

# MINUTES

**TITLE:** Environment & Planning Subcommittee  
**DATE:** Tuesday, 31 July 2007  
**TIME:** 10.00 am  
**VENUE:** Tasman District Council Chamber, 189 Queen Street, Richmond

**PRESENT:** Crs E M O'Regan (Chair), S J Borlase and N Riley

**IN ATTENDANCE:** Consents Planner (R Askew), Consent Planner (D Hewitt), Planner Community Services (R Squire), Administration Officer (B D Moore)

**1. APPLICATION RM050876 - R B LEES, PENINSULA ROAD, TATA BEACH, GOLDEN BAY – OBJECTION TO CONDITIONS OF CONSENT**

The applicant, R B Lees, objected to conditions 4 and 7 of a decision on application RM050876 issued under staff delegated authority on 5 June 2007.

The Committee proceeded to hear the application, presentation of submissions and staff reports as detailed in the following report and decision.

The Committee reserved its decision at 12.15 pm.

## **RESOLUTION TO EXCLUDE THE PUBLIC**

**Moved Crs O'Regan / Riley**  
**EP07/07/25**

**THAT the public be excluded from the following parts of the proceedings of this meeting, namely:**

R B Lees

**The general subject of the matter to be considered while the public is excluded, the reason for passing this resolution in relation to the matter, and the specific grounds under Section 48(1) of the Local Government Official Information and Meetings Act 1987 for passing this resolution are as follows:**

<b>General subject of each matter to be considered</b>	<b>Reason for passing this resolution in relation to each matter</b>	<b>Ground(s) under Section 48(1) for the passing of this resolution</b>
R B Lees	Consideration of a planning application	A right of appeal lies to the Environment Court against the final decision of Council.

**Moved Crs Borlase / Riley**  
**EP07/07/26**

**THAT the open meeting be resumed and the business transacted during the time the public was excluded be adopted.**  
**CARRIED**

**APPLICATION RM050876 - R B LEES, PENINSULA ROAD, TATA BEACH, GOLDEN BAY – OBJECTION TO CONDITIONS OF CONSENT**

**Moved Crs O'Regan / Riley**  
**EP07/07/27**

**THAT pursuant to Section 104D of the Resource Management Act, the Committee UPHOLDS the objection of R B Lees as detailed in the following report and decision.**  
**CARRIED**

**Report and Decision of the Tasman District Council  
through its Hearings Committee Meeting  
held in the Heaphy Room, Richmond**

**on Tuesday, 31 July 2007, commencing at 10.00 am**

A Hearings Committee ("the Committee") of the Tasman District Council was convened to hear the objection lodged by **R Lees** relating to conditions of a subdivision consent issued under delegated authority on 5 June 2007. The objection, made in accordance with Section 357A of the Resource Management Act 1991 ("the Act"), was lodged with the Tasman District Council on 15 June 2007 and refers to resource consent RM050876.

- PRESENT:** **Hearings Committee**  
Cr E M O'Regan, Chairperson  
Cr S Borlase  
Cr N Riley
- APPLICANT:** Ms V Chisnall, McFadden, McMeeken Phillips and  
Mr M Potter, Golden Bay Surveyors Ltd, both representing  
the applicant Mr R B Lees.
- CONSENT AUTHORITY:** **Tasman District Council**  
Ms D Hewitt- Subdivision Officer  
Ms R Squire, Planner, Community Services
- IN ATTENDANCE:** Mr B Askew , Principal Planner (Consents) - Assisting the  
Committee  
Mr B Moore- Committee Secretary

## 1. BACKGROUND OF CONSENT AND CONDITIONS

The applicant, R B Lees made application to subdivide Lot 2 DP 353793 (CT 219979) comprising 3.6267 hectares into three allotments, with proposed Lot 1 comprising 1.0088 hectares and containing an existing dwelling and outbuildings, Lot 2 comprising 1.2927 hectares and Lot 3 comprising 1.3255 hectares. The property lies within a slope instability risk area, the coastal environment area and adjacent to an esplanade reserve (open space zone) that abuts the Tata Beach Estuary. This is identified in the TRMP (Schedule 24.1F) as an area with nationally and internationally important values.

The subdivision is a Discretionary Activity.

## 2. THE OBJECTION

On 15 June 2007 the Council received an objection from Mr Martin Potter of Golden Bay Surveyors, agent for the applicant, Mr Richard Lees pursuant to Section 357A of the Act to conditions contained in a decision issued by Council staff under delegated authority (Resource Consent RM050876).

The agent / applicant objects to the following Conditions:

- **Condition 4 ‘Easements to be Created’** The condition requires easements to be created over services that lie outside of the allotment in favour of that allotment or in gross to TDC as required. This is a “standard condition” for subdivision consents.
- **Condition 7 “Right-of-way – Public Access and Council Vehicle maintenance Access’** – The condition requires that a right-of-way easement be created in gross to Tasman District Council to provide for public access and vehicle access solely for the purposes of maintenance of the access and possible future development of the esplanade reserve located alongside Tata Beach Estuary which is listed in the TRMP (Schedule 25.1F) as an area with nationally and internationally important values. The terms and provisions of the easement relating to location and extent of the easement area, activities and use, have been set out which would be incorporated into an easement instrument to be registered on the title of the relevant allotments, being Lots 2 and 3.

## 3. REASONS FOR THE OBJECTION

- **Condition 4 ‘Easements to be Created’** The wording of the condition excludes easements to be created in gross to Telecom and Network Tasman or any other utility provider. These services will not be provided unless service providers can secure easements in gross.
- **Condition 7 “Right-of-way – Public Access and Council Vehicle maintenance Access’** – The condition goes beyond what was originally discussed and agreed by the applicant. The condition is an invalid condition for Council to impose.

#### **4. PROCEDURAL MATTERS**

No Procedural matters were raised.

#### **5. EVIDENCE HEARD**

The Committee heard evidence from the applicant / objector and the Council's reporting officers. The following is a summary of the evidence heard at the hearing.

##### **5.1 Applicant's Evidence**

Ms V J Chisnall, representing McFadden, McMeeken and Phillips, solicitors, presented written evidence in regards to issues concerning the imposition and objection to condition 7 of the consent.

Ms Chisnall stated that she did not believe that the condition met the provisions of the 'Newbury Test' (Newbury District Council v Secretary of State for the Environment [1981]). The particular matter of the Newbury test that was not met was that the condition did not fairly and reasonably relate to the development authorised by the consent and that the conditions leading to the imposition of the condition was completely unreasonable and should not have been imposed.

Ms Chisnall then proceeded to refer to an exchange of written communication between Council's solicitors and McFadden, McMeeken and Phillips. These had not been circulated with the agenda nor had been seen by the committee so the committee asked for a short recess to read the correspondence referred to.

The letters related to legal opinion and argument as to whether section 220(1)(f) could be used to impose a condition of requiring an access easement. Ms Chisnall made reference in her firms letter to some cases that she considered relevant to the matter however Council's solicitor's response was that the references had not changed their opinion that section 220(1)(f) was a correct and appropriate provision to require the access easement as a condition of subdivision. Ms Chisnall asserted that section 237B of the Resource Management Act (RMA), which provides for Council to acquire an access strip by agreement should be used as this was a specific provision and that this took precedence over the general easement condition provisions provided by section 220(1)(f).

Ms Chisnall also asserted that the top-up to the reserve had met the requirement of section 6(d) of the RMA which provides for the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers.

Mr M Potter who is a surveyor with Golden Bay Surveyors Ltd addressed the matter of the objection to condition 4 which specified easements in gross to be created in favour of the Tasman District Council. He asserted that although a relatively minor matter of restrictive wording, that he considered the condition be reworded to enable easements to be provided in gross for all service providers.

He confirmed that the reworded condition recommended in the planning officer's report was acceptable and that this phraseology should be used in future.

Mr Potter then gave a summary of the history of the application and asserted that there had been some miscommunication, particularly on the matter of the access required by Council.

Mr Potter raised the matter of the practicality of forming a walking track around the peninsular and considered that an access strip would be an unreasonable requirement when there was no certainty as to whether the esplanade reserve could have a walkway developed.

Mr Potter referred to an attached email communication dated 18<sup>th</sup> March 2007 from Community Services Planner, Ms Ros Squire.

In that e-mail Ms Squire proposed two alternative options to the access easement to enhance public access to and along the coastal marine area. One of these options which was the topping up of the esplanade reserve was agreed to by the object and the condition imposed in the consent has not been challenged. Mr Potter said it was felt that the option of the top-up to the reserve had satisfied the Council requirements as an alternative to the access easement.

Mr Potter added that the building site chosen for Lot 2 had been to address issues of land stability but that the imposition of the access strip would have a significant negative effect on the value of that Lot due to the proximity of the building site to the proposed access easement.

## 5.2 Council's Reporting Officer's Report and Evidence

Ms Squire referred to her report in the agenda. She distinguished between the provision of section 220(1)(f) which provides for Council to impose a condition of any easement at the time of subdivision whereas section 237B was a provision for Council to make agreement with a land owner for an access strip outside of the resource consent/subdivision process. Ms Squire in response to a question as to why no access provided earlier, replied that possibly the reason was lack of input by Community Services into the resource consent process.

Ms Hewitt in her evidence also supported the opinion that section 237B did not preclude Council imposing an easement for access under section 220(1)(f). She confirmed that although the activity had fallen into a Discretionary activity status by virtue of the reduction of one Lot below the Controlled Activity threshold due to the increase in the area of the esplanade reserve, that Council still had provided for the matter of access a matter over which Council had reserved control for a Controlled Activity subdivision.

Ms Hewitt stated that the matter of access had been brought up early during the application process and was not a matter that was imposed 'at the last minute'.

On the matter of the building site for Lot 2 Ms Hewitt confirmed that any change to the proposed site would need to go through a further process and that would require further information and assessment.

## 6. DECISION

Pursuant to Section 357D of the Act, the Committee **UPHOLDS** the objection to the as set out below.

**A. Condition 4 “Easements to be Created” is reworded as follows:**

4. Easements are to be created over any services located outside the boundary of the allotment that they serve. Reference to easements is to be included in the Council resolution on the title plan and endorsed as a Memorandum of Easements.

**B. Condition 7 “Right-of-Way - Public Access and Vehicle Maintenance” including the related advice note and is deleted.**

**7. REASONS FOR THE DECISION**

In relation to each of the issues raised in the objection, the Committee considered as follows:

- A. Easements to be Created.** The Committee noted the agreement between staff and the objector and the Committee also agreed that the condition should be modified to the extent that specific reference to an easement in gross in favour of Tasman District Council is removed and the condition reworded to enable easements for any services located outside the boundary of the allotment they serve.
- B. Right-of-Way – Public Access and Vehicle Maintenance.** The Committee considered the evidence of all parties.

**Principal Issues**

- a) The two key points raised were: i) the matter of section 6(d) of the RMA which requires the Council, as a matter of national importance, to recognise and provide for “The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers” and ii) the legal validity of Council’s ability to impose a condition requiring an access easement to the coastal marine area pursuant to section 220(1)(f) of the RMA
- b) The matter of the access to and along the Coastal Marine Area is a Part II Matter under the RMA and the Committee gave considerable weight to this issue during its deliberations. In the evidence it was noted that Council staff had written to the objector on 18 March 2007 advising that as an alternative of an access easement along the existing right-of-way, that a top-up of the existing esplanade reserve to 20 metres would be an option to enhance public access to and along the coastal marine area. The objector has accepted the condition for the top up of the esplanade reserve. The objector, through his solicitor and surveyor, therefore questioned the reasonableness of Condition 7 given the agreement to the option for the top-up of the esplanade reserve. The Committee agrees with the objector that the condition for the right-of-way is, in this particular instance, unreasonable and that the top-up of the esplanade adequately achieves the objective of enhancing the public access along the coastal marine area which is a matter of national importance under Section 6(d) of the RMA.

The Committee notes that access to the esplanade reserve is provided for by way of an access located on the southern side of Peninsula Road approximately 240 metres from this development. This distance was not considered to be unreasonable in terms of providing alternate access.

- c) The Committee also considered that the nationally and internationally important conservation values listed in Schedule 25.1F of the Tasman Resource management Plan would be maintained and enhanced by the increase in esplanade reserve area afforded by the top-up and that the increased area may in time enable public access around parts of the peninsula providing education benefits where this is compatible with conservation values.

## **Part II Matters**

The Council has taken into account the relevant principles outlined in Sections 6, 7 and 8 of the Act and it is considered that granting these changes to the conditions achieves the purpose of the Act as presented in Section 5.

### **Relevant Statutory Provisions**

In considering this application, the Council has had regard to the relevant provisions of the following planning documents:

- a) the Tasman Regional Policy Statement (TRPS);
- b) the proposed Tasman Resource Management Plan (PTRMP); and

How the activity relates to the objectives and policies contained within the TRPS and PTRMP were covered in the original decision. It is considered that the changes being sought by the Objector do not change these considerations.

### **Comment on Legal Matters Raised**

Legal opinions from both the Council's and the objector's solicitors were presented. No further advice or opinion has been sought on the matters raised, however the Committee has not pursued further the objector's legal arguments that section 237B overrides Section 220(1)(f) in regards to its ability to require a condition for an access easement where such access is a fair, reasonable and practical. The decision to uphold the objection in this case stems from the specifics of the case, in particular the history or discussions/negotiations between Council staff and the belief that the top-up of the esplanade reserve was a valid alternative to the accessway easement option discussed with the objector and that this met the matter of national importance for access along the coastal marine area required by section 6(d) of the Act.

Issued this 3<sup>rd</sup> day of August 2007

Councillor O'Regan  
**Chair of Hearings Committee**

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**Date Confirmed:**

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**Chair:**