

Decision not to include proposal in shortlist for Christchurch regeneration area plan

Legislation	Ombudsmen Act 1975, Greater Christchurch Regeneration Act 2016
Agency	Regenerate Christchurch
Ombudsman	Peter Boshier
Case number(s)	486927
Date	July 2019

Complainant’s proposal for the draft Ōtākaro/Avon River Corridor Regeneration Plan excluded from shortlist of proposals for public notification—complainant alleged assessment of proposal flawed, failure of agency to engage with complainant regarding proposal, lack of natural justice in process—Chief Ombudsman concluded that agency had not acted either unlawfully or unreasonably.

Background

Under the Greater Christchurch Regeneration Act 2016 (the Act), Regenerate Christchurch was mandated to develop a regeneration plan for the Ōtākaro/Avon River Corridor area. The Act required the agency as the proponent of the Regeneration Plan, to prepare a draft outline in the first instance and for this to contain certain details relating to the development process including ‘*the opportunities for public engagement in relation to the draft Plan*’. Section 20 prescribes that the proponent must provide the draft Plan to specific parties and seek their views. The parties include ‘*the strategic partners*’, namely Canterbury Regional Council, Christchurch City Council, Selwyn District Council, Te Rūnanga o Ngāi Tahu, and Waimakariri District Council.

The notion of public engagement and the requirement for Regenerate to seek the views of the strategic partners was reinforced in a Letter of Expectations, co-jointly signed by the Minister Supporting Greater Christchurch Regeneration, Hon Gerry Brownlee, and the Mayor of Christchurch, Lianne Dalziel.

The Letter of Expectations specifically required Regenerate in its consideration of the Avon River Corridor land to ‘*assess the feasibility of an open water course suitable for international water sports events being constructed in the residential red zone.*’ It also contained the specific

expectation that Regenerate would *‘work closely with Christchurch City Council on its infrastructure requirements...’*.

A charitable trust (the Trust) representing various flatwater sports communities developed a proposal for a 2.2 kilometre, out-of-river flatwater recreational facility in the area of the Red Zone. The Trust employed experts to design and provide technical advice on facets of the proposal. It engaged with Regenerate about its proposal. There was a sharing of information, including reports that Regenerate had commissioned in the course of fulfilling the Letter of Expectations’ requirement that it consider the feasibility of an open watercourse for international water sports events.

In October 2017, the Trust’s proposal was included in Regenerate’s publication of 10 possible combinations of uses for the area. Regenerate sought public feedback to enable it to determine common preferences, and to decide upon a refined shortlist that would form the basis of a public exhibition to be held prior to public notification of the draft Plan.

Regenerate decided not to include the Trust’s proposal and two other potential land uses, in the refined shortlist. In its decision, Regenerate relied on expert analysis that indicated that the Trust’s proposal would prevent the provision of stormwater treatment that would significantly improve the water quality in Horseshoe Lake. Furthermore, it received advice that in order to keep the flatwater facility free of algal bloom, it would require 43 million litres of water to be extracted from the City’s deep-water aquifers every day. Additionally, the water going into the facility from the aquifers would need to be flushed out into the Ōtākaro Avon River, increasing the flow of the river, causing a greater flood risk, and affecting the river’s banks and existing ecology.

In its complaint to the Ombudsman, the Trust raised a number of concerns about Regenerate’s decision. It considered that the assessment which had led to the exclusion of its proposal was factually flawed, and either not supported by relevant expert advice or had not been adequately explained. It also considered Regenerate had not adequately discussed with it the grounds for excluding the proposal despite on-going interactions between the Trust and Regenerate since November 2016. Additionally, the Trust believed Regenerate had failed to engage with the Trust when it raised these concerns after the refined shortlist had been announced.

Investigation

In his investigation, the Chief Ombudsman considered whether Regenerate acted in a lawful and administratively reasonable manner. It was not the Ombudsman’s role to substitute his judgment for Regenerate’s as to whether the Trust’s proposal should be included in the draft Plan, or attempt to adjudicate between the opposing expert opinions and views of the Trust’s experts and those engaged by Regenerate.

