

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2022] NZEnvC 5

IN THE MATTER of the Resource Management Act 1991

AND an application for declarations under s311 and an application for an enforcement order under s316

BETWEEN NORTHLAKE INVESTMENTS LIMITED

(ENV-2021-CHC-119 and ENV-2021-CHC-120)

Applicant

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Court: Environment Judge J J M Hassan
Sitting alone under s309 of the Act

Hearing: at Queenstown on 20 December 2021

Appearances: A A Arthur-Young and K L Gunnell for the applicant
J Campbell and A H Balme for the respondent

Last case event: 20 December 2021

Date of Decision: 20 December 2021

Date of Issue: 31 January 2022

INTERIM ORAL DECISION OF THE ENVIRONMENT COURT
Interpretation of Conditions 11 and 4 of the subdivision consent



REASONS

Introduction

[1] The following is a written record of my oral decision in this matter. It contains corrections to minor errors or misquotations which do not affect the rationale for, or outcome of, the decision.

[2] Northlake Investments Limited ('NIL') is a land development company. On a priority basis, it seeks declarations and an enforcement order under ss 311 and 316, RMA,¹ concerning how Queenstown Lakes District Council ('QLDC') is approaching its statutory responsibilities in the administration of resource consents for a new residential area of Wānaka, known as Northlake. In essence, NIL is concerned that QLDC is acting unreasonably and unlawfully and this is delaying and stymying its ability to progress the development.

[3] Northlake is a growing residential suburb near to the northern shores of Lake Wānaka. Residential development of the land commenced in 2015, following a change of zoning under the District Plan from the 'Rural' to Northlake Special Zone ('NSZ'). It is now well-advanced in becoming a residential suburb.²

[4] Under the NSZ rules, residential development must be according to an 'outline development plan' ('ODP') consent and related subdivision and land use consents. The rules allow for development staging. In 2016, NIL secured its first ODP consent (for the first 15 stages, 'Stages 1-15 ODP consent') and subdivision consents for the first three stages. Development has now progressed to Stages 16, for which NIL has secured:

- (a) land use consent (RM210419) for the ODP, issued on 17 June 2021;

¹ Resource Management Act 1991.

² Although I did not refer to this orally, there is an adjacent developing residential suburb called Hikuwai that I refer to later.

- (b) land use consent (RM200889) for a water supply reservoir, issued on 1 December 2020; and
- (c) subdivision consent (RM210637), issued on 19 August 2021 ('Stage 16 Subdivision Consent').

Conditions 11 and 4

[5] Issues centre in particular on the proper interpretation of Condition 11 of the Stage 16 Subdivision Consent, and in particular the following parts of that condition:

- 11. Prior to commencing works on the site, the consent holder shall obtain 'Engineering Review and Acceptance' from the Queenstown Lakes District Council for development works to be undertaken and information requirements specified below. The application shall include all development items listed below unless a 'partial' review approach has been approved in writing by the Manager of Resource Management Engineering at Council. The 'Engineering Review and Acceptance' application(s) shall be submitted to the Manager of Resource Management Engineering at Council for review, prior to acceptance being issued. At Council's discretion, specific designs may be subject to a Peer Review, organised by the Council at the applicant's cost. The 'Engineering Review and Acceptance' application(s) shall include copies of all specifications, calculations, design plans and Schedule 1A design certificates as is considered by Council to be both necessary and adequate, in accordance with Condition (4), to detail the following requirements:

...

- c) The provision of a stormwater collection and disposal system which shall provide both primary and secondary protection for future development within Lots 386-393 & 441-487, in accordance with Council's standards and connection policy. This shall include:

...

- (ii) Details demonstrating that the existing downstream stormwater infrastructure has been designed to accommodate stormwater run-off from the development during both the 5% and 1% AEP storm events, in accordance with Council's standards. In the event that any upgrades are required, details shall be provided of the necessary upgrades.

