



**Resource Management Law Association
of New Zealand Inc.**

CONDITIONS OF CONSENT

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LEGAL PRESENTERS

- Jennifer Caldwell, Partner, Buddle Findlay
- Michael Garbett, Partner, Anderson Lloyd
- Alastair Logan, Partner, Ross Dowling Marquet Griffin
- Martin Williams, Barrister, Quay Chambers and RMLA President

Introduction

- Consent conditions are an integral part of any resource consent granted
- A consent constitutes both “benefits and burdens”
- In *Maraetai Road*, conditions of consent have become far more elaborate

[88] *The Strand Ltd v Auckland City Council*

- Applied by the Court of Appeal in *Palmerston North City Council v Dury*
- “Real world”
- Research of Dr Marie Brown
- How safe the assumption the High Court has ruled consent authorities must make, really is!

Scope of Presentation

- An overview of basic requirements, essentially – a “101” on valid conditions
- A recommended approach to referencing application material in consent conditions
- An overview of the key legal requirements for management plan consent condition frameworks

- Requirements for adaptive management approaches
- The range of “securities” available to consent authorities to enforce consent obligations

Basic Legal Requirements

- Section 108 of the RMA
- *Any condition that the consent authority considers appropriate*
- Supreme Court - *broadly expressed discretion*
- Scope of 8 – section 108

- *Newbury DC v Secretary of State for the Environment*

- Resource management purpose

- Fairly and reasonably relate to the activities authorised

- Not be unreasonable

- Supreme Court – *Estate Homes*
- More liberal view of the "*fairly and reasonably relate*" test
- “Logically connected”

Invalid Conditions

- Delegation of council or judicial duties
- Outside the legal powers of the consent authority
- Derogate from (or nullify) the grant of the consent

- Limit an individual's ability to exercise statutory legal rights
- Require actions of third parties

Best Practice

- Drafting that is clear and unambiguous
(*Ferguson v Far North*)
- Conditions that are practicable and enforceable
- Conditions that accurately reflect modifications to application

Referencing Application Material

- “Condition 1” in general accordance with the application
- Don’t simply refer to all of the application material
- Or list a whole series of plans that have been put to the consent authority
- Myriad of expert reports – hidden dangers

- Record important limitations on scale or mitigation requirements expressly in consent conditions themselves
- Application material not 'authored' for purpose of setting specific obligations

- *New Zealand Windfarms Ltd v Palmerston North City Council*
- NIAR
- Predictions
- Not intended to go to the acoustic scope of the proposed activity; *rather, they related to how the predicted noise levels (at the receiving locations) would be achieved, not what the levels should be*
- *Gillies v Waiheke*

- *Queenstown Lakes District Council*
- Ideal is a self contained consent document that is complete on its face
- Condition 1 – gives scope for immaterial variations, but secondary role for future enforcement

Management Plan Conditions

- Striking balance between certainty for decision maker re effects, and need for flexibility in future for consent holders
- Guidance from Court and Boards
- Denniston Plateau decision
- Distinction between process and outcome driven approach to MP conditions

Adaptive Management

Legal Requirements

- High Court and Court of Appeal's assumptions tested in the case of management plans
- Adaptive management - the assumptions stretched to breaking point
- Real care is needed in framing conditions to ensure a *significant irreversible impact* does not result
- Consent authority's essential function must not be delegated (or indeed *abdicated*).

- *Director-General of Conservation v Marlborough District Council*
- *Golden Bay Marine Farmers v Tasman District Council*
- Defined “adaptive management”
 - Baseline surveys
 - Flexibility of staging
 - Monitoring over time with trigger levels and subsequent refinement of the management regime
 - Each stage being dependent on reviewed information
 - Reduction of risk in subsequent stages
- Steps taken before significant affects arise

- Staged provision for marine farming with approval
- 50 hectares at stage 1
- If the effects were acceptable then further 200 hectares could proceed
- Scope for “stopping or reversing” development within the review and enforcement provisions of RMA
- High Court upheld

- *Crest Energy Kaipara Limited v Northland Regional Council*
- Staged “array” of 200 turbines in Kaipara Harbour

- Key requirements of successful adaptive management
 - Collection of baseline knowledge upon which management plans can build in an on-going and cycling process;
 - Setting of clear objectives (that are reasonably certain and enforceable);
 - Design and planning for management of the resource;
 - Managing of the resource;
 - Monitoring, evaluation of monitoring results, reviewing and refining hypotheses, the management plan and programme to better meet the objectives;
 - Repeating the process at the design and planning level

- “Acid test” for adaptive management
- *Clifford Bay Marine Farms v Marlborough District Council* – can remedy effects before irreversible
- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act)

***Sustain our Sounds* – Background**

- Maximum initial annual discharge
 - Annual increase up to a total maximum annual discharge
 - “Eutrophic” state
 - “Ecological disaster”
 - (Majority) expert opinion - eutrophic state was unlikely
 - Board of Inquiry
- “Somewhat astounded” at the lack of modelling of the total maximum”.

- Did not have an adequate description of the *existing environment*
- “Baseline plan”
- “Baseline report”
- If the baseline report not approved, no structure could be placed on the marine farms
- Frustrating the exercise of consent?

