Conditional Written Approvals

- the problem and possible solutions

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INTRODUCTION

There has been much written in recent years about non-notification. Generally, the debate thus far has focussed on the appropriate statutory tests for non-notification, and in particular the formulation of what has become known as the permitted baseline of effects.

One of the key elements in assessing whether an application meets the statutory test for non-notification is whether or not written approvals have been obtained from parties whom the consent authority considers may be adversely affected. It is this aspect of the non-notification process that this article focuses upon.

Why obtain written approvals?

The primary purpose of an owner or a developer obtaining a written approval from potentially affected parties is to increase the chance that the application will be processed on a non-notified basis. To be non-notified, effects must be no more than minor and written approvals of adversely affected persons must be provided.

Section 94(4) provides that any effects on those parties whose written approvals have been obtained shall not be taken into account when determining whether the effects would be minor. This is therefore one particularly useful reason to obtain written approvals. It may allow an application which would otherwise have more than minor adverse effects, to fall into the minor category and potentially be non-notified.

The second most common situation for seeking written approvals is where the effects are no more than minor, but there are adversely affected persons (to more than a *de minimus* extent) so that the application must be notified, unless their written approvals are obtained.

Accordingly, if a development has one aspect, say height in relation to boundary, that is in excess of what is permitted, then it may well be considered to be more than a minor or *de minimus* adverse effect on the immediate neighbour. The only way that the s94 statutory test for non-notification could be met would be if the written approval were obtained from that neighbour and from anyone else who was considered to be affected.

Form of written approvals

There is no set statutory form for written approvals, however some Councils have developed *pro forma* written approval forms. As a minimum, people giving written approvals should clearly state their name and address, and should identify the plans which they are approving in the written approval document and perhaps also sign the plans. This is particularly important for large commercial developments, the design of which may evolve considerably throughout the pre-application and application process. The Environment Court has also held that certain property agreements or rights, such as right of ways, easements and tree covenants, can be considered to be written approvals for the purposes of s94 of the RMA (see, for example, *Deegan v Southland RC* C110/98).

Awareness of the RMA and its procedures

In recent years, members of the public have become increasingly educated about the RMA process,

and about how they can become involved both in the formulation of district and regional plans and also in resource consent applications. This heightened awareness has generally meant that affected people are becoming more discerning about giving their written approvals. Increasingly, those affected by developments are wanting conditions imposed on or accepted by an applicant, in return for the granting of their written approvals.

Depending on their form and the outcome of the Council's processing, such conditional written approvals would appear to be within the scheme of the RMA, as s94 allows consent authorities to take into account the mitigating effect of any proposed conditions when assessing whether or not to notify, or grant consent to, an application. In practice, however, conditional written approvals can cause problems, and it is this aspect that is considered further below.

Conditional written approval: the problem

An example of when this situation might arise is as follows. Assume that a develóper wants to construct a commercial building with an associated driveway. The proposed development complies with all the relevant controls, except the height in relation to boundary control on the western side next to a residential property. The district plan contemplates a discretion over bulk and location modifications, and the location of driveways, etc. The owner of the neighbouring residential property is considered to be directly affected, and the Council refuses to process the application on a non-notified basis unless the neighbour's written approval is obtained.

There are clear benefits in affected neighbours being able to give their written approvals.

The neighbour is fairly relaxed about the height in relation to boundary infringement, however he is concerned about the proposed location of the new driveway. He wants the driveway moved 20m to the east, and is prepared to give his written approval on the basis that the driveway location is moved. The developer agrees and the neighbour submits his written approval in the following terms.

> I, ..., owner of 24 Paterson Street, hereby give my written approval to the development at 22 Paterson Street (ref RC/01876/007) provided that the location of the driveway is amended in the manner shown on the attached plan.

The neighbour amends and attaches a copy of the plan showing clearly the new location of the driveway. The developer also amends the application for resource consent, showing the driveway location in the position requested by the neighbour. As is usual practice, the planning officer responsible passes the application to the Council's traffic engineers for their assessment. The planning and traffic assessments conclude that the application should be granted, and on a non-notified basis, subject to the driveway being relocated back to the position originally proposed by the developer.

The Council is then faced with a dilemma. The Council is likely to regard the neighbour's written approval as invalid or as no longer enabling the Council to complete processing the application on a non-notified basis, as the neighbour would be adversely affected by the driveway in the position considered appropriate by the Council and the neighbour has not given his written approval to that location. Accordingly, the Council would probably be forced to require the application to be notified.

Another slightly different situation is where the neighbour gives his written approval for the height in relation to boundary infringement on the basis that he was not concerned about that infringement and he was happy with the other aspects of the development (including the proposed location of the driveway). Assume then, as a result of the Council's traffic report, that the location of the driveway is recommended to be moved closer to the neighbour's house. The application is processed and granted on a non-notified basis. The neighbour only finds out about the new driveway location later and is upset, as he would not have given his written approval to that changed driveway location.

In yet another situation, a written approval might be given on the basis

that conditions will be imposed on the consent which will require that certain works or activities are undertaken by the developer. Those people giving written approvals generally want to ensure that such requirements are indeed imposed as conditions of consent by the Council, rather than just relying on a verbal agreement by the developer that this will occur. In addition, if the matters agreed to are specified as conditions of consent, the person giving their written approval can request that the Council enforce the conditions of consent (at the Council's cost), or that person might seek an enforcement order from the Environment Court. However, a problem can arise where even though a developer may agree to certain conditions being imposed on the consent of the type desired by the neighbour and may actually invite the Council to impose them, sometimes Councils refuse to impose those conditions on the basis that they are not within the scope of possible conditions under the RMA or are not conditions the Council feels inclined to impose in any event.

