Directions/Minutes of Commissioner #2
LU 5959 Land Use Consent Application – Soul Friend Pet Cremations

1. In response to Minute #1 dated 30 August 2021, I received correspondence from Ms A Davidson, legal counsel for the applicant Soul Friend Pet Cremations (the Applicant) dated 10 Sept 2021 (see Attachment 1). The submissions of Ms Davidson, claim that I made an error in delaying the setting down of a hearing for the land use application under section 91 of the Resource Management Act 1991(RMA), setting out the reasons for reaching that conclusion and referencing case law from superior and other courts that I was not previously aware of. I have sought legal advice as to this matter (see Attachment 2). Reflecting the submissions of Ms Davidson and the legal advice from Mr Jessen, I concur that in my initial Minute #1 I did not correctly interpret the applicability of section 91 of the RMA. As such, the section 91 of the RMA direction in Minute #1 is revoked and the land use application by the Applicant may proceed to hearing.

2. The hearing is scheduled to commence at **9.00am Tuesday 19 October 2021** at the PNCC Council Chamber, First Floor, Civic Administration Building, 32 The Square, Palmerston North. At this stage the hearing is scheduled for one day. PNCC will separately issue a formal hearing notice to the parties. This notice will include details of how the hearing will be conducted relative to the New Zealand Government's requirements as to the applicable Alert Level protocols that will be in place at that time.

3. The Commissioner notes that section 103B, requires that a consent authority must provide the section 42A reports to the applicant and submitters who wish to be heard, at least 15 working days prior to the hearing. In addition, section 103B requires the applicant to provide the consent authority with briefs of evidence 10 working days before the hearing, and for submitters calling expert evidence to similarly provide that evidence 5 working days before the hearing. The Commissioner further notes that the consent authority must give written or electronic notice to the parties, that the Applicant's evidence and any submitter expert evidence is available at the consent authority's offices. In relation to his last matter, I request that PNCC send copies of any material filed to the parties by email.

4. Accordingly; pursuant to section 103B(2) of the RMA, the Commissioner directs that the PNCC section 42A report be provided to the parties, by way of email, no later than **3pm on Tuesday 28 September 2021**.

5. Pursuant to section 103B(3) of the RMA, the Commissioner directs that the Applicant is to provide written briefs of all their evidence to Ms Susana Figlioli, Democracy & Governance Administrator at PNCC, by way of email, no later than **3pm on Tuesday 5 October 2021**.

6. The Commissioner requests that as soon as practicable following receipt of any such evidence received pursuant to Direction [5], PNCC provides a copy to all other parties to these proceedings by way of email.

7. Pursuant to section 103B(4) of the RMA, the Commissioner directs that if any person who has made a submission intends to present expert evidence at the hearing, including expert planning evidence, then that party is to provide a written brief of that expert evidence to Ms Susana Figlioli, Democracy & Governance Administrator at PNCC, by way of email, no later than **3pm on Tuesday 12 October 2021**.

8. The Commissioner requests that as soon as practicable following receipt of any such evidence received pursuant to Direction [7], PNCC provides a copy to all other parties to these proceedings by way of email.

9. In terms of Directions [5] and [7] the reports and evidence should be provided to PNCC electronically by email. Hard copies of the evidence should only be provided on request.

10. Pursuant to s41C(1) of the RMA, the Commissioner directs that in respect of expert evidence pre-circulated in accordance with these Directions, the hearing will be conducted in the following manner:

- The section 42A report(s) will be taken as read;
- The Applicant that has provided the pre-circulated evidence is to call the witness in person;
- The witness should be introduced and asked to confirm his or her qualifications and experience;
- The witness should be asked to confirm the matters of fact and opinion contained in the brief of evidence;
- The witness will then be given an opportunity to draw to the attention of the Commissioner the key points in the brief. No new evidence shall be introduced, unless it is specifically in response to matters raised in other pre-circulated briefs of evidence supplied by another party – in such cases the new evidence shall be presented in written form as an Addendum to the primary brief of evidence and it may be verbally presented by the witness. If there is any variation between what the witness says and what is in the brief of evidence, the Commissioner will assume that the written brief is the evidence unless the content of the brief is specifically amended by the witness;
- The witness may then be questioned by the Commissioner.

11. Given the uncertainties around the COVID-19 Alert Levels and the restrictions that may be in place, I request that non-expert evidence (including legal submissions) should be emailed to Ms Susana Figlioli, Democracy & Governance Administrator at PNCC, no later than **3pm on Friday 15 October 2021,** to enable these to be provided to the hearing participants in advance. This non-expert evidence and/or legal submissions may be read aloud on the day that the relevant party appears at the hearing.

12. The Commissioner requests that as soon as practicable following receipt of any such evidence or legal submissions received pursuant to Direction [11], PNCC provides a copy to all other parties to these proceedings by way of email.

13. The hearing will be conducted in a manner which is appropriate and fair, but without unnecessary formality. Subject to adequate notice, the Commissioner will receive written or spoken evidence in Te Reo Māori. If any party wishes to present evidence in Te Reo Māori, they are requested to advise through Ms Susana Figlioli, Democracy & Governance Administrator at PNCC, no later than **3pm on Friday 24 September 2021**.

14. The Commissioner also requests that all parties (the PNCC reporting officer/s, Soul Friend Pet Cremations as the Applicant and any submitters) calling expert witnesses liaise amongst themselves in order to facilitate their respective experts conferencing on matters relevant to their specific areas of expertise prior to the preparation of their reports or evidence (including any applicable conditions of consent) and through to the commencement of the hearing. The aim of the conferencing should be to identify areas of agreement and disagreement which can then be noted in the reports and evidence. The Commissioner will attempt to focus on the issues of contention during the hearing and in deliberations thereafter and so the assistance of the parties to clearly identify areas of expert agreement and disagreement in this manner will be greatly appreciated.

15. Any correspondence to the Commissioner should be directed through Ms Susana Figlioli, Democracy & Governance Administrator at PNCC at susana.figlioli@pncc.govt.nz

Mark St.Clair
13 September 2021

MATTHEW CASEY
QUEEN'S COUNSEL

Attachment 1

10 September 2021

Planning Services
Palmerston North City Council

By email: susana.figlioli@pncc.govt.nz
phillip@stradegy.co.nz

LU5959 - Soul Friends Resource Consent Application – Response to Minute of Commissioner

1. I have been instructed by Soul Friends Pet Cremations (**Applicant**), in relation to the recent direction of Mr St Clair, purporting to defer the hearing of the above application under s 91 Resource Management Act 1991 (**RMA**). For the reasons set out below, there is no jurisdiction to defer the hearing under s 91 and I invite the Council to set the application down for hearing as soon as possible.

2. The power under s 91 is only available where the two prerequisites in s 91(2) are met:

   (a) other resource consents under this Act will also be required in respect of the proposal to which the application relates; and

   (b) it is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any 1 or more of those other resource consents be made before proceeding further.

3. In this case, the applicant has been clear from the outset that a regional air discharge consent is required in respect of the proposal, and the first prerequisite is satisfied. The second prerequisite requires that it be appropriate for a better understanding of the proposal for the related applications for consent to be "made". In this case, the application for air discharge consent has already been made to Horizons Regional Council and is currently being processed. There are no outstanding applications yet to be made and therefore the second prerequisite is not satisfied. The power to defer under s 91 has been wrongly exercised.

4. Under s 103A(3), the hearing for this limited notified application is required to be completed by 29 September 2021, being 45 working days from the close of submissions. Section 88E(2)(a) makes it clear that the processing clock is on hold only between the making of a s 91 direction and the time the additional application is received by the consent authority. As the Regional Council had already received the application for air discharge before the Commissioner's purported direction, no time periods are excluded and the working days are still running.

5. I further note that there is no provision to keep the land use consent on hold to allow for a later joint hearing with the Regional Council. Under s 102 RMA, a joint hearing is only required if both consent authorities have "decided to hear the applications". The Regional Council has not yet made a determination on notification and has therefore not decided whether a hearing on the air discharge application is required. Such a decision will not be made before the hearing on the land use consent is required to have been completed. As the High Court held in *Burnie v Bay of Plenty Regional Council* [2015] 2 NZLR 541 at [50], "*There is nothing in the RMA which requires the applicant to bring the consents at the same time thus triggering s 102".* The High Court in that case expressed no difficulty with evidence that *"[A] vast number of proposals require consents. … It is common for regional and district consents … [to be] sought separately at different points in time"* (at [48]).

