

Hearings Commissioner

Notice of Meeting

A meeting of the Hearings Commissioner will be held in the Whangarei Library, May Bain Room, Rust Avenue, Whangarei on:

**Thursday
20 November 2014
2.00pm**

**Application by
Red Rock Bay Limited**

**Commissioner
John Childs**

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Report to Hearings' Commissioner John Childs on a Resource Consent Application

Red Rock Bay Limited seeks, by way of a Section 127 application, an extension of time to extend the consent period to give effect to Stage 3 of a subdivision consent granted to D Gollogly on 29th January 2004.

This application was lodged by Reyburn & Bryant on behalf of Red Rock Bay Limited, and was reported on by Council's Resource Consents Manager, Mr Alister Hartstone.



6 November 2014

Alister Hartstone

Resource Consents Manager

This report was peer reviewed by the following signatory:

Paul Dell

Group Manager, District Living

Statement of staff qualification and experience

Alister Hartstone – Resource Consents Manager

I have held the position of Resource Consents Manager since April 2005. I hold the qualifications of Bachelor of Regional and Environmental Planning (Hons).

My previous experience includes seven and a half years employment at the Far North District Council as a Consent Planner and Senior Planner. Both roles involved the processing of landuse and subdivision consents of varying complexity. On gaining employment with the Whangarei District Council in February 2004, I was appointed as Senior Policy Planner (LTCCP), until obtaining my current position as Resource Consents Manager in April 2005. In my current role, I have been involved in various complex applications under the Resource Management Act and other legislation, and given evidence on matters before the Environment Court.

Section 42A Hearing Report

Hearing By: Hearings' Commissioner John Childs of a Section 127 application seeking an extension of time to extend the consent period to give effect to Stage 3 of a subdivision consent granted to D Gollogly on 29th January 2004.

The application site is located at Te Maika Road, Ngunguru legally described as Lot 19 DP 374000, and is located within the Coastal Countryside Environment under the Operative District Plan.

Evidence By: Alister Hartstone

File Refs: SD0337825.07 P076647.SD

1.0 The Proposal & Background

1.1 The application is described best in the Statement of Evidence provided from Mr Brett Hood contained in Attachment 3. Very briefly:

- The original subdivision consent creating 14 lots across three stages was granted on 29th January 2004. A copy of the original decision and subdivision plan are contained in Attachment 1
- Stage 1 was completed in February 2005 and Stage 2 completed in December 2006.
- A Section 125 application was lodged and subsequently granted in March 2009. That extended the consent period for the development of Stage 3 by 2 years, equating to a total of 7 years in which to obtain Section 223 approval to complete the subdivision.
- A Section 125 and 127 application was granted to Red Rock Bay Limited in February 2011 extending the time period for obtaining Section 223 approval for Stage 3 by 2 months, and making significant changes to the conditions relating to Stage 3. A copy of that decision is contained in Attachment 2.
- Stage 3 was given effect to, with Section 223 approval as to survey obtained on the 29 March 2011.
- As per Section 224(h), the survey plan can be deposited where '*less than 3 years has elapsed since the territorial authority approved the plan under Section 223.*' The 3 year period ended on the 29 March 2014 ('deposit date').
- The application under Section 127 to extend the consent period was received by the Council on the 4th March 2014, as per Attachment 3
- In assessing the application it was considered that surrounding landowners may be affected to a minor extent by any granting of the application. As no written approvals were provided, the application was notified on a limited basis to surrounding landowners.
- One submission in opposition has been received from Longview Estuary Estate Limited who own Lot 14 DP374000 contained in Stage 2 of the subdivision. A submission in support was received from Mr B Patel who owns Lot 6 DP 374000. The submissions are contained in Attachment 4.

1.2 For the sake of clarity, the application consists of two key aspects:

- a) An extension of time requesting that the lapse date of 29 March 2011, which is treated as a condition of the consent, be extended to a date in the future, being the date by which the subdivision plan must be approved under Section 223. That date has not been revised given the manner in which the application has progressed, but could not be later than the deposit date offered in b) below, being 29 March 2015.

- b) The corresponding timeframe in which to deposit the subdivision be shortened so that the new deposit date, being 29 March 2015. This effectively provides for a 12 months extension of the consent.
- 1.3 In the absence of advice to suggest otherwise, the application is understood to now request that the Section 223 date be extended until 29 March 2015, being the same date by which the subdivision plan is required to deposit under Section 224.
- 1.4 While the council has processed a number of these applications previously, this application is unusual. None of the previous applications processed by the council in this way have been subject to notification of any kind, and all previous decisions have been made before the Section 224 deposit date has passed.
- 1.5 Council requested some legal clarification of this matter from the applicant. More particularly, the question was raised as to how a proper assessment should be made under Section 127, given that Section 127 directs that the application be considered as a discretionary activity and that any decision be made under Section 104. Given the deposit date of 29 March 2014 has since passed, it is arguable that the existing consent has lapsed and no longer provides a baseline to consider the extension of time application against. Because of this, the assessment effectively requires reconsideration of whether consent can be granted to Stage 3 as a stand alone subdivision. In other words, a new subdivision consent is required.
- 1.6 The position that the applicant has taken is that the assessment of effects under Section 104 should treat the existing consent as a baseline, despite having lapsed, and that the assessment should be carried out in a similar manner to an assessment under Section 125 as an extension of time.
- 1.7 While no formal legal opinion has been provided to date, Mr Hoods statement includes comments on the legal position under his paragraph 32. It is understood that Mr Littlejohn will provide a formal legal submission at the hearing to address this point.
- 1.8 It is noted that avoiding delay in concluding consideration of the S127 application is warranted in this case. Longview Estuary Estate Limited ('Longview') have lodged an enforcement order application with the Environment Court that relates to matters associated with Stage 2 of the subdivision consent. That matter is effectively on hold until this application is concluded.

2.0 Site and Surrounds Description

- 2.1 The Whangarei District Council Operative Plan shows the application site zoned as Coastal Countryside Environment, with no resources. The property is currently vacant and contains approximately 21.2 hectares of rolling to steep country located between Ngunguru and Tutukaka, and is accessed via Te Maika Road from Ngunguru. The site was previously covered in pine forest, which was cleared to provide for the subdivision in 2004. In the absence of development or weed and pest control at this stage, the site is currently covered in a mixture of scrub, weeds, wilding pines and small areas of regenerating native bush. It is noted that the previous stages of subdivision, Stage 2 in particular, included conditions requiring weed and pest control and landscape planting. It is the implementation of these conditions and associated bonds that are of significant concern to Longview who own Lot 14 contained within Stage 2 of the subdivision.
- 2.2 There are a number of dwellings in the locale, mostly located on elevated sites with sea views within Stage 1 of the development. As yet, there are no buildings constructed on any lots within Stage 2 of the subdivision. More developed properties are located further afield to the east adjoining Tutukaka Block Road, and west within the existing residential area of Ngunguru extending along Te Maika Road.
- 2.3 My understanding is that the construction of the access has required reasonably significant engineering works, including large cuts and batters, the details of which are contained in the approved engineering plans prepared by Cook Costello Limited contained in Attachment 5. The reason for delay in completing the works and thereby necessitating the extension of time

appears to be a contractual dispute relating to the engineering works as confirmed under paragraph 24 of Mr Hoods statement.

3.0 Statutory Context

- 3.1 Section 127 of the Resource Management Act 1991 (the Act) allows for the change or cancellation of a condition or conditions of resource consent as follows:
- 3) *Sections 88 to 121 of the Act apply to the consideration of the application, with all necessary modifications, as if:*
- a) *the application was for resource consent for a discretionary activity; and*
 - b) *the references to the resource consent and the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively....*
- (4) *For the purposes of determining who is adversely affected by the change or cancellation of condition, a local authority must consider, in particular, every person who:*
- a) *made a submission on the original application; and*
 - b) *may be affected by the change or cancellation of condition.*
- 3.2 It is my understanding that Section 127 is the appropriate provision under which to consider the appropriateness of, or necessity for, a condition. If the extent of the change is such that it is seeking consent to a materially different activity, then Section 127 should not be used to consider and grant consent.
- 3.3 As per the practice note contained in Attachment 6, Section 127 is able to be used to apply for and obtain consent to vary the consent period specified under Section 125, after the Section 223 approval has been obtained. However, any application requires scrutiny of the legal requirements under Section 127, and (if granted) must provide for a new lapse date to be specified 'in the future' by which a new Section 223 approval must be obtained.
- 3.4 By virtue of obtaining a Section 127 approval in this way, and any subsequent re-approval of a plan under Section 223, under normal circumstances Section 224(h) would apply, thereby allowing up to another 3 years in which to deposit the subdivision plan. Council holds the view that in many cases, it is not appropriate to allow up to an additional 3 years and may not grant consent to applications where this might occur. On that basis, applicants may offer a reduced time period for the deposit date (as is the case in this instance) as a means of 'off-setting' the extended time available to complete the subdivision.
- 3.5 As a deemed discretionary activity, an assessment under Section 104 is required. Matters to be considered by Council when assessing an application for resource consent under Section 104 include (subject to Part II) any actual and potential effects on the environment as a result of the change, any relevant objectives, policies, rules or other provisions of a Plan or Proposed Plan, and any other relevant matters. Those relevant matters are addressed under Section 4 below. Section 104B outlines Council's powers when making a determination on a discretionary or non-complying activity. Section 104B states that:
- After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—*
- (a) *may grant or refuse the application; and*
 - (b) *if it grants the application, may impose conditions under Section 108.*

