BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 06 - Residential Chapters

LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT COUNCIL AS PART OF COUNCIL'S RIGHT OF REPLY

Hearing Stream 6 – Residential

11 November 2016

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TABLE OF CONTENTS

1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Hearing Panel (**Panel**) regarding legal issues that have arisen during the course of the Residential hearing on the Low Density Residential Zone (**LDRZ**) Chapter 7, Medium Density Residential Zone (**MDRZ**) Chapter 8, High Density Residential Zone (**HDRZ**) Chapter 9, Arrowtown Residential Historic Management Zone (**ARHMZ**) Chapter 10, and Large Lot Residential Zone (**LLRZ**) Chapter 11 (together, **Residential Chapters**) and to provide the Council's position on specific issues.

1.2 These submissions also seek to address some matters raised by submitters through their written evidence filed prior to, and presented at the hearing, including submitters' legal submissions, where the Council considers that further analysis is required.

1.3 Otherwise, these submissions do not respond to every legal issue raised by submitters during the course of the hearings. The absence of a specific response in these submissions should not be regarded as acceptance of the points made by counsel for various submitters.

1.4 Filed alongside these legal submissions are the planning replies of:

(a) Ms Amanda Leith, LDRZ Chapter 7;
(b) Ms Amanda Leith, MDRZ Zone Chapter 8;
(c) Ms Kimberley Banks, HDRZ Chapter 9 (this includes some advice sought from Mr Philip Osborne, by the Panel);
(d) Ms Rachael Law, ARHMZ Chapter 10; and
(e) Ms Amanda Leith, LLRZ Chapter 11.

1.5 Having considered matters raised and evidence produced during the course of the hearing, the planning replies and associated revised chapters represent the Council's position.

2. STRATEGIC APPROACH TO RESIDENTIAL ZONES

2.1 The Council submits that overall, the residential zoning approach is an appropriate response to the housing affordability challenges in the

Queenstown Lakes District (**District**). The residential zones have been designed in a manner which:

(a) strikes an appropriate balance between rezoning additional land for development and meeting the demand for housing, while avoiding inappropriate and uncontrolled development; and

(b) takes advantage of the opportunity to improve the efficiency and variety of residential land use, through intensification.

2.2 While rezoning more land as residential may not be the whole answer to the housing affordability challenges in the District, providing for more medium and high density development will increase the supply of new houses and improve affordability, as stated by the Council's expert economist (Mr Philip Osborne) on the first day of the Residential hearing.

2.3 It is submitted that at this stage of the PDP process, establishing the overall character and provisions of the zones is key, rather than finalising the exact boundaries of the zones. The precise extent and location of each Residential zone can be more appropriately determined in the mapping hearings, when the Council's s42A reports address specific rezoning submissions, and the Council and the Panel will have the benefit of an updated dwelling capacity model (**DCM**). At that point in time, the Council will also have had sufficient opportunity to consider how to implement the NPS-UDC, which is addressed in more detail below.

2.4 The Council has provided robust evidence to underpin the residential zoning approach. In particular, Mr Ulrich Glasner's evidence[1] concludes that there is capacity in the infrastructure network to accommodate the additional growth notified in the PDP. Relevantly, Mr Philip Osborne's evidence[2] states that from an economic perspective, facilitating medium and high density residential development in the District will improve community well-being and the economic viability of the District. Mr Osborne's economic review[3]

1 Statement of Evidence of Mr Ulrich Glasner dated 14 September 2016 at paragraph 2.1
2 Statement of Evidence of Mr Philip Osborne dated 14 September 2016 at paragraph 2.14
3 Attached as Appendix 4 to Ms Amanda Leith's Right of Reply for Chapter 8 dated 11 November 2016

further concludes that the proposed density provisions are appropriate from an economic perspective.

3. SPECIFIC PROVISIONS TRANSFERRED TO REZONING HEARINGS

3.1 During the course of the hearing, the Panel discussed with certain submitters, the value of transferring certain provisions (and associated submission points) over to the rezoning hearings. Those agreed between the Panel and submitters (and the Council does not oppose this) are:

(a) Queenstown Heights Overlay Area: Redraft Rule 7.4.8.1(a) and redraft Rule 7.4.9.1(a); and

(b) the specific provisions applying to the MDRZ at Frankton (ie, the land fronting State Highway 6): Redraft Objective 8.2.8 and all policies under that Objective; the sixth matter of discretion under Rule 8.4.11; and Standard 8.5.3.

3.2 These provisions have been shown in yellow font in the recommended chapters filed with the respective replies. All submission points on these provisions will need to be transferred over to the rezoning hearings.

4. PROPOSED REGIONAL POLICY STATEMENT

4.1 The Environment Court has extended the date for filing appeals on the Otago Regional Council's (**ORC**) decision on the Proposed Regional Policy Statement (**PRPS**), to 9 December 2016.

4.2 As covered in the Council's opening and the Panel's minute of 7 October 2016,[4] the Council will be filing written submissions and possibly filing planning evidence if necessary, on the implications of the PRPS for the chapters of the PDP that have already gone to hearing, after the content and scope and any appeals on the Decisions Version, are known.

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4 Panel Minute concerning Otago Proposed Regional Policy Statement, dated 7 October 2016, at paragraphs 4-6

5. NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT CAPACITY 2016

5.1 The National Policy Statement on Urban Development Capacity (**NPS-UDC**) was gazetted on 3 November 2016 and comes into effect on 1 December 2016.[5] Queenstown itself is identified as a high-growth urban area[6] and therefore all objectives and policies in the NPS-UDC apply to QLDC.

5.2 The NPS-UDC includes a number of matters that local authorities must action. Of particular relevance, and in summary:

(a) the Objectives and policies of the NPS-UDC (OA1-OD2), Outcomes (PA1-PA4), Responsible Planning (PC1-PC4) and Coordinated Evidence and Decision-Making (PD1-PD4) must be given effect to from 1 December 2016,[7] and apply to all decision-makers when making planning decisions that affect an urban environment;[8]

(b) the Council shall begin to monitor a range of market indicators on a quarterly basis by 1 June 2017 (PB6);

(c) the Council shall have started using information provided by indicators of price efficiency in their land and development market, such as price differentials between zones, to understand how well the market is functioning and how planning may affect this, and when additional development capacity might be needed, by 31 December 2017 (PB7);

(d) the Council shall have carried out a housing and business development capacity assessment by 31 December 2017) (PB1);

(e) the Otago Regional Council shall set minimum targets for sufficient, feasible development capacity for housing and incorporate these minimum targets into its regional policy

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5 The NPS-UDC is discussed in section 2 of Ms Banks' reply evidence dated 11 November 2016

6 "High-growth urban area" is defined at page 7 of the NPS-UDC by reference to Statistics New Zealand definitions. The first introductory guide to the NPS-UDC (ME 1274), which is to be read alongside the NPS-UDC although it does not have statutory weight, lists Queenstown on page 9 as one of five high-growth urban areas (subject to change as population projections are revised)

7 National Policy Statement on Urban Development Capacity 2016, "Timeframes to implement this national policy statement", at page 17

8 The NPS-UDC defines "planning decisions" as "means any decision on any plan, a regional policy statement, proposed regional policy statement, or any decision on a resource consent." The NPS-UDC also defines "plan" as "means any plan under section 43AA of the Act or proposed plan under section 43AAC of the Act."

statement (PC5), and the Council shall do the same (as an objective) in its district plan by 31 December 2018 (PC9); and

(f) the Council shall have produced a (non-statutory) future development strategy by 31 December 2018 (PC12-PC14)

5.3 At the time of making its recommendations on the PDP, the Panel will need to give effect to the relevant objectives and policies of the NPS-UDC. Given the novelty of the NPS-UDC and the complex and interrelated strategy for implementation that will need to be developed, the Council is not in a position to address the Panel on the consequences of those objectives and policies in this reply.

5.4 We can advise that the Council is currently initiating a program of work in order to consider the requirements set out in the NPS-UDC, as required by s 55 of the RMA and the timeframes set out within the NPS-UDC. The Council respectfully reserves the right to address the Panel further on this at a later date, when it is in a position to comprehensively do so.

6. FUTURE URBAN DESIGN GUIDELINES

6.1 Council passed a resolution on 27 September 2016 that it will develop Urban Design Guidelines for the high and medium density zones, that are located outside of Arrowtown. The current intention is that these will be developed, and notified alongside Stage 2, but will likely need to be a variation to the Stage 1 text. It is anticipated that they would be introduced in a similar manner to Variation 1, where they are introduced into Policy, and incorporated by reference at notification, through being a matter of discretion for various restricted discretionary rules.

6.2 The Panel queried what would happen if it recommended that Urban Design Guidelines are not necessary for the high and medium density zones located outside of Arrowtown. It is understood that the Panel's question was essentially how the Council would justify notification of the guidelines under section 32 of the RMA, if that was the Panel's recommendation.

6.3 The Council's urban design expert Mr Falconer's evidence, is that the notified objectives and policies of the Medium and High Density Residential zones generally support good design outcomes,[9] so in the absence of guidelines, he was comfortable that the objective and policy framework was sufficient. However, Mr Garth Falconer also confirmed to the Panel that he considers the Urban Design Guidelines would be a "nice to have" (but not essential).

6.4 First, it is understood that the Council will be making a decision to notify Stage 2 (and any necessary variations to Stage 1), before the Panel makes its recommendations on Stage 1 text.

6.5 Second, the Council submits that the matter of the Council preparing a section 32 analysis on the appropriateness of any future Urban Design Guidelines, is a separate matter for the Council and not relevant to the Panel's recommendations. Based on the evidence before the Panel, the objective and policy framework is already sufficient in supporting good urban design outcomes, but the guidelines would essentially be a 'bonus', in improving those outcomes. The Council submits there is no inconsistency in that approach.