[6] Also of relevance is Condition 4 of the Stage 16 Subdivision Consent as follows:

- 4. All engineering works shall be carried out in accordance with the Queenstown Lakes District Council's policies and standards, being QLDC's Land Development and Subdivision Code of Practice adopted on 8th October 2020 and subsequent amendments to that document up to the date of issue of any resource consent.

*Note: The current standards are available on Council's website via the following link:
<https://www.qldc.govt.nz>*

The application

[7] Under s311, RMA, NIL seeks declarations to the following effect:

- (a) Condition 11 of resource consent RM210637 (i.e. the Stage 16 Subdivision Consent) does not provide QLDC with the discretion to refuse to issue an Engineering Review and Acceptance ('Engineering Acceptance'), where an Engineering Acceptance application is compliant with the specifications and requirements of Condition 11 ('Declaration A'); and
- (b) QLDC's failure to issue an Engineering Acceptance for Catchment A of the Northlake development in accordance with Condition 11 of the Stage 16 Subdivision Consent within 45 working days, following receipt of a compliant Engineering Acceptance application, contravenes section 21 of the RMA ('Declaration B').

[8] Under s316, RMA, NIL seeks a related enforcement order within the terms of s314(1)(b)(i) to require QLDC to urgently issue it an Engineering Acceptance.

Procedural matters

[9] Prior to the hearing commencement, I invited counsel to respond to the proposition that it would be in the interests of both parties to undertake without prejudice, court-facilitated alternative dispute resolution in parallel with their participation in the hearing of the application. That was particularly in view of two related matters extending beyond the legal issues at the heart of the application. One is the wider public interest and commercial issues involved in a present impasse in progressing a large partially-complete residential subdivision. A further consideration is the potential conflict of interest, or appearance of that, in the fact that QLDC is, at the same time as administering the consent at issue, subject to abatement notice proceedings issued by Otago Regional Council for alleged RMA breach and environmental damage (erosion in a DoC reserve) associated with discharges of stormwater, including from the Site.

[10] I signalled that, if the parties would seek to take up the opportunity of facilitated ADR, Commissioner Mabin (who has pre-read the evidence) would be available for those purposes and the hearing would then proceed judge-alone.

[11] Following a short recess, counsel jointly requested that this arrangement be put in place. Commissioner Mabin was, therefore, discharged from hearing the matter and will assist in facilitation of those ADR discussions.

[12] Indications are that ADR will be progressed in January 2022, following which the parties will report back with any outcomes and related directions. In the meantime, counsel requests that I consider and make findings, by way of a preliminary ruling, on the proper interpretation of Conditions 11 and 4.

Statutory framework

[13] I do that within the statutory framework that applies to my determination of the application for declarations and an enforcement order. The law is well-settled and the matter in contention can be readily addressed.

[14] Unlike the Higher Courts, the Environment Court has no inherent declaratory powers. Rather, the court's powers are in s310, RMA, and are relevantly as to:

- (a) the existence of any function, power, right, or duty under the RMA (s310(a));
- (b) whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene the RMA (s310(c)); and
- (c) any other issue or matter relating to the interpretation, administration, and enforcement of the RMA (s310(h)).

[15] I accept QLDC's submissions that, beyond those parameters, the court cannot make declarations, for instance as to claims of breaches of the general law, fiduciary duties or the like. As counsel also note, the power is discretionary but any declaration requires justification both in an evidential sense (as to essential matters of fact) and gravity of the matter (i.e. that a declaration is in any case justified).³

[16] Declaration A pertains to the matters in s310(a) and (c) and Declaration B to the matters in s310(c) and (h).

[17] In its notice of opposition, QLDC submits that Condition 11 of the Stage 16 Subdivision Consent cannot impose an obligation on QLDC. Counsel for NIL

³ QLDC submissions, dated 14 December 2021, referring to *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37 at [5], *Hay and McNab v Waitaki District Council* [2011] NZEnvC 160 and *Berryman v Waitakere City Council* A46/98, p 5.

disputes that.

