Submitter No. 23

Alan Jefferies

Submission
in relation to
Proposed Plan Change 42
to the Upper Hutt City Council District Plan

In relation to my Submission Point 1

1. The latest version of the so called flood hazard maps are both absurd and demonstrably inaccurate in the following context.

   With reference to the GIS map kindly provided by the UHCC Appendix 1 – Map.

   The white dot shown as "A" represents the top of the bank and "B" represents the bottom of the same bank and "C" represents half way up the same bank. The differential in elevation between the top of the bank and the bottom of the same bank is approximately 30 metres [according to the WRC].

   So with respect to whoever it was who drew this farcical flood hazard extent, I can only ask the open question how can it possibly be that in a flood, of whatever magnitude could a situation occur whereby the water level will have a variance of up to 30 metres in elevation.

   Furthermore, at this location the valley floor is at least 100 metres wide.

   This cannot possibly be right.

   IT IS NOT FIT FOR PURPOSE.

   Please recommend the withdrawal of this absurd proposed plan change.

   In order to understand how this absurdity arose you will need to refer to Appendix 2 – Map.

   This map proves that the edges have been "smoothed". It is the "smoothing" of the edges which has turned to old PC15 maps, which themselves were questionable, into maps which are now demonstrably absurd.

2. Flood maps, as such, likewise any such highly technical information is entirely unnecessary and indeed inappropriate in any district plan.
   There is a provision in the RMA to prevent situations such as this occurring. Schedule 1 Part 3 RMA provides [and has always provided] the simple cost effective solution for the UHCC.

3. The flood risk downstream of my property is significantly understated in these proposed flood hazard maps. The model used from the onset failed to take any account of a significant contributor to any flood risk. That contributor, in this instance, is the uprooted, fallen, falling, dead and dying willow trees which at any given time cause constant blockages affecting the river channel and river flow adjacent to my property. It is those blockages which will inevitably exacerbate the flood risk to the downstream urban area.

That absence of river maintenance will predictably cause havoc downstream. To understate the flood risk downstream so demonstrably is simply providing a false sense of security to the downstream residential property owners.

I'm pleased I don't live there.

In relation to my Submission Point 2

4. The so called erosion hazard line is farcical and in order to understand that it is please again turn to Appendix 1 – Map.

   In relation to my land [which has a steep eroding bank on it] the so called erosion hazard line is located HALF WAY up that bank.

   If the line is supposed to represent a building set back line, then why I ask, would it be sensible to allow building to occur half way down a pre-existing steep eroding bank. The line is ABSURD.

   Please recommend the withdrawal of this farcical nonsensical proposed plan change.

   IT IS NOT FIT FOR PURPOSE.

5. Another two reasons that the erosion hazard line is farcical are as follows, with reference to my marked up Appendix 3 – Map.

   There is a lengthy section of the Mangaroa River where that river hugs the toe of Mount Marua. The toe of Mount Marua at that location is comprised of exposed bedrock, which bedrock, due to the fact that it is exposed bedrock is highly UNLIKELY to erode, particularly during the lifespan of this proposed plan change.

   Further, the farcical line informs plan users that it is foreseeable that Beechwood Way will likely dissolve through erosion.

6. I question both the qualifications and the experience of whoever it was who drew this farcical line on these proposed maps. Likewise I question the terms of the brief [if any] provided to whoever drew that farcical line.

   Again I ask.

   Please recommend the withdrawal of this farcical proposed plan change.

7. As the line affects properties, it likewise affects the owners of those properties. It affects people and communities, in this instance the riparian community. It must be fit for purpose. In its current form – IT IS NOT FIT FOR PURPOSE.

In relation to my Submission Point 3[a]

8. This proposed plan change was fatally flawed from its inception in the same way and for the same reason that its predecessor PC15 was fatally flawed.

9. This proposal proposes the introduction of rules which relate to spaces of land, some of which land is already under the exclusive jurisdiction of the Regional Council in accordance with Sec's 13 and 30 RMA.

10. It is abundantly clear that the WRC has chosen NOT to disclose that fact to the UHCC. More specifically the WRC has evidently failed to disclose the extent of the spaces of land under its exclusive jurisdiction. The extent of those spaces of land represents the limits of WRC's jurisdiction at least in terms of Sec 13 RMA: Those limits, once disclosed also represent the limits of UHCC jurisdiction.

11. Whilst the WRC has evidently NOT disclosed that materially relevant information to the UHCC, it has nevertheless disclosed that materially relevant information to myself, as long ago as 2012. Appendix 4 – Map.

12. That information, which is yet to be disclosed by the WRC is essential, elementary and fundamental to the ultimate success or otherwise the failure of any plan change of this nature.

13. The High Court has already confirmed that UHCC does NOT have jurisdiction over river bed matters Appendix 5 – Decision – Paragraph 59.

14. Should the WRC ever bother to inform its own plan users of their rights in relation to the river beds under its control, by defining those spaces of land it will be informing its plan users which water features are rivers in accordance with the definition in Sec 2 RMA and which are not. Further, in relation to those which are rivers it must inform the extent of those river beds, as it has done on the relevant Appendix 4 Map.

15. A most fundamental aspect of land planning has been completely ignored in the preparation of this proposed plan change. The UHCC has first and foremost failed to ask itself the following elementary question.

    Where precisely does our jurisdiction extend to?

16. UHCC cannot write rules in relation to river beds any more that it could write rules in relation to any land already under the exclusive jurisdiction of any of its neighbouring Council's. It is simply NOT lawful. The same applies with river beds.

