



**AGENDA FOR AN ORDINARY MEETING OF A HEARING BY COMMISSIONER TO BE HELD  
IN THE CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN, WAITAKERE CITY,  
ON FRIDAY, 6 AUGUST 2004, COMMENCING AT 9.30 AM.**

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**NOTIFIED APPLICATION FOR RESOURCE CONSENT UNDER SECTION 125 AND 127 OF  
THE RESOURCE MANAGEMENT ACT 1991 BY ROSS & GAYLE BRITTEN TO ESTABLISH  
A MODEL RAILWAY AND BOTANICAL GARDEN AT 19 CHURCH STREET, SWANSON**

**WAITAKERE WARD**

**RMA 20040857**

**N.B.** This report sets out the advice of Council staff to the Independent Commissioner on the environmental issues raised by the application for resource consent. It is not the decision of the Commissioner. The decision will be made after the Commissioner has considered the application, the submissions, and any evidence provided at the Hearing.

**1.0 INTRODUCTION AND RECOMMENDATION**

**1.1 Nature of the Application**

The applicants hold a resource consent to establish a model railway and botanical garden. Much of the project has been completed. The consent lapsed in August 2003, and the applicants are now seeking an extension of time in which to complete the project. A further three years is sought.

In addition, the applicants have requested the cancellation of condition 11 of the resource consent. That condition requires payment of a financial contribution towards road upgrading works.

*A1-A30* A copy of the application are attached at pages A1 to A30 in the Attachments supplement.

**1.2 Resource Management Issues Raised**

The Resource Management Act limits the scope of the matters to be considered when determining an application for extension of time for the implementation of a resource consent. Notably, an application of this nature does not provide an opportunity to revisit the environmental effects that might arise as a result of implementing the original consent.

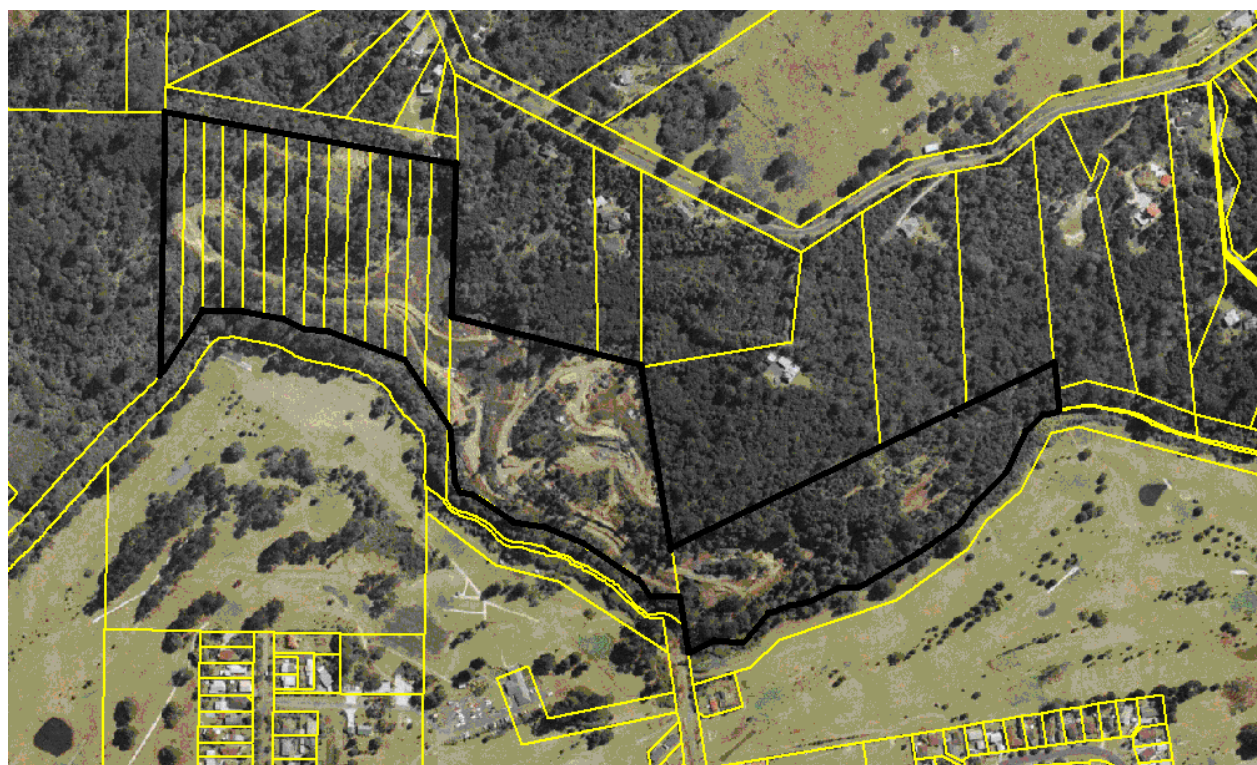
A request for cancellation of a condition of consent can only be accepted where a change in circumstances has occurred that would render the condition unnecessary or inappropriate.

