Form 16

Notice to Environment Court of appeal on decision on application concerning resource consent, transfer of water permit or discharge permit, certificate of compliance, or esplanade strip

Sections 121, 127(3), 132(2), 136(4)(b), 137(5)(c), 139(12), and 234(4), Resource Management Act 1991

TO: The Registrar Environment Court PO Box 2069
20 Lichfield Street
CHRISTCHURCH 8013
(christine.mckee@justice.govt.nz)

AND TO: The Respondents

Gore District Council
(planning@goredc.govt.nz)

Southland Regional Council
(services@es.govt.nz)

Landpro
(claire@landpro.co.nz.)

Notice of Appeal

1. The Waimea Plains Landscape Preservation Society Incorporated ("**appellant**") appeal the following decision ("**Decision**") on an application under Section 88 of the Act for resource consent (References LU 2020/012 & APP-20202268) to:

construct a new pedestrian and cycle bridge across the Matāura River and attach new water pipelines linking East Gore with Jacobstown Wells and Hilbre Ave reservoir, and including constructing a temporary causeway and installing temporary piles in the riverbed.

2. The decision was made jointly by the Gore District Council and Southland Regional Council ("**respondents**").

3. The appellant is a submitter on the consent.

4. The appellant received notice of the Decision on 29 April 2021.

5. The land affected is the Matāura River, and Huron Street and River Terrace Road Reserves, Gore, legally described as:

Matāura River margins and riverbed; River Street and River Terrace Road Reserve; Section 80 Blk XVI Town of Gore (RT SL14/120); Pt Block XXVI Town of Gore (Recreational Reserve NZGZ 1983 p 2175)

Right to Appeal

6. The appellant has a right to appeal this decision under section 120 of the Act. The Decision to which this appeal relates is not one of those activities excluded by section 120(1A) or (1B) of the Act.

7. The appellant made a submission on the consents.

8. The appellant is not a trade competitor for the purposes of Section 308D of the Act.

Parts of the Decision Appealed

9. The appellant appeals the decision in its entirety.

10. By way of background:

(a) The proposal by the Gore District Council (as the resource consent applicant) was underpinned by inadequate consultation with affected residents and the Hokonui Rūnanga, as recorded in the decision at [37]:

"...we note that the consultation process with Hokonui Rūnanga was inadequate, something that the Applicant has now acknowledged."

(b) The commissioners for the respondents accepted at [148] that the proposal would have <u>significant adverse visual effects on around nine properties and that no mitigation can be provided to address this</u>.

(c) The respondents landscape architect, Mr Moore, concluded that if another location could be found that reduces [the significant adverse visual] effects it would be a much better outcome and that more work [by the applicant] needed to be done on this [83].

(d) Further at [85], the decision records:

"We asked whether Mr Moore and Mr Pentecost would be able to identify the most affected properties. We subsequently received a joint signed statement from Mr Moore and Mr Pentecost which indicated that they considered the proposed bridge would have significant adverse effects on nine properties in Halton and Huron Streets and that a further approximately nine properties would be subject to effects that were more than minor. We note here that both landscape architects did not think further visual simulations would change their view."

(e) With respect to alternatives at [129]:

"Consideration of alternative options is mandated in the Fourth Schedule Cl 6(1)(a) of the RMA where an activity may result in significant adverse effects on the environment as is the case here. The Assessment of Environmental Effects has to include a description of any possible alternative locations and methods for undertaking the activity."

(f) Further, at [132]:

"In our view, the AEE accompanying the application seems to have originally assumed that the activity did not result in significant adverse effects on the environment and the assessment of alternatives only appears to have been undertaken "*in order to satisfy the concerns raised by nearby residents regarding the proposal*"4. This is despite the Landscape and Visual Impact Assessment prepared by Align rating the adverse landscape and visual effects from viewpoint 3 as high. While this perhaps highlights one of the problems encountered between the landscape point scale system and the RMA terminology, we consider a rating of high for adverse landscape and visual effects would equate to significant adverse effects, something later confirmed by both Mr Pentecost and Mr Moore at the hearing."

(g) And at [133]:

"In our view, this lack of recognition in the AEE of significant adverse effects led to the assessment of alternatives failing to consider the key visual effect issue. While this was then partially addressed in the subsequent evidence of Mr Pentecost, the alternatives considered by him are somewhat different from those in the AEE."

(h) With respect to the relevance of both the land use and utilities chapters of the Gore District Plan [87]:

"Mr Bryce also said there could be a danger in only considering the utilities chapter and a decision could become open to challenge if this was done."

(i) At [92]:

"In response to questions, Mr Bryce said that it was the view residents had against the enhanced backdrop of the Hokonui Hills which was of issue and that it would be different if that view was of an industrial area."

(j) At [135]:

"We consider Mr Bryce and Mr Moore were correct in concluding that due to the potentially significant adverse effects on immediate residents that this warranted further consideration of alternative sites. The requirement in clause 6(1)(a) of the Fourth Schedule is that the assessment of the activity's effects on the environment must include a description of any possible alternative locations or methods for undertaking the activity where the activity will result in any significant adverse effect on the environment [emphasis added]. In our view it is simply common sense that any such description would include consideration of the significant adverse effect on the environment concerned."

(k) At [136]:

"...we do not agree that a robust assessment of alternatives was initially undertaken. For the reasons outlined above, we consider the application itself failed to properly address the issue of alternatives required by cl 6(1)(a) of the Fourth Schedule of the RMA. This, in our view, was because the MCA failed to include landscape and visual amenity as a criterion and was therefore somewhat flawed."

(l) At [191]:

"Turning to our conclusions, we have found that the actual and potential effects on the environment associated with the proposal will for the most part be less than minor, however in terms of visual amenity for properties in the Huron Street area they will be more than minor and indeed in some cases significant."

(m) Significantly, at [193] the commissioners concluded that:

"We have found this a very difficult application upon which to reach a decision. On the one hand there are clearly some significant visual effects associated with the bridge on a small number of properties in the Huron Street area which are simply unable to be mitigated. On the other hand, there are significant benefits to the broader Gore community in terms of an improved and upgraded water supply and an enhanced walkway and cycleway network which improves connectivity and provides opportunities for non-car related trips. In the end we have reached a conclusion that the wider benefits outweigh the effects on those residential properties concerned, however it is a close call."

(n) And at [194]:

"As maybe apparent from our discussion, we consider the initial assessment of alternatives was not done particularly well and a more thorough assessment may have resulted in a different outcome."

(o) At [143]:

"In terms of the landscape and visual effects, we preferred Mr Moore's conclusions on this option which were that it was further away from houses and similar in terms of landscape character effects in how it fitted into the landscape and that it would have lower visual amenity effects."

(p) With respect to the loss of privacy on 36 Huron Street, Gore at [151]

"...we did not consider effects on privacy from a bridge would be any worse than the current situation".

Reasons for the appeal

11. The reasons for the appeal include that the Commissioner's erred:

(a) by giving significant and critical regard to positive effects that cannot arise from the proposal, namely the wider pedestrian and cycle network components including connecting pathways, that were "not within the scope of the application" [41]. The new cycle and walking paths do not form part of the application, nor are they in place, however the "significant positive effects" arising from this *hypothetical* connectivity for walking and cycling were applied to offset the *actual* significant adverse visual effects on a number of residential properties in the proximity of the bridge.

(b) in acknowledging that the effects of the activity will be significant, allowing a process that enabled the applicant to plug the deficiencies in the Application for Environmental Effects (and lodged and subsequently notified) through an unfair and prejudicial process by way of evidence being presented with the right-of-reply [139], whereby the application should have been refused in part due to the failure to meet Clause 6 (1) (b) of the Fourth Schedule to the RMA where no landscape or visual impact input was sought for the alternatives [49]. The process removed the ability for the public to provide comment and feedback on the alternatives and the merits of the options put forward, circumventing the public process that is directed under the RMA for notified consents.

(c) in placing undue weight on the statement from the applicant that bridges in alternative locations "would be unlikely to qualify for Waka Kotahi funding" [46] and [99].

(d) failing to consider the effects of the raising of the Matāura River stop banks by 500mm and the increased effect this will have on the visual impacts

of the bridge [76], particularly given the finding at [147] that:

"The primary dominance is driven in our view by the 32m high mast positioned on the western bank and its associated spiral strand cables rather than simply the bridge structure itself although this too does have a major impact. Also of importance in this context is the currently unimpeded view of the Hokonui Hills and up the Matāura River valley within which the proposed bridge will sit for some of those affected properties. Both the Hokonui Hills and the Matāura River are considered outstanding landscape features within the District Plan."

(e) failed to consider the cumulative effects arising from the addition of lighting on the bridge on the already "significant adverse visual effects".

