BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 267

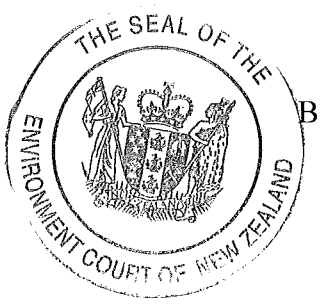
IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under section 120 of the Act
BETWEEN	CONEBURN PLANNING LIMITED (formerly Zante Holdings Limited) (ENV-2010-CHC-185) Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Court:	Environment Judge J R Jackson (Sitting alone under s 279(1)(e) of the Act)
Hearing:	at Queenstown on 28 November 2014
Appearances:	Ms M Baker-Galloway for Coneburn Planning Limited Ms J Macdonald for the Queenstown Lakes District Council
Date of Decision:	23 December 2014
Date of Issue:	23 December 2014

PROCEDURAL DECISION

A: Under section 279(1)(e) of the Resource Management Act 1991 the Environment Court rules that the consent authority and the Environment Court are precluded by section 104(3) of the Act from having regard to any potential adverse effects of the proposed subdivision of Lot 400 DP 378578 and development of seven (7) residences on the resulting lots on the land identified as servient tenements in Annexure Schedule 3 (being a continuation of Schedule A) to Easement Instrument EI7017246.2.

B: Costs are reserved to be costs in the substantive proceedings.



REASONS

Introduction

[1] This case raises some questions about the relationship of landowners' property rights to the participatory principles and procedures of the Resource Management Act 1991 ("the RMA" or "the Act"). They arise out of a request by the parties for a preliminary ruling as to the effect of a registered covenant on the assessment of effects of activities for which resource consents are sought. The principal issue is whether easement instrument 7017246.2 ("the JP covenant") constitutes written approval under s 104(3) of the RMA from all owners and occupiers of Jacks Point properties to the proposal to subdivide and develop Lot 400 at Jacks Point south of Queenstown.

[2] The background to the proceeding is that a large area known as Jacks Point is zoned under the Queenstown Lakes District Plan as a "Resort Zone". The Jacks Point part of the Resort Zone is shown in pink on the district plan's Map 13[1]. On 14 April 2009 a company called Zante Holdings Limited applied to the Queenstown Lakes District Council for resource consents[2] to subdivide Lot 400 DP 378578 ("Lot 400") in the Jacks Point Resort Zone into seven lots, each with a residential unit. The Queenstown Lakes District Council declined[3] the application. Zante, now succeeded, it is claimed, by Coneburn Planning Limited ("Coneburn"), appealed against the decision.

[3] Chapter 12 of the district plan contains provisions which relate specifically to Jacks Point and provides that the objective of this part of the Resort Zone is[4]:

> To enable development of an integrated community, incorporating residential activities, visitor accommodation, small-scale commercial activities and outdoor recreation – with appropriate regard for landscape and visual amenity values, servicing and public access issues.

The relevant implementing policies[5]:

> … require development to be located in accordance with a Structure Plan to ensure the compatibility of activities and to mitigate the impact on neighbouring activities, the road network and landscape values.
>
> …

1 Queenstown Lakes District Council District Plan Vol. 3.
2 Called application RM 090252 by the Council.
3 Council decision dated 21 June 2010 on RM 090252.
4 Resort Zone Objective 3 [QLDC district plan p. 12-5].
5 Policies 3.4 and 3.7 [QLDC district plan pp. 12-6 et ff].

> ... ensure that subdivision, development and ancillary activities on the Tablelands and Jacks Point are subservient to the landscape.

[4] The Jacks Point Structure Plan[6] referred to in the first of those policies 3.4 shows Lot 400 with the notation "G/F". The key explains that "G/F" means "Golf Course. Open Space and Recreational Facilities". The particular area marked G/F which includes Lot 400 is located between two residential areas.

