Upper Clutha Environmental Society

Submission and Evidence on Chapter 1 of the Proposed District Plan

The Society asks the commissioners to refer to Society's introduction to its submissions and evidence on Chapters 3, 4, and 6 for the status of the submissions and evidence given here.

Part 1.6.16 Public Notification of Resource Consent Applications

Public notification is a fundamental issue under the RMA. Public participation was one of the key tenets cited when the Act was introduced. If an application is not publicly notified this shuts the public (and community groups like UCES) out of the public process and out of appeals to the Environment Court. The Court is an important check and balance on the resource consent process.

The provisions in the Act relating to public notification have been amended. The Coro Mainstreet case[1] issued in November 2013 indicates that changes made to the Act mean that new standards are to be applied by consent authorities when considering the non-notification of resource consent applications under section 95A as follows:

1) the presumption in favour of notification has been removed and replaced with a discretion;

2) the stipulation that a consent authority has to be "satisfied" that it has received adequate information before making a notification decision has been replaced with the term "decides." (In Discount Brands the Chief Justice held that the word "satisfied" implied a greater degree of certainty than the word "decides".)

3) The requirement that the consent authority must be "satisfied" that the adverse effects of the proposed activity "will be minor" has been replaced with the requirement that the consent authority must now "decide" whether adverse effects would have or were likely to have effects that are "more than minor".

4) There is no longer an express requirement for the consent authority to have "adequate information" before making a notification-decision.

Dealing with these in turn:

Point 1: The presumption in favour of notification dated back to the start of the Resource Management Act. In practice around 95% of resource

[1] [1] Coro Mainstreet (incorporated) v Thames District Council [2013] NZCA 665.

consent applications were not notified, only those that had obvious public interest and identifiable adverse effects, so effectively the presumption had already been discarded.

Points 2 and 3 seem to the Society to be dancing on the head of a pin.

Point 4 appears irrelevant. It is self-evident that Council should require adequate information to be available before deciding whether to publicly notify

After the amendments the bottom line remains that if council has doubts that adverse effects of an application could be greater than minor it should publicly notify.

The public notification test in section 95A of the Act now reads after the amendments (our underline):

> *95A Public notification of consent application at consent authority's discretion*
>
> *(1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.*
> *(2) Despite subsection (1), a consent authority must publicly notify the application if—*
> *(a) it decides (under section 95D) that <u>the activity will have or is likely to have adverse effects on the environment that are more than minor;</u>*

On the basis of the amendments described above the Society is aware that Council has failed to publicly notify a number of resource consent applications for rural subdivision and/or development. The Society has been surprised by this. In reality the "minor effects" test has been retained in the Act and this is a very tough test. The amendments do not absolve Council from its duty to administer the District Plan.

The assessment matters in the Proposed District Plan state:

> *21.7.1 Outstanding Natural Features and Outstanding Natural Landscapes (ONF and ONL).*
>
> *These assessment matters shall be considered with regard to the following principles because, in or on Outstanding Natural Features and Landscapes, the applicable activities are inappropriate in almost all locations within the zone:*
>
> *21.7.1.1 The assessment matters are to be stringently applied to the effect that successful applications will be exceptional cases.*

The Society believes that it is reasonable to assume, in the context of a District Plan that stipulates that "activities are inappropriate in almost all locations" and that "the assessment matters are to be stringently applied to the effect that successful applications will be exceptional cases.", that the vast majority of applications for subdivision and development within Outstanding Natural Landscape and Outstanding Natural Features will be deemed to be likely to have adverse effects that are more than minor.

The Society's proposed wording for public notification (from its original submission) reflects this logic, and reads as follows, with underlined words added by the Society:

> *1.6.18 Despite the above, Council may publicly notify an application if it decides that special circumstances exist in relation to the application. <u>In the case of subdivision and/or development within Outstanding Natural Landscape or on Outstanding Natural Features non-notification will only occur in very exceptional cases.</u>*

Obviously if successful applications in Outstanding Natural Landscape and Outstanding Natural Features can only occur in exceptional cases then non-notification of applications must be even less likely to occur, hence the "very exceptional" wording.

The wording above also reflects the fact that the "minor effects" test in the Act is a very tough test.

A practical example of how the existing public notification provisions are failing (or have not been correctly implemented by Council) can be seen by reference to the Longview Environmental Trust resource consent application[2] near Emerald Bluffs and in the vicinity of Glendhu Bay.

The 2012 Longview Environmental Trust resource consent application was for a subdivision involving the creation of 2 building platforms within ONL (or possibly ONF). One of the residential building platforms was proposed to be situated high up on ice sculptured hills beside the lake and visible from a number of public places. The Longview Environmental Trust planner's report described this residential building platform as being "atop the rocky roche moutonee landform"[3]. This statement alone should have triggered public notification.

This hardly sounds like an application that is an "exceptional case". On the surface adverse effects are likely to be greater than minor.

Yet Council decided in its decision[4]:

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[2] RM120186
[3] Page 3
[4] Page 2

"The application was considered on a non-notified basis….whereby the consent authority was satisfied that the adverse effects of the activity on the environment were not likely to be more than minor and whereby all persons who in the opinion of the consent authority may be adversely affected by the activity have given written approval to the activity."

There could never be certainty of outcome in terms of adverse effects for a residential development in a sensitive location such as this situated within ONL. Public notification and a public hearing is necessary in cases such as this to reassure the general public that landscape effects are being controlled in a manner acceptable to the community, and should consent be granted, mitigating measures and positive effects can be suggested by the public.

The decision states "all persons who in the opinion of the consent authority may be adversely affected by the activity have given written approval to the activity". How does Council find out who might be adversely affected by an activity unless it publicly notifies? There were hundreds of public submissions to an earlier Parkins Bay Preserve resource consent application that is in the vicinity of the Longview Environmental Trust subject site.

In the case of the Longview Environmental Trust application there is an informal public track (wholly on public land) to a public viewpoint on top of Glendhu Bluffs that looks directly down onto the Longview Environmental Trust development site, yet nobody who walks this track was deemed to be affected by the development. This wasn't brought to the attention of the commissioners by the applicant or the applicant's legal and landscape experts because it was not in its interests to do so.

When Council fails to publicly notify an application that patently should have been public notified it is a statutory failure by Council to correctly administer the District Plan.

The decision not to publicly notify the Longview Environmental Trust resource consent application at Emerald Bay set an awful precedent. Future applicants can point to this decision and ask for their applications within Outstanding Natural Landscape or Outstanding Natural Features not to be publicly notified.

In terms of the Proposed District Plan The message needs to be sent out to developers that non-notification hearings for subdivision and development in Outstanding Natural Landscape and Outstanding Natural Features will occur only in very exceptional cases per the wording suggested by the Society.

Proposed District Plan Part 1.7.6 Building Outline

The Society opposes the changed wording in the Proposed District Plan in relation to the illustrating of the bulk of buildings to be erected in rural resource consent applications because the use of the phrase “Council may request that” will potentially mean that in many applications no poles will be erected.

It is the Society’s experience that the erection of poles is a crucial guide to potential adverse effects of subdivision and development in rural areas.

The Society seeks the retention of the wording in the Operative District Plan as follows:

Building Outline

Any applicant for resource consent to establish a building in the Rural General and the Rural Living Zones shall erect poles or other similar devices to identify the bulk of the proposed building to be erected on the site. The poles are to be in place prior to site assessment and must remain in place until the Council has completed the application. Poles or other similar devices may also be required for new development in other zones at the discretion of the Council.