[18] After hearing from counsel, I gave an oral indication of why, subject to closing submissions, I was satisfied that I have jurisdiction.

[19] Section 21, RMA prescribes:

Every person who exercises or carries out functions, powers, or duties, or is required to do anything, under this Act for which no time limits are prescribed shall do so as promptly as is reasonable in the circumstances.

[20] Section 31 prescribes a related function on QLDC as to the control of any actual or potential effects of the use, development, or protection of land. Condition 11 operates as a means for the exercise of that function. Under that condition, development cannot proceed without completing QLDC certification. I indicated my present view that, in those terms, QLDC is exercising a statutory power of administering and enforcing its consent such as to allow for jurisdiction.

[21] I find the duty in s21 pertains to QLDC's exercise of that s31 function and, hence, can be the subject of an application for declaratory and enforcement order relief.

[22] An enforcement order can, *inter alia*, require a person to do something the court considers necessary to ensure compliance by or on behalf of that person with the RMA (s314(1)(b)(i)). In principle, at least, that can encompass something found necessary to address any breach of RMA duty pertaining to a local authority's functions in the administration of resource consents.

[23] Therefore, I am satisfied the court has jurisdiction to entertain the application for each declaration and the order.

[24] In any case, counsel indicated they were satisfied that I could continue to address the preliminary issue of consent condition interpretation whilst reserving parties' positions in closing submissions.

[25] For completeness, the court is not confined to accepting or rejecting a declaration application. Within the parameters of s310, the court has a broad discretion. It may make the declaration(s) sought or on a modified basis, make other declaration(s) under s310 that it considers necessary or desirable or decline to make any declaration (s313).

The issues concerning the interpretation of Condition 11

[26] The issues pertaining to the applications for Declarations A and B and the order are interrelated. By Minute prior to the hearing, the court directed the parties to confer and set out their agreed list of issues by way of brief questions. This was helpfully set out in a joint memorandum dated 20 December 2021.

[27] I have already addressed the issue as to jurisdiction and now address the remaining agreed issues concerning the interpretation of Condition 11 (and, implicitly, related Condition 4).

[28] Questions both parties seek be answered are:

- (a) what does Condition 11 require? In particular, does it:
 - (i) simply require NIL to secure a form of certification of documentation submitted; or
 - (ii) also set a standard that NIL must duly demonstrate it would meet?

[29] Related questions NIL seeks be answered are:

- (a) does Condition 11 require NIL to demonstrate something more than it already has?
- (b) what does the reference to ‘upgrades’ in Condition 11(c)(ii) mean?
- (c) does Condition 11(c) enable QLDC to reassess the ability of its network to accommodate stormwater from Stage 16?

[30] Depending on how those questions are answered, the parties agree there are further issues as to whether declarations and/or an order should be issued. I can leave these aside from this preliminary ruling.

What does Condition 11 require?

Submissions

[31] In this decision, I make some preliminary findings on this question in light of the testing of evidence in the hearing and legal submissions. I will report more fully on that evidence and submissions in due course.

[32] For NIL, counsel submit that:

- (a) Condition 11 is to be interpreted in view of the extensive effects' assessment and design work already undertaken, as part of the planning for and consenting of Northlake;
- (b) the peer review work QLDC has commissioned, purportedly under the auspice of Condition 11, illegitimately extends to matters at a much broader catchment scale, including in light of abatement notice proceedings issued against it by ORC; and
- (c) QLDC cannot require NIL to resolve infrastructure deficiencies outside its boundaries.

[33] Counsel for QLDC point out that Stage 16 extends outside the area initially consented (Stages 1–15). Counsel refer to the explicitly indicative nature of the information that NIL submitted in its consent application and which QLDC relied on in granting consent. Bearing in mind that Stage 16 relies on downstream infrastructure to accommodate its stormwater, counsel submit that it is, therefore, “entirely legitimate” for QLDC to enquire into the adequacy or otherwise of that network to accommodate that stormwater. Counsel characterise as compelling the evidence that “the downstream network is not sufficiently accommodating existing stormwater runoff, noting the abatement notice recently issued to QLDC”.

