IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Stage 3 of the Queenstown Lakes Proposed District Plan

MINUTE 10 – DECISION ON APPLICATION BY

CARDRONA CATTLE COMPANY LIMITED

APPLICATION TO STRIKE OUT FURTHER SUBMISSION OF

SCOPE RESOURCES LIMITED

Introduction

1. Cardrona Cattle Company Limited ("CCCL") has lodged submissions seeking rezoning of its property on Victoria Flats as General Industrial Zone, accompanied by a series of requested changes to the zone provisions. That submission (#3349) was the subject of a further submission by Scope Resources Limited (#FS3470) ("Scope") opposing the entire submission on a variety of grounds that I will come to in a moment.

2. Ms Steven QC filed a Memorandum dated 16 March seeking an order that the Scope further submission be struck out on the grounds that the further submitter is a trade competitor of CCCL (by reason of its role in the development of industrial land at Coneburn) and the grounds raised in the further submission do not relate to an adverse effect on the environment that directly affects Scope in its operation of the Landfill that adjoins the CCCL site. Ms Steven also noted that the Scope Resources further submission "*does not contain a declaration of Scope's trade competitor status".*

3. Addressing the principal point, Ms Steven analysed the grounds raised in the Scope further submission, suggesting that only one of those grounds (that "*the submission does not adequately address reverse sensitivity issues that ensure the future operation of the Landfill")* comes close to meeting the statutory requirement of a direct effect on the submitter.

4. For the reasons set out in Ms Steven's Memorandum, however, she contended firstly that the use of CCCL's land for industrial activities is not incompatible with the operation of the Landfill and secondly that the nature of reverse sensitivity is that it "*does not relate to a directed effect in an environmental sense, but is strategic in its focus".*

5. I invited Scope's representatives to respond to Ms Steven QC's application and Ms MacDonald has filed a Memorandum dated 24 March 2020 setting out the reasons for opposition to Ms Steven's Strike Out Application.

6. Ms MacDonald accepts that Scope is a trade competitor of CCCL, but submits that "*it stands to be directly affected by CCCL's rezoning submission, which would have allowed, result in the siting of incompatible activities next to the Landfill and lead to possible constraints or restrictions on a legitimate Landfill operations".* Ms MacDonald draws attention to case law recognising that reverse sensitivity effects are legitimate effects on the environment.

7. She also notes the relevance of the QLDC designation over the Landfill, that extends over part of the CCCL site and prohibits a range of activities that CCCL's submission seeks provision be made for in the General Industrial Zone.

Jurisdiction

8. Ms Steven QC's application is made under section 41D of the Act which states:

> "(1) *An authority conducting a hearing on a matter described in section 39(1) may direct that a submission or part of a submission be struck out if the Authority is satisfied that at least 1 of the following applies to the submission or the part:*
>
> *(a) it is frivolous or vexatious:*
> *(b) it discloses no reasonable or relevant case:*
> *(c) it would be an abuse of the hearing process to allow the submission or the part to be taken further…".*

9. The hearing of submissions and further submissions on a Plan Change is one of the matters described in section 39(1).

10. I consider that, unless the context requires otherwise, reference to a *"submission"* should be given its natural and ordinary meaning and therefore be taken in s41D to include further submissions.[1]

11. That position is supported by the note contained in the amended form for further submissions, cross referencing the potential for a further submission to be struck out.[2]

12. Ms Steven QC submitted that an order could be made under section 41D either before or during a hearing. I think that that must be right also. Section 41A says that an Authority conducting a hearing may exercise powers under any of sections 41B to 41D. Section 41B clearly relates to directions made prior to a hearing and I therefore consider that section 41D should be read the same way.

13. On the face of the matter, given Ms MacDonald's concession that Scope is a trade competitor, if Scope's further submission fails to satisfy the tests in the Act regarding trade competition, then it is a clear candidate for an order that all or part of the further submission be struck out.[3]

Discussion

14. Both Ms Steven QC and Ms MacDonald analysed the situation in terms of the tests in clause 6(3) and (4) of the First Schedule.

15. The context of this provision is that clause 5 provides for public notice of a Proposed Plan (which includes a Plan Change). Clause 6(1) states that once a Proposed Plan is publicly notified under clause 5, various people may make a submission on it.

