Before the Independent Hearings Panel

In the Matter of	the Resource Management Act 1991
And	
In the Matter of	the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014
And	
In the Matter of	the Proposed Christchurch Replacement Plan (**Chapter 8: Subdivision**)

Joint Supplementary Legal Submissions

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INTRODUCTION

1. These joint supplementary legal submissions are filed on behalf of Ngāi Tahu Property Limited, Te Rūnanga o Ngāi Tahu and Ngā Rūnanga, Christchurch International Airport Limited, Lyttelton Port Company Limited, and Waterloo Park Limited (and together referred to as **the Submitters**).

2. These submissions are provided to assist the Panel in relation to Judge Hassan's question as to case law support for the principles that:

   (a) An applicant who volunteers conditions or constraints is bound by those conditions / constraints; and

   (b) A resultant certificate / consent is bound by the scope of the application and an applicant can only obtain certification / consent for what it has applied for.

SUMMARY

3. The legal position is that:

   (a) an applicant who volunteers conditions or constraints as part of their application to carry out an activity is bound by those constraints provided the volunteered condition/constraint is imposed by the consent authority and occurs in the context of formal agreement or a specific undertaking. A representation or undertaking determined by inference or an assessment of the application evidence as a whole will not be sufficient;

   (b) a resource consent is bound by the scope of the application. Some amendments or modification to an application are permissible provided they are within the scope defined by the original application.

LAW

Extent to which an Applicant is bound by volunteered conditions

4. *Augier v Secretary of State for the Environment* (1978) 38P and CR 219 (QBD) is the starting point for the case law authority that an applicant who volunteers conditions or constraints is bound by those.

5. This principle has been developed in the context of conditions on resource consents and the genesis and scope of the principle is helpfully explained by the High Court in *Frasers Papamoa Ltd v Tauranga City Council* [2010] NZRMA 29.[1]

6. The Court in *Frasers Papamoa* held that for the *Augier* principle to apply four conditions were required:[2]

   (a) a clear and unequivocal undertaking to the [consent authority] and/or other parties;

   (b) resource consents granted in reliance on the undertaking;

   (c) imposition of a condition on resource consents which broadly encompassed the undertaking; and

   (d) detriment to the [consent authority], or other parties, if the undertaking is not complied with.

7. Once imposed, an *Augier* condition binds a consent holder[3]. This was confirmed by the Environment Court recently where the Court considered an argument that subsequent owners may not be bound by a *Augier* condition. The Court disagreed

> [56] Even if it did not, there was a further hurdle that Mr Lawson had to overcome in advancing the various propositions that he did, namely that the condition in question is an *Augier* condition, volunteered by the Appellants, which would be binding on them even if it could not have lawfully been imposed by the Council. Mr Lawson's response to that proposition was that *… even if a condition is volunteered by an applicant under the Augier principle it*

1 At [22]-[34].
2 At [34].
3 See *Kirton v Napier City Council* [2013] NZEnvC 66

> *may not be enforceable against or may be challenged by a subsequent landowner if the condition does not satisfy the Newbury tests*
>
> [57] We do not accept that proposition. If Mr Lawson is correct there would be no point in any applicant offering (or any consent authority imposing at the request of an applicant) a condition which could not otherwise be imposed by a consent authority. We do not think that is a desirable outcome. By way of example, it is not uncommon for applicants to volunteer conditions which offer environmental compensation or betterment sometimes not directly related to the consent being sought. Such proposals would be meaningless if they could be challenged by a subsequent owner.

8. Provided the required principles of an *Augier* condition are followed, these conditions will bind all holders of the resource consents.

Extent to which an Applicant is bound by the scope of the application

9. The question of scope of resource consent conditions has been extensively considered by the Courts. Counsel are aware of several cases which may provide assistance on this issue. These cases are summarised as follows.

10. *Darroch v Whangarei District Council* A18/93 is authority for the principle that every resource consent is limited by the terms of the original application (and any subsequent amendments provided they are within the scope of the original application) and accordingly, the application which then defines the consent authority's jurisdiction. In particular the Court said:[4]

> "We hold that it is the original application and any documents incorporated in it by reference which defines the scope of the consent authority's jurisdiction. In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by

[4] At page 27

significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required."