17. I reiterate, please recommend the withdrawal of this plan change, as it is unlawful. It is unlawful, primarily due to the fact that the WRC has evidently chosen NOT to provide full disclosure to UHCC.

18. This proposed plan change, as with any plan change under the RMA, must be developed in accordance with the simple provisions of the RMA, not in defiance of the Act.

Not only is this proposed plan change in defiance of the Act itself, it is also in defiance of the High Court decision previously referred to in Appendix 5. Furthermore, that High Court decision was reviewed by our higher Court, the Court of Appeal.

19. So, for the reasons outlined in the preceding paragraphs, to attempt to refer to those spaces of land as a river corridor constitutes contempt of court by the UHCC.

20. That High Court decision explicitly relates to THIS particular Council [UHCC] and also THIS particular river [the Mangaroa].

21. That aspect, of that decision, is, in any event doing nothing other than stating the obvious.

22. The space of land which constitutes the bed of the Mangaroa River MUST be defined, delineated and distinguished from the adjacent land on the PRE EXISITING planning maps when this proposed plan change is withdrawn.

23. The hearing panel must recommend the withdrawal of this proposal because it is unlawful due to the fact it fails to inform ratepayers of their rights in the context it fails to advise of the extent of the land under the exclusive jurisdiction of the respective councils.

24. In its current form, this proposal, if approved is permitting activities in relation to land which is NOT under UHCC jurisdiction and thus it constitutes entrapment in exactly the same way as a previous UHCC resource consent permitted activities on my land, which turned out to be the bed of the Mangaroa River.

25. The sole reason this situation has occurred is due to the fact that WRC has adopted a longstanding and entrenched policy of failing to inform its own plan users, which includes the territorial authorities of the region, of their legal right to be informed. Its plans, both operative and proposed, prove that point and prove it conclusively, due to the simple fact that its [WRC's] plans contain no planning maps whatsoever.

26. Withdraw this proposed plan change.

Appendix 1

Upper Hutt City Council - Property Map

Date Printed: 30 March 2017

Legend

- House Number
- Road Name
- Property
- Hydro Parcel
- Strata Parcel
- Rail Parcels
- Pinehaven Stream Co
- Pinehaven Overland F
- Flood Hazard Area
- Pinehaven Catchment
- Erosion Setback Line
- Overflow
- Ponding
- River Corridor

SCALE 1: 1,500

76.2 0 76.2 Meters

Projection: NZGD_2000_New_Zealand_Transverse_Mercator

This map is a user generated static output from an Internet mapping site and is for reference only. Data layers that appear on this map may or may not be accurate, current, or otherwise reliable.

THIS MAP IS NOT TO BE USED FOR NAVIGATION

A GREAT PLACE TO LIVE
UPPER HUTT CITY
UPPER HUTT CITY COUNCIL

Appendix 2.

1095

1066A

1102

1108

1110

Maymorn Road

Legend

- PC 15 and 42 Erosion Hazard Line
- PC 42 Mangaraoa Overflow
- PC 42 Mangaroa Ponding
- PC 42 Mangaroa River Corridor

PC 15 Flooding

TYPE

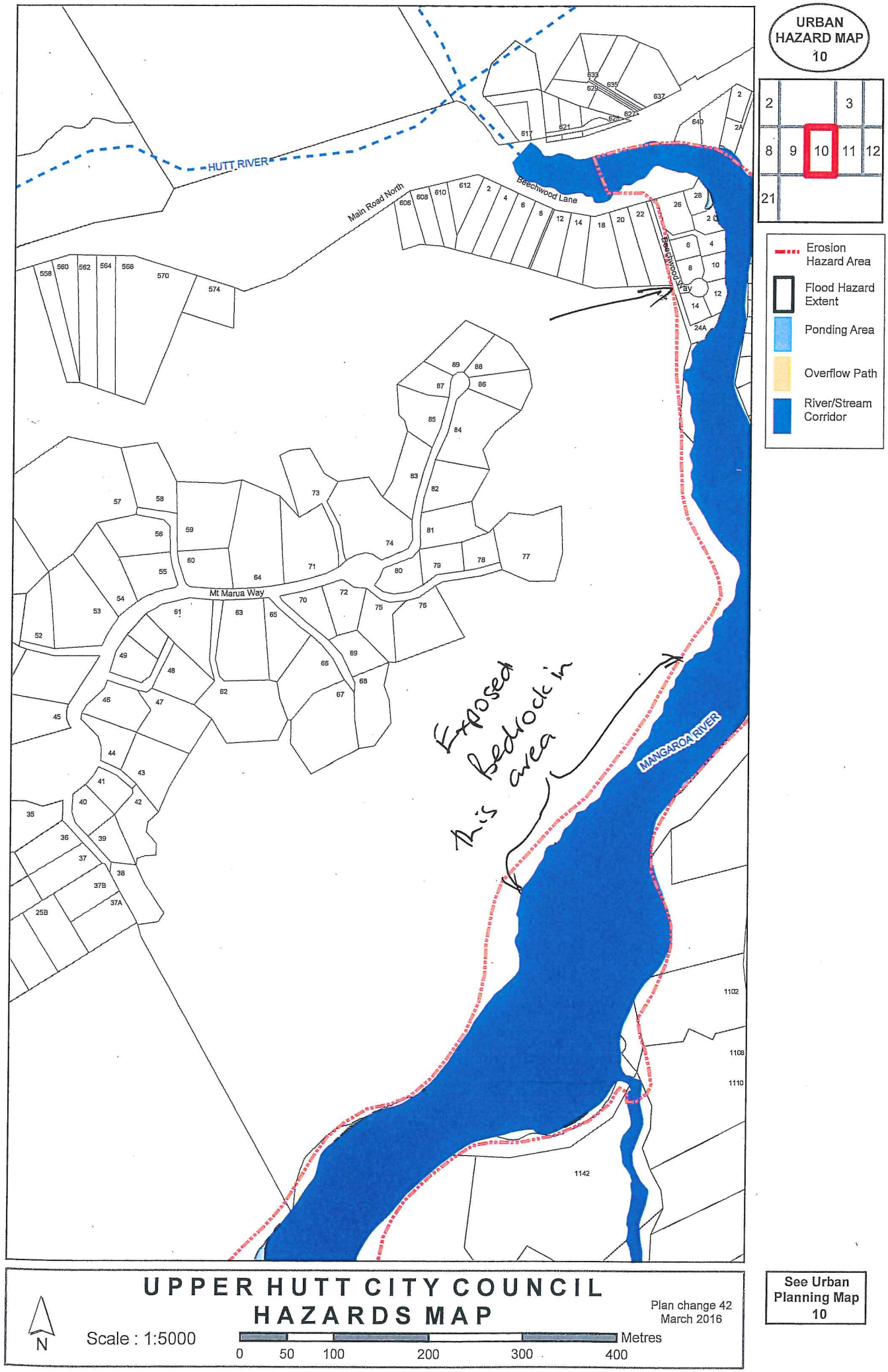
- OVERFLOW PATH
- PONDING
- RIVER CORRIDOR