[5] The list of non-complying activities in the Resort Zone includes[7] "In the Jacks Point Zone[']] buildings which do not comply with the relevant Structure Plan". Residential buildings in the G/F areas in Figure 1 of the Jacks Point Structure Plan do not comply[8]. It was common ground before the Commissioners that the land use consent for residential buildings is a non-complying activity, whereas the subdivision consent is a controlled activity.

[6] Coneburn says that the court will not need to take into account the effects of the development on neighbours because they have all given approvals to the proposal. That approval is alleged to be contained in the JP covenant.

The Jacks Point Covenant

[7] The JP covenant (EI 7017246.2) is dated 24 August 2006 and registered over, amongst others, the lots which are adjacent to or nearby Lot 400 in Kinross Lane. The JP covenant states (relevantly):

> **Easement instrument to grant easement or profit à prendre**
> Sections 90A and 90F, Land Transfer Act 1952 EI 7017246.2 Easement
>
> Land registration district
> Otago
>
> Grantor
> Jacks Point Limited and Jacks Point Residents and Owners Association Incorporated
>
> Grantee
> Jacks Point Limited and Jacks Point Residents and owners Association Incorporated

6 Figure 1 in chapter 12 [QLDC district plan p. 12-26].
7 Rule 12.2.3.5 [QLDC district plan p. 12-14].
8 Site Standard 12.2.5.1 [QLDC district plan p. 12-16]

Grant of easement or profit à prendre or creation of covenant

The Grantor, being the registered proprietor of the servient tenement(s) set out in Schedule A, **grants to the Grantee** (and, if so stated, in gross) the easement(s) or *profit(s) à prendre* set out in Schedule A, **or creates** the covenant(s) set out in Schedule A, with the rights and powers or provisions set out in the Annexure Schedule(s).

Dated this 24th day of August 2006

(Underlining added)

...

Annexure Schedule 2

CONTINUATION OF COVENANT PROVISIONS

Background

A. The Developer is developing the Land, together with the Servient Tenement and the Dominant Tenement, as part of Jacks Point.

B. The Developer and the Society intend that the Land and the Servient Tenement and the Dominant Tenement be subject to a general scheme applicable to and for the benefit of the Land and each of the Servient Tenement and the Dominant Tenement to ensure that Jacks Point is developed and administered in a co-ordinated and harmonious manner and to conserve and enhance the character, value and amenity values of Jacks Point (":the Scheme").

C. The Society has been established to provide for and administer the Scheme for the benefit of the Land and the Servient Tenement and the Dominant Tenement as implemented through the Constitution and the Bylaws.

D. The Developer and the Society intend that this Instrument shall be and remain registered against the titles to the land and to each of the Servient Tenement and the dominant Tenement to give effect to the Scheme so that:

   a. owners or occupiers for the time being of the Servient Tenement shall be bound by the provisions of this Instrument;

   b. owners and occupiers for the time being of any of the Dominant Tenement can enforce the observance of the provisions of this Instrument by the owners or occupiers for the time being of any of the Servient Tenement in equity or otherwise; and

   c. the obligations and covenants of the Grantor under this Instrument are for the benefit of the Grantee and also for the benefit of the Society (in accordance with the Contracts Privity Act 1982).

1. Interpretation

1.1 In this Instrument unless the context otherwise requires:

"Allotment" means:

a. the Servient Tenement; and

b. any part of the Servient Tenement for which a separate title (including without limitation a unit title or a certificate of title for an estate in fee simple) has issued as a result of the subdivision of the Servient Tenement or otherwise.

...

"Developer" means Jacks Point Limited promoting and carrying out the development (including maintenance) of Jacks Point, including any:

a. Related Entity of Jacks Point Limited that undertakes any part of the development or maintenance of Jacks Point; and/or

b. Any assignee and/or successor in title whether in whole or in part or parts of Jacks Point, that continues the promotion and carrying out of such development, and is nominated as such in writing by Jacks Point Limited.

"Dominant Tenement" means:

a. a lot within the Land for which a separate certificate of title (including without limitation, unit title, or a certificate of title for an estate in fee simple) has issued; and

b. in relation to any Covenant means the land described in Annexure Schedule 3 as the dominant tenement which has the benefit of that Covenant.

