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Western Bay of Plenty District Council
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INDEPENDENT REVIEW - CONSENTING OF COMMUNITY RESIDENTIAL TRANSITION HOUSE – 240 RANGIURU ROAD, TE PUKE

Introduction

1. We understand that a community group has asked Western Bay of Plenty District Council (**Council**) to review the process and decision making associated with the establishment of a “*community residential transition house*” at 240 Rangiuru Road, Te Puke (**Site**). Rather than undertaking the review internally, Council has sought an external independent review from Cooney Lees Morgan. This firm has not provided any advice or had any involvement in any of the consenting decisions relating to the Site.
2. We understand you have provided us with the complete consent file relating to the Site. Our brief was to “*carry out a legal review of the process and provide a report back.*”
3. We have reviewed all of the documentation provided. We have not identified any procedural error or irregularity. In our view the original decision to grant consent in 2005 and the decisions granting the two subsequent variations in 2015 and 2019 were all made having regard to the relevant statutory considerations and were all decisions that a reasonable decision maker would have reached in light of the applicable planning and statutory framework. We explain our conclusions below.

Summary of Consenting History

4. **Original consent – 2005:** On 12 April 2005, Council granted consent for a discretionary activity on the Site “*to accommodate up to 25 persons within the Rural G zone.*” Consent was required under the District Plan for an accommodation facility for more than 4 persons. The application was made by the Breakthrough Family Ministry. The application was not notified. Conditions were imposed limiting the number of people (including staff) permitted to stay on-site overnight to 25, restricting noise, and providing for a review of the conditions if necessary to manage effects arising in the future.
5. **First variation – 2015:** On 16 March 2015, Council granted a variation to the original consent, to change Condition 2 relating to occupation numbers. The application was made by the Vincent Hope Trust. The variation was assessed as a discretionary activity pursuant to s127 of the Resource Management Act 1991 (**RMA**). Since the original consent was granted, the Site zoning had changed from Rural to Post Harvest. The variation increased the number of people (including staff) permitted to stay on-site overnight by 10, to a maximum of 35. No other conditions were changed. The variation was not notified.

6. **Second variation – 2019:** On 13 December 2019, Council granted a further variation to the original consent (as varied in 2015) to change Condition 2 relating to occupation numbers. The maximum number of people (including staff) permitted to stay on site overnight was reduced by 5, from 35 to 30. Condition 1 was also amended to refer to new site and travel management plans, and a new Condition 7 was added to limit vehicle movements to 12 per day. The application was made by the Department of Corrections. The variation was assessed as a discretionary activity pursuant to s127 of the RMA. The Site was zoned Post Harvest. The variation was not notified.

Analysis

7. Original consent - 2005

- 7.1 The original proposal authorised under the 2005 consent was described in the application as a “*residential facility catering for those with social and emotional disabilities.*” The application noted that services may include drug and alcohol rehabilitation. The purpose of the facility or the types of people it accommodates was not a relevant consideration under the District Plan. The objectives and policies for the rural zone focus on rural amenity considerations and ensuring productive land is not fragmented. The effects considerations arising from the proposal related to noise and traffic generation. Conditions were imposed to manage those by restricting the number of people on site, imposing a noise condition, and provision for a review of conditions if noise, parking, traffic, or hours of operation effects arising over time require an adjustment to the conditions.
- 7.2 The review condition remains in the current consent and provides for a two yearly review at Council’s discretion. Normally reviews of this nature are exercised if there are complaints from nearby residents who are affected by the activity. We understand no complaints of this nature have been made since the consent was granted. If they are made, Council is required to investigate and decide an appropriate course of action. One option would be to initiate a review under the review condition.
- 7.3 The application was not notified. However, the statutory requirements relating to non-notification were met. Those required an assessment of whether there would be adverse effects on the environment that were more than minor and whether there would be any parties who would be adversely affected. The notification assessment is to be undertaken having regard to proposed conditions of consent to manage effects, against a baseline of the existing environment surrounding the site. The reporting planner had careful regard to the proximity of other dwellings (and potential dwellings) to the Site, existing screening, and a number of written approvals provided by adjacent neighbours.
- 7.4 A written approval is not necessary in order to determine that someone is not adversely affected. Rather, it allows Council to discount any effects on a person who has provided approval. In this case it appears that the written approval of one party identified as potentially affected was not obtained (Lot 3 DPS 92459). However, Council determined that, given the restriction on numbers of people staying on site and the noise restrictions imposed through the conditions, together with the review condition, the effects on that property would be negligible and therefore notification of that party was not required. We consider this assessment to be reasonable and consistent with the case law and provisions of the RMA relating to notification. Any neighbours who have suffered from the effects of the activity would be entitled to complain to Council and seek a review of the conditions. We understand this has not occurred during the history of the consent which was granted more than 15 years ago.

7.5 Overall, we are satisfied that the relevant planning and statutory considerations were taken into account in reaching the decision to grant the original consent on a non-notified basis, and that those decisions were reasonable in the circumstances.

8. 2015 variation

8.1 The applicant for this variation was different to the original consent holder. Given land use consents “run with the land,” the current owner of the land will inherit the consent and will be entitled to operate under it without any formality. The application describes the work being done on Site as providing services to “*mental health consumers*”. As noted above, the use of the accommodation facility and the type of people residing there is not a matter regulated by the District Plan. It is the effects on the environment caused by the residential use, such as noise and traffic movements, that the Plan seeks to manage through rules and conditions of consent. This variation was assessed as a discretionary activity as required by s127(3) of the RMA. Under s127(3), only the effects of the proposed change can be assessed. The Council has no jurisdiction to revisit the original grant of consent.

8.2 Since the original consent was granted, the zoning had changed from Rural to Post Harvest Zone. The latter zone provides for workers’ accommodation to support the post-harvest industry. It permits accommodation facilities of up to 75 people as a permitted activity (no resource consent is required) subject to certain conditions. This provided a “*permitted baseline*” against which the effects of the variation were assessed. So all Council could consider was the increase in people permitted to stay overnight on-site (by ten people). Given 35 people is well under the permitted baseline of 75 for workers’ accommodation, and given the noise conditions of the existing consent are more restrictive than the Post-Harvest zone restrictions, in our view it was reasonable for Council to conclude that the effects of the increased numbers on Site would be less than minor and that there would be no material difference between the existing and varied activity.

9. 2019 variation

9.1 This variation proposed to *reduce* the number of people permitted to reside on-site overnight by 5 (from 35 to 30). The application noted that the proposed use of the Site would also change, to housing people ready to transition back into the community, including those on parole or home detention. It proposed a change to Condition 1 which would refer to the application documentation including the proposed use, and to Condition 2 to reduce the number of people residing on-site overnight to a maximum of 30. All other conditions were proposed to stay the same, given the effects of the activity were considered to remain the same or reduce and given the “*permitted baseline*” discussed above which permits accommodation facilities for up to 75 people.

9.2 The variation application was assessed as a discretionary pursuant to s127(3) of the RMA. As explained above, this means that Council could only assess the effects of the change. Given the proposal was to reduce numbers of people residing on-site, in our view it was unnecessary a variation to be applied for. It would have been possible for the Department of Corrections to operate from the Site under the existing consent (as varied in 2015), which is for an accommodation facility for up to 35 persons. For the reasons explained above, the activity regulated by the District Plan is an accommodation facility, it is not an accommodation facility for a particular purpose or type of person.

9.3 Although Condition 1 of the original consent requires the activity to be carried out “*in accordance with*” the information supplied in support of the original application, that does not require the activity to conform in all respects with the information supplied.

It only requires conformity with matters that the District Plan seeks to regulate and therefore form part of the scope of effects managed by the consent.¹ The type of people residing in the accommodation facility and the particular type of rehabilitation work carried out on-site are not matters the District Plan seeks to regulate.²

- 9.4 Although a variation was arguably not required, Council took the approach that it would be helpful for a variation to be applied for to enable the consent to reflect the proposed use of the site by the Department of Corrections, including the reduced occupancy. This approach is understandable from a compliance perspective. It enables the proposed reduction in numbers on-site (and the resultant reduction in effects) to be “locked in” so that Council can take compliance action if the occupancy numbers are increased.
- 9.5 The application was processed by an external planner from a local consultancy and therefore had a degree of independent assessment. The processing planner identified that the application appeared to propose an increase in vehicle movements from the those arising under the original consent (as varied in 2015). The application indicated there could be 28 vehicle movements a day rather than 12. Although the original consent did not include a condition restricting vehicle movements, the applicant agreed to one being imposed which would restrict vehicle movements to 12 per day. A requirement for a site and travel management plan was also imposed to ensure the vehicle limit could be achieved. The vehicle movement condition was not imposed to manage a new effect, but to make it easier for Council to ensure that the vehicle movements associated with the activity can be managed and if necessary the limit enforced.
- 9.6 In our view the decision on the variation application correctly understood the legal position when it found that “*The type of people within the accommodation facility will change, however the facility will provide programmes to assist residents and the use of the facility is considered to be consistent with what has previously been approved.*”³
- 9.7 In cases involving the establishment of new correctional facilities, the Environment Court has held that community fears about allowing certain types of people into the community is not relevant consenting consideration. That is because the Court cannot prevent this occurring elsewhere in the community. In other words, there is a baseline against which the effects are measured, which is the potential for general (scattered or concentrated) release into the community. The Court observed that a concentration of parolees in a controlled environment (such as in this case) would lessen the chances of reoffending rather than increase them. It took a similar approach to those on “periodic detention” noting that those people were already in the community and have been assessed as suitable to remain in the community.⁴
- 9.8 More recently, the Court has held that “*ill founded perceptions*” of risk or “*discomfort*” are not adverse effects under the RMA. The Court observed “*if that was the case, any proposal would be vulnerable to the discomforts of its opponents no matter how irrational or ill founded those discomforts might be.*”⁵

¹ We note that the Environment Court has held that “*generally in accordance with*” type conditions are no longer appropriate and that consents should specify the particular plans and documents relied on.

² Apart from seasonal worker accommodation where the workers are required to be associated with the post-harvest operations (*Puke Coal Ltd v Waikato RC* [2015] NZEnvC 212).

³ Decision on RC299V02 dated 13 December 2019, para 23.

⁴ *Department of Corrections v Dunedin City Council* C131/97 pp19-22, summarising prior case law.

⁵ *Living in Hope Inc v Tasman DC* [2011] NZEnvC 157 at [124] and [211].

- 9.9 In our view that case law is applicable here, and explains why the Council did not consider that the change in the type of people residing in the facility (from mental health consumers to those entering or being released from prison) was a relevant effect which could be considered. Rather, it properly focussed its assessment on the effects of the change proposed, being a reduction in numbers residing on site. It imposed an additional condition to more clearly manage vehicle movements, and appropriately ensured that the consent granted reflects the actual use of the Site.

Conclusion

10. We have not identified any procedural error or irregularity. In our view the original decision to grant consent in 2005 and the decisions granting the two subsequent variations in 2015 and 2019 were all made having regard to the relevant statutory considerations and were all decisions that a reasonable decision maker would have reached in light of the applicable planning and statutory framework.

Yours faithfully

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