



Waitakere City Council
Te Taiao o Waitakere

NOTICE OF MEETING

HEARING BY COMMISSIONER

I hereby give notice that a Meeting of the Hearings Committee will be held on:-

DATE: Thursday, 20 September 2007 **TIME:** 9.30 am

VENUE: The Trusts Stadium, Central Park Drive, Lincoln North,
Waitakere

to consider an application for resource consent: 19 Church Street, Swanson and to take any necessary action connected therewith.

Sharon Simiona .

11 September 2007

Sharon Simiona
COMMITTEE SECRETARY

Telephone (09) 836 8000 extn 8820

MEMBERSHIP:

Commissioner: Alan Watson

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(The reports and recommendations contained in all agendas are reports and recommendations only and are not to be construed, in any way, as Council policy until adopted.)

**AGENDA FOR A MEETING OF A COMMISSIONER TO BE HELD AT
THE TRUSTS STADIUM, CENTRAL PARK DRIVE, LINCOLN NORTH,
WAITAKERE, ON THURSDAY, 20 SEPTEMBER 2007
COMMENCING AT 9.30 AM**

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1 NOTIFIED APPLICATION UNDER SECTION 125 OF THE RESOURCE MANAGEMENT ACT 1991 BY ROSS & GAYLE BRITTEN TO EXTEND THE TERM OF AN EXISTING RESOURCE CONSENT FOR A MODEL RAILWAY AND BOTANICAL GARDEN AT 19 CHURCH STREET, SWANSON, FOR A FURTHER FIVE YEARS

WAITAKERE WARD

LUC-2006-4093

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 2006, and the applicants are now seeking an extension of time in which to complete the project. A further five years is sought.

A1-A35 A copy of the application is attached at pages A1 to A35.

1.2 Resource Management Issues Raised

The Resource Management Act 1991 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.

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 five years.

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 the engineering report submitted with the current application indicates that a further 46,300m³ of solid fill is required to achieve finished contours. This equates to approximately 64,800m³ of loose material prior to compaction and placement.

This latter figure can be used to calculate the number of truck movements to the site that would be required in order to complete the project. Based on information supplied by the applicants' engineer, a total of approximately 7,400 truck movements would be required over the five year term of an extended resource consent. If an assumption is made that trucks might bring fill material to the site on six days of any given week over the five year period, then an average of approximately five truck deliveries per day would be anticipated.

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 David Johnston, an Independent Commissioner.

A36-A50 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 to this report at pages A36 to A50.

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.

For various reasons, the applicants were unable to give effect to the consent within the specified time period. An application for an extension of time was submitted to the Council, to allow a further three years to complete the works envisaged under the consent. That application was granted by an Independent Commissioner on 21 September 2004. As that extension has also now expired, the applicants have lodged the current section 125 application.

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 m² to 5,898m². 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 cleanfill 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 4 December 2006. A total of 18 submissions were received within the statutory period - nine submissions in support of the application, and nine submissions in opposition.

A52-A126 Copies of the submissions are attached at pages A53 to A126. A map showing the location of the Church Street submitters is also attached at page A52.

5.1 Submissions

The following submissions were received:

Submissions in Opposition	
CA Adam	10 Church Street, Swanson
JA Adam	12 Church Street, Swanson
K Adam	8 Church Street, Swanson
Church Street Residents & Others	17 Welsh Hills Road, Swanson
S Heaslip	19 Graven Court, Henderson
MM Moore	20 Church Street, Swanson
Redwood Park Golf Club Inc	13 Knox Road, Swanson
Swanson Residents & Ratepayers Assn	C/- 5 Coulter Road, Swanson
B Wells (Wells Family Trust)	15 Church Street, Swanson
Submissions in Support	
E Allen	3 Church Street, Swanson
G Allen	3A Church Street, Swanson
L Allen	3 Church Street, Swanson
M Barton	11 Church Street, Swanson
BF Bernard	Craigieburn Road, RD1, Blackball, Westland
JF & MW Creemers	38 Crows Road, Swanson
A Khan	170B Hepburn Road, Glendene
W Reid	64B Pleasant Road, Glen Eden
T Shepherd	1066 Coatesville-Riverhead Highway, Riverhead

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.

