
Thursday, 23 June 2022

Te Hui o Te Kaunihera ā-Rohe o Heretaunga
Hastings District Council: Commissioner Hearing

Ngā Minitī Minutes (in the form of a Procedural Note)

Drainways Contracting Ltd

Te Rā Hui:
Meeting date: **Thursday, 23 June 2022**

Venue **Landmarks Room
Ground Floor
Civic Administration Building
Lyndon Road East
Hastings**

Time start - end **9.30am – 3.25pm**

**(Section 357 Objection to Decision to Refuse Consent
for an Industrial Activity in the Plains Production Zone at 2570 Omahu Road,
Hastings) (RMA20220082)**

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Te Hui o Te Kaunihera ā-Rohe o Heretaunga

Hastings District Council: Commissioner Hearing Meeting

Ngā Minitī

Minutes (in the form of a Procedural Note)

Kua Tae ā-tinana: **Chair:** Commissioner Bill Wasley ([via Zoom](#))

Present:

Kua Tatū:
In attendance: Environmental Consents Manager – Caleb Sutton
Senior Environmental Planner (Consents) – Liam Wang
Democracy & Governance Advisor - Christine Hilton
Executive Assistant and Business Support Team Leader - Yvonne Moorcock (*for part of meeting*)

Kei Konei:
Also present: **“Applicant”**
Brendan Currie, Drainways Contracting Ltd - Applicant
Matthew Lawson – Legal Counsel appearing for Applicant
Phil McKay – Planning Consultant appearing for Applicant
Ian Millner – Land Management Consultant appearing for Applicant
Mike Donnelly – “Save the Plains” Group, supporting the Applicant

HUI

2. SECTION 357 OBJECTION TO DECISION TO REFUSE CONSENT FOR AN INDUSTRIAL ACTIVITY IN THE PLAINS PRODUCTION ZONE AT 2570 OMAHU ROAD, HASTINGS - DRAINWAYS CONTRACTING LTD (RMA20220082)

Council’s Document Reference: Covering report (22/207) and planning report (CG-16-28-00019) together with associated agenda documentation had been circulated prior to the meeting. As this hearing was being undertaken via Zoom, written evidence from the Applicant, Planning Consultant and others giving evidence on behalf of the Applicant had been pre-circulated to the Hearing Commissioner and council officers (25080#0080 to 25080#0084; plus 25080#0099 and 25080#0100). A Synopsis of Opening Submissions from the Applicant’s Legal Counsel (25080#0089) had also been pre-circulated. Details of this evidence, together with additional evidence tabled and circulated at the hearing, are set out in this Procedural Note.

As the Commissioner had been unable to undertake a site visit prior to the hearing, background information (25080#0132) had been forwarded to him. This background information included copies of relevant documents and photographs of the site and its environs that had been provided by the Applicant.

The evidence pre-circulated prior to the hearing and also evidence circulated in hard copy format at the hearing was made available electronically to the Commissioner, who was Chairing this hearing via Zoom.

Commissioner Bill Wasley introduced himself, advising that he had delegated authority to hear and determine the application being addressed at this hearing. He then outlined the process to be followed at the hearing.

Site visit

Prior to the hearing, the Applicant's Legal Counsel, Matthew Lawson, had asked the Commissioner to consider undertaking a site visit, given the highly contextual nature of this application in relation to the site and surrounding locale. Mr Lawson felt the photos submitted to the Commissioner, as background to the hearing, may not fully convey details of the site and its environs.

The Commissioner advised that he had further considered this matter and felt this it was appropriate to undertake a site visit. He signalled that the site visit may take place on the afternoon of Wednesday, 6 July or Thursday, 7 July (Date TBC). The hearing would not be formally closed until after the site visit.

The Applicant, Mr Currie, advised there while there were no hazards on the site, soil contamination was a factor. There was rubbish and some excavation amongst the weeds, so care was needed.

Presentation of evidence

The Commissioner acknowledged receipt of the references provided by Mr Lawson listing the list of cases referred to in his Legal Submissions. The Commissioner also acknowledged receipt of the planning evidence forwarded by Mr McKay, including evidence forwarded the day prior to the hearing, which the latter had identified as being omitted from his earlier pre-circulated evidence.

The Commissioner advised he would like Mr Lawson to give the Right-of-Reply in two parts. The process could be started orally at the hearing session today and then it was to be provided in writing. At the end of the day's session the Commissioner would identify and clarify any issues that he specifically wanted to have addressed in the Right-of-Reply, so that this was clear for Mr Lawson.

