BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 197

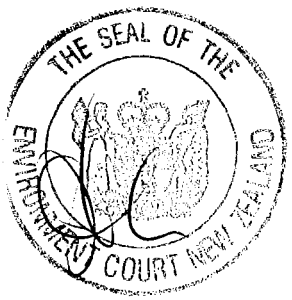
IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under s 325 of the Act
BETWEEN	DOUBLE R DEVELOPMENTS LIMITED (ENV-2018-AKL-000047) Appellant
AND	WESTERN BAY OF PLENTY DISTRICT COUNCIL Respondent

Court:	Environment Judge D A Kirkpatrick Environment Commissioner I M Buchanan
Appearances:	M A Osmand for Appellant R C Zame for Respondent
Hearing:	at Tauranga on 15 May 2018
Date of Decision:	9 October 2018
Date of Issue:	9 October 2018

DECISION OF THE ENVIRONMENT COURT
ON APPEAL AGAINST ABATEMENT NOTICE

A. The appeal against the abatement notice is refused and the abatement notice is confirmed.

B. Costs are reserved with directions made as to any application for costs.



REASONS

Introduction

[1] Double R Developments Limited (the **Appellant**)[1] has filed an appeal against an abatement notice issued to it by the Western Bay of Plenty District Council (the **Council**) requiring it to comply with a condition of its resource consent relating to a subdivision of a site at Hanlen Avenue, Waihi Beach (the **site**).

[2] The relevant condition (condition 7) requires the Appellant to use a particular route to bring fill material from a quarry on Waihi Beach Road to the site. Rather than follow the most direct route south down Wilson Road and Seaforth Road, which would pass through the centre of the town, the condition requires heavy vehicles to avoid passing through the town by travelling west on Waihi Beach Road to State Highway 2, then south on the State Highway, turning east onto Athenree Road and then along Steele and Emerton Roads to Hanlen Road. The State Highway route is significantly longer than the direct route (19.7 km compared to 3.6 km) but results in heavy traffic avoiding the town.

[3] The Appellant says that it applied for consent expressly on the basis that heavy vehicles would use the direct route and that it did not realise that the Council had imposed a condition requiring the use of the State Highway when it granted consent. It says that the State Highway route will add significantly to its costs and the time needed to complete the fill operation and that the effects of the direct route on the amenity values of the town are not so great as to justify such a condition. It says it has received advice that the condition is invalid.

[4] The Council says that it provided the Appellant with draft conditions including condition 7 prior to making its decision and that the Appellant did not challenge the

[1] The appeal was filed by a related company, Double R Ltd, but the relevant resource consent was granted, and the abatement notice was issued, to Double R Developments Ltd. At the judicial teleconference on 29 March 2018 Mr Osmand confirmed that the correct appellant is the latter company and the Court now amends this proceeding to substitute the latter company for the former company under s 278(1) of the Act and Rule 4.52 of the District Court Rules.

condition then or later, after grant, when some other aspects of the conditions were raised by objection under s 357A(1)(g) and resolved. The issue of the validity of the condition was only raised some eighteen months later when the Appellant began to exercise its consent, complaints were received from the public about traffic through the town and the Council's compliance officer made inquiries.

Context

[5] Waihi Beach is a coastal town close to the northern boundary of the district. It had in 2013 a resident population of 1935 people, but it is a popular holiday destination and its summertime population is substantially more than that. The town is essentially laid out in a strip of development following the coastline to the east, with the shops and other commercial activity at the northern end and with residential areas to the west and to the south.

[6] The main vehicle route through the town is on Wilson Road to the north and Seaforth Road to the south. The distance between the northern end of Wilson Road and the point to the south on Seaforth Road where it intersects with Hanlen Avenue is approximately 3 km. Wilson Road connects to Waihi Beach Road which then connects to State Highway 2 approximately 7 km to the west. Seaforth Road connects to State Highway 2 approximately 5 km to the west via Everton, Steele and Athenree Roads.