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.

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 seeks to extend the period after which the consent lapses in accordance with the provisions of section 125 of the Act.

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. The subsequent section 125 application resulted in the consent being extended for three additional years. Consent is now being sought to extend the time period for a further five years in accordance with the provisions of section 125 of the Resource Management Act.

Section 125 provides that the Commissioner may decide to grant an extension, after taking into account -

- “(i) whether substantial progress or effort has been, and continues to be, made towards giving effect to the consent; and*
- (ii) whether the applicant has obtained approval from persons who may be adversely affected by the granting of an extension; and*
- (iii) the effect of the extension on the policies and objectives of any plan or proposed plan.”*

7.0 CONSIDERATION AGAINST STATUTORY REQUIREMENTS

7.1 Section 125 Considerations

In considering the application for an extension of time, the Commissioner must take into account whether substantial progress or effort has been made towards giving effect to the consent and is continuing to be made (section 125(1)(b)(i)); whether any person would be adversely affected by the granting of the extension and, if there are such persons, whether the applicant has obtained their written approvals (section 125(1)(b)(ii)); and lastly whether the extension would have any effect on the policies and objectives of the District Plan and the nature of any such effect (section 125(1)(b)(iii)).

7.1.1 ***“Whether substantial progress or effort has been, and continues to be, made towards giving effect to the consent”***

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 97010 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. Although the Resource Management Amendment Act 2003 introduced some slight changes to the wording of section 125, it is considered that the pre-amendment case law is still relevant and applicable. The key principles are summarised 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 a 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. A substantial amount of reinforcing steel has been obtained by the applicants, for use in the tunnel construction. 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 a further 67,000m³ of compacted fill material (93,800m³ of loose fill) was required to achieve finished contours when the last extension was sought in 2004. Based on this information, it can be calculated that 29,000m³ of loose material has been brought onto the site in the period covered by the most recent extension. This material has been used primarily to form the railway embankment and to stabilise slopes.

7.1.2 "Whether the applicant has obtained approval from persons who may be adversely affected by the granting of the extension"

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 they consider no person to 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 specified 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. While the construction period would be longer than that which would have occurred had the consent been given effect to within the original statutory period, the overall 'envelope' of effects would be the same. For example, the number of trucks that will drive back and forth along Church Street would not be increased if the current application is granted – rather, the extension would simply allow for the same total number of truck movements to be spread out over a longer period.

Arguably, there may even be a positive effect in granting the extension as it would allow the project to be completed. If the extension were not granted, the relatively unattractive appearance of the property in its current state would remain indefinitely, with no simple means of remedying that situation. Potential problems of weed invasion and instability may result if the project were left half-finished.

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. As such, the second limb of section 125(1)(b) is satisfied without the need to obtain any approvals.

7.1.3 “The effect of the extension on the policies and objectives of any plan or proposed plan”

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.

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 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.

Consideration has been given previously 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.

It is noted that several of the submissions raise issues relating to the monitoring of the current consent, and to the slip that occurred on the site during the winter of 2005. The monitoring concerns were addressed at the previous section 125 hearing, through a report provided at the request of the Commissioner. That report concluded that satisfactory monitoring of the consent was occurring and that the consent holder was complying with the conditions of the Johnston consent. Those findings were accepted by the Commissioner. Council monitoring staff are not aware of any instances since that time when there has been a breach of conditions.

In terms of the slip, Council initiated legal proceedings in order to ensure that the land in the vicinity of the slip area was stabilised. That matter is being addressed separately to this application, and there is no direct connection. It is noted that there is no agreement as to the cause of the slip, and it is understood that the slopes in question were created in the early days of the project, before a resource consent was required.

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 take account of the three limbs of section 125(1)(b) when determining the application. From the analysis contained in this report, it is considered that the statutory requirements are met.

As a result, it is recommended that consent be granted. All conditions of the Johnston Consent should remain unchanged and in force, with the exception of condition 25 which is 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 five 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 extension would not have any significant effect on the objectives and policies of the District Plan.

As a result of this recommendation, condition 25 of the Johnston Consent should consequently 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 13 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."

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