The Trust expressed concerns about the manner in which Regenerate had engaged with it in relation to its proposal and dealt with its submissions both before and after the decision to exclude it from the refined shortlist. In its view, there had been an absence of constructive

feedback or direction as to the particular issues needing resolution for the Trust's proposal to succeed. There had also been a failure to provide the Trust with the expert opinions and reports which Regenerate had commissioned and relied upon when deciding to exclude the proposal. It argued Regenerate's experts had not engaged with the Trust's experts when reviewing technical matters raised in its submissions, as expected under industry and ethical engineering practice.

Consultation expectations

From an examination of the communications between Regenerate and the Trust, it was apparent that Regenerate had, on more than one occasion, sought to clarify the level of engagement that the Trust could expect from it, given its particular role to determine the combination of potential land uses to provide the best outcomes for greater Christchurch. Regenerate was willing and did share information, assessments and certain peer reviews that it commissioned. The Trust had an opportunity to provide input and feedback. The Trust also shared with Regenerate reports which it had commissioned.

The Chief Ombudsman considered that Regenerate needed to be impartial as to the outcome of the process and its role in determining the shortlist of land uses to be included in the draft Plan. Furthermore, contrary to any expectation the Trust may have had, its relationship with Regenerate and level of engagement in the process prior to the shortlist decision did not beholden Regenerate to consult with it about the issues that would ultimately exclude its proposal. It would have been inappropriate for Regenerate as the decision maker, to direct or advise the Trust in the development of its proposal on the basis of some predetermined outcome. Neither the legislation nor the Letter of Expectations identified the Trust as a party to be consulted by Regenerate in making its decision.

The Chief Ombudsman was not persuaded to the view that in terms of natural justice, the Trust should have had an opportunity to respond to Regenerate's assessment of its proposal, including the expert opinions which Regenerate sought and relied upon in reaching its decision on the shortlist. The Chief Ombudsman considered that by that point in the process, it was for the Trust to put forward its *'best case'* in order to secure its inclusion. The Trust was able to draw from information and reports Regenerate had commissioned and made available, in order to shape its proposal and related submissions. It was also for the Trust to challenge the information, facts and conclusions reached in the prefeasibility reports commissioned by Regenerate, as it did. It was equally appropriate that Regenerate take notice of alleged errors and review the points at issue, to ensure that there were no material errors of fact.

Obligation to give due consideration

The Chief Ombudsman rejected the notion that Regenerate could have been expected to direct the Trust to the hurdles in its proposal that needed to be addressed in order to secure a place on the shortlist. Regenerate needed to be impartial as to the outcome of the short listing process. The Chief Ombudsman considered that Regenerate's obligation in dealing with the Trust's submission and those from other parties, was to actually and intentionally consider the

proposal and the information supporting it. In other words, to give it due consideration and to make its decision in accordance with the requirements of the Act and the Letter of Expectations. This meant that the lens through which Regenerate was expected to view the Trust's proposal was necessarily much wider than that of the Trust and its supporters.

The time and resources expended by the Trust in developing its proposal, did not give rise to a right to claim a place on the shortlist. Regenerate had signalled to the Trust and other project advocates that it was not looking for them to do any work or expend resources, any decision to do so being a matter of their choice. It was reasonable to infer from this, that there could be no expectation of a particular proposal being adopted on the basis of the extent to which resources had been expended to develop it.

Expert advice

As might be expected in a process providing an opportunity for public input by way of submissions, Regenerate's Board was assisted by its officers in the evaluation of submissions, and where necessary, external technical advice was sought. Given the complexity of factors, effects and impacts of the Trust's proposal and its location in an area identified with potential to provide the treatment of urban stormwater and to improve water quality, it was inevitable that Regenerate would seek such advice. The Chief Ombudsman considered that the Trust could have reasonably expected that the assumptions and information in its submission would be tested and scrutinised in this way. The Chief Ombudsman did not accept that in this process, Regenerate should have required its technical experts to engage with the Trust's experts. It was not Regenerate's role to manage the professional conduct of the experts it consulted, the obligation to comply with the relevant code of ethical conduct rested with the experts concerned.

Both before and after the shortlist was decided upon, the Trust included in its submissions to Regenerate a schedule of alleged errors. On each occasion, Regenerate reviewed the extensive list of errors, consulting its panel of experts on the points at issue. The Chief Ombudsman did not accept that there was an obligation on Regenerate's part to consult with the Trust in relation to its submission, and the contrary expert opinions and factual differences which remained after its review of the alleged errors. The Chief Ombudsman considered that an open-ended consultation process of this nature would likely have become unwieldy and protracted, with no guarantee of achieving unanimity of opinion amongst the experts. It was clear from the documentation that Regenerate did give attention to the alleged errors, and in the Chief Ombudsman's opinion, it was open to Regenerate to rely on the advice and information from its technical advisors over that provided by the Trust's experts.