[7] The site has an area of 4.0473 ha. It is legally described as Lot 4 DPS 19134 and with Computer Freehold Register Identifier SA17D/671. It is on the western side of Hanlen Avenue, is zoned Residential and is generally level. There is existing residential development on higher ground across Hanlen Avenue to the east and more recent housing adjoining the site to the south, with the land to the north appearing still to be used for rural purposes and the property to the west being an unsealed airstrip.

[8] About two-thirds of the site is shown in the plan as being subject to a flood hazard overlay. That hazard requires filling before the land can be put to residential use. Suitable fill is available from a quarry owned by Beach Contractors Ltd located on Waihi Beach Road approximately 2 km to the west of its intersection with Wilson Road.

Application for and grant of consent

[9] On 6 January 2016 the Appellant, by its surveyor, applied for subdivision consent to subdivide its site into 49 residential lots, with roads, access lots, public reserves and associated infrastructure. The application states the name and address for service as being that of the Appellant's surveyors.

[10] Consent was required under the operative district plan in respect of:

a) earthworks over $5m^3$ in a Floodable Area under Rule 8.3.3(c)(ii) as a restricted discretionary activity, with the relevant matters of discretion being listed in Rule 8.5.1.3 as:

i) The effect of the proposed activity (including its location and design) on the capacity of ponding areas and function of overland flow paths;

ii) The appropriate minimum finished floor level of the proposed building/structure; and

iii) Verifiable new information which demonstrates that the subject site is not in fact under threat from the identified hazard; and

b) subdivision of land within a Floodable Area under Rule 8.3.4(c)(i) as a discretionary activity.

[11] The Council engaged an independent planning consultant, Mr J R D Danby, to process the application. Mr Danby considered that the reasons why consent was required were related at least insofar as the earthworks to address the flood hazard were integral to his assessment of the proposed subdivision in the flood hazard area. He accordingly bundled those aspects of the application together and assessed the whole as requiring consent as a discretionary activity.

[12] Mr Danby also recognised the large amount of fill that would likely be required to create suitable building platforms. On 27 January 2016 under s 92 of the Act he sought further information about several matters, including the source of the fill, the routes the trucks carrying the fill would take and the likely number of truck movements. On 22 February 2016 the Appellant's surveyor responded to all of the matters raised by Mr Danby, and in relation to bulk earthworks – truck movements, stated:

> Please refer to the attached document from Beach Contractors as to the proposed truck movements and programming for the earthworks exercise. We anticipate conditions of

consent to monitor same.

The attached document from Beach Contractors Ltd is headed "Estimate" and relevantly states:

- Supply and deliver 50,000m^3 (approx.) soft rock over a period of 2 - 2½ months
- Each unit will be carting approx. 20m^3 – the estimated figure is roughly 1,200 – 1,500m^3 per day = 60 truck units per day
- The route taken from Waihi Beach Quarry will be through Wilson Road, Seaforth Road to Hanlen Ave proposed subdivision

[13] A map of the route is also attached and it confirms the description in words quoted above.

[14] On 3 March 2016 Mr Danby sent a copy of the draft consent conditions by e-mail to the Appellant, apparently to its surveyor. This draft included as condition 1 a standard condition that the subdivision be carried out in accordance with the documents and information submitted as part of the application except where modified by any conditions of the consent. This is followed by a list of 12 documents, including the section 92 response dated 22 February 2016.

[15] The draft also included the following as condition 7:

> 7. THAT the fill to be imported from the Waihi Beach Road quarry shall be transported to the subject site via Waihi Beach Road, State Highway 2, Athenree Road, Steele Road, Emerton Road and Hanlen Avenue. The empty trucks are to return to the quarry via the same route.

[16] On 4 March 2018 the Appellant's surveyor responded by e-mail requesting amendments to 9 conditions and asking to be updated about the requirements for fill and finished floor levels in conditions 6 and 10. The e-mail makes no reference to condition 7, nor to truck movements generally.