Counsel emphasise, however, that QLDC:

is not seeking to solve any issues it may have with its own infrastructure as [NIL] suggests. Rather, it made a conclusion based on information provided by [NIL] at the subdivision stage that the stormwater of the proposed development would be able to be managed consistently with the standard required by the Council's Code. It is now ensuring that the detailed design of the stormwater disposal system continues to achieve that outcome.

[34] In speaking to their respective submissions, counsel for NIL and QLDC analyse the wording of Condition 11 and related Condition 4 in detail.

[35] For NIL, Ms Arthur-Young highlights the focus in Condition 11 on development work to be undertaken. Counsel note that review is limited to specific designs of that proposed development work. She points to the nine listed categories of development work referred to, including stormwater collection and disposal. She notes the two inter-related dimensions of that (in sub-conditions (c)(i) and (c)(ii)). The emphasis of sub-condition (c)(i) is on connection to QLDC's reticulated stormwater system. The emphasis in (c)(ii) is on required details to demonstrate the design of the downstream system to accommodate the specified storm event flows from the development, meaning Stage 16. Counsel submit that 'downstream' means downstream of Stage 16 and refers to that part of QLDC's downstream network immediately beyond the boundaries of Stage 16. Counsel points out that a pond near to that boundary was constructed as part of Stage 16.

[36] Ms Arthur-Young discusses the difficulties inherent in QLDC's interpretation of Condition 11, particularly in the fact that it would require NIL to upgrade parts of a network beyond its control.

[37] For QLDC, Ms Campbell submits that the appropriate point downstream is at a stormwater outlet shown in Attachment A (p 347) to the affidavit of Mr Wallace. She explains that QLDC owns the network to this point and, hence, could allow NIL access to it for any necessary upgrade purposes.

[38] Ms Campbell initially submitted that the entire network to this outlet point was serving Northlake rather than also serving neighbouring Hikuwai. However, Mr Wallace clarified that the section of the stormwater network from Outlet Road to the outlet point was in fact built by Hikuwai, not NIL. This was in order to achieve a separation of Hikuwai's stormwater flows from NIL's. Prior to this diversion and piping work, flows from Northlake simply discharged to a watercourse beyond Outlet Road.

[39] It was Mr Wallace's opinion that QLDC's downstream network continued beyond this outlet point down the rip rap and rockabilly in the gully to where erosion is occurring close to the Clutha River. I understand his analysis is on a premise that most of the flows through this section derive from Northlake, with the Hikuwai contribution being usually minor due to on-site attenuation. However, he acknowledged in questioning that QLDC was continuing its investigations into the causes of erosion and possible solutions to it.

[40] QLDC accepts that matters concerning the abatement notice issued against it by ORC for alleged unlawful discharge and erosion are not to be confused with the matters presently in issue.

[41] That provides somewhat of a potted summary of submissions heard orally prior to my delivery of this preliminary oral interpretation.

Interpretation

[42] Condition 11 is in part a type of certification condition to which established authority applies. I need go only so far, at this stage, to indicate that certification does not delegate to officers substantive approval of the subdivision and development activities for which consent was sought (that approval already having been made by QLDC decision for which QLDC is now *functus officio*).

[43] Condition 11 also specifies an environmental standard which operates as a condition precedent to the capacity to undertake specified activities under the consent.

[44] The standard is essentially to require NIL to document to QLDC's reasonable satisfaction that 'existing downstream stormwater infrastructure' has been designed to be efficacious in two related respects:

- (a) to accommodate stormwater run-off from the development during both the 5% and 1% AEP storm events; and
- (b) to accord with QLDC's standards.

