RMA ROADSHOW – CONDITIONS OF CONSENT

Principal Environment Judge Laurie Newhook

THE CHALLENGES AND PITFALLS SEEN BY THE COURT IN CONDITIONS OF CONSENT

Introduction

I attach as a schedule, copies of sections 108 and 220 RMA for your reference during the seminar. I do not intend to take you through them by rote.

Validity of conditions

There are some prerequisites to the validity of conditions on resource management consents which I will summarise for introductory purposes.

Drawing from the UK House of Lords decision in ***Newbury DC v Secretary of State for the Environment***: ***Newbury DC v International Synthetic Rubber Co Ltd***[1] a condition will generally only be regarded as valid if it is:

(a) For a [resource management] purpose, not an ulterior one;

(b) Fairly and reasonably relate to the development authorised by the consent to which it is attached; and

(c) Not be so unreasonable that a reasonably planning authority, duly appreciating its statutory duties, could not have approved it.

For a time between 2001 and 2007 there was debate before the New Zealand Courts as to whether that general statement of law by Britain's highest Court was authority in the context of the NZ

[1] [1981] AC 578; [1980] 1 AllER 731 (HL)

Resource Management Act, that a causal link was needed. The Court of Appeal held in ***Estate Homes Limited v Waitakere City Council***[2] that a causal link was required between the effects of a proposed subdivision and the conditions imposed by a consent authority, based on a broad view by the consent authority of how a proposal would affect the environment. Of some importance, this finding was quite significantly qualified on appeal by our Supreme Court, and a lesser standard than a causal link was identified. The Supreme Court said:

> We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s108 is simply what the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision.

What are some of the practical problems and concerns?

I will proceed to offer in summary form a list of problems that can occur with the construction and imposition of conditions. For present purposes I will not offer a legal treatise or case citations. Other speakers may touch on particular aspects.

Problems noted in case law over the years have included:

- Uncertainty of purpose
- Uncertainty of expression
- Conditions imposed beyond the legal powers of the local authority
- Invalid delegation of the duties of the local authority
- Conditions unenforceable in relying on compliance by third parties
- Imposition of a financial contribution beyond the terms of the Act (see particularly subsections (9) and (10) of s108); this can include expropriation of land for a public purpose (eg for a reserve) beyond the authority of legislation
- Conditions that effectively nullify the grant of consent
- Vague or ambiguous wording
- Failure to specify objectives where details of compliance have been left to implementation through the development of management plans
- Delegation of further detailed decision-making over the subject matter of the consent, as opposed to a requirement for certification of compliance by suitably identified and qualified persons

[2] [2006] 2 NZLR 619; (2005) 12 ELRNZ 157; [2006] NZRMA 308 (CA)

- Conditions enlarging consent beyond the scope of the activities applied for
- Conditions purporting to prevent application for future consents, particularly for subdivision
- Inappropriate choice of security for performance of conditions (eg requiring a bond for protection of natural features on land as opposed to security for the carrying out of works).

This list does not pretend to be exhaustive or detailed. Other speakers will deal comprehensively with particular kinds of conditions and securities, in particular as they apply to different kinds of consents. I will proceed now to offer some war stories, illustrating some of the sorts of things that can go wrong, and the consequences.

Some war stories

Problems with drafting

The decision of the Environment Court in ***PM Perrott v Rodney DC***[3], provides an illustration of the sorts of problems that can come from badly worded consents.

Mr Perrott applied to the Environment Court for three declarations, including one, remarkably, where the very existence of a consent was in doubt. Mr Perrott undertook some earthworks on his rural property in 2004 generally to improve the pasture and the lie of the land. The Council received complaints from third parties. Abatement proceedings ensued, followed by the subject application for declarations. The consent that Mr Perrott said he was operating under, did not describe the activity applied for and simply recorded that consent was granted to a controlled activity subject to listed conditions! Logically, the Court held that it would need to interpret the application documentation, but that led to a debate about what was encompassed, and in particular whether a retrospective consent was being sought in addition to a prospective one. After analysis the Court held that the application was for both.

That case can be seen as relatively easy to deal with when compared with some extensive recent litigation concerning Te Rere Hau Windfarm in hill country east of Palmerston North. This involved another application for declaration interpreting the meaning of conditions of consent. The proceedings on this occasion were initiated by the consent authority Palmerston North City Council after numerous complaints from neighbours starting about the time the windfarm was two-thirds built. The Environment Court issued a decision ***Palmerston North City Council v New Zealand Windfarms Limited***[4] in July 2012, in which the presiding Judge dissented from the decision of the majority (two commissioners) concerning an important matter of interpretation of

[3] Decision number A102/2009
[4] Decision number [2012] NZEnvc 133

one of the conditions. The consent holder appealed to the High Court, and in a decision ***New Zealand Windfarms Limited v Palmerston North City Council***[5], Justice Williams allowed the appeal on the point that had been in dispute amongst the members of the Environment Court, and referred the matter for further determination. The Environment Court will shortly be conducting a further hearing on that point, and also on some further disputed declaration applications about monitoring and compliance, previously adjourned for further technical study.