"Grantee" means:

a. In respect of the Dominant Tenement shown in Annexure Schedule 4 as being owned initially by Jacks Point Limited as the Developer and then its successors in title who are the registered proprietors of the Dominant Tenement from time to time; and

b. In respect of the balance of the Dominant Tenement being the land shown in Annexure Schedule 4 as being owned initially by Jacks Point Residents & Owners Association Incorporated as the Society, means the registered proprietors from time to time of that land.

"Grantor" means:

a. In respect of that part of the Servient Tenement shown in Annexure Schedule 4 as being owned initially by Jacks Point Limited as the Developer, means the registered proprietors from time to time of that land; and

b. In respect of the balance of the Servient Tenement being the land shown in Annexure Schedule 4 as being owned initially by Jacks Point Residents & Owners

Association Incorporated as the Society, means the registered proprietors from time to time of that land.

...

"Land" means the land which comprises the land formally contained in Lot 1 DP 337993 certificate of title 156346 and Lot 2 and Lot 5 DP 337993 and Lot 5 DP 26261 certificates of title 156347 (Otago Registry) but excluding Lot 13 DP364700.

"Planning Proposal" includes (without limitation) any application for resource consent and/or plan change and/or variation of any nature under or to the relevant District Plan or proposed District Plan or the Jacks Point Zone.

...

2. General Covenants

2.1 The Grantor covenants and agrees:

a. to observe and perform all the Covenants at all times; and

b. that the Covenants shall run with and bind the Servient Tenement for the benefit of the Dominant Tenement.

2.2 The Grantor covenants and agrees:

a. ...

b. to indemnify the Grantee against all claims and proceedings arising out of a breach by the Grantor of any of its obligations set out in this Instrument;

....

8. Covenants in Relation to Future Development

8.1 The Grantor covenants and agrees with the Grantee that the Grantor will not at any time lodge any submission against any Planning Proposal by the Grantee to subdivide, develop or use:

a. any part of the Land identified as Village (V/JP) in the Jacks Point Zone for commercial, visitor accommodation and/or residential purposes;

b. any part of the Land identified as Lodge (L) in the Jacks Point Zone for visitor accommodation purposes; and

c. any part of that Land other than the land specified in clauses 8.1 (a) and (b) for any commercial, residential, rural or recreational activity provided that the benefit of this subclause shall be limited to those parts of the Land owned by the Developer and this subclause shall cease to have effect when no part of the Land is owned by the Developer.

....

8.4 The Grantor and Grantee agree that the Grantor's obligations and covenants under clauses 8.2 and 8.3 are for the benefit of the persons named in those clauses and their successors in

titles to the land referred to in clause 8.2 (in accordance with the Contracts Privity Act 1982).

8.5 ....

8.6 The Grantor hereby gives written approval for the purposes of the Resource Management Act 1991 to any Planning Proposal referred to in clauses 8.1 and 8.2. The Grantor shall provide any necessary further written approval to any such Planning Proposal if requested by any of the persons named in clauses 8.1 and 8.2 and in the event of failing to do so those persons shall be entitled to provide a copy of this clause 8 to the relevant consent authority as evidence that such written approval is given.

...

[underlining added]

[8] The dominant tenement described in Annexure 3 to the JP covenant includes land which is now Lot 400[9].

[9] The servient tenements include all the land in the JPRZ other than public land which is excluded.

Jacks Point ownership and management

[10] The benefit of the covenants is given by the JP covenant to "the Grantor". That term is defined as quoted above. It includes two (legal) persons and certain successors:

(a) the owner "from time to time" of the land owned (shown in Annexure Schedule 4) by Jacks Point Ltd "as the developer"; and
(b) the owner from time to time of the land shown in Schedule 4 as owned by Jacks Point Residents and Owners Association.

[11] In 2012 Jacks Point Ltd changed its name[10] to, not "Coneburn Planning Ltd", but "Coneburn Land Holdings Ltd".

