BEFORE THE ENVIRONMENT COURT

Decision No: [2013] NZEnvC 102

ENV-2012-WLG-000097

IN THE MATTER of an application for a declaration under s311 of the Resource Management Act 1991 by the HASTINGS DISTRICT COUNCIL

Court: Environment Judge C J Thompson
Heard: In Chambers at Wellington

Counsel: M J E Williams for the Hastings District Council
J S Andrew for the Secretary for the Environment

DECISION ON APPLICATION FOR A DECLARATION – NATIONAL ENVIRONMENTAL STANDARD – CONTAMINANTS IN SOIL

Decision issued: 10 MAY 2013

Introduction

[1] The Hastings District Council seeks a declaration in these terms:

1. May the construction and subsequent occupation of a dwelling along with any associated disturbance of the soil ("the activities") on an allotment ("the site") created in accordance with a subdivision consent granted before 13 October 2011 ("prior subdivision consent") be lawfully carried out under section 9(1) of the Resource Management Act 1991 ("RMA") without further resource consent notwithstanding contravention of the NES, and pursuant to sections 9(1)(a) and 43B(5) of the RMA:
   (a) in all such cases, or
   (b) for land within Hastings District, where the prior subdivision consent contains conditions for the purpose of protecting human health upon residential use of the site, and in particular testing by a suitably qualified and experienced engineer following completion of site preparation earthworks on the site (including any necessary remediation) to confirm that the levels of contaminants in the Residential Soil Health Based Guidelines as set out in Rule 15.1.9.18 of the Hastings District Plan are not exceeded on the site, or
   (c) for land in any other district, where the prior subdivision consent contains equivalent conditions for the purpose of protecting human health upon residential use of the site, and including testing by a suitably qualified and experienced engineer following completion of site preparation earthworks on the site (including any necessary remediation) to confirm that the equivalent standards of any other District plan are not exceeded on the site.
2. Where the relevant territorial authority has issued a certificate under s224(c) of RMA pursuant to a prior subdivision consent following completion of site preparation earthworks for the subdivision, are the activities on the site a change in the use of the site to which the NES applies (having regard to regulation 5(6) of the NES) and, if not, may they be lawfully carried out under section 9(1) of RMA without further resource consent notwithstanding the NES:
   (a) in all such cases; or
   (b) where the prior subdivision consent contains conditions to the effect stated in paragraph 1(b) or 1(c).

[2] The NES referred to in the application is, in full, the *National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health*. It was notified in the Gazette on 13 October 2011, hence the reference to that date in the application. I note that Reg 2 of the NES provides that the regulations ... *come into force* ... on 1 January 2012, but s43B(5) RMA provides:

> 43B Relationship between national environmental standards and rules or consents ...
>
> (5) A land use consent or a subdivision consent granted before the date on which a national environmental standard is notified in the Gazette prevails over the standard.

[3] The practical issue behind the application is that within the Hastings District there are a significant number of residential lots (56 is the figure mentioned by Ms Katrina Brunton, the Council's Environmental Consents manager in her affidavit in support of the application) which have been subdivided (in the sense of having received a subdivision consent in terms of s11 and s87(b) of the RMA) before October 2011, but which have not been developed by way of earthworks (eg for foundations) or the construction of buildings. A good number, if not all, of those properties are on land that formerly was horticultural and orchard land and which would be land within the definition in Reg 5(7) of the NES – ie likely to have been contaminated by agrichemicals. The concern is that, now that the NES has been Gazetted, the owners of those properties may be required to have the land tested for such contamination and, if necessary, have it remediated before it may be used for residential purposes. That could well be an expensive proposition, and it is the precautionary course the Council is presently advising developers and landowners to take, to ensure compliance with the NES.

[4] The broadly expressed question is whether the grant of a subdivision consent prior to the Gazetting of the NES authorises activities which might be restricted or prohibited by the NES. A subsidiary question is whether such an exemption might be effective if the subdivision consent itself requires testing for, and remediation of, chemical contamination. That has been the case since Plan Change 28, which dealt with chemical contamination of land, became operative in October 2006, it having been notified in April 2005.

[5] The District Plan provisions do though deal with fewer chemicals than the NES and, in some cases at least, prescribe higher permissible levels of contamination. Where that is so, for activities to which the NES does apply – eg for activities covered by resource consents sought after the Gazetting of the NES, regard must be had to s43B(3) and (4)

> 43B Relationship between national environmental standards and rules or consents ...
>
> (3) A rule or resource consent may not be more lenient than a national environmental standard.
>
> (4) For the purposes of subsection (3), a rule or resource consent is more lenient than a standard if it permits or authorises an activity that the standard prohibits or restricts.