11. This principle has most recently been considered by the Environment Court in *Waiheke Marinas Limited* [2015] NZEnvC 66.[5] The Court summarised the starting point as follows:

> "…amendments can usually be made up until the close of a hearing, constrained however by the requirement that they come within the scope defined by the original application. That has been the position since the decision of the Environment Court in *Darroch v Whangarei District Council*. Beyond such constrained position, a fresh application would need to be brought."

12. The Court then quoted the principles set out in the recent statement of the law made by the Environment Court in *HHL Limited v Queenstown-Lakes District Council*.[6] These principles are:[7]

    (a) A change to a notified application is within the jurisdiction of the Court if its ambit is fairly and reasonably within the scope of the original notified application: *Shell NZ Limited v Porirua City Council;*

    (b) Particular factors to be considered include (see *Atkins v Napier City Council*):

        (i) Scale, intensity and character of the altered activity;

        (ii) the altered scale, intensity and character of the effects or impacts of the proposal;

        (iii) potential prejudice to both parties and the public;

    (c) only if an amended application fails the *Shell New Zealand* test, might the *Estate Homes* approach possibly apply.

13. The Court in *Waiheke Marinas* noted that in applying these principles, each case will depend on its own facts. Changes to a proposal should be analysed against the original application and whether they fall within the

5 At [8].
6 [2014] NZEnvC 45, at [42].
7 *Waiheke Marinas Limited* [2015] NZEnvC 66, at [10].

scope of the original application will be a question of fact and degree. However, the Court did note that a straight reduction in the scale, intensity or character of the proposal will often be found to be within scope.

14. The Court of Appeal decision in *Shell Oil New Zealand Limited v Porirua City Council* CA57/05[8] that is referred to above is authority for the principle that a consent authority has no jurisdiction to grant a consent which extends beyond the scope of a consent application. That case also addressed (although did not traverse the *Augier* line of case law) the legality of the Court imposing a condition on a consent which was offered by the applicant but outside the scope of the application and the consent. The Court affirmed the approach in *Sutton v Moule* (1992) NZRMA 41(46)[9], that a consent which purports to grant more than what is sought in the application is ultra vires to that extent

15. The Supreme Court decision of *Waitakere City Council v Estate Homes Limited* cited with approval the Court of Appeal's decision in *Shell New Zealand Limited v Porirua City Council*.[10] The Court held that Estate Homes Limited should have been constrained by what it had recorded in its application to the Council on the basis on which is sought compensation if it was to construct an arterial road.[11] The Supreme Court suggested several different types of modification of resource consents, some modification being permissible, but 'materially different' modification being beyond jurisdiction.

16. Subsequent Environment Court decisions have read the *Estate Homes* judgment as simply another case in the series of decisions which affirm the proposition that amendments are permissible if they are within the scope defined by the original application.[12]

8 Affirming the earlier High Court judgment: *Shell Oil New Zealand Limited v Porirua City Council* High Court, Wellington, CIV-2003-485-1476.

9 At page 9. Followed in several later cases including *Manners-Wood v Queenstown Lakes District Council* W77/2007 see para [22], and *Calveley v Kaipara District Council* [2014] NZEnvC 182 at para [66]

10 Waitakere City Council v Estate Homes Limited [2007] 2 NZLR 149 at [30].

11 At [31].

12 *Simons Hill Station Limited v Canterbury Regional Council* [2013] NZEnvC 62; in *HHL Limited v Queenstown-Lakes District Council* [2014] NZEnvC 45, at [40].

CONCLUSION

17. An application for subdivision would therefore be constrained by any voluntary concessions that are made by an unequivocal undertaking if; resource consent is granted on the basis of that undertaking, conditions are included that broadly encompass the concession made, and there would be detriment to the consent authority or another party if the undertaking is not complied with. An applicant for a resource consent will also be bound by the scope of what is applied for in the application. What is considered 'out of scope' is an inherently facts-based consideration.

18. Some modification is acceptable, but an alteration to the application which goes beyond a mere adjustment would require a new application to be prepared. For example, applications for subdivision that are accompanied by a certificate as to available servicing capacity, would most likely be able to reduce in scale or intensity through subsequent servicing related discussions with Council without necessitating a new application. However, any amendments to the application which do materially alter the scope are likely to require re-application.

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