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6. It is unfortunate that the Commissioner's misunderstanding now means it is not possible for the Council to comply with its statutory obligations in terms of the timeframe for completion of the hearing. The applicant has been clear from the outset that this application is of critical importance to the business and there is a real prospect of it being unable to continue if certainty on the land use application is not achieved without delay. I have **enclosed** a further copy of the applicant's response when the issue of s 91 was first raised, which clearly sets out the importance of the Council proceeding to hearing in a timely fashion. The applicant is entitled to expect the Council and the Commissioner to comply with the requirements of the RMA, including the obligation to avoid unreasonable delay.

7. Should there be any residual concern about the appropriateness of considering the land use consents separately from the air discharge consent, I refer you to the decision in *Zwart v Gisborne District Council* [2014] NZEnvC 226, where the Environment Court addressed, and granted, the land use aspects of a funeral parlour / crematorium on the basis that the air discharge consent for the latter would be considered later.

8. I would be grateful if you could confirm that the s 91 direction is revoked and advise a hearing date, by close of business Monday. The hearing should be scheduled no later than mid-October 2021.

9. If the Council considers the s 91 direction is valid, please let me know, so that my client can apply for an urgent order from the Environment Court. When doing so, please also provide evidence of the delegation of the s 91 power to the Commissioner.

10. The priority for the applicant is to have its application heard as soon as possible, and would obviously prefer to avoid having to involve the Environment Court. To that end, I am happy to discuss this matter by phone if anything in this letter is unclear. I look forward to hearing from you as soon as possible.

Yours faithfully

Asher Davidson
Barrister
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Email: asher@casey.co.nz

Asher Davidson

From: Manderson, Tabitha <tabitha.manderson@wsp.com>
Sent: Friday, 10 September 2021 12:47 PM
To: Asher Davidson
Subject: FW: Soul Friends - Pet Crematorium. Consideration of deferral under section 91

Tabitha Manderson
Principal Planner

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From: Manderson, Tabitha
Sent: Wednesday, August 25, 2021 3:36 PM
To: Phillip Hindrup <Phillip@stradegy.co.nz>
Cc: 'Simon Mori' <simon.mori@pncc.govt.nz>; Kelly Standish <kelly.standish@pncc.govt.nz>; Jasmine Mitchell <Jasmine.Mitchell@horizons.govt.nz>; Dowse, Samantha <Samantha.Dowse@wsp.com>
Subject: RE: Soul Friends - Pet Crematorium. Consideration of deferral under section 91

Hi Phil

Thank you for the opportunity to respond to your email of 23 August. We have collated a response to each of the three matters. I've set out some of the history of the applications including timing as background to help with the overall understanding.

You have asked for a response in relation to resource consenting timeframes and risks for the applicant if PNCC should determine that a hearing should be deferred under s91. In short, the continued financial viability of our clients business hinges on a timely landuse consent decision from PNCC. There is no "Plan-B" for Simone's business and any delays to the resource consenting process presents a serious possibility of the business failing.

As noted in the application the lease arrangement for the current crematoria expires in March 2022. Our client therefore needs to secure a new site from which to operate her business without delay. The crematoria needs a suitable building in which to be housed and Simone has spent considerable time and money coming up with a fit for purpose building which is in keeping with the aims of the business and the existing environment. Construction timeframes for the new building mean that Simone's ability to continue to operate beyond March 2022 is increasingly at risk. Simone states that this was discussed when you attended you site visit on (17th April) and that you appeared to be understanding of the urgency.

Ultimately our client is looking for certainty regarding the PNCC landuse consent matters as soon as possible. De-coupling the PNCC and Horizons consents allows our client to move forward with more certainty within a timeframe that will potentially allow her to plan and coordinate construction to occur in advance of March 2022 (assuming of course that landuse consent is granted by PNCC). Furthermore the risk of potentially not obtaining an air discharge consent from Horizons sits squarely with our client and Simone understands this possibility.

There is now considerable pressure and risk to the ongoing viability of the business as it is unlikely construction would be able to commence any time soon. Simone has clarified with Totalspan last evening that even if things go

well from here on out, due to increasing timber shortages and more pressure on New Zealand Steel to provide for steel framing, a build could not be completed now until mid next year.

The business provides an essential service and is a permitted business service that can operate under Alert Level-4. This was confirmed during the Covid-19 lockdown in 2020. As an aside for a time during the 2020 lockdown, due to a mechanical breakdown Simone had to transport pets to crematoria outside of the Region. While this can be done for short periods it obviously results in considerable strain from a personal and financial perspective. All surplus will be drained from the business within 3 months leaving the business needing further borrowing.

Related to the paragraphs above is the difference in timing of the applications to PNCC and HRC. As you will have noted in the applications prepared, a number of technical assessments were commissioned by the applicant. This included in some cases testing to support the technical assessments. In particular was the air testing at the existing site to support the air quality modelling undertaken by PDP for the proposed crematoria site. There were delays in the testing being undertaken which led to delays in the final air quality report being produced. As such, the result was that the respective applications to PNCC and HRCC were lodged separately. As explained above due to the pressure on timeframes for the business to secure a new site it was felt that it was better to proceed with the PNCC application to reduce risk to the client and secure a site from which to operate.

In relation to the Horizons s92 request, we have prepared a response to all the technical issues and are currently waiting for feedback from iwi groups. Our intention is to provide the technical response to Horizons in the next day or two and continue to reach out to the additional iwi groups. I would like to emphasize that the technical air quality assessments from PDP have concluded that the actual and potential effects on air quality for all receptors are less than minor.

Finally, in relation to my opinion in relation to s91 matters. The first point I note in relation to s91 is that this section relates specifically to the "deferral pending application for additional consents". I would point out that an application has been made to both Councils and that there are no "pending applications" outstanding. I have discussed above some of the history as to why timing of the applications was not as aligned as would have been liked, however both applications acknowledged that consent was required from the other authority and would be sought; and as such met the requirements of s88.

I note the test of "reasonable grounds" under which s91 is applied and upon which a consent authority may determine not to proceed to the hearing of an application. I would argue in this instance that there are no reasonable grounds to invoke s91 and defer a consent hearing as the "nature of the proposal" has been thoroughly investigated and documented and is consequently well understood.

Considering the wording of s91(1)(b) I note that the test is "*for the purpose of better understanding the nature of the proposa*l". I note here the reference to "*nature of the proposal"* and not *"effects"*. In this case I consider that the nature of the proposal is very clear and it has been well described and documented within the respective consent applications and supporting technical assessments. There is no doubt or ambiguity as to what the nature of the proposal is.

Ironically it is the difference in level of effect that was one of the main factors in me being professionally comfortable that the applications could be de-coupled and progressed separate from one another. The technical advice we have been provided is that, with suitable management and operation, the air quality effects that would result (in the opinion of the technical experts engaged by the applicant) sit comfortably within the less than minor envelope in relation to all the relevant air quality standards.

While I recognize that further cultural views are to be sought in relation to the consent sought for discharge to air permit and that the Regional Council has yet to make it's notification decision I don't see this as a matter that should delay the timely hearing of the landuse consent. Our client has indicated that she will be seeking legal advice in and around this particular issue.

As always happy to discuss and thank you again for the opportunity to respond.

Kind regards

Tabitha

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Principal Planner

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From: Phillip Hindrup <Phillip@stradegy.co.nz>
Sent: Monday, August 23, 2021 5:24 PM
To: Manderson, Tabitha <tabitha.manderson@wsp.com>
Cc: 'Simon Mori' <simon.mori@pncc.govt.nz>; Kelly Standish <kelly.standish@pncc.govt.nz>; Jasmine Mitchell <Jasmine.Mitchell@horizons.govt.nz>
Subject: Soul Friends - Pet Crematorium. Consideration of deferral under section 91

Evening Tabitha

As discussed Commissioner Mark St Clair has posed the question to PNCC officers of whether the processing of the application should be deferred under section 91 now that an application has been made with Horizons to discharge contaminants from the crematorium to air. This would be to allow for the hearing and consideration of both applications jointly.

We have discussed this matter internally, and given the interrelatedness of the applications, and the fact that some of the submissions have raised the discharge of pollutants as a concern, we do believe there is merit in considering the applications jointly.

We do however wish to offer the applicant the opportunity to respond and provide their views on this matter. In doing so it would be helpful if you could outline timing issues/risks for your client, an update on the application with Horizons (specifically the s92 response) and any other material views you may have. We will then put these in front of the commissioner for his determination.

If you have any further questions please let me know.

Regards

PHIL HINDRUP BRP
PRINCIPAL PLANNER | DIRECTOR

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MEMORANDUM

TO: Mark St Clair

FROM: Nicholas Jessen

DATE: 13 September 2021

SUBJECT: LU 5959 Land Use Consent Application – Soul Friend Pet Cremations

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1. The Independent Commissioner seeks advice in relation to a procedural dispute concerning a direction issued by the Commissioner on resource consent application LU 5959 by Minute dated 30 August 2021 ("the Minute").

2. In reliance on s 91(2) of the Resource Management Act 1991 (RMA), and *Affco New Zealand Limited v The Far North District Council* the Commissioner directed that the application *"… should not proceed to hearing at this time"*. The rationale given in the minute indicates that the 'readiness' of the consent for hearing may be determined by the regional council separately deciding (under s 100) whether to hold a hearing for the regional consent(s), which would then raise the prospect of a joint hearing between the two consent authorities under s 102.

3. On 10 September 2021, Counsel for the Applicant ("Soul Friend") wrote to the Council ("the Letter") arguing that the Commissioner's direction does not follow correct procedure under the RMA.

4. In preparing this advice, we have reviewed the Minute and the Letter (and attached emails) in the context of the relevant law on the topic. We attempt to avoid lengthy reasoning, to allow the Commissioner to respond to the issue under urgency.

5. In summary, we consider that the Council cannot rely on s 91 to defer from proceeding to a hearing. We agree with counsel for Soul Friend that the statutory prerequisites for a deferral under s 91 are not met here. We understand that all resource consent applications that are required in respect of the proposal have been "*made*" in the sense that they have been lodged with the relevant consent authority, in this case the regional council. We agree that s 91 cannot be relied on where an application has already been 'made' in this way.

6. Paragraph 5 of the Letter addresses the rationale for the Commissioner's Minute a, saying "*there is no provision to keep the land use consent on hold to allow for a later joint hearing with the Regional Council*", in reliance on the High Court's decision in *Burnie v Bay of Plenty Regional Council*. We **attach** a copy of this decision.

7. Burnie was a judicial review proceeding, in which the applicant sought to restrain the consent authority from taking further procedural steps, in reliance on *Affco New Zealand Limited v The Far North District Council,* on the basis that sound resource management principles 'required' joint consideration of applications where more than one consent authority is involved. In

dismissing the applicant's case, High Court first distinguishes *Affco* (citing different factual circumstances), before holding that:

> There is nothing in the RMA which requires the applicant to bring the consents at the same time thus triggering s 102. Furthermore, s 91 may not be used to bring it into play where a decision not to notify has been made. For these reasons I am not satisfied that the Burnie family has established that there is a real contest and a reasonable possibility of success in this argument. I am thus not satisfied it is necessary to restrain any steps taken by the Regional Council and the RDC in respect of the RDC application.

8. Although it remains appropriate to observe *good practice* in these matters, and *Affco* remains good authority for that, it is not direct authority as to proper interpretation of s 91 and when 'deferral' may be exercised. In that space, the High Court observation in *Burnie* is accurate insofar as it observes there is no specific statutory requirement to bring consent applications to different consent authorities at the same time. Further, *Burnie* is appropriate authority for the proposition that s 91 does not allow a 'deferral' for the reason of 'bringing into play' the possibility of a joint hearing under s 102.

9. We note that the obligation under s 102 for a joint hearing depends upon a decision first being made by the regional council to hold a hearing. While it may make that decision at any time, it is perhaps inappropriate for another consent authority to pause the discharge of its consenting functions while waiting for that independent determination to be made.

10. In this instance, while we generally agree with the applicant's legal analysis, the procedure that the applicant has adopted takes advantage of a possible loophole in the RMA and avoids a joint hearing under s 102. The potential risk to the Applicant from adopting this procedure is that potential efficiencies of a joint hearing under s 102 will not be achieved and effects of the one proposal may not comprehensively be considered. The regional council and territorial authority may be less certain as to the effects management measures taken by the other in areas of overlapping jurisdiction and may be required to take a more conservative approach to both the exercise of discretion under s 104 and in the imposition of conditions.

11. The Letter contends that any such residual concerns about the appropriateness of considering the land use and air discharge consents separately can be allayed by considering that the Court did just that in *Zwart v Gisborne District Council* [2014] NZEnvC 226. There, however, the Court confirmed the 'general view' in *Affco*, that all necessary resource consents should be sought at the same time so that the effects of any one proposal can be comprehensively considered, before explaining that it was not an 'invariable' rule and that it did not apply in that case because the land use consent was exercisable without the air discharge consent. We **attach** at copy of the decision. At [19] the Court held:

> There is certainly a general view that all necessary resource consents should be sought at the same time, so that the effects of any one proposal can be comprehensively considered (see, eg: *Affco NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224). But that need not invariably be so if, for instance, a proposal can be broken down into discrete and independently operable parts, and a reasonable assessment can be made of one or some of those parts without having to consider overlapping or cumulative effects. Here, while para (1)(a) applies, in that (at least) one other resource consent will be required to give the proposal full effect by operating the crematorium, the funeral home could operate independently and without the cremator being installed. As Mr Gedye will apparently be unable to use the cremator at the cemetery, he would, he says, be required to take bodies to Hastings to be cremated unless and until he has

access to his own cremator. That would certainly be time consuming and inconvenient for him, and not, we imagine, something that grieving families would welcome.

12. Here, it is implicit in the purported exercise of the s 91 power that the Commissioner considers that he requires a better understanding of the nature of the proposal, and that the content of the regional consent applications may be relevant to address that. Although we agree with the applicant that deferral under s 91 is not an available tool to obtain that understanding, other powers can be relied upon to gain a better understanding about the nature of the proposal – for example the power to require further information under s 92 RMA. The consent applications may also be voluntarily provided by the Applicant to the Commissioner.

CR LAW

Nicholas Jessen
Partner
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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2014-463-000096
[2014] NZHC 2807

BETWEEN	GEOFFREY RAYMOND BURNIE, ESTHER MARGARET BURNIE and DAVID MAVITTY SIMPSON as Trustees of the BURNIE FAMILY TRUST Applicant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
	RAYMOND KEITH FLEMING Second Respondent
	ROTORUA DISTRICT COUNCIL Third Respondent

Hearing:	(On the papers)
Appearances:	David Simpson for the Applicant Paul Cooney for the First Respondent David Rendall for the Second Respondent Deborah Riley for the Third Respondent
Judgement:	12 November 2014

RESERVED JUDGMENT OF MOORE J

This judgment was delivered by on 12 November 2014 at 4:30pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Contents

Introduction

[1] Raymond Keith Fleming, the second respondent, applied to the Bay of Plenty Regional Council ("the Regional Council") for a resource consent in December 2012 seeking consents for a variety of activities in order for him to operate a construction and demolition landfill at his property situated at 62 Te Manu Road, Rotorua.

[2] The consent application was granted. The Burnie Family Trust ("the Burnie Trust") has applied to have this decision judicially reviewed. That proceeding is set down for hearing early next year.

[3] After the Regional Council granted the resource consent Mr Fleming made a Land Use Consent application to the Rotorua District Council ("the RDC"). That application has been set down for hearing in late November.

[4] The current application seeks interim relief to restrain the Regional Council and the RDC from taking any further steps in relation to the resource consent application before the RDC until the substantive review proceeding is heard.

Background

[5] The Regional Council, as with regional councils elsewhere in New Zealand, is responsible for controlling issues around water, the discharge of contaminants to land, air or water, soil conservation, the enhancement of eco-systems and water bodies, water quality and controlling natural hazards and hazardous substances. The Regional Council is also responsible for preparing the regional plans which regulate these activities and for the issuing of resource consents within the context of their functions under the Resource Management Act 1991 ("RMA").

[6] Mr Fleming's resource consent application to the Regional Council related to specific activities associated with the operation of a construction and demolition landfill. In particular he sought consents for earthworks necessary for the formation of the landfill, the discharge of construction and demolition fill and contaminants to land and the discharge of contaminated storm water to land where it enters the water.