Notwithstanding those potential problems, there are clear benefits in affected neighbours being able to give their written approvals so as to allow appropriate developments to be processed on a non-notified basis. It would be inefficient if potentially affected parties were only able to be given a "take it or leave it" option if a small redesign, for example, could result in a compromise acceptable to all.

Resolving the dilemma

Set out below are some possible solutions that developers, and those in the resource management field, can adopt in order to ensure that the most appropriate solution is found for all those concerned. There may be a range of different methods that could be used for different issues and different submitters.

Some of these methods may be equally useful for obtaining securing the settlement of any appeals that might have been lodged against the grant of notified resource consents.

Conditional written approval

Some Councils may accept conditional written approvals. They may agree to impose all or some of the conditions negotiated between an applicant and the neighbour and therefore can be satisfied that the consent can be safely issued on a non-notified basis. If the parties want some greater certainty over the likely outcome of the Council's assessment process and to test whether the Council would be prepared to accept the proposed conditions of consent, a meeting could be held between the relevant Council staff, the applicant and the affected neighbour to discuss the matter.

If the Council is unwilling to entertain a conditional written approval, or is not willing to impose the conditions agreed between the applicant and the neighbour, then short of the neighbour capitulating and giving his or her written approval regardless, or public notification occurring, the situation can sometimes be resolved by covering those items of concern to the neighbour in a "side agreement" such as a letter of undertaking, deed or agreement, etc. Such side agreements can also be useful to protect a neighbour from a Council unexpectedly imposing conditions altering the development in a manner of concern to that neighbour who would not have given his or her written approval if such a form of development had been a possible outcome.

Letter of undertaking

A useful form of side agreement is for the developer to provide the potentially affected neighbour with a letter of undertaking. This letter should be on the developer's letterhead and should clearly state what the developer intends to do in order to resolve the affected party's concerns. As with any written document, it is imperative that such a letter is as clear as possible.

A letter of undertaking is useful when the conditions which the affected person wants are very straightforward and do not require, or it is not worthwhile to spend the time and expense of preparing, a more formal document such as a deed or agreement. Letters of undertaking are frequently used, especially where the developer/applicant is a well known person or organisation.

A developer can offer in the undertaking to carry out certain works which might enable the neighbour to then give a clean, unconditional, written approval to the Council. Or, the undertaking could include those aspects negotiated between them that the Council is not willing to impose as conditions of consent. Where the parties know that some aspect of the design or of the project is critical to the neighbour, who is willing to give his or her unconditional written

approval to facilitate the processing of the application on a non-notified basis, then the neighbour might wish the developer to undertake not to exercise any consent if the Council has imposed a condition altering the agreed aspect, or to object and appeal any such condition, or to compensate the neighbour in some other manner.

Letters of undertaking are also useful when the parties wish to keep the negotiated conditions between them private, or when there is an urgent need to secure a written approval (eg just prior to lodging the consent, or a consent hearing) or the withdrawal of an appeal (eg just prior to the Environment Court hearing), and there is no time to enter into one of the more formal documents described below. The letter of undertaking might also state that the parties intend to document formally the terms in a deed or in an agreement.

Deed or agreement between the parties

A more formal way of reaching any settlement would be pursuant to a deed or an agreement. The difference between the two types of documents is essentially that, for an agreement to be valid, there needs to be some form of consideration given. Consideration is traditionally in the form of money, however it is defined very widely and would almost certainly encompass the giving of written approval. Deeds, on the other hand, do not require any form of consideration. There are very few situations where deeds are still legally required. In the resource management field, there will usually be a choice as to whether a deed or an agreement is entered into, and some practitioners may have their preference.

The deed or agreement may be enforced in the Civil Courts. There is no limit as to what types of conditions can be contained in deeds or agreements, although common clauses are: confidentiality; agreement not to withdraw written approval; agreement to support the application if called upon to do so; and agreement to enter into a covenant which can then be registered against the title of the land concerned.

Care should be taken to ensure that the requirements of the deed or agreement or any letters of undertaking do not conflict with the conditions of the resource consent. This can be a potential problem. If there is the possibility of a conflict, then it might be appropriate for the deed or agreement to require that in the event of certain conditions being imposed (or not being imposed) the developer not proceed with the development or project and appeal those conditions, or perhaps even surrender the consent.

Any deed or agreement should also require that the consent obtained not be transferred to any other party without that party also being made expressly subject to the same terms and conditions of the deed. This is to ensure that the consent is not simply transferred to another entity against whom you could not enforce the deed.

Another advantage of a deed compared with an agreement is that while the limitation period for enforcing the breach of an agreement is usually only 6 years, the limitation period for enforcing the breach of a deed is usually 12 years.[i]

If the parties did choose to pursue the option of a deed, then the general requirements are as follows:[ii] the deed must be in writing; it must be signed by the party or parties to be bound; the signature(s) must be attested to by a witness and, for New Zealand deeds, the witness must add their residential address and their occupation. For companies entering into deeds, affixing the company seal is now not a requirement, rather the deed should be signed either by two directors, or if there is only one director by that director provided that the signature is witnessed; or by any other person authorised by the constitution to sign such documents (eg the Chief Executive), providing that the signature is witnessed; or by the company attorney.

CONCLUSION

Whether you are representing a developer or a neighbour, you should bear in mind that:

(a) some Councils will not accept conditional written approvals;

(b) if a Council does accept conditional written approvals, problems can arise if the Council is not willing to impose the conditions required by the person giving written approval;

(c) even if written approval is given and the application is processed on a non-notified basis, the proposal may still be amended in a manner detrimental to the affected neighbour.

For these reasons, in many cases it may be appropriate for written approvals to be supplemented by other forms of agreement.

i Limitation Act 1950, s4(3).
ii Property Law Act 1952, ss 4-5;