The dispute thus far centred on a question of whether there was inconsistency amongst three conditions of consent, and if so, as to which would prevail. Condition 1 was a general condition found in many resource consents in this country requiring conformity with application documentation – that is, the windfarm being constructed and operated in accordance with the information contained therein, including plans, drawings, and certain "additional information."

Conditions 4 and 5 set specific standards as to allowable noise levels received at certain sensitive residential locations nearby, and monitoring requirements.

The proceedings thus far have not determined whether or not there are breaches of the specific requirements in conditions 4 and 5. What has underpinned the dispute to date is that it has been established that the noise impact assessment report attached to the AEE, predicting that the turbines would produce a certain precise level of sound power at source, has proved seriously incorrect because the turbines now built are producing considerably more sound power than a prototype earlier established in another part of the country. It has also proved that there are Special Audible Characteristics that were not predicted in the material supporting the application.

All three members of the Environment Court agreed and held:

(a) the turbines have a sound power level 5dBA higher on average than was predicted in the application;

(b) the turbines are generating Special Audible Characteristics, contrary to statements in the application materials.

Where the members of the Environment Court parted company was when the majority held that:

(c) the noise from the windfarm being received at local residential locations exceeds the levels predicted in the application materials. (The judge held that it was sufficient to prove (a) and (b) to hold that condition 1 was breached).

Not unexpectedly, an appeal and a cross-appeal to the High Court, followed.

[5] CIV-2012-485-1503; [2013] NZH 1504

The Environment Court held that there was no conflict between general condition 1 and specific conditions 4 and 5, and that all three can co-exist as separate parameters of the resource consent. Its reasoning was that the AEE is "the bedrock upon which resource consent applications are founded"; that if accurate information had been offered the hearing commissioner instead of the inaccurate material, he could have imposed different conditions about monitoring and compliance.

The High Court held that the outcome depended on the answers to two questions; first, what was the intended acoustic scope of the application; and secondly what was (or were) the intended limit(s) on noise in the consent decision. Justice Williams observed that in each case, true meaning is to be assessed objectively through the lens of an objective observer regarding the documents in question and aware of all relevant context. That is, a purposive or intention-based approach would produce the ultimate result.

The High Court held that an objective reading of the application materials indicated that the sound power levels and special audible characteristic predictions were never matters of scope, rather that the hearing commissioner was simply being "*provided with comfort that scope applied for would not be exceeded… they were the means to that end*." It was held that the predictions related to <u>how</u> predicted noise levels would be achieved, not what the levels should be, hence there was no inconsistency between conditions 1 and 4.

The proceedings will be back before the Environment Court in coming weeks. In the meantime, further technical measurements and analysis have apparently been carried out, and intriguingly there are now further disputes about the meaning of conditions 4 and 5! Examples of the disputes foreshadowed are whether the conditions require data that best approximates the windfarm when all wind turbine generators are operating, or should a range of operating conditions be employed; and as to whether "near field assessment" or "far field assessment" is to be the basis for assessment of Special Audible Characteristics.

The lesson in this case, relating to consenting matters of technical complexity, must be that great care is required not only in technical analysis but also in drafting. Input in such cases must inevitably be required from technical, legal, and planning experts.

Incorrect securities (and more bad drafting)

An interim decision of the Environment Court on an application for enforcement order was issued in ***McGuinness v Longview Estuary Estate & Whangarei DC.***[6] The case involved problems with conditions of consent on a subdivision of a large block of coastal land from which exotic forest had been cleared and exotic weed species like pampas were emerging as is common in warmer parts of the country. A neighbour, the applicant, was concerned that his land was being invaded by weeds and animal pests as a result of the failure of the owner of one of the subdivided lots, Longview, to comply with conditions of consent that allegedly required mitigation planting, weed and pest control, and maintenance of vegetation.

The Council as consent authority, was represented in the sorry saga played out in court, acknowledging some serious inadequacies with the consent as granted, and as to some serious omissions in documentation throughout. Affidavits filed by all parties indicated to the Court the presence of such poor documentation and administration by the original applicant for consent and the Council, that a case management direction was made requiring that full information be supplied concerning all three stages of the subdivision.

The hearing focussed (amongst other things) on two conditions of consent that were causing particular trouble, conditions 1(h) and (g).

