STAFF REPORT

TO: Environment & Planning Committee

FROM: Phil Doole, Resource Consents Manager

REFERENCE: C651

SUBJECT: **RESOURCE CONSENTS MANAGER'S REPORT - REPORT REP10-05-20 -** Report prepared for meeting of 20 May 2010

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1. INTRODUCTION

This report comprises three items: (1) the two recent High Court Judicial reviews regarding non-notification of resource consent applications; (2) the current schedule of appeals; and (3) an up-date on the Government's intentions regarding the pending regulations for discounting resource consent processing fees when the statutory timeframes are exceeded.

2. JUDICIAL REVIEWS

Torrent Bay

Stuart Allen Investments Limited sought a Judicial Review in the High Court on decisions made under delegated authority to grant a land use consent and a discharge permit on a non-notified basis and without its written approval. These resource consents were granted in 2006 and 2007 respectively.

The land use consent was for constructing a second dwelling (as it was defined at the time) on a property at Torrent Bay located within the residential zone and within the Coastal Environment Area. The discharge permit is for the discharge of treated domestic wastewater. Stuart Allen Investments Limited owns an adjacent residential property on the inland side of the subject property, separated from it by a right-of-way.

Council staff prepared affidavits during September 2008, and the matter was heard by the High Court during July last year. The Court's decision released on 11 March 2010 was in favour of the plaintiffs with regard to the land use consent for the second dwelling, and that consent has been set aside (effectively cancelled), but the discharge permit remains valid.

The application had to be assessed in terms of both the residential zone rules, and the coastal environment area rules in the Tasman Resource Management Plan (TRMP). There is no "permitted baseline" for new buildings on the subject property. The Judge reviewed the relevant matters of restricted discretion that applied, and despite the processing planner making a fairly extensive record at the time of his

assessment, the Judge ruled that the assessment of why persons were not affected was deficient – particularly regarding residential zone amenity and privacy matters relating to the plaintiff's property.

A decision was made by Council staff in 2006 to treat the proposed building as a second dwelling because it was separated across a small watercourse from the existing dwelling on the property, although the proposed building would not have a kitchen installed. It could be described as being a bunkhouse. However, it is moot whether that would have influenced the Court's conclusion.

This judgement emphasises that there are often times when it is just as important to record the reasons for deciding that persons are not considered to be affected by a proposed activity, as it is to record those who are affected. Changes were made to our Notification Decision Form in July last year to emphasis this aspect of the notification assessment.

Stephens Bay

J and S Palmer and others sought a Judicial Review in the High Court on decisions made under delegated authority to allow a land use application and an associated land disturbance application to be processed on a limited-notified basis and without their written approval.

The consents granted by a Hearing Subcmmittee in January 2009 were for construction of a replacement dwelling in the residential zone and coastal environment area adjacent to the esplanade reserve at Stephens Bay. The subject property is unusual in that it has four existing dwellings. The plaintiffs own adjacent properties in Stephens Bay.

These proceedings were heard in the High Court on 15 February. The Court's decision released on 30 March 2010 was in favour of the plaintiffs regarding both consents, both of which have been set aside (effectively cancelled). This judgement relates specifically to the decision to limited notify the applications, which the Judge concluded was unlawful, and therefore the subsequent decisions made by the Subcommittee to grant the consents were also invalid.

As for the Torrent Bay case, the application for the dwelling had to be assessed in terms of both the residential zone rules, and the coastal environment area rules in the TRMP, and there is no "permitted baseline" for new buildings on the subject property. The Judge criticises the Council staff assessments for referring to the "permitted standards" for building heights, and considers that they had an erroneous understanding of the permitted baseline concept. The Judge also concluded that changes made to the proposed activity during the process (in an attempt by the applicant to resolve the concerns of their immediate neighbours who had been notified) should have been subjected to a fresh notification assessment before the applications were re-notified on a limited basis.

The Judge was also persuaded by the plaintiffs that Council had insufficient and inadequate information on which to make the decision to not publicly notify the applications, with particular emphasis on the change to the house design plans that occurred during the process – that Council staff should have had more detailed information and/or expert assessments relating to: effects of the proposal on the amenity of Stephens Bay (shading of the beachfront and visual effects); precise fixing

of the line of Mean High Water Springs (MHWS) relating to the 30 metre set back rule; changes to floor levels and floor heights; and corrections regarding how the stormwater disposal associated with the earthworks was described in the application.

This judgement raises several issues around the extent and nature of information required for making notification decisions, and the ability and/or competence of Council staff to make judgements, as well as the distinctions that have to be made between the existing environment, existing use rights and the permitted baseline (if any). While the implications of the changes to the house design may well have justified additional expert assessment with regard to amenity effects, the assertions made by the plaintiff regarding deficiencies in the earthworks application and the precise fixing of MHWS have little merit, in my view, with regard to assessing the adverse effects of this proposal.

Both Judgements recognised that the law regarding notification of resource consent applications changed as from 1 October 2009. I am considering further staff training for this aspect of our work which will include lessons from these two cases.

3. CURRENT APPEALS

Council staff are dealing with the following resource consent appeals, which relate to decisions made by various Hearings Committees or Commissioners:

Appellant	**Matter**	**Status**
Richmond West Group	Subdivision at Richmond West	On hold until Richmond West Plan Change is completed
Reilly Transit NZ Rose Earle and others Fleming	Development at Pupu Springs (Reilly)	To be resolved by consent order
Little Sydney Mining Limited	Subdivision in Rural 1 Zone, appeal on esplanade reserves condition	**Court Hearing required**
Camden Properties Limited	Best Island Resort Development, appeal on raising of ground levels to reduce risks of sea level rise	Mediation held and agreement reached. To be resolved by Consent Order
Punt	Poutama Drain Designation for Richmond West Development Area (TDC Engineering Department)	Mediation held. Adjourned until Richmond West Plan Change is completed
Garden Path Limited	Expansion of café restaurant in Motueka	May be resolved by mediation
Minvest Securities Limited	Proposed Dam, Spring Grove	Resolved by way of minor corrections to conditions

Appellant	Matter	Status
NZ Transport Agency	State Highway 60 Mariri causeway widening, appeal on financial contribution to mitigate effects of reclamation	Appeal Withdrawn
Whitewater NZ Limited	Matiri River Hydro-electric Power, appeal on conditions to require bond to cover decommissioning of works (NZ Energy Limited)	Resolved by Consent Order
Whittaker	Cool Store Extensions Whakarewa Street Motueka (Ngatahi Horticulture)	Awaiting Court decision whether to accept appeal
Ladleys	Water Take for 88 Valley Scheme (Tasman District Council)	May be resolved by negotiation

4. PROPOSED DISCOUNT REGULATION

The Resource Management (Simplifying and Streamlining) Amendment Act 2009 provides for regulations to be made requiring Local Authorities to discount charges for processing resource consent applications **when they are responsible for** exceeding the statutory time periods.

The Ministry for the Environment (MfE) circulated an issues and options paper in mid-January allowing three weeks for feedback. The Council staff comments on that paper were attached to my report to the 20 February Committee meeting.

The MfE Paper expressed a preferred option for a "sliding scale percentage discount" that would start at **5% for one day over time, rising to 25% for five days over time**, rising to a maximum 80% discount by the twelfth week late. The Paper indicated that the number of applications completed only a few days late is a particular concern, but failed to provide any analysis to support this or quantify the "inconvenience" that short time delays cause for applicants.

Last month the Minister for the Environment, Hon Nick Smith, announced that the proposed discount has been changed to a "sliding scale percentage discount" of **1% for each day over time, rising to a maximum 50% discount at 50 days over time.**

This is a vast improvement over the initial proposal, although there is still no differentiation between notified and non-notified processing, the former often being harder to manage in terms of timeframes, and usually involving much higher charges (anywhere between $6,000 - $30,000, or more, if a hearing is required).

Also, the Regulations are expected to take effect for all new applications lodged after 1 August this year, despite a review of the statutory timeframes being part of Phase 2 of the Government's RMA reforms.

It is worth emphasising again that we are being hit with a double blow as the ability to extend the statutory timeframes has been restricted.

The MfE Paper suggested that Local Authorities introduce more rigorous pre-application requirements, and also be more hard-nosed with regard to rejecting incomplete applications. These options can be used but all they really do is shift the time taken to refine an application off the council's processing clock, rather than shortening the overall time taken to complete the application process. Having mandatory pre-application meetings (as some of the city councils do) would be another complication on managing staff workloads.

Improvements to our work management systems have brought better timeliness results, however the biggest influence on results is having sufficient trained and experienced staff to match the workload (or ready access to those skills).

Our current performance indicates that we should be able to avoid discounts for non-notified applications except in a few cases. The notified ones may be more of a concern, although I note that the cause of the delay has to be Council's responsibility for the discount to apply.

For applications lodged since 1 October 2009, when the restrictions on using section 37 time extensions came into force, our timeliness for **non-notified** processing is running at 98 percent in time. Around 8-10 percent of those in time have had Section 37 time extensions applied, many with applicant agreement. If the 2 percent completed out of time (since October 2009) had been subject to discounts at the 1 percent per day sliding scale as proposed, the resulting deductions would total around $1,000.

The main potential concern is what will happen to our timeliness performance if we experience a surge or up-swing in applications - new application numbers are running around 80 percent compared with the workload two years ago. Business choices may have to be made as to whether it is more cost effective to either employ more staff so that timelines can be met most of the time, or to accept that some processing charges will have to be discounted.

5. STAFFING

Staffing of the Resource Consents Section has been stable since the changes last June/July, except that Maree Harley has now replaced Carol Davidson in the job-share Administrator position at the Richmond Office.

6. RECOMMENDATION

That this report be received.

Phil Doole
Resource Consents Manager