The Commissioner asked the parties to highlight the main points in their respective evidence, rather than reading them out in full, as all the evidence had been pre-circulated.

Further evidence had been forwarded by the Applicant's Legal Counsel, Mr Lawson, (prior to the start of the hearing after the release of the agenda and planning report). As the reporting planner had not had the opportunity to address this evidence in his agenda report, Mr Wang asked leave of the Commissioner to make some initial comments and present his draft conditions at the start of the hearing. The Commissioner agreed to this request for the outlined reasons, as did the Applicant and his Legal Counsel.

The Reporting Planner, Liam Wang, presented his initial comments (*comprising three pages without annotation - 25080#0116*) and advised that two pieces of information in the evidence presented on behalf of the Applicant, had not been available when he had written his agenda report. They were: - 1) Mr Millner's evidence identifying the soils on the site as being "anthropic" (i.e. manmade – made through the action of people); and 2) that the training aspects of the Applicant's activities was considered an essential part of the proposal. The key was whether the educational aspect of the proposal can be considered as being essential to the proposal and if the educational and industrial parts of the proposal needed to be co-located on the same site.

Mr Wang stated that if the educational aspect was essential then the outcome may need to be secured by conditions of consent. He tabled some draft conditions (*25080#0120*), and asked that they be treated as "confidential" until they had been considered as part of this hearing process.

The Commissioner asked whether Mr Lawson wanted time to consider the draft conditions that had been presented by Mr Wang.

Mr Lawson noted a condition would be needed to link the two parts of the proposal together, but some of the timeframes proposed were beyond the Applicant's control – e.g. the number of people the EIT and Drainways Contracting may have available. A condition that effectively allows the EIT to determine the operation of the consent almost gives it a power of veto/termination of the consent. A number of EIT's in NZ, including the local EIT, were being merged and there was uncertainty about which courses would be available where; and an accredited provider did not need to be affiliated to any EIT.

The Commissioner requested that the details of the proposed conditions be further discussed between the parties and the resultant agreed set of conditions could be attached to the formal Right-of-Reply.

Mr Lawson asked if Mr Donnelly could present evidence first on behalf of the Applicant, as this witness had to leave early, after the presentation of that evidence.

Mike Donnelly, a member of and a spokesman for "Save the Plains" Group, presented his pre-circulated evidence (*25080#0080*) on behalf of the Applicant, highlighting the main points in that evidence. In response to a question from the Commissioner, Mr Donnelly confirmed that while he was not the main spokesman for the "Save the Plains" Group, the members were in agreement with the evidence being presented at this hearing.

In regard to Paragraph 11 of his evidence, Mr Donnelly confirmed he had read Mr Millner's evidence regarding other sites in the Plains Production zone. He felt the evidence about the makeup of the site was very compelling and if it wasn't permitted the site would likely sit unused for years. The Group was seeking to preserve the good soils of the Heretaunga Plains.

Legal Counsel for the Applicant, Matthew Lawson, presented his pre-circulated Synopsis of Opening Submissions (*25080#0089*), highlighting and expanding on the main points and interpolating as appropriate. He stated this proposal was not a de-facto planning approach to the District Plan or zoning and the Applicant was wanting this to be considered as an exception. He disagreed with the relevance of the case law examples (*25080#0070*) the reporting planner had presented (*Endsleigh Cottages vs HDC and Stone v s HDC*) which referred to fragmentation of land.

Among the main points that he noted: - Mr Lawson referred to the case law examples that he had included in his Opening Submissions (25080#0096), particularly noting Beacham vs HDC and Jara Family Trust vs HDC, which he believed supported the proposal. He said due to inherent limitations on the land, the proposed development work would not impede the use of this site.

Mr Lawson highlighted the main areas of disagreement between the reporting planner and the Applicant's Planning Consultant as set out under Paragraph 17 of his Legal Submissions. There was substantial disagreement as to whether the proposal was an ad-hoc expansion of an industrial activity into the Plains Production zone and how the District Plan's objectives and policies should be applied.

The Commissioner sought points of clarification regarding Mr Lawson's Submissions, including historical dumping of waste on the site; how the Applicant could ensure the longevity of the training part of the operation if consent was to be granted and how any relevant conditions may be addressed in this regard.