[17] On 16 March 2016 the Council issued its decision granting the consent, to which it gave the reference number 9836S (the **consent**). The conditions of consent include condition 7, in the same form as provided in draft and as set out above. The reasons for decision include, at paragraph 22, the following statement:

> 22. In terms of the anticipated vehicle movements associated with the filling and the route to be taken to/from the site the applicant has provided further detail on this as part of section 92 request. This identifies that approximately 60 truck units per day are required to complete the filling over a two month period. Whilst the effects of the earthworks themselves will be managed through the Bay of Plenty Regional Council consent process, a condition is imposed on this consent to ensure that truck movements adhere to the proposed route to and from the site to ensure temporary transport effects on the road network are appropriately managed.

[18] The covering letter From the Council and the sixth advice note attached to the decision both refer to the right of the Appellant to object to the decision including any of the conditions of consent.

[19] On 22 March 2016 the Appellant by its development manager lodged an objection with the Council to conditions 6 and 10 relating to the extent of the flood hazard area and the fill and finished floor levels that should be achieved. This objection was granted by the Council and those two conditions were amended. There is nothing in relation to or otherwise affecting condition 7 in any document relating to the objection proceess.

Exercise of consent

[20] An associated resource consent for earthworks under the regional plan was not granted by the Bay of Plenty Regional Council until 8 September 2017. As that consent does not affect the transport of fill to the site, neither it nor the reasons for the time taken to grant it need to be traversed in this decision. At that stage, and as the Appellant was about to embark on the works authorised by both consents, Mr Giles, the principal of the Appellant, reviewed the conditions of consent. Through his agent Mr Osmand, he sought to engage with the Council about condition 7 as he appreciated that the route in the condition would make the fill costs increase substantially. In the event there was no direct discussion about the condition at that time.

[21] The evidence of Mr Giles is that he then sought advice about condition 7 and was told by an unidentified person or persons that it was *ultra vires* and therefore unenforceable. He then proceeded to instruct Beach Contractors Ltd to proceed. Stage one of the subdivision, with an area of approximately 3,200m^{2,} was on the higher land which required no fill and it was duly completed.

[22] On 5 December 2017 the Council began to receive complaints about the high volume of trucks transporting fill between the Waihi Beach quarry and Hanlen Avenue. Mr B P C Brown, a compliance officer employed by the Council, made inquiries and determined that these loads were connected to the Appellant's subdivision project. He reviewed the Council's records and saw that the subdivision consent was subject to condition 7. He contacted Mr Giles on 8 December 2017, who told him that he had advice from a senior lawyer that condition 7 was *ultra vires* and unenforceable and

that the longer route would increase the cost of the development substantially. Mr Brown also spoke with Mr Osmand who said the same. Mr Brown asked for a copy of the legal advice and any other supporting documents. He followed up that request on 13 December 2017 but says he received no reply.

[23] On 7 February 2018 Mr Brown again tried to contact the Appellant and a meeting was arranged for 14 February 2018. That meeting was attended by Mr Giles and Mr Osmand for the Appellant and by Ms A Curtis (the Council's compliance manager), Mr C Watts (the Council's environmental consents manager) and Mr Brown. The outcomes of the meeting were that the Appellant stated it would apply under s 127 of the Act to change or cancel condition 7 and that otherwise the parties disagreed about the validity of the condition and whether the Appellant was obliged to comply with it pending the outcome of its s 127 application.

[24] On 9 March 2018, Mr Brown observed truck movements relating to the site and says that in a period of approximately 90 minutes saw 12 truck movements using Wilson and Seaforth Roads. The Appellant's application under s 127 was lodged later that day. On 12 March 2018 Mr Giles repeated to the Council that he had instructed Beach Contractors not to comply with condition 7.