[12] Jacks Point Equities Ltd has been the current registered proprietor of Lot 400 for some time. It originally intended Zante Holdings Ltd to develop that land and indeed the

9 Second supplementary submissions of counsel for Coneburn dated 4 December 2014.
10 The Certificate of Incorporation which notes the change of name is annexed to the affidavit of J W Prain dated 10 December 2014 as Annexure "B".

original application for resource consent in respect of Lot 400 was a company called Zante Holdings Limited ("Zante").

[13] The relevant relationship between those parties is shown by an agreement dated 3 May 2010 which Jacks Point Ltd entered into with Jacks Point Equities Ltd and Zante. Those parties agreed[11]:

> ....
>
> **Nomination**
>
> 3. Jacks Point Limited hereby nominates Jacks Point Equities Limited and Zante Holdings Limited. (and Jacks Point Equities Limited and Zante Holdings Limited accepts such nomination), for the purposes of the definition of *"Developer"* referred to in Clause 3.a of the Covenant in respect of Lot 400.
>
> **Acknowledgement**
>
> 4. Jacks Point Residents & Owners Association Incorporated acknowledges that Jacks Point Equities Limited is, and Zante Holdings Limited is, a "Developer" under its constitution and pursuant to the Covenant.

[14] On 5 February 2014 the Registrar received a memorandum from counsel that Zante was being removed from the company register and that Coneburn was its successor. It is difficult to understand how that could be so. It seems more likely that Jacks Point Limited or its successor Coneburn Land Holdings Ltd or even Jacks Point Equities Ltd was its successor. That is immaterial because, as described above, Jacks Point Equities Ltd is the owner of Lot 400, Coneburn is its agent[12], and most importantly Jacks Point Equities Ltd has been nominated by Jacks Point Limited as "Developer" by Jacks Point Ltd under the JP covenant.

The law and the authorities

[15] Because the application for resource consent was lodged in 2009 – before the Resource Management (Simplifying and Streamlining) Amendment Act 2009 came into force on 1 October 2009 – the applicable form[13] of Section 104(3)(b) and (4) introduced in 2003 states:

11 Attachment "A" to affidavit of J W Prain dated 10 December 2014.
12 J W Prain, affidavit 10 December 2014 at para 5 and Exhibit "C".
13 By section 44 Resource Management Amendment Act 2003.

(3) A consent authority must not –

...

(b) when considering an application, have regard to any effect on a person who has given written approval to the application.

...

(4) Subsection (3)(b) does not apply if a person has given written approval in accordance with that paragraph but, before the date of the hearing (if a hearing is held) or otherwise before the determination of the application, that person gives notice in writing to the consent authority that the approval is withdrawn.

[16] The commissioners appointed by the Council wrote[14]:

> We do note some relevant points that may need to be considered if the application goes further. ...[T]here is a real issue as to how far a public decision-maker should be concerned with covenants of this nature. While we accept there is some relevant case law, we are not satisfied that the case law establishes all of the relevant principles. We further note that the wording of the RMA dealing with Affected Party Approvals has changed since the decision in Queenstown Property Holdings Ltd v QLDC [1998] NZRMA 145, a decision that Mr Goldsmith particularly relied on. In that case, the Court placed some emphasis on the word 'agree' in section 104(6) as it then stood. The word 'agree' has not been in the relevant subsection since 2003. As none of the landowners in Kinross Lane attempted to submit against the proposal, we have no occasion to consider the effect of the negative covenant prohibiting them from doing so. However, we remain doubtful that, for the purposes of this hearing, they are deemed to have given written approval. This is for various reasons, but not the least of them being the drafting of the covenant. It seems to say that the covenant will be a deemed written approval if actual written approval has been asked for but not given. There was no evidence that all owners of those lots were asked to give a written approval to this particular application. Further, while the covenants also purport to bind future occupiers as well as future owners, the legal basis for this was not explained or explored.

In their decision the Council's commissioners found that the JP covenant did not amount to written approval by all owners and occupiers of Jacks Point properties. They were of the opinion[15] that the covenant would be deemed written approval only if actual written approval had been asked for but not given. There was no evidence the owners had been asked to give written approval for this particular application.

