



**Report** 04.273  
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**File** WAR/04/0036/1

**Committee** Policy, Finance and Strategy Committee  
**Author** Harvey Collerton, Resource Advisor

## **Objection to Resource Consent Conditions - Transit NZ WAR 040036**

### **1. Purpose**

To consider and decide on the objections raised by Transit NZ to two of the conditions placed on their resource consent for the construction and associated works of the Waiohine River road bridge on State Highway 2.

### **2. Background**

A non-notified resource consent was issued to Transit NZ Ltd on 16 April 2004, under delegated authority, for the following activities:

- Construction of a bridge
- Riverbank protection works
- Works in and on river bed
- Discharge to water
- Diversion of channel

34 conditions were applied to the resource consent in order to control operations in such a way as to minimise adverse effects on the environment. Transit NZ served notice on 6 May 2004 to the Wellington Regional Council of their objection to the conditions of the resource consent under Section 357 of the Resource Management Act 1991.

Specifically, the consent holder objects to conditions 15 and 34 which refer to actions to be taken in the event of archaeological remains being uncovered as a result of the proposed works, and a requirement to restore the site to its original condition.

There was an initial attempt by WRC to deal with this issue by way of either a variation to the consent, or a letter setting out how WRC would assess compliance

with the two conditions, in order to expedite the process. Transit NZ, however, were of the view that the matter should be dealt with by way of an objection under section 357 of the RMA.

Unfortunately, no appropriate delegation has been given to either the Rural Services and Wairarapa Committee or the Environment Committee and therefore this matter must be dealt with by the full Council. The matter of appropriate delegations has been included in the current Consents Review.

### **3. Statutory Matters**

The Resource Management Act 1991 (RMA) provides for objections to certain decisions and requirements of consent authorities. In this case OPUS International Ltd, on behalf of their client Transit NZ Ltd, made an application for a resource consent under section 88 of the RMA which was processed as a non-notified application. Therefore Transit NZ has the right under section 357, subsection 2A, of the RMA to object to the consent authority's decision and they have done this within the statutory timeframe.

In response to this objection the consent authority, namely WRC, have the options of dismissing the objection or upholding the objection wholly or partly.

### **4. Consideration of Issues**

#### **4.1 Condition 15**

OPUS International provided a report on the assessment of environmental effects in support of the resource consent application. In this report iwi matters were discussed and the following consent condition was suggested for inclusion in the consent:

*In the event that an archaeological site is encountered during works for the proposed development, work shall cease immediately and the consent holder shall immediately notify Ngati Kahungunu, Rangitaane o Wairarapa, the New Zealand Historic Places Trust and, if appropriate, the New Zealand Police so that an archaeological assessment can be made and advice given accordingly.*

In processing the consent a similar previously used condition was used rather than the wording suggested by the applicant. The resource consent condition included reads as follows:

**15.** *The consent holder shall implement the following protocols and procedures if waahi tapu sites or other sites of value to tangata whenua are found:*

- *Work is to cease immediately*
- *The consent holder shall contact the Manager, Planning and Resources, Rangitaane o Wairarapa, and Ngati Kahungunu ki Wairarapa immediately*
- *Representatives of Rangitaane o Wairarapa and / or Ngati Kahungunu ki Wairarapa are to be given sufficient time to carry out an investigation of the site to determine any cultural issues and an appropriate course of action. At the discretion of the Manager, Planning and Resources, this action may include permanent or temporary cessation of work on the site.*

The applicant has argued that Condition 15, as it is worded, does not meet the criteria of a valid and lawful condition. The argument put forward is that for a condition to be lawful it cannot have the effect of nullifying the consent (Case law: *Lyttelton Port Company vs Canterbury Regional Council, C8/2001*). The last sentence of the condition gives the Manager the ability to order cessation of works on the site, such that the works authorised by the consent could not be completed, therefore in effect nullifying the consent.

The other argument put forward is that condition 15 is not for a resource management purpose: if an archaeological site is discovered then the relevant legislation becomes the Historic Places Act. Therefore the condition is *ultra vires* or outside the Wellington Regional Council's powers. Furthermore the condition relies on the compliance of a third party and is therefore invalid (*Fergusson vs Far North DC 1999 NZRMA 238*).

Transit indicate that they are not necessarily opposed to the *intent* of Condition 15, but rather its wording renders it unreasonable and invalid. They would be satisfied if the wording of Condition 15 was changed to what they had originally suggested.

Having considered this objection, we believe the applicant has a valid argument. On reflection the condition would seem, by any reasonable interpretation, to provide undue power to the Manager to order the cessation of works. Whether or not the authority to prevent the authorised works from being completed is the *intent* of the condition, nevertheless the potential exists, as it is worded, for the consent to be nullified.

The issue concerning archaeological investigations ultimately concerns the Historic Places Trust and is not the jurisdiction of the WRC therefore it is a reasonable interpretation of the wording of consent 15 that what it proposes is *ultra vires* or outside the powers of the WRC.

Local iwi and the Historic Places Trust were consulted early in the process and signed their agreement to the proposal as it stood with the original consent condition proposed by the applicant. Therefore it is recommended that the wording of condition 15 be changed to the wording proposed by the applicant, as above.

## 4.2 Condition 34

Condition 34 of the resource consent currently reads:

**34.** *The consent holder shall return the site area surrounding the structure back as close as possible to its original condition on completion of the works.*

Transit NZ Ltd holds concern that the wording of this condition is sufficiently vague and uncertain as to be ultimately unenforceable. The applicant contends that the condition should enable the applicant to know with certainty what is required for compliance. In the case of *Fergusson vs Far North District Council, 1999 NZRMA 238*, the court held that a condition requires specificity, clarity and accuracy of expression leading to a certain measure of certainty before it can be enforceable.

The applicant argues that it is ambiguous what constitutes the *structure* and because of the construction it is clearly not possible to return the site to its original condition. The condition actually uses the term “as close as possible” which could reasonably be interpreted as providing accommodation for the fact that the site can not be returned to exactly its original condition.

The *intent* of Condition 34 is to ensure the site is rehabilitated as much as possible after the works are completed, and it is acknowledged that this outcome is also provided for in three other conditions:

- 3. requiring the proposed landscaping to be completed within 6 months;
- 16. requiring tidy-up on completion of the works; and
- 33. requiring the earthworks on the construction site to be sown with grass.

It is acknowledged that the wording of condition 34 lacks the specificity by which the applicant might determine their compliance with a sufficient degree of certainty. It is furthermore acknowledged that the intent of the condition, with regard to the rehabilitation of the site, is adequately covered by other conditions, namely conditions 3, 16 and 33. Therefore it is recommended that condition 34 be removed from the resource consent.

## 5. Communication

It is not considered necessary or appropriate to seek any particular publicity.

## 6. Recommendations

- (1) *That the Committee receive this report; and*
- (2) *That Transit NZ's objection be upheld in whole, namely that;*

- (a) *Consent condition 15 be changed to read as follows:*

*In the event that an archaeological site is encountered during works for the proposed development, work shall cease immediately and the consent holder shall immediately notify Ngati Kahungunu, Rangitaane o Wairarapa, the New Zealand Historic Places Trust and, if appropriate, the New Zealand Police so that an archaeological assessment can be made and advice given accordingly.*

- (b) *Consent condition 34 be deleted from the resource consent.*

Report prepared by:

Report approved by:

**Harvey Collerton**  
Resource Advisor

**Steve Blakemore**  
Manager, Planning & Resources

**Colin Wright**  
Divisional Manager, Wairarapa