N

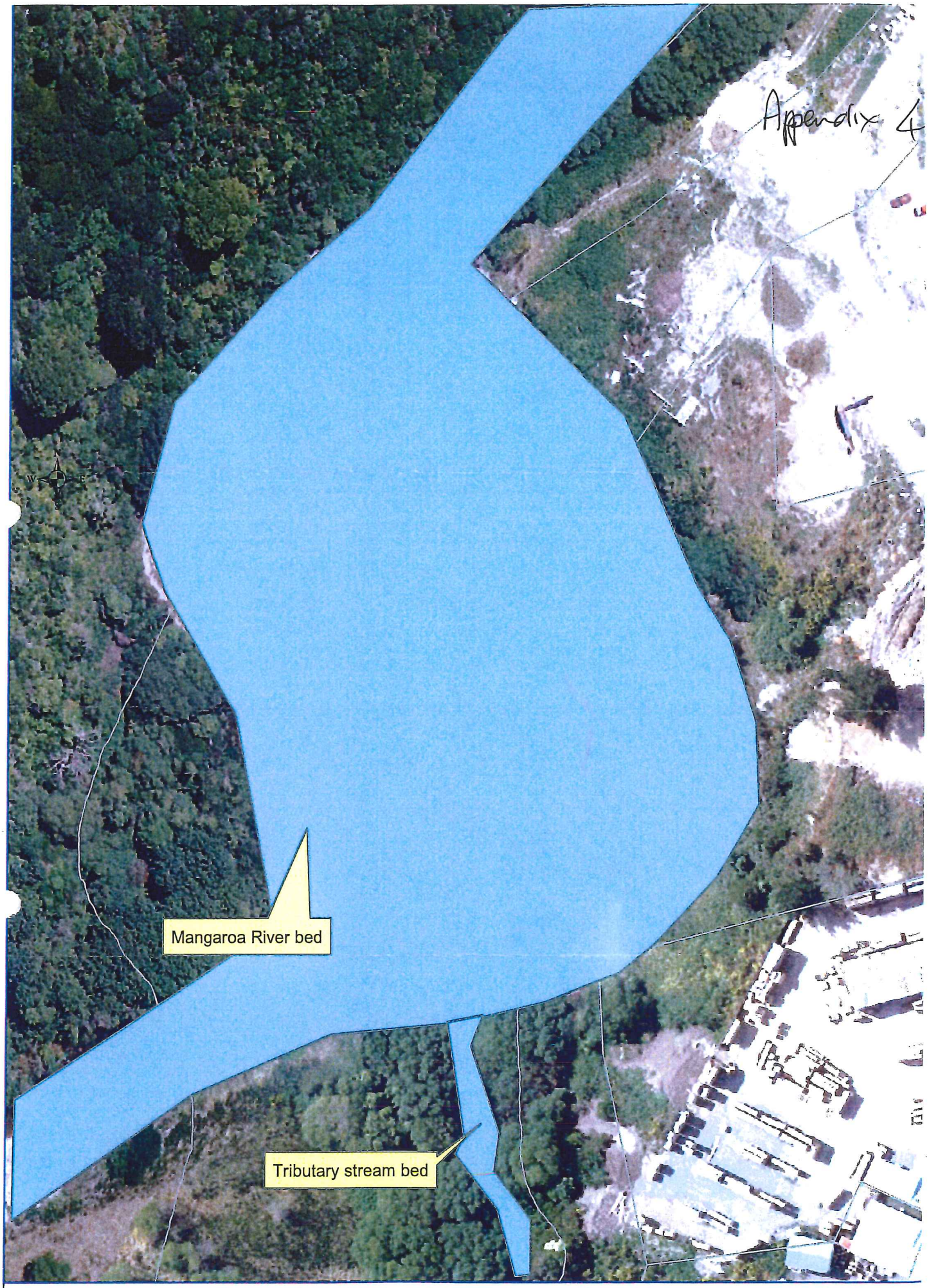
1:1,250

0 20 40 80 Meters

Appendix 3


URBAN HAZARD MAP 10
2
3
8
9
10
11
12
21
Erosion Hazard Area
Flood Hazard Extent
Ponding Area
Overflow Path
River/Stream Corridor
HUTT RIVER
Main Road North
Beechwood Lane
Beechwood Way
Mt Marua Way
MANGAROA RIVER
Exposed Bedrock in this area
UPPER HUTT CITY COUNCIL
HAZARDS MAP
Plan change 42
March 2016
Scale : 1:5000
N
0 50 100 200 300 400
Metres
See Urban Planning Map 10