[25] On 13 March 2018 Mr Brown issued the abatement notice to the Appellant. He also issued a similar abatement notice to Beach Contractors. The notices required both companies immediately to cease using Wilson Road, Citrus Avenue, Dillon Street and/or Seaforth Road at Waihi Beach for the purpose of truck movements between Waihi Beach Road quarry and Hanlen Avenue in contravention of condition 7 of resource consent 9836S. The reasons for the notices recited the background to the consent, the text of condition 7, the receipt of complaints about trucks travelling through the town, the meeting on 14 February 2018, Mr Brown's observations of truck movements on 9 March 2018 and the receipt of the s 127 application. The reasons concluded by stating reliance on condition 7 of the consent and/or s 9(3) of the Act.

[26] The Appellant then lodged its appeal against the abatement notice and applied for a stay. On 4 April 2018 the stay was refused[2] because granting it would effectively amend the resource consent without having undertaken any assessment of the effects of such an amendment, as would normally be required by an application to change or

[2] *Double R Developments Ltd v Western Bay of Plenty District Council* [2018] NZEnvC 41.

cancel a consent condition under s 127 of the Act. A timetable was subsequently set to bring the appeal to a hearing.

Appeal against abatement notice

[27] Under s 322(1)(a)(i) and (4) of the Act an abatement notice may be served on any person by an enforcement officer requiring that person to cease anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer (based on reasonable grounds), contravenes or is likely to contravene a resource consent. Under s 324 an abatement notice must state, among other things, the reasons for the notice, the action required to be taken and the period within which to cease the action. Under s 323(1), subject to the rights of appeal in s 325, a person on whom an abatement notice is served must comply with the notice within the period specified in it.

[28] Under s 325(1) of the Act, any person on whom an abatement notice is served may appeal to this Court against the whole or any part of the notice. Relevantly, s 325(5) and (6) provide as follows:

> (5) Except as provided in subsection (6), the Environment Court must not confirm an abatement notice that is the subject of an appeal if—
>
> (a) the person served with the abatement notice was acting in accordance with—
>
> (i) a rule in a plan; or
>
> (ii) a resource consent; or
>
> (iii) a designation; and
>
> (b) the adverse effects in respect of which the notice was served were expressly recognised by the person who approved the plan, or notified the proposed plan, or granted the resource consent, or approved the designation, at the time of the approval, notification, or granting, as the case may be.
>
> (6) The Environment Court may confirm an abatement notice, that is the subject of an appeal, if the court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval, notification, or granting, as the case may be.

[29] The standard of proof required to support an abatement notice is the civil standard, being the balance of probabilities having regard to the gravity of the matter.[3]

[30] The Court's powers on an appeal are set out in s 290 of the Act:

> **290 Powers of court in regard to appeals and inquiries**

[3] *Wilhelmsen v Dunedin City Council* (1992) 1A ELRNZ 126 (PT).

> (1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against ... as the person against whose decision the appeal ... is brought.
>
> (2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.
>
> ...
>
> (4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation.

[31] In this case, there is no claim that any of the grounds in s 325(5) of the Act apply. The appeal is based on the lawfulness or appropriateness of condition 7 of the resource consent and on the validity of the actions of the Council's enforcement officer. The Court must consider whether the issues raised by the appeal are properly matters of appeal against the abatement notice or whether they are really substantive complaints about the terms of the resource consent which could only properly be addressed by an application under s 127 of the Act to change or cancel a condition of the consent or by a fresh application for consent.

Validity of conditions – general

[32] Any condition of resource consent must be within the scope of the Act, both in terms of the ambit of s 108 and also in terms of well-established case law[4] that, to be valid, a condition must:

a. be for a resource management purpose and not an ulterior one; and

b. fairly and reasonably relate to the activity for which consent is being granted; and

c. not be so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it.

[33] The standard of reasonableness in the third limb is the administrative law standard, that is, a condition must not be so unreasonable that no reasonable planning authority could have imposed it.[5]

[4] *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731 (UKHL); approved in *Housing New Zealand v Waitakere City Council* [2001] NZRMA 202 at [18] (CA); explained in *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, [2007] NZRMA 137 at [61] – [68] (SC).

