



FLETCHER VAUTIER MOORE
LAWYERS

RM 100848



By Email – mike.mackiggan@tasman.govt.nz,

jack.andrew@tasman.govt.nz

Tasman District Council
189 Queen Street
Richmond
Nelson 7050

Office Richmond
Author Julian Ironside
Telephone 03 543 8301
Facsimile 03 543 8302
Email jironside@fvm.co.nz
Matter No 27321\207

2 December 2011

Attention: Jack Andrew & Mike Mackiggan

Dear Jack & Mike

**APPLICATION BY ADCOCK & DONALDSON PROPERTIES LIMITED FOR A REGIONAL
MOTORSPORT PARK AT TAPAWERA**

Instructions

1. At our meeting on 24 November 2011, you raised two questions regarding the application by Adcock & Donaldson Properties Limited (**ADPL**) for resource consent to establish a regional motorsport park at Tapawera:
 - (a) Does the right of way easement granted by the Crown to ADPL provide access to the motorsport park for all potential users of the park?
 - (b) Can the Council impose conditions on ADPL which relate to works on the land subject to the right of way to allow for the clearance of vegetation to mitigate the risk of fire and for the widening of the track to improve traffic safety?
2. On the first question, our advice is set out in a separate letter which you have now received. This letter addresses the second question.

Advice

3. In summary, our response to the second question is that the Council is able to impose appropriate conditions relating to works on the land subject to the right of way where those conditions address fire hazard and traffic safety risks, and are fair and reasonable in scope and content.

Nelson

Level 1, 126 Trafalgar Street, Nelson 7010.
PO Box 90, Nelson 7040, DX WC 70009.
Tel: (03) 548 1469, Fax: (03) 548 2994

Richmond

265A Queen Street, Richmond 7020.
PO Box 3029, Richmond 7050, DX WC 71017.
Tel: (03) 543 8301, Fax: (03) 543 8302

Motueka

12 Wallace Street, Motueka 7110.
PO Box 23, Motueka 7143, DX WC 72002.
Tel: (03) 528 7030, Fax: (03) 528 9120

Discussion

(i) Access

4. Access to the site of the proposed motorsport park is governed as follows:
 - (a) The only means of legal access to the site is over land owned by the Crown (and held under licence by Nelson Forests Limited (**NFL**)) and for a short stretch over land owned by the Bryant family.
 - (b) Legal access through NFL's land is by a right of way easement granted on 17 March 2000. Access along the right of way is provided to ADPL (the Grantee) and 'Secondary Users'.
 - (c) Use of the right of way for access is subject to a number of restrictions. These include restriction on the use of tracked or heavy vehicles that have been prohibited by NFL (clause 3.1.2); a requirement to comply with any conditions imposed by NFL to address forestry related risks (clause 3.1.5); restrictions on signage (clause 3.4); a requirement to meet the costs of any necessary improvements and maintenance (clause 3.7); and a restriction on earthworks and felling of trees (clause 3.7).
5. The application for the motorsport park was fully notified and received a large number of submissions both in opposition and in support. Land Information New Zealand, and its licensee NFL, made submissions in opposition expressing concerns regarding use of the access and the fire risk associated with the proposed motorsport park. NFL opposes measures proposed by the applicant to mitigate fire risk and improve traffic safety along the right of way.

(ii) Conditions

6. As you are aware, a resource consent condition must be:
 - (a) for a resource management purpose;
 - (b) logically connected to a proposed development; and
 - (c) fair and reasonable.¹

Any conditions which relate to the rights or actions of a third party are unlikely to be enforceable and therefore not valid.² Conditions attached to a consent will usually be regarded as unreasonable if incapable of performance.³

7. We understand that as part of the assessment of the application Council's initial views are that it may be necessary to consider imposing conditions on the consent

¹ *Newbury DC v Secretary of State for the Environment* [1981] AC 578; *Waitakere CC v Estate Homes Limited* [2007] NZLR 149.

² *Mackay v Northshore City Council* W146/95, *Flude v Waitakere City Council* A123/92, *Winstone Aggregates v Franklin District Council* A80/02.


³ *Westfield (New Zealand) Limited & Ors v Hamilton City Council* CIV 2003 485 000956, High Court, Fisher J, 17 March 2004, paras 54-56.

holder to upgrade the access track. This would be to avoid, remedy or mitigate potential adverse effects generated by the motorsport park and address matters such as traffic safety and increased fire risk.

8. Such conditions have a clear resource management purpose. In addition, they are logically connected to the proposed motorsport park and therefore valid, assuming they are reasonable in scope and content.
9. The concern you have raised is whether proposed conditions to upgrade the right of way are capable of performance by the consent holder. As set out above, the grant of access to ADPL is subject to restrictions which prevent the felling of trees without the prior approval of NFL and also prevent the use of tracked and heavy vehicles along the access way that have been prohibited by NFL. ADPL may therefore require NFL's approval to upgrade the right of way.
10. We do not see this as preventing the Council from imposing appropriate conditions on ADPL. Whether NFL grants approval to ADPL to undertake clearing of vegetation (if necessary) and improvements to the access track is a separate matter for ADPL to address in relation to the terms of the easement and any conditions of consent that may be imposed.
11. If ADPL requires NFL's approval to carry out improvements to the right of way access, then it will require that approval in order to give effect to the resource consent. To that extent the resource consent is permissive and any condition requiring the right of way access to be upgraded would impose obligations on ADPL, not NFL. If ADPL is unable to upgrade the right of way access to the necessary standard, then the resource consent may not be able to be given effect to and would lapse. Where upgrading the access is fundamental to the establishment of the motorsport park, the Council may wish to consider imposing a *Grampian* type condition which requires the right of way access track to be upgraded prior to the motorsport park becoming operational⁴.
12. In conclusion, we do not see any impediment to the Council imposing conditions on ADPL relating to works on land subject to the right of way where that is necessary to address fire hazard and traffic safety risks arising out of development of the motorsport park.
13. Please do not hesitate to contact us if any matter requires clarification.

Yours faithfully

Fletcher Vautier Moore



Julian Ironside / Antoinette Besier
Partner/Solicitor

⁴ *Roman Catholic Diocese of Auckland v Franklin District Council* W018/17; *Grampian Regional Council v City of Aberdeen* (1983) F&CR 633 at 636 (HL).