Appendix 4



Greater Wellington Regional Council

Approximate river bed location adjacent to 1102 Maymorn Road

0 10 20 Meters

greater WELLINGTON
REGIONAL COUNCIL
Te Pane Matua Taio

Appendix 5.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-2012
[2013] NZHC 1059

	BETWEEN	ALAN DENNIS JEFFERIES Appellant
	AND	WELLINGTON REGIONAL COUNCIL Respondent

Hearing: 3 October 2012

Counsel: F Geiringer (on instructions of P Morahan) for Appellant
T Gilbert for Respondent

Judgment: 10 May 2013

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 4:30pm on the 10th May 2013.

JUDGMENT OF WILLIAMS J

Solicitors:
Mr Geiringer, Barrister, Wellington, felix.geiringer@terracechambers.co.nz
Luke Cunningham & Clere, Wellington, tjg@lcc.co.nz

Introduction

[1] This is an appeal against the decision of the Environment Court to uphold two Abatement Notices issued against Mr Jefferies. Notice 463 relates to a bund the appellant helped to build at the point where the Mangaroa River bed splits between the now largely dry eastern arm and the now running western arm. The split comes back together again 250 metres downstream forming a kind of small 'island'. The bund was largely but not wholly successful in preventing the river from rerouting back through the eastern arm. This arm adjoins the rear of the appellant's property. He and a neighbour, Mr Donald McNeil, placed the bund in order to stop the bank on his land eroding away. According to the abatement notice, the allegedly unauthorised activities included:

(a) deposition of material;

(b) placement of structures; and

(c) associated diversion of water.

[2] The notice was issued on 16 April 2010.

[3] Notice 477 related to the tipping of clean fill down a cliff at the rear of the appellants' land and onto a portion of the now dry bed of the eastern arm of the river.

[4] The notice formally described the breach of s 13 of the Resource Management Act 1991 (RMA) as "unauthorised discharges of contaminants onto the bed of the Mangaroa River".

[5] That notice was issued on 28 May 2010.

The facts

[6] The appellant owns a property at 1102 Maymorn Road in Upper Hutt. It is used as a lumber yard. It backs on to the fluvial flats cut by the Mangaroa River.

His downstream neighbour is D A McNeill Limited at 1066B Maymorn Road. That site is used by Mr McNeill as a construction and demolition cleanfill.

[7] These two properties are located on the eastern arm of the river course. For a decade between 1999 and January 2010 (the month during which Mr Jefferies and Mr McNeill built the bund) the Mangaroa River flowed down that eastern arm. I understand that the western arm was for that period mostly dry. Prior to 1999, the river seemed largely to flow down the western arm. According to Council officers a tree fall in 1999 had caused the river to deviate. Certainly aerial photographs from the 1940s and 1950s show clearly that the western arm was the river's preferred course in those days.

[8] With the course of the river flowing down the eastern arm during the decade to 2010, the two properties in question suffered significant and ongoing erosion. Apart from Mr McNeill's and the appellant's self interest in protecting their own land from erosion, it is to be remembered that the sites have for many years been respectively a cleanfill and a timber yard. Thus, both properties contain potentially toxic contaminants that risked being washed downstream through normal hydraulic action.

[9] After Mr Jefferies acquired his property in 2002, he set about negotiating with the Council over resolving this erosion problem. He applied to divert the river back to the western arm by placing a bund at the upstream fork. This application was withdrawn a year later. In 2007, another application was made again to divert the river down the western arm using a bund. The Council appears to have been concerned that the bund would be regularly overtopped and broken up during periods of heavy flow. This would require, it was feared, regular repair and disturbance of the bed. Following discussions over a two year period, a new proposal was mooted. This involved reducing the level of the western arm bed so as to encourage water to flow that way.

[10] Rather than require a new application incorporating this change, the Council admitted it as part of the existing application through the "further information" provisions in s 92 of the RMA. This, the Council said, involved savings in

application fees and processing time. The matter had, after all, been before Council in one way or another since 2002.

[11] The Council says that at this point the original bund proposal in the application was removed and replaced. The new strategy was that flow would be encouraged away from the eastern arm rather than blocked by the bund. Mr Jefferies, on the other hand, says the change was in addition to the bund rather than in replacement of it.

[12] I will resolve that issue below, but in any event the proposal provided to Council by way of "further information" involved the extraction of 1300m^3 of river gravel from the western arm covering a short reach of 200 metres along the length of that arm to a width of 6-8 metres and a depth of 1 metre.

[13] Stu Clark of New Zealand Environmental Technologies Limited provided engineering advice to the applicants. He sent a plan to the Council indicating proposed work. It showed the river shifting to the western arm as a result of the excavation work, while it was proposed that the eroded bank along the eastern arm below the applicant's property would be armoured with rip rap and planted with willow poles to maintain stability. No bund is shown on the plan.

[14] The new information included a new "consent form" even though the Council was not treating the change as requiring a new consent. The form was, I presume, a convenient way of ensuring all relevant information was provided. It looks as if Stu Clark filled it in. The form indicated that the purpose of the application was to:

> Extract gravel and construct bank protection for purpose of controlling river erosion – Mangaroa River around 1066B Maymorn Road.