The hearing adjourned for morning tea at 11.15am
and resumed at 11.35am

Following the break, Mr Lawson advised that the Draft Conditions put forward by Mr Wang had been discussed with the Applicant and, if consent was to be granted, there was no objection from that party, in terms of tying the educational facility into the activity on the site as part of the condition framework. The EIT may not continue in its current form going forward so any conditions should be tied to the activity of providing the training, rather than who the training was to be undertaken by.

The Applicant, Brendan Currie, presented his pre-circulated evidence (25080#0081) highlighting and expanding on the main points and interpolating as appropriate. He explained that rural work was not his core work and that he aimed to ensure "competency" and raise standards in regard to infrastructure work within the industry and the wider community.

In response to a question of clarification sought by the Commissioner, Mr Currie confirmed that he had made the approach to the EIT as he had the space available on his land for this type of training.

The Land Management Consultant appearing for the Applicant, Ian Millner, presented his pre-circulated evidence (25080#0084) highlighting and expanding on the main points and interpolating as appropriate. The Lattey Report (a preliminary site investigation of this property, prepared by Alasdair Park, of Lattey Group in April 2021) (25080#0048) was also referred to.

Among the main points that he noted: - Mr Millner stated that as a result of his investigations he believed the land on this site was classed as Class 7 and that arsenic levels were higher than the background levels usually found in Gimblett Gravels and how that may affect possible uses of the land. The extent/amount of fill on the site was not known. This was the first time he had encountered the particular set of very unusual circumstances that existed on this site.

In response to questions from the Commissioner, Mr Millner advised that as long as care was taken when working on the site and food grown there was not consumed, people should be able to use and work on the site as proposed. He also indicated where the highest concentration of arsenic was located to give the Commissioner some reference points when the latter undertook the site visit.

The Planning Consultant appearing for the Applicant, Philip McKay, presented his pre-circulated evidence (25080#0082) and the separate Attachment 1 (25080#0083), which comprised an A4 sheet showing the sites referred to in Table 1 of the evidence. He had also separately circulated two email chains and attached documents which formed Appendix 1 of his evidence (25080#0099 and 25080#0100), which had been omitted from the earlier pre-circulated Applicant evidence. He highlighted and expanded on the main points in his evidence, extensively interpolating as appropriate. He also acknowledged the initial comments made by Liam Wang and the draft conditions the latter had circulated at the start of the hearing.

Mr McKay noted that confusion may have arisen in regard to Mr Millner's original report. Mr McKay explained that when the original report had been appended to the Assessment of Environmental Effects (AEE), Mr Millner had been working for another company. The report had been re-submitted on new letterhead and the new date on which it had been lodged was close to the date of the AEE. The statement had been written prior to the Lattey report. This matter had been discussed with Mr Millner and addressed in the submitted email chain (dated 24 March 2022).

Regarding Paragraph 116 of his evidence, Mr McKay noted that he should have tabled the relevant planning map and provisions in accordance with his evidence. He undertook to provide this information following the adjournment of this hearing session, and did so in the form of a covering email (25080#0108) and two attachments – being HB County Council District Scheme and District Planning Map (25080#0111 and 25080#0112).

Mr McKay responded to questions from the Commissioner. Among the matters raised, Mr McKay confirmed that he considered that land should be reclassified from Class 7 to Refuse Anthropic. He confirmed the title had been issued on 29 September 1966.

The hearing adjourned for lunch at 12.45pm
and resumed at 1.45pm

The reporting planner, Liam Wang, spoke to his agenda report and extensively addressed the Legal Submissions and the evidence that had been presented during the hearing. Following the adjournment of this hearing session Mr Wang circulated an annotated version (*comprising five pages - 25080#0117*) of his initial written comments (25080#0116) that had been presented at the start of the hearing.

Mr Wang particularly addressed the areas that he was not in full agreement with, in Mr Lawson's Submissions and in the evidence of Mr McKay and Mr Millner (including referring to sections of the Lattey report).

In the draft conditions (25080#0120) he had presented at the start of the hearing, Mr Wang explained that he had not tied the proposed activity to the EIT or any other particular provider (Draft Condition 4). As the proposed training would not be controlled by the Applicant, if no provider was available there would only be the industrial activity alone on the site. He did not believe there was enough certainty that this activity would happen and his Draft Condition 1 would address that aspect. He felt it was difficult to treat both aspects of the proposed activity (educational and industrial) with the same weight, as the Applicant had stated the training would only be undertaken on a maximum of two days per month.

