

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAUARA

Decision No. [2021] NZEnvC 003

IN THE MATTER OF

an application for enforcement orders
under s 314 and 316 of the Resource
Management Act 1991 (**RMA**)

BETWEEN

STUART DUNDONALD REID
(ENV-2020-AKL-056)

Applicant

AND

BAY OF PLENTY REGIONAL
COUNCIL

First Respondent

AND

HARBOUR RIDGE
DEVELOPMENTS LIMITED

Second Respondent

Court: Chief Environment Court Judge D A Kirkpatrick
Environment Commissioner S C Myers

Hearing: Tauranga on 24 November 2020
Last case event: Submissions of Mr Reid, dated 7 December 2020

Appearances: S D Reid in person
M H Hill for Bay of Plenty Regional Council
A E Nolan and R E Kettlewell for Harbour Ridge Developments
Limited

Date of Decision: 22 January 2021

Date of Issue: 2 February 2021

DECISION OF THE ENVIRONMENT COURT

A: The application for enforcement orders is dismissed.

REID v BAY OF PLENTY REGIONAL COUNCIL & ORS



B: Costs are reserved.

REASONS

Introduction

[1] Mr Reid applied on 4 June 2020 for enforcement orders against Harbour Ridge Developments Limited (**Harbour Ridge**) and Bay of Plenty Regional Council (**the Council**) to ensure compliance with dust control conditions in Harbour Ridge's resource consent and for earthmoving operations to cease on the property at the eastern end of Goldstone Road, Omokoroa:

... in all winds, gust or squalls exceeding 7 km per hour until the limiting wind strength and effective 24-hour, 7 day a week dust control measures are established, are put in place and enforced by way of financial or other penalty for subsequent non-compliance.¹

[2] Harbour Ridge holds resource consents relating to subdivision and development at its property at Goldstone Road, Omokoroa. Mr Reid lives at Lynley Park, close to and on the north-eastern side of the site. He says that dust from the site has crossed the boundary and resulted in accumulation of dust on neighbouring properties causing more than minor adverse effects.²

[3] The application is opposed by the respondents. The Council submits that Mr Reid has failed to prove any breach of the conditions of consent and that the consent conditions relating to dust management contain a series of controls designed to manage dust generation on site to ensure that dust does not travel beyond the site boundary.³ Harbour Ridge submits that Mr Reid has not established that it is not complying with its consent conditions or creating an offensive or objectionable discharge of dust beyond the boundary of its site.⁴

[4] The site is on the Omokoroa peninsula where Harbour Ridge is developing a

¹ Application for enforcement order, 4 June 2020.

² Applicant's response to hearing materials, Part 2, page 6, version 2.

³ Legal submissions on behalf of the Council, paragraph 42.

⁴ Second respondent's legal submissions in opposition, paragraph 3.

residential subdivision. Earthworks for the Harbour Ridge subdivision began in September 2016 and have been undertaken in five stages. Harbour Ridge are currently working on stages 3, 4 and 5.⁵ The earthworks for stages 4 and 5 cover a total area of 8.4 hectares with a calculated volume of 174,834m³ and with stage 4 to be stabilised and closed prior to stage 5 beginning.⁶ The Omokoroa peninsula has experienced significant growth and development over the last 15 years, and this has accelerated over the last five years.⁷ There are four other earthworks sites in the vicinity that are underway.⁸ The Court undertook a site visit on 23 and 25 November 2020 and viewed the Harbour Ridge site and the other earthworks sites in the vicinity.

Regional Plan rules and consent conditions

[5] The operative Bay of Plenty Regional Air Plan (**Air Plan**) was operative at the time the Harbour Ridge resource consents were granted. It provides as a permitted activity for discharges of contaminants to air that are not subject to any other rule in the Air Plan and are not noxious or dangerous, offensive, or objectionable beyond the boundary of the subject property. Proposed Plan Change 13 (**PC13**) to the Regional Natural Resources Plan will replace the Air Plan. Rule AQ R1 of PC13 provides for:

Any discharge of contaminants into air which is not subject to any other rule in this regional plan and excluding the discharge of dust to air associated with a plantation forestry activity, is a permitted activity provided the following conditions are complied with:

- (a) The discharge must not be noxious or dangerous, offensive or objectionable beyond the boundary of the subject property or into any water body.

[6] The approach taken in both the Air Plan and PC13 is to permit discharges of dust particulate matter associated with earthworks activities provided the dust creation is not noxious or dangerous, offensive or objectionable beyond the site boundary.

⁵ Evidence of Mr Goldstone, paragraph 14.

⁶ S42A officer's report for Stages 4 and 5, page 2.

⁷ Evidence of Mr Goldstone, paragraph 10.

⁸ Agreed map of points of interest provided by parties.

Discharges are controlled via consent conditions to ensure the permitted activity standard in Rule 17 of the Air Plan (and Rule AQ R1 of PC13) could be complied with.⁹

[7] Harbour Ridge holds two resource consents relating to the development at its property at Goldstone Road, Omokoroa. Resource consent RM18-0577 for Stage 3 was granted on 12 December 2018 and resource consent RM19-0409 for Stages 4 and 5 was granted on 17 February 2019. Mr Reid in this application for an enforcement order has focused on concerns with resource consent RM19-0409 for Stages 4 and 5 of the development.¹⁰

[8] Dust management controls associated with earthworks operations are addressed through resource consent conditions 8.1 to 8.10 of RM19-0409 as follows:¹¹

8.1 The consent holder shall adopt a proactive strategy for dust control, specifically by complying with the principles of dust management as set out in the Bay of Plenty Regional Council Guideline No. 2010/01 - Erosion and Sediment Control Guidelines for Land Disturbing Activities or its successor, so as to prevent a dust nuisance from occurring beyond the property boundary.

8.2 The consent holder shall ensure that an adequate supply of water for dust control (sufficient to apply a minimum of five millimeters per day to all exposed areas of the site), and an effective means for applying that quantity of water, is available on site at all times during construction and until such time as the site is fully stabilised.

8.3 The consent holder shall ensure that, at all times, the soil moisture level of exposed areas is sufficient, under prevailing wind conditions, to prevent dust generated by normal earthmoving operations from remaining airborne beyond the boundary of the work site.

8.4 The consent holder shall, in the event that wind conditions render dust control impracticable, ensure that any machinery generating airborne dust ceases to operate until such time as effective dust control can be re-established.

⁹ Evidence of Ms Bosch, paragraph 14.

¹⁰ Application for enforcement order, 4 June 2020.

¹¹ Resource consent RM19-0409 issued 17 February 2020, as varied 11 August 2020. CB 20.

8.5 The consent holder shall ensure that, outside of normal working hours, staff are available on-call to operate the water application system for dust suppression, as required by Bay of Plenty Regional Council compliance staff or following a substantiated public complaint.

8.6 At least two working days before works start, the consent holder shall submit to the Bay of Plenty Regional Council evidence that an adequate supply of water for dust suppression has been secured. The water supply shall be sufficient to be used for dust control as per condition 9.2 until the site is fully stabilised. Works shall not start until written confirmation of a water supply has been provided (see Advice Note 3).

8.7 The consent holder shall ensure that the use of Dustop Dust Suppressant is undertaken in accordance with the following documentation and plans: The Terrane Consultants s127 Application to vary consent conditions; and The Terrane Consultants Plan entitled "Stage 4 Chemical Treatment Plan", drawing 4209-SRP-D, dated July 2020 and referenced as BOPRC Consent Plan CH20-01814/01; and The "Safety Data Sheet: Dustop Dust Suppressant", attached as Appendix 5 to these consent conditions.

8.8 The consent holder shall ensure that the Dustop Dust Suppressant kept on-site is stored, covered and banded, with appropriate signage.

8.9 The consent holder shall ensure that in the event of any spills of the Dustop Dust Suppressant (to land or water) that the Bay of Plenty Regional Council is notified immediately.

8.10 The consent holder shall keep records of all applications of the dust suppressant. Records shall be provided to the Bay of Plenty Regional Council within 48 hours of a request (see Advice Note 3).

[9] These conditions provide for measures to be undertaken by the consent holder to control dust, including water supply, a minimum water application to suppress dust, and for maintenance of enough soil moisture to prevent a dust nuisance beyond the boundary. If wind conditions render dust control impractical, resource condition 8.4 directs that dust generating machinery cease operating.

[10] Conditions 8.7 to 8.10 were added through a variation to the resource consent on 11 August 2020 to allow for the use of Dustop dust suppressant. This provides an additional means of controlling dust. The addition of a dust suppressant was undertaken by the consent holder to provide additional controls following the lodgment of Mr Reid's application for enforcement orders.¹²

Issues

[11] The key issue for the Court to decide on is the adequacy of the management of dust on the Harbour Ridge site, and whether the Applicant has proved that the earthworks activities have breached the conditions of consent and that the effects of dust are offensive or objectionable beyond the boundary of the site.

[12] There are other earthworks sites in the vicinity, so before we can make an order against Harbour Ridge we need to be satisfied that any dust effects Mr Reid is concerned with were caused by earthmoving activities on the Harbour Ridge site rather than from one or more of the other earthworks' sites operating in the vicinity.

Legal framework

[13] Section 15 of the RMA restricts the discharge of contaminants to air as follows:

(2) No person may discharge a contaminant into the air, or into or onto land, from a place or any other source, whether moveable or not, in a manner that contravenes a national environmental standard unless the discharge—

- (a) is expressly allowed by other regulations; or
- (b) is expressly allowed by a resource consent; or
- (c) is an activity allowed by section 20A.

[14] Section 316 of the RMA provides for any person to apply for an enforcement

¹² Evidence of Ms Bosch, paragraphs 24-27.

order of a kind specified in s 314(1)(a)-(d), or s 314(2). The application by Mr Reid did not clearly state which provisions of s 314 he relies on. He clarified that he seeks an enforcement order to ensure compliance with required dust control measures in windy conditions in the conditions of consent RM19-0409 and enforcement of s314(1) (a) and (b):

To force the Council to carry out monitoring, controlling and safeguarding duties under the Act, which will keep a tighter rein on dust generation on the HRD site specifically, and maybe other sites generally.¹³

[15] The scope of an enforcement order is set out in Section 314(1)(a) and (b) and provides that:

(1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:

(a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Environment Court,

(i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); or

(ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:

(b) Require a person to do something that, in the opinion of the Environment Court, is necessary in order to

(i) Ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or

(ii) Avoid, remedy, or mitigate any actual or likely adverse effect on the

¹³ Applicants response to hearing material, page 3 and 6.

environment caused by or on behalf of that person

[16] The scope of the application is therefore whether an order should be made requiring Harbour Ridge to either:

- cease or restrict its operation in certain conditions; and/or
- take certain steps to manage the generation of dust from operations on site.¹⁴

[17] Section 319 sets out the decision-making framework that applies to an application under s 314. It provides that after considering an application for an enforcement order, the Court may, in its discretion, make any appropriate order or refuse an application. It provides as follows:

(1) After considering an application for an enforcement order, the Environment Court may—

- (a) except as provided in subsection (2), make any appropriate order under section 314; or
- (b) refuse the application.

(2) Except as provided in subsection (3), the Environment Court must not make an enforcement order under section 314(1)(a)(ii), (b)(ii), (c), (d)(iv), or (da) against a person if—

(a) that person is acting in accordance with—

- (i) a rule in a plan; or
- (ii) a resource consent; or
- (iii) a designation; and

(b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may

¹⁴ Legal submissions on behalf of the Council, paragraph 14.

be.

(3) The Environment Court may make an enforcement order if—

- (a) the court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval or granting, as the case may be; or
- (b) the person was acting in accordance with a resource consent that has been changed or cancelled under section 314(1)(e).

[18] The Council submitted that the burden of proof that a breach of the consent has occurred rests with Mr Reid, and that an enforcement order should not be made unless Mr Reid has proven, on the balance of probabilities, that the activities of Harbour Ridge:

- Have contravened or are likely to contravene the Act or the Consents;
- Are likely to be noxious, dangerous, offensive or objectionable to such an extent that they have/are likely to have an adverse effect on the environment; and/or
- Have/are likely to cause effects on the environment requiring a remedy.¹⁵

[19] The Council submits that the legal test regarding whether effects are offensive or objectionable, is an objective one based on the ordinary reasonable person and having regard to the community at large, and whether there is sufficient evidence that dust has been generated in sufficient quantities and with enough regularity to objectively meet the standard of being offensive and objectionable to the community at large.¹⁶

National Environmental Standards for Air Quality

[20] While the focus of Mr Reid's application for enforcement order is on

¹⁵ Counsel for the Council legal submissions, paragraph 15.

¹⁶ Nolan, transcript page 75. Counsel for Council legal submissions, paragraph 21.7.

compliance with conditions of consent relating to dust management, he has also raised issues relating to the Regional Council's obligations to monitor discharges under the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 (**NESAQ**).¹⁷ In his affirmation and in his submissions at the hearing Mr Reid continued to raise issues relating to the noxiousness and health effects of dust.

[21] The NESAQ includes air quality limits relating to ambient air quality standards (**AAQS**). Regulation 13 of the NESAQ provides the AAQS which must be met in an airshed, and Schedule 1 of the NESAQ provides a threshold concentration and the number of exceedances allowed. An airshed is defined in the NESAQ as either the whole of a region or a separate part of the region gazetted as a separate airshed. The Bay of Plenty region has two separately gazetted airsheds. Omokoroa is not a separately gazetted airshed and forms part of the wider Bay of Plenty region airshed. Section 15 of the NESAQ requires councils to undertake monitoring of the airshed if it is likely the AAQS will be breached. To prove that a breach of Section 15 of the RMA has occurred would require proof of a discharge of contaminant to air in breach of the NESAQ or a plan rule.¹⁸

[22] The Court heard expert evidence from Mr Iremonger, Science Team Leader (Air, Coastal & Land) at the Bay of Plenty Regional Council, responsible for managing the Council's air quality monitoring. Mr Iremonger has been involved in the establishment of monitoring programmes for the region's two separately gazetted airsheds (Rotorua Airshed and Mt Maunganui Airshed) under the NESAQ.¹⁹ In his evidence he discussed the Council's approach to management of dust, and the requirements of the NESAQ in relation to the Council's monitoring network.

[23] Mr Iremonger explained that the only contaminant potentially relevant to dust is particulate matter less than 10 microns in diameter (**PM₁₀**).²⁰ The focus of NES

¹⁷ Evidence of Mr Iremonger, paragraph 7.

¹⁸ Counsel for the Council legal submissions, paragraph 21.1.

¹⁹ Transcript, 24 November, page 45.

²⁰ Evidence of Mr Iremonger, paragraph 8.

PM₁₀ monitoring in the region has been in large urban airsheds where there are issues related to domestic heating sources and industrial operations. Due to the temporal and spatial nature of earthworks sites, a compliance programme approach is employed by the Council to manage earthworks sites, and this is a common approach taken by other regional councils. Mr Iremonger does not consider that special management is needed at Omokoroa as it is unlikely to be a significant ongoing source of particulate discharges.²¹ He explained to the Court that the circumstances at Omokoroa are considerably different, as it is a greenfields earthworks site, not an industrial site.²²

[24] Mr Iremonger explained that measuring the PM₁₀ component of, and establishment of a NESAQ breach can only be determined by operating appropriate PM₁₀ monitoring instrumentation.²³ It would involve firstly screening monitoring using handheld particulate equipment to provide site related particulate matter information. This could be used to determine if more detailed air quality monitoring is required to determine whether the requirements of Schedule 2 of the NESAQ have been met²⁴. Site specific monitoring of the Harbour Ridge development was offered by the Council but was rejected by Mr Reid.²⁵ Mr Iremonger did not consider that NESAQ Schedule 2 level monitoring would be justified in this situation as the activity can be controlled via consent conditions and compliance assessments.

Evidence from Mr Reid

The Court received and considered a number of pieces of information from Mr Reid attached as exhibits to his affirmation and presented at the hearing. The main information he relies on to assert there is a dust problem and a breach of consents included the following:²⁶

- Log of phone calls from Omokoroa residents to the Council regarding dust

²¹ Evidence of Mr Iremonger paragraph 21.

²² Transcript, 24 November 2020, Page 46.

²³ Evidence of Mr Iremonger paragraph 9.

²⁴ Evidence of Mr Iremonger, paragraphs 33-36.

²⁵ Joint memorandum of parties, 10 September 2020.

²⁶ Mr Reid's Opening submissions, Part 2, version 2, page 1.

problems in the Omokoroa area;²⁷

- Results of two surveys of Linley Park residents, undertaken by Mr Reid; one dated June 2020 and the other undated;²⁸
- Two photographs dated 18 March 2020 of dust on flying bridge of boat recently painted on 16 March 2020, and a photograph dated 14 October 2020 of dust on a boat engine room;²⁹
- Photograph of earthworks on the Harbour Ridge site dated 4 January 2020 with wind speed data from Tauranga Aerodrome Weather Station.³⁰

[25] Mr Reid has lived at Vantage Place, Omokoroa since 25 September 2019.³¹ He explained at the hearing that the accumulation of dust on the paintwork of his boat in March 2019 was the trigger to start his investigations for the application for enforcement order.³²

[26] Mr Reid considered that the information he presented, taken together, validates his assertion that there is no effective dust control on the Harbour Ridge site.³³ He explained that as the Harbour Ridge site is close to his property and that due to the prevailing south-westerly and westerly winds and the volcanic nature of the dust, it is most likely that dust is taken across the boundary.³⁴ He submitted that Council is not establishing measurable guidelines for effective dust control and was concerned that measures of dust control were not working and that the water cart used by Harbour Ridge was not an effective means of watering the site.³⁵ He confirmed that if there had been effective dust control going on and effective watering of the site then dust wouldn't be a problem and that effective dust suppression is needed prior to the beginning of the forthcoming dust season.³⁶

²⁷ Log of phone calls from Omokoroa residents to the Regional Council regarding dust problems in Omokoroa area 18 January to 30 September 2020, CB Vol 2A Item 30.

²⁸ CB Volume 3 Items 40 and 41.

²⁹ CB Vol 3 item 37 page 36.

³⁰ CB Vol 3, item 37, page 26.

³¹ Affirmation of Mr Reid, page 1.

³² Transcript, 24 November 2020, pages 9-10.

³³ Affirmation of Mr Reid, page 4.

³⁴ Transcript, 24 November 2020, page 5.

³⁵ Transcript, 24 November 2020, page 6.

³⁶ Transcript, 24 November 2020, pages 14-15.

[27] Mr Reid presented the results of two residents' surveys that he conducted. The Council submitted that we cannot give weight to these surveys as they have not been conducted objectively and are based on assumptions that the dust experienced by survey respondents was generated from the Harbour Ridge site.³⁷ Counsel for Harbour Ridge submitted that little weight should be given to the survey results as the survey has not been conducted fairly and does not follow criteria for the reliability and admissibility of survey evidence.³⁸

Evidence from the Council and Harbour Ridge

[28] The Court heard evidence from:

- Ms Marlene Bosch, Principal Advisor, Consents at the Council;
- Mr Shane Iremonger, Science Team Leader (Air, Coastal and Land);
- Mr Michael Caldwell, an enforcement officer;
- Mr Brian Goldstone, the sole director and shareholder of Harbour Ridge; and
- Mr Milton Clare, responsible for sales and marketing for Harbour Ridge.

[29] Mr Iremonger discussed the information provided by Mr Reid to support the application for an enforcement order. Mr Iremonger considered that caution should be applied with the approach taken by Mr Reid of extrapolating wind information from a remote site, as wind behavior is complex, and that it is difficult to conclude on the basis of wind direction that there had been a breach of the resource consent. He concluded:

Overall Mr Reid presents a generic approach to what is, on a site basis, a complex interplay of a number of related natural drivers and human activities and hence has limited value to determining if the AAQS will be breached.³⁹

³⁷ Counsel for the Council legal submissions, paragraph 21.9.

³⁸ Counsel for the Second Respondent legal submissions, paragraphs 30 and 31.

³⁹ Evidence of Mr Iremonger, paragraph 28.

[30] Mr Caldwell explained that dust/particulate assessments are undertaken by Council officers as part of proactive monitoring of consent conditions, or in response to complaints in accordance with the FIDOL factors set out in PC 13.⁴⁰ The approach in PC13 is as follows:

To determine if a discharge is offensive or objectionable, the Regional Council will make an overall judgment that considers the FIDOL factors as follows:

Frequency – how often an individual is exposed.

Intensity – the strength or concentration.

Duration – the length of exposure.

Offensiveness/character – the hedonic tone (pleasant, neutral, unpleasant) or type.

Location – the type of land use and nature of human activities in the vicinity of the source.⁴¹

[31] A compliance programme with a tiered approach has been employed by the Regional Council for managing earthwork activities, and this is a common approach taken by regional councils.⁴² Mr Iremonger explained that the procedure undertaken by the Council in response to a dust complaint is to undertake a FIDOL assessment offsite, undertake a 360-degree investigation, and then enter the site to determine or confirm that the source of the dust is on the site.⁴³ Mr Caldwell explained that assessments can consist of visual observations of activities on the site, and will take into consideration wind direction, velocity of wind, a 360-degree assessment of a site to see or negate any other factors that may cause dust from going toward the receptor.⁴⁴ The approach undertaken by Council officers when monitoring earthworks sites and responding to dust complaints is considered by Council to be consistent with Ministry for the Environment Good Practice Guide for Assessing and Managing Dust (**GPG**).⁴⁵

⁴⁰ Evidence of Mr Caldwell, paragraph 11, appended in schedule to evidence.

⁴¹ PC13, pages 22-23.

⁴² Evidence of Mr Iremonger, paragraph 15.

⁴³ Evidence of Mr Iremonger, paragraph 24.

⁴⁴ Evidence of Mr Caldwell, paragraph 16.

⁴⁵ Evidence of Mr Iremonger, paragraph 23. CB12.

[32] We heard that Council officers have regularly monitored the site since the consents were granted and that five scheduled compliance monitoring inspections have been undertaken in relation to the 2019 consent since February 2020. Since 4 January 2019 the Council received 19 complaints from members of the public concerning incidents where dust particulate matter has allegedly been generated from the Harbour Ridge site.⁴⁶ One complaint resulted in direction by the Council to cease works at the Harbour Ridge site on 21 January 2019, together with other sites in the vicinity, when the earthworks operations on the site could not control dust movement due to the wind conditions.⁴⁷ We also heard about a complaint from a member of the public on 3 January 2019 which was investigated by a Council officer, during the Christmas period when there were strong winds. Mr Clare told us that he was on duty during that period putting out sprinkler pods and was working all day on 4 January to undertake watering and control dust when the measures were not working.⁴⁸

[33] Dust management is generally provided for in the conditions of earthworks consents to ensure that offensiveness and objectionable effects do not occur beyond the site boundary. The conditions in these consents follow standard practice for earthwork consents and require dust management in accordance with the GPG and the Earthworks and Sediment Control Guidelines.⁴⁹ The consent conditions are considered by Council to be appropriate to manage dust discharges and to ensure dust nuisance will not occur beyond the property boundary.⁵⁰

[34] As explained by Ms Bosch, the appropriateness of the dust mitigation measures proposed for a site are assessed as part of earthworks consent applications, with the s42A report assessing the plans, policies, receiving environment, sensitive receptors like residential areas and imposes consent conditions.⁵¹ The s42A report in this case assessed the availability of water for the Harbour Ridge site as 165m³ of water per day required for the maximum exposed area of 3.3ha.⁵²

⁴⁶ Evidence of Mr Caldwell, paragraph 32.

⁴⁷ Transcript, 24 November 2020, pages 58-66.

⁴⁸ Transcript, 24 November 2020, page 94.

⁴⁹ Evidence of Ms Bosch, paragraph 12.8.

⁵⁰ Evidence of Ms Bosch, paragraph 12.8.

⁵¹ Transcript, 24 November 2020, pages 32-36.

⁵² s42A officer's report, page 7.

[35] The dust control measures typically used on earthworks sites were described by Mr Caldwell as being water application, limiting the size of areas exposed and reducing the amount of vehicle movements in exposed areas.⁵³ Drone flight analysis of the Harbour Ridge site was undertaken by the Council on 1 February 2019 and 29 January 2020 to assess if the exposed area of the earthworks site was within the parameters of the consent conditions.⁵⁴ Earthworks have been undertaken in stages to confine the area of soil exposed at any time⁵⁵ and soil has been processed so that lighter material is handled when it has a higher moisture content in the morning before heavier soils are processed.⁵⁶ Completed earthworks have been stabilised with grass seed and hay mulch, and hay mulch has also used on areas not being worked on for a while.⁵⁷

[36] We asked the Council if a smaller hectarage of area exposed would assist with managing dust on the site. Ms Bosch explained that staging of earthworks and the hectarage open are two of the tools used to control dust, with water volume and quantity being the limiting factor to the size of area exposed. The area of soil exposure has been reduced, with the first consent granted in 2018 allowing 4ha to be open at a time and the consent granted in 2019 reducing this to 3ha. Depending on weather, it is intended to have most of the earthworks completed by the end of the end of the 2021 earthworks season.⁵⁸ Harbour Ridge need the amount of area allowed for to finish this season, and a smaller area would lengthen the project.⁵⁹

[37] We also heard from Mr Goldstone that a winter resource consent for earthworks in May to September 2020 allowed Harbour Ridge to undertake some of the earthworks in the wetter winter season when dust was less of a problem.⁶⁰

⁵³ Transcript, 24 November 2020, page 51.

⁵⁴ Caldwell para 26 and CB26 and 27.

⁵⁵ Goldstone para 34.

⁵⁶ Goldstone para 40 and 41.

⁵⁷ Goldstone para 37.

⁵⁸ Goldstone para 15.

⁵⁹ Transcript, 24 November 2020, page 77.

⁶⁰ Goldstone para 38.

[38] Vehicles and machinery are required to stay on tracks that are well watered. The main road has been completed through the site and this will further mitigate the potential for dust this summer through vehicle movements.⁶¹

[39] Water application is the most common dust mitigation method, with dust suppressants used in higher risk sandy soils.⁶² Mr Goldstone explained that they have a 10,000 litre water cart as well as a backup water cart on site to apply water⁶³ and there is a water main through the whole property providing access to additional water. The dust risk of stockpiles is managed by regularly applying water using the water carts and sprinklers. Harbour Ridge has brought in an additional water tanker and has obtained consent to apply dust suppressant to the site. The use of the dust suppressant provides an additional means to control dust and this was undertaken by the consent holder to provide additional controls for Mr Reid following lodgment of his application for enforcement orders.⁶⁴

Evaluation

[40] The Court was presented with a variety of information from Mr Reid in support of his application. We are not satisfied, however, that this information provides proof that dust has been offensive or objectionable beyond the boundary of the Harbour Ridge site. We are also not satisfied that there is evidence to warrant altering the resource consent conditions or the Council's approach to compliance monitoring of the site.

[41] The information presented by Mr Reid is largely non-site specific, relies on assumptions and extrapolations, and was not reliable as evidence to establish there had been a breach of the resource consent conditions, or a breach of the NESAQ. Mr Reid did not provide any evidence from an air quality expert qualified or experienced in assessing the effects of dust.

⁶¹ Goldstone para 47, 50.

⁶² Bosch para 12.9.

⁶³ Goldstone para 55.

⁶⁴ Planning evidence, Bosch para 28.

[42] The most definitive and site-specific evidence from Mr Reid that dust could have come from the Harbour Ridge site were the photographs taken on 18 March 2020 of dust on the new paintwork on the boat on his property in Lynley Park. We consider that while dust could have crossed the boundary from the Harbour Ridge site, there are several development sites at Omokoroa that could also be sources of dust. On our site visit we observed that the dust control measures for earthworks at the Harbour Ridge site, including the availability of water tanks and the use of grass and mulching, looked to be much better managed than other developments underway in the vicinity. We understand that the prevailing wind is from the west and south-west, however this does not rule out that winds also come from other directions and that dust could have been from other sources.

[43] If Mr Reid were to provide sufficient empirical evidence in the future of a dust problem, then the outcome might be different. We expect the Council to continue its compliance monitoring of the site particularly over the summer months and in windy conditions, including requiring work at the site and other sites in the vicinity to cease if there is a risk of airborne dust beyond the boundary. The use of the dust suppressant and the additional water supply measures introduced by Harbour Ridge look to have been effective, and these practices should continue.

Conclusion

[44] We conclude that an enforcement order should not be made against Harbour Ridge or the Bay of Plenty Regional Council.

[45] Any application by Harbour Ridge or the Council for costs must be made within 15 working days of the issuing of this decision. Mr Reid may respond within a further 10 working days.

For the Court:



D A Kirkpatrick
Chief Environment Court Judge