4.0 Section 104(1)(a) – Actual and Potential Effects on the Environment

- 4.1 In terms of an assessment, it is noted that the application only requests a change to the implied condition that specifies the time frame in which to give effect to the subdivision consent under Section 223, and an offer to reduce the timeframe for depositing the subdivision. Any effects requiring consideration are therefore limited to those associated with the change of conditions only. However, in this somewhat unusual case, two positions may be taken in considering the extent of effects that require assessment, particularly given that the current deposit date has passed.
- 4.2 Mr Hood has outlined those two positions in his statement under Paragraph 36. It is understood that the legal advice to be presented supports the assessment as being one of treating the existing subdivision consent as a baseline. I concur with that approach and the following assessment and comments are made on that basis.
- 4.3 Turning to the application itself, it effectively provides for an additional 12 months from the existing lapse date to undertake and complete the physical works, undertake legal conveyancing requirements, and to obtain Section 223 and 224 certification from Council in order to apply to Land Information New Zealand to deposit the subdivision.
- 4.4 Two submissions have been received during the notification period. Mr B Patel, as an adjoining owner, supports the application and no additional comment is provided in the submission regarding the matter. The submission lodged by Longview opposes the application in its entirety, and identifies two key concerns:
1. Delays causing further hardship and expense to Longview, and;
 2. Extension of an erroneous variation is a menace to surrounding lands and Ngunguru.

Both submissions have been received within the required notification period, and fall within the bounds of the requirements of Section 96, and are therefore accepted by Council.

- 4.5 The submission by Longview appears to be based on two underpinning issues of concern that historically involve Longview, the Council, and Red Rock Bay Limited. Those two issues are:
- a) The granting by Council of the Section 125 and 127 decision in February 2011 (contained in Attachment 2) on a non-notified basis as it affects Stage 3, without the need for any written approvals from affected parties. It is Longviews contention that they should have been considered as an affected party as part of the processing of that consent and that Council erred in granting that decision. No judicial review has been sought by Longview of that decision to date.
 - b) An application for an enforcement order by Longview against Red Rock Bay Limited and Council requesting compliance with bond requirements imposed as part of Stage 2 of the subdivision for weed and pest control and landscape planting. This matter is still effectively in a mediation process and is yet to be heard or decided on by the Court.
- 4.6 These two concerns appear to underlie Longviews position as stated in their submission as follows:
- “Longview does not object in principal to Red Rock Bay being given an extension of time to effectively ‘get its act together’, so long as that further extension is not squandered. If council were willing to repair the current variation to Stage 3, as is their right under the Resource Management Act, and rectify the issues outlined above then Longview may well see the matter differently.”*

Given the above, the following comments are made in relation to effects of the application.

- 4.7 Firstly, should the application be declined, Stage 3 of the subdivision will lapse. The completion of any physical works (such as access) may or may not then be completed, depending on the whim of the landowner. Any weed and pest control which Longview is concerned about may then be required and undertaken only when someone applies for resource consent (as the District Plan rules currently require) to construct a residential unit on what would remain as Lot 19 DP 374000.
- 4.8 Secondly, and conversely, if the application is granted and the subdivision completed, any earthworks and access will be required to be completed to the required standard within the specified timeframe (ie. before 29 March 2015). However, any weed and pest control will still

only be required and undertaken when someone applies for resource consent to construct a residential unit on what would then be one of the four lots created through completion of Stage 3.

- 4.9 Thirdly, the construction of the access, including all earthworks, cut batters and drainage, is a permitted activity under the District Plan and could currently be carried out and completed outside the subdivision process and in accordance with any Regional Council requirements. I understand that Regional Council staff have previously inspected the works on occasion to check compliance.
- 4.10 Council notified the Section 127 application on a limited basis to surrounding landowners recognising that any further delay in completing the subdivision may prolong the ability to address the weed and pest control, which is of fundamental concern to Longview. However, given the above comments, there is merit in suggesting that allowing the subdivision to be completed does address some of Longviews concerns. The submission appears to accept that proposition in part, noting that Longview does not object *'in principal'* to the extension.
- 4.11 Should the application be granted, the total period from granting to completion for Stage 3 of the subdivision will be 11 years. In many cases, Council has granted consent periods of up to 10 years for subdivisions, with the additional 3 years for depositing – 13 years in total. This suggests the 11 year time period for completing Stage 3 is not unreasonable, particularly where multiple stages are proposed.
- 4.12 Taking the above comments into account, it is considered that any effects associated with the granting of the application for an extension of time will be minor and therefore acceptable.
- 4.13 It is respectfully suggested that the Commissioner does not have the scope to address Longviews request to *'repair the current variation to Stage 3'*. The matter before the Commissioner is confined to an assessment of the extension of time application under Sections 127 and 104. The scope of the application cannot be widened to include any assessment of effects or decisions made on other applications. Longview have previously been advised that a review of the February 2011 decision can only be carried out by way of a judicial review process in the High Court. In addition, Longview has raised questions about the use of Section 128 to review and amend the February 2011 decision. Longview have previously been advised that Council is not in a position to undertake such a review.

5.0 Relevant Policy Statements, Plans or Proposed Plans (section 104(1)(b))

- 5.1 Section 104(1)(b) of the Act sets out that when considering an application for resource consent, Council shall have regard to any relevant provisions of policy statements, or plans or proposed plans. Having regard to this, the relevant statutory documents in this case are addressed below.
- 5.2 At the time of granting consent, the application was considered under both the Transitional and Proposed District Plans. Notably, at that time the proposed Plan specified a 6 hectare lot size as a controlled activity – significant weighting was given to this provision when the application was considered and granted on a non-notified basis.
- 5.3 Since the granting of consent, the District Plan has become operative. The minimum lot size as a controlled activity in the Coastal Countryside Environment is now 20 hectares. Subsequently, the New Zealand Coastal Policy Statement (NZCPS) has been revised, with the 2010 version now in force. At the present time, the proposed Northland Regional Policy Statement ('proposed RPS') has progressed to the point where a decision has been issued and appeals are currently being considered by the Court. As Mr Hood states in paragraph 41 of his statement, the subject site is not defined as being within the Coastal Environment in the proposed RPS, despite being zoned Coastal Countryside Environment in the District Plan.
- 5.4 Mr Hood has identified a number of objectives and policies contained within the Whangarei District Plan – I agree they are relevant provisions in this case. However, I don't agree that the

equivalent provisions in the District Plan as at 2004 should be read as being more restrictive. Those objectives and policies must be read in the context of the change from a 6 hectare minimum lot size to a 20 hectare minimum (controlled activity) lot size.

- 5.5 However, the impact of granting consent to the extension of time to allow an additional 12 months, largely based on the assessment of effects being minor and therefore acceptable, will not in my view be contrary to the current objectives and policies of the District Plan.

6.0 Other Matters (section 104(1)(c))

- 6.1 The residual concerns raised in Longviews submissions have been identified and discussed in the effects assessment under 4.13 above. For the purposes of an assessment they may fall to be considered as Other Matters. However, for the reasons expressed previously, they are not considered to be relevant and reasonably necessary to determine the application.

- 6.2 There are no other matters considered relevant to making an appropriate consideration of this application.

7.0 Part 2 Matters

- 7.1 Part 2 of the Resource Management Act 1991 details the overarching purpose and principles of the Act.

- 7.2 In terms of Part 2 of the Act, the proposed activity must meet the purpose of the Act set out in section 5 which is “*to promote the sustainable management of natural and physical resources.*” Section 5 of the Act is supported by a number of other ancillary principles contained in sections 6, 7 and 8 in Part 2 of the Act that provide decision makers with a set of guidelines that reflect current government policies and ideologies in regards to resource management, and assist in the interpretation of sustainable management. The relevance of these sections to the application is assessed below.

- 7.3 Section 6 of the Act highlights matters of national importance that shall be recognised and provided for in order to achieve the sustainable management purpose of the Act. Given the relatively narrow scope of the application, there are no Section 6 matters that are considered relevant.

- 7.4 Section 7 of the Act identifies eleven other matters to be had regard to in achieving the purposes of the Act. Given the nature of the application, and the contents of the Longview submission, the following are relevant matters:

(b) *The efficient use and development of natural and physical resources:*

(c) *The maintenance and enhancement of amenity values:*

(f) *Maintenance and enhancement of the quality of the environment:*

(g) *Any finite characteristics of natural and physical resources.*

- 7.5 With particular regard to these four clauses, it has been determined previously that granting of the extension of time application will only generate minor effects that are considered to be acceptable. Longviews concerns that largely relate to these four clauses are recognised in the sense that there are long-standing and current issues that they have regarding the manner in which the subdivision has and is being implemented. However, those concerns cannot be directly linked to or addressed by consideration of the current application. In that respect, I generally concur with Mr Hoods conclusions under paragraphs 52 and 53 of his statement.

- 7.6 Section 8 requires that decision makers take into account the principles of the Treaty of Waitangi in managing the use development and protection of natural and physical resources. In respect of this application no issues are raised relating to Section 8 and the principles of the Treaty of Waitangi.

- 7.7 Given the above, it is considered that granting the application for an extension of time is consistent with Part 2 of the Act.

8.0 Conclusion & Recommendation

- 8.1 As a Discretionary Activity, under Section 104B Council as a Consent Authority must determine after having considered all relevant matters under Section 104(1) whether the proposal meets the overarching purpose of the Act as defined within Part 2.
- 8.2 In this case, that discretion is applied to whether an extension of time application can be granted or not. Having considered the application against the relevant provisions of the Act, it is recommended that this application be approved.
- 8.3 It is noted that this report is based on the presumption that the Section 223 and 224 will both be required to be approved by 29 March 2015, and the recommendation below provides for this. However, the applicant will need to confirm that this is what is intended for completeness.

THAT pursuant to sections 127, 104, and 104B of the Resource Management Act 1991, it is recommended that consent be granted to Red Rock Bay Limited (SD0337825.07 P076647.SD) to extend the consent period to give effect to Stage 3 of the subdivision consent. This is on the basis that both the Section 223 approval for Stage 3, and depositing of the subdivision plan for Stage 3 subject to Section 224, shall lapse unless otherwise given effect to by 29th March 2015 as offered by the applicant.

The lapsing date of 29th March 2015 is to be recorded on any Section 224 certificate issued by the Council for completion of Stage 3, in order for Land Information New Zealand to be aware of the effect of that date.

Reasons for the Recommendation:

That pursuant to Section 113 of the Resource Management Act 1991 the reasons for this decision are as follows:

1. Pursuant to Section 104(1)(a) any actual or potential effects on the environment related to granting the extension of time are considered to be acceptable, given that the majority of physical works are already completed and any delay in completion will not create any additional adverse effects that might not otherwise arise if the application were declined.
2. Pursuant to Section 104(1)(b) it is considered that granting consent to the application to extend timeframes is not contrary to the relevant objectives and policies of the Whangarei District Plan.
3. The matter has been considered under Part 2 of the Act and found to be consistent with the purpose and principles of the Act

Advice Notes

1. The applicant shall pay all charges set by Council under Section 36 of the Resource Management Act 1991. The applicant will be advised of the charges as they fall.
2. Section 357B of the Resource Management Act 1991 provides a right of appeal to this decision. Appeals must be in writing, setting out the reasons for the appeal, and lodged with the Environment Court within 15 working days after the decision has been notified to you. Appellants are also required to ensure that a copy of the notice of appeal is served on all other relevant parties.

9.0 Attachments

Attachment 1 – Original Subdivision Consent and Plan for Gollogly

Attachment 2 – Section 125 and 127 decision issued February 2011

Attachment 3 – Section 127 application for Extension of Time

Attachment 4 – Copy of Submissions received

Attachment 5 – Approved Engineering Plans for Stage 3 works

Attachment 6 – Council Practice Note regarding Lapsing of Subdivision Consents