater). Where sub-regional rules prevail over the regional take and use rules, these should be referred to in the first instance.

Proposal Type	**Status of Allocation Zone**	**Potential Resolution**
New application to 'take' water with no 'use'	Over allocated	If allocation from other water permit(s) can be surrendered to reduce allocation sufficiently below the plan limit, to accommodate the new allocation for the proposed take, then application can proceed. Applicant will need to demonstrate the amount to be taken will not have adverse effects. Priority of this take is per first in, first served. If insufficient allocation available (i.e. from surrenders) to accommodate the new take then the application would be **prohibited** under the operative plan rules and must be returned.
	Fully allocated	If allocation from another water permit can be surrendered to reduce allocation sufficiently below the plan limit, to accommodate the new allocation for the proposed take, then application can proceed. Applicant will need to demonstrate the amount to be taken will not have adverse effects. Priority of this take is per first in, first served. If insufficient allocation available (i.e. from surrenders) to accommodate the new take then the application would be **prohibited** under the operative plan rules and must be returned.
	Under allocated	If there is sufficient allocation available, application can proceed on the basis that it is an application to 'take and use' water. Applicant will need to demonstrate the amount to be taken will not have adverse effects. Priority of this take is per first in, first served.

New application for a new, additional, or expanded 'use' within an existing 'take' allocation.	Over allocated	As existing 'take and use' consents are linked under the Court of Appeal decision, if the existing use is not continuing then it cannot be considered a 'replacement' application (affected by s124-124C) and must be considered afresh. If surrendering existing allocation from the existing (or other) water permit(s) is sufficient to reduce allocation below the plan limit to accommodate the new allocation, then application can proceed. Applicant will need to demonstrate the amount to be taken will not have adverse effects and that it is reasonable for the end use. Priority of this take is per first in, first served. If insufficient allocation available (i.e. from surrenders) to reduce allocation below the allocation limit then application is **prohibited** and must be returned.
	Fully allocated	If surrendering existing allocation from the existing (or another) water permit should be sufficient to reduce allocation below the plan limit in order to accommodate the new allocation, then application can proceed. Otherwise application is **prohibited** and must be returned.
	Under allocated	If there is sufficient allocation available, application can proceed on the basis that it is an application to 'take and use' water. Applicant will need to demonstrate the amount to be taken for the new use is reasonable and will not have adverse effects. Priority of this take is per first in, first served.

Appendix 2

Memo

Date	8 December 2022
To	Mayoral Forum Mayors and CEOs
CC	
From	Dr Stefanie Rixecker, CEO Environment Canterbury

Implications of the AWA decision on urban development

The Court of Appeal's decision in *Aotearoa Water Action v Canterbury Regional Council [2*022] NZCA 325 (the AWA decision) has impacted the consenting of urban development projects within the Canterbury Region. We believe it important the Mayoral Forum is aware of the complexity surrounding this issue and the solutions we are investigating.

The impacts have been discussed between Environment Canterbury, Christchurch City Council, Selwyn District Council and Waimakariri District Council, and in some cases, solutions worked through. However, the frustrations developers are feeling have spilled over into the media (as evidenced by a recent article in Stuff). There are likely to be impacts in other parts of the region in the future.

Background

The Canterbury Land and Water Regional Plan (CLWRP) has a clear rules framework for takes with an associated use (the "take **and** use rules") and provides for some specific activities where there is a "take" without an associated "use" (the "take **or** use rules").

The interception of groundwater by a stormwater basin (or a where a drain intercepts groundwater) is considered a "take" of water (as water is effectively "taken" from the groundwater system). However, in practical terms there is not always an associated "use" of water. These activities are not covered in the activity specific "take **o**r use" rules.

Prior to the AWA decision, the rule framework was implemented so that if there was a take without an associated use that didn't fall into the activity specific "take **or** use" rules, the activity defaulted to a general rule in the CLWRP and could be consented as a discretionary activity.

The AWA decision has changed the way the CLWRP rules are applied. The Court of Appeal's decision directs that where the phrase "take and use" is included in the rule it applies to both takes and uses of water, even if only a "take" or a "use" applies. This means the "take" of water for a stormwater or drainage infrastructure must be put through the "take and use rules" framework.

These rules prohibit infrastructure that permanently intercepts groundwater where the groundwater resource is considered fully- or over-allocated. Consent cannot be applied for, effectively preventing the balancing of policies which is anticipated by the CLWRP in the unique circumstance of the interception of groundwater by stormwater or drainage infrastructure. The decision and its implications must also be considered in the light of other planning instruments, including Plan Change 7 to the CLWRP (PC7) and the National Policy Statement for Freshwater (NPS-FM2020).

PC7 was developed to respond to emerging resource management issues, to give effect to relevant national direction, and to respond to community-based recommendations for resource management within their specific areas. On 17 November 2021, Environment Canterbury made its decisions on submissions on PC7. It is currently under appeal.
The key impact of PC7 in relation to these issues is that it realigns the boundaries for some of the groundwater allocation zones and reduces the amount of groundwater available for

allocation. The reduction in groundwater allocation was in response to environmental concerns and ties into our implementation of the National Policy Statement for Freshwater Management 2014 (as amended in 2017).

The NPS-FM 2020 was not in force when PC7 was notified, or during the period in which submissions on the plan change were prepared and lodged. However, it came into force before the hearing of the submissions and evidence. Environment Canterbury was unable to give full effect to the NPS-FM 2020 due to there being insufficient scope in submissions.

Decisions on consents need to be made giving effect to the NPS-FM 2020 as much as possible without the planning framework in place to direct them; particularly the hierarchy of obligations in Te Mana O te Wai.

Cloud Ocean Limited have been granted leave to appeal the AWA decision to the Supreme Court; and the hearing is likely to be in March 2023.

Consenting

We are dealing with several 'live' examples where the AWA decision and PC7 restrictions have created an issue for consent applicants – one example is the creation of wetlands for the management of stormwater and/or flood mitigations.

Once the consequences for applicant's were fully understood, Environment Canterbury staff contacted individual consent applicants to inform them of the AWA decision, the potential consequences for their proposal, and to offer them the time to consider the best way forward. Additional advice was provided where requested. Comprehensive advice was provided to Christchurch City Council, Waimakariri District Council and Selwyn District Council management. Further, specific discussions and advice has been provided to those managing individual projects.

In some cases, Environment Canterbury staff have managed to work with consent applicants to amend their proposal and find alternative pathways to enable better environmental outcomes, and the amended proposal to proceed through the consent process. This has occurred through reducing or avoiding the interception of groundwater by redesigning infrastructure. We have also considered the pathway for a deemed permitted activity provided by s87BB of the Resource Management Act but applications to date have not met the requirements for this approach to be used.

However, there are situations where Environment Canterbury have exhausted all legal avenues to enable the activities to proceed. With the summer construction period underway this issue is causing anxiety and will be costly for industry, the community, and territorial authorities (TAs). If TAs are unable to undertake scheduled works, funding may be forfeited and opportunities for the other environmental, economic, and social benefits from the planned infrastructure will be lost.

Consent applicants (and specifically TAs) have been offered the opportunity to seek their own legal advice , to demonstrate a pathway to allow applications to progress. To date, no such proposals have been received. . However, if a compelling proposal was supplied Environment Canterbury may then be able to consider and progress consenting in some situations. This would require Environment Canterbury to agree with the advice; noting this would be contrary to our professional assessment of the situation.
Should an alternative approach the taken to the interpretation of the plan, it may have implications for the Supreme Court case, and there is a risk of judicial review. It may unfairly disadvantage those applicants who, some at considerable expense, have amended their activity.

Depending on the nature of alternative legal advice it may prove difficult to determine who has a genuine need for groundwater takes and who should provide an alternative solution through different design. This approach would set a precedent for any take or use consent; not those specifically related to stormwater and drainage infrastructure.

Planning

A planning solution under consideration involves changes to the CLWRP to enable these "takes" in very limited and specific circumstances relating to enabling stormwater and drainage management. Because there are many risks associated with opening the "take and use rules" framework (for example, those rules are drafted that way to reflect the holistic resource management approach reflected in the NPS-FM2020) we are exploring options in the stormwater, drainage water, and wetlands provisions of the CLWRP.

Any plan change will have to proceed through the RMA's Freshwater Planning Process (as it will not meet the criteria for the streamlined planning process). A freshwater planning process is likely to take around 18 months.

A risk with this approach is promulgating a plan change ahead of the Supreme Court decision could be interpreted as manipulating the outcome of the supreme court case; particularly relating to community perception around water allocation.

To date the planning approach has not been socialised with Ngāi Tahu (as the iwi management authority for the region). Any approach will involve Tangata Whenua to the extent they wish to be involved. The Canterbury Planning Managers are aware we are considering it.

Attachments:

1. Court of Appeal Decision

2. Technical Advice Note : Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents Court of Appeal Decision

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA430/2020
[2022] NZCA 325

BETWEEN	AOTEAROA WATER ACTION INCORPORATED Appellant
AND	CANTERBURY REGIONAL COUNCIL First Respondent
AND	CLOUD OCEAN WATER LIMITED Second Respondent
AND	RAPAKI NATURAL RESOURCES LIMITED Third Respondent
AND	NGĀI TŪĀHURIRI RŪNANGA Intervener

Hearing:	17 and 23 August 2021
Court:	Kós P, Cooper and Brown JJ
Counsel:	J D K Gardner-Hopkins for Appellant P A C Maw and L F de Latour for First Respondent W A McCartney for Second Respondent E J Chapman for Third Respondent J M Appleyard and R E Robilliard for Intervener
Judgment:	20 July 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed and the decision of the High Court is set aside.

B The Council's decisions granting consents CRC180728 and CRC180729 to Rapaki and CRC182812 to Cloud Ocean are set aside, with the further consequences set out at [132] below.

C The Council must pay AWA's costs calculated for a standard appeal in band A, together with usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] Under s 14(2) of the Resource Management Act 1991 (the RMA) no person may "take, use, dam, or divert" water (other than open coastal water) "unless the taking, using, damming, or diverting is allowed by subsection (3)." Under subs (3)(a) the taking, using, damming, or diverting may be expressly allowed by national environmental standards, rules in a regional plan or proposed regional plan, or resource consents.

[2] In this case resource consents were historically granted to take and use water for the purposes of a freezing works and a wool scour, respectively. Those consents were subsequently transferred to Rapaki Natural Resources Ltd (Rapaki) and Cloud Ocean Water Ltd (Cloud Ocean), pursuant to s 136(2)(a) of the RMA. Both Rapaki and Cloud Ocean now seek to take water in reliance on the rights previously granted, not for the purposes of the freezing works and wool scour, but for the purposes of bottling the water and selling it.

[3] In a non-notified process the Canterbury Regional Council (the Council) granted consents for this to occur. The applications for the consents were advanced as applications to change the use to which the water could be put, and the Council considered it was appropriate to proceed in that way, in reliance on the existing rights to take the water. Once the consents to use the water for bottling were granted, the new "use" consents were amalgamated with the existing "take" consents and the Council's records were altered in an administrative process to show that Rapaki and Cloud Ocean had consents to take and use water for bottling purposes.

[4] Aotearoa Water Action Inc (AWA) is an environmental advocacy group initially formed to oppose the present consents.[1] It commenced an application for review in the High Court challenging the grant of the consents. Nation J held that the

[1] We give further details concerning Aotearoa Water Action Inc at [72]–[74].

Council had acted lawfully in granting the consents and doing so on a non-notified basis.[2] AWA now appeals.

[5] The principal issue raised by AWA's appeal is whether it was lawful for the Council to grant consent for the water bottling activities without granting new consents in each case to take the water. As framed by Mr Gardner-Hopkins, who appeared in this Court as counsel for AWA, the broad question is whether a consent to "use" water under s 14 of the RMA can be sought and granted without an associated application to take water for the same use. He submits applications for "take" and "use" must be considered together. That is an issue which has not previously been directly addressed by this Court. The issue arises because here the take consents relied on were granted for different purposes. There are contextual aspects of the question in terms of the Council's Land and Water Regional Plan (LWRP) and the particular circumstances of this case which make it necessary to give a more detailed account of the factual setting, to which we will shortly turn. Underlying the argument is the fact that in the relevant catchment the water has been fully allocated (save for group or community supply and non-consumptive taking) and a new application to take water would, for this reason, be prohibited under the LWRP.

[6] Another issue raised by the appeal is whether the activity of water bottling actually involves the "use" of water under s 14 of the RMA. AWA contends it does not; under s 14(2) a water bottling consent can only be for the "take" of water for the particular purpose of water bottling and once the water is taken for that purpose and put into a pipe or network of pipes it is no longer "water" as defined in the RMA.

We address other arguments raised by AWA below.

[7] AWA's position on the appeal is broadly supported by Te Ngāi Tūāhuriri Rūnanga Inc (the Rūnanga), a party given leave to intervene in the High Court, against the opposition of Ocean Cloud and Rapaki.[3] In that Court, the Rūnanga were allowed to make written submissions and provide an affidavit from Associate Professor Rawiri

[2] *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580 [High Court judgment].

[3] *Aotearoa Water Action Inc v Canterbury Regional Council* [2019] NZHC 3187, [2020] 2 NZLR 359.

Te Maire Tau. Dr Tau addressed the perspective of the Rūnanga as the body holding mana whenua over the land and water relevant to the proceeding. In this Court, we heard from Ms Appleyard on behalf of the Rūnanga. She argued that in processing the application the Council had failed to have regard to, or had inadequate information to consider, effects on cultural values arising from the water bottling activity.

[8] The respondents oppose the appeal. They argue the High Court's judgment should be upheld and the appeal dismissed.

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[9] We note that the High Court determined as a preliminary question that commercial water bottling was not within the scope of the resource consents transferred to Rapaki and Cloud Ocean.[4] There was no appeal from that decision.

Factual narrative

Overview

[10] Rapaki and Cloud Ocean became the holders of the relevant resource consents for the take and use of water pursuant to s 136(2)(a) of the RMA as a result of acquiring the sites for which the consents were granted. In view of some of the arguments on appeal it is necessary to set out the complicated history of the consents.

The Rapaki consents

[11] There were two consents, referred to in the evidence as the "five bore consent" and the "three bore consent", because they enabled water to be taken from respectively five and three separate bores.

The five bore consent

[12] The five bore consent was originally a water permit granted by the Council under s 21(3) of the Water and Soil Conservation Act 1967 to Canterbury Frozen Meat Co Ltd. It was referred to in the Council's records as CRC900359.[5] The term of the

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[4] *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240, [2019] NZRMA 316 at [148].

[5] The Council assigns resource consents a unqiue six figure number with the prefix CRC.

consent was from 2 November 1990 to 30 April 1997. It was a consent to take up to 14,512 cubic metres of water per day at a maximum of 238 litres per second from the five bores "for meat processing purposes", in "connection with" land at "Belfast Road, Belfast".

[13] That consent was replaced by CRC971556 granted under what was then s 105 of the RMA to Primary Producers Co-Operative Society Ltd to take water from the five bores "for industrial use". Its term was from 28 November 1997 to 1 July 2032.

This consent specified particular rates of extraction and volume-limits in respect of each of the five bores.

[14] A notice of transfer of this resource consent to Rapaki under s 136 of the RMA was provided to the Council on 6 September 2016. The Council form used provided for a "full transfer" of the consent.

[15] On receipt of the transfer, the Council issued a new consent, CRC172245, on 16 September 2016. It authorised the take of groundwater from the five bores for industrial use, subject to the same rates of extraction and volumes as had applied under CRC971556. The consent was to apply from 7 September 2016 and expire on 1 July 2032.

The three bore consent

[16] The three bore consent was also granted under the Water and Soil Conservation Act, and commenced on 13 March 1969. The actual permit was not in evidence, but a summary of what was referred to as NCY700281F was provided, referring to the consent location as cnr Blakes Road and Belfast Rd, Belfast. The permit was to "take from two 150mm bores and one 100mm bore for operation of freezing works and processing of its products". No limits as to volume or extraction rate were stated, and there were no conditions.

[17] Subsequently, on 30 November 2001, Primary Producers Co-Operative Society Ltd was granted consent CRC012609, to "take and use groundwater" from the

three bores at a rate not to exceed 70 litres per second. The consent was to expire on 31 August 2035. It is relevant to note that the conditions imposed included the following:

> 2) An investigation of the efficiency of water use arising from the exercise of this consent over a period of one year commencing 1 June 2002, shall be carried out. The consent holder shall provide a copy of the investigation results to Environment Canterbury by 1st September 2003.
>
> The investigation shall: monitor total water use and total production; identify the types of use; measure the proportion of water in each type of use; identify those areas where there is potential to reduce water consumption and the means of achieving the reduction.
>
> 3) The consent holder shall take all reasonable steps to implement those water conservation measures identified in condition (2).

[18] According to the evidence of Dr Philip Burge, the Council's Principal Consents Advisor, this consent was transferred under s 136 of the RMA to Silver Fern Farms Ltd on 12 November 2015 (retaining the same CRC number), and then transferred again, on 20 November 2015, to Silver Fern Farms Management Ltd with the reference CRC163841. A notice of transfer to Rapaki under s 136 of the RMA was received by the Council on 6 September 2016. Once again, this was a full transfer of the consent, "[t]o take and use groundwater from three bores", at 66 Belfast Road, Belfast.

[19] On 9 September 2016, the consent was reissued under a new number CRC172118. It granted Rapaki a permit to take and use groundwater at 66 Belfast Road from the three bores at a rate of up to 70 litres per second, for a term expiring on 31 August 2035. The conditions that were previously attached to CRC012609, including conditions 2 and 3 quoted above, were repeated.

Section 127 application

[20] Section 127 of the RMA enables the holder of a resource consent to apply to a consent authority for a change or cancellation of a condition of the consent. The

provisions of the RMA relevant to resource consent applications[6] apply to an application under s 127 as if it were an application for a resource consent for a

discretionary activity.[7]

[21] On 13 July 2017, Rapaki submitted an application to the Council under s 127 to "change or cancel a condition of a resource consent" in relation to both the five and three bore consents. The application stated that it sought a "[c]hange of conditions of CRC172245 and CRC172118 to allow the use of water for bottling purposes." The application stated that the change in use would result in a "very high efficiency of use of water", and that the overall proposal would result in a "reduction in contaminant being discharged to the environment". Rapaki asserted in the application that there were no relevant policies in the LWRP. It then said:

> It appears that the LWRP does not concern itself with the use of water rather [it requires] that the volume of water taken is reasonable for the intended use (policy 5.65). As the take is already consented this is not applicable.

[22] An assessment of environmental effects was included with the application. That assessment recorded:

> Water taken under permit CRC172245 and CRC172118 is currently consented to be used for industrial use in this process water is taken from the Christchurch aquifer and discharged to the Bexley treatment plant / Waimakariri.
>
> The effect of the take is therefore fully consumptive on the Christchurch aquifers – i.e. no water is returned to the groundwater system through the currently consent[ed] process.
>
> Under the proposed bottling scenario, the take of water will remain with some wash-down water going to the Aquifer via the [Christchurch City Council] system.
>
> An imp[ortant] consideration is that this proposal will result in there no longer being a discharge of polluted water as associated with the current consented use.

[23] The assessment concluded:

[6] Sections 88–121.
[7] Section 127(3)(a).

In conclusion the effects of the change in use will have no additional negative effects, but will result in several positives. These include:

- A very high level of water use efficiency. There will be very little wastage of the water taken.
- An improvement in environmental impact as polluted water associated with the existing consented use will no longer be discharged to the Bexley treatment ponds.
- The creation of jobs.
- Investment in the Christchurch economy.

[24] On 19 July 2017, the consent planning business support team at the Council contacted the Rūnanga as an interested party, by sending an email to the address on file for the Rūnanga which was associated with Ms Amy Beran. The email noted that the subject site of the proposal was in a "silent file" area: an area identified as requiring special protection as a result of the presence of significant wāhi tapu (sacred places) or wāhi taonga (treasured possessions). A copy of the relevant application documents and the location of the proposal were hyperlinked in the email. The Rūnanga was requested to respond by 26 July 2017, but no response was received. Consequently, Council officers concluded that the Rūnanga had no specific concerns about the proposal.

[25] Given the unusual nature of the application, Council officers and in-house counsel discussed how it should be processed. As explained in the affidavit of the Dr Burge, three different options were considered:

(a) not processing the application at all on the basis that commercial water bottling fell within the scope of the "industrial use" permitted by the existing five and three bore consents;

(b) processing the application as one for a change of conditions, in the form in which it had been submitted; or

(c) processing the application as an application for a new use of water, the take of which had already been authorised by CRC172245 and CRC172118.

[26] Ultimately, the Council decided the application should be processed as an application for a new use, influenced by the wording in s 14 of the RMA. That section provides:[8]

> **14 Restrictions relating to water**
>
> …
>
> (2) No person may *take, use, dam, or divert* any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water …
>
> …

[27] Council officers concluded that the separate references to "take" and "use" meant that a new use of water could be considered independently from a "take" of water, provided the relevant RMA considerations were taken into account. Because the "take" component of the original five and three bore consents had previously been exercised, Council officers considered the taking of the water formed part of the existing environment against which the new use applications would be assessed.

[28] The Council decided to treat the application as if it sought two consents, to use the water taken under CRC172245 and CRC172118 respectively. Two new CRC numbers were allocated to the applications: CRC180728 and CRC180729 respectively.

Processing the applications

[29] Two reports dated 31 July 2017 were prepared under s 42A of the RMA by the Council's Principal Consent Planner, Mr Matt Smith, in relation to each application. In both cases, Mr Smith concluded that the "proposed use for bottling is … outside the scope of the original application". Accordingly, the applications were treated as applications for new water permits to use water under s 88 of the RMA. Mr Smith stated that in each case, the new use consent would be amalgamated with the existing consent, resulting in one consent to "take and use" water. As the LWRP related only to the take *and* use of water, Mr Smith recorded

[8] Emphasis added.

that the activity was classified under the "catch-all" provision in r 5.6 as a discretionary activity.[9]

[30] Mr Smith agreed, in relation to both applications, with Rapaki's assessment that the proposed change in use would result in a highly efficient use of water and that the overall proposal would result in a reduction in contaminant discharged into the environment. He also agreed that there were no relevant policies in the LWRP relating to use, and that no person would be affected by the change. He agreed with the conclusions in the assessment of environmental impacts submitted by Rapaki, and noted his view that there would be "several benefits" to the change in use. In light of the activities allowed under the existing consents, he considered that "no additional adverse effects [were] likely to occur".