[15] In the description of effects, the applicants noted:

> Old channel will be cleaned out, metal screened and used to construct bank protection at toe of existing eroding slope.

[16] Post-completion of the work, the form noted ongoing effects as follows:

> Flow may pass down through old channel, some protection will be afforded on bend in existing channel.

[17] On 25 September 2009, Mr Jefferies himself put in a new consent form, still as part of the new information process. Attached to the form was the following comprehensive explanation of the work proposed:

> Extract gravel from the 'old' river channel (the channel which carried the watercourse pre-1999). Mangaroa River behind 1066B–1102 Maymorn Road. Due to lack of effective maintenance the river gravel was allowed to build up to such an extent that the river changed course onto the neighbouring private properties which are contaminated sites. The river has been on its present course since 1999 which has resulted in considerable erosion of the private properties and as a consequence polluted soil and debris continues to enter the watercourse. The 'old' channel will be excavated starting from the bottom of the channel and working to the top end. Gravel extraction will not take place in the actively flowing river. The applicants will be undertaking the proposed works using general hydraulic excavators and dump trucks which may include hired machinery. The estimated volume of gravel to be removed is 1300m^3 (approximate 200m x 1m deep x 6 to 8m wide). The extracted material will be taken to 1066B Maymorn Road outside the 100 year flood zone. It is proposed to commence the works approx 1st Oct 2009 (subject to weather conditions) with a completion date of 31st March 2010. Multiple crossings of the river will be required to undertake the proposal works (approximate 250-350). There is an existing track leading down to a rough ford crossing of the river near the lower end of the 'old' channel which will be used to cross the river. Some of the excavated material will be used on both banks of the river to provide a stabilised crossing and approaches to the ford. It is a roughly formed crossing – it does not have concrete blocks as a base.
>
> In effect the proposal is a public work as it will be on public 'land'. We don't know at this stage what maintenance will be required (if any) although it is probable that it will be necessary to extract gravel from below the old channel if it starts to build up. Should that happen a separate resource consent will be sought but only by one of the present applicants the information in this application supersedes all prior information submitted.

[18] Resource consent was granted on 16 October 2009. The purpose of the consent was recorded in the Council's decision as follows:

> To extract river gravels from the old bed of the Mangaroa River, and to drive vehicles across the Mangaroa River associated with the gravel extraction works, including any associated disturbance of and deposition of riverbed sediments on to the bed of the river.

[19] Condition 1 of the consent contained the standard "generally in compliance" clause, but this was tweaked in light of the 2009 changes to the original 2007 application. It provided as follows:

> The location, design, implementation and operation of the works shall be in general accordance with the consent application and its associated plans and documents lodged with the Wellington Regional Council on 8 October 2007 and further information on 25 September 2009.
>
> Where there may be inconsistencies between information provided by the applicant and conditions of the consent, the conditions apply. Where there may be inconsistencies between the further information provided by the applicant, the information provided on 25 September 2009 shall prevail.
>
> Note 1: There were substantial changes made to the proposal and the information submitted on 25 September 2009 supersedes all prior information.

[20] As is usual practice in applications of this kind the reasons for the decision were prepared by an official – in this case Malory Osmond, Resource Advisor, Environmental Regulation. The reasons described the proposal as set out above. It recorded the shift from the old 2007 proposal to the new 2009 one in the following terms:

> On 25 September 2009, Mr Don McNeill and Mr Alan Jefferies (the applicants) submitted further information to GW which supersedes all prior information submitted under WGN080153. This information outlines the final proposal and is the only information subject to this report.

[21] The reasons continued:

> No stream diversion has been included in the final proposal, however it is expected the proposed gravel extraction will provide a maintained secondary overflow path during flood events which will reduce the amount of erosion that currently occurs on the applicants' properties.

[22] The document was peer reviewed by Amy Holden, Resource Advisor, Environmental Regulation and approved by Miranda Robinson, Team Leader, Environmental Regulation.

[23] The works were undertaken between December 2009 and January 2010 – a period of low flow. Council officers visited the site in March 2010 following a complaint. It was discovered that a bund about 1.5 metres high had in fact been built across the eastern channel using extracted gravel (presumably from the western arm excavation) set behind a barrage of large concrete blocks with iron lifters.

[24] In addition, a narrow channel had been excavated down the western edge of the dry eastern arm – presumably to direct any water finding its way into that arm to the opposite bank to that owned by Mr McNeil and Mr Jefferies. The site visit also revealed that fill material had been tipped down the bank from the appellant's site, being deposited on the now dry eastern channel.

[25] Abatement notices were served on both Mr Jefferies and Mr McNeill in relation to the bund and on Mr Jefferies for tipping fill down the bank behind his property. Mr McNeill did not challenge the notice, pleaded guilty and was sentenced.

[26] Mr Jefferies challenged the notices. The Environment Court heard his appeal pursuant to s 325 of the RMA – a provision specifically relating to abatement notices. That court dismissed the appeals and upheld both notices.

[27] The Environment Court held that the abatement notices set out in clear terms the nature of the breaches complained of; that the bund had been built and tipping carried out on the bed of the river in breach of s 13; that the 2009 consent contained no permission to construct the bund; that the activity was not permitted under r 37 of the Regional Freshwater Plan (RFP); that the narrow "excavated channel" on the eastern arm was not permitted under r 39 of the RFP; that the concrete rubble tipped down the bank behind Mr Jefferies' property was a contaminant under the RMA; and that deposition of the rubble was not authorised by an Upper Hutt City Council land use consent to build a silt trap granted in July 2001.

[28] On further appeal to this court, six questions of law were raised:

(a) Was the eastern arm made dry by the redirection still part of the bed of the Mangaroa River in terms of the definition of riverbed in s 2 RMA? There were two quasi factual sub-questions:

(i) Was the bund was placed in the bed of the river?

(ii) Was the material dumped at the back of the Jefferies' property deposited on the bed of the river?

(b) Did the Environment Court fail to focus on the precise location of the deposition? Again this seemed to have two parts:

(i) The bund had to have been built on dry bed because, at least arguably, the river had already diverted westward as a result of legal excavation "upstream" of it on the western arm pursuant to the 2009 consent. The first sub-question then is, by the time the bund had been built, had the bed already shifted to the western arm?

(ii) Had the Environment Court failed to understand that the excavated channel on the western edge of the eastern (and now dry) arm of the river was the only part of the bed on that side, so that the clean fill fall even if it did come down to river level, came nowhere near the new bank?

(c) Was the Environment Court required to consider the cause of the river's diversion? If the original diversion had been caused by lawful excavation and the bund placed behind that to prevent reversion, could it be argued that the bund had not diverted the river?

(d) Did r 37 of the RFP allowing beach recontouring apply to relieve the appellant of the necessity to obtain consent for the bund anyway? The requirements of the rule mean this question broke down to further questions as follows:

(i) Was the bund built by using non-natural material?

(ii) Did the bund form "a barrier to water movement"?

(e) Could the 2009 consent be read so as to include material in relation to a bund from the 2007 consent application, making the bund consented

to, even though not expressly referred to in the 2009 consent or conditions? Sub-questions are as follows:

(i) Could the 2009 consent be read so as to leave room for the bund to be read in?

(ii) If so, could representations made in meetings in relation to the consent be taken into account?

(iii) If so, were any relevant representations made in fact?

(f) Could the appellant's dumping of fill material down the bank at the rear of his property be authorised by a 2001 consent from the Upper Hutt City Council to build a silt trap?

Is the eastern arm part of the bed?

[29] On Question (a), the Environment Court found that the river flowed into the eastern channel even after the bund was completed and that there was evidence that the bund was partly washed out by hydraulic action. The court said:[1]

> There is also evidence of water from a tributary of the Mangaroa River which, until the time of the works, intersected with the river at the eastern channel. The channel is approximately 200 metres in length, itself carrying a small *river*. (Emphasis in original).

[30] In any event the court said:

> ... Mr Stewart Clark, an engineer called by Mr Jefferies, said that it would not have required that significant an event for the river to flow into the eastern channel as the river itself would always want to get back into the eastern channel. He said that the bund proposed in the more recent design he had done for Mr Jefferies would not have prevented water flowing down the eastern side in very high flows, even though it would have been significantly higher than that actually built. It is as clear as can be that since the bund was built, from time to time, at least, part of the river flow has gone down the eastern channel, and in that sense alone that channel has remained part of the riverbed.

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1 *Jefferies v Wellington Regional Council* [2012] New Zealand EnvC 50 at [27].

[31] For the appellant, Mr Geiringer argued that once the river abandoned the eastern arm, it could no longer be considered to be riverbed. He argued that, to the extent that the river was still able to flow down a much narrower channel along the western edge of the eastern arm, that meant that the bed of the river on that arm could be no greater than the width of that much narrower flow.

[32] Riverbed is defined in s 2 of the RMA as follows:

> (a) In relation to any river–
>
> (i) for the purposes of esplanade reserves, esplanade strips, and subdivision, the space of land which the waters of the river cover at its annual fullest flow without overtopping its banks:
>
> (ii) in all other cases, the space of land which the waters of the river cover at its fullest flow without overtopping its banks
> ...

[33] The distinction between the two is that for the purpose of defining the land to be given up by a riparian owner on subdivision, the riverbed is to be narrowly construed – "annual fullest flow" – whereas for any other purpose a wider meaning is adopted – "fullest flow". In the present case, there are no issues in relation to wide flood plains, the Mangaroa river channel at this point being constrained between high banks on either side. A number of riverbed related cases were cited by counsel – the leading decisions in *Whitby Coastal Estate v Porirua City*[2], *R v Newton*[3] for example, but ultimately this aspect of the appeal must fail because the facts do not support the legal theory being run by Mr Geiringer.

[34] The Environment Court made findings of fact that the bund had been overtopped and breached by river flow. The court inferred that the eastern arm had carried flow wider than the excavated channel on the eastern arm, despite the bund. Evidence of undermining of the bund structure at various points supported this.

[35] The Environment Court was in a far better position than me to make findings of fact on this question since it visited the site and heard evidence first hand. These findings of fact ought not to be revisited by me. They were consistent with expert

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2 *Whitby Coastal Estate v Porirua City* [2009] NZRMA 269 (Environment Court).

3 *R v Newton* Greymouth District Court CRI-2009-018-000815, 31 May 2011 Judge Keller.

evidence on both sides. All agreed that the bund could occasionally be overtopped and water would flow down the eastern arm. This might, they said, happen annually, or once every few years depending on climate. As I noted, the statutory definition sets the bed as the land covered by water at the fullest flow of the river, and this river has well demonstrated its ability to flow across the extent of the dry bed of the eastern arm if it wants to. That is in itself an end to this line of argument. Thus the site of the bund is unquestionably riverbed. And point where the rubble hits the dry bed is too.

[36] In any event, if, as I surmise, when the river is running high but not overtopping the bund, water will strike the bund before cutting west in circumstances where it would, but for the bund, have continued east. Mr Geiringer cannot argue that the bund takes the eastern channel out of play because it in effect dried the old channel up. Mr Gilbert is correct, that would be an absurd way to interpret the statute. It would make any diversion of any river performed in the way Mr Jefferies performed it here, lawful without the need for a resource consent. That runs against the entire purpose of the Resource Management Act's river environment provisions. Section 2 can only make sense on facts such as these if bed means the bed as it was *before* the illegal activity took place.

[37] It must follow that (on either basis) the bund was placed in the bed. It must also follow that the dumped material referred to in notice 477 has found its way to the bed as well. In any event in respect of the latter point, there seems to be photographic evidence to suggest that the area immediately below the rubble fall at the cliff face contains backwash likely to produce a flow along that edge during a fresh.

Was the lawful excavation the real cause of the diversion?

[38] Question (b) is to be answered the same way since on the law as I find it and the facts as the Environment Court found them both depositions are in the riverbed. In short, the appellant cannot rely on the argument that the diversion was created by his excavation in the western channel rather than the bund. That is because the

evidence was that even with the excavation, the river will choose to flow down the eastern arm during periods of high flow and will either:

(a) strike the bund, and be diverted; or

(b) overtop the bund and flow across the eastern arm anyway.

[39] Once that is accepted, the precise location of the bund and rubble fall within the eastern channel becomes immaterial.

Did the Environment Court misunderstand the cause of the diversion?

[40] As to Question (c), the Environment Court effectively found that the bund did cause the diversion. The court put it this way:

> The point is however that, as the Abatement Notice notes, the bund had been constructed in the river and was blocking off the eastern channel. So whether or not gravel extraction had caused or contributed to the movement of the river to the western channel, the bund prevented, and could only have been intended to prevent, the main flow ever returning to the eastern channel unless the bund was overtopped or breached in a high flow event.

[41] I agree with that conclusion. Even if it was true (and it probably was) that when the western arm was excavated at low summer flow, it was the excavation that caused the initial diversion – remember the excavation was lawful: the 2009 consent provided for it – once the river reached a level above the lip of the excavation, the flow would overtop the lip, flow to east, and then strike the bund before being diverted back west.

[42] Mr Geiringer argued that this was not a diversion; it was simply a preventive against reversion back to the eastern side. But as Mr Jefferies' own witness said, water will naturally want to return to the eastern channel unless it is diverted from that choice. Just because water diverts lawfully at flow *x*, that does not mean that the Act entitles the diverter to take whatever steps are necessary to ensure the diversion remains at flow *x* plus 5. That is just not the way the RMA works.

Was this permitted beach recontouring?

[43] As to Question (d), r 37 of the RFP provides as follows:

> The disturbance and recontouring of any part of the bed of a river that is not covered by water (ie beach recontouring) to remedy or mitigate the adverse effects of flooding erosion is a Permitted Activity, provided that the activity complies with the conditions below:
>
> (1) The river or lake bed shall not be disturbed to a depth or an extent greater than that required to reduce the flood or erosion hazard to an accepted level.
>
> (2) *The material shall not be mounded up so that it forms a barrier to water movement.* … (my emphasis)

[44] The rule requires any recontouring to use natural material. Beach recontouring is defined in the RFP to mean:

> Disturbance of any riverbed by the mechanical movement of *sand, shingle, rock, gravel or other natural material*, to realign that part of the bed that is not covered by water at the time of the disturbance, for the purpose of remedying or mitigating the adverse effects of flooding or erosion. (my emphasis)

[45] This bund included a barrage of concrete blocks with iron lifters. Rule 37 therefore could not apply to save the bund.

[46] The next question is whether the bund was intended to form "a barrier to water movement", in which case it would not qualify as recontouring. The Environment Court found that:[4]

> … the whole purpose of the bund is to form a barrier to the movement of water and so breached condition (2) of the Rule.

[47] Mr Geiringer is right that the bund was never intended to block flow completely, it was simply aimed at diverting it to a different course. Nonetheless, I am satisfied that the bund is a barrier for the purposes of this rule. Wherever recontouring ends and a barrier starts (I agree this will be a matter of degree), a structure that puts the flow of a river on an entirely different course leaving the old

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4 *Jefferies v Wellington Regional Council*, above n 1 at [30].

course dry, must be a barrier. I agree with the Environment Court that this bund does not comply with condition (2) of the Rule.

Did the consent authorise the bund?

[48] As to Question (e), the court found:[5]

> ... matters that might have been discussed, formally or informally, with Council officers or representatives in the course of preparing or negotiation applications for, and grants of, resource consents do not help unless they actually reflect what eventually made its way into the terms of the consent.

[49] Later in its judgment, the court says:[6]

> The resource consent says not a single word about the building of a bund blocking the eastern channel of the river, and nor did the material lodged in support of the application for it. There was a somewhat faint suggestion from Mr Hewison that the Regional Council resource consent ... doesn't preclude the construction of a bund. It certainly does not permit it, and we need to say no more than to draw attention to the wording of s 13 – *no person may ... unless expressly allowed by a ... resource consent.* The prohibition of the nominated activities is absolute, unless there is an express authorisation and an absence of a preclusion is certainly not that.

[50] In my view, it is abundantly clear that the consent granted in 2009 was not intended to include a bund. First and foremost, as the Environment Court points out, the consent includes no express reference to one and s 13 makes it plain that the bund is only lawful if it is "expressly allowed" by a consent or rule. There is no such thing under the Act as an implied consent. The second point is that looking behind the terms of the consent to the preparatory papers and discussions provides no assistance to the appellant's case in any event. The reasons for decision were drafted by Malory Osmond and signed off by her team leader, Miranda Robinson. Those reasons make it clear that the Council was not expecting to see a bund.

> ...
>
> No stream diversion has been included in the final proposal, however it is expected the proposed gravel extraction will provide maintained a secondary overflow path during flood events which will reduce the amount of erosion that currently occurs on the applicant's property.

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5 At [4].
6 At [16].

[51] The Council clearly expected that the eastern arm would continue to carry water, but at a lower and less destructive level from Mr Jefferies' perspective. What is more, once it became clear to him that the 2007 bund and backfill proposal would not be supported by the Council, the additional information filed by Mr Jefferies in 2009, proposed only gravel extraction. The new material contained no mention of a bund. The plans filed by Mr Clark with the appellant's information in relation to the new proposal included no scheme of a bund and no location for one.

[52] The 2007 application of course did include a bund of more significant proportion than that which Mr Jefferies ultimately built, but Mr Jefferies' own 2009 documentation included the following:

> The information in this [2009] application supersedes all prior information submitted.

[53] That phrase was carried through into the substantive decision of the Council and the final consent itself. The only sensible way to read that in context, is that the bund had been dropped as an idea.

[54] Mr Geiringer suggests that the appellant's expectations in respect of the bund had been the subject of discussions around the time of the consent and afterwards, and Mr Jefferies had been led to believe that a bund could be built pursuant to the consent.

[55] The Environment Court rejected the suggestion that background discussions could be taken into account in interpreting a consent. The court said that the application, decision and consent documentation were all relevant but it was inappropriate to look behind that material to discussions between the parties.

[56] That is surely the correct position. The Privy Council in *Opua Ferries Ltd v Fullers Bay of Island Ltd*[7] set the position out in these terms.

> There would be much to be said in favour of this argument if the relevant documents were contained in a contract between the parties which the Court was being asked to construe ....

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7 *Opua Ferries Ltd v Fullers Bay of Island Ltd* [2003] 3 NZLR 740 (PC).

> But it does not follow that the same approach is to be taken when one is construing a public document. The documents included in the register maintained by a regional council under s 52(1) of the Act have that character. This is, and is intended to be, a public register of passenger transport services. Members of the public who consult the register may come from far and near. They may have some background knowledge, but they may have none at all. In *Slough Estates Ltd v Slough Borough Council* [1971] AC 958 at p 962 Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very different thing from using evidence of facts known to the maker of the document but which are not common knowledge or alter or qualify the apparent meaning of words or phrases used in it. *As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence* ... (my emphasis)

[57] It would be quite wrong to admit this kind of imprecise and debated evidence into the task of interpreting a public law document governing the rights not just of the current consent holder but of his successors as well. It would open up a path to relitigation of consents long after they have been granted.

[58] It was argued that such material could nonetheless be taken into account in the court's discretion in deciding whether to affirm an abatement notice. I doubt that, although I accept that it may arguably be relevant to penalty. But even if such material was admissible in relation to the abatement notices, there is just no evidence to support the appellant's case in this respect anyway. Mr Jefferies' own evidence of discussions with Malory Osmond and the Regional Council and in respect of written correspondence he received from the Council all support the Council's interpretation of the consent's parameter.

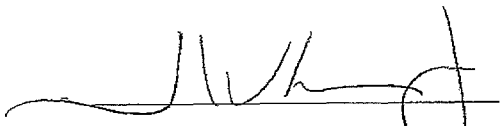
Is the 2001 silt trap consent for Upper Hutt City Council relevant?

[59] As to Question (f), the consent the appellant seeks to rely on provides no benefit to him. The silt trap consent is a land use consent under s 9 of the RMA. Upper Hutt City Council has no jurisdiction over riverbed matters. They belong to Regional Councils under s 13 RMA. Even if the tipped rubble had been put there to build a silt trap, and even if Upper Hutt City Council had granted consent for such a trap, the appellant would still be in breach of s 13 unless it had a consent from the Regional Council. That takes us back to the question of whether the fill had been

tipped onto the riverbed on the eastern arm, and I have already decided that question against the appellant.

[60] It follows that the appeal must be dismissed.

[61] Costs are reserved.



Williams J

Section 12B: inserted, on 1 January 2005, by section 6 of the Resource Management Amendment Act (No 2) 2004 (2004 No 103).

River and lake beds

13 Restriction on certain uses of beds of lakes and rivers

(1) No person may, in relation to the bed of any lake or river,—

(a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or

(b) excavate, drill, tunnel, or otherwise disturb the bed; or

(c) introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or

(d) deposit any substance in, on, or under the bed; or

(e) reclaim or drain the bed—

unless expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

(2) No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—

(a) is expressly allowed by a resource consent; or

(b) is an activity allowed by section 20A.

(2A) The activities are—

(a) to enter onto or pass across the bed of a lake or river:

(b) to damage, destroy, disturb, or remove a plant or a part of a plant, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(c) to damage, destroy, disturb, or remove the habitats of plants or parts of plants, whether exotic or indigenous, in, on, or under the bed of a lake or river:

(d) to damage, destroy, disturb, or remove the habitats of animals in, on, or under the bed of a lake or river.

(3) This section does not apply to any use of land in the coastal marine area.

(4) Nothing in this section limits section 9.

Section 13 heading: amended, on 7 July 1993, by section 11 of the Resource Management Amendment Act 1993 (1993 No 65).