Condition 1(h) required that prior to the issuing of a certificate under s223 RMA:

> (h) That a detailed Landscape Plan for the purpose of providing visual softening be submitted to council for approval of the Parks Manager. The management plan may cover all three stages if desired. The plan shall illustrate proposed planting:
>
> - within proposed lots 6, 10, 14 and 15
> - on all earthworks batters (cut and fill).
>
> The plan shall include the following:
>
> (i) location and extent of building sites to ensure integration with the surrounding landscape and landform
>
> (ii) proposed planting to mitigate the potential adverse visual effects of buildings, to maintain and create privacy and to further amenity and habitat, to assist in achieving background canopy closure to integrate the development, and revegetation of cut and fill areas. To include details of species proposed, plant spacing, stock size, details of mulch (type, depth).
>
> (iii) details of proposed maintenance of planting;
>
> (iv) details of proposed weed management programme;

[6] Decision number [2011] NZEnvC 382

> (v) identify areas of native vegetation to be protected and specify the details and form of protection.

A landscape plan was lodged, assessed by the Council, and a certificate under s223 was issued.

Problematic condition 2(g) required that prior to the issue of a certificate under s224 RMA:

> (g) planting will be undertaken in accordance with the Landscape Management Plan approved under condition 1(h) in the first planting season (March – September) to the satisfaction of the Parks Manager. All planting will be maintained thereafter to ensure continued success.

Further conditions 2(m) and 2(n) provided for bonds to cover ongoing maintenance and failed-plant replacement over a three year period from the 224C certificate and in respect of the weed management plan the work was to be carried out and maintained for a five year period following its implementation. The bonds were prepared, executed and registered over the relevant lots.

Problems emerging at this point included the disparity of time periods between the two bonds, the planting bond being concerned only with ongoing maintenance and not with the establishment of plants, and the certificate under s224(c) oddly certifying that "***some*** *of the conditions of the subdivision consent have been complied with…*" (my emphasis), without specifying which.

The Council told the Court that it had an "expectation" that there would be an application under s127 for the bond period for the planting to be extended, but, perhaps not unexpectedly, this did not eventuate.

Further problems emerging from full examination of the council's files revealed inadequacies of cross-referencing amongst documents; difficulties in ascertaining which versions of certain documents, particularly the Landscape Management Plan, were certified; missing annexures; inaccuracies in mapping of existing vegetation to be protected; a distinct limitation on the purpose of the planting condition (merely for "*visual softening*"); and shortcomings in the conditions about the bonds, and in the bond documentation itself. It also emerged that there was considerable uncertainty or ambiguity about the nature of the planting obligations, some notable limitations on the geographical extent of planting required; and lack of supervision and enforcement of such limited planting as had occurred … it had been done at a dry time of year and subsequently died. To cap it off, there was a complete lack of weed and pest management other than fencing out of stock and a non-selective dumping of weedicide from a helicopter, killing native seedlings as well as a few weeds.

Through counsel, the Council also had to concede that use of the provisions of s221 RMA (consent notices registered on titles) would have been more appropriate and workable than the limited and poorly drafted bonds.

The ability of the Court to grant relief was severely hampered, in particular because there was no ongoing obligation at law on the owners of the subject lot to undertake planting activity or ongoing weed and pest management beyond the limited terms of the bonds; also that areas of existing bush had been mapped completely inaccurately; and with most of the obligations not being secured long term.

The Court was also very critical of vagueness of wording in the landscape management plan, for instance "*the process of natural restoration **can be** assisted by the introduction of plants or seeds*", and "*it is proposed that natural restoration be supplemented by the laying of manuka and direct planting to **some** areas…*" (my emphasis), which do not create clear and enforceable obligations. Rather, mere motherhood and apple pie.

Further, the Court observed that the planning report generated for the council hearing had contained excessively optimistic and generalised assertions about the nature of obligations proposed for the consent, and the extent to which they would be secured.

Subsequently, the owner of the lot against whom limited enforcement orders were made, in turn became upset about invasion of his land by weed and animal pests from other lots in the subdivision. So he applied for enforcement orders against them! Sorry to say, the Court's ability to assist him is likely to be at least as restricted, if not more so.

The underlying legislation

The following RMA sections provide as follows:

108 Conditions of resource consents

(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

(2) A resource consent may include any 1 or more of the following conditions:

- (a) subject to subsection (10), a condition requiring that a financial contribution be made:
- (b) a condition requiring provision of a bond (and describing the terms of that bond) in accordance with section 108A:
- (c) a condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:
- (d) in respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates):
- (e) subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:
- (f) in respect of a subdivision consent, any condition described in section 220 (notwithstanding any limitation on the imposition of conditions provided for by section 87A(2)(b) or (3)(a)):
- (g) in respect of any resource consent for reclamation granted by the relevant consent authority, a condition requiring an esplanade reserve or esplanade strip of any specified width to be set aside or created under Part 10:
- (h) in respect of any coastal permit to occupy any part of the common marine and coastal area, a condition—
  - (i) detailing the extent of the exclusion of other persons:
  - (ii) specifying any coastal occupation charge.

(3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.

(4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do 1 or more of the following:

- (a) to make and record measurements:
- (b) to take and supply samples:
- (c) to carry out analyses, surveys, investigations, inspections, or other specified tests:
- (d) to carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:
- (e) to provide information to the consent authority at a specified time or times:
- (f) to provide information to the consent authority in a specified manner:
- (g) to comply with the condition at the holder of the resource consent's expense.

(5) Any conditions of a kind referred to in subsection (3) that were made before the commencement of this subsection, and any action taken or decision made as a result of such a condition, are hereby declared to be, and to have always been, as valid as they would have been if subsections (3) and (4) had been included in this Act when the conditions were made, or the action was taken, or the decision was made.

(6) [Repealed]

(7) Any condition under subsection (2)(d) may, among other things, provide that the covenant may be varied or cancelled or renewed at any time by agreement between the consent holder and the consent authority.

(8) Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or 15B subject to a condition described in subsection (2)(e), the consent authority shall be satisfied that, in the particular circumstances and having regard to—

- (a) the nature of the discharge and the receiving environment; and
- (b) other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment—

the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.

(9) In this section, *financial contribution* means a contribution of—

- (a) money; or
- (b) land, including an esplanade reserve or esplanade strip (other than in relation to a subdivision consent), but excluding Maori land within the meaning of Te Ture Whenua Maori Act 1993 unless that Act provides otherwise; or
- (c) a combination of money and land.

(10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless—

- (a) the condition is imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

- (b) the level of contribution is determined in the manner described in the plan or proposed plan.

220 Condition of subdivision consents

(1) Without limiting section 108 or any provision in this Part, the conditions on which a subdivision consent may be granted may include any 1 or more of the following:

- (a) where an esplanade strip is required under section 230, a condition specifying the provisions to be included in the instrument creating the esplanade strip under section 232:

- (aa) a condition requiring an esplanade reserve to be set aside in accordance with section 236:

- (ab) a condition requiring the vesting of ownership of land in the coastal marine area or the bed of a lake or river in accordance with section 237A:

- (ac) a condition waiving the requirement for, or reducing the width of, an esplanade reserve or esplanade strip in accordance with section 230 or section 405A:

- (b) subject to subsection (2), a condition that any specified part or parts of the land being subdivided or any other adjoining land of the subdividing owner be—

    - (i) transferred to the owner of any other adjoining land and amalgamated with that land or any part thereof; or

    - (ii) amalgamated, where the specified parts are adjoining; or

    - (iii) amalgamated, whether the specified parts are adjoining or not, for any purpose specified in a district plan or necessary to comply with any requirement of the district plan; or

    - (iv) held in the same ownership, or by tenancy-in-common in the same ownership, for the purpose of providing legal access or part of the legal access to any proposed allotment or allotments in the subdivision:

- (c) a condition that any allotment be subject to a requirement as to the bulk, height, location, foundations, or height of floor levels of any structure on the allotments:

- (d) a condition that provision be made to the satisfaction of the territorial authority for the protection of the land or any part thereof, or of any land not forming part of the subdivision, against erosion, subsidence, slippage, or inundation from any source (being, in the case of land not forming part of the subdivision, subsidence, slippage, erosion, or inundation arising or likely to arise as a result of the subdividing of the land the subject of the subdivision consent):

- (e) a condition that filling and compaction of the land and earthworks be carried out to the satisfaction of the territorial authority:

- (f) a condition requiring that any easements be duly granted or reserved:

- (g) a condition requiring that any existing easements in respect of which the land is the dominant tenement and which the territorial authority considers to be

redundant, be extinguished, or be extinguished in relation to any specified allotment or allotments.

(2) For the purposes of subsection (1)(b)—

- (a) where any condition requires land to be amalgamated, the territorial authority shall, subject to subsection (3), specify (as part of that condition) that such land be held in 1 certificate of title or be subject to a covenant entered into between the owner of the land and the territorial authority that any specified part or parts of the land shall not, without the consent of the territorial authority, be transferred, leased, or otherwise disposed of except in conjunction with other land; and

- (b) land shall be regarded as adjoining other land notwithstanding that it is separated from the other land only by a road, railway, drain, water race, river, or stream.

(3) Before deciding to grant a subdivision consent on a condition described in subsection (1)(b), the territorial authority shall consult with the Registrar-General of Land as to the practicality of that condition. If the Registrar-General of Land advises the territorial authority that it is not practical to impose a particular condition, the territorial authority shall not grant a subdivision consent subject to that condition, but may if it thinks fit grant a subdivision consent subject to such other conditions under subsection (1)(b) which the Registrar-General of Land advises are practical in the circumstances.