[31] Mr Smith concluded that neither public nor limited notification was required and recommended that the applications be processed on a non-notified basis.

He recommended that the proposed consents expire on the same date as their existing counterparts, and that they be subject to certain conditions including the installation of a water meter and recording device and a process for reviewing the conditions of consent.

[32] A delegated decision-making panel consisting of Mr Paul Hopwood, Principal Consent Advisor, and Dr Burge dealt with both new use applications and the corresponding amalgamations in a decision dated 8 August 2017.

[33] The panel agreed with Mr Smith's assessment that public notification was not required under s 95A of the RMA because, among other things, the effects of the proposed use on the environment would be no more than minor and there were no special circumstances that required the application to be publicly notified. Although the panel noted the "public interest in water bottling and allocation of water", they did not consider that factor alone amounted to a sufficient basis to require public

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[9] We refer in more detail to the relevant Land and Water Regional Plan (LWRP) provisions below.

notification. As to limited notification under s 95B, the panel agreed that there were "no adverse effects on any person" nor any affected protected customary rights groups.

[34] After considering Mr Smith's recommendations, the panel granted the substantive applications on the conditions outlined by Mr Smith. This resulted in the grant of two new consents "[t]o use water" taken from the five and three bores: CRC180728 and CRC180729 respectively.

[35] Those consents were then amalgamated with the original "take and use" consents for the five and three bores, and new consents were issued on 11 August 2017. In relation to the five bores, CRC180311 granted a water permit "to take and use water" (the amalgamated five bore consent). Similarly, CRC180312 granted a water permit to "[t]o take & use water" from the three bores (the amalgamated three bore consent). In both cases, the terms of the new amalgamated consents provided that "[w]ater shall only be used for commercial bottling operations".

[36] Both of the consents granted on 11 August 2017 were very brief. CRC180728 granted Rapaki a water permit "[t]o use water" at Belfast Road and Factory Road, Belfast. It had a commencement date of 11 August 2017, and an expiry date of 1 July 2032. It included a further statement that it was "subject to the following conditions":

> In addition to uses listed under CRC172245, water taken under CRC172245 may also be used for commercial bottling operations.

[37] CRC180729 was in similar terms, relating to CRC172118. Once again, it had a commencement date of 11 August 2017, and there was a slightly later expiry date of 31 August 2035. And it contained the following "conditions": [10]

> In addition to uses listed under CRC172118, water taken under CRC172245 [sic] may also be used for commercial bottling operations.

[38] The amalgamation of the new consents to use with the existing consents CRC172245 and CRC172118 under CRC180311 and CRC180312 was an administrative step which Dr Burge acknowledged had no formal basis in the RMA.

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[10] The reference to CRC172245 here must be a mistake; what was intended must have been to refer to CRC172118.

He explained:

> Since the RMA came into force, large numbers of water permits have been obtained on a piecemeal basis as the social and economic requirements of consent holders have changed. These consents have been obtained either via new applications (where there was water available) and/or by the transfer of existing consents.
>
> Transfers of water permits have occurred either as an administrative transfer on sale and purchase of a property (i.e. under section 136(1) or section 136(2)(a) of the RMA), or via a site-to-site transfer (section 136(2)(b) of the RMA). This often results in a complicated web of overlapping and cross-referenced consent documents, which are confusing to administer, both for Council officers and consent holders.
>
> The 'amalgamation' of resource consents is therefore undertaken in some instances in order to simplify the administrative burden for all parties.
>
> In regard to these specific consents, the 'amalgamation' of the Rapaki (and Cloud Ocean) consents was undertaken as a separate decision following the processing, consideration (under the relevant RMA matters as outlined in the s42A and decision reports) and granting of the standalone 'use' permits.
>
> Should the decision to 'amalgamate' the original Rapaki (and Cloud Ocean) consents and the standalone 'use' permits be considered unlawful (but the granting of the separate use permits not unlawful), the consent holders would therefore revert to using the non-amalgamated consents.

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[39] On 14 February 2018 the amalgamated five bore consent was partially transferred to Cloud Ocean, under CRC183763. A new water permit was issued to Rapaki, CRC183761, described as "partial transfer CRC180311 – to take and use water" for a term commencing on 14 February 2018 and expiring on 1 July 2032. It authorised Rapaki "to take and use" a combined total of 5,117,780 cubic metres of water annually from the same bores specified in CRC180311. That figure reflected the total water allocated to Rapaki under CRC180311 (a maximum of 5,317,780 cubic metres per year), less the maximum of 200,000 cubic metres per year which were allocated to Cloud Ocean concurrently (in relation to one of the bores specified in CRC180311) under CRC183763. The water could "only be used for commercial bottling operations".

[40] Although CRC183761 and CRC183763 are not directly challenged in the judicial review proceedings, a successful challenge to CRC180311 (the five bore amalgamated consent) resulting in it being set aside would also defeat any subsequent consents issued in reliance on it.

The Cloud Ocean consents

[41] On 1 May 1997, the Council granted to Kaputone Woolscour Ltd a water permit to take groundwater at Station Road, Belfast for "industrial use". The consent, CRC971084 in the Council's records, was to expire on 30 April 2032, and specified a volume not exceeding 4,320 cubic metres per day.

[42] A notice of transfer to Canterbury Land Resources Ltd under s 136 of the RMA was received by the Council on 11 April 2017. The transfer was a "full transfer" of CRC971084. The Council reissued the consent to Canterbury Land Resources Ltd under CRC175585. A subsequent notice of transfer from Canterbury Land Resources Ltd to Cloud Ocean was provided to the Council in April 2017, confirmed by Cloud Ocean in a notice given on 9 May 2017. The Council then reissued the consent to Cloud Ocean on 15 May 2017, under CRC175895. It remained a consent to take water for industrial use, with the same limit of 4,320 cubic metres per day.

[43] On 30 November 2017, Cloud Ocean made an application to the Council for another resource consent. It was submitted in the form of an "Application for Resource Consent to Take and Use Groundwater" under s 88 of the RMA, and sought "[a] water permit to allow the water taken under CRC175895 to be used for bottling purposes". The application stated that as the proposed use for water bottling was considered to be outside the scope of the original application, the application had been lodged as an application for a new permit to use water. For ease of administration, Cloud Ocean requested that the new water permit be amalgamated with the existing consent.

[44] Cloud Ocean stated the proposed new use sought to achieve the purposes of the RMA by promoting a "very high efficiency of use of water", and a reduction in contaminants being discharged into the environment.[11] An assessment of environmental effects was included with the application. Cloud Ocean stated that water taken under the existing consent was "currently consented" to be used for wool scour purposes, under which water would be taken from the Christchurch aquifer and wastewater discharged to the Christchurch City Council wastewater system. In contrast, using the consent for water

[11] Resource Management Act, s 7(b) and (f).

bottling activities would "result in there no longer being a discharge of contaminants related to the wool scour activities".

In terms of sch 4, cl 6(1) of the RMA, Cloud Ocean stated the proposed change in use:

(a) would not result in a significant adverse effect on the environment;

(b) did not involve the use of hazardous substances or installations;

(c) resulted only in "positive" effects that did not require mitigation;

(d) would not affect any person, and therefore no consultation had been undertaken;

(e) did not require any special monitoring; and

(f) would not have adverse effects that were more than minor on the exercise of a protected customary right.

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[45] As with Rapaki's application, the application submitted by Cloud Ocean stated that there would be "positive effects" including a high level of water use efficiency, improved environmental impacts and the creation of employment and investment in the Christchurch economy. The assessment stated:

> In conclusion, the effects of including the ability for water taken under CRC175895 to be used for bottling will have no additional negative effects, but will result in several positives.

[46] Council officers assessed the Cloud Ocean application in the same manner as the Rapaki applications. A detailed report was prepared by Mr Carlo Botha under s 42A of the RMA, dated 21 December 2017. It dealt with two applications: CRC182812, an application for a water permit to use water for commercial water bottling; and CRC182813, an application to amalgamate CRC182812 with the existing wool scour consent.

[47] Mr Botha agreed with Cloud Ocean's assessment that no persons would be adversely affected by the applications. He noted that the Council had contacted the Rūnanga, the Christchurch City Council, the North Canterbury District Health Board and Fish and Game New Zealand as interested parties on 4 December 2017, requesting that any response be received by 11 December 2017. The contact address used for the Rūnanga was the same as that which had been used on 19 July 2017 in relation to the Rapaki applications. The only response received was from the Christchurch City Council, which was disregarded as it related to a different bore.[12]

[48] Although Cloud Ocean had not provided a description of the affected environment with its application, Mr Botha noted that, among other matters, the subject site was located within the Christchurch/West Melton Groundwater Allocation Zone (as defined by the planning maps in the LWRP) in which the water was fully allocated. Mr Botha also noted that the subject site was located within a silent file area but was not within a "Statutory Acknowledgment Area or Rūnanga Sensitive Area".

[49] As to potential adverse effects on the environment and aquifer, Mr Botha noted that Cloud Ocean had stated that the proposed new use would be "fully consumptive", and would not, unlike a wool scour, result in the discharge of contaminated water. On that basis, Mr Botha concluded that the "effects on the aquifer due to the change in use will be no greater than those allowed by the existing water permit".

[50] Mr Botha then turned to whether there would be any adverse effects on tangata whenua values. He noted that the relevant site was situated within the rohe of the Rūnanga and within a silent file area. However, although the Rūnanga had been approached for comment on 4 December 2017, no response to that request had been received. Mr Botha recorded that he had assessed the proposal against the relevant policies contained in the Manaanui Iwi Management Plan: the iwi management plan for the Rūnanga. Because there would be no effects on the aquifer, other groundwater users and the wider environment additional to those already authorised pursuant to

[12] This was BX24/1577 for which consent was granted on 1 August 2017. The process of obtaining consent for that bore and Cloud Ocean's subsequent application to take and use water from it are discussed below at [64].

CRC175895, Mr Botha concluded that the proposal for the new use was consistent with the relevant policies in the Iwi Management Plan. Accordingly, he concluded that the proposal would have no additional adverse effects on tangata whenua values beyond what had been previously authorised.

[51] He also agreed with Cloud Ocean that the change in use would have a number of positive effects, including a high level of water efficiency, an improvement in environmental impact due to contaminants not being discharged, the creation of employment and investment in the Christchurch economy.

[52] Turning to public notification under s 95A of the RMA, Mr Botha noted that the application had been "subject to extreme public scrutiny", including a petition to rescind the existing consent on the basis of climate change and public sentiment. As a result of that opposition, Mr Botha gave consideration whether special circumstances existed that would require the application to be notified. He concluded that while public interest was a factor it was not in itself sufficient to constitute "special circumstances" requiring notification.[13] He concluded that notification would not provide additional information that might inform the substantive decision. That was

because the public scrutiny and debate focused mainly on the take of water (as opposed to its use) and the take was part of the existing "consented environment" and would remain in place even if Cloud Ocean's application for a new use was declined.

[53] After concluding there were no affected persons required to be notified under s 95B, Mr Botha recommended that the application be decided on a non-notified basis. He recommended that the substantive application should be granted, with certain conditions relating to the rate and volume of the water, monitoring and a process for review of the consent conditions.

[54] A decision on notification and the substantive Cloud Ocean application was made by Dr Burge as delegated decision-maker on 21 December 2017. Dr Burge noted that opposition had been voiced by members of the public, and that a letter had been

[13] Citing *Murray v Whakatāne District Council* [1999] 3 NZLR 276 (HC).

received by the Council on 15 December 2017 from Mr Peter Richardson, a solicitor of Linwood Law, on behalf of "certain parties" that had instructed the firm in respect of their concerns with the application. The "interested parties" to whom Mr Richardson referred would later become AWA. In his letter, Mr Richardson canvased various concerns about Cloud Ocean's application and the Council's treatment of it, including the alleged incompleteness of Cloud Ocean's application in terms of sch 4 of the RMA, the Council's separation of the "take" and "use" of the original consent, and the fact the wool scour consent was not being utilised and thus should not be treated as part of the existing environment

[55] Dr Burge dealt with those concerns as a "preliminary matter". While acknowledging the issues raised by Mr Richardson, he stated:

> … exercised consents (and granted consents that are likely to be exercised) form part of the existing environment in terms of considering further applications under the RMA. I consider that the fact that the take is already consented needs to be taken into consideration when processing this application for a change in the use of that water.

[56] Dr Burge noted that as the holder of CRC175895, Cloud Ocean was entitled to re-establish the wool scour "at its full rate of take" without requiring any further consideration by the Council. Although acknowledging Mr Richardson's statement that Cloud Ocean had shown no indication of doing so, Dr Burge noted that "the fact remains that if the consent holder chose to do so, they could and the Council would have no grounds to prevent that". He concluded:

> Having given consideration to the matters above, I conclude that the effects of the take form part of the existing (consented) environment, and are outside of what should be examined in regard to the proposed change in the use of water. The application has therefore been processed and considered as a new water permit to use water (CRC182812).

[57] Turning to the question of notification, Dr Burge agreed with Mr Botha's assessment of the adverse environmental effects in the s 42A report and adopted his conclusions. Dr Burge also accepted Mr Botha's assessment that the activity should be classified as a discretionary activity under r 5.6 of the LWRP.

[58] Dr Burge recorded that in addition to the matters discussed by Mr Botha in his s 42A report, there had also been "some public concern about the effect of increased numbers of plastic bottles" on the environment. Dr Burge noted that he had considered whether

conditions could be imposed to address that issue. Given the number of intervening parties involved prior to the ultimate disposal of a plastic bottle, Dr Burge was of the view that it was difficult to see how imposing a condition related to the end disposal could reasonably be considered "'directly' connected to the 'activity'" as required by s 108AA of the RMA. He noted that if Cloud Ocean were held responsible for the disposal of plastic bottles, that line of reasoning could equally be applied to all activities related to the use of water which involved plastic packaging in the end product. Were consent holders held responsible for the actions of "significantly removed" third parties, that would effectively shut down most industries that required plastic packaging on the basis of the actions of a third party.

[59] Dr Burge concluded:

> While I consider that the proliferation of plastic bottles in the environment is an issue, it arises due to inappropriate disposal of those bottles by the end user. It is unreasonable to prevent applicants from obtaining a consent for an activity on the basis that third parties outside their control might dispose of the packaging (in this case plastic bottles) inappropriately. This would be an unreasonable expectation for any party who wished to make use of a natural or physical resource, not just water bottles.

[60] He then turned to whether there were "special circumstances" requiring public notification. Like Mr Botha, Dr Burge concluded that notification would not provide additional information that might inform the substantive decision, and thus public notification on the basis of special circumstances was not required. He also agreed with Mr Botha's reasoning on limited notification under s 95B and concluded that the application should proceed on a non-notified basis.

[61] Dr Burge adopted Mr Botha's discussion of the matters in s 104 of the RMA in terms of the substantive decision. He concluded that as the effects of the change in use would be no more than minor and the proposal was consistent with the relevant provisions in the planning documents, the proposal would (subject to conditions) achieve the purposes of the RMA. Dr Burge therefore granted the applications with the conditions recommended by Mr Botha and for a period consistent with CRC175895, the original wool scour consent.

[62] Consent CRC182812 was then issued, commencing on 22 December 2017. It granted consent to what it described as an "Application for Change in Conditions", and stated

it was to "change condition in CRC175895 - to take groundwater … for industrial use." The consent was granted in these terms:

> Water taken under CRC175895, may also be used for commercial water bottling operations as consented by CRC182813.

It was granted for the period to 30 April 2032.

[63] CRC182813 (the amalgamated Cloud Ocean consent), was issued concurrently, commencing on 21 December 2017. It granted a consent to "take & use groundwater" with a volume not exceeding 4,320 cubic metres per day, and 1,576,800 cubic metres annually. Condition 3 provided that "[w]ater shall only be used for commercial water bottling operations".

The deep bore consent

[64] On 11 July 2017, Clemence Drilling Contractors Ltd had submitted an application for a resource consent on behalf of Cloud Ocean "to construct a bore" on the same site as the wool scour consent. The application was granted on 1 August 2017, resulting in consent CRC180265, authorising Cloud Ocean "to install a bore"

(the deep bore consent). A 186 metre deep bore was drilled pursuant to that consent. As the deep bore consent did not authorise the take of water, on 23 October 2018 Cloud Ocean applied for a variation of its amalgamated consent to enable water to be taken from the original 33.1 metre deep bore or the new 186 metre deep bore.

[65] The Council accepted the application could appropriately be processed as an application to change the conditions of CRC182813 (the Cloud Ocean amalgamated consent) pursuant to s 127 of the RMA.

[66] Mr Jason Eden prepared a s 42A officer's report dated 3 December 2018. While stating that he agreed with Cloud Ocean's assessment that there would be no parties affected by the proposal, for "completeness" he addressed the concerns raised by a number of interested parties who had been informed of the consent application by the Council. These parties relevantly included the Rūnanga, on behalf of which a response had been provided by Mahaanui Kurataiao Ltd on 28 November 2019, and

AWA. The Rūnanga opposed both the application and the existing activity. They recorded that they considered themselves an affected party. Mr Eden also noted that a further response had been received from Dr Te Marie Tau, outlining the Rūnanga's concerns with water bottling. However, Mr Eden stated that he did not consider that issue could be assessed because they did not arise from the application; the effects to be assessed were "restricted to those arising from the proposed change".

[67] The concerns expressed by the Rūnanga were addressed by Mr Eden in his assessment of actual and potential effects. He stated:

> It is my view that the concerns held by Ngā Rūnanga relate more to effects that were required to be considered for the grant of the original consent, as the concerns raise[d] relate primarily to the allocation and the use of the water. Those matters are not in my view effects which arise from the change of conditions proposed.
>
> Acknowledging the concerns raised by Mahaanui Kuratai[a]o Ltd and Dr Te Maire Tau, as the application is for a change of conditions, the scope of effects able to be considered are those that arise directly from the change sought.
>
> I have concluded that there will be no change in cumulative effects, stream depletion and the wider environment outside that currently authorised by CRC182813 due to the abstraction rate and volumes remaining the same. Effects on surrounding groundwater users have furthermore been considered as less than minor.
>
> I consider that effect of the change of conditions proposed will be less than minor on Ngā Rūnanga and [t]angata [w]henua values.

[68] As to AWA's opposition, Mr Eden concluded that as AWA did not own bores or land within the vicinity of the proposed take, it was not an "affected party" for the purposes of the application for a change of conditions.

[69] After considering the relevant policies in the Canterbury Regional Policy Statement 2013 and rules in the LWRP, Mr Eden turned to the issue of notification. He considered no special circumstances existed that would require the application to be publicly notified. Nor did he consider limited notification was required pursuant to s 95B of the RMA. Mr Eden recommended that the application be granted on a non-notified basis.

[70] Both notification and the substantive application were considered in a decision of an Independent Hearings Commissioner, Richard Fowler QC, dated 12 December 2018. Mr Fowler agreed with Mr Eden's recommendation that the application should be granted on a non-notified basis, subject to conditions.

[71] As Dr Burge acknowledged, if CRC182813 (the amalgamated Cloud Ocean consent) were quashed the subsequent variation enabling water to be taken from the deeper bore would also fall away, with the result that Cloud Ocean would be required to reapply for a variation of the "pre-amalgamation water permit" (CRC175895) to enable water to be taken from the deeper bore. There is no direct attack on CRC182813 in the present proceeding.

Aotearoa Water Action Inc

[72] AWA was incorporated on 5 February 2018 for the purpose of challenging the consents granted to Rapaki and Cloud Ocean. A member of AWA, Nicolette Gladding, explains how AWA has the wider purpose of "protect[ing] New Zealand's freshwater resource[s]" and has focused on "water sovereignty" and, in particular, the growth of the water bottling industry in New Zealand. AWA is concerned to ensure there is sufficient water to meet increasing domestic needs resulting from climate change and population growth. It is also concerned about the effects of increased numbers of plastic bottles in the environment.

[73] Ms Gladding states that AWA first became aware of the consents sought by Cloud Ocean in May 2017, and initially all communications with Council officers were made in the context of the Cloud Ocean proposal. In the course of that correspondence, AWA became aware of the Rapaki consents.

[74] On 30 January 2018, before the application for judicial review was filed, counsel for AWA, Ms Steven QC, wrote to both Rapaki and Cloud Ocean in the same form. In her letters to both companies, Ms Steven stated that the consents purporting to allow the "take and use" of water for bottling purposes would be challenged by judicial review, and that "[a]ny works undertaken by you in furtherance of implementing those consents is now at your own risk". A statement of claim was filed in the High Court at Christchurch on 5 March 2018.

[75] In addition to this summary of the process that was followed it is necessary to say something about the Regional Plan provisions relevant to the process followed by the Council.

The Regional Plan

[76] Dr Burge noted that the Council's previous Regional Plan, called the Natural Resources Regional Plan, clearly distinguished between rules regulating the take of water, and those regulating the use of water. The current plan, the Canterbury LWRP, replaced the Natural Resources Regional Plan and contains specific rules which control the "taking or use of water", and other rules that control the "taking and use of water".

[77] Rule 5.120 refers to:

> The taking of water from groundwater for the purpose of de-watering for carrying out excavation, construction, maintenance and geotechnical testing and the associated use and discharge of that water …

[78] There are two rules concerning water in canals and water storage facilities. Rule 5.121 controls the "taking or use of water from irrigation or hydroelectric canals or water storage facilities" providing that it is a permitted activity if certain conditions are met. Rule 5.122 provides that if the conditions are not met, then the "taking or use" of the water is a discretionary activity.

[79] Rule 5.123 is about the "taking and use of surface water from a river or lake". That is a restricted discretionary activity provided certain conditions are met. The Council has restricted the exercise of its discretion to a number of matters, as follows:

> 1A. The rate, volume and timing of the take; and
>
> 1. The actual or potential adverse environmental effects on water quality, including whether the activity, in combination with all other activities, will alter the water quality allocation status of the relevant catchment; and
>
> 2. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the [Council] will consider the matters set out in Schedule 10; and
>
> 3. For water used for irrigation, the management of water allocation and resulting nutrient discharges on individual farms; and
>
> 4. The potential effects on groundwater recharge where the groundwater allocation zone is fully or over allocated as set out in Sections 6 to 15; and
>
> 5. The availability and practicality of using alternative supplies of water; and

6. The effects the take has on any other authorised takes or diversions; and

7. The potential to frustrate or prevent the attainment of the regional network for water harvest, storage and distribution, shown on the Regional Concept diagram in Schedule 16; and

8. The reduction in the rate of take in times of low flow and restrictions to prevent the flow from reducing to zero as set out in policies to this Plan; and

9. Whether and how fish are prevented from entering the water intake; and

10. The provisions of any relevant Water Conservation Order; and

11. The proximity and actual or potential adverse environmental effects of water use on any significant indigenous biodiversity and adjacent dry land habitats; and

12. Where the proposed take is the replacement of a lawfully established take affected by the provisions of Section 124-124C of the RMA and is from an over-allocated surface water catchment, the reduction in the rate of take and volume limits to enable reduction of the overallocation; and

13. Where the water is to be used for irrigation, the preparation and implementation of a Farm Environment Plan in accordance with Schedule 7 that demonstrates that the water is being used efficiently.