Clearly then, if the resource consent applications had been made after the NES was Gazetted, the NES provisions, being more stringent, would prevail.

[6] It seems to me that there can be no doubt, on any reasonable reading of s43B(5), that a subdivision or land use resource consent granted before 13 October 2011 will, if the two conflict, prevail over the NES. That is, activities authorised by such a consent may lawfully be carried out, notwithstanding that they are dealt with by the NES. The first question must be, do the terms of any given subdivision consent authorise relevant activities which the NES prohibits or restricts?

Notification of application and interest of other local authorities

[7] The Council suggested, and the Court agreed, that given that the issues were unlikely to be confined only to the Hastings District, the application for a Declaration should be widely notified so that other interested persons could contribute to the discussions if they wished. To effect that, a copy of the application was served on Local Government New Zealand and the Chief Executives of all territorial authorities in the country. Public notice of it, in a form approved by the Court, was published in the *New Zealand Herald* and *Hawke's Bay Today* and, with the assistance of their secretariats, it was distributed to all members of the Resource Management Law Association, the New Zealand Planning Institute and WasteMinz. In addition, the owners of the 56 sites known to be affected in the Hastings District were served with copies.

[8] In the event, none of the persons served wished to join the proceedings, but the Secretary for the Environment, adopting the role of an amicus, has made submissions through Crown Counsel, Ms Andrew. I am very grateful for that assistance.

What activities come within the terms of the NES?

[9] The answer to that question is contained in Reg 5 of the NES. It provides:

> 5 Application
>
> (1) These regulations —
>
> (a) apply when a person wants to do an activity described in any of subclauses (2) to (6) on a piece of land described in subclause (7) or (8): ...
>
> Activities
>
> (2) (not relevant)
>
> (3) An activity is sampling the soil of the piece of land, which means sampling it to determine whether or not it is contaminated and, if it is, the amount and kind of contamination.
>
> (4) An activity is disturbing the soil of the piece of land, which—
>
> (a) means disturbing the soil of the piece of land for a particular purpose: ...
>
> (5) An activity is subdividing land, which means subdividing land—
>
> (a) that has boundaries that are identical with the boundaries of the piece of land; or
>
> (b) that has all the piece of land within its boundaries; or
>
> (c) that has part of the piece of land within its boundaries.
>
> (6) An activity is changing the use of the piece of land, which means changing it to a use that, because the land is as described in subclause (7), is reasonably likely to harm human health.
>
> Land covered
>
> (7) The piece of land is a piece of land that is described by 1 of the following:
>
> (a) an activity or industry described in the *HAIL* is being undertaken on it:
>
> (b) an activity or industry described in the *HAIL* has been undertaken on it:
>
> (c) it is more likely than not that an activity or industry described in the *HAIL* is being or has been undertaken on it.
>
> (8) If a piece of land described in subclause (7) is production land, these regulations apply if the person wants to — ...
>
> (b) sample or disturb —
>
> (i) soil under existing residential buildings on the piece of land:
>
> (ii) soil used for the farmhouse garden or other residential purposes in the immediate vicinity of existing residential buildings:
>
> (iii) soil that would be under proposed residential buildings on the piece of land:

> (iv) soil that would be used for the farmhouse garden or other residential purposes in the immediate vicinity of proposed residential buildings:
>
> (c) subdivide land in a way that causes the piece of land to stop being production land:
>
> (d) change the use of the piece of land in a way that causes the piece of land to stop being production land. ...

I should note here that the acronym *HAIL* expands to *Hazardous Activities and Industries List*, a document published by the Ministry for the Environment and which may be updated from time to time. Its latest iteration seems to be that of October 2011. If the land in question is *HAIL* land and it is proposed to undertake activities covered by the NES, then the requirements of Reg 8 must be met for the activity to be *permitted* – or a resource consent for a *controlled, restricted discretionary* or *discretionary* activity must be obtained – see Regs 9 to 11.

[10] The immediately relevant activities would be those in:

- Reg 5 4(a) – disturbing the soil of the piece of land for a particular purpose
- Reg 5(5) – subdividing land
- Reg 5(6) – changing the use of the piece of land to a use that is reasonably likely to harm human health.

In the context of this application, the activities mentioned in Regs 5(5) and 5(6) will, almost certainly, be authorised by a subdivision consent. But activities within Reg 5(4)(a) will, commonly, not be within the terms of a subdivision consent. In the context of this application, generally a subdivision consent does not authorise the construction of a house – if it does, it will actually be both a subdivision and a land use consent. The construction of a house on land subject to a subdivision consent will generally be a *permitted* activity, subject to compliance with prescribed requirements, conditions and permissions. Notwithstanding that, the excavation required for the foundations of a house, even if it is a *permitted* activity, will require ... *disturbing the soil of the piece of land for a particular purpose* ... and that is captured by the NES.

[11] The distinction between the two types of consent is concisely discussed in the judgment in *Meadow 3 Ltd v van Brandenburg and QLDC* (CIV-2007-409-001695 High Court Christchurch, 30 May 2008). At para [21]ff there is this passage:

> [21] ... It is typical in comprehensive developments for there to be the need for more than one type of resource consent. In this case there plainly had to be at least a land use consent and a subdivision consent.
>
> [22] The RMA creates a separate regime for land use consents and subdivision consents, subject to the qualification that there can be a degree of overlap.
>
> [23] A land use consent is a consent to depart from s9. All uses of land are permitted unless a rule in a plan or a proposed plan states otherwise.
>
> [24] A subdivision consent permits a departure from s11. The reverse presumption applies. With limited exception (some matters are specifically excluded from s11) no survey plan may deposit under the Land Transfer Act without following the s11, survey plan, s223, s224 deposited plan process.

The judgment goes on to remind the reader that if the subdivision consent imposes ongoing obligations on the owners for the time being, the council is required to issue a consent notice which by s221(4) is deemed to create an interest in the land and to form an ongoing covenant.

[12] I agree with Ms Andrew's submission that there are difficulties with the Council's suggestion that the *Meadow 3* decision can be distinguished on the basis that the Hastings District Plan allows earthworks for residential development, on land for which a subdivision consent has been granted, as a *permitted* activity. As the judgments in *Housing New Zealand Corporation v Auckland CC* (2007) 14 ELRNZ 52 and *HB Land Protection Soc v Hastings DC* [2009] NZRMA 485 confirm, resource consents do not, and cannot, approve permitted activities included within the development proposed. In any event, any allowance for relevant earthworks would have to be specific and express.

[13] Following that view, I concur with the Secretary's position on this aspect, as set out in para 42 of Ms Andrew's submissions:

> It cannot be correct that the construction and occupation of a dwelling created in accordance with a pre-notification subdivision consent is permitted pursuant to ss9(1)(a) and 43B(5) "in all such cases." An assessment is required to determine whether the construction and occupation is "expressly allowed" by a particular resource consent granted prior to notification of the NES.

For that reason, it follows that I would not make a Declaration in terms of 1(a) of the application – there is no answer which applies ... *in all such cases.*

[14] Taking the subdivision consent that is Exhibit B to Ms Brunton's affidavit as an example, it relates to the subdivision of land for 26 residential lots, a recreation reserve lot, and two road lots, at Arbuckle Road, Hastings. Included in what is authorised to be done on the land are:

- the construction of water, sewer and storm water services (including separate connections to the individual lots) – condition 5
- the construction of roads (including street and traffic signage and lighting) – condition 21
- the planting of street trees – condition 28
- general earthworks, including proposed ground levels – condition 31
- contouring of the site of the recreation reserve – condition 54

Unquestionably, all of those works will require the disturbance of soil, in some cases profoundly so. For those activities, the subdivision consent will prevail over the NES. But it is silent about the activities required to construct a house on any of the 26 residential lots, and does not authorise any such activity, expressly or implicitly.

[15] It is the Council's understanding and submission that it was intended that subdivision consents granted prior to the advent of the NES were intended to prevail. It points out that the Ministry for the Environment's Users Guide to the NES says this:

> A land-use consent or subdivision consent granted before 1 January 2012 will prevail over the NES. If an application for consent has been lodged, and a decision on whether to notify it was made before 1 January 2012, then the consent prevails over the NES (RMA s43B(5)). Notwithstanding this, if an activity [removing or replacing a fuel storage system, sampling the soil, disturbing the soil, subdividing land, and changing the use of the land] covered by the NES occurs after 1 January 2012 on HAIL land for which a consent for another activity has been granted, then the NES requirements must be met. The most common example of this situation is where a subdivision consent has been granted and the land remains production land but is later developed in a way that means the land stops being production land.

As a first comment, and as a matter of statutory interpretation, I am not sure I can agree with the Users Guide in its fixing of the *operative date* as I January 2012. Section 43B(5) is clear – for a resource consent of either kind to prevail over the NES, it must have been granted before 13 October 2011 –the date of notification in the Gazette.

