

Our ref 486927 (Complaint ground: 486936)
Contact Juliet Le Couteur
22 July 2019



Mr Ivan Iafeta
Chief Executive
Regenerate Christchurch

By email: OIA@regeneratechristchurch.nz

Dear Mr Iafeta

**Final opinion on complaint
Meri Gibson of East Lake Trust**

I refer to my letter of 5 June 2019 advising you that I had formed a provisional opinion on the complaint made by Meri Gibson on behalf of East Lake Trust, and was providing her with an opportunity to comment. Having received her response, I am now in a position to form a final opinion.

My investigation concerned Regenerate's decision not to include the Trust's flatwater facility known as East Lake, in the refined shortlist of proposal for the draft Ōtākaro/Avon River Regeneration Area Plan. As advised in my letter of 13 November 2018 notifying you of my investigation, my consideration of this matter has been necessarily confined to reaching a view on whether, in reaching its decision, Regenerate acted in a lawful and administratively reasonable manner. I have now formed the final opinion that it did not act either unlawfully or unreasonably in this matter.

You will be aware that the Trust raised a number of factors about Regenerate's handling of its proposal and the decision making process. I have assessed the various factors and taken them into account in forming my overall opinion that Regenerate did not act unlawfully or unreasonably. I **attach** extracts from both my provisional and final opinions so that you are aware of my assessment of the various points contributing to my overall conclusion.

Due to the public interest in this matter, I have decided to issue a media release on the outcome of the investigation. I am also publishing a case note under the authority of the Ombudsmen Rules 1989. It sets out the details of the investigation, the issues considered, and my views on the facts of the case. I enclose a copy of the case note which will be published today at midday on the website, www.ombudsman.parliament.nz - together with the media release.

I have now completed my investigation. Thank you for the assistance that has been provided.

Yours sincerely

A handwritten signature in black ink, appearing to read "Peter Boshier".

Peter Boshier
Chief Ombudsman

Appendix 1. Details of my opinion

The Refined Shortlist and the Trust's status

There was no legislative requirement for Regenerate to consult with the Trust when deciding on the refined shortlist. The Trust is not identified in either the Act or the Letter of Expectations as a party to be consulted by Regenerate in reaching its decision. While you have submitted that in terms of natural justice, you should have been given the opportunity to respond to Regenerate's assessment of the Trust's submission, including the expert opinions which it sought at that time, I am not persuaded to this view. By this point in the process, it was for the Trust to put forward its 'best case' in order to secure its inclusion in the draft plan. It was open to the Trust to draw from the information and reports which Regenerate had commissioned and made available, in the process of shaping its proposal and related submissions. It was also open to 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 the alleged errors and review the points at issue to ensure that there were no material errors of fact.

It was for the Trust to identify and address effectively within its submission, the perceived hurdles which the proposal needed to overcome in order to secure a place in the refined shortlist. It was not Regenerate's role and nor was it appropriate, for it to direct the Trust in this process, given the need for it to be impartial as to the outcome of the refined shortlist.

Regenerate's obligation

As I see the position, 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 the submission. It was not under an obligation or bound to adopt the Trust's proposal. It could be expected to give the Trust's proposal due consideration, and to make its decision in accordance with the requirements of the Act and Letter of Expectations. In that respect, the lens through which Regenerate was expected to view the proposal was necessarily much wider than that of the Trust and its supporters. While the Trust had undoubtedly expended much time and resources in putting together its proposal, this did not give rise to a right to claim a place in the refined shortlist.

As in other comparable decision-making situations where the public has an opportunity to have an input by way of submissions, the Board of Regenerate could expect its officers to assist in the evaluation of the submissions, and where necessary, obtain external expert technical advice. Given the complexity of factors, effects, and impacts related to 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 Trust could have reasonably expected that the assumptions and information presented in its submission, would be tested and scrutinised in this way, and indeed in the same way as the Trust had sought to challenge the information and opinions in Regenerate's prefeasibility reports...

It does not seem to me that there was an obligation on Regenerate's part to consult with the Trust in relation to its submission and the contrary expert opinions, or the factual differences

which remained after the review of the schedule of alleged errors. At this point in the process, an open-ended consultative process between the parties would likely to have become unwieldy and protracted, with no guarantee of achieving unanimity of opinion amongst the experts. Regenerate had given attention to the Trust's extensive schedule of errors and having done so it seems to me that it was open to the agency to rely on the advice and information from its technical advisors over that provided by the Trust's experts. In this type of situation, the preference for the decision maker to accept the advice of its experts, is unexceptional...