[80] Rules 5.124 and 5.125 then provide as follows:

> 5.124 The taking and use of surface water from a river or lake that does not meet one or more of the conditions of Rule 5.123, excluding condition 1, is a non-complying activity.
>
> 5.125 The taking and use of surface water from a river or lake that does not meet condition 1 in Rule 5.123 is a prohibited activity.

[81] Rule 5.125C is a special rule dealing with hydroelectricity generation associated with particular named schemes. This rule refers to the "take and use of water."

[82] Rule 5.126 is about the "non-consumptive taking and use of water from a lake, river or artificial watercourse and discharge of the same water" to the same source. That is established as a restricted discretionary activity, provided certain conditions are met. Where the conditions are not met, the non-consumptive taking and use of the water is a non-complying activity pursuant to r 5.127.

[83] Rule 5.128 provides that the "taking and use of groundwater is a restricted discretionary activity" provided certain conditions are met. It is this rule that is most relevant in the present case. The conditions are as follows:

> 1. The take is from within a Groundwater Allocation Zone on the Planning Maps; and
>
> 2. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, for stream depleting groundwater takes, the take, in addition to all existing consented surface water takes, does not result in any exceedance of any environmental flow and allocation limits set in Sections 6 to 15 for that surface waterbody in accordance with Schedule 9; and
>
> 3. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, the seasonal or annual volume of the groundwater take, in addition to all existing consented takes, as determined by the method in Schedule 13 does not exceed the groundwater allocation limits for the relevant Groundwater Allocation Zone in Sections 6 to 15; and
>
> 4. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the bore interference effects on any groundwater abstraction other than an abstraction by or on behalf of the applicant are acceptable, as determined in accordance with Schedule 12.

The exercise of discretion is restricted to the following matters:

1A. The rate, volume and timing of the take; and

> 1. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the [Council] will consider the matters set out in Schedule 10; and
>
> 2. The availability and practicality of using alternative supplies of water; and
>
> 3. The maximum rate of take, including the capacity of the bore or bore field to achieve that rate, and the rate required to service any irrigation system; and
>
> 4. The actual or potential adverse environmental effects on surface water resources if the groundwater take is within a surface water catchment where the surface water allocation limit, as set out in Sections 6 to 15 is fully or over allocated; and
>
> 5. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the actual or potential adverse environmental effects the take has on any other authorised takes, including interference effects as set out in Schedule 12; and

6. For stream depleting groundwater takes, the matters of discretion under Rule 5.123; and

7. Whether salt-water intrusion into the aquifer or landward movement of the salt water/fresh water interface is prevented; and

8. The proximity and actual or potential adverse environmental effects of water use to any significant indigenous biodiversity and adjacent dryland habitats; and

9. The protection of groundwater sources, including the prevention of backflow of water or contaminants; and

10. Where the proposed take is the replacement of a lawfully established take affected by the provisions of Section 124-124C of the RMA and is from an over-allocated groundwater allocation zone, the reduction in the rate of take and volume limits to enable reduction of the overallocation; and

11. Where the water is being used for irrigation, the preparation and implementation of a Farm Environment Plan in accordance with Schedule 7 that demonstrates that the water is being used efficiently. [84] Rules 5.129 and 5.130 provide as follows:

5.129 The taking and use of groundwater that does not meet one or more of conditions 1 or 4 in Rule 5.128 is a non-complying activity.

5.130 The taking and use of groundwater that does not meet one or more of conditions 2 or 3 in Rule 5.128 is a prohibited activity.

[85] The Council considered that neither the Rapaki nor the Cloud Ocean consents were appropriately dealt with under any of the provisions above, including r 5.128. Rather, the Council processed the applications as discretionary activities under r 5.6, which provides as follows:

Any activity that—

(a) would contravene sections 13(1), 14(2), s14(3) or s15(1) of the RMA; and

(b) is not a recovery activity; and

(c) is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA

— is a discretionary activity.

First issue — is water bottling a use of water?

[86] It is logical to deal with this issue first: if the argument made by Mr Gardner-Hopkins is correct, the consequence would be that the Council could not grant a consent for the activity of water bottling, since that would not be a use contemplated by s 14 of the RMA.

[87] In order to place the argument in context it is appropriate first to set out s 14 of the RMA. It provides as follows:

> **14 Restrictions relating to water**
>
> (1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity—
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
>
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of a person's animals for drinking water,—
>
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
>
> (c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

(d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) the water is required to be taken or used for emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017.

[88] It is also necessary to note the definition of "water" in s 2 of the RMA:

water—

(a) means water in all its physical forms whether flowing or not and whether over or under the ground:

(b) includes fresh water, coastal water, and geothermal water:

(c) does not include water in any form while in any pipe, tank, or cistern

[89] Mr Gardner-Hopkins submits that in this case the proposals in each case involve water being taken from the ground, pumped to the bottling site in pipes and, after a filtering process, placed into water bottles. He argues that, once taken from the ground at the outset of this process, the water is no longer within the definition, because it is in a pipe and para (c) of the definition excludes it. Mr Gardner-Hopkins claimed that, the bottles in which it is placed are within the concept of tank or cistern, and consequently not water at that point either. It follows that the water is not water that can be the subject of a resource consent under s 14(3)(a) since the prohibition in subs (2) would not apply. The Council was not entitled to grant consent for a separate water bottling use, and then seek to amalgamate it with the existing "take *and* use consents" for the freezing works and wool scour. The argument is that any new consent would have had to be for a fresh take for an activity comprising the combined *taking* of water *for the purpose* of water bottling. And that consent could not have been granted, because of the fact that water in the catchment is fully allocated and that would be prohibited under the LWRP.

[90] For the Council, Mr Maw noted that this issue had not been directly addressed in the High Court, nor raised in the grounds of appeal. He submitted the argument relied on an artificial distinction between water bottling and other activities in which water was piped, such as irrigation. It was not appropriate to treat the bottles in which

the water was placed as equivalent to tanks or cisterns, because that would be contrary to the dictionary definitions of those terms.

[91] We have not been persuaded by Mr Gardner-Hopkins' argument on this point. We consider the relevant statutory provisions are to be construed on the basis that the water, once taken from the ground, is not water while it remains in the pipe. Once it leaves the pipe it is water again, for the purposes of the statute. We do not accept that a bottle is to be regarded as a tank or cistern for the purposes of the definition.

[92] The definition of "water" is an important provision in the RMA, because it is central to the provisions controlling not only the taking and use of water (s 14), but also those controlling the discharge of contaminants into water, whether directly or indirectly (s 15(1)(a) and (b)), and the discharge in the coastal marine area of harmful substances from ships or offshore installations (s 15B). The controls set out in these provisions are matched by the allocation of functions to regional councils under s 30(1)(e) and (f) of the Act, and the obligations in respect of regional policy statements and plans set out in pt 5, subpt 3 of the Act. The definition appears to have been carefully drafted to ensure that it is appropriate for the various contexts in which it has to be applied under the Act.

[93] The first thing to notice about the definition of water is that it is intended to be broadly inclusive. By virtue of para (a) it extends to water in all its physical forms, and "whether flowing or not" and "whether over or under the ground". The terms "fresh water", "coastal water" and "geothermal water" are specifically included by para (b). These kinds of water are referred to in other specific provisions of the RMA, and have their own definitions in s 2. Possibly, without the reference to them in para (b) there might have been doubt about whether they were within the concept of "water in all its physical forms", but any such doubt is removed by the specific words of para (b). In the circumstances we see para (b) as expressly including kinds of water that would have been included under para (a) in any event.

[94] After these broad statements of what is included in the definition of water, para (c) of the definition then creates an exclusion. It is for water (as has been broadly defined) "while in any pipe, tank, or cistern". The natural and ordinary meaning of

this provision is that for the period in which the water is in a pipe (or tank or cistern) it is no longer water. But once it is no longer in the pipe (or tank or cistern), it is no longer excluded.

[95] We think it would be a strained use of language to describe water placed in a bottle as having been placed in a tank or cistern. According to the *New Zealand Oxford Dictionary*, a "tank" is "a large receptacle or storage chamber usu[ally] for liquid or gas".[14] A "cistern" is defined as "a tank for storing water, esp[ecially] one in a roof space supplying taps or as part of a flushing toilet".[15] These words are not synonymous with bottle, which is defined as "a container, usu[ally] of glass or plastic and with a narrow neck, for storing liquid".[16]

[96] We do not think it matters in this case that the water is placed in a container once it leaves the pipe, and so will not have a direct effect on the environment once that happens. While many uses of water result in a discharge into the environment, discharges are dealt with under s 15(1) of the Act; it is not possible to limit the ordinary meaning of "use" on the basis that the water is used for the purpose of bottling and not discharged.

[97] In the circumstances we conclude that when water leaves the pipe and enters the bottle, that amounts to a use of water covered by the prohibition in s 14(2) of the RMA, unless s 14(3) applies.

Second issue — must applications for take and use be considered together?

[98] Mr Gardner-Hopkins submitted that the primary issue is whether the Council had the ability to grant a resource consent to "use" water for bottling purposes, separately to the authorisation to take the water so used. He argued that under the LWRP both take and use are to be considered together and because the water in the

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[14] Graeme Kennedy and Tony Deverson (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 1147.
[15] At 200.
[16] At 127.

relevant catchment has been fully allocated any new application for consent to "take and use" would be prohibited.

[99] The High Court held that there was nothing on the face of ss 14 or 30 of the RMA which suggested the ability to grant a resource consent to "use" water was in any way limited with the effect that a use permit could only ever be granted as part of a "take and use" consent.[17]

[100] We have earlier set out s 14. Section 30 sets out the functions of regional councils, to be exercised for the purpose of giving effect to the RMA. One of the functions set out in subs (1)(e) is:

> (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
>
> (i) the setting of any maximum or minimum levels or flows of water:
>
> (ii) the control of the range, or rate of change, of levels or flows of water:
>
> (iii) the control of the taking or use of geothermal energy:

[101] The Judge considered that it was implicit in the drafting of both ss 14 and 30 that there could be a consent for either use or take separately. He found support for this view in this Court's judgment in *Central Plains Water Trust v Ngāi Tahu Properties* which he treated as authority for the proposition that separate applications could be made for the take or use of water.[18] The Judge also referred to a decision of the Environment Court in *P & E Ltd v Canterbury Regional Council*, noting that Court had not considered it unusual for applications for consent to use water to be dealt with separately from a hearing "over the application for a take".[19]

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[17] High Court judgment, above n 2, at [104].

[18] At [111], referring to *Central Plains Water Trust v Ngāi Tahu Properties* [2008] NZCA 71, [2008] NZRMA 200.

[19] At [114]–[115], referring to *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106 at [9]. [20] At [122]–[131].

[102] He also observed that some provisions in the LWRP dealt with taking and use of water conjunctively, others referred to the taking or use "disjunctively". He rejected an argument put to him on behalf of AWA that use of the water for commercial bottling was not a use in the sense referred to in s 14 or other relevant sections of the RMA, but was instead simply the "purpose of the take".[20] He considered the suggested interpretation was at odds with the terms of the original consents and noted that, in the decision on the preliminary question, the High Court had found that the scope of the

use for which the takes had originally been granted was limited by the use for which the consents had originally been sought: for a meat processing plant in the case of the Rapaki consents, and a wool scour in the case of the Cloud Ocean consent.[20] He determined that the use of water now proposed for commercial bottling was a use of water in terms of s 14, and able to be the subject of an application for consent "to a change of use".[22]

[103] He concluded:

> [132] I have thus concluded that s 14 is to be interpreted in accordance with what appears to be its plain meaning. Section 14 permits a council to consider an application for a change of use from an already consented take without requiring it to be treated as an application for both a take and use consent.
>
> [133] There was no error in the Council processing the applications as applications for approval of a change in the use of water from already consented takes without having to consider whether it should also approve those takes.

[104] Mr Gardner-Hopkins accepted that there could be separate applications for consent to use water and to take water, and that s 14 did not always require those applications to be sought together or at the same time. However, he argued that in the circumstances of this case take and use were necessarily to be considered together partly because the original take consents had been granted for a particular purpose and the new purpose now proposed could not be considered on its own without fresh consideration of whether a take was appropriate.

[105] He submitted that the existing take had been granted for a very specific purpose, and it would be against the policy of the RMA for that take to be relied on or

[20] At [123], referring to *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 4. [22] At [131].

utilised for a different purpose. The volumes for which consent was originally granted had been considered and granted with the particular purpose in mind. So too, the benefits of that take, what the water would be utilised for, and how much water was needed for that particular purpose were all integral to the grant of the consent. He maintained that where a new activity is proposed, consent should be sought for both the take and the use together so that the consent authority can consider whether the take is appropriate as well as the use in terms of any efficient use of that take or

any other effects of the use arising. In the present case, there should have been a fresh application for a take and use so that both were able to be considered together. The problem arising from the fact that water in the existing catchment was fully allocated with the result that no further take consent could be granted could be overcome by surrender of the existing take consent. Alternatively, application could be made for a new take and use consent, but on the basis that if it were granted the earlier consent would be surrendered, or the two would simply not be exercised together.

[106] For the council, Mr Maw supported the reasoning in the High Court judgment. He submitted that s 14 of the Act referred disjunctively to "take, use, dam, or divert" and submitted there was nothing on the face of the section to suggest that it should be read as regulating "take *and* use" together as opposed to damming or diverting, which are regulated as separate activities. He submitted a plain reading which incorporates "or" between each of the words in the section is consistent with the balance of the section and argued that there was no reason why a "take and use" of water could only be dealt with together, but damming or diverting water could be separately authorised. He emphasised the difference between a water permit and a land use consent, because a water permit is "allocative" in nature. He submitted the RMA regulates the allocation of water on a first in, first served basis and the water allocated to Cloud Ocean and Rapaki could not be reallocated to anyone else for the term of the existing consents which he submitted was the effect of s 30(4) of the RMA. He submitted that this Court's judgment in *Central Plains Water Trust v Synlait Ltd* was consistent with the idea that "take" and "use" can be separately regulated.[21]

[21] *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363.

[107] Mr Maw derives support from the provisions of the RMA dealing with the transfer of water permits. He referred in particular to s 136(2)(b) which provides that the holder of a water permit granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit "to another person on another site, or to another site, if both sites are in the same catchment … aquifer, or geothermal field" where the transfer "is expressly allowed by a regional plan" or "has been approved by the consent authority that granted the permit on an application under subsection (4)". Such an application is to be considered as if it were an application for resource consent.[22] Mr Maw maintained that this provision would enable a new use to be ascribed to an allocation of water, without affecting the priority of the allocation. He argued that the ability to transfer the permit recognised the existence of the allocation although the use on a new site would not be within the scope of the existing permit. Thus the Act would apparently allow an allocation of water to be used for a different purpose on a different site, subject to an assessment of the effects.

[108] Mr Maw accepted that the transfer provisions do not deal with the situation where water allocated to a site is to be used for a different purpose at the same site, noting that the Act allowed the transfer of the whole permit as an "administrative post box exercise" under s 136(3). But he contended that the Council here had adopted what he described as an "'elegant' solution" to enable allocated water to be used for a new purpose, whilst ensuring that all of the effects of that new use were assessed. He argued that a holistic consideration of take and use was only required when there was both a proposal for a new take and a new use; a different approach such as that adopted by the Council was appropriate where the existing take was relied on. He argued that none of the authorities relied on by AWA established that, where a component of a proposed activity is already authorised, it is unlawful to grant a further resource consent for new, unauthorised components relying on the existing consent. In circumstances such as the present, granting a new use permit would still enable all relevant effects of the use to be considered and he argued that the Council could

[22] Section 136(4)(b).

control the effects of the new use through its power to impose conditions. In that way the scale of the new use could be limited to what was appropriate.

[109] Mr Maw also rejected criticisms of the amalgamation process which the Council had adopted. He submitted that the amalgamation did not alter the rights conveyed by the consents and the Council's decision had made it clear that what was granted was an additional use in reliance on the existing allocation.

Analysis

[110] We do not consider that the High Court erred in its interpretation of s 14 of the RMA. In particular, the prohibition in s 14(2) that "[n]o person may take, use, dam, or divert" treats each of those activities disjunctively. There is no reason, given the drafting, to treat "take" as necessarily combined with "use", any more than there is to treat "take" as necessarily linked to "dam" or "divert". All of the activities are subject to the same prohibition unless authorised by subs (3).

[111] Again, the drafting of s 14(3) relates to each of the activities individually. Thus a person will not be prohibited from taking, using, damming or diverting water. The statute does not require a linkage between any one or more of those actions.

[112] The High Court also based its reasoning on the provisions of s 30(1)(e) of the RMA which, as noted above, relevantly provide for functions controlling activities in relation to water. Once again, it is the individual actions that are referred to, namely "taking, use, damming, and diversion of water".

[113] But it does not necessarily follow from the drafting of ss 14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take. Whether or not that is possible will in our view depend on the terms of the regional plan and the controls it contains in relation to water. In this case, the LWRP as has been seen refers variously to "taking or use" and "taking and use". We consider the different wording is important and must have been intended. Thus, where the expression used is "taking or use of water" the

plan contemplates that there might be an activity involving one or the other or both. Where the expression used is "taking and use" the intent appears to be that the activity will involve both.

> [114] Consistently with that r 5.128 is preceded by a heading, namely "Take and Use [of] Groundwater". The opening words of r 5.128 itself provide "[t]he taking and use of groundwater *is* a restricted discretionary activity …".[23] The use of this singular "is" suggests that "taking and use" is to be regarded as one activity.

> [115] We acknowledge that the conditions on restricted discretionary activity status that immediately follow provide particular requirements in relation to the take of the water. Thus, under condition 1, the take must be from within a groundwater allocation zone on the planning maps. Where condition 2 applies the take must in addition to all existing consented surface water takes "not result in any exceedance of any environmental flow and allocation limits set [out] …". Condition 3 contains a similar restriction to ensure that the "seasonal or annual volume of the groundwater take, in addition to all existing consented takes, as determined by the method in Schedule 13 does not exceed the groundwater allocation limits for the relevant Groundwater Allocation Zone …". Again, condition 4 contains a condition concerning "bore interference effects" once more related to the take.
>
> [116] While the conditions do not relate to the use of groundwater, they are expressed as conditions relating to the "taking and use of groundwater" at the outset of the rule, and do not detract from the proposition that it is the taking and use which together constitute the restricted discretionary activity. The drafting in effect amounts to an expansive definition of the "take" component of the "taking and using" activity.

It does not indicate that each may be consented to separately.

> [117] That conclusion is underlined when reference is made to the matters to which the Council has restricted the exercise of its discretion, which then follow. These are the matters which the Council will take into account when deciding whether or not to

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[23] Emphasis added.

grant consent to the defined restricted discretionary activity. Significantly, as set out above, these include:

> 1. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the [Council] will consider the matters set out in Schedule 10 …

[118] We consider this creates a direct linkage between take and use. The amount of the take has to be assessed to see whether it is reasonable for the proposed use. The question of what is reasonable in an area where the water is fully allocated is obviously intended as a control mechanism to ensure that no water is taken beyond what is appropriate for the proposed use. If the take is treated as an activity separate to the use, it is unclear how the reasonableness criterion could be applied. Where the use is, as here, water bottling and the proposal is to bottle all of the available water under the existing take consent, it is unclear how the amount of water bottled could be controlled. We say that because on the approach of the Council, Rapaki and Cloud Ocean the consented volumes of the take are a given. That is a consequence of separating out the take and use components of the proposed activity. In our view that subverts the evident intent of r 5.128 read as a whole.

[119] Similar reasoning is prompted by other discretionary considerations set out in the rule, namely the "availability and practicality of using alternative supplies of water". It is clear this is intended to involve a consideration of whether an alternative supply of water is available for the proposed use of the water. That cannot be genuinely considered if the water take is not before the Council when considering the "use" component of the application: it would necessarily be an irrelevant consideration, because the applicant can say that it already has a consented supply. Other discretionary considerations, dealing with the maximum rate of take and potential adverse effects on other authorised takes would also be otiose where there is reliance on a pre-existing use consent. We do not think it is a satisfactory answer to say that these matters must be assumed to be satisfactory because there is an existing consent. In our view the intent of the rule is that all relevant matters will be able to be considered in relation to the application for consent and use.

[120] It can be seen that consistent with r 5.128, the wording of rr 5.129 and 5.130, quoted above, also treats taking and use as one activity. This is significant in the case

of r 5.128, because the non-complying activity status it creates is where the "taking and use of groundwater" does not meet either or both of conditions 1 and 4 in r 5.128. Those conditions both relate to the water take. Yet, the non-complying activity status arises for both the taking and use. And again, in the case of r 5.130, the prohibited activity status arises where there is a failure to meet one or both of conditions 2 and 3 in r 5.128. While the conditions referred to are those relating to location of the take and groundwater allocation limits, the drafting of r 5.130 is not restricted to the take aspect of the activity.

[121] If separate consents were possible for taking and using, the drafting could readily have left the "use" aspect out of both rr 5.129 and 5.130. The provisions could have each provided that the taking of water that does not meet the relevant conditions is non-complying and prohibited. If the plan had contemplated separate consents for the taking and use necessary for one activity, that would surely have been the approach adopted. But it consistently treats both together.

[122] By contrast to these rules, the drafting of other rules in the LWRP uses the expression "taking *or* use". This is the case with rr 5.121 and 5.122 (concerning the taking or use of water from irrigation or hydroelectric canals or water storage facilities). We see no reason to conclude that the difference in wording is not intentional.

[123] We see our approach as consistent with s 30(1)(e) of the RMA. While that provision enables regional councils to control the taking, use, damming and diversion of water, there is nothing in the drafting that prevents a regional council from exercising control by treating taking and use as matters which are linked for the purposes of its regional plan. There is also nothing in s 30(4) which suggests a different outcome. The thrust of that subsection is apparent from its opening words, providing that a rule in a regional plan allocating a natural resource may allocate the resource in any way subject to various qualifications then set out. There is nothing in the subsection which could found an argument that the regional council may not have a rule that regulates take and use together.