[5] *Housing NZ Ltd v Waitakere City Council* [2001] NZRMA 77 at [48] (HC), adopting *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (EWCA).

[34] Beyond those standards for validity, there are also standards of good practice which call for conditions to be clear and specific. These standards are important in ensuring that conditions are readily enforceable.

[35] It is pertinent to observe that a legal challenge to the validity or enforceability of a condition of resource consent does not relieve the consent holder from complying with the challenged condition pending the outcome of the challenge. In the case of an abatement notice, this is the clear effect of s 325(3) which provides that an appeal against such a notice does not operate as a stay. In more general terms, it is well established that, except perhaps in a case of flagrant invalidity, the decision granting the resource consent (including any conditions of that consent) is recognized as valid until it is set aside or amended by a Court of competent jurisdiction.[6] It is therefore not lawful for a person to refuse or otherwise fail to comply with a condition of their resource consent merely because they believe, whether on advice or otherwise, that the condition may be flawed in some way.

Validity of conditions - control of roads

[36] In general terms, the controls on the use of land based on or made under the RMA do not control the use of roads: general use of roads is controlled under specific roading and transport legislation which largely reflects the ancient rights of every person to travel along any highway and thereby to gain access to and from land with frontage to that highway.[7] That general approach has been held not to preclude controls where traffic generated by a land use will affect other road users (including other owners or occupiers of land with frontage to that road) in a way or to an extent that control of such effects is necessary or appropriate to address the externalities of the land use.[8] On that basis, there is jurisdiction for a consent authority to impose a condition controlling heavy vehicle movements associated with a land use which requires resource consent, such as condition 7 in this case. On that jurisdictional basis the condition cannot be said to be invalid.

[37] There may be other factors which go to the appropriateness of the condition, but those are issues arising in relation to the substantive merits of the decision to

6 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).

7 *Paprzik v Tauranga City Council* [1992] 3 NZLR 176, (1992) 1 NZRMA 73 (HC); *Hall v McDrury* [1996] NZRMA 1 (PT); *Norsho Bulc v Auckland Council* [2017] NZEnvC 109 at [99].

8 *Winstone Aggregates Ltd v Franklin District Council* Decision A 80/02 at [28].

grant resource consent that are properly addressed by an application to change or cancel the condition under s 127 or a further application for resource consent and not by an appeal against an abatement notice. In the present case, the substantive merits appear to raise real issues about the effects of the activity on the environment. If the conditions of consent are to be changed, then there should be an assessment of those effects in accordance with the statutory framework which applies to applications for resource consents in Part 6 of the Act rather than the framework for enforcement proceedings in Part 12.

[38] Initially it appeared from the appeal and its supporting documents that the condition may have been imposed without notice to the Appellant in circumstances where the application had been made on a different basis. In those circumstances there might be an issue as to the validity of the condition for procedural reasons.[9] As now presented to the Court, the Appellant accepts that it did have notice of this condition prior to the grant of consent. Although it complains that the reasons for the Council's decision might be interpreted to mean that its proposal for the direct route had been granted consent, that would only be of assistance if the condition were uncertain in its meaning and effect so that reference to the reasons for the decision were necessary to interpret the condition. As the condition is clear in its terms, and in particular about the requirement to use State Highway 2 rather than the more direct route, the interpretation of the reasons for the decision does not assist that Appellant.

[39] In terms of the *Newbury* criteria set out above, the condition plainly has been imposed for a resource management purpose, being to maintain the amenity values of Waihi Beach by avoiding the adverse effects of heavy transport activities on the town's main street. The condition also fairly and reasonably relates to the activity for which consent was granted, as the earthmoving and filling activity is central to the consent to subdivide land in a flood hazard area and so the transport of fill is directly within the scope of the consented activity. While the relevant rule provides for earthworks over $5m^3$ as a restricted discretionary activity and no relevant restrictions are stated in the plan, the overall activity status is discretionary because it is appropriate to bundle the consents given the overlap of effects[10] associated with subdivision, development in a flood hazard area and earthworks.