In response to questions from the Commissioner, Mr Wang advised that his recommendation had not changed since hearing the Legal Submissions and evidence presented at the hearing. He still felt that the proposal was contrary to a number of key objectives and policies and was not convinced that the necessary criteria had been met, nor that the educational aspect was unique. However, he was not qualified to comment on the matter of contamination and soil quality and said if the Commissioner felt that the soils can be quantified as Refuse Anthropic and believed the educational aspect was essential to the proposal, then consent could be approved on the grounds that the application was unique.

It was noted that the Applicant had presented expert evidence from Mr Millner on soils on the site, while the Council had not done so. Mr Wang still believed versatile land encompassed more than just soil quality and therefore had not investigated this aspect any further. Officers advised that the original PSI and Landvision report had identified the site as being “Omahu”, rather than “Refuse”, and sites in this area usually had Class 7 soils. If information regarding the reclassification of the site’s soil type had been available earlier, it was likely the Council would have engaged a peer reviewer.

Officers further noted that Mr Millner’s evidence had stated the site should not be used for food intended for human or animal consumption (but it was not stated that specific crops couldn’t be grown there). It was not uncommon to have poor orchard land with high arsenic contamination levels.

Right-of-Reply

The Commissioner reiterated that the Right-of-Reply could be started orally today and then it was to be provided in writing.

Mr Lawson began presenting the first part of the Right-of-Reply orally on behalf of the Applicant, with a written version to follow. Among the main points he highlighted: - He noted there was some agreement on the key issues, with the main point of difference being whether the land was versatile and how that definition was to be applied; consistency or otherwise with the key policy framework; the issue of water supply; Section 6.2.6(f) and the relationship between crops grown on the same site – and how the site visit may show the Commissioner how this related to Note 2 under this section.

Mr Lawson continued, noting that he had referred to the Jara Family Trust vs HDC case law as that was similar as it also involved a site in an industrial enclave. The educational aspect – the Applicant will work with council officers, with the key aspect being not to link this activity with any specific provider but to tie the conditions to the activity. Evidence presented regarding soil contamination on the site had been clearly presented in Appendix 3 to the AEE.

The Commissioner advised he was happy to have the educational facility aspect further addressed as part of the written Right-of-Reply.

The Commissioner asked that the outcome of further discussion between the parties regarding the proposed conditions be included with the written Right-of-Reply. The resultant set of conditions were to be forwarded with the written Right-of-Reply and annotated to show which conditions had been agreed to; where there was still any disagreement between the parties; and suggested alternative wording as appropriate – so he could see possible alternative approaches in regard to any particular condition. He highlighted that these comments did not indicate whether or not he was looking to uphold/reject the objection.

He also outlined the timing for receipt of the written version of the Right-of-Reply and his undertaking of the site visit - these details would be set out in a Commissioner Minute he would issue. The site visit would likely be undertaken on Wednesday, 6 July or on Thursday, 7 July (Date TBC). He may undertake this alone or with a council officer who was not involved with work relating to this hearing.

The meeting was adjourned at 3.25pm

At this point in the hearing process, the following evidence or further information was subsequently received (in the order shown below) and was forwarded to the Commissioner and also sent to the council officers:

- (On 23/6/22) - Commissioner requested word versions of original and objection planning reports (25080#0105); objection letter and AEE (25080#0106 and 25080#0107); and Mr Lawson's Opening Submissions (25080#0114) – all provided on 27/6/22.
- (On 23/6) Mr McKay provided copies of documents referred to in Paragraph 116 of his evidence – HB County Council District Scheme – Rural 6 Provisions (25080#0111) and HB County Council District Scheme Map (25080#0112) (sent to Commissioner and officers on 27/6).
- (On 27/6) Commissioner Minute 1 (25080#0123) received and sent to applicant and officers (25080#0124).
- (On 6/7) Commissioner advised that site visit now on Wednesday, 13 July. Officers and applicant were advised (25080#0125). He had been unable to do this prior to hearing.
- (On 13/7) Commissioner confirmed site visit undertaken by himself (25080#0126).
- (On 15/7) – as requested by Commissioner received Mr Lawson's Right of Reply (25080#0127) – forwarded to the Commissioner and officers that same day (25080#0128).
- (On 4/8) – Commissioner advised he had closed hearing on 3/8 (25080#0129).
- (On 25/8) - Commissioner issued signed hearing decision, dated 24/8/22 (25080#0133 and 25080#0135).

The meeting was subsequently formally closed
on Wednesday, 3 August 2022

The signed Commissioner Decision (25080#0135) forms part of these Minutes (prepared in the form of a Procedural Note) from this hearing.

Confirmed:

Chairman:

Date: