ORIGINAL

Decision No. C 76 /2007

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against an abatement notice under section 325 of the Act
AND	of an application for a stay of an abatement notice under section 325(3A) of the Act
BETWEEN	MOUNT CARDRONA STATION LIMITED and CARDRONA HOLDINGS LIMITED
	(ENV-2007-CHC-135)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (sitting alone under section 279 of the Act)

In Chambers at Christchurch

DECISION ON APPLICATION FOR A STAY OF AN ABATEMENT NOTICE

Background

[1] On 1 June 2007 the Registrar received an appeal (via email) against an abatement notice issued by the Queenstown Lakes District Council ("the Council") to Mount Cardrona Station Limited and Cardrona Holdings Limited ("Cardrona").

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

The abatement notice requires Cardrona to comply with the conditions of resource consents RM040097 and RM040096, which were granted retrospectively in respect of an access road at Mount Cardrona Station, 234B Cardrona Valley Road, Wanaka.

[2] The appeal against the abatement notice was out of time and a waiver was sought in respect of that late lodgement. The waiver is not opposed by the Council and is granted.

[3] Cardrona have also sought a stay of the abatement notice pending the hearing of their appeal. That application is supported by an affidavit sworn by Mr John Allandale Lee, a director of Cardrona Holdings Limited. However, it is opposed by the Council who have filed a memorandum in reply to the application setting out the reasons why the Council opposes a stay of the abatement notice.

The application for stay and the reply

[4] Cardrona's application for a stay may be summarised as follows:

(1) Cardrona has endeavoured to comply with the conditions of consent since the resource consents were granted;

(2) the nature of the access track (e.g. the soil type, vegetation types, and need for maintenance etc.) has made compliance problematic;

(3) specific conditions are not capable of being fulfilled;

(4) a variation of the resource consents will be sought "shortly"; and

(5) continuing to attempt to comply in full with the conditions of consent could cause additional adverse effects and would be unreasonable in the circumstances.

[5] In the reply, counsel for the Council submits:

(1) the access track is highly visible and prominent, and constitutes a continuing adverse effect of the amenity of the area which degrades the natural character of an outstanding natural landscape;

(2) it would not be unreasonable for Cardrona to be required to comply with its resource consents pending a hearing of the abatement notice since:

(a) the resource consents are retrospective and were subject to an appeal by Cardrona that was subsequently withdrawn (signifying effective acceptance of those conditions);

(b) the effect of the variation that Cardrona says it will seek is speculative as it would be assessed as a discretionary activity with no guarantee of success; and

(c) in any event, the variation has be awaited for some time (apparently since December 2005) and has yet to materialise.

(3) the conditions are not impossible to comply with; and

(4) the application for stay should be declined.

Consideration

[6] Under section 325(3D) of the Resource management Act ("the RMA" or "the Act"), before granting a stay of an abatement notice and Environment Judge must consider:

(a) What the likely effect of granting the stay would be on the Environment; and

(b) Whether it is unreasonable for the [appellant] to comply with the abatement notice pending the decision on the appeal; and

(c) Whether the parties should be heard; and

(d) Such other matters as the Judge think fit.

[7] As the Council indicated at an early stage that it wished to oppose the application for a stay, I decided to await their reply. The Council also indicated that it wished to provide expert evidence. That would have meant further delay which, in the context of an application for stay, seemed excessive. I consider that counsel's memorandum for the Council has adequately conveyed its position.

[8] The Council's reply also raises the issue of how these resource consents came about. They were applied for and granted retrospectively and were subject to an appeal by Cardrona. That appeal was withdrawn after mediation with the Council and interested parties. I record this simply to confirm that at the time the appeal was withdrawn (in January 2006), mention had already been made of the need (as viewed by Cardrona) for variation of certain consent conditions. It is apparent that these variations have not yet been sought.

[9] As the Council also notes, such a variation requires more than a rubber stamp. So it cannot be seen as a certainty that it will be granted. In that case, pending further appeals, it may just as easily be that the existing conditions of consent will remain.

[10] Having said that, in the circumstances of the efforts that Mr Lee has stated have occurred to implement the conditions and with particular regard to the fact that it appears that the growth of vegetative cover that needs to occur is unlikely to be achieved during the winter months, there must be a question of whether much can be gained in the short term by insisting that the conditions of consent be complied with. It is difficult to see how the adverse effects that are currently being experienced (according to the Council) can be alleviated during the winter months.

[11] However, I note that in the abatement notice itself, some doubt is cast over the extent of the efforts to date to comply with the conditions, and any efforts (or the lack of them) appear to have been prefaced by the continuing need for the yet to be seen variation application. It appears to be the opinion of the enforcement officer that, as late as March 2007, no visible efforts had been made to achieve compliance. That is seemingly at odds with Mr Lee's statements but that cannot be resolved in the context of a stay application.

[12] In these circumstances, I can understand the Council's opposition to the application for stay. As the application itself states, if granted Cardrona "would not continue with endeavouring to comply with the Consents conditions", in circumstances where the Council seems to be of the opinion that those endeavours have been less than serious to date.

[13] I am clearly faced with some considerable divergence of opinion as to the practicality of complying with the conditions of consent. I acknowledge that Cardrona may in fact have been the architect of its own misfortune (I note that it appears that the landscaping and vegetation designs accepted by the Council were produced by Cardrona's own experts), but it seems prudent for the issue to be properly tested, with appropriate expert witnesses, in a hearing of the appeal against the abatement notice.

[14] I comment that I do have some difficulty with granting a stay of an abatement notice that effectively acts as a stay of conditions of resource consents that were applied for and granted retrospectively, and subject to an appeal by the applicants that was withdrawn. Therefore, if I am to grant a stay of the abatement notice it will be on the condition that the appeal against the abatement notice is to be brought on for hearing as soon as possible. Preferably the matter will be heard prior to the beginning of the next occasion when growth of cover vegetation becomes possible (or at least more likely of success).

[15] In other words there would be no adjournment of the appeal pending any application for variation (unless exceptional reasons can be provided). This will mean that the dispute as to the ability to comply with the conditions can be fully tested. And it would also seem likely that if, after the extent of the process so far, the conditions were to be confirmed – for the second time – costs would certainly be an issue.

[16] Accordingly, I consider that the most appropriate course at this time is to grant the stay of the abatement notice. I grant the stay on the conditions outlined below, namely:

(1) a timetable will be directed to have the matter ready for hearing as soon as possible;

(2) if the appellant does not comply with order [18](1) below the stay will automatically lapse on Monday 16 July at 12 pm; and

(3) no application for adjournment or revision of the timetable will be granted, unless exceptional circumstances exist.

[17] I give the following directions so that the appeal will be ready for hearing as soon as possible. In passing, I note that this matter, involving as it does activities in an area of outstanding natural landscapes and having already been through a retrospective consent process, is not a likely subject for mediation. Though, of course, the parties are still able to request that should they so choose. If any request for mediation is made, it will not displace the following timetable.

[18] I direct that:

(1) The appellant must lodge and serve any further evidence in chief by Friday 13 July 2007.

(2) The Council must lodge and serve its evidence in chief by Friday 17 August 2007.

(3) Any rebuttal evidence must be lodged and served by Friday 31 August 2007.

(4) The Registrar will set the matter down for the first available hearing date after 31 August 2007 (possibly as a back-up fixture).

[19] Further, leave is reserved to the Council to apply to have the stay set aside should it receive expert advice that there are any remedial matters that require immediate attention.

[20] Costs of the application for stay are reserved as costs in the substantive proceeding.

DATED at CHRISTCHURCH 19 June 2007.

J R Jackson
Environment Judge
Issued: 19 JUN 2007