Post Exclusion and engagement with Trust

The Trust alleges that Regenerate failed to engage with the Trust after April 2018 when it raised concerns about the decision to exclude its proposal from the refined shortlist. However, this complaint overlooks the various communications between the Trust and Regenerate following the decision...

...It seems to me that the above referenced communications from Regenerate, illustrate that it remained willing to engage with the Trust regarding its proposal. The Chair agreed to meet with the Trust on the terms you proposed, that is, 'without lawyers or technical advisors, and on a without prejudice basis'. It undertook to receive and give due consideration to any submissions made by the Trust in response to the Exhibition. Thereafter the Chief Executive acknowledged the Trust's submissions of 28 June 2018, informing Mr Goodman of the action taken since receiving them and confirming that the outcome of the independent review of technical matters which had been raised by the Trust, would be provided to the Board along with analysis of all the feedback received during the public engagement. In addition, the Chief Executive conveyed the views of the relevant strategic partner, namely Environment Canterbury on the matter of taking water from the aquifer for the purposes of the Trust's proposed facility.

Review of exclusion decision

As the statement of reasons discloses, Regenerate effectively reviewed the decision to exclude the Trust's proposal from the refined shortlist on receiving the Trust's submission of 29 June 2018. The various corrections and the new information arising from the review, are already known to the Trust. As a result of the information released by Regenerate, the Trust will also know how the agency dealt with the corrections and new information, namely that they were drawn to the Board's attention together with the results of the updated multi-criteria analysis and comparative analysis.

The expert opinions that were obtained and relied upon during the review and the outcome of the review, namely the endorsement of the decision to exclude the Trust's proposal, were not notified to the Trust at the time. I do not consider this to have been an omission. Regenerate has explained that it received over 2200 submissions on the refined shortlist during the Exhibition period. The feedback received was extensive and involved detailed submissions such as provided by the Trust, through to qualitative and quantitative survey work undertaken by independent contractors. Regenerate advises that the public

information as to the process at this point, indicated that all of the feedback would be used to inform the draft Plan which would then be notified and available for public comment...

Transparency

In the event, the Trust's submission was extensively referenced in the Preferred Land Uses and Activities Assessment Report and this was made publically available on Regenerate's website, the day after the draft Plan was publically notified. It seems to me that the release of the report served to provide transparency as to how Regenerate had handled the concerns raised in the Trust's submission of 29 June 2018, and the information and reasons for the Board's decision to reaffirm the exclusion of the Trust's proposal from the draft Plan. 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 provided during the period 14 November 2018 to 19 December 2018. The release of the report also served to demonstrate that Regenerate's decision had been through a robust review process covering each of the 44 points in the Trust's submissions of 29 June 2018. While the Trust may wish to challenge the opinions offered in the context of the review, it is indisputable that Regenerate acted in accordance with the undertaking of the Board Chair that it would 'prudently assess all information that comes before [it].'

Legally privileged and confidential reports

Mr Goodman had drawn attention to certain reports that were obtained by Regenerate in the process of considering the Trust's submissions of 29 June 2018, which were marked 'legally privileged and confidential'. He suggested that the fact that the reports were marked in this way clearly indicated that Regenerate did not want to disclose those reports to the public following the Trust's 29 June 2018 submission. He commented also that 'it is clear that at this point, that Regenerate became concerned about the validity of its decision.'

You have suggested that at the time of these reports, Regenerate was seeking to justify its decision after the fact and 'cloak the reports with confidentiality and privilege.' You state that at no time had you threatened legal proceedings, and in your view, relying on privilege was inappropriate. You state that in fact, at the meeting held on 29 June, a member of the Board stated that 'the only way you will change our mind is through judicial review proceeding'. You state that you felt that this was a highly inappropriate remark to make and indicative of Regenerate's inflexibility.

The facts do not support this conjecture. Regenerate did release the reports on its website the day after the draft Plan was notified. Regenerate does not know why the author of the reports marked them as 'legally privileged and confidential.' Regenerate denies that it was responsible for marking them as such, and in its opinion, the notion that the reports can attract legal privilege was mistaken.