[16] My second comment is that I agree with the thrust of the Council's submission, but the critical point is the answer to the question: *What did the subdivision consent actually authorise?* If it did not, in its terms, authorise the construction of a house (which the examples exhibited to Ms Brunton's affidavit appear not to do) then it cannot prevail over the NES in the sense that the construction will necessitate soil disturbance that is beyond what is authorised by the subdivision consent, and is within the activities captured by the NES.

[17] So it follows also that I would not make a Declaration in terms of 1(c) of the application either – in each case the same fact dependent question has to be asked – *what did the subdivision consent actually authorise*?

[18] The Hastings District Plan, operative since 2003, addresses the issue of possible harmful effects of residential developments being put in place on soil contaminated by chemicals used on it in the past. Section 15, dealing with subdivisions, contains this *Issue*:

- **The potential for land being subdivided for residential use, particularly in New Urban Development Areas, to contain levels of historic persistent chemical residues that may result in potential adverse health effects for the future occupants.**

  Assessing the potential for adverse effects to human health from historic persistent chemical residues in the soil at the time of subdivision provides an opportunity for environmental effects to be avoided or remedied before the land use changes to a more sensitive use such as residential activities.

  The proposed New Urban Development Areas identified in Section 2.4 of the Plan are typically on land currently or previously used for agricultural or horticultural purposes. In some instances, agrichemical spraying of horticultural crops over a number of years; or animal drenching or dipping in the same location over prolonged

periods, may have resulted in elevated levels of arsenic, lead, DDT or copper persisting in the underlying soil. This issue generally relates only to historic agrichemical use, as three of the four substances of concern; arsenic, lead and DDT have not been available for use since 1975, but where used are likely to persist in the soil.

In most instances the concentrations of residues persisting in the soil are unlikely to pose a risk for future residents. Soils in 'hot spot areas' (under animal yards, sheep dips or spray mixing points), or areas that have been subjected to spray regimes involving the chemicals of concern for prolonged periods, however could cause chronic health effects to future residents if those residents are subjected to long term exposure (over a number of years) to the residues in that soil.

Accordingly, it is important to ensure residential subdivisions are occurring on land that is suitable for residential use and will not put residents' health at risk from long term exposure to the historic persistent soil residues of concern.

[19] That recognised Issue is addressed in Policy SPD 25:

- **SDP25 To avoid, remedy or mitigate the adverse effects of the subdivision of land for residential purposes, where soils have the potential to contain historic persistent chemical residues that may result in potential adverse health effects for the future occupants.**

  Explanation

  Where historic persistent chemical residues (eg copper, arsenic, DDT, lead) are present in the soil above accepted concentrations, they may give rise to adverse health effects from prolonged exposures if land is developed and used for residential activities. Subdividers will therefore be required to ensure that historic persistent chemical residues are at levels suitable for residential land uses at the time of subdivision, or that suitable remediation will occur to achieve safe residue levels, or if residues are not reduced that other measures are taken to ensure future residents will not be exposed to those residues.

  National Environment Standards are proposed to be introduced to address the effects of historic persistent chemicals on a nationwide basis. If those National Environmental Standards are less restrictive than the standards and assessment criteria in the Hastings District Plan, a Plan Change will be considered to address any inconsistencies.

[20] The Plan's regime is given practical effect, for some areas of the District at least, in Rule 15.1.9.18:

15.1.9.18 (A) POTENTIAL CONTAMINATION FROM AGRICHEMICAL RESIDUES –RESIDENTIAL DEVELOPMENT

a) For any subdivision or development of new urban areas in Arataki, Goddard Lane, Williams Street and Lyndhurst (as identified in Appendix 2.4-1) intended for residential use, soil testing must be carried out and the developer shall demonstrate that the soil concentrations (to a depth of at least 75mm) comply with the residential soil health based guidelines in Table 1 below. Reference will be had to Specific Assessment Criteria in 15.1.10.2(14).

Outcome
Risk to human health from historic persistent chemical residues in residential soil is avoided

TABLE 1: Residential Soil Health Based Guidelines (mg/kg dry weight)

	Arsenic	Copper	Total DDT[1]	Lead
Guidelines	30	2,300	25	400

Notes:
1. Total DDT isomers 2, 4-DDE, 2,4-DDD, 2,4-DDT, 4,4-DDE, 4,4-DDD and 4,4-DDT.
Source: Pattle Delamore Partners Ltd – November 2004
Website Reference: http://www.hastingsdc.govt.nz/environment/pesticides/index.htm
and/or
TRIM reference: STR-7-03-04-17

[21] Mr Williams' point that the Hastings District Plan, prior to the advent of the NES, contained a *contaminated soils* regime is plainly correct, in respect of arsenic, copper, DDT and lead contamination dealt with in this Rule. But that regime will not prevail if the activities authorised by the relevant RMA consent are not those dealt with by the NES, nor if the Plan's regime is less stringent than that of the NES in the case of *post-Gazettal* consents: - see s43B(3).

[22] The question contained within para 2 of the application brings s224(c) into play. That section provides:

> 224 Restrictions upon deposit of survey plan
>
> No survey plan shall be deposited for the purposes of section 11(1)(a)(i) or (iii)] unless — ...
>
> (c) There is lodged with the Registrar-General of Land a certificate signed by the chief executive or other authorised officer of the territorial authority stating that, it has approved the survey plan under section 223 (which approval states the date of the approval), and all or any of the conditions of the subdivision consent have been complied with to the satisfaction of the territorial authority and that in respect of such conditions that have not been complied with—
>
> > (i) A completion certificate has been issued in relation to such of the conditions to which section 222 applies:

> (ii) A consent notice has been issued in relation to such of the conditions to which section 221 applies:
>
> (iii) A bond has been entered into by the subdividing owner in compliance with any condition of a subdivision consent imposed under section 108(2)(b); and
>
> (d) There is lodged for registration with the Registrar-General of Land a consent notice in respect of any conditions of a kind referred to in paragraph (c)(ii); and ...

[23] I cannot see that the issuing of a s224 certificate alters the situation. The certificate does no more than authorise the Registrar-General of Land to accept the subdivision plan as being compliant with the statutory requirements, and then to issue Certificates of Title for the resultant lots. A certificate cannot, and does not purport to, override the requirements of the NES.

[24] Ms Andrew's submission was that the question is whether the *change of use* occurs at the time of the subdivision, or at the time the houses are complete and occupied. It was suggested that the point should be determined in the light of Reg 5(6) – bringing into play the factor of possible harm to human health. In terms of a *change of use* though, I would add this. *Use* is defined in a very wide way in s2 RMA. In the context of a subdivision of rural land, once roads and accessways are formed and sealed, building platforms are contoured, and drainage and other services are installed, it seems to me that the *use* of the land has changed. The use is no longer agricultural, or whatever it once was – it has become residential land, even if it awaits the arrival of house(s) and their residents. In those respects, reference can be made to Reg 5(8)(c) and (d). If the land in question is *production land* (see definition in s2, RMA), the NES regulations will apply if the intention is to subdivide the land in a way which causes it to stop being production land, or if the use of the land is changed in a way that causes it to stop being production land. In this instance (but it will not always be so) the change of use occurred can be said to have occurred at the time the subdivision is effected.

[25] Against those views of the correct interpretation of the NES and the Statute, I would make declarations in these terms:

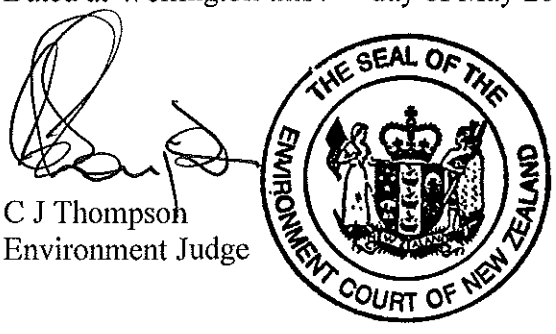
1. The construction and occupation of a dwelling and any associated disturbance of soil on an allotment created in accordance with a subdivision consent

granted before 13 October 2011 may be lawfully carried out under s9(1) of the Resource Management Act 1991 without further resource consent notwithstanding contravention of the NES if, and only if, the subdivision consent specifically authorises the disturbance of soil for the purpose of constructing and occupying the dwelling.

2. That will be the case whether or not the Territorial authority has issued a certificate under s224(c) of the Resource Management Act 1991.
3. Where the subdivision consent in question contains conditions for the purpose of protecting human health upon residential use of the site, it will be an issue of interpretation in each case whether *the change of use* occurs at the time of subdivision, or when the house(s) are complete and occupied.

[26] I am very grateful to Mr Williams and Ms Andrew for the comprehensive and helpful submissions they have made. And I should say also that I acknowledge the difficult and, as they will see it, unfair situation that the owners of the affected pieces of land have found themselves in simply because, for whatever reason, the actual construction of houses on those sites did not proceed before the NES was *Gazetted*. But I cannot see any principled interpretation of the Act and the NES which will avoid the consequence that the NES must be complied with in the development of those sites.

Dated at Wellington this 10th day of May 2013



C J Thompson
Environment Judge