[124] The High Court was influenced by this Court's decision in

Central Plains Water Trust v Ngāi Tahu Properties.[24] In that case, predecessors of the Central Plains had made an application in 2001 for consent to take water from the Waimakariri and Rakaia rivers which it intended to use to irrigate an area of some 60,000 hectares. Its application explained the purpose for which the water was to be used, but did not seek consent for the use at that stage. Subsequently, Ngāi Tahu Properties Ltd made an application both to take water from Waimakariri River and to use it for irrigation purposes, over an area of 5,659 hectares. Central Plains then lodged a further application, to take water from a new proposed location further up the River. The Council treated this as an amendment to the original application rather than a new application. But the Central Plains application was placed on hold because the

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Council considered it was not ready for notification in the absence of the application for consent to use the water.

> [125] The question arose as to which application should be considered as having priority for the allocation of the water. The Environment Court decided that the issue was to be determined on the basis of which application was first in a form appropriate for notification.[25] The High Court endorsed that view.[26] Randerson J considered that while there could be applications where it was unnecessary or inappropriate to consider all resource consent applications together, in the case before the Environment Court, it was correct to conclude it would be artificial to separate the water take from the applications relating to the end use of the water.[27] That meant the Council had been correct to place the Central Plains application on hold. In those circumstances, Ngāi Tahu's application should have priority, because it was in a form in which it could be publicly notified.[28]
>
> [126] This Court, by a majority, took a different view. It held that the Central Plains application contained sufficient information as to the intended use of the water to enable a proper consideration of the application to take water, even though the

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[24] *Central Plains Water Trust v Ngāi Tahu Properties*, above n 18.
[25] *Re Ngāi Tahu Property Ltd* EnvC Christchurch C104/06, 21 August 2006.
[26] *Central Plains Water Trust v Ngāi Tahu Properties Ltd* (2006) 13 ELRNZ 63 (HC).
[27] At [40].
[28] At [69].

application for consent to the use of the water had not been made.[29] This meant that Central Plains should not lose priority for the allocation of the water to the Ngāi Tahu application, even though the latter had applied for both consents in one application.

The essential basis of the judgment is encapsulated in the following paragraph:

> [80] It is sufficient to record my answer to question (a): An application for resource consent to take water which is not disqualified by unreasonable delay and which, although recognising the need for subsequent use applications could not as filed be rejected as a nullity, takes priority over an application which relates to the same resource and which, although complete in itself, was filed later by a party with knowledge of the earlier application …

> [127] The decision is about priority between different applications, and the circumstances in which an incomplete application may lose priority to a later one. It is not a decision which says anything about whether or not applications separately made

in respect of the same overall activity can properly be considered separately.[30] As Nation J recognised, the case is not authority for the proposition that a council may consider an application for consent to take water separately from an application to use the water which is to be taken, although he did see it as authorising the making of separate applications for the take and use of water.[31]

> [128] While that might theoretically be correct these observations are not decisive in the current context. Here, for the reasons we have given, the LWRP creates one activity, namely the taking and use of water. Both elements require consent under the RMA but here it must be remembered that the relevant consent provisions of that Act are those in pt 6, not s 14. Under s 87, a resource consent is relevantly defined as a consent, among other things, to do something that "otherwise would contravene section 14 (in this Act called a **water permit**)".[34] Section 87A then deals with classes

[29] *Central Plains Water Trust v Ngāi Tahu Properties*, above n 18, at [70]–[71] and [76].

[30] We think the same can be said of *Central Plains Water Trust v Synlait Ltd*, above n 22, to which we were referred by Mr Maw.

[31] High Court judgment, above n 2, at [111]. He noted at [112] Randerson J's observations in *Central Plains Water Trust v Ngāi Tahu Properties Ltd*, above n 28, at [40] that it may not always be necessary for applications for take and use to be considered together. [34] Section 87(d). The emphasis is in the Act.

of activities, describing successively permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited activities.

[129] If reference is then made to s 14(2), it may be seen that it operates as a proscription against the taking and use (among other things) of water, unless it is allowed by subs (3); and subs (3) contemplates those activities being expressly allowed by certain standards and rules made under the RMA "or a resource consent". Here, the necessary resource consent was a consent to take and use water, because that is the activity that the rule contemplates. We do not consider it can be legitimate to proceed on the basis that the plan contemplated stand-alone take and use consents given the drafting of the relevant rules.

[130] We note that the Council proceeded on the basis that because there was no rule specifically governing a stand-alone use of water, the application was properly considered by the Council under what Dr Burge described as the "catch-all" r 5.6 as a discretionary activity. We have quoted that rule above. We consider that was a wrong approach in the present context. Because the LWRP provides in r 5.128 for the taking

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and use of groundwater as a restricted discretionary activity, and goes on to provide that the taking and use of groundwater that does not meet one or more of the conditions is either non-complying (r 5.129) or prohibited (r 5.130), we do not consider it was open to the Council to consider a stand-alone application for consent for only one of those elements. If it could do that in respect of a use consent, why not a take consent?

[131] If both elements can be separately considered it is difficult to see how the plan can be administered in a way that preserves its integrity. For example, it is clear that under r 5.129, an application to take water that does not comply with condition 4 of r 5.128 should be considered as an application for a non-complying activity. However, under the Council's reasoning it would be said that because the LWRP deals only with take and use together, an application for consent restricted to a take only would be a discretionary activity, because it would not be classified by the plan as any of the other classes of activity listed in s 87A of the RMA. This approach simply does not work given the pattern of drafting adopted in the LWRP, which plainly contemplates both take and use being considered together.

[132] For these reasons we have concluded that the Council did not have the ability to grant a resource consent limited to the use of the water for bottling purposes separately to the authorisation to take the water to be used for that purpose. Under the LWRP it was necessary to consider both take and use together. These conclusions mean that consents CRC180728 and CRC180729 granted to Rapaki and CRC182812 granted to Cloud Ocean were not lawfully granted. It follows that consents granted subsequently (amalgamating those consents with the existing water take consents) that were contingent on the grant of those consents were also unlawful. That result follows from the infirmity of consents CRC180728, CRC180729 and CRC182812, rather than the process of amalgamation and reissue subsequently adopted by the Council. We consider those were legitimate administrative steps, but they were dependent on the lawfulness of the consents treated in that way.

[133] This means that the appeal must be allowed and the decisions of the Council granting the impugned consents set aside.

[134] Having reached that conclusion it is unnecessary for us to go on to consider the other issues raised about the impact of selling water in plastic bottles (raised by AWA and the Rūnanga) and the adverse effects on cultural values arising from the water bottling activity (raised by the Rūnanga). Nor is it now relevant to consider whether the Council's decisions to deal with the applications without requiring notification or limited notification were also unlawful.

Result

[135] The appeal is allowed and the decision of the High Court is set aside.

[136] The Council's decisions granting consents CRC180728 and CRC180729 to Rapaki and CRC182812 to Cloud Ocean are set aside, with the further consequences set out in [132] above.

[137] AWA is entitled to costs. We direct that the Council must pay AWA's costs calculated for a standard appeal in band A, together with usual disbursements. Noting that the submissions of the other parties were of limited scope and that the Rūnanga was an intervener we consider it appropriate for other costs to lie where they fall.

Solicitors:
Linwood Law, Christchurch for Appellant
Wynn Williams, Christchurch for First Respondent
Carson Fox Legal, Auckland for Second Respondent
Duncan Cotterill, Christchurch for Third Respondent
Chapman Tripp, Christchurch for Intervener

Attachment 2

Environment Canterbury Regional Council
Kaunihera Taiao ki Waitaha

Technical Advice Note

Implications of Court of Appeal Decision in *AWA v CRC* [2022] and next steps for Consents

19 August 2022

Disclaimer: *This memo does not constitute legal advice and should not be relied on as such.*

On 20 July 2022, the Court of Appeal released its decision of *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325. The key findings of that Court that affect consenting were:

- There is no reason, under s14 of the RMA, that the **take** [of water] must be read conjunctively with the **use** [of water]; but

- It does not necessarily follow that the Council can then grant a separate consent for a use and a separate consent for a take. This will depend on the relevant plan rule. A rule that uses the expression “take and use” indicates that the take and use of water must be considered conjunctively, while one that specifies the “take or use” indicates that separate consents can be envisioned.

This decision has implications for the ongoing implementation of the Canterbury Land and

Water Regional Plan (LWRP)[32]. This Technical Advice Note outlines the approach Environment Canterbury will be taking to implementing the decision. It does not constitute legal advice and consent holders are encouraged to seek their own advice relevant to their own circumstances.

The LWRP rule framework

The LWRP envisions some situations where there is a take of water, but no associated use (or vice versa). These situations are addressed through provision of specific "take or use" rules (e.g. rules 5.121 (permitted) and 5.122 (discretionary) for the take or use of water from irrigation or hydroelectric canals, or from water storage facilities) to enable these activities to occur. Over the last decade of implementing the LWRP however, there have been applications lodged for other activities that appeared to also fit into a "take or use" classification (as they appeared to only require consent for either a take or a use), but which did not appear to be managed under the existing rules. This has included applications for:

- Stand-alone takes of water where there is no use (but typically with an associated discharge e.g. for:
    - Stormwater treatment wetlands intercepting high groundwater levels;
    - On-going removal of 'nuisance' high groundwater levels (e.g. impacting on basements or other infrastructure);
- Stand-alone uses of water associated with existing (already consented) takes e.g.:
    - Same purpose, expansion of scope: expand existing uses while relying on existing consents to take and use water e.g. adding additional irrigation areas to existing irrigation consents within the allocation limit on that consent;
    - Different purpose, new use activity: change uses of water e.g. from irrigation to quarry dust suppression;
    - add extra uses (often to regularise activities such as unconsented dairy shed and stockwater takes that are occurring) – within the allocation limits on an existing water take and use (albeit for another purpose) consent;
- Miscellaneous situations, e.g.:
    - Where catchment plans have interacted with the LWRP to provide situations where catchment plan applied solely to the take of water (e.g. WRRP), and LWRP solely to the use of water;

[32] This advice is primarily written regarding implementation of the LWRP as that was the focus of the Court of Appeal decision. Implications for other plans are also briefly addressed below but may require further consideration based on the specific situation.

- Cross-jurisdictional situations where water was taken and used from another region subject to that region's plan requirements (e.g. West Coast) but was then used in Canterbury (e.g. Kiwirail Otira rail tunnel cleaning consents).

As these applications did not appear to be specifically for a "take and use", and as there was no specific "take or use" rule for these activities, they were addressed under the 'default' catch-all rule 5.6 of the LWRP (which was intended to cover unanticipated activities not managed under another rule). The Court of Appeal has now said that this approach is not correct in some of the circumstances highlighted above. Where an activity to take and/or use water is to be consented under the LWRP and is not managed under an activity specific rule (e.g. for community supply, dewatering etc.), it must be considered under the general "take and use" rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater, or a relevant sub-regional rule where it prevails over the regional-wide rules).

Repercussions for consents already granted under the old approach

Until the recent Court of Appeal decision, the High Court decision from 2020 was the 'law of the land', and supported the approach taken by Environment Canterbury regarding the use of rule 5.6 of the LWRP in the situations above.

While the Court of Appeal has now changed the approach that Environment Canterbury must take towards implementation of its plans going forward, Environment Canterbury has no power to revisit or cancel the grant of applications granted prior to the Court of Appeal decision. Resource consents granted under that approach are considered lawful unless they are specifically challenged, and decision on those consents quashed by the Court (i.e. in the event there is a challenge to the grant of a consent under rule 5.6, if the challenge is successful the Court may or may not cancel the consent. This is likely to depend on the specific circumstances of the case).

As such, unless the consent is cancelled by the Court, applications to vary or 'renew' (i.e. applications made under s127, or affected by s124 through s124C) water permits granted under the previous approach should be processed under the relevant provisions of the RMA and LWRP. For example, an application to 'renew' an existing water permit for a 'standalone use' for dairy shed use, that is linked to an existing 'take and use' permit for irrigation, should be considered collectively as a combined take and use (affected by provisions of s124, s124A-C RMA) for all composite parts (i.e. as a take and use for irrigation and dairy shed use) under the relevant rule.

Repercussions for new activities / potential applications

In cases where there is allocation available (or where allocation can be made available, see below) there is unlikely to be an impediment to making an application for new activities. Rather than treating activities for a stand-alone "take" or "use", that is not already governed by a specific "take or use" rule (e.g. for takes from storage facilities), as discretionary under rule 5.6, those activities must be considered under the general "take and use" rule (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater, or a relevant sub-regional rule where it prevails).

In fully or over-allocated allocation zones however, it is typically prohibited under the

Canterbury Land and Water Regional Plan (LWRP) to apply for a (consumptive) "take and use", and therefore no application can be made except for replacement of existing activities affected by the provisions of s124-124C (i.e. which are not increasing or changing in scope[33]).

In some situations, it may be possible for an applicant to surrender sufficient existing allocation to 'free up' space in an allocation block. Where this would bring the total cumulative allocation below the allocation limit, an application could then be made for the quantum of water available below the limit, subject to meeting the necessary conditions of the rule.

Site-to-site transfers (s136(2)(b)(ii))

In addition to the situations above, the Court of Appeal decision also appears to have repercussions for site-to-site transfers where the applicant *wishes to change the end use of water* (e.g. a transfer of an irrigation permit to another site for dust suppression).

While the LWRP rules provide for the transfer of a "take or use", the Court of Appeal has said "take and use" under the LWRP are inextricably linked and that, under the LWRP, it is not possible to apply for a stand-alone use or take (unless there is a specific "take or use" rule). While it is arguably possible to transfer a take, or a use, in isolation from the other aspect of an existing consent, in practice once transferred there is no mechanism to apply for the other component of an activity in a fully or over-allocated water allocation zone, i.e. if you applied to transfer a take to a new site, without the existing use, you couldn't then apply for a new use at the new site as it wouldn't be a replacement application affected by the provisions of s124-124C (as based on the Court of Appeal decision take and use are inextricably linked and s124-124C would apply to the activity as a whole, not the respective 'take' and 'use' components).

In practice therefore, most site-to-site transfers in over-allocated zones are effectively limited to transfers of both the take and use. The exception would be where the transfer would enable an activity managed under a "take or use" rule (or where it is not prohibited to apply for new allocation e.g. community supply).

Repercussions for applications in process

When considering applications for water permits already in process under the 'catch-all' rule

[33] The LWRP prohibits applications in fully or over-allocated water allocation zones for a 'take and use' of ground or surface water except for 'replacement' applications subject to the provisions of s124124C. To be affected by s124-124C requires the activity to be the same as that already consented, e.g. where a consent for irrigation authorises a take and use at a particular rate and volume and over a particular area, an application can be made to replace that consent at the same rate, volume and area, but no application could be made to take the same quantum of water for a use over a larger area (or for a new use) as it would no longer be the same activity. As such, no application could be made until such time as the cumulative allocation was back below the limit set in the LWRP.

5.6, these will need to be reconsidered against the generic 'take and use' rules in the LWRP[34]. How those activities will need to be treated will depend on several factors.

The first step will be to determine if the application is for a new activity or whether it is considered a 'replacement' application (i.e. one where the take and use are affected by the provisions of s124-124C RMA).

Once that has been done, the possible resolutions will depend on where applications are situated, and the allocation status of the water resource. Table 1 (attached) provides an example of how this situation would resolve when activities currently being processed under rule 5.6 must now be considered under the region-wide take and use rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater). Where specific sub-regional rules prevail, these should be considered on a case-by-case basis.

In practice, most of these applications will need to be returned to an applicant so that they can re-consider their proposals to see if they can be structured or redesigned in such a way as to be able to be processed under the take and use rules as the scope of the application, if framed to be under rule 5.6, may not cover the required considerations under a "take and use" rule.

Other Regional Plans

This advice above is written regarding implementation of the LWRP and is not necessarily applicable to other Canterbury catchment-specific plans. These plans (e.g. the Waimakariri River Regional Plan (WRRP) or the Hurunui Waiau River Regional Plan (HWRRP)) have their own specific rules which need to be applied on a case-specific basis. The below discussion provides some guidance on how to apply those provisions considering the Court of Appeal decision.

The Hurunui and Waiau River Regional Plan (HWRRP) and the Waipara Catchment Environmental Flow and Water Allocation Regional Plan (Waipara Plan)

Like the LWRP, the HWRRP and the Waipara Plan include rules governing the "take and use" of water. In general applications should be therefore considered in the same way as the LWRP e.g. rule 6.1 of the the Waipara Plan refers to the *"take and use of groundwater"* [emphasis added], and as such take and use must be considered together.

This approach is complicated however, as some rules combine all four verbs (i.e. take, use, dam, divert) from section 14 of the RMA e.g. rule 2.3 of the HWRRP refers to the *"taking, diverting, using and discharging"* of surface water. In this situation, the rule should be read in a way that where consent is required for multiple activities (listed in the rule) to operate the

[34] It is unlikely that any of these activities will fit under one of the specific 'take or use' rules, because if that had been the case, they should have already been classified under those rules. This should, however, be checked in each case.

proposal, then they should be applied for together under the rule. This includes situations where applicants may already hold one or more consents for part of a proposal (e.g. for an existing diversion or take), and want to change another aspect of the existing consent (e.g. a new use).

For example, if an activity required a resource consent for a take and discharge to operate e.g. for a stormwater wetland that intercepts groundwater), or a diversion and use (e.g. for in-stream hydroelectricity generation), then these activities should be applied for and considered together. Changes to part of an existing authorisation, e.g. an expansion of irrigated area without changing the take, would be required to be considered as a new application for the "take and use" of water, even though there is an existing take which is not changing.

Waimakariri River Regional Plan (WRRP) and the Opihi River Regional Plan (ORRP)

The WRRP seeks to manage *inter alia* water takes and uses affecting the Waimakariri River and its tributaries while the ORRP seeks the same for the Opihi River. Unlike the LWRP however, the WRRP and ORRP separate the take and use activities into separate rules. For example:

- Rule 5.1 of the WRRP manages the taking of surface water or from hydraulically connected groundwater within the Waimakariri River Catchment "below Woodstock" but does not manage the use of water.

- Rule 5.2 manages the use (and diversion and damming) of water in the Waimakariri River or its tributaries, but does not manage the use of water outside these waterbodies.

Neither the WRRP or the ORRP manage the use of water outside the waterbodies. These uses were, prior to the LWRP, managed under a separate rule for the "use of water" the Natural Resources Regional Plan (NRRP). When the NRRP was replaced by the LWRP, the use rules were replaced by the current suite of "take and use" and "take or use" rules in the LWRP.

The LWRP states however that where the WRRP or ORRP manage the same activity, the specific catchment plan prevails. This creates an unusual situation where the WRRP and ORRP apply to the take and the in-stream use of water, but the LWRP applies to the out-ofstream use. This has, to date, been resolved by considering any out-of-stream use of water taken under the WRRP or ORRP under rule 5.6 of the LWRP.

In considering the application of the Court of Appeal decision this situation is factually different to the situation in *AWA v CRC* (which was specific to activities that would be covered by the "take and use" rules of the LWRP). In this situation the WRRP and ORRP have no equivalent "take and use" rules and do not cover out-of-stream uses at all. Equally the LWRP does not apply to takes managed under those plans (c.f. section 2.8 LWRP). As

such, the LWRP “take and use rules” cannot apply and using rule 5.6 of the LWRP[35] to consider an out-of-stream “use” remains valid.

Pareora Catchment Environmental Flow and Water Allocation Regional Plan (PCFWARP) and the Waitaki Catchment Water Flow and Allocation Regional Plan (WCWARP)

Both the WCWARP and PCFWARP use “take or use” rules for consumptive takes of water. As such it is possible to continue to process separate take or use applications under these catchment plans.

[35] Where there is no relevant “take or use” rule in the LWRP

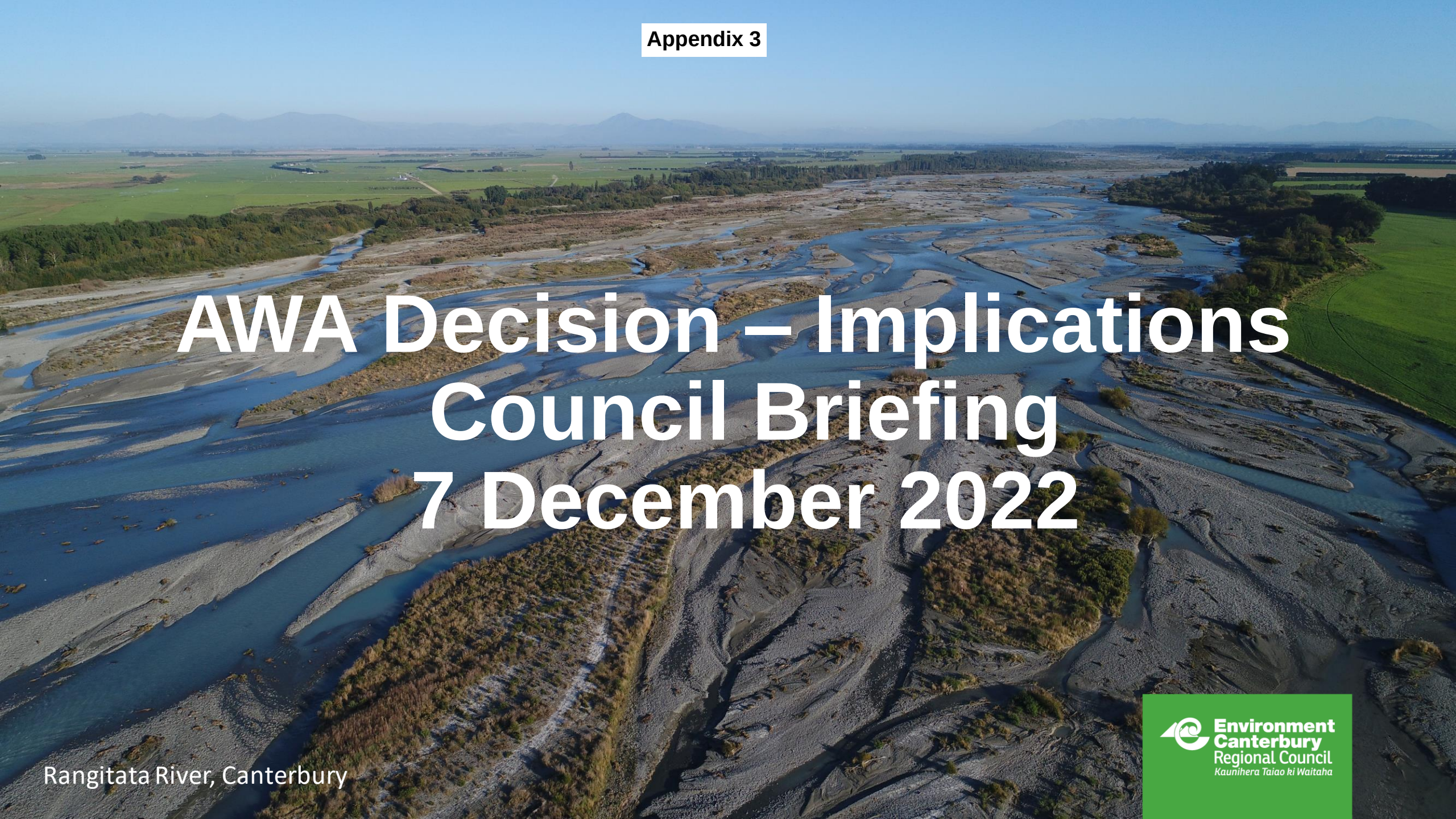
Table 1. Approach to dealing with applications in process under the LWRP for stand-alone 'takes' or 'uses' under rule 5.6 post Court of Appeal Decision in *AWA v CRC*. The table assumes there is no relevant 'take or use' rule and that the activity must be classified under the relevant region-wide 'take and use' rules (i.e. rules 5.123 – 5.125 in the LWRP for takes and uses of surface water; 5.128 – 5.132 in the LWRP for takes and uses of groundwater). Where subregional rules prevail over the regional take and use rules, these should be referred to in the first instance.