7. DEFAULT ACTIVITY STATUS FOR VISITOR ACCOMMODATION

7.1 The Panel put the following questions to counsel at the Residential hearing:

(a) If the objectives, policies, and rules of any or all of the residential zones directly enable a land use consent application to be made for an activity (whether that activity is explicitly named or not) do those provisions provide scope for submissions on those activities?

(b) Or in the alternative, if Visitor Accommodation is to be explicitly not provided for through these planning provisions,

9 Statement of Evidence of Mr Garth Falconer, dated 14 September 2016, at paragraphs 4.13 and 5.8

does it necessarily lead to a prohibited activity status where no resource consent can be applied for?

7.2 Counsel indicated orally that the answers to these two questions are "yes" and "no". For clarity, the reasons for those answers are set out below.

7.3 Regarding question a), until specific Visitor Accommodation rules are notified in Stage 2, it would be captured by the default activity status since it is not explicitly named as an activity. Submissions can be made on any aspect of the default activity status, including whether or not it is appropriate for Visitor Accommodation to fall into that category (although at notification of Stage 1, there were specific rules for Visitor Accommodation, so it is unlikely that any such submissions exist).

7.4 As mentioned, the Council has resolved to notify Visitor Accommodation provisions (including rules) in Stage 2 of the review. At that time, Visitor Accommodation activities will be given a specific activity status, and the default activity status will be of no relevance. Therefore although submissions can be made on any aspect of the default activity status, it is submitted that they should be given little weight, as in Stage 2, additional rules will be notified to address this particular activity.

7.5 It follows that the answer to question b) is "no". Like all other activities that are not explicitly named, Visitor Accommodation is captured by the default activity status rather than becoming prohibited.

8. IMPLICATIONS OF REZONING ON EXISTING CONSENT NOTICES (STANDARD – NOTIFIED 11.5.10)

8.1 The Panel queried a note in notified Standard 11.5.10 which states that where any existing conditions of a relevant subdivision or land use consent require lower reflectance values, those conditions shall prevail. The Panel asked the Council to consider the implications of

the rezoning in the PDP for areas such as Meadowstone where a number of consent notices are currently in force.

8.2 Ms Leith has recommended deletion of this 'note' in her reply for the LLRZ. There is no need for the note, as the RMA prescribes the process to deal with this situation.

8.3 If a landowner wishes to pursue an opportunity to benefit from the lower reflectance values, it would need to make an application under the RMA. It could give written notice to the consent authority of surrender of the consent, under s 138 of the RMA (in whole or in part). It is noted however that while a resource consent can be surrendered, the conditions do not automatically cease on surrender or expiry of the consent.[10] In its notice of acceptance of surrender, the Council as consent authority has power to direct that the person who surrendered the consent is not liable to complete any work still required to give effect to it.

8.4 What decisions the Council might make if consents (or part consents) were surrendered that had conditions relating to lower reflectance values cannot be predetermined through this plan review process, but the Council can, in fully accepting surrender of the consent under section 138(4), direct that work to give effect to the consent (which includes conditions such as lower reflectance values) does not have to be completed.

8.5 Further, under section 125 of the RMA, a consent will lapse on the date specified in the consent or 5 years after the date of commencement of the consent (if not given effect to). A consent holder may also apply to the consent authority for a change or cancellation of condition of the consent. Again, the Council through this district plan process, cannot predetermine any decision that the Council as consent authority might make, if such an application is made to amend conditions of existing consents, that relate to lower reflectance values.

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10 *Auckland City Council v Easton* EnvC Auckland A075/09, 31 August 2009 at [56]; *Bay of Plenty Regional Council v Waaka* EnvC Auckland A080/09, 4 September 2009 at [21]-[26]

8.6 In the context of existing consent notices on a subdivision in west Wanaka (an area which is currently zoned Rural Lifestyle under the ODP and proposed to be LDRZ and LLRZ under the PDP) the Panel also queried whether the Council could remove all of these consent notices in one go, instead of all of the individual landowners having to apply.

8.7 Again, the RMA process must be followed, all of which follow from an application from a consent holder.

9. UNIT AND STRATA TITLES (NOTIFIED RULE 27.5.2; REDRAFT 27.7.13; DEFINITION OF "SITE")

9.1 Ms Kimberley Banks considers that notified Rule 27.5.2 (redraft 27.7.13) should apply to the HDRZ where limited to unit title, strata title or cross lease subdivisions.[11] The Panel has queried whether there is a difference between "unit title" and "strata title".

9.2 A unit title is one form of strata estate. Strata estates are a broader category that includes other types of dimensional divisions of land (for example, tunnels or cantilevered balconies). To reflect this, the Council submits it is important to retain both terms in redraft rule 27.7.13 as Ms Banks has recommended (noting her recommendation is that redraft rule 27.7.13 should be *limited to* unit title, strata title and cross lease subdivisions, and not apply to the HDRZ generally).

9.3 Ms Banks also considered that some amendments to the definition of "site" could be necessary to clarify how the PDP site standards apply to unit title, strata title and cross lease subdivisions. Ms Banks has recommended a possible revision to the definition in her reply evidence. The Council intends to re-address the definition in the Definitions hearing stream, in order to assess its plan-wide effects.

9.4 The Panel also sought clarification about whether "site" means the parent site before subdivision, or the sites proposed to be created through the subdivision. The Council submits that the wording of the notified definition captures only "parent" or existing sites. Post

11 Summary of Evidence of Ms Kimberley Banks, dated 10 October 2016, at paragraph 11

subdivision, the new lots created would then comprise the site, after a separate Certificate of Title is issued.

9.5 For example, under item (1)(i) "site" means an area of land which is comprised in a single lot or other legally defined parcel of land and held in a single Certificate of Title. Proposed sites for which title is yet to be issued do not fit into that definition. Items (2) to (4) similarly refer to land that has a Certificate of Title or is otherwise legally defined, or has previously been conveyed. Put shortly, in the Council's view the definition is intended to capture sites that already have legal existence rather than future sites. As noted above, the Council submits this should be re-addressed in the Definitions hearing.

10. URBAN GROWTH BOUNDARY (PLANNING MAP 30)

10.1 The Council's opening legal submissions[12] and the evidence of Ms Amanda Leith[13] incorrectly indicated that the Residential zones were all located within the proposed Urban Growth Boundaries, as Planning Map 30 shows an area zoned Low Density Residential at Lake Hayes outside the Urban Growth Boundary.

10.2 Ms Leith's reply evidence notes that there are a number of rezoning requests for land surrounding this area, and consequently the zoning may change as part of the consideration of submissions for the mapping hearing. The Council submits that no changes should be made at this point in time to the UGB.

11. MINOR NON-SUBSTANTIVE CHANGES

11.1 The Council officers have recommended a number of minor, non-substantive amendments by way of the s 42A reports on the Residential chapters. These non-substantive amendments generally relate to structural issues, matters of clarification, and minor errors where there have been no submissions.

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12 Opening Representation / Legal Submissions for Queenstown Lakes District Council (Hearing Stream 06), dated 10 October 2016, at paragraph 6.6

13 Summary of Evidence of Ms Amanda Leith, Chapter 7 Low Density Residential Zone (Hearing Stream 06), dated 7 October 2016, at paragraph 2

11.2 The Council maintains the position taken in the District Wide hearing,[14] namely that as the proposed changes are of neutral effect, there is no legal or procedural barrier preventing the Panel from recommending them, and the Council subsequently making the changes under clause 16(2).

11.3 Despite the above, it would be appropriate for the Panel to distinguish any recommended non-substantive amendments from recommended changes that are based on submissions. The Council submits that any recommended non-substantive amendments could be marked by the Panel in a similar manner as is done by the Council officers in the proposed revised chapters filed alongside their s 42A report and planning replies.

12. CHANGES RECOMMENDED ON THE MERITS, BUT NOT SCOPE

12.1 The Council officers have identified a number of possible changes that are recommended on the merits, but for which there is no scope. These possible changes are discussed in the reply evidence but are not shown as recommended in the revised chapters.

DATED this 11th day of November 2016

S J Scott / H L Baillie
Counsel for Queenstown Lakes
District Council

14 See Legal Submissions for Queenstown Lakes District Council as part of Council's Right of Reply, District Wide (Hearing Stream 05), dated 22 September 2016, at paragraphs 5.1-5.3

APPENDIX 1

CASE LAW

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. A 075 /2009

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND

IN THE MATTER of an application for declaration under Section 311 of the Act

BETWEEN AUCKLAND CITY COUNCIL
(ENV-2008-AKL-000208)
Applicant

AND MATTHEW DOUGLAS EASTON
Respondent

Hearing: 20th July 2009 at Auckland

Court: Environment Judge J A Smith
Commissioner H A McConachy
Commissioner I D Stewart

Counsel: A W Braggins and A L Harlowe for Auckland City Council (**the Council**)

M D Easton for himself (**Mr Easton**)

D A Kirkpatrick for M Griffiths – Section 274 Party (**Mrs Griffiths**)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT

The Court makes the following declaration in relation to the structures between 41 & 43 Marine Parade, Herne Bay, Auckland.