**1.3 Planner's Recommendation**

The planner who has prepared this report recommends that, subject to any contrary or additional evidence submitted at the Hearing, consent be granted to the application to extend the time within which the consent can be implemented for a further three years.

In addition, it is recommended that the request for cancellation of condition 11 be granted in part.

## 2.0 LOCATION PLAN



Location: 19 Church Street, Swanson  
Legal Description: Lot 1 DP 57548, Pt Allot 174 SO 42, and Lots 28-40 DP 21080  
Human Environment: Foothills Environment  
Natural Area: General, Managed, and Protected Natural Areas  
Landscape Elements: None

## 3.0 APPLICATION

### 3.1 Proposal

The applicants hold a lapsed resource consent to establish and operate a model railway and botanical gardens on their property at 19 Church Street, Swanson. The project is partially complete, and a further three years is sought to allow sufficient time for the construction phase to be finished and for operation of the facility to commence.

The scale model locomotive would operate on a track of approximately two kilometres in length, laid in a loop formation within the site. Two small stations would provide stopping points for the train, to encourage people to wander through the various parts of the property. Substantial landscaping would be established to provide an attractive garden setting, including the development of a waterfall that would provide a central feature within the site. Two tunnels would be constructed to provide interest for train passengers, and to deal with difficulties imposed by some of the steeper topography on the property. A building proposed for the eastern part of the site would provide refreshments and souvenirs.

Access to the facility would be from Church Street, with an internal road network and parking areas being provided to cater for visitors' vehicles. The internal roads would also provide a means of gaining access to the railway track and gardens for maintenance purposes.

Creation of the railway embankment has required substantial earthworks, in order to ensure a grade that is level enough to successfully operate the locomotive. These earthworks have been most extensive on the western part of the property, where a couple of gully features have been filled and re-contoured. There is no definitive estimate of the volume of fill material that has been deposited on the site, although engineering plans submitted with the current application indicate that a further 67,000m<sup>3</sup> is required to achieve finished contours. This equates to approximately 93,800m<sup>3</sup> of loose material prior to compaction and placement, which is used to calculate truck movements to the site.

The applicants are also seeking the cancellation of a condition of the existing resource consent which imposes a requirement to pay a financial contribution of \$45,000 towards the upgrading of Church Street.

### 3.2 History

The current application constitutes the latest stage in a long and controversial history of development activities on this site.

Earthworks and vegetation clearance associated with this project commenced in the late 1980's. At that time, the former District Plan allowed such activities to be undertaken over much of the applicants' site without the need for any form of resource consent. However, those development works were undertaken in order to facilitate the proposed model railway, which did require resource consent.

An application was subsequently lodged, and was granted by Council on 26 May 1994. Although work continued to be undertaken on the site in reliance on that consent, the scale of the project and the relatively slow progress combined to ensure that the resource consent lapsed in 1996 without the project being completed.

A further resource consent application was lodged, this time required also in respect of the provisions of the Proposed District Plan, which had been publicly notified in October 1995. The Proposed Plan contained a more restrictive regime in relation to protection of the natural environment. The application was publicly notified and a hearing was held before an Independent Commissioner, David Johnston.

*A31-A45* Consent was granted on 2 September 1996, subject to a number of conditions. That resource consent is generally referred to as the 'Johnston consent'. A copy of the decision is attached at pages A31 to A45 in the Attachments supplement.

The applicants subsequently lodged an appeal with the Environment Court in relation to condition 11 of the Johnston consent. This condition required the payment of a road upgrading contribution, specifically towards the cost of kerb and channelling and footpath construction within Church Street. On appeal, the Court confirmed the condition (albeit slightly modified) in a decision released on 17 August 1998.

### 4.0 THE SITE AND NEIGHBOURHOOD

The subject site is located on a southern slope that rises from the Swanson Stream towards the Crows Road ridge. The site overlooks the Redwood Park Golf Course. Access to the property is gained from the end of Church Street, where the road passes over a culvert crossing of the Swanson Stream.

The site comprises 13.3866 hectares, currently held in 15 separate titles. Thirteen of the sites are long narrow contiguous lots varying in area from 3,622 m<sup>2</sup> to 5,898m<sup>2</sup>. The balance of the land, generally at the centre and eastern end of the property, is in two larger lots.

Much of the site is vegetated with a mixture of native and exotic trees. The original contours of the property have been substantially modified through earthworks and clean fill operations that have been conducted over a number of years.

Adjoining land uses are predominantly rural-residential in nature, although Church Street is developed with housing at a typical urban density.

## 5.0 ISSUES IDENTIFIED THROUGH THE SUBMISSION PROCESS

The application was publicly notified on 29 April 2004. A total of 65 submissions were received within the statutory period - 44 submissions in support of the application, and 21 submissions in opposition.

Copies of the submissions are bound in a separate volume that will be available at the hearing, although it can be provided to parties in advance of the hearing on request. A map showing the location of the Church Street submitters will be provided at the hearing.

### 5.1 Submissions

The following submissions were received:

	Name	Address	Oppose / Support
1.	L and R Wylie	9 Church Street, Swanson	O
2.	JF Creemers	38 Crows Road, Swanson	S
3.	M Courtney	PO Box 20001 Glen Eden	S
4.	SR Wright	21 Beach Road, Te Atatu	S
5.	T Courtney	58 Milan Drive, Glen Eden	S
6.	CR Gyde	203 Royal Road, Massey	S
7.	M Taylor	2/17 Sunnyside Road, Henderson	S
8.	S Katipa	32 Tawavale Crescent, Glenfield	S
9.	S Coleman	176 Macrocarpa Place, Ranui	S
10.	J George	79A Browns Road, Manurewa	S
11.	K Abernethy	1/146 Prince Regent Drive, Half Moon Bay	S
12.	P and I Pascoe	Hunua Road, Papakura	S
13.	P Restall	26 Kirton Crescent, Manurewa	S
14.	S Abernethy	144A Old Wairoa Road, Papakura	S
15.	DC Abernethy	RD4 Eggleton Road	S
16.	P Greehan	6 Kellett Road, Swanson	S
17.	A Eagle	79 Rangeview Road, Henderson	S
18.	Redwood Park Golf Club Inc	PO Box 95 142, Swanson	O
19.	Swanson Residents & Ratepayers Association Inc	PO Box 95 012, Swanson	O
20.	A Gough	109 Caton Road, Waitakere	S
21.	C Riggans	2/122 Parkhurst Road, Parakai	S
22.	C Vranjes	300 Glengarry Road, Glen Eden	S
23.	K Pengelly	35 Hogarth Rise, West Harbour	S

	Name	Address	Oppose / Support
24.	B Palensky	41 Leo Street, Glen Eden	S
25.	CJ Jones	39 Kamara Road, Glen Eden	S
26.	M Denton	11 Nicolas Avenue, Glen Eden	S
27.	J Vranjes	300 Glengarry Road, Glen Eden	S
28.	J Hardwick	11 Patons Road, Howick	S
29.	J Hinton	PO Box 21560, Henderson	S
30.	Barney	156 Metcalf Road, Ranui	S
31.	R Hinton	PO Box 21560, Henderson	S
32.	J Puhipi	10 Chislehurst Street, Henderson	S
33.	B Paki	14B Pinotage Place, Henderson	S
34.	W Leef	160 Rangitoto Road, Papatoetoe	S
35.	M Hakaraia	34 Potter Avenue, Owairaka	S
36.	MC Barton	11 Church Street, Swanson	S
37.	MK Ardern	5 Church Street, Swanson	O
38.	R and M Third	20A Church Street, Swanson	O
39.	G Hinton	PO Box 21560, Henderson	S
40.	S Hinton	PO Box 21560, Henderson	S
41.	C Hinton	PO Box 21560, Henderson	S
42.	R Hinton	PO Box 21560, Henderson	S
43.	H Hinton	PO Box 21560, Henderson	S
44.	MM Moore	20 Church Street, Swanson	O
45.	J Berry	5 Coulter Road, Swanson	O
46.	M Dyhhuis	26 Rimu Road, Waitatarua	S
47.	A Delaat	26 Rimu Road, Waitatarua	S
48.	GJ and VJ Adam	14 Church Street, Swanson	O
49.	V Burgess	24 Swanson Oaks, Swanson	O
50.	K Adam	8 Church Street, Swanson	O
51.	M Adam	10 Church Street, Swanson	O
52.	CA Adam	10 Church Street, Swanson	O
53.	Royal Forest & Bird Protection Society - Waitakere Branch	PO Box 45144, Te Atatu Peninsula	O
54.	JA Adam	12 Church Street, Swanson	O
55.	B Wells	15 Church Street, Swanson	O
56.	S and G Heaslip	18 Church Street, Swanson	O
57.	M and J Reed	5A Church Street, Swanson	O
58.	LR and SA Rooney	44 Crows Road, Swanson	O
59.	M Clarke and D Walker	17 Church Street, Swanson	O
60.	Mr and Mrs Gosshawk	13 Church Street, Swanson	O

	Name	Address	Oppose / Support
61.	I Hutchinson	PO Box 310, Kumeu	O
62.	W Young	16 Palmer Avenue, Glen Eden	S
63.	P Bain	15A Muscat Place, Henderson	S
64.	J Dicks	68 Rauhuia Crescent, Parau	S
65.	MacClures Timber	Swanson Road, Henderson	S

The main concerns expressed by the submitters in opposition can be summarised as follows:

- Truck movements create a nuisance due to noise, vibration, dust and mud on local roads.
- Truck movements create a safety hazard for pedestrians and motorists.
- The property is a clean fill disposal site, and the applicants have no genuine intention to construct a model railway and botanical gardens on the property.
- Previous resource consents have been poorly monitored, and conditions have not been met.
- The project will degrade and destroy the natural landscape and bush on the property.
- The amount of fill material that has been deposited on the site has exceeded that which is required to complete the project.
- The information provided with the application is inadequate, and the proposal is not supported by accurate engineering information.
- Earthworks on the site are unstable, and such works may affect the stability of adjoining sites.
- The construction phase of the project has been ongoing for many years, and local residents have had to endure the adverse effects for that time.
- The wheel wash facility is contaminating Swanson Stream with silt, oil and grease, and earthworks on the site are contributing to sedimentation of the Stream.
- Heavy truck movements are damaging Church Street.
- The consent holder should be required to pay a financial contribution for the upgrading of Church Street.
- Development on the land contravenes an agreement for sale and purchase.

Submitters in support of the application considered that the proposal would benefit the local area, and sought that the consent be granted in order to allow the project to be completed. One of the submitters stated that footpath and road upgrading is a Council responsibility that should not be placed on the applicants.

## 5.2 Pre Hearing Meeting

A pre-hearing meeting was not held in this instance. It was considered that there was no likelihood of issues being resolved by mutual agreement between the parties.

## 6.0 STATUTORY REQUIREMENTS

The application requires consent under two separate sections of the Resource Management Act 1991.

Firstly, the application seeks to extend the period after which the consent lapses in accordance with the provisions of section 125 of the Act. Secondly, consent is sought to cancel a condition of the existing Johnston consent pursuant to section 127 of the Act.

It is noted that the current application is subject to the 'savings provisions' of the Resource Management Amendment Act 2003. Section 112 of the Amendment Act requires that the processing and consideration of applications for resource consent that were lodged prior to the enactment of the Amendment Act shall be continued and completed (including any appeals) in accordance with the principal Act as if the Amendment Act had not been enacted.

The Amendment Act was enacted on 1 August 2003, whereas the application was lodged on 6 February of the same year. As a result, the current resource consent application is subject to the provisions of the Resource Management Act that applied when the application was received.

### 6.1 Section 125

Condition 25 of the Johnston consent provided as follows:

*"For the purposes of section 125 of the Resource Management Act 1991 this consent shall lapse on the expiry of 5 years from the date of commencement of the consent unless it is given effect to before the expiry of that period or an extension of time is granted under section 125."*

The consent commenced on 17 August 1998, and consequently lapsed five years later on 17 August 2003. Consent is now being sought to extend the time period in accordance with the provisions of section 125 of the Resource Management Act.

The relevant provisions of section 125 of the Act, as it was immediately prior to 1 August 2003, required that consent can be granted if the Commissioner is satisfied that:

- "(i) Substantial progress or effort has been made towards giving effect to the consent and is continuing to be made; and*
- (ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of ever such approval; and*
- (iii) The effect of the extension on the policies and objectives of any plan is minor."*

### 6.2 Section 127

The application also seeks cancellation of Condition 11 of the Johnston consent, in accordance with the provisions of section 127 of the Resource Management Act. That section provides for the holder of a resource consent to apply to change or cancel a consent condition on the grounds that "a change in circumstances has caused the condition to become inappropriate or unnecessary".

Condition 11 of the Johnston consent stated as follows:

*"Before the facility opens to the public, the consent holders are to pay the sum of \$45,000. This is to be their sole contribution towards the cost of kerbing and channelling on both sides of Church Street, and of one footpath along the east side of Church Street, generally in accord with option 1 with concrete footpath, as set out in the evidence of Mr Owen Neville Campbell."*

A46-A58 This condition is a modified version of the original condition 11, which was amended by the decision of the Environment Court (A99/98) dated 17 August 1998. A copy of the decision is attached at pages A46 to A58 in the Attachments supplement.

## 7.0 CONSIDERATION AGAINST STATUTORY REQUIREMENTS

### 7.1 Section 125 Considerations

In considering the application for an extension of time, the Commissioner needs to be satisfied that substantial progress or effort has been made towards giving effect to the consent and is continuing to be made (Section 125(1)(b)(i)); that no person would be adversely affected by the granting of the extension (Section 125(1)(b)(ii)); and that the effect of the extension on the policies and objectives of the District Plan would be minor (Section 125(1)(b)(iii)).

#### 7.1.1 **“Substantial progress or effort has been made towards giving effect to the consent and is continuing to be made”**

The law in relation to this ‘test’ in section 125 has been the subject of considerable judicial analysis in recent years, most notably through the decisions of the High Court in *Body Corporate 970101 v Auckland City Council (M1725/99)* and the Court of Appeal in *Body Corporate 97010 v Auckland City Council (CA64/00)*.

A number of principles can be drawn from these cases and other relevant case law, relating to the application of Section 125(1)(b)(i) of the Act. A summary of the principles is as follows:

- Reference to the term “substantial” in section 125(1)(b)(i) does not require a majority of the work to be completed because it is used in the context of continuing progress.
- The “substantial” progress or effort must be towards the objective of giving effect to a consent.
- All endeavour, both on and off the site, contributing to the completion of the work envisaged by the consent can be looked at in determining whether or not progress is continuing to be made.
- The words “or effort” in section 125(1)(b)(i) assists a consent holder who, while making substantial efforts towards giving effect to the consent, has been unable to make substantial progress for some reason. If a consent authority were obliged to find that substantial progress or effort had not been made due to a period of time when work was held up through no fault of the consent holder and despite their best efforts, injustice could arise.
- Continuous progress or effort is not required towards giving effect to the consent. While continuity of progress or effort is required, there may be reasonable interruptions which do not break the overall picture of continuing towards the end in view.
- It is appropriate to take into account the practical and economic realities of constructing and completing a major development, including fluctuations in market demand and the need to raise finance.
- Substantial effort alone can satisfy the test in Section 125(1)(b)(i) provided it is aimed at giving effect to this consent.

This last stated principle is not specifically stated in the *Body Corporate* case, but the terms “progress or effort” in Section 125(1)(b)(i) is disjunctive so that either type of activity can be relied upon. The *Body Corporate* case itself demonstrates that substantial effort on the part of consent holder without any actual physical “progress” being made is sufficient for the purposes of that subsection.

In the context of these principles, it is evident that substantial progress has been made towards giving effect to the applicants’ resource consent and, furthermore, that such progress is continuing to be made. Substantial physical works have occurred on the site during the term of the Johnston consent and works continue today.

The railway embankment has largely been completed, except for a relatively short length at the western end of the site. Further fill material is required to complete this portion of the embankment, together with fill required to cover the tunnels and to adjust the grade of the embankment in some locations to provide for the track to be laid.

In addition, work has commenced on the tunnels with formwork on site to prepare the concrete arches that will provide the necessary structural support within the tunnel design. Building consents have been issued to authorise this work in respect of the Building Act 1991.

Lengths of track are currently on site together with the locomotive itself. The roadway and parking areas that would serve the facility have been formed and substantial landscape planting has been established in some areas. Drainage has been established over much of the site, some of which provides a source of water for the central waterfall feature that has been roughly formed.

It is noted that the applicants have not utilised the full five-year period for construction activities, due to the effect of restrictions arising from the conditions of consent. In particular, the conditions of the Johnston consent required that engineering reports be provided to the satisfaction of Council before any further filling, clearance or construction work could be undertaken on the site. Council's engineers were not entirely satisfied with the first report that was submitted, and the applicants' geotechnical engineer was required to provide a supplementary report which was lodged in August 2001. Council subsequently gave a clearance by letter dated 2 October 2001, and this allowed physical works to recommence on the site.

The effect of this impasse was that three years of the five-year consent term were not available for progressing the construction phase of the project. The current application for an extension seeks to reclaim that lost time. Although the applicants could be accused of reducing their available construction time through the provision of engineering reports that were not initially of a satisfactory standard, the fact remains that less than two years were available to implement a consent that Commissioner Johnston considered would require an extended period of five years. It is considered that this is a factor that supports the application for extension of time.

The applicants have also taken a more realistic approach to implementation of the Johnston consent (as compared to previous endeavours on the site), through the engagement of a contractor to complete the construction phase. Prior to this initiative, the applicants themselves largely undertook development works as time allowed and this resulted in relatively slow progress. The contractor is on the site on a full-time basis to manage the works.

**7.1.2 “The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority’s opinion it is unreasonable in all the circumstances to require the obtaining of every such approval”**

The applicants have not provided any approvals in order to satisfy the requirements of Section 125(1)(b)(ii) of the Act, presumably on the basis that there is no person who may be adversely affected by the granting of the extension.

The Courts have provided a clear interpretation of the law that is of assistance in determining whether Section 125(1)(b)(ii) can be satisfied. In considering this issue, it is important to bear in mind the following comments of the Court of Appeal:

*“...an extension application is not an opportunity for the Council to consider again the adverse effects on neighbours and other persons of the activity for which it granted the resource consent. In relation to such persons it is confined to adverse effects of the extension of the period for implementation of the consent.”*

(Paragraph 74, *Body Corporate* decision)

As such, the Commissioner is required to consider only whether there are any potential effects that may arise from granting an extension that would not have arisen if the consent had been fully implemented within the five-year term. Importantly, the application for an extension of time to give effect to a consent under Section 125(1)(b) is not an opportunity to re-litigate the consent itself.

When viewed on this basis, it is difficult to see how any person would be adversely affected by the granting of an extension. The construction period would be no longer than that which would have occurred had the consent been given effect to within the original statutory period. The same number of trucks will drive back and forth along Church Street.

Arguably, there may even be a positive effect in granting the extension as it would allow the project to be completed in the shortest possible time. If the extension were not granted, the relatively unattractive appearance of the property in its current state would remain indefinitely.

For these reasons, it is considered that there would be no person who would be adversely affected by the granting of the extension, as distinct from parties that might be affected by the potential effects of implementing the Johnston consent. The second limb of section 125(1)(b) would therefore be fulfilled. Having reached this conclusion, it is not necessary for consideration to be given to the unreasonableness or otherwise of obtaining any approvals.

### **7.1.3 “The effect of the extension on the policies and objectives of any plan is minor”**

The final limb of Section 125(1)(b) of the Act recognises the fact that planning documents will change over time, and proposals that were once acceptable may not always be so if the objectives and policies that govern sustainable management of a particular district were significantly altered.

If a proposed District Plan was publicly notified after the granting of the original consent, and that Plan contained a significantly different policy direction that suggested the consent were no longer appropriate, then that may provide grounds for concluding that Section 125(1)(b)(iii) could not be satisfied.

However, in this instance the proposed District Plan was in existence at the time the Johnston consent was granted. It is evident from reading the decision of Commissioner Johnston that the proposed District Plan was considered in determining the application. The objectives and policies of that Plan, which is now operative, have changed little in the intervening period.

In these circumstances, it is considered that an extension of time to enable the consent to be implemented would have no effect in terms of the policies and objectives of the District Plan.

## **7.2 Section 127 Considerations**

In considering the application to cancel condition 11 of the Johnston consent, the Commissioner needs to be satisfied that a change in circumstances has caused the condition to become inappropriate or unnecessary.

As a prerequisite to the favourable consideration of the application, it is necessary to firstly establish that there has been a change in circumstances since the Environment Court imposed the condition, and secondly to demonstrate that the condition has become inappropriate or unnecessary.

In the first regard, circumstances have changed since 1998 when the modified condition 11 was imposed. At that time, the Council did not have any immediate intention to undertake footpath construction or install kerb and channel within Church Street. However, in recent years the project has risen steadily up the Council's priority list to the point where it is now the highest priority project for footpath construction and associated kerb and channel development. Council's Roading Assets Engineers advise that this work is programmed to be completed in the current financial year.

On this basis, it is highly likely that the upgrading work will be undertaken by the Council up to three years prior to the time at which condition 11 requires a payment from the applicants. The project is fully rates-funded through the Council's Annual Plan, and does not rely upon a financial contribution from the applicants or from any other local landowner. Provided that the works were undertaken by the Council before the applicants' facility opened to the public, no adverse environmental effects that would arise as a result of the condition being cancelled.

This situation also appears to lend weight to the applicants' assertion that the works are a 'catch-up' that is required to serve the existing neighbourhood, irrespective of any proposed development of their property. The concerns of local residents would be addressed as the work is proposed to be undertaken within the current financial year, and the source of the funds is largely irrelevant from a resource management perspective.

For these reasons, it is considered that it would be reasonable to cancel the applicants' obligation with regard to the road upgrading, unless the works have not been completed by the Council prior to the facility opening to the public. It is suggested that the modified condition 11 could read as follows (added text underlined):

*"Before the facility opens to the public, the consent holders are to pay the sum of \$45,000. This is to be their sole contribution towards the cost of kerbing and channelling on both sides of Church Street, and of one footpath along the east side of Church Street, generally in accord with option 1 with concrete footpath, as set out in the evidence of Mr Owen Neville Campbell. Notwithstanding the above, the consent holders' financial obligation will only extend to such works identified herein that have not been completed by the Council prior to the opening of the facility. In the event that some of the works remain outstanding at that time, the consent holders will be required to pay a percentage of the \$45,000 contribution, that percentage being set at the cost of the uncompleted works as a proportion of the overall cost of the works identified in this condition."*

## 8.0 OTHER ISSUES

There are a host of other issues that have not been addressed specifically through the consideration of the application in relation to Sections 125 and 127 of the Resource Management Act.

The submissions raise many concerns that, while perhaps legitimate, cannot be reconsidered through the current application. The consideration of the application does not provide the community, or the Council for that matter, with the opportunity to revisit the original decision of Commissioner Johnston.

Much of the angst in the local community relates to the movement of trucks to and from the site along Church Street. Unfortunately, the Johnston consent does not include a condition that manages these effects and, as a result, the frequency and timing of these movements is uncontrolled.

During the processing of this application consideration was given to the possibility that such a condition could be introduced at this stage. However, it appears that the relatively limited considerations of section 125 do not provide jurisdiction to impose any new conditions as a result of the current application. The only consolation for the local community is that unrestricted truck movements will ensure that the construction phase of the project is completed in the shortest possible time.

On the same basis, the various other concerns that were raised through submissions are also unable to be addressed in any meaningful way through the current application.

## 9.0 CONCLUSION

The Resource Management Act sets clear parameters for assessment of this application.

In relation to the extension of time, the Commissioner needs to consider whether the three limbs of section 125(1)(b) are satisfied. From the analysis contained in this report, it is considered that the statutory requirements are met.

With regard to the applicants' request to cancel condition 11, the Commissioner must be satisfied that a change in circumstances has occurred that has caused the condition to become inappropriate or unnecessary. The Council now intends to undertake this work in the current financial year through its normal civil works programme. As such, there would be no necessity for the applicants to undertake the work, and the Council's decision suggests that the upgrading is required to remedy an existing situation irrespective of the traffic effects of the proposed railway and botanical gardens.

For these reasons, it is recommended that consent be granted (although in part in relation to the section 127 request). All conditions of the Johnston consent should remain unchanged and in force, with the exception of conditions 11 and 16 which are recommended to be modified if consent is granted.

### **RECOMMENDATIONS**

That pursuant to Section 125 of the Resource Management Act 1991 **consent be granted** to the application by Ross and Gayle Britten to extend by a further three years the time period within which to establish and operate a model railway and botanical garden at 19 Church Street, Swanson, being lots 28-40 DP 21080, Pt. Allot 174 and Lot 1 DP 57548, for the following reasons:

- (i) Substantial progress and effort has been made towards giving effect to the consent, and such progress is continuing; and
- (ii) There is no person who would be adversely affected by the granting of an extension of time for the implementation of the consent (as distinct from the effects that might arise as a result of implementing the consent); and
- (iii) The effect of the extension on the objectives and policies of the District Plan would be minor.

As a result of this decision, condition 25 of the 'Johnston' consent shall therefore be amended as follows (amendment underlined):

*"For the purposes of section 125 of the Resource Management Act 1991 this consent shall lapse on the expiry of 8 years from the date of commencement of the consent unless it is given effect to before the expiry of that period or an extension of time is granted under section 125."*

### **AND**

That pursuant to section 127 of the Resource Management Act 1991 **consent be granted in part** to the application by Ross and Gayle Britten to cancel condition 11 of the resource consent issued on 2 September 1996 to establish and operate a model railway and botanical garden at 19 Church Street, Swanson, being lots 28-40 DP 21080, Pt. Allot 174 and Lot 1 DP 57548, for the following reasons:

- (i) A change of circumstances has occurred as a result of the Council's decision to undertake the work that was required under condition 11 of the resource consent; and
- (ii) It is anticipated that the road upgrading work will be completed within the current financial year, and therefore the works would be in place before the requirement for the applicants' contribution would be triggered. In these circumstances, the cancellation of the condition would not give rise to any adverse environmental effects. As such, the condition is unnecessary in its current form.

Condition 11 shall be modified as follows (added text underlined):

*"Before the facility opens to the public, the consent holders are to pay the sum of \$45,000. This is to be their sole contribution towards the cost of kerbing and channelling on both sides of Church Street, and of one footpath along the east side of Church Street, generally in accord with option 1 with concrete footpath, as set out in the evidence of Mr Owen Neville Campbell. Notwithstanding the above, the consent holders' financial obligation will only extend to such works identified herein that have not been completed by the Council prior to the opening of the facility. In the event that some of the works remain outstanding at that time, the consent holders will be required to pay a percentage of the \$45,000 contribution, that percentage being set at the cost of the uncompleted works as a proportion of the overall cost of the works identified in this condition."*

Report prepared by: Philip Brown, Group Manager: Planning & Community Services.