Proposal Type	Status of Allocation Zone	Potential Resolution
New application to 'take' water with no 'use'	Over allocated	If allocation from other water permit(s) can be surrendered to reduce allocation sufficiently below the plan limit, to accommodate the new allocation for the proposed take, then application can proceed. Applicant will need to demonstrate the amount to be taken will not have adverse effects. Priority of this take is per first in, first served. If insufficient allocation available (i.e. from surrenders) to accommodate the new take then the application would be **prohibited** under the operative plan rules and must be returned.
	Fully allocated	If allocation from another water permit can be surrendered to reduce allocation sufficiently below the plan limit, to accommodate the new allocation for the proposed take, then application can proceed. Applicant will need to demonstrate the amount to be taken will not have adverse effects. Priority of this take is per first in, first served. If insufficient allocation available (i.e. from surrenders) to accommodate the new take then the application would be **prohibited** under the operative plan rules and must be returned.
	Under allocated	If there is sufficient allocation available, application can proceed on the basis that it is an application to 'take and use' water. Applicant will need to demonstrate the amount to be taken will not have adverse effects. Priority of this take is per first in, first served.

New application for a new, additional, or expanded 'use' within an existing 'take' allocation.	Over allocated	As existing 'take and use' consents are linked under the Court of Appeal decision, if the existing use is not continuing then it cannot be considered a 'replacement' application (affected by s124-124C) and must be considered afresh. If surrendering existing allocation from the existing (or other) water permit(s) is sufficient to reduce allocation below the plan limit to accommodate the new allocation, then application can proceed. Applicant will need to demonstrate the amount to be taken will not have adverse effects and that it is reasonable for the end use. Priority of this take is per first in, first served. If insufficient allocation available (i.e. from surrenders) to reduce allocation below the allocation limit then application is **prohibited** and must be returned.
	Fully allocated	If surrendering existing allocation from the existing (or another) water permit should be sufficient to reduce allocation below the plan limit in order to accommodate the new allocation, then application can proceed. Otherwise application is **prohibited** and must be returned.
	Under allocated	If there is sufficient allocation available, application can proceed on the basis that it is an application to 'take and use' water. Applicant will need to demonstrate the amount to be taken for the new use is reasonable and will not have adverse effects. Priority of this take is per first in, first served.

Appendix 3

AWA Decision – Implications Council Briefing 7 December 2022



Rangitata River, Canterbury

Environment Canterbury Regional Council
Kaunihera Taiao ki Waitaha

Outline

- Issues
- Timeline and regulatory landscape
- What does this mean?
- Activities most impacted
- Next steps – short term and long term.

Environment Canterbury Regional Council
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Issue

- Court of Appeal's decision in *Aotearoa Water Action v Canterbury Regional Council [2022]* NZCA 325 has changed how we must apply our rule framework
- This has significant implications for some development proposals
- Some activities, in overallocated water zones that cannot meet permitted activity criteria, are now prohibited
- Short term solutions require significant changes, long term solutions will take time.

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Terminology used

- Permitted Activities
- Deemed Permitted Activities
- Prohibited activities
- Permitted baseline
- Existing environment.

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Timeline

- **2017** Cloud Ocean Water & Rapaki Natural Resources applied for "use" consents to bottle water.

Consenting approach at time was to separate take and use when required by applicant

- **2018** Aotearoa Water Action Group (AWA) sought judicial review of “use” consents.

Consenting approach remained to separate take and use when required by applicant

- **2020** National Policy Statement for Freshwater Management**

Consenting approach required consideration of hierarchy of obligations

- **2021** Plan Change 7**

Consenting approach provided direction on quantities of water available in some catchments through stronger planning framework

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Timeline

- **2022** National Policy Statement on Highly Productive Land**

Provides framework on subdivision, use and development of highly productive land

- **2022** National Policy Statement for Urban Development

Provides framework to enable intensification in beneficial locations and enable further greenfield development

- **2022** Court of Appeal decision found Council had erred in application of rules

Consenting approach now must be to consider rule as written – take and use together.

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What does this mean?

- **Court of Appeal decision is the ‘law of the land’ - council must apply the court's decision**
- Applications now need to be made and processed in a way that considers take and use holistically
- Where a proposal cannot do so, or where there is no water allocation available, consents cannot progress
- **In most overallocated zones some proposals are likely to be prohibited** (exceptions for community water supply takes).

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Activities most impacted?

- **Impacts stand-alone takes of water where there is no use (but typically with an associated discharge):**

Stormwater treatment systems intercepting high-groundwater levels;

Removal of ‘nuisance’ high groundwater levels (e.g. impacting on basements or other infrastructure);

- **Territorial Authorities and Developers**

Subdivisions and developments underway;

Future housing growth;

- **Others:**

Consents for quarrying activities, regional boundary consents, some expiring consents, some transfers.

What we have done so far

- Made changes to process to adhere to the Court of Appeal's Decision
- Robust legal analysis
- Advice to current applicants and consultants
- Presentation of issues to Territorial Authorities individually, Canterbury Planning Managers and Operations Forum under the Canterbury Mayoral Forum
- Tangata Whenua Advisory Services awareness of consenting impacts and changes

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What we have done so far

- Workshop with Christchurch City Council and Waimakiriri District Council staff, resulting in consideration of

  - deemed permitted activity process

  - issuing deemed permitted activities

- Specific advice to applicants reconsidering their proposal design.

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A perverse outcome?

The Land and Water Regional Plan was designed to

- Recognise in most situations take and use needed to be considered together
- The Court of Appeal decision changes the way we administer our plan
- National Direction for productive land, freshwater and urban development has also added complexity.

This has:

- Increased the cost of critical infrastructure for urban development
- Resulted developers needing to redesign stormwater infrastructure
- Focused developer interest in greenfield rather than brownfield sites
- Created tension between planning framework
- Timeframe pressures and access to funding.

A perverse outcome?

But it has also

- Improved environmental performance
- Reduced potential effects on groundwater
- Begun to address overallocation
- Requires best practice approach – Greenfields developments, catchment approach.

What next – Short Term?

- Legally required to implement ‘law as it stands’. Case by case consideration & working through with individuals
- Applying a 'pragmatic approach' would be to act unlawfully
- Developers could (and some have) re-designed their systems to:

  - avoid interception; or

  - fit within Permitted Activity Criteria or Deemed Permitted Activity; or

    - create allocation headroom through surrendering other water sources

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What next – Short Term?

- Territorial Authorities could look at a new use of water associated with an existing Community Water Supply take
- Territorial Authorities & Developers may seek their own legal advice and expect us to implement this
- These options are not feasible solutions for some situations.

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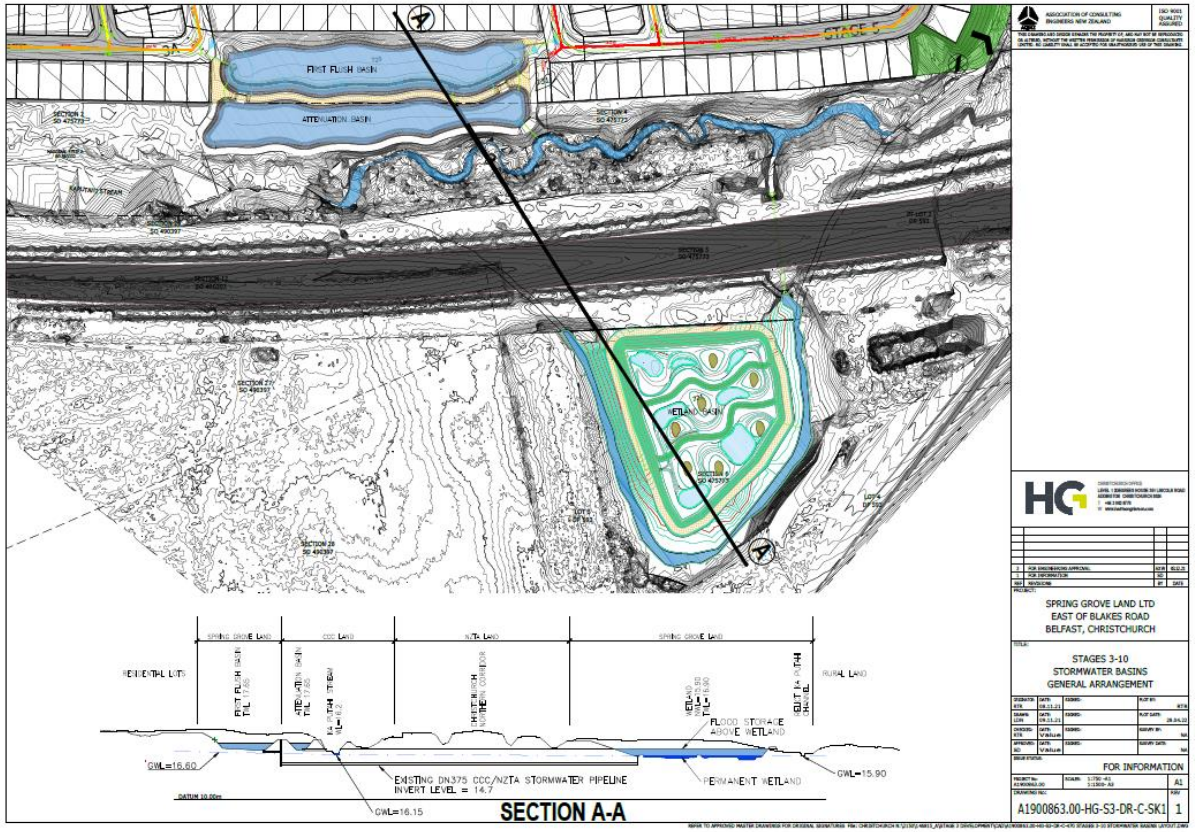
Example – Proposal redesign

Pre AWA:

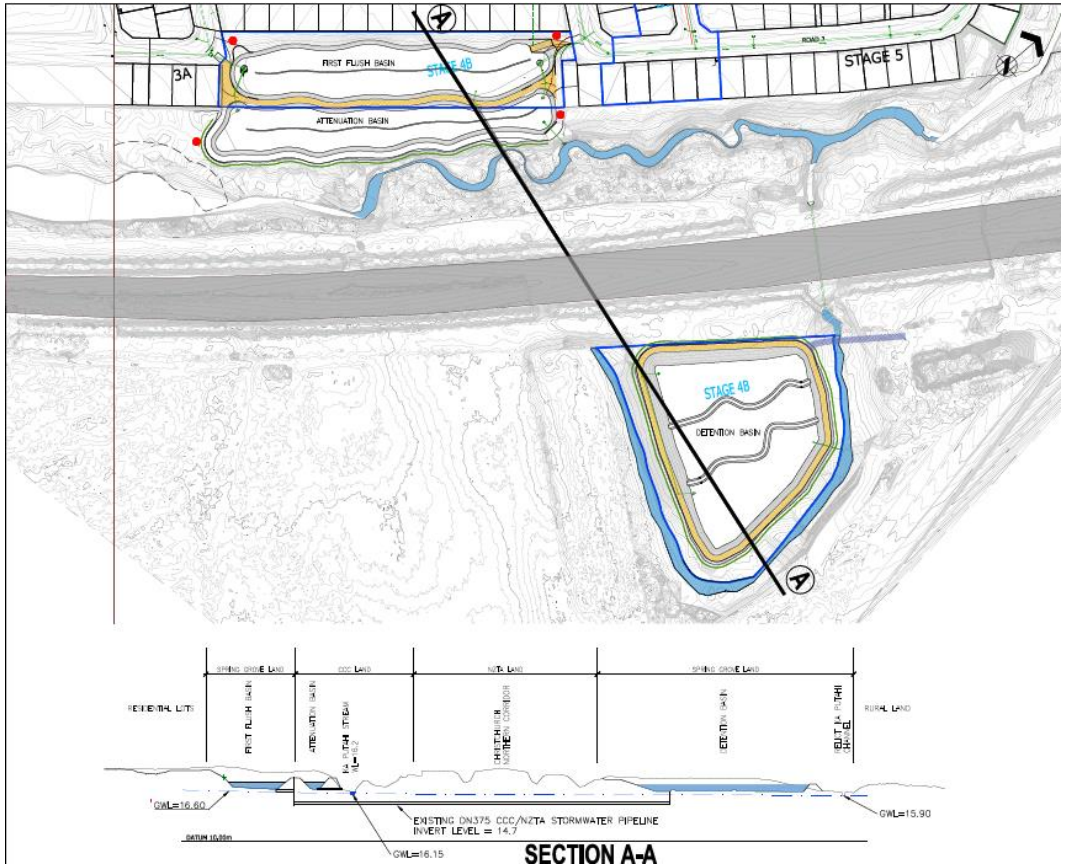


- Live application at time of Court of Appeal decision
- Wetland stormwater infrastructure constructed in high groundwater zone
- Allocation and contamination issues to consider
- Dark blue on cross section indicates groundwater interception and take.

Example – Proposal redesign

- Consents team worked with applicant, proposal adjusted
- Small amount of additional land
- Raised proposal to create perched wetland
- Less contamination risk
- No overallocation of groundwater resources.

Post AWA:



Example – Road construction

- Road construction for subdivision
- Subdivision designed prior to AWA
- AWA and Plan Change 7 make this a prohibited and proposed prohibited activity
- Land allocated to maximise design yield. Unsuitable land set aside for infrastructure in development plan.
- Plan required permanent dewatering to keep road above water level
- Options provided but none suitable – applicant found alternative site access temporarily and proceeded with construction phase of proposal without need for road in original location.

What next – Long Term?

- **Supreme Court**
  - We may seek to provide legal submissions to assist the Supreme Court on the matters of broader importance to us
  - Focus on the impact to our regulatory framework.
- **Interim Plan Change**
  - Initial work already commenced - aligned with greater Christchurch Councils, but engagement with our mana whenua has not yet occurred
  - Difficult to progress prior to Supreme Court decision
  - Unbudgeted – normally takes 6 months to develop targeted plan change
  - Focused on stormwater and urban development.

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What next – Long Term?

- **Integrated Planning Process**
  - Provide holistic solution – and address wider concerns.

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Taking action together to shape a thriving and resilient Canterbury, now and for future generations.

Toitū te marae o Tāne, toitū te marae o Tangaroa, toitū te iwi.

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Appendix 4

BUDDLE FINDLAY

13 April 2023

To
Gavin Hutchinson, Christchurch City Council
Brian Norton, Christchurch City Council
Brent Pizzey, Christchurch City Council
Gerard Cleary, Waimakariri District Council
Kalley Simpson, Waimakariri District Council

From
Cedric Carranceja

By Email
gavin.hutchison@ccc.govt.nz
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Dear all

LWRP Legal Review – Groundwater Takes

1. You have advised that Christchurch City Council (**CCC**) and Waimakariri District Council (**WDC**) have encountered difficulties in progressing resource consent applications with Canterbury Regional Council (**ECan**) involving the interception and drainage of groundwater from fully allocated or overallocated groundwater zones for the following types of infrastructure projects:

    (a) **Stormwater Basins** constructed for the primary purpose of treating and attenuating stormwater, but with groundwater seeping into those basins. The groundwater is then removed from the Stormwater Basin by conveying and discharging that water (along with any stormwater collected) to a surface water body (e.g. stream) with no intervening use by a person as part of the system design (e.g. no irrigation, electricity generation, water bottling). For the remainder of our opinion, we refer to the interception, conveyance and drainage of groundwater through this type of infrastructure project as "**Stormwater Basin Activity**".

    (b) **Sub-Soil Drainage Infrastructure** (e.g. drainage infrastructure beneath roads or under stormwater basins) constructed for the primary purpose of deliberately lowering the water table, with groundwater intercepted within that infrastructure being removed by discharging to a surface water body (e.g. stream), possibly with some intervening conveyance of the water, but with no intervening use by a person as part of the system design. For the remainder of our opinion, we refer to the interception and drainage (possibly with intervening conveyance) of groundwater through this type of infrastructure project as "**Sub-Soil Drainage Activity**".

2. ECan staff have advised CCC and WDC that both Stormwater Basin and Sub-Soil Drainage Activities are now prohibited activities in overallocated or fully allocated groundwater zones pursuant to rule 5.130 of the Canterbury Land and Water Regional Plan (**LWRP**). Although ECan previously considered these activities to be capable of being consented under rule 5.6 of the LWRP,

you have advised that ECan changed its position following a reconsideration of how the LWRP provisions should be interpreted in light of:

(a) Plan Change 7 to the LWRP (**PC7**) which adjusted various groundwater allocation limits in Waimakariri District downward so that the "take and use" of groundwater is a prohibited activity in groundwater zones that are (now) considered overallocated or fully allocated under the revised allocation limits; and

(b) The Court of Appeal's recent decision *Aotearoa Water Action Inc v Canterbury Regional Council* (**AWA decision**) which held that ECan does not have the ability to grant a resource consent limited to the use of water for water bottling purposes separately to the authorisation to take the water to be used for that purpose.[1]

3. There is a shared understanding between CCC, WDC and ECan that outrightly prohibiting Stormwater Basin and Sub-Soil Drainage Activities in overallocated or fully allocated groundwater zones is an unintended and undesirable outcome, with numerous beneficial and critical/essential infrastructural projects capable of providing good environmental outcomes now unable to be progressed. For example, Stormwater Basins are critical for achieving the LWRP's water quality and quantity outcomes, and prohibiting these cause material harm to the environment and communities. There is general agreement that a change to the LWRP should be pursued so that such critical and essential projects are not prohibited.

4. However, as a plan change is a time-consuming process, CCC and WDC wish to investigate whether ECan's interpretation of the LWRP groundwater "take and use" provisions is correct, and whether Stormwater Basin and Sub-Soil Drainage Activities might be capable of being consented by alternative means.

5. Accordingly, you have asked us to advise whether Stormwater Basin and Sub-Soil Drainage Activities involve a "taking and use" of groundwater that would be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130.

Summary

6. In summary, we consider that Stormwater Basin and Sub-Soil Drainage Activities do not involve a "taking and use" of groundwater to be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130. LWRP rule 5.130 does not apply to Stormwater Basin and Sub-Soil Drainage Activities because those activities involve a "taking" only, with no intervening use by a person.

7. We provide the reasons for our opinion below.

Approach to plan interpretation

8. This matter raises issues of plan interpretation. Accordingly, we summarise our approach to plan interpretation below.

[1] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, at [132].

9. The Courts generally attempt to give a plain ordinary meaning to a plan provision, having regard to the immediate context. However, where any ambiguity, obscurity or absurdity arises, it becomes necessary to refer to the other sections of the plan (such as the objectives and policies) in order to derive a purposive interpretation.[2]

10. The Court of Appeal decision *Powell v Dunedin City Council*[3] contains guidance on the interpretation of district plans as follows:

> *In this case, the appellants argued that the Court should look to the plain meaning of the access rule and, having found that there is no ambiguity, interpret that rule without looking beyond the rule to the objectives, plans and methods referred to in the earlier parts of section 20 of the plan. While we accept it is appropriate to seek the plain meaning from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this court made clear in Rattray, regard must be had to the immediate context (which in this case would include the objectives and policies and methods set out in section 20) and, where any obscurity or ambiguity arises, it may be necessary to refer to the sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by a rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgment of this Court in Rattray or with the requirements of the Interpretation Act.*

11. Where competing interpretations of a district plan are available, the interpretation ought to:

    (a) avoid absurdity or anomalous outcomes;

    (b) be consistent with the expectation of property owners; and

    (c) promote administrative practicality (e.g. rather than requiring lengthy historical research to assess lawfulness or otherwise).[4]

Assumption about water seeping into infrastructure

12. For the purpose of this opinion, you have asked us to assume that the water beneath the ground that seeps into Stormwater Basins and Sub-Soil Drainage Infrastructure is "groundwater" as defined in the LWRP, being:

> *"means all water beneath the surface of the earth contained <u>within the saturated zone</u>, but excludes the water chemically combined in minerals"*
>
> [our underlining for emphasis]

13. This assumption has been made because if all water seeping into Stormwater Basins and Sub-Soil Drainage Infrastructure from beneath the surface of the earth is exclusively from outside the saturated zone, then such water will not be groundwater as defined in the LWRP, and thus will not be captured by prohibited activity rule 5.130 which applies only to "groundwater".[5] Rule 5.130 states:

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[2] *Powell v Dunedin City Council* [2005] NZRMA 174 (CA); *Lower Hutt City Council (Re an Application)* (W46/07); *Nanden v Wellington City Council* [2000] NZRMA 563, 573.
[3] [2005] NZRMA 174 (CA).
[4] *Nanden v Wellington City Council* [2000] NZRMA 563; *Mount Field Limited v Queenstown Lakes District Council* 31 October 2008, Heath J, HC Invercargill CIV 2007-425-700.
[5] The likely reality is that water beneath the surface of the earth which seeps into Stormwater Basins and Sub-Soil Drainage Infrastructure would be either water from within the saturated zone, or from outside the saturated zone, or a combination of both. For the purposes of this opinion, we have assumed all seepage water is groundwater.