[45] Condition 4 sets a related standard for that design that effectively colours what Condition 11 intends. That is that the design is to accord, in performance terms, with QLDC's Land Development and Subdivision Code of Practice adopted on 8 October 2020 and subsequent amendments ('COP').

[46] The standards in the COP apply subject to what the conditions in the consent otherwise may specify or allow.

[47] The words 'designed to accommodate' are to be understood in their ordinary sense. That is, that the design of downstream infrastructure must be demonstrated to have sufficient space to cater for the development's stormwater runoff during the specified 5% and 1% AEP storm events. In particular, that requires calculation to be undertaken of how much capacity remains, over and above existing other demands on that infrastructure, in order to conclude that it will remain sufficient to cater for the additional flows from Stage 16 during such storm events. If proper calculation reveals there would not be sufficient capacity for the additional storm event flows from Stage 16, NIL would be required to detail any necessary upgrades.

[48] On the face of the condition, there is some uncertainty as to what is meant by ‘existing downstream stormwater infrastructure’.

[49] In such circumstances, statutory interpretation principles apply to enable recourse to legitimate background materials. The consent decision itself throws little, if any, light on this matter. Rather, it reflects a commonly minimalist practice in non-notified delegated consent decisions of this kind. That minimalism in reasoning and findings however is indicative that the consenting officers essentially relied on what the applicant advanced in the application and AEE and what the reporting QLDC engineer recommended. The decision records acceptance of that engineer’s advice, including his observations:

Previous stages of Northlake have been supported by extensive reporting regarding stormwater management, in which the Northlake Special Zone was broadly split into two catchments referred to as catchment A (which drains to the Northlake Drive Swale) and catchment B (which drains to the north). The majority of the proposed subdivision lies within catchment A, with a smaller area being within catchment B.

The overall stormwater strategy for catchment A is that runoff flows through a series of attenuation ponds and the Northlake Driveway Swale before being discharged under Outlet Road. I am satisfied that the downstream infrastructure was designed to attenuate the flows from the proposed subdivision for up to a 1% AEP storm event (i.e. in accordance with Council’s standards), and I make no recommendations in this regard.

[50] That contrasts with his more qualified opinion for allotments to discharge to Catchment B, including as to the need to have a condition requiring it to be demonstrated that there is sufficient capacity in the existing pond.

[51] Accepting that wording of the condition itself is not so confined, nevertheless, it was imposed in full acceptance of the engineer's opinion on these matters, including his relative lack of concern regarding the efficacy of Catchment A arrangements.

[52] Under the NSZ regime, the staged consenting of Northlake has involved a preliminary ODP consent followed by the substantive subdivision consent for relevant stages (including the subject Stage 16). The ODP is a curious beast in that it does not, itself, appear to allow any activity restricted by the RMA (i.e. whether a land use under s9 or subdivision under s11). Rather, it is effectively a creature whose meaning only arises once the substantive subdivision consent is issued, in essence as a layer of related regulatory approval for what that substantive consent authorises.

[53] This two-phase consenting regime throws some light on the proper interpretation of existing downstream stormwater infrastructure.

[54] I interpret 'downstream stormwater infrastructure' to refer to QLDC infrastructure from the boundary of Stage 16 through to where it ultimately was designed to terminate for the Northlake development, prior to the intervention of the adjacent Hikuwai works. In a practical sense, that extends now to effectively where the infrastructure passes under Outlet Road.

[55] Specifically, I do not accept the interpretation offered by Mr Wallace that it should extend further to where water discharges near to the Clutha River.

[56] At the time QDLC consented Hikuwai, it was in a position to properly appraise itself of the efficacy of the modified arrangements then put in place, including their design suitability and capacity to receive upstream flows from NIL and other development, when built out.

Directions

[57] Since delivering my oral decision, the parties undertook mediation and, on 21 January 2022, filed a reporting memorandum. I now direct the parties to file a further reporting memorandum (including any proposed timetabling directions) by **Friday 4 February 2022.**

For the court



J J M Hassan
Environment Judge

