MINUTES

of the

COMMISSIONER (RESOURCE CONSENT) HEARING MEETING

held

11.00 am, Friday, 4 March 2016

at

Tasman Council Chamber, 189 Queen Street, Richmond

1 OPENING, WELCOME

2 REPORTS

2.1 R and C Johns - Section 357 Objection Decision

Report and Decision of Commissioner, following a hearing held in the Heaphy/Wangapeka Room, Tasman District Council on Friday 4 March 2016, commencing at 11:00 a.m.

RM150892

The Tasman District Council appointed an independent commissioner to hear and make a decision on the objection lodged by **Richard and Christine Johns** pursuant to section 357 of the Resource Management Act 1991 (RMA).

PRESENT:	**Hearings Commissioner** Rob Lieffering
APPLICANT:	**Richard and Christine Johns** Peter McRae – Counsel Richard Johns – Applicant (via Skype)
CONSENT AUTHORITY:	**Tasman District Council** Neil Tyson – Consent Planner, Water/Natural Resources Leif Pigott – Coordinator Natural Resources Consents Joseph Thomas – Groundwater Scientist
IN ATTENDANCE:	Michael Croxford – Tasman District Council Principal Resource Consents Advisor Graeme Dick

Details of The Application and Objection

Richard and Christine Johns (the Applicants) lodged an application for a resource consent, being a water permit[1], with the Tasman District Council (the Council) on 30 October 2015 to take groundwater from a bore located at 6 Seaton Valley Road, Mapua.

The details of the application have been variously described by the Applicants and Mr Tyson and the following presents a summary of its key components:

- Water would be taken from an existing bore (referenced as WWD 8031);
- Water would be used for domestic supply, irrigation, and for a proposed 40 lot residential development (Mt Hope); and
- A water permit(s) was previously granted to Mr D Freilich to take water from bore WWD 8031 for irrigation and also for community supply. Mr Freilich transferred this water permit to CMG Limited[2] who were subsequently granted a site-to-site transfer which moved this water allocation to a nearby bore WWD 23931 which was recently drilled.

On 3 November 2015 Mr Pigott, under authority delegated to him by the Council and upon recommendation from Mr Tyson, determined that the application was incomplete and that it must be returned under section 88(3A) of the Resource Management Act 1991 (RMA). Mr Tyson wrote a letter to the Applicants on 6 November 2015 (the section 88 letter) advising them of the Council's determination that the application was incomplete and outlined the reasons why this determination had been made. The letter identified six areas where the application was deemed to be incomplete – I do not repeat those here as a copy of it is included in the section 42A report as Attachment 1.

Mr Tyson sent a subsequent letter to the Applicants on 19 November 2015 confirming the Council's determination that the application was incomplete, this letter having been sent in response to an email(s) that the Applicants had sent to the Council upon receipt of the section 88 letter.

On 21 November 2015 the Applicants lodged a formal objection (via email) to the Council's determination that their application was incomplete. Whilst not explicitly stated, this objection was deemed by the Council to have been lodged pursuant to section 357(3) of the RMA. A further email was sent by the Applicants on 22 November 2015 which expanded on the objection email sent the previous day.

Procedural Matters

The Applicants raised the question of what constitutes a 'working day' under the RMA in respect to serving of documents. They considered that they only had four working days to consider the section 42A report when the RMA states that this should have been received at least five working days before the hearing. Mr Croxford advised the hearing that there is no definition in the RMA regarding what time of the day constitutes the start or end of a working day but that the Ministry for the Environment's guidance document on the RMA discounting provisions is often used as a reference. I am satisfied that the Council has complied with the timeframe requirements of the RMA in providing the section 42A report to the Applicants, which were received via email on Friday 26 March 2016.

[1] As per section 87 of the RMA.
[2] For the purposes of this decision I have used the same naming convention as was included in the section 42A report for this entity.

Mr McRae provided a Right of Reply on behalf of the Applicants to the Council on 10 March 2016 and this was forwarded to me via email on the same day by Mr Croxford.

I closed (concluded) the hearing on 14 March 2016 and advised the parties of this through the Council.