A. ***The New Block Wall and the older retaining wall constitute a single and complete structure (Combination Wall).***

B. ***That the Combination Wall constitutes a building as defined by the District Plan.***

C. ***Where the Combination Wall straddles the boundary, the vertical point for measuring height pursuant to the relevant boundary rule of the Operative Plan is the base of the Old Retaining Wall.***

D. ***The majority of the New Block Wall also serves the function of retaining material over 1m in height and should be considered together with the Old Retaining Wall as a single retaining wall (Combination Wall).***

E. ***That the New Block Wall and/or the Combination Wall constitute a structure, and are accordingly controlled by Rule 5B.7.1 within the Coastal Management Area of the District Plan. A resource consent is accordingly required for the construction of the New Block Wall and/or the Combination Wall.***

F. ***Where the Old Retaining Wall straddles the boundary, the vertical point for measuring the height of the Combination Wall for the purposes of the BIRB rule is the base of the retaining wall.***

G. ***That the depth of earth retained by the Old Retaining Wall and New Block Wall should be combined to give the depth of earth retained by the Combination Wall.***

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

H. ***That none of the above answers would be resolved by disconnecting the New Block Wall from the Old Retaining Wall.***

I. ***Any applications for costs are reserved and considered as part of the enforcement proceedings to follow.***

J. ***Directions will be made for a substantive hearing on the enforcement orders if required. A Memorandum is to be filed by the Council within 20 working days advising the court if a further hearing is required.***

REASONS FOR DECISION

Introduction

[1] The Council has sought declaration and enforcement orders against Mr Easton, filed in July 2008.

[2] Mrs Griffiths is the owner of the property at 43 Marine Parade, Herne Bay, adjoining Mr & Mrs Easton's property at 41 Marine Parade.

Background

[3] In excess of 30 years ago (probably in the 1950s or 1960s) a wall was constructed along the boundary of 41 and 43 Marine Parade (**Old Retaining Wall**).

[4] It is clear that the existing ground level was cut into and the Old Retaining Wall set upon, or adjacent, to the boundary at the finish level for the Griffiths' property. Although the height varies along the wall, it would have retained less than 1m of natural ground. Thereafter, there appears to be some minor filling behind the wall at 41 Marine Parade.

[5] Marine Parade runs approximately southwest to northeast with the longer axis of the subject properties lying southeast to northwest. At the western edge they terminate on the edge of the harbour with a steep embankment down to sea level. The land falls from the southwest towards the northeast with a more gradual fall beyond the Griffiths'

property to the neighbouring property. There may have originally been a gully at or near the Griffiths' property, but extensive works through this area make it difficult to ascertain the natural ground levels now. There is a steep drop from the road on the road boundary of the Griffiths' property which is retained by concrete terracing. On the Easton property there is a fall from the road onto the property, but it is more gradual. The original ground levels have been significantly altered in recent years, and the court has had to rely on photographic evidence produced and on interpolation from the ground conditions still evident.

[6] In the 1950s and 1960s the Old Retaining Wall was constructed by the Griffiths and the ground cut down to provide a level platform for the building and garden areas. The height of the Old Retaining Wall varies along its length up to around 1m in height. The Griffiths building has been built relatively close to the southern boundary and there is a distance of some 1.5m between the building facade and the boundary line. The ground has concrete on it, and it is not clear whether it was laid or poured, and abuts the Old Retaining Wall.

[7] From photographic evidence we have seen, it appears that the Old Retaining Wall was cut into the natural land contour and was not constructed as a retaining wall, although it has always had dirt behind it. Photographs show the wall is not reinforced nor does it have concrete fill in the internal voids. The Old Retaining Wall was built onto the natural ground level and no doubt some loose fill was placed behind the wall. Subsequently there has been some topping up to bring the ground level relatively close to the top of the Old Retaining Wall.

[8] At some stage on a date unknown timber framing has been erected on top of the wall with some short sections of timber retaining and then trellising. It looks as though further filling has then occurred up to the top of the timber retaining (a further 200mm).

[9] In February 2004, Mr & Mrs Easton communicated to Mrs Griffiths that they intended to raise the height of the *existing boundary/retaining wall by approximately 2m over a length of 47m.* Diagrams attached to a letter (copy of which is annexed hereto marked **A**) show the Old Retaining Wall being reduced slightly in height, and then having attached to it the **New Block Wall.** The diagram does however show approximately ½ of the height of the New Block Wall as having fill and proposed subsoil drains thereby giving the impression that the ground level on the Easton property was to

be raised. This is reflected in the words *proposed GL* shown around 1m higher than the ground level at the time of the diagram.

Works Undertaken

[10] Consent from Mrs Griffiths was not forthcoming. Consent was obtained from the Council and the New Block Wall constructed, but there is no dispute that the New Block Wall does not comply with the conditions of the consent. It is evident to us from our site visit that some courses of blocks were added and finished to a high standard, probably bringing the total height of the Old Retaining Wall and New Block Wall to some 2m.

[11] Thereafter it is evident that the completion of the block courses is of a different standard with clear evidence of excess mortar, non-pointing of the joints (at least on the Griffiths side of the property), bringing the total height of the Old Retaining Wall and New Block Wall to something in the order of 3m from the Griffiths ground level.

[12] Also evident from our inspection was that the wall was approximately 2m above the height of the Old Retaining Wall, depending on whether the Old Retaining Wall had had a course of blocks removed or simply its capping course, and that fill had been placed behind the block wall of ½m - 1m over some of its length.

[13] Mr Easton produced photographs to the court which demonstrate that the Old Retaining Wall was reduced at least by the capping rail and in many places by a further course of blocks, that the ground was also dug out behind the wall to form a solid foundation for a footing for the New Block Wall. After steel was placed into those blocks of the Old Retaining Wall which could take it, or epoxied into the capping cement where it could not, a course of blocks was then keyed in and a footing made back into the natural ground behind the wall. This footing appears to have been at a height of around 1.2m from the photographic evidence produced.

[14] The steel connecting the New Block Wall with the Old Retaining Wall was also keyed into the rear footing, and it is evident that concrete piles were also poured into the natural ground behind and below the Old Retaining Wall. The end result and objective was to create a rigid structure consisting of;

- the Old Retaining Wall,

- through it steel was placed with concrete poured around it connecting into the footing,
- which connected to piles into natural ground behind the retaining wall, and
- thereafter the New Block Wall has been constructed.

The result is designed to act as a single unit, which Mr Easton confirmed.

[15] We are also able to conclude as a fact that the Old Retaining Wall does bear, and is designed to bear some of the weight and force of the entire structure. In addition, both the Old Retaining Wall and the New Block Wall act together to retain fill which has been placed on the Easton's property.

[16] The end result is that on the Griffiths side of the property the gutter of the house is below the height of and less than 1m from the New Block Wall which approaches 3m in height from ground level on the Griffiths side. With back-filling on the eastern side of the boundary, the height of the wall above ground is around 1.2m – 1.5m. Although Mr Easton originally applied for and obtained a consent for a New Block Wall, he has not complied with the conditions of that consent and says that he has surrendered that consent and that there is no longer a consent in force in respect of the wall.

The Issues

[17] Given the topography, it is surprising that the Operative District Plan (**the District Plan**) does not have more explicit provisions in respect of the construction of boundary walls. As we shall discover, the provisions are very similar to those in many other areas of New Zealand which do not have the same topographical challenges.

[18] Although the court has previously considered issues as it relates to walls, this has not been in a situation where there is an argument as to whether there is a single structure made up of newer and older components. We are also told that this is the first case of this type under the Operative District Plan.

[19] The particular declaration sought by the Council is:

[a] A declaration pursuant to Section 31(d) of the Act, that (and the extent to which) a concrete wall (a New Block Wall) built on top of a concrete brick retaining wall (the Old Retaining Wall) on or near the boundary of 41 and 43 Marine Parade is a building as defined by the Auckland City Council Operative District Plan (Isthmus Section) and exceeds the Rule 7.8.1.3 Buildings In Relation to Boundary (**BIRB**) of the District Plan.

[20] In order to explore this application for declaration (which is actually a compound question) Mr Braggins agreed that several issues would need to be resolved.

a) Can a single wall be made up of portions constructed at different times and serving different functions? (Can there be a compound wall?)

b) If there is compound wall, is it over 2m in height?

c) Does the wall constitute a retaining wall, retaining over 1m of material?

[21] In order to answer some of these questions, issues arise as to how height is calculated in relation to boundary, and how ground level is evaluated, especially where there has been a modification of natural ground level.

Previous Case Law

[22] In ***G H Blair v Auckland City Council***[1] decided in June 1993, the Blair property was lower lying than the Powley House property. When a carpark retained land to some 2m in depth, a question arose as to whether or not a further fence could be constructed on top of that. For reasons that are not clear from the decision, the only question before the court was whether the fence was a building, given that a fence itself if not over 2m high does not constitute a building.

[23] It is fundamental to the ***Blair*** case therefore that there was no particular consideration (and it may not have arisen on the facts) as to whether the fence was acting in conjunction with and depending upon the retaining wall. There appears to have been a set-back from the boundary. On appeal before the High Court[2] it was confirmed that both the carparking area and the timber retaining wall were erected under relevant planning controls as part of the development of the house.

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[1] Decision A67/93
[2] HC 10/94

[24] The definition of *building* in force at the time was almost identical with that for current purposes being:

> ... any building or structure or part of a building and in addition to its ordinary and usual meaning shall include the following:
>
> ...
> (c) any retaining wall or breastwork exceeding 1m in height;
> (d) any fence or wall exceeding 2m in height;

[25] Similarly, the definition of height and its relationship to ground level is similar.

[26] The factual situation had some similarities to the present. It was described by the High Court by Hammond, J [page 6]:

> Effectively his property is now confronted by a fairly formidable obstacle (I think "cliff face" was terminology used orally before me): a retaining wall with this substantial fence on top of it. Powley House, on the other hand, was in the unenviable position that it had to erect a fence (or wall) to comply with the car parking requirements. I mention that however simply to illustrate that this is not a case, as sometimes happens, of one neighbour quite deliberately erecting a large fence or structure to deliberately impede or fence out a neighbour; the Powley House fencing initiative was undertaken in an endeavour to itself comply with the City's rules.

[27] Mr Blair put the submission to the High Court:

> ... when a fence or wall is situated on top of an elevated structure, the individual height of the fence or wall is aggregated with that of the elevated base and limited to two metres overall and any fence height in excess of this is classified as a building by virtue of its being part of the deck or terrace exceeding that covered by the exclusion clause.
>
> ...
> (i) it is in excess of two metres in height from the operative 1975 ground level
>
> ...
> (ii) it is aggregated with the retaining wall ....