14 Council decision para [141].
15 Council decision para [141].

[17] Coneburn submits the commissioners erred in their decision. It contends[16] that, by virtue of the covenants registered against the certificates of title to all adjoining and nearby individual lots which will potentially be affected by the proposed activity, the owners and occupiers of those lots are deemed to have given affected party approval to the application, and therefore the consent authority are precluded from taking into account any potential effects on those persons under section 104(3) of the RMA.

[18] Counsel referred to three decisions of the Environment Court including *Queenstown Property Holdings Ltd v Queenstown Lakes District Council*[17], *Waiheke Island Airpark Resort Ltd v Auckland City Council*[18], and *Christchurch Surgical Associates Holdings Ltd v Christchurch City Council*[19]. The first two decisions were on a very different and much fuller version of section 104(3) of the RMA so I need to refer to them. The third decision was decided after the 2003 amendments, which this decision is to apply, were made but did not refer to the amended wording. It simply followed *Queenstown Property Holdings Ltd* so does not assist either.

[19] *South Pacific Tyres NZ Ltd v Powerland NZ Ltd*[20] is authority that a no-complaints covenant may be binding under the RMA. The *South Pacific* covenant was worded in a general manner[21], precluding Powerland from complaining about any effects of the use of South Pacific's land and precluding Powerland from lodging any submission restricting or prohibiting the current or future use of South Pacific's land, including any action to "modify the current or future use". Associate Judge D I Gendall held that was not illegal.

Consideration

[20] The issue is whether the JP covenant provides a written approval to the application under section 104(3)(a)(ii) of the RMA. Counsel for Coneburn submitted it does because the wording of the section is now less prescriptive. Section 104(3) no longer requires **express** written approval, nor does it refer to a person **agreeing** to the

16 See section 310 Resource Management Act 1991.
17 *Queenstown Property Holdings v Queenstown Lakes District Council* [1998] NZRMA 145 (EC).
18 *Waiheke Island Airpark Resort Ltd v Auckland City Council* EC Decision A088/09.
19 *Christchurch Surgical Associates Holdings Ltd v Christchurch City Council* EC Decision C120/08, 3 November 2008.
20 *South Pacific Tyres NZ Ltd v Powerland NZ Ltd* [2007] NZRMA 58 (HC)
21 *South Pacific Tyres NZ Ltd v Powerland NZ Ltd* [2007] NZRMA 58 (HC) at para [9].

proposal; it does not require the Council to be "satisfied"; it simply states that effects on "a person who has given written approval to the application" must not be considered.

[21] Certainly, at first sight, the JP covenant looks as if it might be a generic written approval under section 104(3) by all the grantees of any application made by JPL or its assignees. The Council says it is not for these reasons: first an approval and section 104(3) must be specific not general; second the subsection requires that the approval is of the actual application; third the consent authority should not need to inquire into covenants of this kind. As a continuation of the last point the Council says the conditions for exercise of the JP covenant were not met.

What does section 104(3) require?

[22] For section 104(3) to apply, there needs to be:

(a) a written approval from a person; and

(b) an application for resource consent which is the subject of the approval.

[23] In this case paragraph 8.6 of the JP covenant states "[t]he Grantor hereby gives written approval for the purposes of the [RMA] ...". The Council submits that there must be a conscious giving whereby a person turns their mind to the specific proposal. The answer is that when a person purchases a lot in the Jacks Point zone subject to the JP covenant, that person must comply with the provisions of the covenant. Further, even if there is a defect in the covenant (and at present I am not determining there is), section 153 of the Land Transfer Act 1952 provides a statutory implied covenant that the grantor "... will do all such acts as may be necessary on his part to give effect to all covenants, conditions, and purposes expressly set out in the instrument.

[24] The grantor (or covenantor) of the JP covenant must be held to have consciously turned their mind to all the possible planning applications that could have been made by JPL or designated successors. Consequently the first component of section 104(3) is clearly supplied. The word "written" in the covenant is redundant but it emphasizes that the covenant is focused on subsection (3).