16. Clause 6(2) provides that the Local Authority may make a submission on its own Plan.

17. Then follows the provisions for persons other than the Local Authority:

> "(3) *Any other person may make a submission but, if the person could gain an advantage in trade competition through the submission, the person's right to make a submission is limited by subclause (4).*

1 The definition in the Act has a different focus, and so, does not assist

2 Refer Clause 6(6) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2017

3 Compare *Bunnings Limited v Queenstown Lakes District Council* [2018] NZEnvC 174 where a section 274 Notice by a party held to be a trade competitor was struck out by the Environment Court

(4) A person who could gain an advantage in trade competition through the submission may make a submission only if directly affected by an effect of the proposed policy statement or plan that-

(a) adversely affects the environment; and

(b) does not relate to trade competition or the effects of trade competition."

18. Finally, clause 6(5) requires that a submission is in the prescribed form.

19. These provisions need to be read against a background of Part 11A of the Act, the heading of which is entitled "*Act not to be used to oppose trade competitors".* The balance of Part 11A, however, relates to resource consent applications and is not, therefore, directly relevant to us.

20. The relevant form for submissions on a notified proposal for a Plan Change[4] requires a declaration as to whether or not the submitter is a trade competitor, and if so, a statement on the matters contained in Clause 6(4).

21. If the clause 6 restrictions apply to Scope, then I consider that Ms Steven QC has a point. There are five specified grounds in the Scope further submission. Ms MacDonald seeks to defend only one (that related to reverse sensitivity). While it is always dangerous to read silence as acceptance, Ms MacDonald does not provide any grounds for concluding the other four grounds relate to direct effects on Scope. I should note in passing that I think that a case could be made that part of the third ground (based on the failure to demonstrate how the proposed zone sought by CCCL will be accessed) could potentially relate to a direct effect on Scope since depending on the evidence, inadequate access might have direct adverse effects on a neighbour.

22. Be that as it may, as regards the one ground that Ms MacDonald does seek to defend, I do not think that she answers the essential point. While I accept that reverse sensitivity is a legitimate environmental effect, well recognised in the case law, I have difficulty categorising it as a **direct** effect. The nature of a reverse sensitivity effect is that a new activity commences that is sensitive in some way to the operation of an existing activity on a neighbouring property, and that sensitivity then generates complaints about the latter's operations. It seems to me that while undoubtedly real, that is an indirect effect of allowing the sensitive effect to

4 Form 5 in the Resource Management (Forms, Fees, and Procedure) Regulations 2003

establish. I do not, however, accept Ms Steven QC's first point, that there is no inherent incompatibility between Scope's landfill operations and the activities CCCL seeks to provide for on its land, at least at this stage. I would want to hear the evidence of the parties on that point before reaching any final conclusions in that regard.

23. However, Scope's further submission was not filed under clause 6 of the First Schedule. It was filed pursuant to clause 8. There is no parallel restriction in clause 8 to the trade competition provisions in clause 6(4). Rather, clause 8(1) provides different restrictions, including that a further submitter must have an interest in the Proposed Policy Statement or Plan "*greater than the interest that the general public has".* I do not think that there is any doubt that Scope, as an immediate neighbour of CCCL could satisfy that test.

24. Nor does the relevant form in the 2003 Regulations for further submissions (Form 6) have parallel provisions to those in the form for primary submissions related to trade competition.

25. Accordingly, the answer to Ms Steven QC's complaint that Scope did not identify itself as a trade competitor is that, in terms of the relevant form, it was not required to do so.

26. Having said above that reference in the Act to a "***submission"*** should normally be read as including a further submission, I think that that general approach must give way to the way in which the First Schedule differentiates the two, and provides different requirements as to who may make further submissions from those defining who may make a primary submission.

27. I infer that the legislature may not have felt it necessary to constrain further submissions in the same way as primary submissions because a further submission is limited to a matter in support of/or in opposition to the relevant submission[5].

28. I also note that the same may not be the case in the Environment Court, because Form 7, applying to notices of appeal, does have a trade competition declaration requirement.

29. Ms Steven QC did not put her application on the basis that Scope's further submission would be an abuse of process irrespective of the statutory provisions

5 First Schedule clause 8(2)

she was relying on. Given that trade competition objections were not generally categorised as an abuse of process prior to the 2009 amendment to the Act putting in place the provisions I have been discussing, that would be a difficult argument to make. However, it might depend on the nature of the case advanced, which we will not know until we see Scope's evidence.

30. In summary, I decline to strike out Scope's further submission at this time, without prejudice to CCCL's ability to make a fresh application later in the process, when the matters being advanced by Scope are better defined.

Dated 27 March 2020

Trevor Robinson
Chair
Stage 3 Hearing Panel