

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 177

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under s120 of the Act
BETWEEN THE CANYON VINEYARD LIMITED
(ENV-2019-CHC-138)
Appellant
AND CENTRAL OTAGO DISTRICT COUNCIL
Respondent

Court: Environment Judge J J M Hassan
Sitting alone pursuant to s279 of the Act

Hearing: In Chambers at Christchurch

Date of Decision: 19 October 2020

Date of Issue: 19 October 2020

**PARTIAL CONSENT ORDER AND
SECTION 116 DETERMINATION (BY CONSENT)**

A: Under s279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

(1) the appeal is allowed to the extent that condition 9 of resource consent RC190110 is amended (as underlined) to read as follows:

9. Prior to the undertaking of any activities authorised in terms of Condition 2 of this consent the consent holder shall upgrade the right of way carriageway between the northern boundary of Lot 9 where it departs from the alignment of the power pylons supporting the voltage transmission line and the entrance of Lot 18 to the Local Access A category road standard in terms of Table 3.2(a) of the Council's July 2008 Addendum to NZS 4404:2004 modified as follows:



- A minimum carriageway top width of 5.5 metres.
- Adequate widening on bends for bus passing.
- Maximum gradient of 16.7% for right of way carriageway provided sections may increase to 17.5% and any exceedances of 16.7% being constructed to a sealed standard.
- Subgrade CBR >7.
- Well bound durable all weather surfacing over pit run base layer.
- Suitably sized culverts.

(2) the appeal otherwise remains extant. A consent order will not issue until such time as the Central Otago District Council informs the court that condition 9 has been satisfied. Directions are made to that effect.

B: Under s116(1) of the Resource Management Act 1991, the Environment Court determines that resource consent RC190110 (as amended by Order A(1) of this decision) shall commence on the date that this determination is issued, subject to the conditions in [13](b).

REASONS

Introduction

[1] This proceeding concerns an appeal by a resource consent applicant, Canyon Vineyard Limited ('Canyon') against part of a decision by the Central Otago District Council ('CODC'). The consent for a proposal to conduct wine tasting, wine sales, restaurant services and hold events at Loop Road, Bendigo was granted. The appeal is against conditions 5 and 9 of the consent. Specifically, Canyon sought that condition 5 be amended to apply only to functions that do not cease before 10.00 a.m. and that condition 9 be deleted.

[2] Bendigo Station Developments Limited ('Bendigo') is the only s274 party to the appeal. Its s274 notice records that it opposes the relief sought.

[3] On 31 July 2020, the parties filed a joint memorandum seeking a consent order as to resolution of the appeal. This proposed amendments to the relevant conditions (and a consequential amendment to condition 6). However, by separate memorandum of counsel of the same date, Bendigo reported that it had concerns about whether condition 9 would be enforced by CODC, such that the required upgrades to the right of



way carriageway would be undertaken before activities authorised under the consent would be commenced.¹ In essence, condition 9 is intended to require the upgrading of the shared right of way between properties “prior to the undertaking of activities authorised by condition 2...”.

[4] Bendigo sought that condition 9 commence under s116(1) of the Resource Management Act 1991 (‘the RMA’) with the remainder of the appeal lying in court subject to the completion of that work. In essence, that was to ensure that the carriageway upgrading is completed prior to any other activities taking place under the consent and to avoid recourse to CODC for enforcement action.

[5] As Bendigo had raised these concerns by separate memorandum, the court issued a Minute, on 9 September 2020, directing that the other parties state their positions on Bendigo’s proposal.

[6] Canyon and CODC responded by confirming that they agreed to Bendigo’s proposal. The essence of the agreed position is:

- (a) condition 9 would be amended, as agreed;
- (b) an order for early commencement of the amended “condition 9” would be made under s116, RMA by consent; and
- (c) the remainder of the appeal would lie with the court until that condition has been satisfied.²

Consideration for early commencement

[7] Section 116 of the RMA provides (relevantly):

116 When a resource consent commences

- (1) ... every resource consent that has been granted commences –
 - (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
 - (b) when the Environment Court determines the appeals or all appellants withdraw their appeals –

¹ Memorandum of counsel on behalf of Bendigo dated 31 July 2020.

² Joint memorandum of counsel dated 16 September 2020 at [2].



unless the resource consent states a later date or a determination of the Environment Court states otherwise.

[8] Relevantly, s116 enables the court to determine that a resource consent that has been granted commences in advance of the determination or withdrawal of the related appeal. While the parties' joint request is for s116 determination for the early commencement of condition 9, I understand the substance of the request is for early commencement of the consent itself on a basis that the only authorised activity is that which condition 9 governs and requires. While s116 is silent as to the scope of the court's discretion in making any early commencement determination, I am satisfied (and it is well-established) that any determination can be made on a conditional basis.³ When considering whether to grant an application under s116, the court must determine:⁴

- (a) whether early commencement of the consent will serve the RMA's purpose as stated in s5, which is to promote the sustainable management of natural and physical resources; and
- (b) whether prejudice would arise from allowing or disallowing early commencement of the application.

[9] Given Canyon's application for resource consent was granted at first instance and with reference to CODC's decision, which evaluated the application against the relevant provisions of the plan and concluded that the proposal was consistent (subject to conditions) with those provisions, I am satisfied the RMA's purpose will be promoted by a determination for the early commencement of the consent on the basis that:

- (a) condition 9 is amended as agreed;
- (b) the consent may be exercised only to the extent that works for the upgrading of the right of way carriageway may be undertaken subject to and in accordance with that amended condition; and
- (c) CODC reports to the court as to the completion of the carriageway upgrade works in accordance with the amended condition 9 as soon as practicable after their completion.

³ For example, in *NCI Packaging (NZ) Ltd v Auckland Council* [2013] NZEnvC 40 at [8] it is observed that the "court is able to authorise a limited exercise of a consent, which is still subject to appeal, provided those parts of the consent that commence do not go to the core of the matter to be determined by the court".

⁴ *Walker v Manukau City Council* C106/99.



[10] Further, as this is an application by consent and the remainder of the appeal is agreed upon, I find there is no prejudice to any party.

Outcome

[11] The determinations and orders herein are made under s279(1), RMA by consent rather than on the merits pursuant to s297. The court understands for present purposes that the parties to the proceedings:

- (a) have executed memoranda requesting those determinations and orders; and
- (b) are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction, and conform to the relevant requirements and objectives of the RMA including, in particular, pt 2.

[12] As the orders and determinations herein are expressed in somewhat different terms than those offered by the parties in their memoranda, I provided a draft of this decision to the parties in advance to give them opportunity to make any comments or submissions. The parties have confirmed they agree with the draft decision.⁵

[13] Therefore:

- (a) the appeal is allowed to the extent that condition 9 of resource consent RC190110 is amended as set out in Order A(1);
- (b) the s116 application for early commencement of resource consent RC190110 is granted and may commence on the date that this determination is issued subject to the following conditions pending further order or determination:
 - i. the consent may be exercised only to the extent that the works for the upgrading of the right of way carriageway as specified in the amended condition 9 may be undertaken; and
 - ii. only subject to and in accordance with that amended condition.
- (c) CODC is directed to file with the court:
 - i. a memorandum of counsel reporting as to the completion of the



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5 Emails on behalf of the appellant and Bendigo received 15 October 2020; and email on behalf of CODC received 15 October 2020.

- carriageway upgrade works in accordance with the amended condition 9 as soon as practicable after their completion;
- ii. an updated and complete set of consent conditions suitable for the issuance of a full consent order (and associated order(s) to cancel the orders in (b) and (d));
- (d) pending further order(s), the appeal remains extant and no further activities authorised under resource consent RC190110 may be undertaken.



J J M Hassan
Environment Judge

