RULINGS FROM THE COURTS

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TREE FELLING HALTS $100 MILLION SUBDIVISION

van Brandenburg v Queenstown Lakes District Council and Meadow 3 Limited (Decision C85/2007, Environment Court, Christchurch, Judge Jackson, 28/6/07)

Non-compliance with resource consent conditions does not always result in standard enforcement action or prosecution. In this decision, the Environment Court used its powers to grant declarations under the RMA to "enforce" landscaping conditions attaching to land use and subdivision consents granted for a subdivision overlooking Lake Hayes. The felling and pruning of trees was held to have breached conditions of both consents. The Court declared that the land use consent was "invalid and voidable" because it was incapable of being exercised and that the council could not issue section *223* and 224 certificates, preventing the issuing of titles and effectively stalling the subdivision.

Background

Meadow *3* Limited ("Meadow") is developing the land on the western side of Lake Hayes for residential use. Subdivision and land use consents were granted, subject to conditions requiring existing trees to remain to screen the houses proposed. Mr van Brandenburg, a neighbour who lives on the eastern side of Lake Hayes, was concerned about views across Lake Hayes and brought an application for declarations and enforcement orders. He argued that Meadow had breached land use and subdivision resource consent conditions or caused adverse effects by felling trees and removing low-lying branches from others which removed the screening role of the trees and by developing the site before management plans were approved by the Council. Meadow opposed the applications, and denied cutting or pruning the trees.

Issues and the Court's findings

The Court needed to consider four main issues: whether trees on the site had been felled or pruned; whether the site had been "developed" before the Council approved management plans; whether subsequent Council actions might have remedied any non-compliance with conditions; and, overall, whether Meadow had breached the conditions of its land use consent and subdivision consent by felling and pruning trees.

Meadow claimed there was no evidence establishing that the trees had been cut, relying on the generic nature of pre-development drawings of the trees. The Court accepted that it was for the applicant to demonstrate, on the balance of probabilities, that trees had been felled or altered. It went on to carefully compare the state of vegetation on the site at the time consent was granted, relying on photographs taken before consent was granted, and its present condition. It concluded that at least 34 trees had been removed and most of the remaining trees pruned with large trees limbed to heights of 8-9 metres above ground level

The land use consent required the activity to be undertaken in accordance with certain plans and specifications, including a landscape plan and landscape strategy. Meadow argued that it had not breached the condition requiring approval of the landscape plan before development of the site, because the tree work was not an activity controlled under the District Plan and therefore was not a "development". The Court disagreed on the basis that the overall development incorporated the trees and their removal was now governed by the resource consent.

Meadow also argued that the removal of trees was subsequently approved by the Council when it approved a plan lodged with the Council showing the site with trees and vegetation removed. However, the Court held that those plans did not include all matters requiring approval and the condition requiring approval was not fully met.

In interpreting the landscape conditions, the Court found that those documents did not contemplate substantial felling, pruning, limbing or replanting of trees. The Court described the actions of the developer as a fundamental breach of the resource consent and stated that they showed a worrying disregard for the spirit and intent of the land use consent. In arriving at this conclusion, the Court made several significant findings relating to the effects of the work undertaken. First, the houses and cottages on a number of the lots would be visible when looking at the site from across Lake Hayes. Second, the tree work undertaken also made it impossible for Meadow to comply with the land use consent thus contravening the land use consent. Third, commencement of building work on the site would be very likely to cause serious adverse effects on the Lake Hayes environment, especially its landscape, when looked at from the eastern side of the lake.

The Court concluded that the tree felling contravened the land use consent and it was invalid and voidable because it could no longer be performed and/or the consent had been abandoned. As a result, until the land use consent was varied in a way which meant conditions could be met, it could not be exercised (residences could not be built on the building platforms).

The Court also held that, by failing to comply with its landscaping plan, the company had also breached

its subdivision consent because the express inclusion of the landscape plan and strategy and identification of building platforms on the subdivision plans meant compliance with the landscape plan and strategy was also a condition of the subdivision consent. The Court therefore held that the Council could not grant section 223 or 224 certificates for the survey plan, preventing the issuing of certificates of title. This had the effect of stalling the subdivision.

In determining to exercise its discretion to grant declarations, the Court took into account the value given to the landscape setting of Lake Hayes in the district plan, the focus of the site's landscape plan and strategy in preserving the setting of the heritage homestead on the site and the impossibility of now giving effect to the landscape plans in question. These issues outweighed the prejudice to the conditional purchasers of the lots, who the Court noted had contractual remedies.

