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Report to Environment Committee
from Rob Robson, Principal Resource Advisor

Objection on Behalf of Seaside Haven Limited Under the Resource Management Act 1991 to Decision on Non-notified Consent Application

1. Purpose

To consider and make a recommendation on an objection on behalf of Seaside Haven Limited under the Resource Management Act 1991.

2. Background

The objection is to a decision made by the Manager, Consents Management (under delegated authority), on the Seaside Haven Limited to discharge leachate to land from the Fort Dorset contaminated site.

In December 2001 the application by Seaside Haven Limited (“SHL”) for resource consent WGN 020084[21693] was granted on a non-notified basis under delegated authority (Attachment 1). The granting of this consent followed the exchange of letters requesting additional information, and a site visit. All conditions except that subject to this objection were discussed with the applicant’s consultant by telephone and in e-mail before the consent was granted.

3. Objection

On 29 January 2002, SHL lodged an objection to the decision on this application pursuant to section 357(2) of the Resource Management Act 1991. Section 357(2) of the Act states:

(2) *Except as provided in subsection (3), where under –*

(a) *Section 88 an application is made for resource consent; or ...*

(b) *... ..*

(c)

and, in accordance with section 94 or section 127 (3) or section 130 (3), the application or review is not notified in accordance with section 93, [or, if the application or review was notified, no submissions were received or any submissions received have been withdrawn,] the applicant or consent holder shall have a right of objection to the consent authority in respect of that authority's decision on the application or review.

(7) *The consent authority or local authority –*

(a) *May dismiss the objection or uphold the objection wholly or partly authority –*

(8) *Where an objection is made under subsection (2) and, in accordance with subsection (7) (a), the consent authority decides to uphold the objection wholly or partly, that decision shall substitute for that part of the earlier decision to which the objection relates.*

A copy of SHL's objection is attached as Attachment 2. The relief the objector has sought is cancellation of condition 8 of discharge permit WGN020084 [21693], which reads:

The consent holder's interest in this consent may not be transferred to any other person.

4. **Considerations**

The site

The Fort Dorset site is listed as a potentially contaminated site on the Wellington Regional Council's ANZECC Site Use Database because of its former use as a landfill. Groundwater flowing beneath the site generates weak leachate from the old landfill, which discharges to coastal water within the inter-tidal zone. Wave action and an enormous dilution factor appear to prevent any accumulation of contaminants in the immediate coastal environment.

The Seaside Haven development proposes to subdivide the Fort Dorset site into residential allotments. The purpose of the consent application is to authorise any discharge of leachate from the contaminated site arising from remedial activities and also for the ongoing discharge of leachate.

The effects

The main effect of allowing the discharge of leachate from the site relates to the proposed remedial works, namely the potential for compaction to induce a flux of contaminants to the water table. To identify and manage the actual and potential effects of any increased discharge of contaminants from the Fort Dorset site, quarterly

then six-monthly monitoring of groundwater in boreholes, for a period of four years following completion of the remedial works, was made a condition of the consent. If the monitoring did indeed demonstrate an adverse effect, then by the condition of review the monitoring requirements could be extended and/or further discharge controls considered.

Justification for condition 8

The Wellington Regional Council officer who processed the original application anticipated there could potentially be difficulties in securing compliance with the conditions of the permit if it were to be transferred to multiple owners of the new lots, or a body corporate of those persons. Some individual lot owners could be reluctant to deal with adverse effects that pertain to the greater contaminated site, which they do not either own or are financially responsible for.

Further, the grounds set out at paragraph 6(c) of SHL's objection highlight that circumstances might arise whereby the consent holder is required to negotiate land access with private land owners to comply with the consent conditions. That requirement would be no less than what any body of persons who assumed SHL's interest in the discharge permit would also potentially face, although SHL would have had the advantage of ensuring such access by caveat on the individual lot titles.

Accordingly, the officer initially considered exercising control over the duration of the permit, and intimated to the applicant that a period of 10 years might be an appropriate timeframe for the consent. The Applicant, however, was resolute in e-mail that it could see no reason why a term of 35 years should not be granted. The Applicant also referred to its concern that *future property owners will not want to have the uncertainty of applying for consents in 10 to 20 years time*. The officer consequently chose to be helpful to SHL and, mindful that the effects of the site remediation would be minor, recommended the consent be granted for 35 years. However, to ensure the consent was enforceable, its transfer was restricted.

Section 137(2) of the Resource Management Act 1991, Transferability of discharge permits, states:

- (2) *The holder's interest in a discharge permit may be transferred by the holder to any owner or occupier of the site in respect of which the permit is granted [or to a local authority], unless the permit expressly provides otherwise.*

Section 137(2) of the Act indicates that Parliament clearly has contemplated that circumstances may arise where it will be valid for a consent authority to restrict the transfer of a discharge permit.

The objection

The points raised in the letter of objection are now dealt with in order:

- (a) *the condition is unnecessary and does not serve a valid resource management purpose;*

Condition 8 relates to the need to ensure other conditions of consent, which are to manage potential adverse effects, are enforceable. Therefore the condition serves a valid resource management purpose.

- (b) *the condition is unreasonable in that it may impose obligations on the consent holder in respect of land that it no longer owns or is financially responsible for;*

Conditions imposed on resource consent must be consistent with the *Newbury* principles [*Newbury DC v Secretary of State for the Environment; Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578], and in particular a condition must not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it. Under these special circumstances of development of a contaminated site, I consider that it is not so unreasonable for the developer to retain some obligations in respect of the land it developed whether or not it owns or has financial responsibility for that land at some time in the future. Further, the Council has every right to protect itself from liability in the event the nature of the discharge changes, and we are unable to secure compliance in terms of implementing any necessary discharge controls.

- (c) *the condition may require the consent holder to negotiate land access with private land owners in order to comply with other conditions of consent; and is therefore unenforceable;*

SHL is currently in a position to secure land access by, among other things, caveats on individual lot titles. Any future body of persons may not be able to do so.

- (d) *the imposition of the condition lacks sufficient justification.*

The relevant justification is discussed above.

The key consideration

The status of the proposed activity itself was assessed as *controlled* under Rule 22 *Contaminated sites (off-site discharges)* of the Regional Plan for Discharges to Land (“RPDL”). Under Rule 22 of the RPDL “duration of the consent” is a matter that Council is able to exercise control over. In my opinion for this consent there is a practical link between duration and transferability in terms of whether, if adverse effects arise, the consent is enforceable. Nevertheless, under Rule 22 of the RPDL Council has not strictly restricted the exercise of its discretion to “transferability of the discharge permit”. Consequently, notwithstanding the grounds on which SHL have objected, I consider condition 8 of the consent is not appropriate and should be cancelled.

5. Communication

No further public communication is necessary for this report.

6. Recommendation

That the Environment Committee recommend to Council that Seaside Haven Limited's objection be upheld (wholly) and that condition 8 of resource consent WGN020084 [21693] be cancelled.

Report prepared by:

Approved for submission:

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PAULA BULLOCK
Manager, Consents Management

JANE BRADBURY
Divisional Manager, Environment

Attachments: 2