Notice is hereby given that a meeting of the Finance and Assurance Committee will be held on:

Date:	**Wednesday 5 June 2024**
Time:	**10am**
Meeting room:	**Council Chamber**
Venue:	**Level 2** **20 Don Street** **Invercargill**

Finance and Assurance Committee Agenda - Late Items
OPEN

Note: The reports contained within this agenda are for consideration and should not be construed as Council policy unless and until adopted. Should Members require further information relating to any reports, please contact the relevant manager, Chairperson or Deputy Chairperson.

TABLE OF CONTENTS

ITEM **PAGE**

REPORTS

Legal Issue Steering Group update on Te Anau Downs Station findings

Record no: R/24/5/35974
Author: Michael Aitken, GM strategy & partnerships (interim)
Approved by: Cameron McIntosh, Chief executive

☐ Decision ☐ Recommendation ☒ Information

Purpose

1 The purpose of the report is to update the Finance and Assurance Committee on the activity of the Legal Issue Steering Group in relation to the environment court decision regarding Te Anau Downs Station.

Executive summary

2 Given the significant costs awarded and the reputational damage to Council arising from the Te Anau Downs Station case, the Council's Chief Executive initiated an independent review of the circumstances which led to this outcome, and any lessons to be taken from it and undertook to provide regular updates to Council as the work progressed. A Legal Issue Steering Group (LISG) comprising the Mayor, the Chair of Finance and Assurance, and the Chief Executive was appointed to oversee the work.

3 The independent review had twelve recommendations for improvement, all which Council accepted. A twelve-point action plan was developed by the Chief Executive and has been reported against at Finance and Assurance 5 June 2024.

4 Following the release of the independent review, Mr Chartres and his legal team made a presentation to Council. In response, the LISG requested and received feedback from the original authors.

Recommendation

That the Finance and Assurance Committee:

a) Receives the report titled "Legal Issue Steering Group update on Te Anau Downs Station findings".

b) Determines that this matter or decision be recognised as not significant in terms of Section 76 of the Local Government Act 2002.

c) Determines that it has complied with the decision-making provisions of the Local Government Act 2002 to the extent necessary in relation to this decision; and in accordance with Section 79 of the act determines that it does not require further information, further assessment of options or further analysis of costs and benefits or advantages and disadvantages prior to making a decision on this matter.

d) Notes the activity of the Legal Issue Steering Group

Background

5 The Southland District Council (SDC) applied for enforcement orders to manage what were perceived as unlawful indigenous vegetation clearance practices at Te Anau Downs Station (TADS). The application was declined by the Environment Court. The Council was ordered to pay costs of $300,000 to the respondent.

6 Given the significant costs awarded and the reputational damage to Council arising from the case, the Council's Chief Executive initiated an independent review of the circumstances which led to this outcome, and any lessons to be taken from it.

7 A Legal Issue Steering Group (LISG) comprising the Mayor, the Chair of Finance and Assurance, and the Chief Executive was appointed to oversee the work and provide regular updates to Council as the work progressed.

8 This work culminated in the report from the independent reviewers being received and the recommendations adopted by Council 15 November 2023.

Issues

9 In March 2024 the Chief Executive received a request from Mr Chartres, through his representative, to address Council in the Public Participation section of a Council Meeting and to put on the public record a detailed response to the independent report (Attachments 1 & 2). On Wednesday, 1 May 2024, the SDC heard directly from Mr Chartres and his team.

10 Following this presentation, the LISG made three requests of the authors of the original report who had been provided the documentation from Mr Chartres and had viewed the presentation online:

- make explicit why the review did not make direct contact with Mr Chartres and his team.
- review the wording in the report that Mr Chartres found particularly egregious (e.g., "well resourced") and consider if these references could be altered without diminishing the value and meaning of the report.
- provide suggestions, if any, you may have for changes to the recommendations made to Council in the report in light of the presentation.

11 Their response to these requests is attached (see Attachment 3).

12 In response to the first request the authors note that "The thrust of Mr Chartres complaints about the Council process are laid out in detail in their 39-page submission to the Environment Court on costs" and that they asked themselves "…what else might Mr Chartres be able to tell us that was not already in the public domain, and which would assist in answering the questions which formed our terms of reference. Our answer was 'probably not much'. It was our perception that the existence of new or additional issues not already covered in the Chartres submission to the Court on Costs was unlikely."

13 In response to the second request, they provided an amended report that removed the references that Mr Chartres identified noting that "These references could be altered or deleted without diminishing the value and meaning of the report…" This amended report has now replaced the original report and is publicly available through the SDC website.