[25] The second component is that the approval must be of "the application". This is at the heart of the respondent's concerns because para 8.6 of the JP covenant is both generic and pre-dates the application. The Council refers to the wording of the covenant where it states that approval is given "... to any Planning Proposal referred to in clauses 8.1 and 8.2" and argues that approval is not of "the application" made to it as consent authority and now before the court.

[26] The words "Planning Proposal" are defined[22] in the JP covenant as meaning, amongst other things, "... any application for resource consent ... under ... the relevant District Plan". However, covenant 8.6 does not catch all resource consent applications, but only those referred to in its paragraphs 8.1 and 8.2. The relevant provision in this proceeding is paragraph 8.1 which refers to planning proposals in respect of:

> c. any part of that Land other than the land specified in clauses 8.1 (a) and (b) for any commercial, residential, rural or recreational activity provided that the benefit of this subclause shall be limited to those parts of the Land owned by the Developer and this subclause shall cease to have effect when no part of the Land is owned by the Developer.

Two aspects of the covenant are notable. The first is that the grantor is placing considerable faith in the developer because the grantor effectively approves applications for any commercial, residential, rural or recreational activity. The only large category of activities in the district plan which is excluded is industrial. On the other hand, this covenant is not for the benefit of the owners of the land in perpetuity because of the way 'Developer' is defined. The covenant giving approval applies only so long as a particular person – the developer Jacks Point Limited or its successors nominated by Jacks Point Limited as the Developer – own land in the Jacks Point development.

[27] I have already found that Coneburn is acting as agent for Jacks Point Equities Ltd which is a successor of Jacks Point Limited and a nominated developer. Further, Lot 400 is owned by Jacks Point Equities Ltd, and the applications for resource consent are each therefore a "Planning Proposal referred to in clause....8.1...."[23]. Accordingly if section 104(3) is applied in a straight-forward way the JP covenant does provide written approvals by the owners of all the servient lots in the Jacks Point Resort Zone subject to

22 Para 1.1 of Annexure Schedule 2 to Easement Certificate EI 7017246.2.
23 JP covenant at 8.6.

the Easement Certificate. As Tipping J stated when giving his decision in the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[24]: "...the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say."

Achieving the purpose of the RMA

[28] If I understood Ms Macdonald's second argument correctly it was that allowing a generic covenant which pre-dated the application to be read as a written approval of the application was not consistent with the purpose of the RMA especially its participatory theme.

[29] It has long been recognised that the right to participate in the RMA processes is an important general principle of the Act. For example, in *Westfield (NZ) Ltd v North Shore City Council*[25] Elias CJ stated that there is:

> ... [a] general policy of the Act that better substantive decision-making results from public participation.

In the same decision Keith J added[26]:

> ... The [RMA] and its predecessors have long recognised that members of the general public may be able to participate in a planning process in certain circumstances. Under Part 6 of the Act that process includes a hearing if, among other things, anyone who made a submission asks to be heard.
>
> ...
>
> The purposes of those public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, second, to enhance the quality of the decisionmaking.

That passage identifies that one of the purposes of the participatory process is to allow people to protect their interests (including, implicitly, property rights).

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24 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC5; [2010] 2 NZLR 444 (SC) at [23]

25 *Westfield (NZ) Ltd v North Shore City Council* [2005] NZSC 17; [2005] NZRMA 337 (SC) at [25].

26 *Westfield (NZ) Ltd v North Shore City Council* [2005] NZSC 17; [2005] NZRMA 337 (SC) at [45] and [46].

[30] That is important because the participatory principle is by no means the only relevant theme of the RMA. In *Central Plains Water Trust v Synlait Ltd*[27] Baragwanath J, giving the judgment of the Court of Appeal, identified efficiency as one of the "two broad themes"[28] of the RMA, the other being the "dominant"[29] theme of sustainable management contained in "... the other aspects of Part 2 [of the RMA]"[30]. No doubt because of the facts before it the Court of Appeal concentrated[31] on the procedural aspects of efficiency under the Act – starting with section 21 (heading: **Avoiding unreasonable delay**) and traversing various other provisions.

[31] Despite those provisions which require prompt disposal of applications, it is inevitable and a source of frequent complaint that the RMA's procedures take time and impose opportunity costs on, at least, applicants. In my view if a developer wishes to set up a scheme of development for an area which avoids some of the costs of applying for consents, by contracting to remove opportunities for purchasers to oppose a developer, then they may do so. That is entirely consistent with the procedural efficiency theme identified in *Central Plains Water Trust v Synlait Ltd.*

[32] It is also important to recognise that the efficiency theme of the RMA goes well beyond mere procedural efficiency. It has a substantive component also. Section 7(b) of the RMA requires everyone applying the Act to have particular regard to "... the efficient use and development of natural and physical resources".

[33] In relation to the resource of land, the substantive efficiency theme links back to section 9 of the RMA. Section 9 reserves[32] the property rights of land owners to carry out (generally) any activities they choose unless a rule in a plan manages a particular activity and/or its effects. Those property rights traditionally include the common law rights of exclusive possession, right to transfer (in whole or in part), of quiet possession and – and the important corollary which is often overlooked – the right <u>not</u> to be exposed to serious annoyance (i.e. a nuisance). The property right not to be exposed to a nuisance is often overlooked because the action for nuisance is labelled a "tortious"

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27 *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 (CA).
28 *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 (CA) at [74].
29 *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 (CA) at [77].
30 *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 (CA) at [77].
31 *Central Plains Water Trust v Synlait Ltd* [2010] 2 NZLR 363 (CA) at [74] and [75].
32 Subject, in effect, to sections 15 and 16 as to externalities of pollution and noise.

action but the highest authorities confirm it is essentially related to property in that if it serious and unreasonable interference to land – *Hunter v Canary Wharf Ltd*[33], which emanates from other land: *Wu v Body Corporate 366611* [34]. The RMA complements that general and rather uncertain property right with others which manage annoyances – "nuisances" in a loose sense – in more specific ways.

[34] The principal management tool used around NZ to manage such effects is to zone land either by identifying activities, or by settling standards for the adverse effects of activities so as to manage externalities (including annoyances to neighbours).Many district plans control pollution[35] or noise[36] directly. They also control other adverse effects of land use of incompatible activities by making each potentially troublesome activity a discretionary or non-complying activity (in a rule) in combination with the differential zoning of different areas.

[35] It is a common misconception that every zoning and rule decreases (property) rights. That is not necessarily correct. There is reciprocity between landowners within each zone so that, if the zone's boundaries and rules are properly drawn, they gain more than they lose. Thus in an Industrial Zone the adjacent landowners can allow more annoyances to emanate from their land knowing they are unlikely to have residential neighbours who will complain. Or, in the Wakatipu Basin, the owners of the ring of outstanding natural landscape which comprises the sides of the basin (or of the islands e.g. Slope Hill which are outstanding natural features) know that while they would find it difficult to subdivide and build more residences on their land, their views of the landscape will not be spoilt by the neighbour doing that either. There is a subtle aspect to this also: some of the owners are the public as lessors (through the Crown) under the Crown Pastoral Land Act 1998, so even if resident in Auckland or Wellington they have the reassurance that "their" views of the mountainsides around Queenstown are recognised and protected[37]. This is more than a mere economic interest – an "existence

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33 *Hunter v Canary Wharf Ltd.* [1997] 2 All ER 426 (HL).
34 *Wu v Body Corp* 366611 [2014] NZSC137 (SC); [1997] AC 655.
35 Under section 15 RMA.
36 Under section 16 RMA.
37 As required by section 6(b) RMA.

value" – and more than the Crown's theoretical interest as "absolute owner of the soil"[38]. It is, through the Crown, an indirect reversionary interest in the land.

