

RESOURCE CONSENT CONDITIONS - COMPENSATION FOR ADVERSE ENVIRONMENTAL EFFECTS

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Under the Resource Management Act 1991, consent authorities do not have a general power to impose conditions requiring an applicant for resource consent to compensate others for adverse environmental effects.

The Act does allow consent authorities to impose such conditions in limited situations. Section 108(1)(a) provides that a consent authority can require that a financial contribution be made as a condition of a resource consent. A "financial contribution" is defined and includes a contribution of money, land, works or services (or a combination of them).

The purpose of a financial contribution is to offset any adverse effect on the environment. However, a financial contribution can only be made for purposes specified in the plan. If the environmental effect in question is not one of the matters for which the plan prescribes a financial contribution, no financial contribution can be required.

Consent authorities do have a general power to impose "any other condition that the consent authority considers appropriate" (subsection(2)) but it would seem that a consent authority cannot rely on this general power to impose a condition requiring monetary compensation for adverse environmental effects because there is already a specific provision dealing with contributions of money (*NZ Rail Limited v Marlborough DC C36/93*).

It is noted that the Resource Management Amendment Bill No. 3 proposes amending the definition of "financial contribution" by deleting reference to works or services so that conditions requiring a contribution of works or services can be imposed even if they are not provided for in the plan.

The report from the Planning and Development Committee on the Bill recommends that works and services

should be provided for separately in section 108 to counter any argument that the removal of works and services from the definition of financial contribution indicates that they may not be included as conditions of consent.

It is argued that section 108 of the Act should be amended to give consent authorities general jurisdiction to impose conditions requiring an applicant to compensate others for the adverse environmental effects of their proposed activity.

There are many cases where this type of condition would be appropriate. Take the example of the deterioration of a road by the passage of heavy trucks connected with an activity. The applicant for resource consent would be faced with objection from whoever is responsible for the upkeep of the road. The applicant's options would be to decrease the number of truck movements so as to mitigate any adverse effects on the road or to pay the responsible body for the upkeep of the road.

For business reasons, it may not be an option for the applicant to decrease the number of truck movements. It may not fit with demand from suppliers. The applicant therefore needs to try to reach agreement for the upkeep of the road. If agreement cannot be reached, the applicant cannot request the consent authority to impose a condition requiring it to pay for upkeep of the road because the consent authority does not have jurisdiction to impose such a condition (unless it is provided for in the plan). For the same reason, even if agreement is reached, the details of the agreement cannot validly be included as a condition of the consent.

One advantage of these types of conditions would be to give consent authorities greater flexibility to determine how the adverse effects of an activity could be avoided, remedied or mitigated - as the Act requires. It would

also incorporate into the Act an economic tool which could be used to further the purpose of sustainable management and the "user and polluter pays" principle.

Another advantage would be that payments to third parties would be transparent in the granting of resource consent. At the moment, it would seem that payments to third parties could not validly be included as conditions of consent because there is no jurisdiction for them to be imposed. If the Act was amended these payments could be included as conditions. All the circumstances surrounding the granting of consent would be obvious and the recipients of compensation could use the enforcement mechanisms in the Act if payment was not forthcoming. At the moment, the only remedy for a payee is an action for breach of contract in the District or High Court.

Certainly, any amendment needs to be carefully drafted. A condition requiring compensation for adverse environmental effects would not be appropriate in all circumstances. For instance it should only be imposed where the effects of the activity could not otherwise be reasonably avoided, remedied or mitigated. In addition, such a condition should meet any intergenerational equity issues: "Financial compensation cannot be the generally preferred approach where it would lead to progressive, irreversible conversion of natural capital to financial capital" (*Environment 2010 Strategy* p 16).

The Environment Court has already indicated its support for such conditions. In *Colonial Homes Limited v Queenstown-Lakes District Council W104/95* the applicant sought retrospective resource consent to build two townhouses which breached the side-yard rules in the district plan by providing for a side-yard of 1.5 metres instead of the required 2.5 metres. A neighbour complained that the encroachment adversely affected the amenity values of his property.

Because the application was for a non-complying activity the court considered the application in terms of the threshold tests under section 105(2)(b). The court found that the side-yard intrusion was contrary to the objectives

and policies of the plans and therefore failed the first threshold test. It went on to consider whether the effects of allowing the activity would be minor.

The court had before it the opinions of two valuers. The valuer for the developer gave evidence that the encroachment would have no effect on the value of the neighbour's property. The valuer for the neighbour asserted that there would be a loss in value of \$23,500.

In considering the valuers' evidence, the court held that it was unable to decide between the opinions of the two valuers but found that there would be some effect on the neighbour's property and that a figure of \$11,700 (plus or minus 10 per cent) would probably be a reasonable estimate of loss. On this basis the court found that the effect on the neighbour's property was not minor.

The applicant offered to subject itself to a condition setting compensation for the loss in value but Judge Treadwell doubted whether the court had jurisdiction to impose a compensation condition. He went on to say that the court "would, however, be receptive to such a condition if we had the power to impose it" but added that "it appears to us that the RM Act is not designed to place the Planning Tribunal in the role of assessing compensation but rather to prevent adverse effects for the purpose of advancing the concept of sustainable management". He also said that if the court could impose such a condition,

this would effectively force a neighbour into a consent situation.

The Judge asked the parties to file submissions on whether the court had jurisdiction to impose such a condition and sent the parties away with a strong indication that the matter should be settled between them. Interestingly (given the Judge's doubts about jurisdiction) the court made an order by consent between the parties, requiring the applicant to pay \$10,000 to the neighbour for the effects caused by the encroachment.

The court in this case clearly indicated that a condition requiring compensation for adverse environmental effects could be appropriate in some situations. In imposing such conditions, consent authorities would not be forcing a neighbour into a consent situation, rather making a judgment as to how the effects of an activity could be avoided, remedied or mitigated. This is a task that consent authorities are involved in each time they consider an application for resource consent.

The Environment Court should not be a forum for determining general claims for environmental damage between individuals. However, allowing consent authorities to impose conditions requiring applicants for resource consent to compensate others for the adverse environmental effects of their proposed activity would provide another useful tool in achieving the purpose of sustainable management and is worthy of serious consideration.