14 In response to the final request, they note "The 12 recommendations of the report are focused on the systemic issues which lead to this litigation failure and how recurrence can be avoided. Other than by changing references to the now repealed Natural and Built Environment Act 2023 to RMA reforms, including proposed amendments to the application of SNA provisions, no consequential changes are necessary or recommended."

15 The Mayor has written to Mr Chartres (Attachment 4) thanking him for his presentation, repeating the Council's full acceptance of the findings of the environment court, reinforcing the focus of the independent report on internal council systems and noting that changes to the independent report have been made in response to Mr Chartres' input.

Next steps

16 Progress against the Twelve Point Action Plan to address the shortcomings identified by the independent report will be monitored by the Chief Executive and reported to the Finance and Assurance Committee quarterly.

Attachments

A Attachment 1: Request to present to Council
B Attachment 2: Peter Chartres response to independent review
C Attachment 3: Review authors response to LISG questions
D Attachment 4: Letter from Mayor to Peter Chartres

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1 March 2024

Chief Executive Officer
Mr Cameron McIntosh
Southland District Council
BY EMAIL

Dear Cameron

INDEPENDENT REVIEW ON TE ANAU DOWNS ENFORCEMENT PROCEEDINGS DATED 10 NOVEMBER 2023

1. A copy of this Review has been considered by Peter Chartres, ourselves and counsel James Winchester.

2. To be frank, the review is, with respect, seriously deficient. The report heading is "*Circumstances and Lessons.*" Unfortunately, the key findings in the report are based on an incorrect understanding of the circumstances of this case with the result that there will be little value to the Council in achieving the stated purpose of identifying improvements that will reduce the risk of similar outcomes in the future.

3. We have been instructed by Peter to prepare a response to the Review, to highlight the aspects of the report which are factually wrong or a misinterpretation of the facts. A copy of this response is **attached**. As an over-arching observation, we are unsure why or how the Review authors could have made so many fundamental factual errors and misrepresentations given that they ultimately had access to the full record of evidence, submissions and memoranda that were before the Court. It is also puzzling and disturbing that a number of the errors in the Review which are identified in Peter's response are directly at odds with the Court decision and its express findings of fact.

4. Moving to the Response, it is, as you will see, quite detailed but there are two aspects of the Review that we wish to highlight. One, which is a matter of process and the other, an important part of the factual background:

   4.1 We consider that it was a serious error of good process for the Reviewers not to interview Mr Chartres or the writer as part of the review. While Mr Winchester was spoken to by telephone, he did not understand this to be a formal interview and Mr Winchester was only engaged as counsel for the latter part of the proceedings[1]. Consequently, the source of truth for the factual findings has come from Council officers and the Anderson Lloyd solicitors who represented Council and whose objectivity is likely to have been compromised.

   4.2 The second matter is the omission of the Review to identify and acknowledge that the decision by the Council on 20 May 2020 to commence the enforcement proceedings was based on a report from Marcus Roy which was factually inaccurate and misleading. It is difficult to understand how the report writers could have failed to identify this as a significant failing of process in these proceedings.

[1] During the telephone conversation, it became apparent to Mr Winchester that a materially incomplete record of evidence and Court documents had been provided to the Reviewers by Anderson Lloyd and the Council. Mr Winchester expressly identified a significant number of highly relevant and material documents that the Reviewers needed to see and carefully consider in order to properly perform their role.

5. Peter considers, and we agree, that it is important his response be documented and put on the record. Peter also requests that he be given an opportunity to speak to the response at the public forum of the next available Council meeting. We would be grateful if you would confirm that this opportunity will be provided and confirm the date and time.

Yours faithfully
CRUICKSHANK PRYDE

Rex Chapman
Partner

Email: rex.chapman@cplaw.co.nz

COPY TO: Mayor Rob Scott
Southland District Council
BY EMAIL

RTC-027181-56-1104-V2:JAS

RESPONSE BY PETER CHARTRES TO INDEPENDENT REVIEW ON TE ANAU DOWNS ENFORCEMENT PROCEEDINGS ("*the Report*")

Overview

1. This review is extremely disappointing and has resulted in a missed opportunity for the Council, and in particular councillors, to have a proper understanding of what and who contributed to the failed enforcement proceedings, the significant costs award and the reputational damage to Council arising from the case.

2. The Report's Executive Summary includes the statement:

   "***Our essential conclusion is that there was no single action, fault or omission that caused the result. Rather, a decade long concept of factors aligned in a way that was difficult to foresee, difficult to avoid and difficult to navigate. Whilst performance was not always optimal, no single individual was most responsible.***"[1]

3. This conclusion is seriously at odds with the facts which can be found in the Court decision itself, the Court transcript, costs application and subsequent costs decision.