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9 *Sustainable Ventures Ltd v Tasman District Council* [2012] NZEnvC 235.

10 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529 (CA) at [21] – [22] and *King & ors v Auckland City Council* [2000] NZRMA 145 (HC) at [47] – [50].

[40] In terms of reasonableness, in our judgment the condition meets the administrative law standard: the condition is not so unreasonable that no reasonable consent authority, duly appreciating its duties under the RMA, could have imposed it. The relationship between the likely cost of compliance and the extent of adverse effects on the environment appear to us to be matters of fact and degree requiring an assessment based on evidence and perhaps on notice to affected persons, and are not so obviously disproportionate as to be unreasonable in that sense.

[41] Whether the condition is reasonable in terms of the options available for addressing the effects of heavy transport on the environment and the relative benefits and detriments of each option is, as we have already said, a matter that goes to the substantive merits of the Council's decision to impose such a condition. But these matters are not properly to be addressed on an appeal against an abatement notice. They are appropriately addressed either on an appeal from the decision granting consent and imposing such a condition or, now, by way of an application to change or cancel that condition under s 127 RMA.

[42] A hearing to consider the merits and the relative reasonableness of each option is also the proper forum in which to assess the extent, if at all, to which such a condition may be unfair because it involves different treatment of people undertaking the same or similar earthworks or other heavy transport activities which involve traffic through Waihi Beach.

Validity of enforcement action

[43] The Appellant also mounted a challenge to the authority of the Council's enforcement officer to issue an abatement notice. If made out, the challenge would render the notice invalid. This issue was not raised in the notice of appeal and appeared to take the Council by surprise. In order to ensure a fair hearing of the issue, we directed that further submissions be lodged, first by the Appellant and then in response by the Council, specifically on this issue.

[44] As presented to us, the challenge was that the warrant of the enforcement officer had not properly been made or issued by the Council. Mr Osmand submitted that the warrant presented in evidence by Mr Brown, the Council's enforcement officer, was incorrect in several particulars.

[45] First, it was submitted that the name on the warrant, Ben Brown, was not the officer's full name which is Ben Peter Chadburn Brown, and that this rendered it invalid. We were not referred to any authority for the proposition that a warrant must bear the full name of the warranted officer. Section 38 RMA requires that a warrant clearly state the functions and powers that the person concerned has been authorised to exercise and carry out under the Act. The copy of the warrant produced to us states that it authorises the holder, among other things, to serve an abatement notice under s 322.

[46] We do not doubt that, to be valid, a warrant must adequately identify the warranted officer. The warrant also bears Mr Brown's signature and an image of him which we are able to determine, from his affidavit and his appearance before us, are both accurate. We are satisfied that this identification is adequate.

[47] Second, Mr Osmand challenged the manner in which the warrant had been issued by the Council. He referred to s 38(1)(a) RMA which provides that "a local authority may authorise any of its officers ..." He submitted that the sealing of the warrant under the hand of its chief executive officer was insufficient authority, because s 34A(1)(b), which empowers local authorities to delegate to an employee any functions, powers or duties under the Act, expressly does not allow for the delegation of the statutory power of delegation. He submitted that the appointment of an enforcement officer must be done by resolution of the Council and not by its CEO as an employee and that if it is done by the CEO then it is an unlawful sub-delegation, contrary to s 34A(1)(b).

[48] In response, Ms Zame for the Council produced several documents, including:

(a) A memorandum dated 17 February 2015 from Rachael Davie, the Council's Group Manager Policy, Planning & Community, to Miriam Taris, the Chief Executive Officer, recommending that the CEO approves under delegated authority the issue of warrant powers to the employee, namely Ben Brown, as outlined in an attachment which includes the power under s 322 of the Act to serve an abatement notice;

(b) The minutes of Meeting No. C9 of the Council held on Thursday 3 July 2014, including at item C9.10 resolutions relevantly:

(i) appointing Miriam Taris as Chief Executive Officer from 25 July 2014 to 30 September 2019; and

(ii) delegating to the Chief Executive Officer all of the Council's powers, functions, duties and responsibilities (including the power to delegate) required for the efficient, effective and economic operation of the Council, including but not limited to those specific matters listed in an attached schedule except those powers listed as or otherwise specifically restricted or limited, which list includes at item ii. 8 the Resource Management Act 1991 the matters listed in s 34A(1)(a) and (b).

[49] In Ms Zame's submission, the appointment of Mr Brown as an enforcement officer by Ms Taris was her exercise, as the Council's delegate, of the power under s 38 and not any kind of sub-delegation of any power, whether to Mr Brown or otherwise.

[50] We agree with that submission. We do not find any substance to the argument that the Chief Executive Officer's actions in appointing Mr Brown and signing his warrant constituted an unlawful sub-delegation of power from the Council. There is nothing in the RMA to suggest that the power in s 38(1) of appointment of enforcement officers must be exercised by the Council alone and cannot be delegated. The restriction in s 34A(1)(b) on sub-delegation is not applicable. The several statutes, including the RMA, which generally, and subject to stated exceptions, enable the delegation of powers, functions, duties and responsibilities from a Council to an officer such as its CEO do so in order to place that officer in the position of the Council for those purposes. The acts of the officer as its delegate are therefore the acts of the Council and do not constitute any kind of unlawful further delegation.[11]

[51] Third, Mr Osmand submitted that Mr Brown had not *served* the abatement notice: the only evidence in his affidavit was that he had prepared, signed and *issued* it. As Ms Zame pointed out, this aspect was not explored in any detail at the hearing, and in particular it was not put in cross-examination to Mr Brown. In any event, we do not consider there is any substance to this submission. Under s 38 RMA, the authorisation of a person is *to carry out all or any of the functions and powers as an*

[11] *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563 (EWCA).

enforcement officer under this Act. Under s 322(1) RMA, the power to serve an abatement notice on any person is conferred on *an enforcement officer. Serving* an abatement notice is also referred to in subs (3) and (4). It is notable that s 322(2) refers to the *issuing* of an abatement notice in certain circumstances in relation to the contravention of rules in a proposed plan.

[52] In this case s 322(2) does not apply, but we see no basis on which to hold that there is any material difference in meaning between *serve* and *issue* as used in s 322 which would render what Mr Brown did invalid. We accept Ms Zame's submission that his evidence shows that the manner in which he gave the abatement notice to the Appellant (being by email to its director and by post) conforms with the permissible means of service under s 352 RMA.

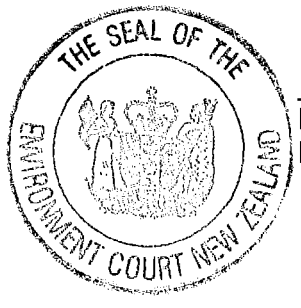
[53] The challenges to Mr Brown's warrant and the manner in which he prepared and served or issued the abatement notice do not appear to us to have any objective merit. It is clear that he holds a warrant to act as an enforcement officer for the purposes of the RMA and on behalf of the Council. It is also clear both that he was appointed by and that his warrant has been signed by the Chief Executive Officer as the lawful delegate of the Council. We are satisfied that Mr Brown is and was at all material times a warranted enforcement officer of the Council and that he lawfully served an abatement notice on the Appellant.

Decision

[54] For the foregoing reasons we refuse the appeal and confirm the abatement notice.

[55] We reserve the issue of costs. Any application must be made within 10 working days of the date of issue of this decision. Any response must be made within 5 working days. If a reply is required, then it must be made within a further five working days.

For the Court:



D A Kirkpatrick
Environment Judge