[28] The court concluded:

> Provided that the fence is not more than two metres in height (which the Tribunal had found to be so in this case), it is not therefore a building. Or, to put it another way, provided the fence is two metres or less in height it is excepted from the "rule" definition of height. And if that is so, height in relation to a fence

> not exceeding two metres in height must necessarily mean the height of the fence itself from the ground on which the fence sits to the top of the fence.

[29] The High Court distinguished ***Bilkey v Auckland City Council***[3] on the basis that that was a retaining wall case, whereas this was a fence case.

[30] It is clear from this discussion that neither the Planning Tribunal nor the High Court considered the relationship of the fence to the retaining wall structure. There appears to be no suggestion or evidence that the two were connected, even though the fence itself was constructed on fill which in part relied upon the retaining wall for its structural integrity.

[31] In ***Bilkey v Auckland City Council***, the Planning Tribunal was concerned with height-in-relation-to-boundary controls for a retaining wall. That case involved a retaining wall installed by excavation below 1975 ground levels. The wall was a building by virtue of the retention of earthen terracing. This case is clearly distinguishable from the current case where the wall and the ground level have predated 1975.

The Application of the Relevant Rules of the District Plan

[32] For practical purposes, the relevant rules of the City Plan are largely similar to those discussed in ***Blair*** and ***Bilkey***. The BIRB Rule 7.8.1.3 states:

> No part of any building shall project beyond a building envelope contained by recession planes from points 2.0m above any site boundary adjacent to land zoned residential.

[33] A definition of *building* includes both:

> ...
> (c) any retaining wall or breastwork exceeding 1m height;
> (d) any fence or wall exceeding 2.0m in height.

[34] Curiously, the City Plan has become subject to a Proposed Change which seeks to constrain alterations to older buildings and seeks to protect high levels of amenity within the residential areas. Notwithstanding this, the rules in relation to walls and fences

[3] [1992] 1NZRMA189

appear to be unchanged from the early 1990s when the courts last considered these issues in detail.

[35] There is a circularity to the definitions in the District Plan. The definition of *building* in Part 13 of the District Plan includes:

> ...
> (c) any retaining wall or breastwork exceeding 1m in height;
> (d) any fence or wall exceeding 2 metres in height;

[36] *Height* however is defined in relation to a *building*. In order to calculate whether a fence or retaining wall constitutes a building, it is necessary to establish its height. For practical purposes we have concluded that the only possible interpretation of these provisions is that the height of the fence or wall (and thus whether it is a building or not) must be calculated using the District Plan definition of *height*.

[37] The reasons for this conclusion turn upon the wording of the provision, the relevant portion of Part 13 which reads:

> **Height**
>
> In relation to a building means one of the following:
>
> A. the vertical distance between the highest part of the building and the average ground level, being the average level of the ground at the external foundations of the building; or
>
> B. the vertical distance between ground level at any point and the highest part of the building immediately above that point.

Essentially we are implying after *building* the words *or whether a structure is a building.*

[38] The reasons we have concluded that height calculation must be relevant to establishing whether a wall or fence is a building are:

a) The definition of height states that it is ***in relation to***. It is clear that the calculation of height is in relation to establishing whether the wall or fence is a building.

b) The definition provides a practical method of assessing whether a wall or fence is a building. Given that a wall is generally a linear structure,

definition B of height provides a practical method of measuring whether it complies or not.

c) Ground level itself is defined as:

> **Ground Level**
>
> Shall be deemed to be the finished level of the ground at the time of the completion of the most recent subdivision in which additional lots were created, except that where no such subdivision has occurred since January 1975, ground level shall be deemed to be the finished level of the ground on 5 January 1975.

Practical Implications

[39] The practical implications in respect of the Old Retaining Wall are that the height of that wall is calculated from the finished ground level under the wall to the top of the wall i.e. the finished level on 5 January 1975. Given that the New Block Wall is constructed on top of the Old Retaining Wall, the question essentially turns on whether ground level for the New Block Wall is;

a) the top of the Old Retaining Wall as modified for the construction of the New Block Wall, or

b) the level of the fill or natural ground behind the wall prior to construction of the New Block Wall, or

c) the level at the base of the Old Retaining Wall.

[40] We have already concluded as a fact that the New Block Wall was constructed on top of the Old Retaining Wall and appears as a single structure. We have also concluded as a fact that it is interconnected to the Old Retaining Wall with steel and concrete fill where possible. Where this was not possible, the top of the Old Retaining Wall is drilled and steel fixed with epoxy to the old wall, with block wall construction on top of this.

[41] We conclude that the finished ground level as at 1975 under the Old Retaining Wall is the appropriate level to calculate the height of the Combination Wall. There is clear evidence that the New Block Wall was constructed from the top of the old block

wall (at least the capping course was removed and in many cases another block or part of the block layer). If we were to set the top of the Old Retaining Wall as the ground level, this would involve an interpolation into the definition of ground level, so that;

a) it did not include ground level, but the Old Retaining Wall (as modified prior to the New Block Wall being constructed),

b) it would be unrelated to the definition contained in the District Plan not being the result of any subdivision or ground level as at 1975.

[42] Mr Easton's primary argument was that the natural ground level prior to the placement of the Old Retaining Wall, being that reflected behind the retaining wall as at 1975, was the appropriate ground level to calculate the height from. This faces the major problem that the majority of the wall is constructed on top of the existing retaining wall. Some of the footing for that wall is contained behind the wall and appears to have been rebated into natural ground, and the piles go through the natural ground behind. Nevertheless, these structures merely support the New Block Wall on top of the Old Retaining Wall as a single complete structure.

[43] While we acknowledge that construction of a wall on natural ground behind the wall (and thus on Mr Easton's side of the boundary) may have resulted in a 2m high wall that is not what in fact occurred. Such a wall would not have constituted a boundary wall and would have involved significant construction difficulties. A consequence of adopting Mr Easton's definition of ground level would be that any retaining walls constructed prior to 1975 would now be identified as establishing ground level and allow an additional metre of retaining to be a permitted activity.

Combination Boundary/Retaining Wall

[44] In the end we have concluded that on the facts of this case, there is no doubt that the Old Retaining Wall and the New Block Wall constitute a single boundary/retaining wall/fence (**Combination Wall**). The design of the New Block Wall was intended to incorporate the Old Retaining Wall as an essential part of its structure.

[45] Although height-in-relation-to-boundary (**BIRB**) may be important for the purpose of calculating building compliance with the relevant Council rule, the primary

test is whether the fence or wall is over 2m in height. If it is a building then the BIRB requirements come into play.

[46] Given our conclusion that the Combination Wall is a single structure, it is clear that the fence or wall is generally in the order of 3m, or a little more, in height, and accordingly constitutes a building in terms of the District Plan.

[47] We have also concluded therefore that the retention of some 1.5m – 2m of fill behind the Combination Wall constitutes a retaining wall in excess of 1m in height.

[48] Therefore, on both these grounds the structure constitutes a building under the District Plan and is therefore controlled by the BIRB rules.

BIRB Application

[49] Most of the wall straddles the boundary. In those positions, clearly the wall offends the BIRB rule. The Babbage Consultants Wall Cross Sections show that on a number of sections (A-A, B-B, C-C, D-D, and E-E) the property boundary is on the Griffiths side of the property. Therefore, in all of those cases the height-in-relation-to-boundary would be calculated from the ground level on the Griffiths property. Given that there is a 55° slope allowed towards the eastern property for building of the wall on that boundary position, a 200m set-back for A-A would calculate to approximately 0.2m extra in height for the wall. Given our conclusion, Rule 7.8.1.3 does apply to this case.

[50] In sections F-F, the front face of the wall is essentially on the boundary or within some 10mm of it, and at 3.2m is therefore in the order of 1.2m in excess of the 2m height. In respect of G-G, H-H, and I-I, the critical sections next to the house, the boundary is in the centre of the block wall. In all of those cases therefore the wall is around 1m in excess of the 2m height and would also offend directly against the height-in-relation-to-boundary requirements of the District Plan.

Other Plan Provisions

[51] In light of the foregoing, strictly speaking, it is not necessary for us to consider the wider purposes of the District Plan and how the rules seek to implement those. Nevertheless, we should say that the provisions, particularly as a result of recent changes,

stress amenity within these residential areas and seek to attain relatively high standards in zones such as Residential 2B in which this site is located. The site is also within the Coastal Management Area. Relatively strict controls include earthworks over $5m^3$ requiring a discretionary activity consent.

[52] We also conclude that the Combination Wall and/or the New Block Wall also constitutes a structure within the Coastal Management Area thus requires a consent under Rule 5B.7.1 of the District Plan. The requirement for a consent in the Coastal Management Area turns on whether there is a *structure*. That term is not defined in the District Plan, but is defined in Section 2 of the Act:

> **structure** means any building, equipment, device, or other facility made by people and which is fixed to land; ...

[53] Accordingly, we have no hesitation in concluding that the New Block Wall and the Combination Wall are structures in terms of the District Plan. Independent of its status as a building, the Combination Wall and/or New block Wall are a device or other facility made by people which is fixed to land.

[54] The conclusion therefore is that the New Block Wall and/or Combination Wall also required a resource consent as a structure independent of its status as a building. Under Rule 5B.7.1, buildings ***and structures*** are deemed to be restricted controlled activities. Such status seems to be a controlled activity in terms of the Act with the assessment criteria set out at Part 5B - Coastal [page 11].

[55] Mr Easton argued in submissions to the court that he had surrendered consent LUC20040850401, in which case he cannot rely upon that consent to justify the breach of Part 5B.7.1.