4. The authors interviewed six current and previous Council staff and the lawyers who acted for Council. Surprisingly, the authors chose not to interview Mr Chartres or his solicitor Rex Chapman who acted for him throughout. While one of the Report authors spoke to Mr Winchester by phone, Mr Winchester did not understand this to be a further formal interview. Mr Winchester was only engaged as counsel in late 2021 prior to the hearing in April 2022.

5. The review omits, and misrepresents important facts and evidence, and the failure to interview Mr Chartres has resulted in an overall lack of balance in the Report which has undermined its credibility. As a consequence, the Report has not provided the Council with a proper understanding of the contributory causes and the persons responsible for the outcome. This means that the Council will not achieve its objective of identifying improvements that should be made to reduce the risk of similar outcomes.

6. Mr Chartres wishes to put on the record his concerns about the Report and highlight the aspects of the Report which are factually wrong, or a misinterpretation of the facts.

Response

"*The need to evaluate the defence offered by lawyers acting for the owners of TADS resulted in the brief to Council's legal advisers being narrowly expressed.*"

7. Mr Chartres' position has been consistently expressed from the outset.[2] Mr Chartres did not accept that the indigenous vegetation clearance contravened any rule in the relevant District Plan and in the alternative, relied on existing use rights. The need for the Council and its legal advisers to prove a breach of the relevant Rules should have been apparent from the outset and is an integral part of addressing existing use rights, in that they only apply if there is a breach of the Rules.

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[1] Report page 3.
[2] Cruickshank Pryde letter to Michael Garbett dated 30 November 2018.

"*The Council's case focused on existing use rights at the expense of a first principles analysis of the two District Plan Rules affecting the matter.*"[3]

8. This assessment is not correct. Mr Chartres' counsel sought directions prior to the hearing requiring the Council to expressly identify in a memorandum all clearances that were considered to be unlawful in terms of Section 9 of the Resource Management Act. This memorandum dated 18 February 2022 confirmed that the Council considered that all clearances from 2001 were in breach of the Plan. As a consequence, Mr Chartres had to prepare evidence to address all alleged breaches from 2001 to 2020.

"*Councillors and past and present CEO(s) appear to have been kept well informed about the many steps leading to these proceedings.*"[4]

9. The problem with the information that was provided to councillors and CEO(s) is that it is now known that because of the Council officers' incorrect understanding of the Plan rules, councillors were not properly informed or were misled as to the merits of the proceedings. They were also misled by Mr Roy when the decision was made to authorise the proceedings, as discussed in paragraph 19 below.

"*We note the questions about the delegated authority of various Council officers and the Council to make various decisions, were raised by legal counsel for TADS's owners. Our review suggests that there may have been issues in this domain, but that it was remedied.*"

10. The footnote to this statement says that counsel for TADS's owners raised but did not pursue this in the hearing before the Environment Court.

11. This statement is incorrect and it should have been evident to the Report writers that the issue was pursued if they had read the Court's decision. TADS did pursue the delegations issue in the hearing before the Environment Court and the Court directly addressed it as Appendix 1 to the Court's decision delivered on 28 October 2022. It was not necessary for the Court to determine the issue because the application was declined on substantive grounds, but the Court expressed doubts about whether the revised Enforcement Order proceedings were lawfully commenced. It remains unclear whether the problems identified with delegation have in fact been remedied, as the Report suggests.

"*We found nothing in the actions and processes applied by the Council's officers to imply application of an over-zealous or idealistic approach to this matter.*"[5]

12. There are many examples of an over-zealous approach by Council officers. Two examples are Mr Roy's definition of "vegetation clearance" and his interpretation of Council's own rules which was rejected out of hand by the Court. Mr Roy's deliberate use of the Bog Lake area complaint which related to DOC vegetation clearance, to support his recommendation that Council initiate the enforcement proceedings was arguably much worse than over-zealous. This is discussed further in paragraph 19 below.

[3] Report page 7, paragraph 15.
[4] Report page 8, paragraph 21.
[5] Report page 9, paragraph 23.

"***Strongly adversarial Respondent and a well-resourced legal team***"[6]

13. This is a mischaracterisation and is not supported by any of the Appendix 1 documentation which includes "*Respondent's Timeline Bundle of Documents Items 001 to 93*" dating from 14 April 2010.

14. Mr Chartres' approach from the outset and throughout the proceedings demonstrated a willingness to engage with the Council and resolve issues by agreement. The inference that Mr Chartres' adversarial approach (which is not accepted) was why the matter proceeded to Court fails to acknowledge that he was the *Respondent* and had to deal with the way that the Council chose to run its case. It was the Council driving the proceedings and advancing positions which, in light of the very significant consequences for Mr Chartres', required a correspondingly strong response. There can be no criticism of the way that Mr Chartres responded, which is simply a reflection of the Council's choices. If the suggestion is that Mr Chartres could or should have made some further concessions to the Council rather than vigorously defend his position, that is both misconceived and ignores the approach Mr Chartres took at mediation, which is addressed in paragraphs 21 to 25 below.

15. Mr Chartres takes particular exception to this finding which implies that the Council was a victim of an unreasonable or aggressive approach by him. The truth is just the opposite. It was the Council who took a heavy handed, aggressive approach and did not genuinely attempt to find a mediated solution. The Report also makes reference to Mr Chartres having a well-resourced legal team, suggesting that the Council was at some material disadvantage in this respect. Mr Chartres had to fund his defence of these proceedings out of his own personal income. The Council spent over $500,000 including GST in the pursuit of these proceedings and engaged a national law firm to represent it. Any suggestion that there was an imbalance of resources which contributed to the outcome is wrong. If anyone was at a disadvantage here, it was Mr Chartres.

"A Court that had little interest in evidence that new or different clearance methods were being used at TADS in 2017-20 such that the scale and character of clearance appeared markedly different to what had gone before."[7]

16. This criticism of the Court is unwarranted. The Court expressly recorded in its decision that the assertion of new methods and a different scale and character of clearance was advanced by the Council[8]. The Council provided no evidence that new or different clearance methods were being used and the Court, having carefully considered all of the evidence, identified that the Council's case went little further than asserting that the rules had been breached in relation to all indigenous vegetation clearances since 2001[9]. The evidence, including supporting diary records and photographic evidence provided by Mr Chartres proved that there was nothing new, different or novel in the clearance methods or machinery used after 2017[10]. This was the evidence the Court relied on and no contrary evidence was produced by the Council. In reality, the Court's decision shows that it carefully considered the Council's assertion about new or different clearance methods and an increased scale

[6] Report page 9, paragraph 27h.
[7] Report page 9, paragraph 27j.
[8] Environment Court decision [2022] NZEnvC 215 at [24]
[9] Court decision at [26]
[10] See the Court's identification of this issue at various places including [69], [70], [103], [104], [195], [359], [362] and [376]

of clearance in 2017-2020, as well as the competing evidence on that point. Instead of showing little interest in the evidence as the Report writers suggest, the Court made fully informed findings of fact, with the issue being that the Court found that the Council's evidence failed to support its assertion.

"***During this site investigation it was agreed between SDC officers and Mr Chartres that each would obtain and exchange legal opinions as to their respective positions.***"[11]

17. Correct. What the Report fails to mention is that the Council later resiled from this agreement and refused to provide a copy of the legal opinion that it had obtained from Anderson Lloyd.[12]

18. Mr Chartres honoured this agreement and provided the Council with the legal opinion that he was relying on.[13]

"***On 20 May 2020 the TLRM submitted to the elected members of Council seeking authority to commence an interim enforcement action. The background to this Report is recorded and is noted for various assertions including:***

> ***A complaint has been received relating to the preparation of a new round of vegetation clearance on a part of the property that has not previously been cleared.***"[14]

19. The Report fails to note that the TLRM's report on 20 May 2020 was found to be inaccurate and misleading. This was one of the many factors identified in the Respondent's application for costs, and was not challenged by the Council in its response. The relevant section of the Application for Costs[15] is as follows [emphasis added]:

> "*41. Mr Roy's report is materially inaccurate and misleading in other important respects. It misled the Council about what he refers to as the "latest complaint" which he says was sent to Ministers Parker, Sage, Shaw and O'Connor. The complaint is attached to his report **[TBD 70]** and says "Before lockdown, I drove down the track to the delta of the Eglington at Lake Te Anau. It looks as if preparations are underway to clear about 800 to 1000 ha of native forest around Bog Lake".*
>
> *42. This anonymous complaint was not disclosed to the Respondents immediately or fully despite a LGOIMA request by Mr Chapman on behalf of the Respondents on 4 May 2020 **[TBD 59]**. The subject matter of the complaint was however the subject of a direct query from Mr Roy to the Respondents. The Respondents clearly advised Mr Roy that the only work being undertaken was the fencing work on the property boundary which was being carried out by the Department of Conservation (**DOC**) in accordance with a resource consent granted by the Council **[TBD 57]**.*
>
> *43. Mr Roy therefore knew where this work was being undertaken and would also have known that the clearance activity that was being complained about around Bog Lake was not in fact undertaken by the Respondents, but was being lawfully carried out by DOC. Armed with this knowledge, the omission in Mr Roy's report to the Council to accurately record the position is submitted to be staggering and must be deliberate. This failure*

[11] Report page 13, paragraph 15.
[12] Letter from Cruickshank Pryde to Michael Garbett dated 30 November 2018.
[13] Cruickshank Pryde letter to Michael Garbett dated 30 November 2018.
[14] Report page 15, paragraph 22.
[15] Application for Costs on Behalf of the Respondent dated 18 November 2022.

> *left the Councillors under the impression that the Respondents were preparing to "clear around 800-1000 ha of native forest around Bog Lake", which is simply untrue*."

20. We would have expected that a thoroughly conducted Independent Review would have looked into this vitally important issue given that it was the starting point for the Council's commitment to a very costly and ultimately unsuccessful piece of litigation. The absence of any consideration or discussion of this matter in the Report is striking, given that this specific issue was pivotal to the Council deciding to commence the ill-fated and expensive Court proceedings which triggered the need for an independent review to be commissioned at all.

"Council sought directions as to Environment Court mediation and a date was arranged."[16]

21. It is a matter of record that it was Mr Chartres who initiated mediation, not the Council as asserted in the Report.

22. In paragraphs 209 and 210 of his first affidavit filed in opposition to the Enforcement proceedings, Mr Chartres said:

> "*209. As I have tried to show in this affidavit, contrary to the impression that the Council has given in these proceedings, I have endeavoured to constructively engage with the Council over the development of Te Anau Downs. I have always been open about the continued development of the Station. I have always endeavoured to undertake the development in an environmentally responsible manner achieving a balance between increased production and protection of significant and sensitive areas. I believe that I have acted lawfully.*
>
> *210. I would have preferred to have been able to discuss the issues that are the subject to these proceedings with the Council prior to these proceedings having been filed. It is still my wish that these issues may be capable of being resolved through Court assisted mediation.*"

23. The references in the Report to the mediation and its outcome demonstrate that the Report writers have not been provided with an accurate account of the mediation by AL and have failed to consider the discussion about mediation in the costs application.[17]

24. It should be noted that the only parties who were present at the mediation were three Council officers being Marcus Roy, Fran Mikulicic, Erin Keeble, AL solicitor Shelley Chadwick, Council's ecologist Glen Davis, Mr Chartres, his partner, solicitor Rex Chapman and ecologist Kelvin Lloyd. Neither Mr Chartres nor anyone else in his team present at the two mediations was interviewed as part of this review. It is not surprising therefore that the account of the mediation and many other aspects of this case are inaccurate.

25. What actually occurred was as follows:

    i. The first mediation was held over two days on 26 and 27 November 2020. At the conclusion of this mediation, Mr Chartres agreed at his cost to engage Wildlands to undertake an ecological assessment in terms of paragraph 1(b)(i) of the Application

[16] Report page 17, paragraph 40.
[17] Paragraphs 77 to 91, Application for Costs on Behalf of the Respondent dated 18 November 2022.

for Enforcement Orders. Following receipt of this Report, it was agreed that the mediation would resume.

ii. The draft Wildlands report was received and provided to the Council on 30 July 2021. On 11 August 2021, the mediation resumed.

iii. Mr Chartres' position at the resumed mediation was that he agreed in principle to the mediation and mitigation measures proposed and recommended in the Ecological Report subject to those measures being refined and quantified.

iv. In doing so, Mr Chartres essentially was agreeing to the orders that were sought in the original application for the enforcement orders.

v. To Mr Chartres' surprise, at the conclusion of the mediation, the Council said it was no longer seeking the remediation orders as sought in the original application and would be seeking additional and different remediation orders which at that time were unspecified.

vi. It was the Council, not Mr Chartres who terminated the mediation discussions and sought a Court hearing.

vii. The Court directed the Council to file its application for revised Enforcement Orders by 15 December 2021. This revised application included the effective abandonment of most of the orders which had originally been sought and sought different and more extensive remediation orders, a position that the Court expressly recorded. As a consequence of this radically altered position of the Council, Mr Chartres instructed his solicitors to withdraw the concessions that Mr Chartres was prepared to make in response to the original application.

"*The Environment Court mediator had a background in pastoral farming. Surprisingly, she was said to have shared her own experience of vegetation clearing with those present.*"[18]

26. It is unclear why this would be referred to in the Report and also unclear why it would be found surprising that an Environment Court Mediator would share these details with the parties? The Mediator's shared experiences as a farmer are no more notable than the fact that the Mediator was a former Minister of Conservation.

"***Based on the concessions made by Mr Chartres AL properly requested that Mr Chartres consent to corresponding Court Orders to enshrine the agreements and narrow the remaining issues. Although the correspondence tends to suggest that Mr Chartres would enable such orders to be made by consent, he never directly communicated that to the Court and no orders were ever made. On the contrary, there is a suggestion that vegetation clearance continued unabated.***"[19]

27. Mr Chartres was prepared to negotiate an outcome on the hypothetical basis that the clearances were unlawful, although that was denied.

28. The concessions that Mr Chartres made at mediation were for the purposes of settling the enforcement proceedings in total, not for the purposes of "*narrowing*" remaining issues. There was nothing "*proper*" about AL's request for him to sign consent orders, leaving the Council free to continue the proceedings seeking new and different orders.

[18] Report page 17, paragraph 40.
[19] Report page 18, paragraph 42.

29. What the Council wanted was for Mr Chartres to agree to the remediation measures which were sought in the original application and for the Council then to file and pursue a revised application for further remediation orders. In other words, the Council wanted to "*bank"* the concessions that Mr Chartres had made at mediation and then seek further far-reaching and punitive orders. It is not surprising that Mr Chartres did not agree to this.

30. For the record, the suggestion that "*vegetation clearance continued unabated*" is wrong and demonstrates again the Council's failure to understand their own rules. The only vegetation clearance undertaken by Mr Chartres was a permitted activity under the Plan Rules. At this time, Mr Chartres was subject to an Interim Enforcement Order. The Report suggests that Mr Chartres was in contempt of this Order. This is a very serious allegation and is untrue.

31. Given the temporal coverage of the Council's evidence ran right up to the commencement of the hearing in April 2022, any suggestion of breach of the Interim Enforcement Order would have been dealt with in the Court's decision. No evidence of this nature was produced by the Council, and nor does the Court's decision consider this suggestion at all. The basis for the Report writers to record such an inflammatory and baseless suggestion can only have come from the Council officers or counsel. Again, one would reasonably consider that a thoroughly conducted and genuinely objective Independent Review would not record such a suggestion without establishing that it had a proper basis.

"For a second time AL's efforts to achieve a settlement came to nothing."[20]

32. This conclusion is incorrect.[21] Paragraphs 90 and 91 of the Costs Submissions more accurately summarises the position:

> "*90. The dramatic change in the Council's position on remediation, which had not been in any way signalled prior to the resumed mediation in August 2021, meant that the preparation and attendance at the mediation by the Respondents, their Counsel, and Dr Lloyd was a completely wasted exercise.*
>
> *91. It is often the case where the issue to be determined in proceedings is mediated and the parties simply fail to reach an agreement. In such case where the failure cannot be fairly attributed to either party, the practice of excluding mediation from a costs award is understandable. The situation in this case is very different. The failure of mediation cannot be attributed to a failure to reach agreement. The mediation failed because the Respondent had largely agreed with the orders sought in the application that was then before the Court, but at the conclusion of the mediation the Council said that additional and different remediation order would be sought and particulars of these was eventually provided in the revised application filed on 15 December 2021 after the case had been set down for hearing.*"

33. This statement also infers that the first mediation had "*come to nothing*" which is also incorrect. At the first mediation, Mr Chartres agreed to engage Wildlands to conduct a full ecological assessment and agreed to resume mediation once this report had been reviewed by SDC. Mr Chartres complied with this agreement.

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[20] Report page 18, paragraph 43.
[21] Paragraphs 77 to 91, Application for Costs on Behalf of the Respondent dated 18 November 2022.

"*Subsequently AL refined the case to focus on the more recent clearances of indigenous vegetation (between 1 January 2017 and 13 June 2020) …*"[22]

34. This statement is incorrect. As noted earlier, Council was directed to provide a memorandum identifying the breaches of the Resource Management Act relied on for the final enforcement orders. This memorandum alleged that all clearances from 2001 were unlawful. Council's case was not therefore narrowed down prior to Mr Chartres having to prepare his second affidavit. Notably, the Court's decision expressly recorded and was critical of the problems created by the Council's significant and belated change of case, which was first signalled during its opening submissions at the commencement of the Court the hearing and then ultimately confirmed in its closing submissions[23].

"***Once it became clear to Mr Chartres that SDC intended to push on and seek final orders, "he took all steps available to him to resist this occurring.***"[24]

35. The Council rejected Mr Chartres' offer to resolve the proceedings based on the application that was then before the Court and the Council elected to file a fresh application for different Orders leaving Mr Chartres with no option but to oppose them.

36. It is difficult to understand why the report writers appear to be critical of Mr Chartres taking all necessary steps to protect his rights, in the face of the dramatic change by the Council in what it was now seeking. It goes without saying (but we will repeat it again), that Mr Chartres was the Respondent and was having to respond to the case being advanced by the Council. Given the Court's very clear conclusions about the respective merits of the parties' positions, any implicit criticism of Mr Chartres is simply without foundation.

"*That the Court dismissed Mr Davis' evidence as to the age of cleared vegetation as readily as it did was disappointing to SDC personnel who felt that tangible objectivity had been brought to bear on Mr Chartres' assertions that he was doing little more than clearing re-growth as permitted by the 2018 Plan or existing use rights.*"[25]

37. An Independent Review should address facts and evidence, rather than deal with concerns based on the personal feelings of Council officers. Once again, the Court's decision thoroughly identifies and explains the problems that it had with the objectivity and reliability of Mr Davis'' evidence, as well as addressing in detail the reasons why it preferred the evidence or Mr Chartres' ecological expert Dr Lloyd. That should be the end of the matter and the Report should not have entertained the issue. Even characterising Mr Chartres' evidence as "assertions" creates an unwarranted adverse inference, particularly when the Court decision expressly accepted his evidence on this point.

38. The Report fails to address the problems with Mr Davis' ecological assessment and the reason why it was no relied on by the Court. Mr Davis' assessment was far from objective and this is addressed in the Environment Court decision at paragraphs [274] to [283]. These problems included:

    - Unlawfully cutting down indigenous vegetation for the purposes of aging the vegetation. This activity is not permitted under the Plan and would have required a resource consent.

[22] Report page 18, paragraph 44.
[23] Court decision from [36] to [47], and [320]
[24] Report page 18, paragraph 45.
[25] Report page 20, paragraph 54.

- Highly selective and unrepresentative sampling of vegetation for the purposes of aging vegetation. Mr Davis selected a small number of older indigenous shrubs and trees from within the stands of vegetation that had deliberately not been cleared by Mr Chartres, in order to support Council's assertion that Mr Chartres was unlawfully clearing vegetation that fell outside the age limit imposed under the Plan.

- Mr Davis understated the prevalence of exotic weeds amidst the indigenous vegetation that was cleared and over-estimated the areas of indigenous vegetation that was cleared.

- Mr Davis failed to appreciate or acknowledge that the Plan definition of "*indigenous vegetation*" was "*plant communities dominated by species that are indigenous to New Zealand*." Large areas of vegetation cleared on Te Anau Downs fell outside this definition.

"*Ultimately, however, Mr Chartres and his advisers resiled from those representations and the Court placed no weight on the content or nature of the Memorandum*."[26]

39. The report writers completely misconstrue this Memorandum to the Court dated 24 September 2021 which was provided to the Court for the purposes of a Case Management Conference in relation to timetabling orders.

40. Mr Chartres and his advisers had made no "*representations*" and did not resile from anything. The Memorandum was a factual statement to the Court of Mr Chartres' position in relation to the application that was then before the Court. Once the Court was apprised of the position, the Court directed the Council to file its revised application so that Mr Chartres and the Court could understand what the Council was now seeking which, as identified earlier and also expressly identified by the Court, were effectively entirely new and different orders.

P D Chartres
Te Anau Downs Station

[26] Report page 22, paragraph 74.

Follow up Questions of SDC

Considering the presentation to Council on 1 May 2024 could you please consider and respond to these 3 questions:

1. Make explicit why the review did not make direct contact with Mr Chartres and his team.

2. Review the wording in the report that Mr Chartres found particularly egregious (e.g., "well resourced") and consider if these references could be altered without diminishing the value and meaning of the report.

3. Provide suggestions, if any, you may have for changes to the recommendations made to Council in the report in light of the presentation.

Responses

Having viewed the 1 May presentation of Mr Chartres, Mr Winchester and Mr Chapman, we respond as follows:

1. Why the Review did not make direct contact with Mr Chartres and his team.

In summary, the investigation was tasked with assessing what went so wrong that the Court rejected Council's application and awarded $300k of costs against it, and how that could that be prevented from recurring. The focus was on identifying the circumstances which led to this outcome and how Council could learn from them.

The thrust of Mr Chartres complaints about the Council process are laid out in detail in their 39-page submission to the Environment Court on costs. We accepted that there were human and emotional elements that were likely to have been touched on but not developed in that submission.

However, the submission did not hold back on describing "…a very significant adverse impact on the operation of the Station and on the Respondents' livelihood while interim enforcement orders were in place (over two years), when such interim orders were based on misleading and incomplete information.

The Submission is also notable for describing Council's conduct as "extraordinary and improper" and "…irresponsible, incompetent and careless". It referred to "bad faith motivations…" and malicious commencement of proceedings; motivation of "…an improper purpose", misleading, and "seeking to take a highly punitive and unreasonable approach"; the pleading and presentation of the Council's case was said to be, "shambolic, incoherent and at times bordering on an abuse of process".

The context also included the 130 pages of the Court's substantive decision and the 12 pages of the Court's Costs decision.

We asked ourselves what else might Mr Chartres be able to tell us that was not already in the public domain, and which would assist in answering the questions which formed our terms of reference.

Our answer was 'probably not much'. It was our perception that the existence of new or additional issues not already covered in the Chartres submission to the Court on Costs was unlikely.

The presentation to Council on 1 May confirmed our judgement on this aspect. With one exception, there was nothing said by Mr Chartres, Mr Winchester, or Mr Chapman in their presentation to council that would have helped us with our response to the terms of reference and ultimate recommendations that we did not already have.

The one exception is the articulation of the hurt expressed by Mr Chartres and that this was exacerbated by a sense that he was not being heard.

On this aspect there are two things that come to mind. First, Mr Chartres has repeatedly complained that Council officer, Marcus Roy was overzealous and not reasonably controlled or managed and that this was exacerbated by unnecessarily aggressive approach by Council's lawyers.

Our report made it clear that there was a crucial lack of experience both with management of the Council's processes and their day-to-day handling, and that Council's lawyers were asked the wrong questions.

Secondly, on the conduct of Council's lawyers, we made findings and recommendations that Council take a different approach to obtaining the most appropriate legal services in the future.

Recommendations around the management of legal processes such as enforcement proceedings have been made and we are told, are being implemented, in order to prevent a recurrence of these aspects, in an effort to move towards the 'gold standard' of legal processes that Mr Winchester refers to as being a local government responsibility.

We agree that Council could have taken a more constructive approach to acknowledging and addressing this issue in its efforts to settle the proceedings. As concluded in the report:

> Although SDC resolved to seek clarification as to the application of its vegetation rules, a disjunct occurred between that purpose and the legal process selected with its dual purpose of an enforcement order to prevent further vegetation clearance.

Our report is consistent with Mr Winchester's view that the Council's legal process should have been to seek a declaration as to the practical meaning of the district plan's indigenous vegetation management provisions.

2. Review the wording in the report that Mr Chartres found particularly egregious (e.g., "well resourced") and consider if these references could be altered without diminishing the value and meaning of the report.

This description adds nothing to the findings of the report. It is an observation made in the context of the overall management of risks attached to a litigation process. Simply put, it was intended to convey that a party who is investing heavily in expert witnesses and legal support can be less likely to settle at mediation or in the lead up to a hearing. This should have been considered by the lawyers advising the Council on overall strategy.

These references could be altered or deleted without diminishing the value and meaning of the report and we have provided a version of the report with those changes.

3. Provide suggestions, if any, you may have for changes to the recommendations made to Council in the report in light of the presentation.

The 12 recommendations of the report are focused on the systemic issues which lead to this litigation failure and how recurrence can be avoided. Other than by changing references to the now repealed Natural and Built Environment Act 2023 to RMA reforms, including proposed amendments to the application of SNA provisions, no consequential changes are necessary or recommended.

IG / JH

22 May 2024

29 May 2024

Peter Chartres

Dear Peter

Re: Deputation response

On behalf of Southland District Council, I would like to thank you again for taking the time to attend our recent meeting and share your response to the Independent Review.

I wish to acknowledge the points you raise and the distress that aspects of the process have caused, which was evident in your presentation to Council.

I would like to confirm that the Council has sought and received a response from the review authors to the key points you and your legal representation have raised, which will be considered alongside your comments as part of our programme of improvements.

I would also note that the purpose of commissioning the Independent Review into the Council's handling of the Te Anau Downs Station Environment Court proceedings was to seek lessons from what occurred and take steps to ensure actions were not repeated. The Council accepts that we got it wrong in this situation and we are committed to learning from this.

The review ultimately found no single fault in a "decade long concert of factors aligned in a way that was difficult to foresee, difficult to avoid and difficult to navigate". The Independent Review is not an end-point, rather a basis for us to continue a programme of improvements. Your input, and that of others in the community, is important to these ongoing learnings.

Staff have now considered the further information from the review authors. This will become part of our review implementation plan that will be reported to the Finance and Assurance Committee on a quarterly basis.

One immediate outcome of the process has been to amend the report to remove some of the references you brought to our attention. Thank you, once again, for your time and information; we remain open to hearing from you in future.

Yours faithfully

Rob Scott

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