- Further “feedback” loop investigations, before any increase in current feed levels
- Three years of assessment required to demonstrate no statistically significant difference
- Approval of an ‘annual report’ – increase the tonnage of feed allowed
- Amount of feed might need to be reduced, stock removed

- *Qualitative water quality standards?*
- Quantitative water quality standards determined and approved by Council
- “No significant movement along the trophic state scale”

- Board of Inquiry's synthesis:

“Have to be satisfied that:

(a) there will be good baseline information about the receiving environment;

(b) the conditions provide for effective monitoring of adverse effects using appropriate indicators;

(c) thresholds are set to trigger remedial action before the effects become overly damaging; and

(d) effects that might arise can be remedied before they become irreversible.

- Department of Conservation's guidance notes
- "Adaptive management approach will not be appropriate where it *"cannot remedy effects before they become irreversible."*

- International Union for Conservation of Nature (**IUCN**) guidelines
- Use of adaptive management *“unless strict prohibitions are required”*
- Precautionary principle:
 - Urgent measures*
 - Imminent potential threats*
 - Particularly vulnerable species*

Australian and Canadian cases

- Adaptive management, *“whereby the development is expanded as the extent of uncertainty is reduced”*
- Counters the *“potentially paralysing effects of the precautionary principle on other socially and economically useful projects”*

- Supreme Court concluded:
- What must be present.

“There must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk”.

- [129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:
 - (a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);
 - (b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);
 - (c) the degree of uncertainty; and
 - (d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.

- *“Normally one would expect there to be sufficient baseline information before any adaptive management approach could be embarked upon (as against prohibition until any deficiency in baseline information is remedied)”*

Security Instruments

- Brookfields Lawyers – Mr John Sheppard
- **“Importance of Security Documentation...**

SECURITY INSTRUMENTS

We discuss the use of:

- Bonds
- Consent notices
- Encumbrance
- Covenants

Bonds

A bond is essentially a written promise to comply with conditions of consent, or to pay the bond holder money so that Council can complete the conditions

There are two main times a bond arises:

- To secure compliance with conditions of consent under sections 108 and 220
- Following issue of 224(c)

Consent conditions need to spell out very carefully and precisely:

- What is to be bonded
- When the bond is to be provided
- The amount of the bond
- How the bond quantum is to be reviewed
- What the essential terms of the bond are to be
- The form, content, guarantor and quantum must be acceptable to the Council

Dealing with a cash bond

A cash bond needs to be receipted and held on trust

A cash bond needs to be supported by a signed bond agreement

Role of the guarantor / surety

The payment of the bond needs to be secured by a guarantor (surety)

Common practice is to require the guarantor to be a registered trading bank of New Zealand

Collecting a bank bond

Write to the bank along the following lines:

- Writing to require payment from the bank under the terms of the bond
- Attach a copy of the signed bond
- Refer to the relevant provisions of the bond
- Request payment of the bond sum
- Provide bank account details for the bonded sum to be paid into

Other sureties

Examples include some insurance companies, and also overseas banks

Some due diligence will be needed as to their financial security, reputation and track record

Pitfalls and traps

Finite term

A bond that has a finite term needs to be actively monitored

Once a bond has expired that is the end of it

Bonded sum is inadequate

Care is required to establish a bond for an amount that adequately covers the work to be completed

A good rule of thumb is a bond should be for cost plus 25-30%

Types of conditions to secure

Securing compliance with conditions that Council can step in and complete, preferably as a one off

Types of conditions that are not suited to a bond would include:

- Preparing management plans
- Locating a dwelling within a particular building platform
- Retaining indigenous vegetation

Consent Notice

For conditions that restrict land use, a consent notice is the most suitable security binding future owners

Common examples:

- Dwellings to be located in a specified building platform
- Restrictions on buildings such as height, colour
- Requirements to maintain planting
- Not construct structures in hazard prone areas

Encumbrance

Memorandum of Encumbrance or also sometimes called a Rent Charge Agreement

This is a document that creates a mortgage over property that enables the restrictions contained in the agreement to be registered on the relevant title

Legal implications

Encumbrance creates a mortgage

Breach of the agreement is a dispute that needs to be resolved in the civil courts

Property Law Act 2007 also implies a range of terms in any mortgage

To avoid this implied power the encumbrance must specifically set out a contrary intention

Commentary

Slightly clumsy as it creates a mortgage

Payment obligation in event of a breach

Terms can be specifically tailored

Enforcement of it can be costly and time consuming

There is no power for a consent authority to require an encumbrance

Sets out an obligation on the landowner to pay an amount of money in the event of failure to comply with the restrictions on the use of the land

Encumbrance would need to be volunteered to become a condition of consent

Covenants

In essence a contractual arrangement borrowed from the private law realm

Covenants imposed against the will of the landowner are rare

Covenants in a land use consent context are generally volunteered by the applicant in question

A covenant of the kind envisaged by s108(2)(d) of RMA is necessarily a covenant “in gross”

Parliament intended, in providing for such covenants to secure the performance of obligations and consent conditions