As the resource consents could not be implemented until the vegetation is returned to its original state, the Court found it was not necessary to make enforcement orders. It noted that any enforcement orders would be second-best outcomes compared with maintaining the current (undeveloped) landscape and allowing Meadow apply to the Council for a variation of consent that "more fully remedies the very obvious problems it has made:'

This strongly worded decision is a reminder about the importance of complying with resource consent conditions and also demonstrates that the Environment Court's declaration powers can sometimes have an "enforcement" function In this case, Meadow's development has been stalled, even though some of the lots on the site had been conditionally sold. If Meadow decides not to challenge the Court's decision or wait 10 or 20 years until it can comply with the landscape plan, its only practical option appears to be to apply to the Council to vary its land use and subdivision consents. If it does so in the manner suggested by the Court, that would result in removing several lots from the subdivision, presumably with significant financial implications.

PRIORITY OF APPLICATIONS AND RECEIVING ENVIRONMENT

Unison Networks Limited v Hawkes Bay Wind Farm Limited and Hastings District Council (High Court, Napier, Heath J, 15/05/07)

In this judgment, the Court held that the rule on priority of resource consent applications, namely "first come - first served L applies to non-finite as well as finite resources. The Court also held that a resource consent which had been granted and was likely to be implemented forms part of the receiving environment, meaning subsequent applications are to assessed in that environmental context.

> "Its only practical option appears to be to apply to the Council to vary its land use and subdivision consents [which] would result in removing several lots from the subdivision"

Background

Unison and Hawkes Bay Wind Farm ("HBWF") both appealed decisions of the Environment Court granting resource consents in favour of each company for wind farms on adjoining land. Unison's application for 15 turbines was the first stage of a two stage project. HBWF had applied to construct 75 turbines. Unison lodged its application first and, after a hearing, consent was granted. HBWF lodged its application after Unison and by the time its application was heard, the decision to approve Unison's application was known. Unison appealed to the Environment Court against the conditions of HBWF's consent and HBWF appealed against Unison's consent and conditions imposed. HBWF also argued that the two applications were lodged at effectively the same time and should be considered as a package. However, the Environment Court confirmed that Unison's application had priority because it was received and granted first. Consequently, in determining the conditions to attach to HBWF's consent, the Court was obliged to take into account the effects on the Unison proposal (particularly effects of turbine wake turbulence) because it formed part of the existing environment under section 104(1)(a). The Environment Court granted consents for both proposals and both parties appealed to the High Court.

Issues and Court's consideration

The principal appeal issue raised by HBWF was the Environment Court's decision on the question of priority. The issue had reasonably significant cost implications as it determined which developer would bear the cost of mitigating the effects of turbine wake turbulence on its competitor's wind farm.

On the priority issue, the Court considered whether there is any difference in principle in the approach to be taken as between finite and non-finite resources. HBWF argued that the RMA intended to draw an distinction between finite and non-finite resources and that the "first in time" rule established by the Court of Appeal in Fleetwing should not apply in the latter case. In response, the Unison submitted that the decision of the Court of Appeal in Fleetwing was applicable and binding on the High Court and the Environment Court's approach had been correct. Alternatively, if the Court of Appeal authorities could be distinguished, Unison claimed that priority was justified for analogous reasons and no difference in principle could be drawn between the approach to finite and non-finite resources.

After considering previous decisions on the priority issue, the Court concluded that the Environment Court was correct and there should be no differentiation between finite and non-finite resources in relation to priority of applications. Of course, an application needs to be complete in order to qualify for priority. The Court accepted the Council's argument that practical problems would flow from any departure from the settled priority rules which would make the resource

consent provisions of the Act unworkable for consent authorities. The Court held that, although there are elements of unfairness in application of the priority rule, there needs to be a definitive rule in the interests of predictability. It noted that the alternative of attempting to achieve justice in each individual case is likely to significantly increase costs for developers and result in uncertainty and unnecessarily delay final determination of the applications.

The Court's decision to give priority to Unison meant that the Unison proposal was to be treated as part of the "environment" against which HBWF's application fell to be assessed, following the Court of Appeal's decision in the Hawthorn Estate case. In that decision, the Court of Appeal held that the word "environment" in section 104(1)(a) of the Act included the future state of the environment as modified by activities which could be undertaken as of right under unimplemented resource consents, where it appeared likely that they would be implemented. In this case, on the facts, the Court found that it was "likely" that Unison's consent would be implemented. As a consequence, HBWF would have to bear the cost of mitigating the effects on the Unison site of wake turbulence caused by its turbines.

This decision provides a useful reminder about the importance of securing priority for resource consent applications regardless of whether or not a resource is finite, and where potentially competing applications are likely to affect the scale of an activity or have cost implications for a subsequent development. Effects on activities authorised by unimplemented resource consents must also be considered where the consent is likely to be implemented.

Note: This decision has been appealed to the High Court,