Resource Consent for the New Block Wall

[56] Notwithstanding that the Resource Consent LUC2004085040 may have been surrendered by Mr Easton subsequent to the construction of the block wall, any conditions imposed upon that consent at the time of its construction and prior to the consent being surrendered, are still enforceable as against Mr Easton. We should point out that having regard to the overall amenity and rule provisions, it appears to us that the

interpretation of the Plan provisions should be construed (where there is any doubt) so as to impose the potential for the activity to be scrutinised for consent purposes to ensure that the amenity of the area is maintained.

[57] To the extent that it is necessary for the purpose of this declaration, we are in no doubt that the Combination Wall has an adverse effect on amenity, both to anyone in the Griffiths home or visiting, but also to any person who may look into this area from the road.

[58] Given our primary conclusion as to the clarity of the application of the rules of the District Plan in this case, we do not need to rely upon the amenity impacts to affect our construction of the document. Nevertheless, the District Plan itself seeks the preservation of the natural contours of the land and high amenity, being key features within these residential areas.

Mr Easton's Submissions

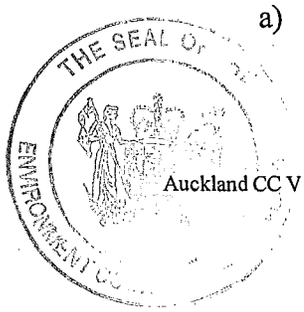
[59] Mr Easton has opposed these proceedings vehemently citing Council confirmation of his position, surveyors confirmation of his position, and minimal effect as grounds to oppose the declaration. He also notes that he cancelled and withdrew the Resource Consent on 17 July 2005.

[60] We are not bound by either Council or surveyors statements, but do not consider any of the documents referred to by Mr Easton support his position. The interpretation of survey results turns on the position used for ground level. As an architect, Mr Easton will be aware that the ground level on the boundary and under the Old Retaining Wall has been the base of the retaining wall for many years prior to 1 January 1975.

[61] Many of Mr Easton's other arguments are contentious (particularly his comments about Mrs Griffiths) and seek to obfuscate the issues in this case.

[62] In respect of the argument that the reconstruction of the wall 200mm behind the Old Retaining Wall would have the same effect, we note:

a) A consent is required for any structure within the Coastal Management Area;



b) The New Block Wall would need to commence at a lower level if relying for support on the existing ground. A setback of 500mm or 1m into the Easton property would have a significant impact on the effect of the existing Combination Wall and also its degree of reliance on the Old Retaining Wall.

[63] Mr Easton also suggested that he could overcome the issue relating to the Combination Wall by severing the connections between the two walls. We assume he was suggesting cutting the concrete and reinforcing between the two walls. There are several reasons we reject this as a solution:

a) The New Block Wall was designed to be integrated with the Old Retaining Wall;

b) The height of the New Block Wall is still calculated from ground level as at 1 January 1975 which is the base of the Old Retaining Wall;

c) Both structures (Old Retaining Wall and New Block Wall) are likely to become unstable if the connection is severed. At least the New Block Wall is likely to rotate until it rests again on the Old Retaining Wall. The Old Retaining Wall may rotate towards the Griffiths property.

d) It would introduce a weakness in the middle of the retained fill depth.

In short, the intent and effect of the Combination Wall would continue, albeit weakened and possibly subject to failure.

[64] We are also concerned that in cancelling the consent Mr Easton has now put himself in a position where the entire wall is unauthorised. We can only say that this is a situation entirely of his own making and the consequences may be significant. We do not understand that it is possible to resurrect a surrendered consent.

Conclusion

[65] For the reasons already set out in this decision, we have concluded that the following amended declarations sought by the Council should be made:

a) ***The New Block Wall and the older retaining wall constitute a single and complete structure (Combination Wall).***

b) ***That the Combination Wall constitutes a building as defined by the District Plan.***

c) ***Where the Combination Wall straddles the boundary, the vertical point for measuring height pursuant to the relevant boundary rule of the Operative Plan is the base of the Old Retaining Wall.***

d) ***The majority of the New Block Wall also serves the function of retaining material over 1m in height and should be considered together with the Old Retaining Wall as a single retaining wall (Combination Wall).***

e) ***That the New Block Wall and/or the Combination Wall constitute a structure, and are accordingly controlled by Rule 5B.7.1 within the Coastal Management Area of District Plan. A resource consent is accordingly required for construction of the New Block Wall and/or the Combination Wall.***

f) ***Where the Old Retaining Wall straddles the boundary, the vertical point for measuring the height of the Combination Wall for the purposes of the BIRB rule is the base of the retaining wall.***

g) ***That the depth of earth retained by the Old Retaining Wall and New Block Wall should be combined to give the depth of earth retained by the Combination Wall.***

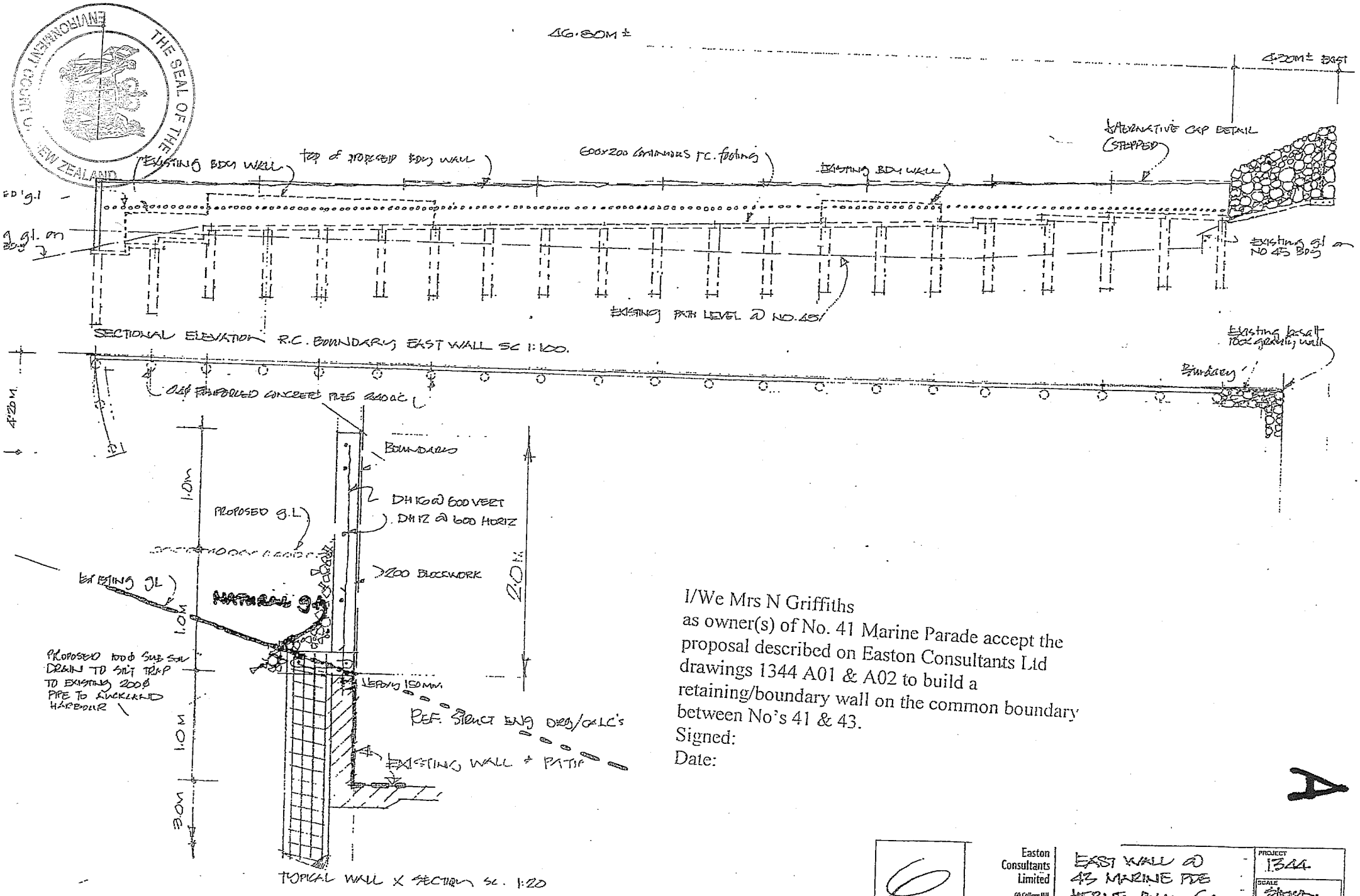
h) ***That none of the above answers would be resolved by disconnecting the New Block Wall from the Old Retaining Wall.***

[66] Applications for enforcement order have been made, but the Council wishes to explore resolution in light of any declarations. The Council is to provide a report within 20 working days of this decision advising whether it wishes to set the matter down for a substantive hearing on the enforcement orders. The Section 274 Party has also indicated a wish to consider enforcement orders. Any further or other enforcement orders sought by the Council or the Section 274 Party are to be filed within 20 working days of the date of receipt of this decision.

[67] Costs in respect of this matter are reserved until the court has an opportunity to consider whether enforcement orders are required. The parties are encouraged to discuss a resolution of this issue.

DATED at Auckland this 31st day of August 2009

J A Smith
Environment Judge



I/We Mrs N Griffiths
as owner(s) of No. 41 Marine Parade accept the proposal described on Easton Consultants Ltd drawings 1344 A01 & A02 to build a retaining/boundary wall on the common boundary between No's 41 & 43.
Signed:
Date:

A

Easton Consultants Limited
60 College Hill
Auckland, New Zealand
PO Box 47-054, Ponsonby
Phone: 64-9-376 0557

EAST WALL @ 43 MARINE PDE HERNE BAY FOR MD & MD ESTON.

PROJECT 1344
SCALE SHOWN
DRG. No.

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. A 080 /2009

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND

IN THE MATTER of an appeal under Section 314 of the Act

BETWEEN BAY OF PLENTY REGIONAL COUNCIL
(ENV-2009-AKL-00295)

Applicant

AND LANCE HORI WAAKA

Respondent

Hearing at: Tauranga on 24th August 2009

Court: Environment Judge J A Smith sitting alone under Section 309(1) of the Act

Appearances: Mr A A Hopkinson and Ms R Zame for Bay of Plenty Regional Council (**the Council**)

Mr L H Waaka for himself under protest to jurisdiction (**Mr Waaka**)

Mr S A Waaka for Poike 12 Block Trust (**the Trust**)

DECISION OF THE ENVIRONMENT COURT

A. The court orders Mr L H Waaka:

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[a] To cease bringing or allowing others to bring materials that are not selected cleanfill materials as discussed in this decision onto the landfill site;

[b] To permit warranted officers for the Council to enter onto the property for the purposes of;

[i] inspecting the property in order to determine whether or not the remaining conditions of the Resource Consent have been complied with,

[ii] undertake storm water and stream water samples at position set out in the conditions of Old Consents 51143 and 80861, at all reasonable times upon complying with Section 332 of the Act, upon the production of warrants and written authorisation on initial entry and upon reasonable request, or comply with Section 332(4).

[c] The results of any sampling undertaken by the Council:

[i] Are to be forwarded to both Mr Waaka and the trustees of the Trust;

[ii] The cost thereof to be forwarded to Mr Waaka.

[iii] If agreement cannot be reached as to payment, the proportions to be borne by the parties and/or the Trust is to be determined by Court.

[d] That the Council is to provide a report to the Court by 15th October 2009 as to progress in terms of these orders, and in particular advise:

[i] Whether it seeks further orders from the court as against Mr Waaka and/or the trustees of the Trust;

[ii] In the event that it does seek further orders, the type of orders sought and in particular whether the Council will be seeking to complete the rehabilitation works required on the site.

[e] A copy of that report is to be forwarded to Mr Waaka and the trustees of the Trust.

[f] The Court will then determine whether to proceed by way of further telephone conference, further hearing, or pre-hearing conference. The Court may then modify or make such further orders as it concludes appropriate or extend the current orders.

B. Costs are reserved for further consideration after 15th October 2009.

REASONS FOR DECISION

Introduction

[2] Mr Waaka and/or the Trust operated a landfill at 70 Waimapu Pa Road, Tauranga (**the property**) for some time. On 30th June 2008 two resource consents permitting the activity and discharge of contaminants (Resource Consent 51143 granted to Mr Waaka and Resource Consent 60861 granted to the Trust)(**the Old Consents**) expired. Both of these consents contained conditions requiring the rehabilitation of the site.

[3] Subsequently, the Council granted a further Resource Consent 65430 (**the New Consent**) to Mr Waaka on 25th November 2008 giving limited continued use of the site essentially for the purpose of fully rehabilitating and capping the site. That New Resource Consent is due to expire on 31st December 2009. It is unclear whether Mr Waaka ever commenced operations to fulfil the terms of the New Resource Consent and/or whether that new consent has been surrendered.

The Application

[4] The Council has made application for enforcement orders as follows:

1. Require the Respondent to take all necessary actions to fully comply with all the conditions contained within consent 65430 (the "Resource Consent") in relation to the landfill site the Respondent is operating of R71 Waimapu Road, Oropi, Tauranga (the "Property"). In particular:

   a. That the Respondent complies with condition 6.1 of the Resource Consent and cease undertaking activities inconsistent with re-contouring the site to the correct batter slope as per condition 6.4 and disturbance associated with capping as per condition 7.1 of the Resource Consent, and in particular:

      i. That the Respondent complies with condition 6.2 and 7.3 of the Resource Consent and cease bringing material which is not cleanfill on to the landfill site at the Property.

   b. That the Respondent be required to bring all conditions which have not yet been complied with up to date, including as follows:

      i. Leachate sampling within the leachate ponds to be undertaken in accordance with condition 14.5 of the Resource Consent by 1 October 2009;

      ii. Stream water sampling be undertaken in accordance with condition 14.6 of the Resource Consent by 1 October 2009;

      iii. Results of the sampling to be undertaken as set out in 1(b)(i) and (ii) above, to be forwarded to the Applicant in accordance with condition 14.7 of the Resource Consent by 1 November 2009.

   c. That the Respondent be ordered not to obstruct the Applicant's officers from exercising their powers of entry under section 332 of the Resource Management Act 1991 (the "Act") for the purposes of inspecting the Property in order to determine whether or not the remaining conditions of the Resource Consent are being complied with.

d. That no earthworks are undertaken during the period 1 June to 15 September (inclusive) in accordance with condition 7.7 of the Resource Consent.

[5] The orders are sought pursuant to Sections 314(1)(a)(i) and (b)(i) of the Act.

[6] The Regional Council also seeks an order to:

3. Require (in the alternative) that if the Respondent fails to comply with the order sought under paragraph 1 above, that the Applicant be granted consent from the Environment Court to enter on to the Property and comply with the order on behalf of the Respondent and recover the costs and expenses of doing so as a debt due from the Respondent.

[7] This order is sought pursuant to sections 315(2)(a) and (c) of the Act.

[8] There are a number of difficulties in the way that the Regional Council sought the enforcement orders, which I will discuss in due course. It has also made it difficult for Mr Waaka to understand exactly what is required. Nevertheless, as I understand it, the orders sought are:

[a] That only selected cleanfill materials be brought onto the site and only for use in the capping and rehabilitation of the site;

[b] That leachate sampling be undertaken on the site;

[c] That stream water sampling be undertaken and all results be forwarded to the Regional Council;

[d] That the Court reinforce the existing statutory powers of the council officers to enter the property;

[e] That the Court reinforce a condition of the consent that no earthworks be undertaken from 1st June 2009 to 15th September 2009.

Sovereignty Issues

[9] Mr Waaka argued that the court had no jurisdiction in respect of this matter. In particular, that his landfill was not subject to control under the Act.

[10] Given the landfill was subject to three resource consents granted under the Act it appears both Mr Waaka and the Trust must have acknowledged the jurisdiction of the Act to obtain at least the Old Consents.

[11] In any event, there is no doubt the court has jurisdiction to make enforcement orders over Mäori land as discussed in ***Western Bay of Plenty District Council v Te Whaiti***[1] and the cases particularly cited therein:

[a] Court of Appeal in ***Ngai Tahu Trust Board v Director General of Conservation and Ors***[2]

[b] The Privy Council decision in ***McGuire v Hastings District Council***[3]

[c] ***Te Ohu Ngä Taonga Ngati Maru v Stratford District Council***[4]

[d] ***Minhinnick v Minister of Corrections***[5]

[e] ***Smith v Auckland City Council***[6]

When was the New Consent application made?

[12] Given that the earlier two consents expired in June 2008, no detail was given by the council as to when Mr Waaka made an application to continue the activity. If Mr Waaka made an application for a further consent 6 months prior to the expiry of the earlier Old Consents, then those Old Consents continued in force until the determination of his New Consent. This follows on from the provisions of Section 124 of the Act. Failure of the Council to cover this matter in their affidavits or submissions to the court is an important omission, for reasons that will be explained later.

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[1] A128/05 paras [4] – [6]
[2] CA 18/95
[3] Privy Council [2001] NZRMA 557 para [20] and [26]
[4] ENV C W74/99
[5] ENV C A43/04
[6] [1996] 1 NZLR 634

[13] In the particular circumstances of this case, that failure is not fatal to the application. However, in many other cases it may be. In practical terms, provided the application for a replacement consent is made at least 6 months prior to the expiry of the existing consent, then under Section 124(1) the consent holder may continue to operate within the terms of the original consent. Under Section 124(2) if the application is made no more than 3 months prior to the expiry of the existing consent, then the council may at its discretion allow the consent holder to continue to operate within the terms of the original consent.

[14] Given that there is no evidence that the council exercised its discretion to continue to allow the consent holder to operate, the application may have been made 6 months prior to the expiry of the original consent or the New Consent applied for after that time.

[15] In an affidavit from Mr R B Gardner, a pollution prevention manager for the council, he intimates that the council have a practice of giving more than 6 months notice of the expiry of a consent. He states in relation to the New Consent:

> This is a standard letter that the Applicant sends to all consent holders when their consents are due to expire within the next six months ....

[16] Although this is related to the New Consent, I have no reason not to accept that the council would have sent a similar letter (or should have) to Mr Waaka more than 6 months prior to the expiry of the Old Consents. On that basis, it is possible that when Mr Waaka made his application for a continuation of the activity, he did so with the intent and understanding that his consent would continue until the new application was determined.

What was the nature of the application for a New Consent?

[17] In his first affidavit, Mr M J Caldwell, another enforcement pollution prevention officer of the council indicates that there had been non-compliance with various conditions of the Old Consents. He goes on to say at para 17:

> Upon discussing the process and requirements of the consent application, the application was then amended by the respondent to allow the operation of a cleanfill site only.

[18] He goes on to say that there was a discussion as to the draft consent conditions and the council then had Mr Waaka sign the draft:

> ... which indicated to me that he had read and understood the contents of the draft consent.

[19] I refer to a letter written by Mr Waaka dated 7th March 2009 annexed hereto marked **A**. In that letter he advises that:

> Because of all the conditions in the consent 65430 I have decided to not proceed with it. I told you and Dudley that the consent at the time was not much good to me, because of costs that would be incurred I would not get enough to cover the cost of $500.00 to fill the bulldozer ....

[20] There is also a comment later in that letter which suggests that the notice advising the expiry of the original consents may not have been sent to Mr Waaka six months prior to expiry. It is therefore unclear when exactly Mr Waaka made his application for a further consent. It is also unclear whether Mr Waaka has surrendered, or in fact ever operated under the New Consent. As I have already noted, in many cases such concerns would lead to at least further evidence being required, or alternatively, refusal of the orders.

Continuing Obligations of a Consent

[21] However, the circumstances of this case are such that the court does not need to rely upon Section 124 of the Act to extend the Old Consents, or upon the New Consent in order to derive obligations that are the subject of enforcement orders (continuing obligations under resource consents). I have reached the clear conclusion that Mr Waaka and the Trust continue to be bound by continuing conditions of the Old Consents.

[22] Section 108 of the Act gives the court a very broad and general power to impose conditions on resource consents that it considers appropriate. The types of conditions outlined are by way of example only and the list is not exhaustive. Nevertheless, Section 108(2)(c) notes:

> (c) a condition requiring ... works, including (but without limitation) the ... restoration, or enhancement of any natural or physical resource ...

[23] It is also clear that the court can impose conditions prior to the consent being utilised (see ***The Director-General of Conservation v Marlborough District Council***[7]) and also conditions subsequent (see ***Meadow 3 Limited v Van Brandenburg and Anor***[8]). Section 108(2)(d) of the Act provides:

> (d) in respect of any resource consent ... a condition requiring that a covenant be entered into ... in respect of the performance of any condition of the resource consent ...

[24] Accordingly, the consent conditions may also contemplate steps beyond the consent itself may be required which are enforceable outside the consent. Although there does not appear to be direct authority on the point, I have concluded clearly that continuing conditions of a consent are not avoided by the surrender or expiry of the consent. Section 138(3) of the Act provides:

> (3) A person who surrenders a resource consent remains liable under this Act—
> (a) ...
> (b) to complete any work to give effect to the consent unless the consent authority directs otherwise ...

[25] Where the consent has been operated under and upon, one cannot avoid the imposition of conditions simply by the subsequent surrender of that consent (see Section 138 of the Act and ***Auckland City Council v Easton***[9]).

[26] I have concluded that this also applies to the expiry of a consent under Section 125 of the Act. This of course will turn on whether the condition is intended to enure or expire with the consent. The rehabilitation of the site in this case is clearly a condition that is intended to take effect at the end of or after the operation consented to. To suggest that a consent holder could avoid that condition by simply not undertaking the work during the term of the consent would in my view be to undermine the basis of the consent itself. It would also be inconsistent with the surrender provisions of Section 138 of the Act.

[27] Consent 51143 included rehabilitation provisions under condition 9.1, including conditions 9.2 and 9.3 which states:

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[7] HC CIV-2003-485-002228, MacKenzie, J at para [17]
[8] HC CIV-2007-409-001695, Fogarty, J

9.2 The consent holder shall rehabilitate all of the areas affected by the exercise of this consent.

9.3 The consent holder shall ensure that all landfill areas, including slopes but excluding access roads, are grassed or otherwise suitable vegetated within six months of reaching the final position for that area.

[28] Consent 60861 required a management plan for the landfill, but also imposed a number of conditions including those relating to leachate control and collection. In particular, maintenance condition 16.1 required:

16.1 The final cover and vegetation of the landfill shall be maintained in a suitable condition compatible with the landfill's end use.

[29] Condition 17 of Consent 60861 also requires:

17 **Final Cover**

The final cover on the landfilled refuse shall consist of a capping layer of at least 1 metre minimum compacted depth of selected cleanfill, overlain by topsoil and vegetated, as generally outlined in the information submitted with the application, including subsequent information received on 28 February 2001.

[30] It is clear that these conditions are intended to enure past the operation of the consent as capping of the landfill area with a final cover requires landfill activity to cease. However, the position in respect of certain other conditions is not so clear. For example, control of stormwater and leachate are matters that might continue beyond the life of the consent or may expire with the expiry of the consent. Clearly in the council granting a consent for only 10 years, they could have explicitly discussed this issue but have not chosen to do so. In the end it is difficult to construe these clauses, in the absence of further evidence, as directly imposing a continuing obligation on the landholder. The situation is even more problematic in respect of the question of monitoring.

[31] However, in the end a holistic view must be taken of the conditions of consent and I have reached the following conclusions:

[a] That not withstanding the expiry of the consent, the conditions of the consent require the site to be rehabilitated, more particularly as described in condition 17 of Consent 60681;

[b] That until such time as all of the rehabilitation conditions are satisfied, the conditions relating to stormwater, leachate and monitoring continue in force.

[32] I have reached this conclusion because until such time as the capping is securely in place and the area revegetated, then there is the potential for further intrusion of water into the landfill and thus capacity for the creation of leachate. It appears to have been determined by the council that provided the capping was rehabilitated then the site would stabilise over time and leachate discharges would reduce.

Ongoing Obligation for Monitoring and Control after the Expiry of the Consent

[33] I have not had sufficient evidence or submissions to consider the broader and more complex question of whether or not the consent holder's obligation for stormwater and leachate monitoring continues after the expiry of the consent, even when the consent holder has fulfilled all the conditions of consent. I consider this to be a problematic proposition and would require significantly greater evidence. I am not aware of any decision on this issue given most landfill consents have been for 35 years and/or renewed.

[34] However, on the facts of this case it is quite clear that the site has not been rehabilitated as required, and accordingly, neither the Trust nor Mr Waaka has fulfilled the continuing obligations under the conditions of consent.

Can the Court make Orders under Section 314?

[35] Although the application for enforcement orders are predicated on the validity of the New Consent, the actual requirements are set out relatively clearly as I have stated at the beginning of this decision. The obligations and conditions in the New Consent are similar in many ways to those which arise by virtue of the Old Consents. I consider these obligations.

Cleanfill onto the Site

[36] It is clear that for the capping of the site, only selected cleanfill materials may be utilised (condition 7 Old Consent 60861). The original materials permitted under condition 8.1 Old Consent 60861 included:

a) Concrete and brick, masonry rubble
b) Polystyrene, fibreglass batts, insulfluf and rocwool
c) Wiremesh and silver foil building paper
d) Steel rebar (mainly in concrete)
e) Glass and ceramics
f) Timber (treated and untreated) when of a size not able to be recycled
g) Wallboards (plasterboard and hardboard)
h) Roofing iron offcuts, damaged sheets not able to be recycled, and
i) Clean fill as per the Regional Land Plan definition

[37] I accept that this definition is too broad to meet the requirements of capping of the landfill. The New Consent suggests in condition 7.3 that the cleanfill:

> ... shall include only natural materials such as clay, soils, rock and such other materials as concrete, brick or demolition products that are free of:
>
> - combustible or putrescible components (including green waste) apart from up to 10 percent by volume untreated timber in each load
> - hazardous substances or materials (such as municipal waste) likely to create leachate by means of biological or chemical breakdown
> - any products or materials derived from hazardous waste treatment, stabilisation or disposal processes
> - any other characteristic that the Chief Executive of the Regional Council or delegate deems necessary.

[38] In general, of the other materials that are included within Old Consent 60861, I consider polystyrene, fibreglass batts, insulfluf and rocwool, wiremesh, silver foil building paper, glass and ceramics, timber beyond 10% by volume of untreated, roofing iron offcuts, to be inappropriate as selected cleanfill.

[39] Although the Trust holds Old Consent 60861, both Mr Waaka and the Trust confirmed to the court that Mr L H Waaka is responsible for the landfills day-to-day operation. Accordingly, I conclude that an order can be made requiring Mr Waaka to comply with the original conditions of the Old Consents and/or New Consent by ceasing to bring any material onto the site which is not selected cleanfill. Although these orders can also be made against the Trust, no application is before the court.

[40] As far as the questions of sampling, I consider again that these are covered by the original conditions of consent. The conditions of the Old Consents require sampling only at two positions marked WT on the BOPRC Plan Number RC 05 1143/2, analysed for pH, alkalinity, ammonium, boron and chemical oxygen demand. Results of the analysis were required to be forwarded to the council by 30th April each year. Given however that Mr Waaka has not complied with these conditions, I agree that it is appropriate that both leachate and stream stormwater sampling be undertaken as set out in the original conditions of consent. Furthermore, the results of that should be forwarded to the council shortly after being obtained.

[41] Again, I agree with the council that given the non-compliance, it is appropriate that the court should set reasonable time for the obtaining of those tests and also the forwarding to the council. Mr Waaka has indicated that he is not in a position to meet the costs of these tests, and that these could be undertaken by the council. In those circumstances I conclude it may be appropriate for this court to direct the council to undertake the sampling and advise Mr Waaka of the outcome. Questions of the costs of sampling can be examined by the court in due course if necessary and if the parties cannot reach agreement.

Section 332 of the Act

[42] The council has asked this court to reinforce the terms of Section 332 of the Act. This does not arise by virtue of any consent and appears to us to be a clear statutory power. However, given the evidence of the affidavits that council officers have been intimidated and threatened, I consider that it is appropriate in the circumstances to reiterate the clear legal position.

Earthworks from 1st June 2009 to 15th September 2009

[43] This is a condition imposed under the New Consent and the purposes for it are not clear. On its face, it appears to grant a consent to 31st December 2009, but not permit a person to act in terms of the consent for some 3½ months of it. This condition is not imposed in other consents beyond a general reference to the Environment BOP's *"Erosion and Sediment Control Guidelines for Earthworks" – Guideline No. 1 – Version 3: Amendments March 1998.*

[44] Given that this period will nearly be at an end by the time this decision is issued, I see little or no point in making an order repeating such controls.

Enforcement Orders

[45] The orders I have considered are all generally raised in the application by the Council. In essence the significant change is that it does not rely exclusively on the New Consent, but rather on continuing obligations from the expired Old Consents. I do not consider that to be a change of substance. Mr Waaka and the Trust's objections were more broadly based than the precise consent upon which the council is seeking the orders. In any event, the form of the orders sought was relatively clear and I do not consider the reference to conditions of the New Consent to be fatal to the application or to substantively change the nature of that application. I also conclude that obligations under the Old Consents can be seen as the joint responsibility of Mr Waaka and the Trust. However, enforcement orders are currently sought only against Mr Waaka.

Further Orders Sought

[46] The council also seeks orders, expressed to be in the alternative, that if Mr Waaka fails to comply then the council be granted consent to comply with the order.

[47] It is unclear exactly what the council intends by this application. In practical terms it could have but has not sought an order to complete the works required to rehabilitate the site. Given the court's conclusion on other matters, it appears that the council may wish to reconsider whether that is the alternative order that it wishes to obtain. At this stage no direct order has been sought against Mr Waaka or the Trust requiring them to complete that rehabilitation work.

[48] So far as the sampling work is concerned, this is work that Mr Waaka and/or the Trust would need to have done by a third party in any event, and Mr Waaka himself suggested that it would be appropriate if the council did this, providing that the costs were reasonable. That could be part of the duties to be undertaken by an officer on inspection. It appears that the solution in this case is for the court to require the council officers to undertake the sampling and to report the results to Mr Waaka and the Trust, and to the court.

[49] The council will need to consider alternative orders, particularly:

[a] how to prevent the use of the site for continued dumping of non-permitted materials; and

[b] the steps required to rehabilitate the site.

[50] Nevertheless, I wish to give Mr Waaka and the Trust an opportunity to consider their position and light of this decision, and consider whether there is method whereby compliance can be achieved by co-operation with the council rather than the necessity of further orders.

[51] Accordingly, it is my intention to make interim orders and to adjourn this matter for further report by the council by 15th October 2009 with a view to the council making application for further orders if necessary, contemporaneously with that report.

Conclusion

[52] I conclude that enforcement orders can be made to require Mr Waaka to cease contravening the Act and/or resource consents by:

[a] allowing materials other than selected cleanfill materials to be utilised on the site, which can only have materials delivered for rehabilitation of the cap to the landfill;

[b] failing to undertake sampling as required;

[c] failing to allow council officers to attend the site as required under Section 332 of the Act.

[53] I am not prepared to make orders in respect of the earthworks period, both for reasons of practicality (the set period is nearly over) and because I am not clear that Mr Waaka has ever operated in terms of the New Consent.

[54] I adjourn the question of alternative orders and suggest that the Council would need to consider whether it needs to make orders seeking powers to rehabilitate the site if acceptable arrangements cannot be made with Mr Waaka.

[55] Accordingly, the court orders Mr L H Waaka:

[a] To cease bringing or allowing others to bring materials that are not selected cleanfill materials as discussed in this decision onto the landfill site;

[b] To permit warranted officers for the Council to enter onto the property for the purposes of;

[i] inspecting the property in order to determine whether or not the remaining conditions of the Resource Consent have been complied with,

[ii] undertake storm water and stream water samples at position set out in the conditions of Old Consents 51143 and 80861, at all reasonable times upon complying with Section 332 of the Act, upon the production of warrants and written authorisation on initial entry and upon reasonable request, or comply with Section 332(4).

[c] The results of any sampling undertaken by the Council:

[i] Are to be forwarded to both Mr Waaka and the trustees of the Trust;

[ii] The cost thereof to be forwarded to Mr Waaka.

[iii] If agreement cannot be reached as to payment, the proportions to be borne by the parties and/or the Trust is to be determined by Court.

[d] That the Council is to provide a report to the Court by 15th October 2009 as to progress in terms of these orders, and in particular advise:

[i] Whether it seeks further orders from the court as against Mr Waaka and/or the trustees of the Trust;

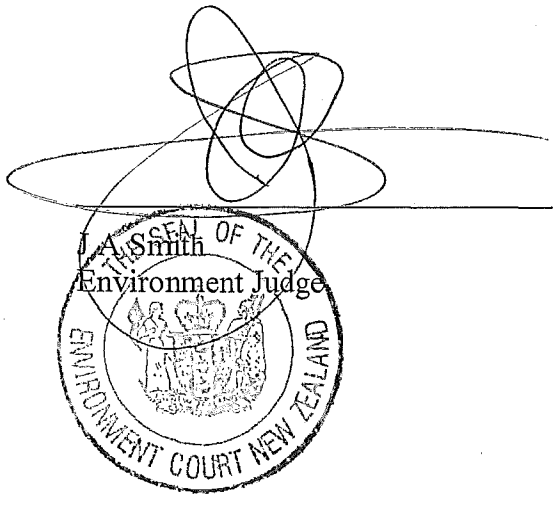
[ii] In the event that it does seek further orders, the type of orders sought and in particular whether the Council will be seeking to complete the rehabilitation works required on the site.

[e] A copy of that report is to be forwarded to Mr Waaka and the trustees of the Trust.

[f] The Court will then determine whether to proceed by way of further telephone conference, further hearing, or pre-hearing conference. The Court may then modify or make such further orders as it concludes appropriate or extend the current orders.

[g] Costs are reserved for further consideration after 15th October 2009.

DATED at AUCKLAND this 4th day of September 2009



J A Smith
Environment Judge

A.

Lance Waaka

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7 March 2009

To Mike Caldwell,

Thank you for your letter dated 2 March 2009 .

Because of all the conditions in the consent 65430 I have decided to not to proceed with it. I told you and Dudley that the consent at the time was not much good to me, because of costs that would be incurred I would not get enough to cover the cost of $500.00 to fill the bulldozer and the Digger and after Two days another $500.00 to fill up again. Also as for sampling the drain at three different places at a cost of $970.00 per Sample, when the consent I had for 10 Years for rubbish only had two sampling places and the consent you gave me for one year for clean fill has got three sampling Places. Also there is no money to pay the account that is owing $2379.15. There has been no money to pay the bulldozer driver so I have had to drive my truck, drive the bully, and the digger at night ,on Sundays. There are only so many hours in a day just to try to satisfy E.B.O.P. There has been no clean dirt that has come in to cover the site and it does not look like I will get any . So I say to you and Dudley next time you should listen to me when I say things and not just do your own agenda. I will list some of the harrasment that I have received from Environment Bay of Plenty right from the start.

1. <u>Plastic</u>: E. B.O.P field officer at the time said I could take plastic from building sites, when that E.B.O.P. Field Officer left E.B.O.P. The next E.B.O.P. Field came and said that I was not allowed to take Plastic.

2. <u>Salt Sludge</u>: Salt Works at the mount approached me and said they had a letter from E.B.O.P. saying that they could dump it at My Landfill after reading the letter I made a area for them To dump, after it dried out I pushed it around with the bully the E.B.O.P.field officer at the time said it was all right. Again when that E.B.O.P. officer left and the next one came he said that I was not allowed to bring the salt sludge into the landfill.

3. Green Waste: E.B.O.P. field officer said I could bring in 10% Green Waste in a bin Load. Next field officer said I was not allowed to bring in Green Waste.

4. Height of Landfill: You Told me that the height of the landfill was only supposed to be 5 meters high. I told you that it is supposed to be 10 meters high but you would not listen you told me to close the landfill down on a certain date. So I Wrote to all of my customers saying that the dump was to close down on a certain date. Just before the time to close you rang me and said that we need to have a urgent meeting. At the meeting you said that you had just come from a 2 hour meeting with your lawyers and he told you that you were wrong and that the height was 10 meters high. So I told my customers that they were still allowed to dump but not many came back.

5. Water Sampling: When we started I got the Water Tested and it cost me about a $1000.00 I asked E.B.O.P. If I could get it done any cheaper anywhere. E.B.O.P. said to me that they might be able to do the water testing cheaper be cause they get that many done. The field officer said he would look in to it and get back to me. He enquired and said to me that he could do it cheaper so he took the samples and gave me a copy of the results. When he left E.B.O.P. no sampling was carried out then E.B.O.P told me that I had to do my own sampling again I got a person to start the testing again hence the $970.00 bill. Everything was good when E.B.O.P. was doing the sampling but the moment they stopped they started to complain to me saying it was not their job to do it.

6. E.B.O.P. wrote to me about April 2008 in that letter it said that basically that if you apply for an Extention before six months before expiry 30 th June 2008 it was non notify and three months before expiry was at the descretion of E.B.O.P. I asked at the time how come E.B.O.P. did not send me this Letter in December or before six months expiry date. The answer I Got back was we don't have to even tell you. So I Say To you why even bother sending a letter after the fact. I have asked why I could not get any extention on my old consent and I was told the people at the top of E.B.O.P. said no. No names of people who said no and no reasons or explainations in writing why they said no. These are the people who should be accountable for their actions and out of courtesy should have written to me explaining why they said no.

Getting back to your letter 2 March 2009.I Have asked you to give me the names of the people who are complaining to you but you refused to give me their names. How can I talk to them if I Do not know who they are. I have been talking to the fire person and to the Mayor about getting a fire Hydrant up our driveway not only for the dump but for our houses to when I Got them down here the Mayor asked the fire person to write a supporting letter. I Have not heard back from them. Maybe if you wont tell me who are complaining you can tell them the situation and tell them to complain to the Mayor or to the health Department . Because the more that complain maybe something will get done. I have been complaining to the city council since the last big fire to get a fire Hydrant but to no avail.

As for the abatement notice I told you that you can take me to court, you will be there, I will not be there because the Judge just listens to you and does not listen to me as far as I am concerned its not even justice. Plus I have not got any money.

Because of the situation and the harassments I have to walk away from the whole landfill issue any leave it as it is like I said to you and Dudley at the start. I have tried my hardest to tidy the dump up on the dwindling resources I had but the resources have run out. I have been up front with E.B.O.P. but I feel they have their own agendas.

Signed Lance Waaka

Signature L Waaka.

cc DUDLEY CLEMENTS

cc W. E. BAYFIELD.

cc DAWN DENT.

cc. EDDIE GROGAN.

cc. AILEEN LAWRIE

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND