

BEFORE THE HEARING COMMISSIONERS

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER A resource consent
application for subdivision
at Cambridge Road,
Cambridge.

BETWEEN 3Ms Cambridge GP Limited

Applicant

AND G Hawthorn, F & C Ritchie,
G Alton, D & J Brough and
Cambridge Cohousing
Project Society

Submitters

**LEGAL AND OPENING SUBMISSIONS OF COUNSEL FOR THE
SUBMITTERS**

Dated: 24 May 2021

Summary of the positions of the Submitters

1. The Submitters are the owners of properties adjoining the application site, with the exception of the Cambridge Cohousing Project Society (“the Cohousing Society”), which intends to acquire and develop part of the Brough property.
2. All of these submitters are opposed to the granting of the subdivision consent to the Applicant (“3Ms”) in its proposed form.
3. The proposition by 3Ms is that the main collector road and stormwater corridor could be installed otherwise than as shown in the Structure Plan, potentially within the properties of the Submitters. The Submitters have stated their wish to have that public infrastructure installed in the 3Ms land as shown in the Structure Plan. Their intention is to have their homes at those properties and, in some cases, continue the businesses that are established there.
4. The Submitters are aware that the Structure Plan makes provision for the road and stormwater corridor to be at the western edge of the 3Ms property and they support that as part of the development of stage 1 in the Cambridge C2 Growth Cell.
5. The Submitters are aware that the 3Ms land will be redeveloped for housing and related infrastructure, up to their boundaries. They are equally aware that they will be able to carry on their current and planned activities as long as they wish, with that development in place. There is no obligation on them to change their uses of their land.

Legal issues

Non complying activity status

6. It is stated in paragraph 4 of the evidence of 3Ms planning witness Mr Chrisp that “it is important to recognise that the non-complying activity status is largely just a matter of timing”. Mr Chrisp goes on to refer to the potential for the Deferred Zone status being removed through Proposed Plan Change 13. (“PPC 13”)
7. The reasons for this proposal having that activity status do not affect the way in which this application must be considered. None of the special considerations for non-complying activities are reduced, narrowed or otherwise affected by the reasons for it having that status. In the usual way, the proposal must pass one of the “gateway” tests in s104D RMA and must have some unique or special characteristic to justify a consent being granted.¹
8. It is entirely the Applicant’s decision to proceed with a non-complying activity application rather than waiting until the activity is (if ever) a more “supported” activity e.g. discretionary or restricted discretionary, through re-zoning.
9. The approach taken by 3Ms planning witness is effectively to encourage the Commissioners to assume the confirmation of PPC 13. The reality is that PPC 13 has no effect on activity status currently.
10. As a qualification on that position, if there are no submissions in opposition to a proposed rule that would be implemented by PPC 13, the unopposed rule is to be treated as operative.²

¹Auckland Regional Council v Living Earth Limited [2009] NZRMA22(CA), Auckland Regional Council v Living Earth Limited HC Auckland CIV-2006-404-66659

² RMA s86F(a)

11. At least one submission has been lodged in relation to PPC 13 that should be treated as opposing altogether the confirmation of that proposed plan change.³ More importantly, PPC 13 proposes that the stormwater corridor and various other proposed locations of reserves are re-zoned as Reserve. The notified PPC 13 does not propose that those parts of the 3Ms site are zoned Residential. If 3Ms is to place reliance on PPC 13, the proposed Reserve zonings on the 3Ms land are a very relevant factor.

Objectives and policies

12. The most relevant objectives and policies are those that are currently operative. These are the relevant objectives and policies in District Plan Section 1 Strategic Policy Framework, Section 14 Deferred Zones and Section 15 infrastructure, hazards, development and subdivision. In these submissions I focus on the objectives and policies in Section 14 and the provisions in the Structure Plan that help to evaluate the proposal in terms of the Section 14 objectives and policies.
13. The objectives and policies in District Plan Section 14 Deferred Zones refer to land use, but it would be artificial and contrary to the purpose of the deferred zoning technique to pretend that those provisions are not relevant to subdivision to enable particular land uses.

³ Submission 2 on PPC 13 by J F Sharman includes the submission that there should be no increase in housing without constructing a bypass from the outskirts of Leamington to Cambridge Road west or the expressway, and submitting that there should be a review of the impact of adding the planned housing for the two towns most affected. The decision requested is that there should be an immediate review of the plan in terms of the impact of new traffic, noise and pollution from it, and considering a bypass. The requested decision also relates to the character of Cambridge being preserved for the future.

14. The absence of objectives and policies that refer directly to subdivision in the Deferred Residential Zone is consistent with the non-complying activity status of subdivision in that zone.
15. The sole objective 14.3.1 emphasizes planned conversion of a deferred zone to a new use and protection of its resources for its intended use. Plans incorporated in the Structure Plan show the intended use of specific parts of the 3Ms land as for the main collector road and primary stormwater corridor.
16. The development planning recorded in Appendix 19 includes the approach that collector roads shown in the Structure Plans “are generally in fixed location, subject to the outcomes of detailed design”. To suggest that the exclusion of the collector road altogether from the 3Ms development proposal is simply the outcome of detailed design considerations would be absurd. It is a change acknowledged to be driven by private financial considerations. Rather than a relocation of the collector road to a position that produces a better design outcome, there is no provision for the road as part of the subdivision proposal.
17. The Stormwater provisions for the C2 Growth Cell in Appendix 19 include at paragraph S19.4.1.13(k) *A large, deep (varies along its length from 3m to 5m), centrally located open channel drain will convey stormwater through C2*. That is a statement about a certain and specific infrastructure feature and a central location that is shown in the Structure Plan. The exclusion of any provision for that channel to be located centrally in the C2 Growth Cell is a step that is not aligned with the objective of developing the C2 Growth Cell in a planned manner and protecting its resources for the anticipated future use.
18. The exclusion of the collector road and stormwater corridor from the Stage 1 development of the C2 Growth Cell is unlikely to implement

the single structure planning policy of *providing a framework for new growth areas through a comprehensive and integrated structure planning process.*

19. The majority of the lots shown in the 3Ms application are obviously intended for residential use. Some of them are on the land that is intended for roading and other public infrastructure including reserves. The Structure Plan and PPC 13 both make provision for those public land uses within the 3Ms land.
20. There is a clear conflict between the land uses enabled by 3Ms proposal and the intended future use of parts of the 3Ms land.
21. The objective and policy for deferred zonings are implemented through rules that closely regulate changes in land use and avoid subdivision pending re-zoning.
22. The intentions of those rules to preserve current land uses and prevent subdivision are particularly important where the plan change that proposes to uplift the deferral also proposes re-zoning of the stormwater corridor to a Reserve Zone.

Effects on the environment

23. RMA s104D(1)(a) enables a resource consent to be granted if the adverse effects of the activity on the environment will be minor. S104(1)(a) also requires consideration of the effects on the environment. The relevant activity in this case is the subdivision of the 3Ms land in the specific manner proposed in the application.
24. The RMA definition of *environment* is particularly broad:
 - (a) *Ecosystems and their constituent parts, including people and communities; and*
 - (b) *All natural and physical resources; and*

- (c) *Amenity values; and*
- (d) *The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.*

25. Natural and physical resources must include the land within the bounds of the C2 Growth Cell that is clearly intended for development and use in accordance with the Structure Plan.
26. Additional pressure for private homes and businesses to be taken by compulsion will affect the amenity values of the owners and occupiers.
27. The certainty of achievement of efficient roading and stormwater networks, particularly the collector roads and stormwater corridors, have been matters of some importance in the development of this Structure Plan. 3Ms claim quite rightly to have been instrumental in the development of the Structure Plan through the PC 7 process. This included strong support for the location of the main collector road and stormwater corridor through the western edge of the 3Ms property. This was acknowledged as being an important factor due to the size and single ownership of that property.⁴

As 3Ms is the largest landowner within C2 we have positioned most of the main trunk infrastructure assets within C2 landholding. This will give Waipa District the most efficient and sustainable infrastructure solutions necessary to service 3Ms land and the land adjacent to its landholdings.

28. The efficiency and certainty achieved through location of the road and stormwater corridor within the 3Ms land, and therefore within stage 1 of the Growth Cell, are valuable components of the

⁴ PC 7 evidence of Mr M Smith, paragraph 19

Structure Plan. Effects on efficiency and certainty of provision of public infrastructure are effects on natural and physical resources.

29. The relatively undeveloped state of the 3Ms land and the low level of effect on existing built resources and business activity resources makes that land particularly appropriate for location of that corridor.
30. In contrast, the inevitably greater disturbance of existing developed resources in the western parts of the Growth Cell is an effect on the environment.
31. The fragmentation of landownership outside the 3Ms land makes the location of the corridor less efficient and less certain to be achieved within any particular timeframe. That is an effect on the public infrastructure resources and public financial resources.
32. The opposition of landowners outside the 3Ms site to the short term development of their land and the location of the corridor within that land must impact on the certainty of construction of those public assets within any particular timeframe. That impacts on public financial and infrastructure resources.
33. If there is a need to resort to a Public Works Act compulsory acquisition programme, dealing with multiple landowners, that must impact on the timing and cost of land acquisition. A process involving multiple landowner/ occupiers must be less efficient and more personally intrusive than a process involving a single developer landowner. That is an amenity effect and an effect on physical resources.
34. The opposing submitters whom I represent wish to remain living on their properties and continue the activities that they have developed and enjoy on those properties. In contrast, the 3Ms property has been put together expressly for the purpose of immediate

residential development and land use. The comparatively low level of impact on amenity values for the purposeful developer, and the comparatively low level of impact on aesthetic enjoyment of its land are relevant matters for consideration in the context of effects on the environment.

35. All the matters raised in the preceding paragraphs are relevant to the consideration of adverse effects of the 3Ms proposal on the environment.

Should this application be considered in isolation from related land use resource consent requirements?

36. If a proposal requires resource consents for land use and for subdivision, the general requirement is that applications for all necessary resource consents are considered together.⁵
37. This is a matter that at least needs to be clarified and potentially requires the hearing of the subdivision and land use consent applications together, so the full implications of the proposal can be understood and considered in an integrated way.
38. The outcomes of PPC 13 are far from certain. If the proposed Reserve zoning of the stormwater corridor and other parts of 3Ms land is confirmed, some of the subdivision features will be difficult to consent. To pre-empt the re-zoning process by consenting a subdivision now could not be a sound implementation of the District Plan's deferred zoning methodology.

⁵ Affco NZ Limited v Far North District Council (No2) [1994] NZRMA 224, and RMA s91, United Seadown Inc v Timaru District Council, EC Decision [2010] NZEnvC 313

39. It is understandable that subdivision in the deferred zones is non-complying. A lifting of the deferred zoning may well be accompanied by refinement of the ultimate zonings, as in this case.
40. There are currently no subdivision rules that apply to the proposal, other than those found in District Plan Section 15. There will be no clarity about subdivision standards or activity status until the deferred zoning has been uplifted, either through PPC 13 or otherwise.
41. The proposal for subdivision and the uplifting of the deferred zoning cannot be separated, with future zonings being uncertain and the subdivision proposal being dealt with in a vacuum. This is particularly so when there is a publically notified process already under way to deal with the zoning of the stormwater corridor land that is in dispute in this application.

The extent and significance of departures from the Structure Plan

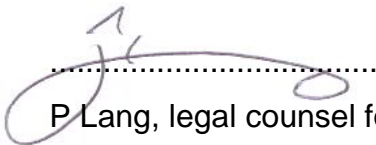
42. It is not essential in this case to determine whether the proposed exclusion of the main collector road and stormwater corridor will or will not be “in general accordance with” the Structure Plan. The activity is already categorised as a non-complying activity because there is a Deferred Residential zoning. Therefore it is not vitally important to determine whether these departures from the Structure Plan would make the activity discretionary because they are not “in general accordance” with the Structure Plan.
43. The critical determination is about the extent and significance of the departures from the Structure Plan in terms of the relevant District Plan objectives and policies and environmental effects.
44. 3Ms has approached this issue by examining whether the proposed departures will frustrate or prevent development of the C2 Growth

Cell as it is specified and described in the Structure Plan. The more relevant consideration is how those proposed departures fit with the objectives and policies and what effects the departures will have on the environment.

The decisions sought by the Submitters

45. The Submitters whom I represent seek a decision declining the application for the reasons set out in Mr Phizacklea's evidence and these submissions.
46. If the Commissioners decide that the better course is to grant the consent, the conditions must include a condition similar to that proposed in the s42A report as condition 3. Such a condition can be imposed if it is worded as a condition precedent to implementation of the consent.
47. A condition that enables the consent to be implemented when certain matters occur or are achieved is not a condition that requires compliance of a third party. It can defer the implementation until (in this case) an alternative location for the infrastructure corridor is secured.⁶

Dated: 21 May 2021



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P Lang, legal counsel for the Submitters

⁶ Westfield (New Zealand) Limited and others v Hamilton City Council Fisher J High Court Hamilton 17 March 2004 paragraphs 50-60, Lysaght v Whakatane District Council & others [2021] NZHC 68 paragraphs 71-78.