[36] So in the Jacks Point Resort Zone each of the residential owners has given up their right to carry out commercial or rural activities but gains because their neighbours cannot undertake those activities either. However, this right of reciprocity works the other way as well, in that owners can give up some or all of their rights. The efficiency justification for that, is that while zoning rules give considerable certainty, there are undoubtedly opportunities foregone. Sometimes as wider circumstances change those lost opportunities may cause greater losses than originally contemplated. That is especially so because the transaction costs of applying for (say) a non-complying resource consent activity for residences in a non-residential area, or for commercial uses in a residential area may be considerable – as are the further opportunity costs of lost time.

[37] To cover these potentialities a developer may wish to reserve its options on its land despite the zoning. Obviously it can only do that in respect of the land it owns, but in respect of that land it may reserve developments rights in the form of covenants. That is precisely what Coneburn (or its predecessors) have done here and it is entirely consistent with authority. The common law rights of land owners and occupiers to bargain for different levels of annoyances (and externalities) is generally preserved under the RMA: see *Christchurch International Airport Limited v Christchurch City Council*[39]; and – *Rowell v Tasman District Council*[40]. In *South Pacific Tyres NZ Ltd v Powerland (NZ) Ltd*[41] Associate Judge Gendall followed those decisions and wrote:

> I am likewise satisfied that reverse sensitivity covenants like the Covenant in this case do not contravene the principles or provisions of the RMA. In my view, the rights to public participation in the RMA can be waived by an individual giving free and informed consent – as, clearly, the defendant here did.

38 Bennion, Brown, Thomas and Toomey New Zealand Law 2nd Ed (2009), Brookers Ltd at paragraph 1.2.01.
39 *Christchurch International Airport Limited v Christchurch City Council* [1997]1 NZLR 573(FC).
40 *Rowell v Tasman District Council* [1997] NZRMA 241; [1997] 3 ELRNZ139 (HC).
41 *South Pacific Tyres NZ Ltd v Powerland (NZ) Ltd*, [2009] NZRMA 58 (HC) at para [61].

[38] In this case the purchasers of lots in the JP development, gave some flexibility to the developer in the period before the development was complete. However, once the development is complete and the Developer (as defined) owns no part of the Jacks Point Resort Zone, that flexibility disappears and certainty for the purchasers of land within the zone will increase. To assist the possibility that the Council, as consent authority, would approve a desirable (in the Developer's eyes) development JPL wrote the JP covenant so that the potentially adverse effects of a different activity were approved (in advance) by its neighbours. I hold that authorising a general approval under section 104(3) RMA is consistent with the purpose of the RMA because both the procedural and substantive aspects of the efficiency theme may (and do here) outweigh the participatory theme.

The words of the covenant

[39] I introduce discussion of the next submission for by the Council by recording that I am uneasy about it. The argument depends on a close reading of the JP covenant. I must bear in mind that the court has no power to make findings as to the legality of documents not directly for a resource management purpose, unless it is necessary to do so to establish jurisdiction.

[40] Counsel for the Council submits that clause 8.6 seems to envisage situations where the covenant is not sufficient evidence of approval for a planning proposal, for example where an approval does not meet the requirements of legislation. There is something worryingly circular about that proposition. In my view the reference to 'further written approval' is there, not because clause 8 may not always be sufficient, but because an application may change.

[41] A narrow application point was also argued by the Council, which is that there is no evidence that Coneburn tried to get approvals and failed in terms of covenant 8.6. But this is irrelevant because there is no obligation on the Council as consent authority to inquire into that. All the Developer needs to do under that covenant is to provide a copy of the covenant to the authority as evidence that the approval is given. That seems to be conclusive. In any event there is no evidence that any further written approval is necessary so all sentences in covenant 8.6 after the first are inapplicable on the facts.

Result

[42] In my judgment any adverse effects of subdivision and development of Lot 400 on the servient, especially residential, tenements of the Jacks Point Residential Zone, do not have to be considered by the Environment Court when considering section 104 and section 104D of the RMA in relation to the application. I will rule accordingly.

[43] The parties should lodge (preferably by agreement) a proposed timetable for the service of evidence by 30 January 2015.

J R Jackson
Environment Judge

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