Evidence

At the hearing, I heard evidence from the parties listed on page one of this decision. In addition, I advised those present that I had read the application that was lodged with the Council, the Council's letter(s) returning the application to the Applicants as it was deemed to be incomplete, the Applicant's responses to that letter, the objection email(s), and also the section 42A officer's report – these were all taken as read.

I also advised those present that I had been provided with copies of various consent files. These were provided to me by the Council before the hearing as they contained relevant background information to the water permits which were referred to in Mr Tyson's letters to the Applicants and also the Applicants' objection.

I asked questions of Council staff regarding the section 42A report. I then heard evidence from Mr Johns and legal submissions from Mr McRae who both helpfully provided copies of their submissions in writing. Mr McRae provided a Right of Reply on behalf of the Applicants in writing following the hearing.

Evaluation

The decision that I must make is whether the application lodged by the Applicants was complete under section 88 of the RMA. In coming to my decision I must review the Council staff's determination, and the reasons why they concluded the application was incomplete under the RMA. My review needs to examine the question of whether the Council's decision was technically/legally correct and also, just as importantly, whether the determination and reasons were based on reasonable grounds.

The question of whether the application met all the legal tests of being complete under section 88 of the RMA is, in this case, reasonably straightforward to answer in the negative because it clearly did not include all the matters required by Schedule 4 of the RMA. However, Council staff confirmed to me that the vast majority of applications it receives could technically be returned as being incomplete under section 88 of the RMA if scrutinised 'to the letter of the law'. Council staff informed me they exercise their discretion in determining whether an application is complete or not and that the level of information required to be submitted is dependent on the scale and significance of the proposed activity.

Therefore, the real question in this case is whether the Council's determination was made on reasonable grounds because the Applicants' contend in their objection that the Council has been unreasonable. They consider Council staff had sufficient information on other consent files and that their application has been treated differently to other similar applications.

I note here that the Applicants' objection raises a number of matters which are beyond the scope of the decision that I am tasked with making. For that reason I do not propose to traverse those matters in this decision.

Further, I do not consider it necessary for me to repeat or summarise all the evidence in this decision as the Applicants have essentially committed to providing the three pieces of information which the Council officers confirmed at the end of the hearing were, in their view, necessary for the application to be received as being complete. These are:

1. An assessment of how the proposed water take may affect neighbouring bores including WWD 23931 (CMG Limited) – this essentially being item 1 of the section 88 letter;

2. An assessment of whether the proposed water take poses any risk of saline intrusion and whether any 'cease take' triggers are necessary to minimise this risk – this essentially being item 2 of the section 88 letter; and

3. An assessment of the relevant policies and objectives of the Tasman Resource Management Plan (TRMP) – this being item 6 of the section 88 letter.

A large part of the Applicants' objection to being required to provide item 1 (above) is based on the following:

- Previous water permits were granted to take groundwater from bore WWD 8031 and these were for rates greater than what is being sought in this application. The Applicants contend that the Council has previously been satisfied that the adverse effects of taking from this bore were acceptable and the same conclusion should apply for this application;

- Step pump test data for bore WWD 8031 were available to the Council as such a test was undertaken in 1992 for Mr D Freilich who was a previous consent holder to take water from WWD 8031;

- The Council accepted that the pump test undertaken by CMG Limited on its new bore (WWD 23931) concluded that taking water from that bore did not affect WWD 8031 and the Applicants contend that taking water from WWD 8031 will therefore not affect WWD 23931; and

- The Council had all the above information in its possession and no further pump testing or analysis should therefore be required.

However, what the Council staff confirmed to me was that the water allocation landscape in this area has changed since Mr Freilich was granted his water permits to take water from WWD 8031. In particular, Mr Freilich's allocation from WWD 8031 has been transferred to CMG Limited and CMG Limited subsequently moved the location of that allocation via a 'site to site transfer' to WWD 23931. What this means is that any application to take water from WWD 8031 is deemed to be a 'new' application despite the fact that a previous water permit was in place to take water from this bore. Consequently, any new application to take water from WWD 8031 must assess how the taking of water from this bore will affect nearby bores, including WWD 23931, as it forms part of the existing environment when previously it did not (ie. when Mr Freilich's application to take water from WWD 8031 was considered). Further, while the pump test on WWD 23931 concluded that taking water from that bore would not adversely affect WWD 8031, that conclusion was on the basis that water would only be taken from WWD 8031 under the permitted activity take rates. The Applicants are wanting to take water at rates in excess of the permitted activity rates and the Council needs to know whether the taking will affect CMG Limited's ability to take its already