I note that prior to the meeting on 29 June 2018, Mr Goodman had already raised the spectre of legal action. I refer to his letter of 21 May 2018 to the Board Chair...

Concern about validity of decision

Regenerate rejects the suggestion that it became concerned about the validity of its decision. It states that at all times, its decisions were based on available technical data and where any party, including the Trust, identified additional material or disputed issues, it sought to thoroughly review and where necessary commission additional work.

Regenerate also rejects that it took a defensive approach. On the contrary, it asserts that its methodology resulted in the concept of a lake being revisited many times during the decision-making process, up to and including when the final draft Plan was being written. It argues that the process which it adopted indicated 'an open-minded, transparent, robust review and revisiting process' and that this was appropriate to its role.

From my scrutiny of the process, I consider that Regenerate's description of its approach to the subject matter is a fair one. As discussed elsewhere, the Letter of Expectations meant that it was not only bound to consider the type of proposal advanced by the Trust, but also to have regard to the views of its strategic partners and the city's infrastructure requirements. I would suggest that this was never going to be an easy task. It was clearly beholden on Regenerate to conduct a robust process, and one which would involve independent technical advice...

Ethical practice

You have stated that the authors of these reports should have engaged with your experts when reviewing the technical matters raised in the Trust's submission of 29 June 2018. You advise that this should have happened in accordance with 'industry and ethical engineering practice', and a prudent decision maker should have allowed for this consultation between the Trust's and Regenerate's experts.

I do not consider that it was for Regenerate 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. In terms of acting as a prudent decision maker, I consider it was incumbent on Regenerate to review its position in the light of the Trust's submission and to do so by seeking relevant expert advice and thereafter informing the Board of the outcome of that process...

Alleged error

You state that Regenerate misinterpreted its own expert advice. You advise that in the period since Regenerate responded to your official information request, your experts have had time to assess the information and they have come to the view that an error was made...

From the outset, it was made clear that this investigation would not attempt to adjudicate between the opposing opinions and views of the Trust's experts and those consulted by Regenerate. However, when read in its totality, the expert's report clearly identifies feasibility issues and limitations relating to the stormwater treatment provided in the Trust's proposal in conjunction with the lake. I will not be drawn into second guessing Regenerate's assessment of the feasibility issues. However it needs to be borne in mind, that in

considering a proposed land use, the Letter of Expectations clearly required the Board to have regard to the Council's infrastructure requirements. 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.

Multi-criteria and risk analysis

Without doubt, the difficulty of accommodating the flatwater facility and stormwater requirements within the area, appears 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 Trust will be aware of the comparative evaluation made of all proposals under the multi-criteria analysis. The assessment clearly disclosed some substantial limitations in the Trust's proposal 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 other words, 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. For example, the lake received a score of zero in the 'achievable and deliverable' ranking on the basis of 'significant hurdles to approval and in delivering the project including groundwater extraction activity status'. Additionally, the score of 1 in relation to the lake's 'affordability and investment', was indicative of a further hurdle to its inclusion...

Conclusions

You have submitted that key Regenerate staff formed the view early on that they did not want the lake in the plan and did not bother to obtain key pieces of advice until it had made the decision to exclude the lake from the refined shortlist and Exhibition, when it then sought to justify the decision after the fact, under the cloak of legal privilege. You comment that even then the advice does not support Regenerate's stated views and that any technical criticism about the feasibility of the lake or its practicality, has a good answer.

There may have been staff who were not enamoured of the Trust's proposal. I have not sought to interrogate that issue in the course of the investigation. In my assessment, it is not germane to reaching a view on whether Regenerate acted in a lawful and administratively reasonable manner in reaching the decision not to include the Trust's proposal in the draft Plan. Even if there were staff who did not favour the proposal, it is clear that the opinions and assessments which were critical to the assessment of the Trust's proposal, were from external consultants and experts engaged by the agency. Furthermore, I am satisfied that the decision making process through the various stages of finalising the Plan, provided ample opportunity for the Trust to challenge, rebut and correct Regenerate's assessment of its proposal. The Trust took advantage of those opportunities, submitting its own expert opinions and schedule of alleged errors. While you may consider that there is a good answer to any technical criticism about the feasibility of the lake, it seems to me that this view fails to 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.