

16 August 2017

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Dear Campbell

Procedural challenges raised by Ceri Warnock

- 1 You have asked for advice on a number of procedural challenges raised by Ceri Warnock in her oral submissions and subsequently noted down on 7 August 2017. These challenges relate to:
 - (a) New economic evidence will lock out potential submitters;
 - (b) The disadvantage to submitters from expert caucusing at a late stage in a hearing because of the inability for submitters to cross-examine;
 - (c) That any change in design will impact on amenity effects and is therefore out of scope; and
 - (d) The AEE is so deficient that there is no jurisdiction to consider the application.
- 2 We address these challenges in turn.

New economic evidence

- 3 The AEE discusses the importance of a 5 star hotel to Dunedin but does not include specific economic evidence. The Applicant's evidence circulated prior to the hearing and presented at the hearing expands on the economic benefits of a 5 star hotel. The panel requested further information (the Infometrics report) during the hearing and provided time for submitters to respond to that information. Ceri Warnock says that "*Adducing evidence of economic effects on the penultimate day of the hearing has the effect of locking out submitters who may have submitted on the economic effects if this information had been filed before submissions closed.*"
- 4 Any potential submitter who viewed the application documents would have noted that the Applicant was relying on the benefits a 5 star hotel would bring to Dunedin. The new information provided in the Infometrics report would not, in our opinion, act as a catalyst for someone who had not made a submission to make a submission. In addition the many existing submitters have been given an opportunity to comment on the Infometrics report¹.

Expert caucusing

- 5 The urban design experts have been asked to confer and report back as per the process used by the Environment Court². Ceri Warnock says that this process is unfair and cites *Gisborne District Council v Gisborne District Council* A 230 /2002 EnvC 21st November 2002 (unreported decision) paras [13-16]. In our opinion this case is not particularly relevant to the urban expert caucusing as part of this hearing.

¹ Minute of the Commissioner/Chairperson, Further Evidence required by Hearing Panel, LUC-2017-48 and SUB 2017-26 dated 3 August 2017

² Minute of the Commissioner/Chairperson, Further Evidence required by Hearing Panel, LUC-2017-48 and SUB 2017-26 dated 3 August 2017 and Environment Court Practice Note, Section 7.1

- 6 The statutory authority for enabling expert caucusing at a council hearing is section 39 of the Resource Management Act 1991 which requires the hearing to be held in public, and for the establishment of a procedure that is appropriate and fair in the circumstances. If the Commissioners feel that they would be assisted by having the experts caucus, then they can request this.
- 7 Submitters are never able to cross-examine at a council hearing and it is for the Commissioners to test all evidence before them.

Scope for design changes

- 8 Generally there is scope to reduce the size of a building because any adverse effects related to the size of that building will not be increased and there is no prejudice to parties who did not submit³. In this case Ceri Warnock says that any design alterations will cause different amenity effects. Assuming that there is a reduction in height then there will, likely, be reduced shading effects and reduced amenity effects relating to views. This reduction in effects is within scope. If the design changes in a way that does create different and new effects then the Commissioners should assess whether anyone would be prejudiced by accepting the new design. If there are effects that were new and potential submitters would be affected then the design changes would be out of scope.

AEE deficient

- 9 Ceri Warnock cites *Scott v New Plymouth District Council* (1993) 1B ELRNZ 43 at 48, a case where there appears to have been hardly any AEE at all. That can be distinguished from the current application. In this case there has been a substantial AEE with many technical reports. The AEE is the first assessment, supplemented by evidence from all parties given throughout the hearing process. We do not consider the AEE in this case can reasonably be found so inadequate, to create a lack of jurisdiction.

Conclusion

- 10 Assuming that any changes of design reduce the adverse effects identified as relating to shading and amenity views and do not cause new adverse effects then there is scope to consider a reduced size. The Commissioners were entitled to ask for more information and expert caucusing. Because of the good process the Commissioners have followed, with the opportunity for submitters to respond, there is no prejudice to submitters. The Commissioners retain the jurisdiction to determine this application.

Yours faithfully
Anderson Lloyd



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³ *Haslam v Selwyn District Council* (1993) 1B ELRNZ 15, (1993) 2 NZRMA 628 considered the test was whether it was "plausible" that any other person who lodged a submission would have done so if the application information available for examination had incorporated the amendment and that the application of the test is underlain by fairness.