"The taking and use of groundwater that does not meet one or more of conditions 2 or 3 in Rule 5.128 is a prohibited activity."

[our underlining for emphasis]

Do Stormwater Basin and Sub-Soil Drainage Activities involve a "taking and use" of groundwater that would be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130?

14. You mentioned that ECan historically interpreted the LWRP provisions as not requiring groundwater resource consents for taking "drainage water" when a site is operational. ECan then shifted its interpretation so that taking "drainage water" is also subject to the rules for taking "groundwater". On that basis, ECan considered that Stormwater Basin and Sub-Soil Drainage Activities:

    (a) involved a water "take" and a “discharge” but without a "use";

    (b) do not involve a "taking and use" of groundwater for rules 5.128 to 5.130 to apply; and

    (c) could be considered under "catch-all" rule 5.6 where they did not fall within the scope of other LWRP rules. Rule 5.6 states:

        "Any activity that–

        (a) would contravene sections 13(1), 14(2), s14(3) or s15(1) of the RMA; and

        (b) is not a recovery activity; and

        (c) is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA

        — is a discretionary activity."

        [our underlining for emphasis]

15. However, ECan has further changed its position so that Stormwater Basin and Sub-Soil Drainage Activities in overallocated or fully allocated groundwater zones can no longer be considered under catch-all rule 5.6, but are now prohibited activities under the "taking and use" of groundwater rule 5.130 (quoted at paragraph 13 above).

16. We apprehend from our discussions and the technical advice notes issued by ECan that ECan appears to have two main reasons in support of its changed position:

    (a) **First reason**: The effect of the AWA decision is that any activity that either takes or uses groundwater must be considered under LWRP "taking and use" groundwater rules 5.128 to 5.130.[6] Thus, prohibited activity "taking and use" rule 5.130 will apply to any take or use of groundwater in overallocated or fully allocated groundwater zones, including any Stormwater Basin and Sub-Soil Drainage Activities where there is a taking, but no use, of groundwater.

    (b) **Second reason**: Stormwater Basin and Sub-Soil Drainage Activities will be considered as involving a use of groundwater for the "taking and use" groundwater rules 5.128 to 5.130 to apply, if there is evaporation or evapotranspiration and/or plants using water to grow, while seepage groundwater is being conveyed from point of interception to point of discharge.

[6] See page 2 of ECan's Technical Advice Note entitled "*Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents"*, dated 19 August 2022.

17. We comment on these reasons below.

Considering the first reason – Does the AWA decision require an activity that genuinely involves only a "take" of groundwater, and no associated "use" of that groundwater, to be considered under LWRP "taking and use" groundwater rules 5.128 to 5.130?

18. We understand ECan's position in reliance on the AWA decision is that "take" and "use" of groundwater are intrinsically linked under the LWRP, and therefore it is not possible to apply for a stand-alone use or a stand-alone take consent for groundwater *in all circumstances*. Accordingly, ECan considers that LWRP "taking and use" groundwater rules 5.128 to 5.130 (including prohibited activity rule 5.130) apply to Stormwater Basin and Sub-Soil Drainage Activities, even if those activities genuinely involve no "use" of groundwater.[7]

19. We disagree. For the reasons given below, we consider that the AWA decision does not require LWRP "taking and use" groundwater rules 5.128 to 5.130 (including prohibited activity rule 5.130) to apply to a proposal that genuinely involves only a take of groundwater that has no associated use.

20. In the AWA decision, the Court of Appeal set aside ECan's decision to grant resource consent for the use of water for water botting activities in circumstances where no associated resource consent was sought and granted to take water for that same use. It is notable that the Court of Appeal accepted that there was no reason under section 14 of the RMA to treat a take as necessarily combined with a use.[8] Accordingly, it is open for regional planning documents to have rules that specifically apply to just a take, or just a use, of water.

21. The Court of Appeal considered that the terms of a regional plan rule could dictate whether the Council can grant to a particular activity, a separate consent for a take and a separate consent for use. The Court observed that where a plan rule uses the expression "taking or use", then the rule contemplates that there might be an activity involving one, or the other, or both. However, a rule drafted as applying to "taking and use" anticipates an activity that involves both a taking and a use of water. As the Court states at paragraph [113]:

> *"In this case, the LWRP as has been seen refers variously to "taking or use" and "taking and use". We consider the different wording is important and must have been intended. Thus, where the expression used is "taking or use of water" the plan contemplates that there might be* ***an activity*** *involving one or the other or both. Where the expression used is "taking and use"* *the intent appears to be that* ***the activity*** *will involve both."*
>
> [our underlining and bold text for emphasis]

22. Thus:

    (a) A "taking or use" rule can apply to **an activity** involving a take, or a use, or both a take or a use.

    (b) However, a "taking and use" rule applies to **an activity** that involves both a take and use.

[7] ECan's Technical Advice Note entitled "*Implications of Court of Appeal Decision in AWA v CRC [2022] and next steps for Consents"*, dated 19 August 2022.
[8] *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, at [110].

23. For an activity that involves both a take and use (such as a proposal to take and use groundwater for water bottling) the Court concluded that under the LWRP "taking and use" rules:

    (a) A "taking" cannot be consented separately from the "use", or vice versa.[9]

    (b) It was necessary to consider both the taking and use of water.[10]

    (c) It was not open to ECan to utilise "catch-all" LWRP rule 5.6 to consider a stand-alone application for consent for only one of a "taking" or a "use".

24. The Court of Appeal was careful to communicate that its decision is applicable to the specific context that was present before it, which was a proposal that involves both a take and use of water. In that specific context, the Court considered that ECan's application of "catch-all" rule 5.6 was wrong. As the Court states at paragraph 130:

> *"We note that the Council proceeded on the basis that because there was no rule specifically governing a stand-alone use of water, the application was properly considered by the Council under what Dr Burge described as the "catch-all" r 5.6 as a discretionary activity. We have quoted that rule above. We consider that was a wrong approach in the present context."*
>
> [our underlining for emphasis]

25. The AWA decision was not concerned about an activity or a proposal that genuinely involves a take of water, but with no associated use.

26. For the above reasons, we consider the AWA decision only makes it necessary for activities or proposals genuinely involving both a taking and use of groundwater to have both the taking and use of water considered together under LWRP "taking and use" groundwater rules 5.128 to 5.130, with no ability to grant a consent for a take separate from a use (or vice versa). However, the "taking and use" rules do not apply to activities or proposals that do not involve both a taking and use, such as Stormwater Basin and Sub-Soil Drainage Activities where no "use" is involved. In short, we consider ECan's position incorrectly applies the AWA decision to activities and contexts that were not intended by, and not before, the Court of Appeal.

27. Support for our interpretation of the "taking and use" rules can also be found in written legal submissions presented to the Supreme Court that heard the appeal against the AWA decision on 22 and 23 March 2023.[11] None of those submissions sought to argue that prohibited activity status rule 5.130 applies to activities involving a genuine groundwater "take" only, where there is no intervening "use" by a person. Rather, AWA supported a conclusion that rule 5.130 only applies where the reality of a particular proposal involves both a taking and use of groundwater (e.g. a water bottling activity that requires both take and use), but not where a proposal genuinely involves only a "take" with no "use". In summary, the position of the five parties to the Supreme Court were:

    (a) **Cloud Ocean Water Limited** and **Southridge Holdings Limited** (previously Rapaki Natural Resources Limited) argued that the "taking and use" rules do not apply to them because their

[9] Ibid, at [116].
[10] Ibid, at [132].
[11] *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* (SC 82/2022).

proposed activity does not involve both "taking and use", but rather their groundwater take is already consented and they are proposing a use only.

(b) **AWA** submitted that "taking and use" rules do apply to Cloud Ocean and Southridge because the *reality* of what the applicants were doing is to take and use water, not using it only. AWA agreed with our interpretation that "taking and use" rules (including rule 5.130) would not apply to an activity that is truly a take only (e.g. Stormwater Basin and Sub-Soil Drainage Activities where no "use" is involved). AWA's legal submissions state:

> "*if there were a situation where an activity was truly only a take or use of groundwater, then that activity would not be classified by the plan and r 5.6 would be engaged*"[12]
>
> "*there may be circumstances where an activity is only a "take" or only a "use" and as such it would not be regulated by a "take and use" rule meaning that the [sic] those standalone activities are not otherwise classified by the LWRP and r 5.6 is engaged. The problem for the appellant in the present case is that the appellant's activity is one that involves both take and use, and so is not one of these activities*"[13]

(c) **ECan** took a neutral position, and indicated it would abide by the Supreme Court's decision on how the groundwater "taking and use" rules are to be applied.

(d) **Te Ngāi Tūāhuriri Runanga Incorporated** did not specifically submit on the issue.

28. As no party argued in written submissions for an interpretation of *"taking and use"* rules (including prohibited activity rule 5.130) that requires those rules to apply to a genuine "take" only proposal (e.g. Stormwater Basin and Sub-Soil Drainage Activities), then it is highly unlikely the Supreme Court would make a ruling to that effect. Rather, it is highly likely that any ruling by the Supreme Court will provide for genuine "taking" only proposals to be capable of being consented under LWRP rule 5.6.

Considering the second reason – Are evaporation, evapotranspiration, or plants extracting water to grow, a "use" controlled by the LWRP?

29. You mentioned that ECan appear to have a view that even though Stormwater Basin and Sub-Soil Drainage Activities involve no use of groundwater by a person, there will still be a "use" of water for the purposes of the LWRP rules if there will be evaporation, evapotranspiration and/or plants extracting water conveyed by Stormwater Basins and Sub-Soil Drainage Infrastructure. This reasoning suggest ECan considers that Stormwater Basins and Sub-Soil Drainage Infrastructure in overallocated or fully allocated zones will be prohibited under rule 5.130 regardless of the AWA decision.

30. We disagree. For the reasons given below, we consider that evaporation, evapotranspiration and plants extracting water being conveyed by Stormwater Basins and Sub-Soil Drainage Infrastructure are natural processes that do not, in and of themselves, constitute a "use" that would trigger the application of the LWRP "taking and use" groundwater rules. We outline our reasons below.

[12] Legal submissions on behalf of Aotearoa Water Action Incorporated Limited dated 14 March 2023, at paragraph 36.
[13] Ibid, at paragraph 75.

31. The LWRP does not provide a definition of "use". However, as a matter of jurisdiction, the LWRP cannot control uses of water that the RMA does not empower or authorise regional councils to control.

32. The purpose of a regional plan is to assist a regional council to carry out its functions in order to achieve the purpose of the RMA.[14] Section 30(1)(e) provides that one of ECan's functions "for the purpose of giving effect to this Act", is to control the "use" of water. Although the RMA does not provide a definition of "use" as it relates to water, a "use" under the RMA must be understood having regard to the purpose and context of the RMA.

33. The purpose of the RMA is concerned about "use" undertaken by people and communities. Section 5(1) provides that the purpose of the RMA is to promote the "sustainable management" of natural and physical resources, while section 5(2) defines "sustainable management" by reference to managing "use" of natural resources (such as water) in a way, or at a rate, which enables "people and communities" to provide for their well-being and health and safety. Sustainable management of the use of water is therefore concerned about use of that water by people and communities.

34. Section 14 of the RMA also provides relevant context, as it reinforces that the RMA is concerned about use of water by people. Section 14(2) states that no "person" may "use" water, while section 14(3)(a) confirms the "person" is not prohibited from "using" water if allowed by (amongst other things) a regional plan or resource consent.

35. Accordingly, the "use" of water that regional councils are empowered to control under section 30(1)(e) of the RMA "for the purpose of giving effect to this Act" must be a use by people. Natural processes such as evaporation, evapotranspiration and the use of water by plants are not a use of water by people. As natural processes are not themselves "uses" a regional council can control under the RMA through its LWRP, they cannot cause Stormwater Basins and Sub-Soil Drainage Infrastructure in overallocated or fully allocated zones to be a "use" prohibited under "taking and use" rule 5.130.[15]

36. By contrast, uses by people such as the use of water for irrigation purposes will constitute a use that a regional council can control. Accordingly, if a proposal involves the taking and use of groundwater for irrigation purposes, then it can be caught by prohibited activity rule 5.130 in overallocated or fully allocated zones.

Conclusion

37. For the above reasons, we consider that neither the AWA decision, nor the natural occurrence of evaporation, evapotranspiration, or use of water by plants, would cause Stormwater Basin and Sub-Soil Drainage Activities to be prohibited in overallocated or fully allocated groundwater zones under

[14] Section 63 of the RMA.
[15] While speculative, it is possible there may be some confusion within ECan regarding the distinction between treating evaporation, evapotranspiration and plants extracting water as a "use" in and of itself, rather than an "effect" of a person using water. Loss of water from evaporation, evaporation and plant extraction has the potential to be considered as an effect arising from a use of water by a person (e.g. when a person applies for resource consent to use water for irrigation, efficiency considerations might involve a consideration of water losses through evaporation, evapotranspiration and irrigated plant extraction). However, if there is no use of water by a person, then evaporation, evaporation and plant extraction of water are not, in and of themselves, a use of water controlled by the RMA.

LWRP rule 5.130. Prohibited activity rule 5.130 does not apply to Stormwater Basin and Sub-Soil Drainage Activities because they genuinely do not involve a "use" of water by a person. However, any proposal involving the taking and use of groundwater for irrigation purposes can be caught by prohibited activity rule 5.130 in overallocated or fully allocated zones.

38. While the implication of our views is that Stormwater Basin and Sub-Soil Drainage Activities will not be prohibited in overallocated or fully allocated groundwater zones under LWRP rule 5.130, that does not necessarily mean that any resource consent application for such activities will be granted. ECan retains an ability to consider a resource consent application on its merits, and thus there remains a prospect that an application involving a take (but no use) of groundwater in overallocated or fully allocated groundwater zones might still be declined.

39. Please do not hesitate to contact us if you have any further queries.

Yours faithfully
Buddle Findlay

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Special Counsel

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Appendix 5

NPS-UD Policy 1	**Consequences of a planning decision to:**		
Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:	**Maintain the status quo***	**Approve the current proposal**	**Approve the reduced option**
(a) have or enable a variety of homes that: *(i) meet the needs, in terms of type, price, and location, of different households; and* *(ii) enable Māori to express their cultural traditions and norms; and*	**No:** No expansion of existing household capacity or variety (which is mainly for rural residential) and limited potential for redevelopment within the Residential 3 Zone. The current supply does not satisfy current demand for housing (type, price and location) in Ōhoka. No change in terms of enablement of Māori to express their cultural traditions and norms.	**Yes:** Provides for a greater supply and variety of housing (in terms of type/density and price) compared to the current stock in the Ōhoka area where there is a demonstrated demand. The proposal also enables Māori to express their cultural traditions and norms, to the extent relevant to the site context. Waterway protection requested by Te Ngāi Tūāhuriri Rūnanga is provided by the proposal as well as significant enhancement of the waterways within the site.	**Yes, to a reduced extent:** Similar outcome as compared to the current proposal but to a reduced extent.
(b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and	**No:** No provision for local convenience and no provision for hosting the famers market on an all whether surface during winter months.	**Yes:** Provision for an appropriate variety of sites to accommodate a local convenience offering for existing and future residents of Ōhoka via the proposed Business 4 Zones. Further, the proposal provides for the hosting of the farmers market during winter months.	**Yes, to a reduced extent:** Similar outcome as compared to the current proposal but may result in a narrower local convenience offering given the lower resulting resident population.

(c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and	**No:** Accessibility remains as currently provided. Servicing Ōhoka with additional public transport options is less likely given the low resident population of the settlement.	**Yes:** The proposal provides good connectivity and accessibility at the local scale, and acceptable levels beyond. The increased population increases the viability of additional public transport service options being provided.	**Yes, to a reduced extent:** Similar outcome as compared to the current proposal but servicing Ōhoka with public transport options is more challenging given the lower resulting resident population.
(d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and	**No:** Places reliance on future rezoning proposals elsewhere in the district to avoid or minimise the impacts of monopolistic competition with respect to residential land, particularly given the medium and long term development capacity shortfall within the district.	**Yes:** Supports the competitive operation of land and development markets.	**Yes:** Similar outcome as compared to the current proposal but to a lesser degree.
(e) support reductions in greenhouse gas emissions; and	**Uncertain:** There is uncertainty as to whether the status quo would support reductions in GHG emissions at a district level, noting additional land will be needed to accommodate demand for housing if not provided for at Ōhoka, and the GHG emissions implications would depend on its location. Potentially, VKT and GHG emissions could increase with more distant development (e.g. Oxford, or peripheral locations of Rangiora or Woodend dependent on private vehicle trips).	**Yes:** Supports reductions in GHG emissions including through factors such as: - the removal of dairying activity from the site, - lower emission housing construction, and - EV charging ready homes.	**Yes:** Similar outcome as compared to the current proposal.

	Further, the status quo would not provide for a local convenience offering which would have a VKT reducing influence.		
(f) are resilient to the likely current and future effects of climate change.	**Uncertain:** Additional land will be needed to accommodate demand for housing if not provided for at Ōhoka. Alternative location(s) may be more vulnerable to the impacts of climate change compared to Ōhoka – especially areas subject to high flooding hazard and coastal inundation.	**Yes:** Achieves increased resilience to the likely current and future effects of climate change due to the distance of Ōhoka from coastal areas susceptible to sea level rise and storm surges, and the ability to avoid the potential effects of flooding.	**Yes:** Similar outcome as compared to the current proposal.
* It is acknowledged that Ohoka currently contributes to the Greater Christchurch urban environment, albeit the contribution is a minor one owing to the small scale of the existing settlement. A planning decision to approve the proposed plan change would make a more significant contribution to the Greater Christchurch urban environment for the reasons set out above and as discussed in my evidence in chief from paragraph 218 to 230. A planning decision to approve the reduced option would also make a more significant contribution to the Greater Christchurch urban environment compared to the status quo, but to a lesser degree than the current proposal.			

Appendix 6

OUTLINE DEVELOPMENT PLAN – ŌHOKA

Introduction

The Ōhoka Outline Development Plan ('**ODP**') provides for a comprehensive and carefully considered expansion of Ōhoka. The area covers approximately 156 hectares extending in a southwest direction from Mill Road and bounded on either side by Bradleys Road and Whites Road.

Key features of ODP area include:

- a village centre providing local convenience goods and services for residents and a small village square for community events/gatherings,
- provision for approximately 850 residential units, a school, and a retirement village (if a school is not developed, approximately 42 additional residential units could be established),
- provision for a polo field and associated facilities,
- a green and blue network providing for movement, recreation, and ecological enhancement of waterways, and
- high amenity streets appropriate for the rural setting.

All requirements specified below are to be designed/coordinated to the satisfaction of Council prior to approval of any subdivision consent application.

Land Use Plan

The development area shall achieve a minimum net density of 12 households per hectare, averaged over the Residential 2 zoned land. The zone framework supports a variety of site sizes to achieve this minimum density requirement. Staging is required to ensure the ODP area develops in a logical and appropriate manner in recognition of the current urban form of Ōhoka. Staging will proceed from the Mill Road end towards the southwest. Ōhoka Stream forms the first line of containment, the realigned and naturalised spring channel forms the second line, Ōhoka South Branch the third, and Landscape Treatment B the last.

Confirmation at the time of subdivision of each stage, and an assessment as to how the minimum net density of 12 households per hectare for the overall area can be achieved, will be required.

Residential activities are supported by key open spaces, waterbodies, and two small commercial centres, the larger of which is to become part of the village centre of Ōhoka. These commercial centres will provide good accessibility and help to meet some of the convenience needs of residents in the immediate area. Car parking within the village centre can provide a public transportation hub via the provision of park and ride services. It can also provide for ride sharing. The parking area will be of a high amenity standard enabling it to be integrated into a village square to provide additional hard surface area when required for community events, as well as providing for parking for the Ōhoka farmers market at the neighbouring Ōhoka Domain. Provision is also made to host the Ōhoka farmers market during winter months when ground conditions in the domain are unsuitable.

Provision is made for educational facilities in the area immediately adjoining the larger of the two commercial zones on Whites Road on the south side of the Ōhoka Stream. The prospect of developing such facilities will be subject to a needs assessment according to the Ministry of Education processes. If the Ministry decides that educational facilities are not required, additional residential properties will be developed at a minimum net density of 12 households per hectare.

Residential development shall retain rural village characteristics within the street environments and along property boundaries. Development controls and design guidelines specific to the development area shall be prepared and submitted to Council for approval. The guidelines will ensure that development is of the quality and character required to maintain the rural village character of Ōhoka. An independent design approval process will be established and most likely administered by a professional residents' association which would appoint an architect and landscape architect to review and approve proposals to demonstrate compliance with Rule 31.1.1.9A of the District Plan.

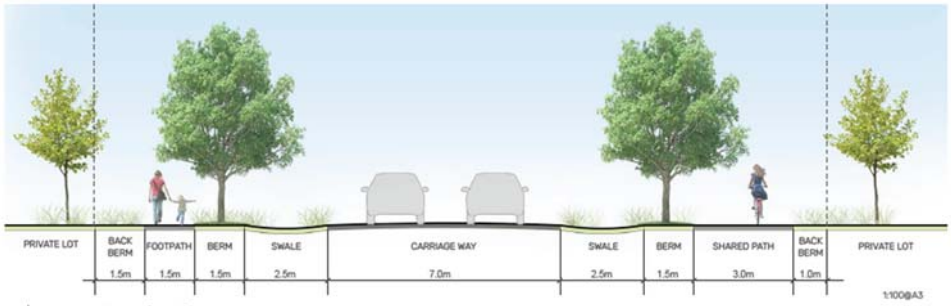
Movement Network

A road network and classification for the ODP site shall be developed that, together with the green network, delivers a range of integrated movement options. A key design principle of the movement network shall be facilitating movement towards the village centre and within the ODP site, particularly on foot or bicycle. In recognition of the character of the Ōhoka setting, several specific road types within the ODP area shall be developed with varying widths and layouts depending on the function and amenity. These are to be developed in collaboration with Council at subdivision consenting stage. Indicative cross-sections of the street types are shown in Figure 1.

Gateway treatments are located at the intersection of Mill Road and Bradleys Road, and on Whites Road at the intersection of Ōhoka Stream. The Mill Road / Bradleys Road gateway is directly at the intersection with a hard contrast from flat open rural land to a built-up edge supported by the verticality of landscape treatment. The Whites Road gateway will use the Ōhoka Stream as a distinct design feature. Combined with specific landscape treatment and bespoke design details, such as lighting and signage, this will create a strong rural gateway. The existing 100km/hr speed limit would ideally reduce to 60km/hr from the Ōhoka Stream gateway. There are potential minor traffic thresholds proposed at the southern boundaries of the ODP area at both Bradleys Road and Whites Road. The speed limit would ideally reduce to 80km/hr on Bradleys Road and Whites Road alongside the ODP frontage (outside the gateways). Regardless, two pedestrian/cycle crossings are to be provided across Whites Road, one near the Ōhoka Stream and the other near the commercial area.

The road classification shall deliver an accessible and coherent neighbourhood that provides safe and efficient access to the new development. The movement network for the area shall integrate into the existing and proposed pedestrian and cycle network beyond the ODP area. A 2.5m wide shared path is proposed with the Landscape Treatment Area A along Whites Road and Bradleys Road. Wherever possible, other bicycle and pedestrian routes shall be integrated into the green network within the ODP area. Cycling and walking shall otherwise be provided for within the road reserve and incorporated into the road design of the overall road network where applicable. Adequate space must be provided to accommodate bicycles and to facilitate safe and convenient pedestrian movements. The management, design and/or treatment of roads within the subdivision shall achieve an appropriately low-speed environment, accounting for the safety and efficiency of all road users.

Trees in the road reserve will assist in reducing the perceived width of the road corridors and provide a sense of scale. Further, the street trees will break up the roof lines of the denser areas and provide shade and texture. The trees may be located between carriageway and footpaths on larger roads, and closer to the carriageway on smaller roads. Swales will also assist in softening the road appearance, along with providing stormwater treatment. Aside from the functional aspects, the different street environments will significantly contribute to differentiating the ODP area from the typical suburban character found in the main centres of the District.



01 | Collector Road (22m)

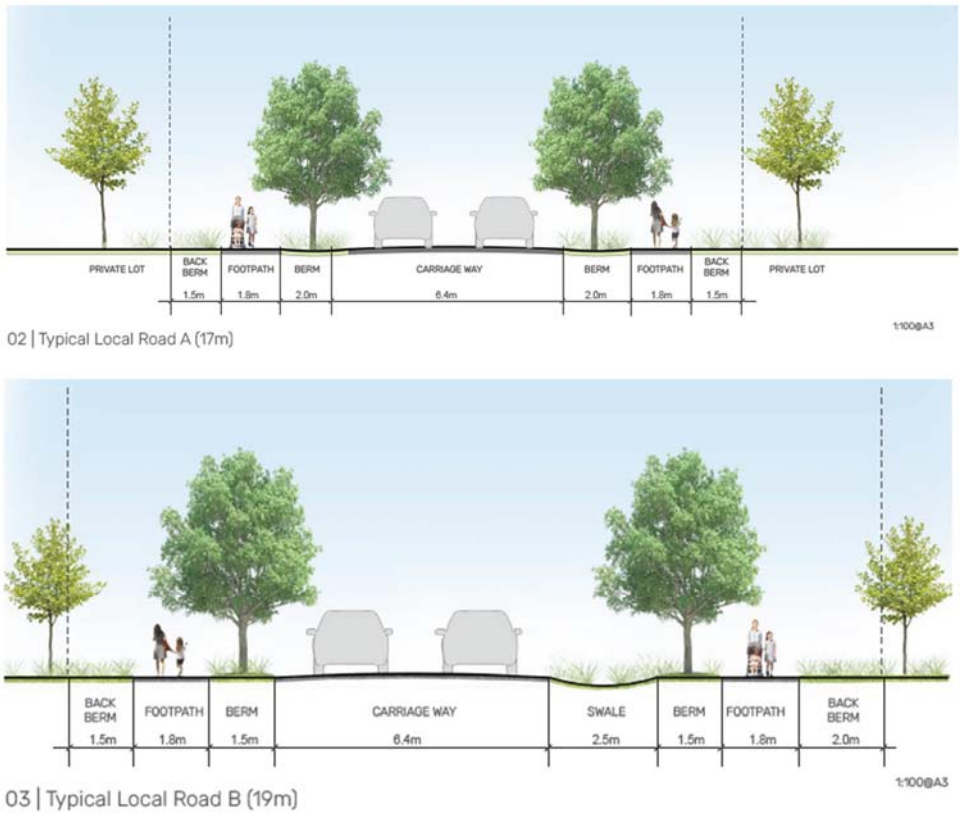


Figure 1: Indicative road cross-sections

The ODP provides road links to Mill Road, Bradleys Road and Whites Road. These intersections will be priority-controlled with priority given to the external road network. Direct vehicular access to private properties can be provided to Mill Road. Otherwise, no direct vehicular access to Bradleys Road and Whites Road is provided.

Consideration shall be given to whether the development warrants minor works to carriageways and roadside hazards, including roadside signage and/or line markings, on Whites and Bradleys roads (on the stretches between Tram Road to Mill Road), Mill Road (where impacted by the development) and Threlkelds Road. Further, consideration shall be given to whether and what (if any) interim safety improvements are required at the Tram Road / Whites Road intersection. Examples of the types of improvements that may be required include visibility splay / sightline improvements, improved signage on the approaches, and/or Rural Intersection Activated Warning Signs. Any required improvements shall be implemented prior to occupation of dwellings and commercial buildings.

Water and Wastewater Network

Water reticulation is to be provided by the establishment of a new community drinking water scheme. A site of approximately 1,000m² will be provided within the development for water supply headworks infrastructure including treatment plant, storage reservoirs and reticulation pumps. Fire-fighting flows to FW2 standards will be provided for Residential 2 and business-zoned properties. Hydrants will be provided for emergency requirements within the large lot property areas, zoned Residential 4A, in a similar manner to the neighbouring Mandeville and Ōhoka areas.

Wastewater will be reticulated to the Rangiora Wastewater Treatment Plant either via gravity reticulation or a local pressure sewer network or a combination of both. A new rising main connecting the development to the treatment plant is likely to be required.

Open Space, Recreation and Stormwater Management

The green network combines the open space, recreational reserves including pedestrian connections, and stormwater management throughout the ODP area. The green network largely follows waterways and provides access to open space for all future residents within a short walking distance of their homes. Pedestrian and cycle

paths will integrate into the green network to ensure a high level of connectivity is achieved, and to maximise the utility of the public space.

Detailed stormwater solutions shall be determined by the developer at subdivision stage and in accordance with Environment Canterbury requirements. Stormwater management facilities shall be designed to integrate into both the movement and open space networks where practicable. Groundwater monitoring will assist in the design of the stormwater management facilities.

The stormwater solutions shall be cognisant of a 26-hectare area adjacent the Whites Road boundary that cannot be attenuated. The stormwater solutions for development of the site shall demonstrate hydraulic neutrality up to the 50-year event. If neutrality cannot be achieved, the density of development within the 26-hectare area may need to be reduced.

The proposed green and blue network provides an opportunity to create ecological corridors. Plant species in the new reserves and riparian margins shall include native tree and shrub plantings. The plant species selection process shall involve consultation with local Rūnanga. The green network will ensure that dwellings are setback an appropriate distance from waterbodies.

Supporting reductions in greenhouse gas emissions

To support reducing greenhouse gas emissions, district plan rules require additional tree planting on all residential properties and at least 15% of site area to be planted in native vegetation on larger properties. Further, all dwellings shall be required to be electric vehicle charging ready. This is to be enforced through developer covenants.

Character and amenity through landscape and design

The character of Ōhoka is strongly reliant on landscaping, in particular trees, in both public and private environments. The landscape treatment of the waterway margins may include large specimen trees, but will mostly be comprised of planted natives. Space for street trees is to be provided on both sides of all road types and are to be placed strategically to create an organic street scene avoiding a typical suburban street appearance. Additional tree planting is required on private properties via district plan rules.

An overall planting strategy is to be developed for the ODP site at subdivision consent stage.

Specific measures to protect and enhance landscape values will be addressed at the time of subdivision, and development within the ODP area shall include:

a. An assessment by a suitably qualified and experienced arborist, guided by a suitably qualified terrestrial ecologist, that:

    i. Identifies trees that are to be retained and integrated into the development

    ii. Specifies protection measures during construction to ensure survival of selected trees

To further support the distinct village character of Ōhoka, street furniture, lighting and all other structures in the public realm are to reflect the rural characteristics with regard to design, type, scale, material and colour. In particular, street lighting shall be specified to minimise light spill and protect the dark night sky. These can be considered as part of the development controls and design guidelines mentioned previously.

Landscape Treatment A

Landscape Treatment A shall be designed to assist in retaining a rural character along Whites and Bradley Roads and to screen development from public and private vantage points outside the ODP area. It shall consist of a 1.5-metre-wide grass strip at the site boundary with an adjoining 2.5-metre-wide gravel path and a 10-metre-wide native vegetation strip in the location identified on the ODP and include a post and rail fence or post and wire fence on the road side of the vegetation. Solid fencing within this strip is not permitted. This is combined with a 20m building setback, consistent with setbacks required in the rural zone.

The planting is to consist of the following species, or similar, planted at 1000mm centres to achieve a minimum height of 5m once established:

- *Griselinia littoralis*, Broadleaf;
- *Cordyline australis,* Ti kouka;
- *Pittosporum tenufolium*, Kohuhu;
- *Podocarpus totara*, Totara;
- *Phormium tenax,* Flax;
- *Dacrycarpus dacrydioides,* Kahikatea;
- *Sophora microphylla,* SI Kowhai;
- Korokia species; and
- *Cortaderia richardii,* SI Toetoe.

Landscape Treatment B

Landscape Treatment B, as indicated on the ODP, shall be designed to provide a visual buffer between the ODP site and adjacent rural land to the southwest. The treatment shall consist of retention of the existing shelter belts running along the southern boundary of the ODP site and planting a 6m wide landscape strip consisting of either (or a mix of) the following trees, or similar, to achieve a minimum height of 5m with trees at a maximum spacing of 2000mm:

- *Pinus radiata*, Pine;
- *Cupressus Arizonia*, Arizona cypress;
- *Chaemaecyparis lawsoniana*, Lawson's Cypress;
- *Populus nigra,* Lombardy Poplar;
- *Podocarpus totara*, Totara (native);
- *Pittosporum eugenioides*, Tarata (native);
- *Phormium tenax,* Flax;
- *Prunus lusitanica,* Portuguese laurel; and
- *Griselinia littoralis*, Kapuka / Broadleaf (native).

Landscape Treatment C

Landscape Treatment C is proposed to be located toward the northern extent of the ODP area and act as a buffer between the ODP area and the existing Ōhoka Village properties on the southern side of Mill Road. The treatment shall be a planted single row consisting of one of the below species, or similar, along the shared internal boundaries to achieve a minimum established height of 4m and a width of 2m, planted at a maximum spacing of 1500mm (within a 6m wide strip). This relates to the internal boundaries of 290 and 344 Bradleys Road; 507, 531 and 547 Mill Road; and 401 Whites Road.

- *Prunus lusitanica (Portuguese Laurel*
- *Pittosporum eugenioides (Tarata, Lemonwood)*
- *Pittosporum tenuifolium (Kohuhu, Black Matipo)*
- *Griselinia littoralis (Broadleaf)*
- *Kunzea ericoides (Kanuka)*
- *Leptospermum scoparium (Maunka)*

Approval, Implementation and Maintenance

All proposed planting within Landscape Treatments A, B and C and the green and blue networks will be is subject to Council approval. A landscape management plan shall be developed to ensure a successful outcome and provided for approval at Engineering Approval Stage. The plan will provide direction on the establishment of planting, weed and pest control, replacement planting, irrigation and maintenance. The landscape maintenance period shall extend for five years following implementation.

The National Grid

The National Grid Islington – Southbrook A (ISL-SBK-A) 66kV transmission line traverses the site. The line starts at the Islington Substation in Christchurch and extends through the Christchurch, Waimakariri and Hurunui

districts. The following matters will assist in ensuring the ability for Transpower to operate, maintain, upgrade and develop the National Grid is not compromised by future subdivision and land use.

Consultation

Transpower shall be consulted as part of any application for subdivision consent affecting the National Grid. Evidence of this consultation shall be provided to Council as part of any subdivision consent application.

Planting and maintenance of landscaping beneath the National Grid

Any landscaping in the vicinity of the National Grid shall be designed and implemented to achieve compliance with the New Zealand Electrical Code of Practice for Electrical Safe Distances (NZECP 34:2001) and the Electricity (Hazards from Trees) Regulations 2003, including when planting reaches maturity.

Water Bodies and Freshwater Ecosystems

The ODP area contains several waterbodies with varying characteristics. Development of the ODP area provides potential for higher ecological values to be re-established through restoration and enhancement. This could include protected reserve space, native planting, naturalisation, and instream enhancement. Development shall protect and enhance selected water bodies and freshwater ecosystems within the ODP area and incorporate these features into the wider green and blue network of the site.

In terms of specific measures to be addressed at the time of subdivision in order to protect and enhance freshwater values and ecosystems, development within the ODP area shall:

a. Include an assessment by a suitably qualified and experienced practitioner that:
    i. Provides the results of groundwater and spring water level and spring flow monitoring across the site to inform the construction methodologies that are applied in different parts of the site; and
    ii. Specifies construction measures to ensure that shallow groundwater is not diverted away from its natural flow path for those areas where the shallow groundwater (in water bearing seems or layers) is likely to be intercepted by service trenches and hardfill areas.
b. Be in accordance with an Ecological Management Plan prepared by a suitably qualified and experienced practitioner that, as a minimum, includes:
    i. Plans specifying spring head restoration, riparian management, waterway crossing management, and segregation of spring water and untreated stormwater.
    ii. Aquatic buffer distances, including minimum waterbody setbacks for earthworks and buildings of:
        - 30 metres from the large central springhead and Northern Spring head identified on the ODP.
        - 20 metres from the Ōhoka Stream and Groundwater Seep origin.
        - 15 metres from Northern and Southern Spring Channel and South Ōhoka Branch.
        - 10 metres from the Groundwater Seep channel.
        - 5 metres from the South Boundary Drain along the furthermost southwest boundary of the ODP area.

        Any additionally identified springs shall be assessed to determine the appropriate aquatic buffer distance.
    iii. Ongoing maintenance and monitoring requirements that are to be implemented, including groundwater level, spring water level and spring flow monitoring.
c. Maintain the perennial course of the lower Southern Spring Channel.

d. Possible re-alignment of the Northern Spring Channel baseflow into the Southern Spring Channel downstream of the spring-fed ponds. Both channels are perennial and could be meandered and naturalised.

e. Possible meandering and naturalisation of the Groundwater Seep.

f. Riparian planting plans with a focus on promotion of naturalised ecological conditions, including species composition, maintenance schedules, and pest and predator controls.

g. Stream ecology monitoring (i.e., fish, invertebrates, instream plants and deposited sediment surveys).

The aquatic buffers shall be protected by appropriate instruments (whether that be esplanade reserves/strips, recreation reserves or consent notice condition imposed setbacks) at the subdivision consent stage. Further, landscape design drawings of stream setbacks are to include input and approval from a qualified freshwater ecologist, with a minimum of the first 7 metres of the spring and stream setbacks to be reserved for riparian vegetation only, with no impervious structures and pathways as far as practicable away from the waterway.

Cultural

The importance of natural surface waterbodies and springs to Manawhenua is recognised and provided for by the ODP and the specific measures described above in respect of waterbodies and freshwater ecosystems that will support cultural values associated with the ODP area. The Ngāi Tahu Subdivision and Development Guidelines shall be referred to throughout the subdivision design process with guidance adopted where practical/applicable.

For all earthworks across the site, an Accidental Discovery Protocol will be implemented at the time of site development, in addition to appropriate erosion and sediment controls, to assist in mitigating against the potential effects on wahi tapu and wahi taonga values generally.

Detailed Site Investigation

Due to the previous agricultural land use including the storage and spreading of dairy effluent, a Detailed Site Investigation shall be carried out at subdivision consent stage. This investigation will identify what (if any) remediation is required to satisfy the requirements of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011.

The plan change request proposes the following changes to the Waimakariri District Plan:

1. To amend the Waimakariri District Plan Planning Maps, by rezoning the site to Residential 2, Residential 4A and Business 4.

2. To amend Waimakariri District Plan Planning Maps, by inserting the Outline Development Plan.

3. To amend the District Plan provisions as below (changes underlined or struck through, with a change indicated during the hearing on 11 September 2023 emphasised in red text).

4. Any other consequential amendments including but not limited to renumbering of clauses.

Objectives and Policy

Definitions

INSERT NEW DEFINITION

Educational facilities

means land or buildings used for teaching or training by childcare services, schools, or tertiary education services, including any ancillary activities.

16 Business Zones

AMEND POLICY

Policy 16.1.1.1

…

Reason

…

The Business 4 Zone provides for activities existing at 20 June 1998, and limited future expansion of retail and business activities with similar effects on the southwestern corner of Williams and Carew Streets in Kaiapoi (District Plan Maps 104 and 105), and the Lilybrook Shops on the corner of Percival Street and Johns Road, Rangiora (District Plan Maps 113 and 117). This zoning recognises the commercial zoning that these sites enjoyed under the Transitional District Plan. The Business 4 Zone also provides for a local community business zones at West Kaiapoi (District Plan Map 104), ~~and~~ within the Mandeville North settlement (District Plan Map 182) and at Ōhoka (District Planning Map 185).

INSERT NEW POLICY

Policy 16.1.1.12

Provide for retail and business activities in the Ōhoka Business 4 Zone, in a way that:

a) *maintains the characteristics of the Ōhoka settlement as set out in Policy 18.1.1.9;*

b) *provides for limited business activities to provide for day-to-day convenience needs of the local community, is designed to achieve high quality urban design principles and a high standard of visual character and amenity; and*

c) *limits retail distribution effects on the nearby Business 4 Zone at Mandeville North.*

AMEND

Principal Reasons For Adopting Objectives, Policies and Methods 16.1.4

…

The Business 4 Zone enables site-specific areas of existing retail and business activity located outside of the Kaiapoi and Rangiora town centres. The effects of activities are known for those already developed, including those impacting on adjoining residential areas. Activity and development standards constrain the scale and nature of possible future effects. A specific policy and rule framework exists for the Business 4 Zone in West Kaiapoi, ~~and the Business 4 Zone in~~ Mandeville North and Ōhoka to ensure suitable scale and characteristics of any development within the zone and with regard to Mandeville North to recognise community desires.

18. Constraints on Subdivision and Development

AMEND POLICY

Policy 18.1.1.9

Ensure that any growth and development of Ōhoka settlement occurs in a manner that:

- *maintains a rural village character comprising a predominantly low density living environment with dwellings in generous settings;*
- *achieves, as far as practicable, a consolidated urban form generally centred around and close to the existing Ōhoka settlement;*
- *encourages connectivity with the existing village and community facilities;*
- *achieves quality urban form and function;*
- *allows opportunities for a rural outlook;*
- *encourages the retention and establishment of large-scale tree plantings and the use of rural style roads and fencing;*
- *limits the potential for reverse sensitivity effects;*
- *avoids significant flood hazards;*
- *promotes the efficient and cost-effective provision and operation of infrastructure;*
- *recognises the low lying nature of the area and the need to provide for stormwater drainage; and*
- *ensures that any residential development occurring in the Ōhoka settlement does not increase the flood risk within Ōhoka and adjoining areas.*

Explanation

Growth of Ōhoka settlement, defined by the Residential 2, ~~3,~~ 4A and 4B zones, is constrained by the need to ensure that any future residential development maintains its rural village character. This is most likely to be achieved by consolidating growth around or adjacent to the

existing urban area and ensuring that development complements the existing low density rural residential environment. A consolidated growth pattern will provide opportunities for establishing connections with the existing settlement and community facilities, including the Ōhoka School. This form of development is also anticipated to promote the efficient provision of reticulated water and wastewater infrastructure and reduce the potential for reverse sensitivity effects on surrounding rural activities.

It is important that any further rural residential development occurs in a way, and to an extent, that does not overwhelm the special semi-rural character of the settlement.

It is expected that the type of growth and development required to maintain the rural village character of Ōhoka is that of low density living, where larger allotments ~~dwellings are situated within generous settings comprising an average lot size of between 0.5 – 1.0 hectare~~ surround smaller properties which form a walkable community around the village centre. The presence of rural village attributes within ~~such~~ the low density residential areas, including the retention and establishment of large-scale tree plantings and the use of rural style roads and fencing, will also assist in maintaining the settlement's rural themed characteristics. This type of settlement pattern is anticipated to generate a high level of amenity, including opportunities for a range of lifestyle living activities and an aesthetic rural outlook. This can be achieved either by enabling views into open green space or by the establishment of treed vegetation areas within or adjoining properties.

Another development constraint for growth at Ōhoka is the need to avoid land subject to significant flood risk. It will therefore be necessary for any proposed development to demonstrate that the land is suitable for its intended use and is not subject to undue risk of inundation. This includes the impact of cumulative effects on the area's drainage systems.

INSERT POLICY

Policy 18.1.1.9A

Provide for activities that support the Ōhoka settlement including educational facilities, a retirement village and a polo field and associated facilities.

Rules

27 Natural Hazards

INSERT RULE

27.1.1.34 Within the Outline Development Plan area shown on District Plan Map 185, any dwellinghouse shall have a floor level of 400mm above the 0.5% Annual Exceedance Probability flood event except within areas subject to Medium Flood Hazard where the floor level shall be 500mm above 0.5% Annual Exceedance Probability flood event.

31. Health, Safety and Wellbeing

Dwellinghouses

INSERT RULE

31.1.1.9A In the Residential 2 and 4A Zones, Ōhoka shown on District Plan Map 185, dwellinghouses shall be in accordance with any relevant Council approved design guidelines.

Structure Coverage

AMEND RULE

31.1.1.10 The structure coverage of the net area of any site shall not exceed:

…

n) 55% in Business 4 Zone in Ōhoka as shown on the District Plan Map 185

Setbacks For Structures

AMEND TABLE

Table 31.1: Minimum Structure Setback Requirements

Location	*A setback is required from*	*Setback depth (minimum)*
Rural Zone	*Any road boundary*	*20m for any dwellinghouse* *10m for any structure other than a dwellinghouse*
	Any internal site boundary	*20m for any dwellinghouse* *3m for any structure other than a dwellinghouse*
	Any existing dwellinghouse on an adjoining site	*10m for any structure (excluding a dwellinghouse)*
Rural Zone Maori Reserve 873 cluster housing	*Any road boundary, any site boundary external to the cluster, and any existing dwellinghouse on an adjoining site*	*15m*
All Residential Zones other than the Residential 4A Zone (Wards Road, Mandeville North and Mill Road, Ōhoka), Residential 6A and 7, the Residential 4A Zone (Bradleys Road, Ōhoka) and the Mandeville Road – Tram Road Mandeville North Residential 4A Zone, and the Residential 4A Zone (Woodend Beach Road, Woodend) (excluding any comprehensive residential development) *NOTE: See Rule 31.1.1.15*	*Any road boundary (other than a boundary to a strategic road or arterial road) or any accessway*	*2m*
	The zone boundary within Tuahiwi at the northern, eastern and southern extent as shown on District Plan Map 176B	*15m*

Comprehensive residential development within Residential 1, 2 and 6 Zones	*The road boundary*	*2 m for any dwellinghouse* *4 m for any garage where the vehicle entrance is generally at a right angle to the road.* *5.5 m for a garage where the vehicle entrance faces the road, and the garage must not be located closer to the road boundary than the front façade of the associated dwellinghouse*
Residential 4A Zone (Bradleys Road, Ōhoka) shown on District Plan Map 169 and the Mandeville Road – Tram Road Mandeville North Residential 4A Zone shown on District Plan Map 182	*Any road boundary* *Any internal site boundary*	*15m* *5m*
Residential 4A Zone (Wards Road, Mandeville North) shown on District Plan Map 162, Residential 4A Zone (Mill Road, Ōhoka) shown on District Plan Map 160 and Woodend Beach Road shown on District Plan Map 171)	*Any boundary from a local road*	*10m*
Residential 4A Zone (Mill Road, Ōhoka) shown on District Plan Map 160	*Mill Road boundary* *Any internal site boundary*	*15m* *5m*
All Residential Zones, other than Residential 6, 6A and 7, where the site fronts onto a strategic or arterial road	*The road boundary of any strategic or arterial road*	*6m, or 4m for any garage where the vehicle entrance is generally at right angles to the road*
Residential 5 Zone	*Any site boundary adjoining an accessway for allotments 15, 16, 17, 27, 28 and 29 shown on District Plan Map 140*	*4m*
Residential 6A Zone (other than areas identified on District Plan Map 142 as	*Any internal site boundary, other than boundaries with accessways*	*2m for any structure other than garages and structures above garages*

excluded from the setback requirement)		
Residential 6A	*Boundaries with accessways*	*10m for any structure other than a garage and structures above garages* *NOTE: Refer to Figure 31.1 and Rule 31.1.1.16*
Residential 7	*Any road boundary (other than to an arterial road) or any accessway*	*2m for any dwellinghouse within Area A* *3m for any dwellinghouse within Areas B and C* *5.5m for any structure other than a dwellinghouse within Areas A, B and C*
	The road boundary of any arterial road	*6m*
	Any internal site boundary	*2m*
	Any site boundary of 309 Island Road being Lot 1 DP 62400	*20m*
Business 2, 3 and 6 Zones, where the site fronts onto a strategic or arterial road	*The road boundary of any strategic or arterial road*	*10m*
Business 2, 3, 5 and 6 Zones, and Woodend Business 1 Zone *where the site is adjacent to a Residential Zone or a Rural Zone boundary*	*The zone boundary, or where the zone boundary is a road, the road boundary*	*10m*
Business 4: Williams/Carew Zone and Business 4: Mandeville North	*Any road boundary*	*6m*
	Any internal site boundary	*5m*

Business 5 Zone at Kaiapoi	*The zone boundary, the Smith Street boundary, and any site boundary adjoining a reserve*	*10m*
All Zones	*All 110kV overhead high voltage electrical lines as shown on District Plan Maps* *All 220kV and 350kV overhead high voltage electrical lines as shown on District Plan Maps where the span length is less than 375 metres* *All 220kV overhead high voltage electrical lines as shown on District Plan Maps where the span length is 375 metres or greater* *All 350kV overhead high voltage electrical lines as shown on the District Plan Maps where the span length is greater than 375 metres*	*32 metres either side of the centreline* *32 metres either side of the centreline* *37 metres either side of the centreline* *39 metres either side of the centreline*
Residential 4A Zone (Ōhoka) shown on District Plan Map 185	*Any road boundary* *Any internal site boundary*	*10m* *5m*
Business 4 (Ōhoka) shown on District Plan Map 185	*Any residential zone*	*3m*

Structure Height

AMEND RULE

31.1.1.35 Any structure in the ~~Mandeville North~~ Business 4 Zone at Mandeville North or Ōhoka shall not exceed a height of 8 metres.

Screening and Landscaping

AMEND RULE

31.1.1.39 Where a site within any Business Zone, other than the Business 4 – West Kaiapoi Zone and Business 4 Zone at Ōhoka, shares a boundary with any Residential Zone, the site shall be screened from the adjoining Residential Zone site(s) to a minimum height of 1.8m except where a lesser height is required in order to comply with Rule 30.6.1.24, for unobstructed sight distances.

AMEND RULE

31.1.1.50 Within the Residential 4A Zone, Bradleys Road, Ōhoka identified on District Plan Map 169 and the Residential 4A Zone, Ōhoka identified on District Plan Map 185 any fences/walls within any boundary setback shall be:

a) limited to a maximum height of 1.2m and a minimum height of 0.6m; and

b) limited to traditional post and wire or post and rail fences, and be at least 50% open; and

c) of a length equal to or greater than 80% of the length of the front boundary.

INSERT NEW RULE

31.1.1.50A Within the Residential 2 Zone, Ōhoka identified on District Plan Map 185, fencing/walls shall be in accordance with any relevant Council approved design guidelines.

AMEND RULE

31.1.1.53 Within the Residential 2 and 4A zones shown on District Plan Map 185, landscaping for all residential properties (excluding retirement village activities) shall provide a minimum of:

a) one tree within the road boundary setback for every 15 metres of road frontage (or part thereof) and;

b) one additional tree elsewhere on the property for every 400m^2 of site area (or part thereof);

c) all trees shall be not less than 1.5 metres high at the time of planting;

d) all trees and landscaping required by this rule shall be maintained and if dead, diseased or damaged, shall be replaced; and

e) for all allotments greater than 2,500m^2 in area, no less than 15% of the site shall be planted in native vegetation.

INSERT NEW RULE

Land use near the National Grid – Residential 4A (Ōhoka)

31.1.1.67 Within the Residential 4A Zone (Ōhoka) identified on District Plan Map 185, any structure located within 12 metres from the outer visible edge of a foundation of a National Grid support structure or located within 10 metres of the centre line of an overhead 66kV National Grid transmission line shall comply with the following:

a) The structure is not a school, dwellinghouse or hospital.

b) The structure complies with NZECP 34:2001 and is:

i. a network utility;

ii. a fence not exceeding 2.5m in height; or

iii. a non-habitable building used for agricultural or horticultural activities other than a milking/dairy shed, a wintering barn, a building for intensive farming activities, a commercial greenhouse or produce packing facility.

c) The structure permitted under Rule 31.1.1.67.a must:

i. not be used for the handling or storage of hazardous substances with explosive or flammable intrinsic properties in greater than domestic scale quantities;

ii. not permanently obstruct vehicle access to a National Grid support structure;

iii. be located at least 12 metres from the outer visible edge of a foundation of a National Grid support structure, except where it is a fence located at least 6 metres from the outer visible edge of a foundation of a National Grid support structure.

31.3 Discretionary Activities (Restricted)

INSERT RULE

31.3.9 A retirement village, in the Residential 2 Zone as shown on District Plan Map 185 that meets all applicable conditions for permitted activities under Rule 31.1, except for Rule 31.1.1.4 and Rule 31.1.1.6, shall be a restricted discretionary activity.

In considering any application for a resource consent under Rule 31.3.9 the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the following matters:

a) Whether the development, while bringing change to existing environments, is appropriate to its context, taking into account:

i. Context and character:

The extent to which the design, including landscaping, of the village is in keeping with, or complements, the scale and character of development anticipated for the surrounding area and relevant significant natural, heritage and cultural features.

ii. Relationship to the street, public open spaces and neighbours:

Whether the village

- *engages with and contributes to adjacent streets and any other adjacent public open spaces to contribute to them being safe and attractive, and*

- *avoids unacceptable loss of privacy on adjoining residential properties.*

iii. Built form and appearance:

The extent to which the village is designed to minimise the visual bulk of the buildings and provide visual interest, and consistency with any relevant Council approved design guidelines.

iv. Access, parking and servicing:

The extent to which the village provides for good access and integration of space for parking and servicing particularly to cater for the safety of elderly, disabled or mobility-impaired persons.

v. Safety:

The extent to which the village incorporate CPTED principles to achieve a safe, secure environment.

vi. Stormwater

The adequacy of proposed stormwater management within the site.

vii. Sustainability measures

The extent to which, where practicable, incorporation of environmental efficiency measures in the design, including passive solar design principles that provide for adequate levels of internal natural light and ventilation.

Any application arising from this rule shall not be publicly notified.

INSERT NEW RULE

31.3.10 Educational facilities in the Residential 2 Zone within the educational facilities overlay as shown on District Plan Map 185 that meets all applicable conditions for permitted activities under Rule 31.1, and where no more than 250 students are enrolled shall be a restricted discretionary activity.

In considering any application for resource consent under Rule 31.3.10, the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the following matters:

a) Whether the development, while bringing change to existing environments, is appropriate to its context, taking into account:

i. Context and character:

The extent to which the design of the educational facility is in keeping with, or complements, the scale and character of development anticipated for the surrounding area and relevant significant natural, heritage and cultural features.

ii. Relationship to the street and public open spaces:

Whether the educational facilities engage with and contribute to adjacent streets, and any other adjacent public open spaces to contribute to them being safe and attractive.

iii. Built form and appearance:

The extent to which the educational facilities are designed to minimise the visual bulk of the buildings and provide visual interest.

iv. Access, parking and servicing:

The extent to which the educational facilities provide for good access and integration of space for parking and servicing.

v. Safety:

The extent to which the educational facilities incorporate CPTED principles to achieve a safe, secure environment.

vi. Stormwater

The adequacy of proposed stormwater management within the site.

vii. Sustainability measures

The extent to which, where practicable, incorporation of environmental efficiency measures in the design, including passive solar design principles that provide for adequate levels of internal natural light and ventilation.

Any application arising from this rule shall not be publicly notified.

INSERT NEW RULE

31.2.11 A polo field and associated facilities in the Residential 2 Zone within the polo facilities overlay as shown on District Plan Map 185 where:

a) structures so not exceed a height of 8m, and

b) structures are set back no less than 10m from any residential site

shall be a restricted discretionary activity.

In considering any application for resource consent under Rule 31.2.11, the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the following matters:

a) Whether the development, while bringing change to existing environments, is appropriate to its context, taking into account:

i) landscape planting consistent with the rural village character of the Ōhoka settlement and to assist the integration of the proposed development within the site and neighbourhood.

ii. the location and design of vehicle and pedestrian access and on-site manoeuvring.

iii. creation of visual quality and variety through the separation of buildings and in the use of architectural design, detailing, glazing, materials, colour and landscaping.

viii consistency with any relevant Council approved design guidelines.

viii. where practicable, incorporation of environmental efficiency measures in the design, including passive solar design principles that provide for adequate levels of internal natural light and ventilation.

ix. the proposed stormwater management within the site

Any application arising from this rule shall not be publicly notified.

31.1.4 Discretionary Activities

INSERT NEW RULE

31.4.5 A retirement village, in the Residential 2 Zone as shown on District Plan Map 185 that does not meet all applicable conditions for permitted activities under Rule 31.1 shall be a discretionary activity.

INSERT NEW RULE

31.4.6 Educational facilities in the Residential 2 Zone within the educational facilities overlay as shown on District Plan Map 185 that does not meet all applicable conditions for permitted activities under Rule 31.1, or/and where more than 250 students are enrolled shall be a discretionary activity.

INSERT NEW RULE

31.4.7 A polo field and associated facilities in the Residential 2 Zone within the polo facilities overlay as shown on District Plan Map 185 that does not meet the conditions under Rule 31.3.11 shall be a discretionary activity.

INSERT NEW RULE

31.4.8 Any land use which does not comply with Rules 31.1.1.9A and 31.1.1.50A shall be a discretionary activity.

31.5 Non-complying Activities

INSERT NEW RULE

31.5.10 Any land use that does not comply with Rules 31.1.1.67 is a non-complying activity.

Retail Activities and Traffic Matters

31.26 Discretionary Activities

INSERT NEW RULE

31.26.4 Retail activity exceeding a total of 2,700m^2 Gross Floor Area within the Business 4 Zones, Ōhoka shown on District Plan Map 185 except any retail activity associated with a farmers market.

32. Subdivision

32.1.1 Standards and Terms

Residential 4A Zone

AMEND RULE

32.1.1.11 The minimum area for any allotment created by subdivision in any Residential 4A Zone shall be 2500m^2. The average area of all allotments in any Residential 4A Zone shall not be less than 5000m^2 except within the Residential 4A Zone (Ōhoka) identified on District Plan Map 185 where the average area of all allotments shall not be more than 3300m^2. Any allotment over 1ha in area is deemed to be 1ha for the purposes of this rule.

Outline Development Plans

AMEND RULE

32.1.1.28 Subdivision within the following areas shall generally comply with the Outline Development Plan for that area.

…

ak) The Residential 2 and 4A Zones and Business 4 Zone (Ōhoka) identified on District Plan Map 185 including the associated Outline Development Plan text.

32.2 Discretionary Activities (Restricted)

INSERT NEW RULE

National Grid – Residential 4A (Ōhoka)

32.2.16 Within the Residential 4A Zone (Ōhoka) identified on District Plan Map 185, any subdivision of land located within 32 metres of the centre line of an overhead 66kV National Grid transmission line is a restricted discretionary activity where a building platform is identified on the subdivision plan that is located more than 12 metres from the outer from the outer

visible edge of a foundation of a National Grid support structure and more than 10 metres from the centre line of an overhead 66kV transmission line, to be secured by way of a consent notice.

In considering any application for a resource consent under Rule 32.2.16 the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of its discretion to the following matters:

i. The extent to which the subdivision allows for earthworks, buildings and structures to comply with the safe distance requirements of the NZECP 34:2001 New Zealand Electricity Code of Practice for Electricity Safe Distances.

ii. The provision for the ongoing efficient operation, maintenance, development and upgrade of the National Grid, including the ability for continued reasonable access to existing transmission lines for maintenance, inspections and upgrading.

iii. The extent to which potential adverse effects (including visual and reverse sensitivity effects) are mitigated through the location of an identified building platform or platforms.

iv The extent to which the design and construction of the subdivision allows for activities to be set back from the National Grid, including the ability to ensure adverse effects on, and from, the National Grid and on public safety and property are appropriately avoided, remedied or mitigated, for example, through the location of roads and reserves under the transmission lines.

v. The nature and location of any proposed vegetation to be planted in the vicinity of the National Grid.

vi. The outcome of any consultation with Transpower New Zealand Limited.

vii. The extent to which the subdivision plan clearly identifies the National Grid and identified building platform or platforms.

INSERT NEW RULE

32.2.17 In the Residential 2 and 4A Zones, Ōhoka shown on District Plan Map 185, subdivision of more than 250 residential allotments (cumulatively) shall be a restricted discretionary activity.

In considering any application for resource consent under Rule 32.2.17, the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the effects on the safety and efficiency of the Tram Road / State Highway 1 interchange.

Any application arising from this rule shall not be publicly notified but shall be limited notified to Waka Kotahi – New Zealand Transport Agency absent its written approval.

INSERT NEW RULE

32.2.18 In the Residential 2 and 4A Zones, Ōhoka shown on District Plan Map 185, any subdivision of land shall be a restricted discretionary activity.

In considering any application for resource consent under Rule 32.2.18, the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the outcome of a traffic assessment undertaken in consultation with the District Council to determine what upgrades (if any) are required in respect of either the Mill Road / Ohoka Road intersection or the Flaxton Road / Threlkelds Road and Mill Road / Threlkelds Road intersections prior to the issue of a completion certificate under section 224 of the Act.

Any application arising from this rule shall not be limited or publicly notified.

INSERT NEW RULE

32.2.19 In the Residential 2 and 4A Zones, Ōhoka shown on District Plan Map 185, subdivision of more than 250 residential allotments (cumulatively) shall be a restricted discretionary activity.

In considering any application for resource consent under Rule 32.2.19, the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the outcome of a traffic assessment undertaken in consultation with the District Council to determine what upgrades (if any) are required in respect of the Tram Road / Whites Road intersection prior to the issue of a completion certificate under section 224 of the Act.

Any application arising from this rule shall not be limited or publicly notified.

INSERT NEW RULE

32.2.20 In the Residential 2 and 4A Zones, Ōhoka shown on District Plan Map 185, subdivision of more than 450 residential allotments (cumulatively) shall be a restricted discretionary activity.

In considering any application for resource consent under Rule 32.2.20, the Council shall, in deciding whether to grant or refuse consent, and in deciding whether to impose conditions, restrict the exercise of discretion to the traffic safety and efficiency effects in respect of the Bradleys Road / Tram Road intersection. This rule shall not apply if a roundabout has been constructed at this intersection.

Any application arising from this rule shall not be limited or publicly notified.

32.3 Discretionary Activities

INSERT NEW RULE

32.3.7 Any subdivision that does not comply with Rule 32.1.1.28.ak is a discretionary activity.

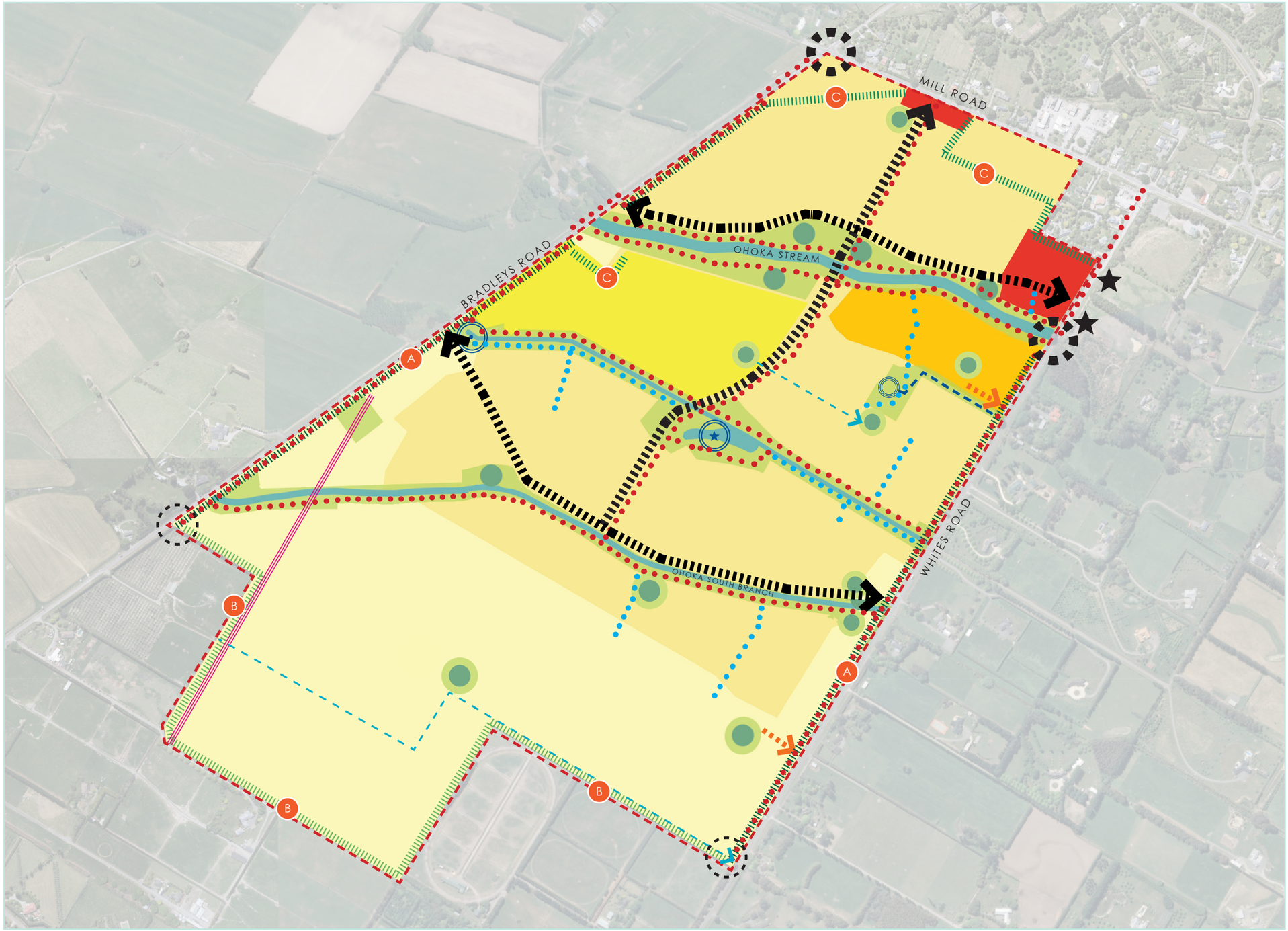
32.4 Non-complying Activities

INSERT NEW RULE

32.4.14 Any subdivision of land within the Residential 4A Zone (Ōhoka) identified on District Plan Map 185 that does not comply with Rule 32.2.16 is a non-complying activity.

LEGEND

- Outline Development Plan Area
- Residential 2
- Residential 2 (Educational Overlay)
- Residential 2 (Polo Grounds Overlay)
- Residential 4a
- Business 4 Zone
- Indicative (Collector) Road
- Indicative Local Road Connection
- Village Threshold / Gateway
- Potential Minor Threshold
- Indicative Pedestrian-Cycle Network
- Indicative Pedestrian Path
- Indicative Stormwater Management Areas (size and location to be confirmed)
- Existing / Modified Waterways
- Existing Springs and Associated Setback (30m)
- Stormwater Conveyance Flow Path
- Groundwater seep and associated setback (20m)
- Groundwater Seep Channel
- Existing Pond (size and location to be confirmed)
- Green Network
- A Landscape Treatment A
- B Landscape Treatment B
- C Landscape Treatment C
- Pedestrian / Cycle Crossing
- Overhead 66kV Power Lines



A. OUTLINE DEVELOPMENT PLAN - 535 MILL ROAD, OHOKA