allocated water from WWD 23931. This is entirely reasonable and I agree with the Council staff that such an assessment needs to be included in the Applicant's application. It may well be that the existing pump test information can be used to assess the effect on neighbouring bores but only a suitably qualified and experienced groundwater specialist can assess that. I note here that it is the duty of an applicant to prepare such an assessment, not the Council staff as their role will be to audit that assessment when it is lodged with an application.

As I noted earlier in this decision, the Applicants have agreed to provide the outstanding information and to that end they have engaged the services of a suitably qualified and experienced groundwater consultant to address these matters. Mr McRae's Right of Reply confirms that the Applicants have engaged the services of Mr T Hewitt who will assess the available information and data, and he will also consult with Mr Thomas to ensure that his assessment meets Council staff expectations. If Mr Hewitt concludes that there is insufficient information to determine either of items 1 or 2, he may recommend that further testing be undertaken. Again, I commend the Applicants approach to progressing their application in this regard.

In respect of item 3 above (being item 6 of the section 88 letter), at the end of the hearing Mr Tyson agreed to provide the Applicants with a list of the relevant TRMP provisions which need to be assessed. Mr Tyson provided these to the Applicant following the close of the formal part of the hearing. Mr McRae's Right of Reply addresses these TRMP provisions, however these will need to be included in (or appended to) the amended application.

Mr McRae's Right of Reply outlines how the Applicants consider this objection should be resolved in light of the commitments they have made in engaging Mr Hewitt and also in light of addressing the TRMP provisions in the Reply. The Applicants consider that I should:

1. Decide that their application is, except for some further information, complete and is, or will be, suitable for further consideration;

2. Note that the Applicants have engaged Mr Hewitt to address items 1 and 2; and

3. Note that the Council should formally request the outstanding information in items 1 and 2 under section 92(1) of the RMA.

I can only uphold the objection if I find that the application contains all the necessary information. Notwithstanding the fact that the Applicants have engaged Mr Hewitt to address two of the outstanding matters (items 1 and 2), that work is not finished and until it is provided the application cannot be determined to be complete.

I acknowledge that section 92(1) of the RMA could be used to request the outstanding information, but that option was available to the Council when the application was first lodged. Council staff considered that the missing information was significant enough to warrant the application to be deemed incomplete under section 88 rather than using the provisions of section 92 of the RMA. I questioned Council staff on the use of section 92 versus section 88 and Mr Pigott advised that section 92 is used when relatively minor information is missing, not where fundamental information is missing. In this regard I consider that the outstanding information (items 1 and 2) are significant and that they should be included in an amended application. It is important that the Council deals with such matters in a consistent manner, especially for water permit applications within water management zones which have allocation limits and those limits are close to being reached.

Decision

Pursuant to section 357C(1) of the Resource Management Act 1991 I dismiss the objection lodged by Richard and Christine Johns.

Reasons

The reasons for my decision are contained throughout this document. In summary, the reasons for my decision are as follows:

1. The applicant has not provided a complete assessment of environmental effects. The information that has not been provided is:

    a) An assessment of how the proposed water take may affect neighbouring bores, including WWD 23931 (CMG Limited); and

    b) An assessment of whether the proposed water take poses any risk of saline intrusion and whether any 'cease take' triggers are necessary to minimise this risk.

2. While the Council has the ability to request information under section 92 of the RMA, the outstanding information in this case is fundamental and significant enough that it should be included with an amended application for it to meet the requirements of a complete application under section 88 of the RMA.

3. The Council has returned other similar applications as being incomplete under section 88 of the RMA where they do not include such an assessment of effects. It is important that the Council is consistent in the way it determines completeness of applications, particularly where there may be competing applications for available water allocations.

4. The Applicant has engaged the services of a suitably qualified and experienced groundwater specialist to provide the outstanding information.

Issued this 22nd day of March 2016

Rob Lieffering
Commissioner

Date Confirmed: Chair: