

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision No. [2023] NZEnvC 262

IN THE MATTER

of an application for an interim
enforcement order or enforcement
order under ss 316 and 320 of the
Resource Management Act 1991

BETWEEN

PUKETOTARA LODGE LIMITED

(ENV-2022-AKL-113)

Applicant

AND

BLUEGUM GOSPEL HALL TRUST

Respondent

Court: Environment Judge L J Semple
Environment Commissioner I Buchanan

Hearing: at Auckland 29 September 2023 and AVL 20 October 2023

Last case event: 20 October 2023

Appearances: S Ryan with S Thomson (29 September 2023) for the Applicant
R Bartlett with E Greensmith-West for the Respondent

Date of Decision: 5 December 2023

Date of Issue: 5 December 2023

DECISION OF THE ENVIRONMENT COURT

A: The application is declined.

PUKETOTARA LODGE LIMITED v BLUEGUM GOSPEL HALL TRUST



B: Costs are reserved. Any application for costs should be made within 10 working days of the date of this decision. Any party may reply within a further 10 working days. Any response to matters raised for the first time in the reply may be made within a further 5 working days.

REASONS

Introduction

[1] On 18 May 2022, Puketotara Lodge Ltd (the Applicant) applied to the Court for a without notice interim enforcement order in relation to activities, including the establishment of a sealed carpark, on an adjacent property owned by Bluegum Gospel Hall Trust (the Respondent).

[2] The enforcement order sought to require the Respondent to cease all works involved in sealing the carpark until further notice of the Court or until a new resource consent for such works had been obtained. The application was based on the grounds that the activity contravened a resource consent authorising the activity (2150305-RMALUC (the consent)) and would have adverse effects through increased flooding and pollution of the property downstream from a proposed stormwater discharge.

[3] The consent was granted by the Far North District Council (the Council) on 5 June 2015. This consent authorises the construction of a gospel hall and associated carpark at 25 Bluegum Road, Kerikeri.

[4] Following a judicial conference with the parties on 20 May 2022, the Court placed a hold on proceedings¹ to allow time for the Council and the parties to exchange information and further discuss the issues involved. The application was set down for hearing on 9 June 2022. This hearing was adjourned by the Court² to allow further discussion and court-facilitated expert conferencing to occur.

¹ Minute dated 20 May 2022.

² Minute dated 9 June 2022.

[5] Expert conferencing took place on 28 June and 4 July 2022, after which the Court issued an interim enforcement order on 8 July 2022.³

[6] In a memorandum to the Court dated 27 September 2022 the Council advised the Court that its evaluation of the Respondent's technical information provided following the expert conference had led it to conclude that the conditions of the resource consent relevant to stormwater management had been met.

[7] Further facilitated expert conferencing took place on 8 and 23 November 2022 to consider the additional information provided by the Respondent's engineer, Mr Kumar and attended by the Applicant's engineer, Ms Rhynd, and the Council's engineer Ms Mishra. Subsequent to this, the Court rescinded the interim enforcement order by consent⁴ and invited the Applicant to file an amended application.

[8] On 1 February 2023, the Applicant filed a second amended application for an enforcement order (second application) seeking an upgrade of the design of the stormwater management system associated with the carpark development in order for resource consent conditions to be met. It is this second application that is the subject of these proceedings.

[9] The Council's position was confirmed by the issue of a Code of Compliance certificate for construction at the site and notice that conditions of consent had been met. By way of memorandum to the Court, dated 5 July 2023, the Council confirmed that it considered compliance with the resource consent conditions had been demonstrated by the Respondent. On that basis, the Council sought and was granted leave to not participate any further in the proceedings.

[10] On 16 June 2023 the Applicant provided the Court with a notice of motion for joinder of the Council in relation to these proceedings. This was opposed by the

³ Minute dated 8 July 2022.

⁴ Direction dated 21 December 2022.

Respondent⁵ and by the Council.⁶ The application was declined⁷ on the grounds, amongst others, that the proceedings are enforcement proceedings against Bluegum Gospel Hall Trust, that the Council decision-making is not at issue and no relief is being sought from the Council.

[11] The hearing of the second application took place on 29 September 2023, adjourned for completion on 20 October 2023.

The second application

[12] The second application is for the Court to direct by way of an enforcement order that the following additional/upgrade works to the stormwater pond on the Respondent's property be undertaken:

1. Puketotara Lodge Limited (the applicant) hereby applies for enforcement orders to require the respondent to undertake works to the stormwater pond on the Property to upgrade the current design to address:
 - a) Quantity of flow based on meeting pre-development flow rates, including:
 - i) Forebay at inlets,
 - ii) Soakage trenches at base of the pond,
 - iii) 200m³ volume below the invert of the outlet pipe.
 - b) Quality of runoff to meet permitted activity status, including:
 - i) Forebay at inlets, with planting to mimic wetland like features,
 - ii) Soakage trenches at base of the pond,
 - iii) 200m³ volume below the invert of the outlet pipe.
 - c) Alternatively, or in addition to the orders sought in (a) & (b), upsize the culvert under the accessway to the neighbouring Puketotara Lodge.

⁵ Respondent memorandum dated 4 July 2023.

⁶ Council memorandum dated 5 July 2023.

⁷ *Puketotara Lodge Ltd v Bluegum Gospel Hall Trust* [2023] NZEnvC 151.

- d) Such further or other relief as the court thinks fit to address outcomes from the expert witness caucusing undertaken on 28 June 2022 & 4 July 2022, and 8 & 23 November 2022.

[13] The Applicant argues that the purpose of the works proposed is to ensure that the stormwater pond is compliant with the intent of Conditions 6 and 8 of the consent:

Condition 6 states:

Prior to undertaking pond construction on site the consent holder shall submit for the approval of Council's duly delegated officer a report and plan of the stormwater detention/retention pond, a flow attenuated outflow to limit run-off from the site to the pre-development levels for rainfall events up to those with a 2 % AEP.

Condition 8 states:

Prior to undertaking pond construction on site, the consent holder shall provide evidence that the stormwater discharge complies with the Permitted Activity status in the RWSP or, alternatively provide evidence that a discharge consent, has been obtained from the Northland Regional Council for the discharge of stormwater.

[14] Although the conditions refer on their face simply to providing information to the Council, the Applicant argues that the conditions must be intended to ensure run off from the site is managed to pre-development levels. Their position is that the works proposed would achieve this.

[15] The Applicant has filed a draft enforcement order for the Court to consider which contains the relief set out in [12], but counsel for the Applicant also submitted that there is scope for the Court to impose alternative orders.

[16] Counsel submitted:⁸

An alternative formulation could provide prescriptions which ensure run-off levels do not exceed predevelopment levels (including a design event for the 2 % AEP rainfall event) and or conditions requiring maintenance, and compliance on an ongoing basis with the permitted activity conditions prescribed in the RWSP.

We will address this later in our evaluation.

⁸ Applicant submissions in reply dated 20 October 2023 at [20].

The Law

[17] Section 316 RMA provides relevantly:

- (1) Any person may at any time apply to the Environment Court in the prescribed form for an enforcement order of a kind specified in paragraphs (a) to (d) of section 314(1)
- ...
- (4) Any person who applies for an enforcement order under any provision of this section may request that the enforcement order be made on any terms and conditions permitted by section 314(3) or section 314(4).

[18] Section 314 provides relevantly:

- (1) An enforcement order is an order made under section 319 by the Environment Court that may do any 1 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 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
 - ...
 - (b) require a person to do something that, in the opinion of the 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 environment caused by or on behalf of that person:
 - (c) require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person:
 - ...
- (3) Except as provided in section 319(2), an enforcement order may be made on such terms and conditions as the Environment Court thinks fit
- ...

[19] Section 319 provides, relevantly:

- (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 ... (b)(ii), (c) ... against a person if -
 - (a) that person is acting in accordance with-

...

 - (ii) a resource consent; ...

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 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; ...

The Applicant's Position

[20] The Applicant argues that the Court can and should take into account issues related to the effectiveness of the consent granted in managing the likely ongoing adverse effects of the activity on the Applicant's property. In so doing, the Court should require the Respondent "to do something" to ensure that conditions of consent are met in the long-term. This may either be by redesign of the stormwater facility or requiring long-term compliance with discharge quantity and quality standards.

[21] The Applicant does not accept that the information provided by the Respondent establishes compliance with conditions of the consent. The defence of

“acting in accordance with ... a resource consent” under s 319(2)(a)(ii) is therefore not, on the Applicant’s submission, available to the Respondent. However, even if the consent is found to be complied with, the Applicant submits that it is still appropriate for the Court to make the orders sought as there has been a “change in circumstances” since the consent was granted, consistent with s 319(3)(a). In this regard the Applicant argues that this is because the conditions were poorly drafted, plans were not provided prior to construction and downstream adverse effects were not anticipated.

The Respondent’s Position

[22] The Respondent acknowledges that full design and operational information was not provided to the Council prior to construction of the stormwater facility as required by Conditions 6 and 8 of the consent. However, it considers this defect was remedied by the provision of this information to the Council prior to the second expert conference of engineers. It says that the information provided establishes substantive compliance with Conditions 6 and 8 and that no redesign of the facility is required.

[23] It also considers operational efficiency to ensure long-term compliance with the consent standards is provided by adoption of an appropriate operations and maintenance plan by the Respondent.

[24] As pre-development flows will not be exceeded, no adverse downstream effects can be attributed to the operation of the stormwater facility. It submits that the consent is complied with and there is no change in circumstances from when consent was granted in this regard.

The Council’s Position

[25] The Council’s expert engineer Ms Mishra accepted, based on the information provided to the second expert conference, that:⁹

⁹ JWS 8 and 23 November 2022 at [2].

Provided there is a regular programme of operation and maintenance as described by PK then the PK design should satisfy Condition 6.

[26] This remains the Council position confirmed in its memorandum dated 5 July 2023.

The Court's Jurisdiction

[27] It is common ground that these enforcement order proceedings are not in any way a judicial review of the Council decision regarding compliance of the stormwater facility design with Conditions 6 and 8 of the consent. The Environment Court does not have the inherent jurisdiction to review and quash administrative decisions if a material error of law is found.

[28] Declarations are also confined under s 310 RMA and do not include the ability to review and declare whether an administrative decision was appropriate. This was reinforced by the Environment Court in *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council*.¹⁰

[69] For those reasons, in my judgment the scope of *any other matter* under s 310(h) of the RMA is not unlimited and does not provide a basis, on its own, for the Court to judicially review an administrative action under the RMA.

...

[79] I do not consider that the Environment Court has a general supervisory jurisdiction to review the administration of a local authority. It has no inherent jurisdiction. Even while sharing the High Court's confidence in the effectiveness of declarations made in relation to public bodies, it is doubtful that a power of declaration is or can be truly supervisory of administrative action involving a statutory power of decisions where that power is not fully supported by the suite of review powers that include the powers to make orders quashing, requiring or prohibiting such action.

[29] As such the Court's jurisdiction here is confined to considering compliance with the consent conditions, or, if the consent conditions are found to be complied with, whether there are adverse effects arising which require the Court's intervention.

¹⁰ *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180.

[30] Consideration also needs to be given to counsel for the Applicant's submissions in reply that the Court is not limited to the terms and conditions sought by the parties. The reference here is to the absence of any requirement on the Respondent to meet the design standards of Conditions 6 and 8 over the long-term. To some extent this overlaps with [1(d)] of the second application as set out above in that a key issue for the Applicant's expert engineer in the JWS Report relates to the likelihood of inadequate maintenance in perpetuity. We will examine these matters through the statutory tests in s 319 on the evidence.

Evidence

[31] Before we move to examining the live questions, it is necessary to note our disquiet with the parties' approach to the somewhat iterative filing of evidence up to and indeed beyond the first hearing date.

[32] The amended directions dated 30 May 2023 required all evidence to be filed by 16 June 2023. Despite this direction, the Court received additional evidence from the Respondent on 14 August 2023 and from the Applicant on 15 September 2023. In granting leave retrospectively,¹¹ the Court expressed its displeasure with the parties for filing additional evidence without prior leave to do so.

[33] Leave was then sought by the Respondent to file supplementary reply evidence in relation to the 15 September 2023 Applicant's affidavits and this evidence was filed on 27 September 2023, two days prior to the scheduled hearing.

[34] Considerable additional evidence was adduced at the hearing, particularly from Ms Rhynd for the Applicant and Mr Kumar for the Respondent.

[35] By way of memorandum dated 16 October 2023, the Applicant sought leave to file additional evidence from Ms Rhynd and the owner of Puketotara Lodge, Mr Levers. On 17 October 2023, the Respondent sought leave to file supplementary reply evidence from the Respondent's project manager, Mr Simpkin, and Mr Kumar.

¹¹ Minute dated 21 September 2023.

[36] The Court declined the applications to allow further evidence of Ms Rhynd, Mr Levers, and Mr Kumar on the grounds that these witnesses had given their evidence before the Court and no opportunity was available to appropriately test the supplementary evidence.¹² The supplementary evidence of Mr Simpkin was accepted as this witness had yet to be heard.

[37] The Court reconvened on 20 October.

[38] The practice followed by the parties in these proceedings to simply file and serve additional evidence without providing the Court with the opportunity to consider whether it was appropriate in the circumstances does little to assist the Court in discharging its obligations to conduct a fair and effective hearing process. To have this occur almost to the eve of the hearing and then to continue after witnesses had been heard by the Court has not been helpful.

Stormwater Flows

[39] We have considered what paragraph [1(d)] of the second application describes as “outcomes” arising from the expert witness conferences. The outcome of the first conference in June 2022 was the identification of gaps in the inconclusive information available to the experts. This was rectified by the Respondent prior to the second conference in November 2022.

[40] The only “outcome” we can deduce from the November joint witness statement is Ms Rhynd’s concern that, without adequate maintenance to remove silt build-up in the base of the pond, the requirement to limit run off from the site to pre-development levels would not be met without additional protection, such as forebays and a trench. Ms Rhynd was also of the view that stormwater run off from the carpark required pre-treatment for the discharge from the pond to meet water quality standards. We understood Ms Rhynd’s concern to be that without additional protection and the likelihood that the maintenance regime would be ineffective in the long-term, there was real potential for adverse environmental effects downstream

¹² Minute dated 18 October 2023.

from the stormwater pond.

[41] In response to those issues, Mr Kumar described his reasoning in designing a dry pond attenuation system to take advantage of the infiltration capacity of the soil below the pond and a winter ground water level measured at 3.5 m below the base of the pond. This design allows for exfiltration of water from the pond to the groundwater system when stormwater is present in the pond.

[42] Mr Kumar presented modelling evidence for pre- and post-development flows based on an average 20 cm per hour exfiltration rate of water through the base of the pond. This modelled outcome was, in his opinion, verified by post-construction monitoring of actual performance and shows that, for the rainfall events modelled, there is a generally a reduction in outflows post-development.

[43] It was not until the reconvened hearing on 20 October 2023, when Mr Kumar was recalled to further explain soakage results, that we obtained a full understanding of how the overall system is designed to work. Our understanding from the evidence is:

- there is 205 m³ of water storage available before the outlet pipe operates;
- during the period that any water is in the pond exfiltration will occur to groundwater;
- it is only when the volume of water entering the pond exceeds the rate of exfiltration that the water level will rise and at times reach the invert level of the pipe;
- the diameter of the outlet pipe (317 mm) is designed to allow no more than the pre-development flow generated by a 2 % AEP event;
- any input flow above this will be stored in the pond (700 m³ capacity) until the level of the concrete spillway is reached when flows in excess of the pre-development 2 % AEP may be discharged;

- following a large rainfall event any water stored above the outlet pipe will drain through this pipe until the invert level is reached, then water levels will continue to drop through exfiltration to groundwater until the pond is dry.

[44] The spillway level would only be reached in an event well above the 2 % AEP and Mr Kumar's evidence was that had not been reached during the past winter, the wettest on record for Northland. Mr Kumar described in response to questioning how the exfiltration rates vary according to the level of water in the pond due to pressure provided by the additional head achieved as water depth increases.

[45] The Applicant's evidence centred on the issue of the likelihood or otherwise of an appropriate maintenance schedule for the removal of silt from the pond resulting in design exfiltration rates being achieved in the long-term. To this end, the Applicant submitted a series of photographs through the evidence of the owner of Puketotara Lodge, Mr Levers, purporting to show that the pond was not working as designed as water remained in the pond over a period of time in September 2023 and that remained the case up to the date of hearing.¹³

[46] In response, Mr Kumar described the implementation of landscape work around the pond in July, resulting in an unanticipated addition of silt from these workings entering the pond. This resulted in the retention of water shown in the photographs provided in Mr Levers' evidence. The pond had been pumped dry and silt removed from the base in mid-September 2023 and silt logs installed around the pond to prevent any further leaching of silt from the surrounding landscaping works to the pond.

[47] A series of photographs from early October provided by project manager Mr Simpkin¹⁴ appear to show pond water levels declining as expected following rainfall events resulting in a dry pond after a period with no rainfall.

¹³ Exhibit E.

¹⁴ Simpkin further supplementary affidavit dated 17 October 2023.

[48] As a consequence of its experience with the unexpected addition of silt from the landscaping works and the recorded outcome of a return to predicted exfiltration following removal of the silt, the Respondent has been provided with a clear indicator that any retention of standing water during periods without rainfall is a signal that an immediate maintenance response is necessary. We were advised that the Respondent has adopted the maintenance schedule as recommended by Mr Kumar which outlines this.

[49] The unusual circumstances described above and the response to this demonstrate the Respondent's willingness and ability to carry out silt removal to maintain the performance of the system. We find that to be an inherent component of the design that the Respondent has developed and provided to the Council in compliance with Condition 6. Should a circumstance arise where more water than expected is being retained in the pond during periods with no rainfall, we were provided with no evidence to suggest that the Respondent would not take the same action as it did in response to the recorded September 2023 situation. It is accepted that if appropriate maintenance is not undertaken the pond will not operate as intended and an adverse effect may ensue. However, there is no evidence this has occurred to date.

[50] With the maintenance schedule in place, and the ability to detect and respond to unexpected circumstances, Mr Kumar's evidence was that the system as designed will limit stormwater discharge from the Respondent's property to no more than that experienced prior to development of the sealed carpark. We were provided with no evidence that these flows had been exceeded since the carpark had been sealed.

Water Quality

[51] Notwithstanding that the management of stormwater discharges is the responsibility of the Northland Regional Council, the consent conditions include Condition 8 requiring evidence that the stormwater discharge complies with the Regional Water and Soil Plan (RWSP) or that a discharge consent had been obtained from the Northland Regional Council.

[52] Setting aside the timing related to providing this evidence, which we will address later, we rely on the evidence of Mr Kumar and Mr Simpkin that post-development stormwater samples taken during the 9 May and 18 May 2023 rainfall events and analysed by Hills Laboratory show that all water quality parameters are considerably below the permitted activity standards allowed by the RWSP. For the useful indicator parameter of total suspended solids (TSS) the 9 May 2023 sample shows a level of 3 grams per cubic metre in the pond discharge, while the 18 May sample records 18 grams per cubic metre. The permitted standard is 100 grams per cubic metre.

[53] Ms Rhynd, in addressing the water quality sampling evidence, contends that the pond inflow results from one sample are not indicative of water quality run off from the carpark in the future. While not providing any evidence of the likely long-term water quality, Ms Rhynd continues throughout her evidence to assert that pre-treatment of the discharge from the pond is necessary to meet the RWSP standards for permitted activities. In the absence of evidence to the contrary, and from the evidence we do have, we can only conclude that the discharge meets the water quality standards by some margin and consequently no discharge consent is required. Should this not be the case in the future, it is the responsibility of the Regional Council to address.

[54] In response to questions from the Court, Ms Rhynd acknowledged that the inflow and outflow would meet the TSS standards.¹⁵ Ms Rhynd went on to suggest that the design was not resilient enough to guarantee the measured contaminant levels all of the time and to meet the standards long-term.

[55] In cross-examination by Mr Bartlett, Ms Rhynd agreed that the quality of water entering the pond met the guidelines (which we assume means the RWSP standards).

[56] Stormwater quality standards are set within Regional Plans to protect receiving environments from unacceptable adverse effects. In this case, recorded water quality parameters are well within the standards set in the RWSP for the Northland region.

¹⁵ NOE 29 September 2023 at 40, line 28 and at 41, line 4.

Accessway Culvert

[57] The second application advances in the alternative, or in addition, to the other design features sought that the Respondent be directed to upsize the culvert under the accessway to Puketotara Lodge. Ms Rhynd asserts that the establishment of the carpark and other impervious surfaces on the Respondent's site will increase the post-development flow of stormwater reaching this culvert. This assertion is premised on her contention that appropriate long-term maintenance of the pond is required to achieve the pond's intended design outcomes (attenuation of flows to pre-development levels) and there is no guarantee that this maintenance will occur. Ms Rhynd suggests the upsizing of the culvert as an alternative solution to upgrading the pond design.¹⁶

[58] Mr Kumar agrees that the culvert is inadequate and has always been so. He agrees with the upgrade proposal advanced by Ms Rhynd but does not consider that the need for this upgrade can be attributed to the exercise of the consent, as stormwater run off from the site will be mitigated by the pond facility.

[59] The Council, in an email to Mr Levers from Mr Stuart Hofstetter, building compliance officer, dated 28 July 2021,¹⁷ confirmed that the Council position was that even if the Respondent was willing to assist with upgrading the accessway pipe "[t]hey have no obligation to do this and Council cannot enforce this".

[60] Ms Rhynd contends that the upgrade of the culvert should have been considered in the design of the facility and required by the Council in order to prevent downstream problems if the stormwater device failed.¹⁸

[61] This matter was explored at length with Mr Levers in cross-examination where it was established that there had been some discussion in 2021 between the Applicant and Respondent on upgrading the culvert. Mr Levers' concerns were focused on the

¹⁶ Rhynd further affidavit dated 31 March 2023.

¹⁷ Attached to Affidavit of Mr Donald Lawrence Cottle, Trustee for the Respondent Trust, in Opposition to the Application for Enforcement Orders, dated 1 May 2023.

¹⁸ NOE 29 September 2023 at 18, line 25.

concentration of stormwater from the Respondent's site reaching the accessway culvert via the outlet pipe from the pond. This, in his view, was causing flooding in the accessway and downstream damage to his property. It was later established that the Respondent's site comprises approximately 25 per cent of the catchment leading to the accessway pipe.¹⁹

[62] We accept the Respondent's evidence. The design and operation of the stormwater system, including a maintenance programme, mitigates any increase in stormwater flows from the installed impervious surfaces of the buildings and carpark. This mitigation ensures that stormwater flows from the site reaching the accessway culvert will be no greater than pre-development flows.

Timing – Compliance with Conditions 6 and 8

[63] As noted earlier, compliance with the standards set in Conditions 6 and 8 of the consent required plans and evidence to be submitted to the Council for approval prior to construction commencing. It is our understanding from the evidence that a building consent application, including the design of the stormwater facility was lodged with the Council in January 2021. This building consent was approved in March 2021.

[64] The application for building consent did not include any reports providing information of how Conditions 6 and 8 of the original resource consent would be achieved. This information deficit was identified at the first expert witness conference and subsequently rectified prior to the second conference.

[65] Mr Bartlett acknowledged that the required information in relation to the stormwater pond had not been provided until after construction had commenced.²⁰ Following receipt of this information, the Council confirmed that the standards in Conditions 6 and 8 of the consent had been met as noted earlier. Mr Bartlett submitted "[t]he provision of drawings, data, and calculations post-construction does

¹⁹ NOE 20 October 2023 at 7, line 5.

²⁰ Respondent submissions dated 27 September 2023 at [7].

not negate the adequacy of the current design and the evidence in support of it”.²¹

[66] We concur and it is this same evidence that is now in front of us for these proceedings. The fact that it was not available to the Council prior to construction as required by the conditions of consent is clearly a technical breach of the consent but one we now consider to be resolved.

Evaluation

[67] The Applicant’s case centres on the premise that the conditions of the resource consent authorising the installation of the stormwater management facility are ineffective and that they do not provide assurance that the design standards for the facility will be met in the long-term. Mr Ryan submitted in closing that this assurance could be achieved either by requiring the amended design that is sought by the order or directing that the design standards for stormwater flow and quality be met in perpetuity and a maintenance programme set in place to achieve this.

[68] Mr Ryan submitted that the Court has wide powers under s 314(1)(b)(ii) to issue an order requiring the Respondent to “do something” that in the opinion of the Court was necessary to manage actual or likely adverse effects caused by the Respondent. In his submission, the Court was not restricted to only considering the actions sought by the enforcement order applied for. This alternative proposition from the Applicant is dependent on its interpretation of the provisions of s 314(1)(b)(ii) that was first advanced in closing submissions. As such there was no opportunity for us to hear from the Respondent on this interpretation.

[69] Mr Bartlett briefly submitted, following Mr Ryan’s closing, that if the Court was to consider such a proposal we would first need to hear from the Respondent and possibly also the Council. We agree with that submission although as outlined we have not found it necessary to consider alternative options.

²¹ Respondent submissions dated 27 September 2023 at [9].

[70] As noted earlier, the evidence in these proceedings establishes to our satisfaction that adverse effects from the stormwater run off from the subject site are mitigated by the design and operation of the pond and adherence to the water quality standards set in the conditions of consent. The Respondent has demonstrated by its actions the ability and commitment to maintain the facility and address any unanticipated build-up of silt that hinders performance to the extent that potential downstream adverse effects are fully mitigated.

Section 319

[71] The Council advised the Respondent that conditions of consent 2150305-RMALUC have been met. As noted earlier and accepted by the parties, the Court has no jurisdiction to review that administrative decision. We have also found that the Respondent is acting in accordance with its resource consent.

[72] That consent required a stormwater management facility to be designed which met requirements for both the quantity and quality of discharge flows (Conditions 6 and 8 respectively). In imposing these conditions, the Council has recognised that stormwater flows and quality parameters have potential adverse effects downstream from the discharge. These are the same effects in respect of which the order is sought in these proceedings and were expressly recognised in granting the consent (see s 319(2)(b)).

[73] With respect to s 319(3)(a), the time elapsed since granting of consent is not advanced as an issue for the parties beyond the suggestion by Mr Ryan in closing submissions that the manner in which stormwater run off is managed by the Council has progressed over time and that the order being sought is somehow consistent with that change. We see little merit in this proposition.

[74] Mr Ryan in opening submitted that:

The evidence demonstrates that there has been a change in circumstances following the granting of consent, namely:

- (a) The circumstances allow the Court to recognise – that from the outset – the conditions were poorly drafted.

- (b) Council never received adequate plans prior to pond construction which dealt with RMA issues, when it anticipated that it would; and
- (c) the continuing adverse effects on land downstream were not anticipated and did not exist at the time the resource consent was granted.

[75] Mr Bartlett responded in opening submissions that:

- with respect to point (a), the Court had no jurisdiction to inquire into as these proceedings are not a judicial review;
- with respect to point (b), the design is compliant with the consent conditions, notwithstanding that the information necessary to confirm this was not provided prior to construction of the stormwater pond; and
- with respect to point (c), stormwater has always flowed from the subject site to the accessway and has not increased since the granting of the consent.

[76] We concur with Mr Bartlett in this regard. Issues of the effectiveness of conditions and the timing of information have been considered earlier in this decision. We find that neither of these constitute a material change of circumstances.

[77] Likewise, we have already noted that potential adverse effects from the alteration of land use on the subject site resulting in increased stormwater run off were recognised by the Council in granting the consent. We were provided with no evidence that adverse effects attributable to the discharge of stormwater from the Respondent's property have occurred since the development of the site and the construction of the stormwater management facility which were not anticipated at the time the consent was granted.

[78] Mr Levers' evidence (related to the flows he observed and photographed) does not establish that the volume of stormwater reaching the accessway from the stormwater facility is any greater than what had occurred under comparable rain events prior to the development of the Respondent's site or what was considered by the Council in granting the consent. We find no change in circumstances is

demonstrated.

Costs

[79] Costs are reserved. Any application for costs should be made within 10 working days of the date of this decision. Any party may reply within a further 10 working days. Any response to matters raised for the first time in the reply may be made within a further 5 working days.



L J Semple

Environment Judge



I Buchanan

Environment Commissioner