[7] It seems Mr Fleming's application was so he could regularise previously unauthorised activities which had been taking place on his property which involved its use as a fill site. He had been dumping various types of fill material and construction waste without having the necessary resource consents from the Regional Council. He needed those consents because the activity involved unauthorised discharges to the land and air.

[8] At Mr Fleming's request one of the Regional Council's consents officers visited the site and discussed with him what was necessary for him to comply with the Regional Council's requirements so he could lawfully operate the site as a landfill in the future.

[9] After the site visit the consents officer wrote to Mr Fleming setting out what he needed to do and recommended he should engage an environmental consultant to help him prepare a site management plan for the proposal.

[10] The issue was complicated to some extent by the necessity to also engage the local district council, the Rotorua District Council ("RDC"). As a district council, the RDC is primarily responsible for controlling the effects of land use and the effects of activities on the surface of lakes and rivers. Mr Fleming separately applied for consents relating to those matters for which the RDC had specific responsibility such as the stock piling of reusable material, the discharge of wood products to land and earthworks. These also included issues such as traffic and access, noise, dust, etc.

[11] Discussions took place between the Regional Council and RDC about whether any of the applications engaging the RDC should be considered in tandem with the issues relevant to Mr Fleming's application to the Regional Council with the possibility of having a joint hearing process if public notification was required. The Regional Council's consents officer was of the opinion that a decision on this issue was premature given that at that time an application from Mr Fleming had yet to be received and an assessment of the potential effects yet to be undertaken.

[12] The engineering firm, Tonkin & Taylor, undertook preliminary site assessments and produced a site inspection report which made recommendations for the site to ensure it met the Ministry for the Environment's "Guide to Managing Cleanfills". That report also concluded the current landfill operation posed a negligible risk to human health and some risk to the environment. The report recommended that "non standard commercial and demolition material should be removed or adequately covered to prevent leaching and discharges to the air".

[13] On 17 December 2012, the planner instructed by Mr Fleming to prepare the application, lodged the resource consent. The consents officer checked it to ensure all the relevant consents had been applied for. He was aware that other consents were required from the RDC, that these had not yet been applied for. He was of the view that the activities which fell for consideration by the Regional Council could be fully assessed without considering the RDC's requirements. The consents officer considered whether or not public notification was required. He decided it was not because the applicant had not requested public notification, there was no rule or national environmental standard that required notification under s 95A(2)(c) of the RMA and the applicant had not refused or failed to provide further information in response to a request in terms of s 95C of the RMA. He also considered that the effects of the environment could be managed with appropriate conditions and would be less than minor and, on that basis, considered that public notification was not required under s 95A of the RMA.

[14] He then considered whether the application should be limited notified under s 95B of the RMA. This requires the identification of any affected persons in relation to an activity if the activity's adverse effects on the people are minor or more than minor. Hardly surprisingly, written approval of the application was received from the Fleming family who owned the land. However the consents officer considered that adjacent landowners to the site were not "affected persons" because any effects would be confined within the property's boundaries and any potential effects beyond the boundary would not be more than minor.

[15] The consents officer knew that the Burnie Trust family home was about a kilometre from the landfill site and about 140 metres from the access way at its closest point.

[16] On this basis he decided that there were no "affected persons" in relation to the activities for which consents were being sought and no requirement to notify anyone of the resource consent application filed by Mr Fleming. He recommended to his supervisor, the Regional Council's Consents Manager, the application should be processed on a non-notified basis. She agreed with him and decided to process the application on a non-notified basis.

[17] The resource consent application was granted on 5 March 2013.

[18] On 3 June 2014 the Burnie Trust brought the application to judicially review the Regional Council's decision to grant the non-notified resource consent.

[19] The Burnie Trust owns an 8 hectare property situated at 54 Te Manu Road. The property is not immediately adjacent to the proposed landfill site but the unsealed access road runs along the southern boundary of the Trust's property. The Trust's house, occupied by members of the Burnie family, is located approximately one kilometre from the landfill site which they say is about 60 metres from the Ngongotaha Stream, a natural feature which has been identified as being "a nationally significant habitat and fishery values for trout".[1] The land which is the subject of the consent is within the catchment of both the Ngongotaha Stream and the Utuhina catchment.

[20] The first the Burnie Trust knew of Mr Fleming's application to the Regional Council was when Mr Fleming approached them in October 2013 with a RDC "Written Approval of Affected Persons" form. Attached to the form was a summary of the proposal to operate the landfill which indicated the Regional Council had already granted its approval. The Burnie Trust brought the proceedings to revoke the Regional Council's consent.

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1 Schedule 1D of the Bay of Plenty Regional Water and Land Plan.

The review proceedings

[21] The statement of claim contains four grounds of relief which are summarised below.

First ground of relief: Failure to publicly notify – s 95A of the RMA (trout and water)

[22] In exercising its discretion not to notify the application, the Burnie Trust says that the Regional Council gave inadequate consideration to the fact that the RDC had identified the land in its proposed district plan as a "significant natural area" within which the proposed landfill is a non-complying activity and that the Regional Council failed to give consideration to s 6 of the RMA in relation to matters of national importance and, more particularly, the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. Had it done so it would inevitably have concluded that the adverse effects would likely to be more than minor and should thus have publicly notified the application.

[23] The Burnie Trust says that the Regional Council failed to have regard to s 7 of the RMA in relation to the requirement to protect the habitat of trout and salmon[2] and that it failed to attach any significance to the fact that the Ngongotaha Stream is identified in the Regional Council's own water and land plan as being "a nationally significant habitat in fishery values for trout". They say had it done so it would have concluded that public notification should have been given.

Second ground of relief: Failure to public notify – s 95 of the RMA (potential that failure of management, accident, extreme weather even or earthquake would likely have serious environmental consequences)

[24] Furthermore, the Burnie Trust claims the Regional Council failed to give any consideration to the effect on the environment in the event of a management failure, accident, extreme weather event or earthquake, noting that any mishap would be likely to have serious environmental consequences and that those who utilise the river system and rely on it for their livelihood should have been provided with the

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2 Section 7(h).

opportunity to be heard on a notified application. This is the "low risk" but "high impact" ground of relief.

Third ground of relief: Affected party – ss 95B and 95E of the RMA (limited notification)

[25] The Burnie Trust also claims that the Regional Council was wrong when it concluded that there were no affected parties who ought to have been notified. They say that they are an affected party because the adverse effects are minor or more than minor by reason of one or more of the following:

(a) dust generated from the access way, from the top of the trucks and from the landfill itself;

(b) noise from the landfill operation;

(c) smoke from the burning of dumped material;

(d) heavy traffic on Te Manu Road and the inconvenience, danger and noise emanating from this;

(e) an easement running with the Burnie Trust's property which provides access to the Ngongotaha Stream for the purpose of drawing water for domestic consumption downstream from the proposed landfill and the concerns that in the event of pollution entering the river system the water would be unusable.

Fourth ground of relief: Error on the face of the document

[26] The Burnie Trust claims that the Regional Council wrongly concluded that all adjacent landowners had provided unconditional written approval but failed to identify the Burnie Trust as an affected person which would have required limited notification.

[27] The Burnie family seek an order revoking the consent.

Joint consideration

[28] Sitting in behind these grounds of review and central to the present application seeking interim relief is the argument is that the two applications were related and should have been heard together. The Burnie Trust say that the Regional Council failed to identify all the necessary consents which would have allowed for the possibility of a joint consideration of the proposal between the Regional Council and the RDC. Failure to do so meant that the applications were not considered in a holistic manner.

Application for interim orders

[29] The Burnie Trust now brings an application under s 8 of the Judicature Amendment Act 1972 seeking an order that the Regional Council and the RDC be restrained from taking any further steps in relation to the resource consent application before the RDC until the judicial review has been determined.

[30] Mr Fleming lodged a Land Use Resource Consent application with the RDC on 27 March 2013. The RDC determined the application should be notified. A hearing date of 17 October 2014 was initially set. Notification of the hearing date was given after the substantive judicial review proceedings were filed which explains why no application for interim relief was made at the time the proceedings were filed.

[31] The RDC asked Mr Fleming if he would agree to a deferment of the hearing in accordance with s 37A of the RMA.[3] Apparently the request was made because RDC officers were of the view it would be beneficial for the application to be heard after the outcome of the judicial review proceedings.

[32] However Mr Fleming would not consent to a deferment and as a consequence the RDC was obliged to set the application down for a hearing. It is this hearing

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[3] Section 37A of the RMA prohibits a consent authority from extending time limits unless certain criteria are met including the consent of the applicant.

which the Burnie family seek to have suspended until the outcome of the substantive proceedings is determined.[4]

[33] A telephone conference was scheduled before me. Mr Rendall for Mr Fleming, while not consenting to any adjournment of the RDC hearing, did suggest one possible option might be for the RDC hearing to proceed but on the basis of an undertaking by Mr Fleming that no steps to implement any consents would be taken before the judicial review was determined. However, Mr Simpson, for the Burnie Trust, resisted such a course and in the absence of consent the Court was left with no option but to deal with the present application on an urgent basis. Submissions have been filed by all parties and I have decided the matter on the papers.

[34] I have since received advice that the RDC hearing is now scheduled to take place on 19 November 2014.

Legal principles

[35] This application for interim orders is brought under the provisions of s 8 of the Judicature Act 1972. Section 8 states:

> **8 Interim orders**
>
> (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
>
> (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power;
>
> ...

[36] The approach to an application made under s 8 is discussed in *Carlton and United Breweries Limited v Minister of Customs*.[5] There the Court of Appeal said

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4 A fixture is apparently likely to take place in the first part of 2015, probably in February.

5 *Carlton and United Breweries Limited v Minister of Customs* [1986] 1 NZLR 423 (CA).

that the power should not be restricted by reading qualifications into the broad language of the section and that the test and terminology used in interim injunctions is not appropriate. Under s 8 it is for the Court to determine whether, in the circumstances shown to exist, reasonable necessity to preserve the applicant's position is established and, if so, whether an interim order should be made. In considering the answer to this question Richardson J noted:[6]

> ...the nature of the review proceedings will be material. So will the character, scheme and purpose of the legislation under which the impugned decision was made. And appropriate weight must of course be given to all the factual circumstances including the nature and prima facie strength of the applicant's challenge and the expected duration of an interim order.

[37] This approach may be broken down into three questions:

(a) Is there a serious issue in contest between the parties and a reasonable chance of the applicant succeeding in that contest?

(b) Is it necessary to make the interim order in order to preserve the position of the applicant?

(c) Should the residual discretion be exercised?

[38] This approach was recently approved by the Supreme Court in *Easton v Wellington City Council*.[7]

[39] In *Esekielu v Attorney General* it was said that the appropriate test was whether there was "a real contest between the parties and a reasonable chance of an applicant succeeding in that contest." [8] In *Carlton and United Brewers Limited* the Court of Appeal noted that a "serious question to be tried" test may be too light and that a prima facie case for ultimate success in the judicial review proceedings should be preferred. In *Minister of Immigration v Kang* it was said the test is raised or lowered as appropriate depending on the nature of the interest at stake.[9]

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6 At 431.
7 *Easton v Wellington City Council* [2010] NZSC 10, (2010) 20 PRNZ 360.
8 *Esekielu v Attorney General* (1993) 6 PRNZ 309.
9 *Minister of Immigration v Kang* [1993] NZAR 456 (CA).

[40] In my view, in the context of the present case, the *Esekielu* test of "real contest" is appropriate.

[41] I propose to deal with each of the three questions referred to above in order.

Is there a serious issue in contest between the parties and a reasonable chance of the applicant succeeding in that context?

[42] The relief sought on the present application is to restrain Mr Fleming and the RDC from taking any further steps in relation to the resource use consent application until the substantive application for judicial review has been determined. The position sought to be preserved relates solely to the argument that the applications should be heard together. I must there consider whether there is a real contest between the parties and a reasonable chance that the Burnie Trust might succeed on this argument.

[43] The Burnie Trust claims that the RDC application relates to the same land which is subject to the consent issued by the Regional Council and that Mr Fleming's filing of separate applications has prevented an integrated approach to considering the proposed land use by the relevant territorial authorities. The essence of this argument is that the Regional Council's and RDC's hearings should proceed together in accordance with s 102 of the RMA which states as follows:

> **102 Joint hearings by 2 or more consent authorities**
>
> (1) Where applications for resource consents in relation to the same proposal have been made to 2 or more consent authorities, and those consent authorities have decided to hear the applications, the consent authorities shall jointly hear and consider those applications unless—
>
> (a) all the consent authorities agree that the applications are sufficiently unrelated that a joint hearing is unnecessary; and
>
> (b) the applicant agrees that a joint hearing need not be held.

[44] Although the two consents were not applied for at the same time the Burnie Trust argues that because the Regional Council wrongly elected to non-notify as no

consideration was made of s 91 of the RMA which could have been used to bring s 102 of the RMA into play. [10]

[45] Section 91 provides as follows:

> **91 Deferral pending application for additional consents**
>
> (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—
>
> (a) other resource consents under this Act will also be required in respect of the proposal to which the application relates; and
>
> (b) it is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any 1 or more of those other resource consents be made before proceeding further.

[46] Mr Simpson for the Burnie Trust submits that sound resource management principles require a joint consideration of applications where there is more than one consenting authority. In support of that submission he refers to the judgment of Judge D F Shepherd in *Affco New Zealand Limited v Far North District Council* where his Honour stated that where more than one resource consent is required for a proposal, applications for all consents should be made at about the same time noting the value of integrated decision making and the utility of assessing together the effects, positive and negative, of a proposal. [11]

[47] However, as Mr Rendall for Mr Fleming notes, *Affco New Zealand Limited* related to the bundling of multiple land use consents being made. It is a very different factual situation from that which confronts this Court.

[48] Mr Cooney for the Regional Council submits that s 91 only applies to when a decision to notify or not notify has been made. When the decision has been made not to notify s 91 is not engaged. In the present case the Regional Council made the

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[10] The application to the Regional Council was made on 17 December 2012; the application to the RDC was made on 27 March 2013.

[11] *Affco New Zealand Limited v Far North District Council* [1994] NZRMA 224.

decision not to notify and thus s 91 is not engaged.[12] The Regional Council's consent officer said that joint applications are relatively uncommon, commenting that:

> [A] vast number of proposals require consents. … It is common for regional and district consents … [to be] sought separately at different points in time.

[49] It is plain from the evidence that Mr Fleming wanted to apply for the consents separately. The consent officer said he communicated with Mr Fleming who was aware that he needed separate consents from the RDC for the works but wished to first address the Regional Council consents before undertaking the RDC consent process.

[50] There is nothing in the RMA which requires the applicant to bring the consents at the same time thus triggering s 102. Furthermore, s 91 may not be used to bring it into play where a decision not to notify has been made. For these reasons I am not satisfied that the Burnie family has established that there is a real contest and a reasonable possibility of success in this argument. I am thus not satisfied it is necessary to restrain any steps taken by the Regional Council and the RDC in respect of the RDC application.

[51] In any event if the Burnie Trust is successful in its judicial review then both consent applications could be heard together which would mean that while there would be some inconvenience associated with re-hearing the RDC application, the inconvenience would not be substantial.

[52] Further there is no evidence that the landfill could, in any event, begin operation prior to the substantive hearing. Given the indications of when this Court can hear the judicial review proceedings the delay is minimal and measured in a few months which includes the Christmas break.

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[12] *Far North DC v Te Runanga A Iwi O Ngati Kahu* [2013] NZCA 221.

Conclusion

[53] I am not satisfied the applicants have established that there is a serious issue in contest in relation to the relief sought. I do not regard it as necessary to consider the remaining grounds for review as their success does not relate to the relief sought.

Result

[54] The application for interim relief is declined.

[55] Costs are awarded in favour of the second respondent on a 2B basis with disbursements as fixed by the Registrar.

Moore J

Solicitors:
Ms Talbot, Tauranga
Mr Cooney, Tauranga
Mr Rendall, Rotorua
Ms Riley, Auckland

BEFORE THE ENVIRONMENT COURT

Decision No [2014] NZEnvC 96
ENV-2013-WLG-000056

IN THE MATTER of an appeal under s120 of the Resource Management Act 1991

BETWEEN WILHELMUS ZWART and AVIS ZWART
Appellants

AND THE GISBORNE DISTRICT COUNCIL
Respondent

Court: Environment Judge C J Thompson
Environment Commissioner A C E Leijnen
Heard: at Gisborne on 14 - 15 April 2014: site visit 16 April 2014
Counsel: J C Bunbury for G M Gedye – applicant
D J Sharp for appellants
G R Webb for the Gisborne District Council

INTERIM DECISION OF THE COURT

Decision issued: 30 APR 2014

Costs are reserved

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] In a decision dated 27 June 2013 the Gisborne District Council granted land use resource consents to Mr Graeme Gedye to build and operate a funeral home on the property at 601 Nelson Road, on the western outskirts of Gisborne City. Mr Gedye currently operates a stonemasonary business, providing headstones, benchtops and other granite supplies from a building on the site.

[2] The proposed funeral home will provide a range of services, including office and consultation facilities, the receiving and preparation of deceased persons for burial or cremation, embalming facilities, viewing rooms, a chapel (large enough for some 350 mourners) for the conduct of funerals, and reception areas for light refreshments afterwards. There will also be parking, landscaping, fencing and utility areas on the site. It is proposed that the headstone and granite supply business will continue in the workshop, which is to be extended.

[3] Mr Gedye also expresses an intention to build and operate a cremator on the site but, at the time of applying for the other consents in 2013, did not seek the necessary air discharge consent from the Council to enable that to be done. We understand that such an application was made on 14 February 2014 but the Council required further information from the applicant and, unsurprisingly, has not yet been able to make a decision about it. We shall return to that topic. There were suggestions also of a need to have a discharge consent for wastewater and trade waste from the embalming processes; a stormwater discharge consent to deal with stormwater from the buildings' roofs and hardstand areas, and a means of providing the required amount of fire-fighting water, as the property will not have reticulated water. We shall return to those also.

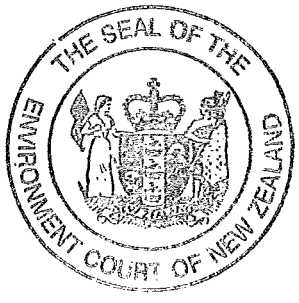
[4] In describing the background to the application, Mr Gedye confirms that from 1999 to 2005 he was employed by the one existing funeral home in Gisborne, managing their subsidiary monumental business. That also involved him, from time to time, in helping with the transport of deceased persons and other activities connected with the business.

[5] Mr Gedye advises that the average number of deaths per annum in Gisborne is approximately 400, of whom Mr Gedye estimates somewhere between a half and a third will have their funerals in churches, marae, or other venues. That would give a figure of between 200 and 270 funeral services per annum, or 4 – 5 per week, being conducted in funeral directors' premises, and the proposal is, of course, expected to gain its share of that business. To give some context to the issues, assuming that it succeeds in gaining one half of it that would mean that on average there would be 2 or 3 funerals per week at the site. Mr Gedye expects that the business will employ between three and seven staff.

The site and its surroundings

[6] The site is some 5232m^2 in area and is directly opposite the Taruheru Cemetery, which is the only cemetery operated by the local authority. On the cemetery is the only crematorium presently operating in Gisborne. The building is owned by the Council, and leased by the existing funeral director which owns and operates the cremator. It is a cremator only – funeral services are not held there – and its operation is a *permitted* activity on the cemetery land.

[7] Beside the applicant's land on Nelson Road is an area presently noted as *Heritage Reserve* in the Gisborne District Combined Regional Land and District Plan. We are informed that the site is in fact set aside for future expansion of the cemetery. That expansion is a distant prospect – said to be possibly 50 to 100 years away. The Zwart land runs along the western boundary and rear (northern) boundary of the application (Gedye) site and extends behind the cemetery expansion area. The Gedye property is on land that was subdivided from the Zwart land. Apart from the cemetery, the surrounding area is rural or semi-rural in its uses. There are large-scale glass houses on the Zwart property, and an even larger glasshouse and growing operation (Leaderbrand) nearby at the bend to the west on Nelson Road. There is also a sawmill and timber merchant business some distance away to the east on Nelson Road. Otherwise, there are lifestyle properties, pastoral farming, and horticulture.



[8] As might be imagined from this description, the area is a transitional one, moving from the urban periphery to open countryside, with the very large cemetery a significant, even dominating, presence at this end of Nelson Road.

[9] The landform generally is flat and low lying with drainage being an issue, particularly from buildings and sealed areas.

Zoning and Planning Status

[10] The planners consulted by the appellants and the applicant agree that the land is zoned *Rural Residential* under the Gisborne District Plan. It is outside the *Reticulated Services Boundary*, which is a method to require that relevant activities within the urban area are connected to the Council's reticulated services, so this site is not connected to reticulated water, or to the City's wastewater services. The land is not within the *Land One* overlay, meaning that it is not regarded as vulnerable to instability and erosion. The Taruheru Cemetery opposite the site is, as one might expect, zoned *Cemetery Reserve*.

[11] The proposed activity is a combination of industrial and commercial operations – under Rule 21.9.4.4 it is a *discretionary* activity, so the application is to be considered under s104, s104B and Part 2 of the RMA.

The parties' positions

[12] The applicant has a resource consent for the existing stonemasonary business, and points out that the proposed buildings will all fit within the Plan's recession plane contained in Rule 21.8.3. As the funeral home can operate without a cremator, the balance of the proposal does not require an air-discharge consent. He notes that, in terms of ratio of the building sizes, the proposed space for the cremator is very small and, apart from its 7m chimney, it is physically insignificant in the overall picture. The supply of fire-fighting water will be dealt with by providing tanks sufficient to hold the required 45,000 litres - (if the buildings are equipped with sprinklers – which they will be) and it is proposed that stormwater attenuation be dealt with at the building consent stage.

[13] Overall, Mr Gedye points to the advantages for the community in having a choice of provider for such services, and the employment and servicing opportunities that will be provided by the new business, and to the obvious convenience in having such a business very close to the city's cemetery.

[14] The Council is content with its decision, but did not call any evidence at the hearing before us. A number of Council officers were summonsed by the applicant and gave evidence on matters within their fields of operation.

[15] The appellants have a number of issues with the proposal. They regard the site as *too small* to accommodate all that the applicant wishes; they believe that it will have effects on their visual amenity and on the character of the area and that it will be *... detrimental to the appellant's [sic] interest.* They express concerns about traffic congestion and danger caused by overflow parking on the berms along Nelson Road, and about noise generated by traffic and by activities such as haka and bagpiping accompanying some funeral ceremonies.

[16] They have particular concerns about smoke and particulate discharges from the cremator but that is not, as we are about to discuss, part of the proceeding before us.

[17] Mr and Mrs Zwart regard the conditions imposed on the consent granted by the Council as being insufficient to mitigate the adverse effects they believe will be caused. They wish to see the Council's decision overturned, or at least that what they regard as improved conditions put in place, to mitigate the adverse effects to an acceptable degree. We shall discuss their concerns in more detail in considering the possible adverse effects of the proposal.

Section 91 – integrated consideration – the required resource consents

[18] Section 91 RMA provides:

> Deferral pending application for additional consents
>
> (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—

(a) Other resource consents under this Act will also be required in respect of the proposal to which the application relates; and

(b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.

(2) Where a consent authority makes a determination under subsection (1), it shall forthwith notify the applicant of the determination.

(3) The applicant may apply to the Environment Court for an order directing that any determination under this section be revoked.

[19] There is certainly a general view that all necessary resource consents should be sought at the same time, so that the effects of any one proposal can be comprehensively considered (see, eg: *Affco NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224). But that need not invariably be so if, for instance, a proposal can be broken down into discrete and independently operable parts, and a reasonable assessment can be made of one or some of those parts without having to consider overlapping or cumulative effects. Here, while para (1)(a) applies, in that (at least) one other resource consent will be required to give the proposal full effect by operating the crematorium, the funeral home could operate independently and without the cremator being installed. As Mr Gedye will apparently be unable to use the cremator at the cemetery, he would, he says, be required to take bodies to Hastings to be cremated unless and until he has access to his own cremator. That would certainly be time consuming and inconvenient for him, and not, we imagine, something that grieving families would welcome.

[20] But we can, nevertheless, assess the effects of a stand-alone funeral director's operation, as proposed, without a cremator. Given that the issue of a s91 adjournment was not squarely raised by any party in advance of the hearing it seemed wasteful of time and resources to not proceed to hear what we could. We did so on the basis that the issue of a cremator was not before us because there has been no Council-level decision about one and so, of course, no appeal to this Court.