(f) gave undue weight to the purported positive effects of the proposal and relied on a reverse-engineered evaluation of alternatives for a proposal that has been presented from the outset by the applicant as a *fait accompli*. (The *fait accompli* also demonstrated by the applicants purchase of land adjacent to the river and contiguous to the proposed bridge site in early to mid 2020).

(g) in disregarding the precedent effect [188] that has been established by the grant of consent, whereby a significant structure has been offset against more favourable planning provisions relating to utilities. The decision sets a precedent that any other bridge over the Mataura River (an ONL and ONF) simply needs to incorporate a utility for it to be viewed more favourably in an assessment.

(h) in failing to consider the objectives and policies in Chapter 4 (Land Use Activities) of the Gore District Plan and rather considering only what they considered as the key Utilities provisions under Chapter 7.

(i) in concluding that the proposal "is not contrary to or inconsistent with" the relevant objectives and policies of the District Plan and the Regional Plans [191].

(j) in failing to give proper regard to section 6, 7 and 8 of the RMA.

(k) in forming an overall conclusion that the the environment overall would be better served by a granting of consent and in this context, finding it meets the requirements of Part 2 of the RMA [194].

(l) by giving insufficient regard to the loss of privacy on the residence at 36 Huron Street, Gore, and other residences.

(m) in concluding that "….there is no particular procedural issue at play here in terms of the consultation process followed by the applicant" [37].

Relief sought

12. The appellant seeks:

(a) the refusal of the application; or

(b) Any other similar, consequential, or other relief as is necessary to address the issues raised in the appellant's appeal, including the advancement of an alternative location or method for undertaking the activity.

(c) Costs.

Alternative dispute resolution

13. The appellant agrees to participate in mediation or other alternative dispute resolution of the proceeding.

Attachments

14. The following documents are attached to this notice.

(a) a copy of the Decision (which includes the application); and

(b) a copy of the appellant's submission.

(c) Proof of fee payment.

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Signature of appellant
(*or* person authorised to sign on behalf of appellant)

David J. GRAY – CHAIRMAN.

20 May 2021
Date

Address for service of appellant: 33b Main Street, Gore
Telephone: 03 208 9385
Fax/email: admin@abgraylaw.co.nz
Contact person: David J Gray

Note to appellant

You may use this form to lodge an appeal.
Your right to appeal may be limited by the trade competition provisions in Part 11A of the Resource Management Act 1991.
You must lodge the original and 1 copy of this notice with the Environment Court within 15 working days of receiving notice of the decision. The notice must be signed by you or on your behalf. You must pay the filing fee required by regulation 35 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.
You must serve a copy of this notice on the authority that made the decision within 15 working days of receiving notice of the decision.
You must also serve a copy of this notice on the applicant or consent holder, on every person who made a submission on the application or review of consent conditions, and (if the decision relates to a restricted coastal activity) on the Minister of Conservation within 5 working days of lodging it with the Environment Court.
Within 10 working days after lodging this notice, you must give written notice to the Registrar of the Environment Court of the name, address, and date of service for each person served with this notice.
However, you may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see* form 38).

Advice to recipients of copy of notice

How to become party to proceedings
You may be a party to the appeal if,—

(a) within 15 working days after the period for lodging a notice of appeal ends, you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
(b) within 20 working days after the period for lodging a notice of appeal ends, you serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.
You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (*see* form 38).

**How to obtain copies of documents relating to appeal*

The copy of this notice served on you does not attach a copy of the relevant application (*or* submission) and (*or* or) the relevant decision (*or* part of the decision). These documents may be obtained, on request, from the appellant.

*Delete this paragraph if these documents are attached to copies of the notice served on other persons.

Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

Schedule 1 form 16 heading: amended, on 1 November 2010, by regulation 19(1) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2010 (SR 2010/279).

Schedule 1 form 16: amended, on 3 March 2015, by regulation 10 of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2014 (LI 2014/386).

Schedule 1 form 16: amended, on 10 October 2013, by regulation 4 of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2013 (SR 2013/385).

Schedule 1 form 16: amended, on 1 November 2010, by regulation 19(1) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2010 (SR 2010/279).

Schedule 1 form 16: amended, on 1 June 2006, by regulation 10(4) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2006 (SR 2006/99).

Schedule 1 form 16: amended, on 1 June 2006, by regulation 10(8)(b) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2006 (SR 2006/99).