The Trust had an expectation that Regenerate would respond to and consult with it directly on the submissions it made in the context of the public exhibition. Having closely reviewed the submissions and with the benefit of expert advice, Regenerate made some corrections in the information presented to the Board on the Trust's proposal. In this process, Regenerate also updated the multi-criteria and comparative analysis of the Trust's proposal. Notwithstanding this further review and analysis, the Trust's proposal remained excluded from the draft plan.

Transparency

The Trust was not notified of the outcome of this review. The Chief Ombudsman did not consider that this constituted an omission in the process. Regenerate had received over 2200 submissions in response to the public exhibition. The feedback had been extensive and detailed. No submitters received direct feedback. Regenerate advised that it was neither feasible nor appropriate to do so. The Chief Ombudsman accepted that the process required Regenerate to provide the draft plan to its strategic partners prior to public notification, and it was inappropriate for other parties to have access to its content before that step was taken. In the event the Trust's submission and Regenerate's review of it, were referenced in reports released on the agency's website at the time of the public notification of the draft Plan. In the Chief Ombudsman's view, the release of the material in this way served to provide transparency as to how the agency had handled the concerns raised in the Trust's submission and the information and reasons for the decision re-affirming the exclusion of the proposal from the draft Plan. The Chief Ombudsman noted that this transparency also gave the Trust the opportunity to further challenge the validity and correctness of Regenerate's decision in the context of the public notification process. The Chief Ombudsman commented that the material released on the website demonstrated that Regenerate's decision had been through a robust review process covering each of the 44 points of the Trust's submission.

The Chief Ombudsman drew attention to the fact that the assessment process was not restricted to the technical aspects of proposals but the extent to which the proposed land use combinations would achieve the overall vision and objectives which the regeneration plan was expected to provide for. In the event, when evaluated in terms of the multi-criteria against which all proposals were assessed, there were aspects of the Trust's proposal which were adjudged not to align with the Plan's vision and objectives.

Alleged error

The Trust was strongly of the view that Regenerate had made an error in its decision to exclude its proposal. It submitted that Regenerate had misinterpreted its own expert's report relating to feasibility issues and limitations in the stormwater treatment provided in the Trust's proposal in conjunction with its lake proposal. The Chief Ombudsman was not willing to be drawn into Regenerate's assessment of the feasibility issues. However he drew attention to the fact that in considering any proposed land use for inclusion in the draft Plan, the Letter of Expectations clearly required Regenerate to have regard to the Council's infrastructure requirements. The Chief Ombudsman commented that given the potential of the area to provide for stormwater treatment, it could have reasonably been expected that the Trust's proposal would be closely scrutinised as to the degree to which it would constrain the potential for the area to serve these requirements. He also commented that there was no doubt that the difficulty of accommodating the flatwater facility and stormwater requirements within the area, appeared to have been a significant factor in the Board's decision not to adopt the Trust's proposal as a preferred land use and activity. However, to view the decision as resting on this factor alone, would be misguided. The process involved a comparative evaluation of all proposals under the multi-criteria analysis. The evaluation in the case of the

Trust's proposal clearly disclosed some substantial limitations compared to other proposed land use options when evaluated against the vision and the objectives of the Plan and the multi-criteria used in assessing all proposals. In effect, the issue about whether the lake proposal and stormwater requirements were mutually exclusive, was not the only hurdle to the adoption of the Trust's proposal.

Outcome

The Chief Ombudsman considered that in the decision making process through the various stages of finalising the draft Plan, Regenerate had provided ample opportunity for the Trust to challenge, rebut and correct any perceived errors in the agency's assessment of its proposal. The Trust took advantage of those opportunities, submitting its own expert opinions and schedules of alleged errors. While the Trust may have considered that any technical criticism about the feasibility of its proposal could be addressed, the Chief Ombudsman considered that this notion did not take into account that Regenerate's mandate required it to make an assessment across a range of factors, not confined to the technical feasibility of a proposal.

The Chief Ombudsman therefore formed the final opinion that Regenerate had not acted unlawfully or unreasonably in this matter.

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