[21] In discussing the issues further, we should be understood as dealing with the application as the Council did – without considering a cremator or any issues of

discharges to air of smoke, particulates, or odour. If and when the Council is able to make a decision about such an application, that will be a stand-alone issue.

[22] All wastewater from the premises, including diluted chemicals from the embalming process, is to be disposed of in a two-step process. The first will be its collection, on site, in a tank. Then, as required, that tank will be emptied by a contractor, and then disposed of into the City's sewerage system off site. All of that is quite straight forward and such parts of it as may not be a *permitted* activity can be authorised by an unexceptional resource consent.

[23] There was a suggestion however, which we understand originated from within the Council, perhaps informally, that a further resource consent might be required to cover a possible accidental spillage from the holding tank, or during the process of transferring the tank's contents to the contractor's tanker. In other words, it would be a resource consent to anticipate non-compliance of an unknowable kind and degree, and *legitimise* it. We did not have a satisfactory response to our inquiries about this possibility, and we do not take it further.

[24] We mentioned at para [12] that it was Mr Gedye's expressed intention to deal with stormwater attenuation at the point of seeking and obtaining a building consent – in other words quite independently of the resource consent process. That had some superficial appeal until at least the extent of the building and sealed surface coverage, and the nature and degree of the landscaping required to deal with visual issues became apparent. Attempting to set conditions around the landscaping issues without knowing how stormwater can be managed is not realistic, and it seems rather likely that the practicalities of stormwater management could be compromised by pre-set and incompatible landscaping requirements. In short, the two issues need to be dealt with in a coordinated way, meaning that stormwater attenuation should be dealt with at the resource consent stage of the process.

Section 104(1)(a) – effects on the environment – positive effects

[25] It has to be acknowledged that locating a funeral home directly across the road from the City's only cemetery has a certain symmetry about it in terms of the

efficient use of resources. As well, a choice of provider of funeral services could readily be seen, in s5 RMA terms, to help enable people to provide for their … *social … and cultural wellbeing*. There will be additional employment opportunities also which, although not huge, will also add to … *economic … wellbeing*.

Section 104(1)(a) – adverse effects - traffic and carparking

[26] We begin this discussion by reminding ourselves that the Act defines *amenity values* as:

> … those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[27] For present purposes, we take it as a given that mourners attending a funeral on the premises will travel by car. The District Plan requires 1 carpark per $5m^2$ of meeting rooms which, on the building plan's most recent iteration, would mean c68 parks are required. As laid out on that most recent iteration, parking on site will cater for some 58 cars, plus room for a hearse and three *family* cars at the portico. Mr Andrew Prosser (a traffic engineer called by the Appellants) adopted a ratio of 2-3 persons per car as being a suitable estimation for a funeral home. So, for a capacity attendance of 350 at a funeral it would be reasonable to expect between 116 and 175 cars. We note that the planner witnesses agreed, as do we, that it would not be reasonable for that requirement for on-site parking to be met by this sort of proposal.

[28] The cemetery across the road has no, or very little, provision for parking on site. Occasionally, we understand, a piece of open (as yet unused) ground at its western side, with access off Nelson Road, is opened for informal parking if a particularly large crowd is expected at an internment. Short of that, overflow cemetery parking is along the grass berms on either side of Nelson Road, and it is expected that will also be the case for the proposal. The berm immediately outside the site, and extending past the cemetery extension site, is not wide enough to take cars parked at 90° to the road, but it can take parallel parking with, at worst, only a slight intrusion onto the sealed surface. The berm on the cemetery side is amply wide for 90° parking, and extends some 400m away to the south-east.

[29] There is a question about people having to park some distance along Nelson Road and then, there of course being no footpaths, using the sealed road surface to walk back to the site – both because other parked cars may not allow sufficient room to walk along the berm behind them or, particularly in poor weather, there may be reluctance to get *Sunday Best* shoes marked with mud.

[30] We accept that the parking along the berms, while generally quite acceptable, could give rise to some safety concerns on a piece of road which has a 100kph speed limit. Two possible solutions were raised. First, that there be a permanent speed reduction on this stretch of Nelson Road to 50 kph. We are not sure that is likely to be very effective, nor necessary.

[31] The better solution appeared to us to be that suggested by Mr Prosser that a traffic management plan (TMP) be adopted, so that it can be put in place when there is a funeral which is thought likely, or in the event proves to, to draw a crowd large enough to require parking to extend beyond the capacity of the on-site parking and onto the berms of Nelson Road. The outline of such a management plan would consist of management regimes to (we refer to Mr Prosser's para 57 and Figure 3):

- set a temporary speed limit of 50kms;
- gated positioning of speed limit signs;
- funeral signs supplementary to the speed restriction signage to signify the nature of the event;
- no parking signs to manage sight lines;

And we would add:

- an *on ground* manager to encourage appropriate arrangement of parking (eg: 90 degrees; parallel; off the carriageway);
- we would also suggest that a qualified person(s) be on site at all times where there is the potential for an overflow of parking to occur so that the TMP could be implemented efficiently when demand requires;
- methodology for implementation, layout, assignment of responsibilities etc which would be the norm for a TMP.

[32] Mr Gedye, as a former Police Officer with some years experience in the Traffic Safety Branch, would be ideally placed to operate such a plan[1]. He will be able, in consultation with the family or friends of the deceased, to estimate the likely attendance at a funeral, and will be on site to ensure that the appropriate signage is displayed and other steps taken to minimise risk to traffic and pedestrians.

[33] The preparation and operation of such a plan should form a part of the resource consent, and we shall return to that shortly.

[34] That plan will also need to address the practicalities (perhaps by way of a protocol or something similar) of coordinating the timing of funerals at the site with internments at the cemetery from funerals conducted elsewhere, to avoid a *double-up* of parking requirements on Nelson Road. The control of ceremonies at the cemetery is provided for in the Council's by-laws, and is effectively delegated to the Sexton.

Adverse effects – noise

[35] As mentioned, concerns were expressed about noise, such as from haka being performed, or bagpipes being played, as part of a funeral ceremony. This issue can be shortly dealt with. At most, a haka will last for minute or two – a lament on the pipes perhaps a little more, and either of those will occur in a minority of the perhaps two or three funerals each week.

[36] Against that, it is to be recalled that this is a rural-residential area, where rural activities are everyday events. A neighbour using a chainsaw to produce a season's firewood from a felled tree may easily take half a day, or more, to do so. A tractor-mounted post driver could be in use all day replacing a damaged or aging fence. Complaints of the possible adverse effects on amenity of the rare, brief and transient sound of a haka, or bagpipes, in such a receiving environment is, with respect to the appellants, rather difficult to give weight to.

[1] Accepting he will need to gain the appropriate certification which both he and Mr Prosser agreed would be appropriate.

Adverse effects -visual amenity

[37] The proposal will certainly visually fill the site – the buildings and hard seal will cover the major part of it. That said, the design of the buildings (so far as can be confirmed from the plans presented) are, as noted, single storey and well within height-to-boundary requirements. As the preparation for, and the hearing itself progressed, a better appreciation of the landscaping requirements seemed to emerge. In the end, Mr Gedye was happy to comply with the suggestions of the landscape architect engaged by Mr and Mrs Zwart, Ms Debra Stewart.

[38] We have to say at this point that it became apparent that the plans submitted for the Court to consider were well short of what is expected. Mr Gedye had prepared them himself and submitted two iterations as the hearing progressed which were, in his words, *to scale but he did not know to what scale.* This meant that other witnesses could not scale them. As we examined the opportunities for landscaping it appeared that if the District Plan parking requirements were applied as directed by that document, there should be ample opportunity for landscape planting. Due to the nature of the plan it was simply not possible to check this in the context of the hearing. It is not the Court's role to secure information in the appropriate form – it is the role of the Council when the matter is submitted for its consideration and the applicant in preparation for the hearing. We have to say that had the Council insisted on professionally drawn plans, and a clear and complete application, its assessment could have been more accurate, and the issues much easier to identify and deal with. Having made that point we felt comfortable, based on the work the experts have now completed, and the answers they gave in evidence, that we can proceed to a determination. However, our remaining concerns are reflected in the way we will seek to conclude the matter.

[39] We agree that with good landscaping, visual amenity of the surrounding properties can be preserved to a satisfactory degree and that too should be a matter addressed in the consent conditions.

Permitted baseline

[40] Section 104(2) provides:

> When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

This is the concept known as the *permitted baseline*, meaning that there is a discretion to take into account only effects which are greater than those produced by activities permitted as of right by the Plan. Here, we are conscious that permitted activities could result in buildings of a size and footprint at least comparable with what is proposed, and which could also be higher and of a more utilitarian appearance. Also, noise of an industrial kind could well be at least comparable. While not decisive, those are to be borne in mind in considering adverse effects. We agree though that it would be difficult to think of a permitted activity which would produce a concentrated volume of traffic comparable to that of the proposal.

Section 104(1)(b) – planning documents

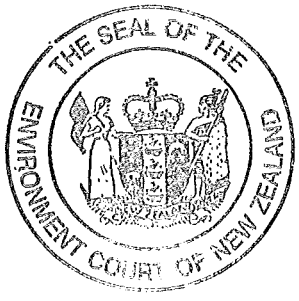
[41] There are no applicable national standards or other similar documents. The Regional Policy Statement, it seems to be agreed between the planning witnesses, is a high-level document, given effect to by the Combined Regional Land and District Plan, which is operative.

[42] The planning witnesses agreed that the provisions of the Rural Residential Zone provide for the assessment of non-rural activities subject to the criteria set out in Policy 21.4.2. They also acknowledge the synergies that could be developed by locating a funeral home and a crematorium in close proximity to the district's main cemetery.

[43] The two planners agree that the most relevant District Plan objectives and policies for the land use application are:

21.3 General Objectives (All rural zones)

1. Enable subdivision, use and development in all rural zones provided that adverse environmental effects can be avoided, remedied or mitigated.
2. Maintain rural amenity values.



3. Sustainable management of the life supporting capacity of the soils on the Poverty Bay Flats.
4. Enable peri-urban living in appropriate areas, and at densities where the adverse effects of this activity can be avoided, remedied or mitigated.
5. Locate structures and plant trees in such a manner as not to cause adverse environmental effects across property boundaries.

21.3A Objectives (Rural Residential)

6. To provide for peri-urban development on the fringes of the Gisborne Urban Area and the fringes of the rural townships, where the adverse effects of this activity can be avoided, remedied or mitigated.
7. To preserve areas on the fringes of the Gisborne Urban Area where sustainable quality future residential development may be appropriate.

21.4 General Policies (All rural zones)

1. When preparing plans or considering applications for plan changes, resource consents or designations in all rural zones regard shall be given to the following general policy as well as any specific policy relating to the zone: …
   - ...
   - the location, scale and nature of the proposed activity and its effect on the balance of the land and on adjoining properties;
   - alternative methods and locations available to carry out the works or activities;
   - physical constraints to the site such as separation by rivers or roads, site configuration and layout;
   - any adverse effect that the activity may have on existing rural activities;
   - ...
   - whether covenants, buffer zones or separation distances between activities would assist in mitigating adverse environmental effects.
2. To manage the effects of landuse in rural zones which may not be of a rural nature by ensuring that the amenity values of the rural environment and surrounding properties are maintained with particular regard to:
   - traffic generation whereby:
     * the level of traffic generated by the activity must be able to be accommodated without compromising the safety of traffic and residents on the District's roads;

* given the nature of adjacent roads that all entry, exit and manoeuvring of vehicles onto a public road can be conducted safely;
* adequate on-site vehicle parking and manoeuvring areas are provided for all developments;

- noise;
- visual impact ensuring that:
  * to manage the effects of landuse in rural zones which may not be of a rural nature the scale of the structure is appropriate for the use and the environment in which it is located;
  * activities are of an appropriate scale and intensity for the area in which they are located;
  * structures, areas and activities visible from public places are screened;
  * the type of construction materials are not inappropriate to the environment in which they are located.

3. Tall vegetation and structures should retain, where possible, the adverse environmental effects they generate within the property boundaries. …

[44] Policy 21.6A Rural Residential, contains a number of provisions. Perhaps the most relevant here, which is a matter not covered by the earlier noted policies, is the following:

> 12. To enable peri-urban subdivision, use and development on the fringes of the rural townships, Gisborne Urban Area, and the areas adjacent where subdivision below one hectare is considered: …
>
> - Preferably in areas in close proximity to the urban area in order to reduce commuting distances.

[45] These provisions are all very much aimed at visual and other rural amenity values, and to some extent consolidation of activities which we have discussed at some length, and we need not repeat that here. We consider that, with the steps we will require by way of layout and landscaping, without solid fencing and with open fencing embellished with good plantings, effects on rural amenity can be well mitigated, to the point of acceptability. Traffic is undeniably a matter that will require considered and ongoing management. We are though confident that the kind of Traffic Management Plan to be required will manage those issues also.

Part 2 factors

[46] There are no Treaty issues arising under s8, nor any matters of *national importance* under s6. We do however need to have ... *particular regard* to at least some s7 matters: ...

> *(b) the efficient use and development of natural and physical resources;*
> *(c) the maintenance and enhancement of amenity values; ...*
> *(f) maintenance and enhancement of the quality of the environment;*
> *(g) any finite characteristics of natural and physical resources.*

[47] The issues in paras (c) and (f) are largely matters of amenity, which we have already discussed. The matters in (b) and (g) are efficiency issues – the symmetry of having such an operation immediately opposite the City's cemetery has been mentioned, and maximising the use of a piece of the urban-rural interface land without harm to the surrounding environment is also efficient, and takes account of the finite characteristics of such land.

The Council's decision – s290A

[48] Section 290A requires us to ...*have regard to* the Council's decision, and we have done that. It will be apparent that we agree that the proposal, properly formulated, should not produce adverse effects of a kind or degree that mean it should not proceed; nor does it conflict with the relevant planning documents or Part 2 of the Act. In some respects however the evidence we heard, and which the Council did not, leads us to conclude that on some aspects significantly more detail is required before the necessary resource consents, and their conditions, can be resolved.

Overall conclusions

[49] As a concept, we see no reason, in either an effects-based approach, or in considering compatibility with the planning documents, to decline consent to a generic funeral director's operation along the lines proposed.

[50] But the application was so inchoate, and was being adapted so significantly as the hearing progressed, that a conclusive decision one way or the other is not presently possible. What is required, to enable us to make a final evaluation and decision is, at least:

- A site traffic movement and carparking plan confirmed as to accuracy and compliance by a traffic engineer.
- A landscaping plan, incorporating stormwater attenuation, prepared and confirmed by a qualified landscape architect and a water engineer respectively.
- Confirmation of whether a stormwater discharge consent is actually required.

We think it goes without saying that those requirements will only be possible when the design and dimensions of the building(s) have been finalised. Further, these requirements need to be considered together to effect a practical, workable layout and make the best of shared opportunities in the design layout; eg, placement of trees relative to parking spaces, location of groundwater attenuation, pervious paving, and the like. Low impact environmental design is a common feature of site designs and was considered a feature which should be encouraged according to Mr Robert Budd (the Council's Stormwater specialist, summonsed by the applicant) and we agree with him.

Result

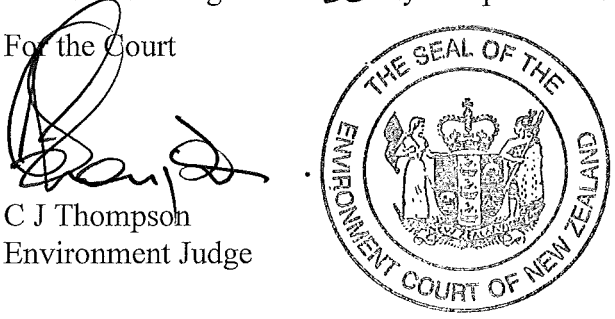
[51] We ask that those matters be attended to, taking into account the matters we have set out, and that counsel then confer to produce a matching set of conditions for approval, by Friday 6 June 2014. The Court will then be able to decide whether, as a matter of formality, the appeal should be declined.

Costs

[52] Costs are reserved. Any application should be lodged within 15 working days of the issuing of our final decision, and any response lodged within a further 10 working days.

Dated at Wellington this 30th day of April 2014.

For the Court



C J Thompson
Environment Judge