SIDE AGREEMENTS IN THE RESOURCE CONSENT PROCESS:

IMPLICATIONS FOR ENVIRONMENTAL MANAGEMENT

Office of the
PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT
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Te Kaitiaki Taiao a Te Whare Pāremata

PO Box 10-241, Wellington, New Zealand

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PREFACE

Concern that side agreements between Resource Management Act 1991 (RMA) consent applicants and affected parties might adversely affect environmental management arose during a 1995 investigation by my predecessor. In addition, in 1997, during the preparation of my Strategic Plan, *Future Directions*, concern was raised by a number of stakeholders that side agreements with affected parties may, in some cases, lead to poorer environmental outcomes.

The RMA creates a climate where there are clear incentives to enter into private agreements for a variety of reasons with potentially positive or negative environmental outcomes. The incentive to enter into agreements is particularly strong in relation to avoiding notification of an application, or minimising costs and delays if an application is notified. The existence of such, often undeclared, side agreements has potential to generate unanticipated and unwanted environmental outcomes, particularly in the future. This is grounds for concern given the complexity of the RMA, the long-term nature of many of the environmental benefits we are trying to deliver through it, and New Zealand's growing history of poor management of complex large systems as witnessed by the 1998 central Auckland power failure, deaths at Christchurch Hospital in the mid 1990s, and the illegal importation of the rabbit calicivirus in 1997.

It was my unease regarding New Zealand's record for managing complex systems, and a general propensity to focus on private rights rather than community or collective (frequently environmental) rights, as much as specific stakeholder concerns regarding side agreements with affected parties under the RMA, that prompted me to initiate this investigation.

The purpose of this report is to clarify issues as a basis for an informed debate. The recommendations made are aimed at improving understanding rather than attempting to resolve a complex issue.

The investigation proved to be a relatively difficult one for my team. The confidential nature of some of the agreements identified constrained the extent to which they could be investigated and/or reported. Nevertheless, sufficient insights into the nature, but not the extent, of side agreements with affected parties was obtained to indicate that there is enough uncertainty over the potential environmental management impacts of side agreements to conclude that they should not be ignored. The greatest difficulty in determining the pluses and minuses of side agreements with affected parties is the lack of any reporting system. They represent a process that can have

major influences on the activities of parties prior to applications being lodged. While it can be, and is, argued that good consent assessment processes will ensure that the approval of all affected parties, or the absence of objectors, should not lead to a reduction in consideration of environmental effects, in reality, it appears it does.

An obvious way to reduce the risk of unanticipated or unwanted environmental outcomes arising from side agreements is to require disclosure of an agreement even if some specifics of it remain confidential. Simple disclosure may be sufficient to ensure consent authorities pay particular attention to an applicant's AEE.

While this investigation has raised more questions about the potential impacts of side agreements with affected parties than it has provided answers, I do not believe it is appropriate to continue to ignore the potential consequences. It is highly desirable that provision be made at the very least, to quantify the prevalence of the activity and to require disclosure. I will examine the recently released proposed changes to the RMA to determine if this need has been addressed.

Dr J Morgan Williams
Parliamentary Commissioner for the Environment

EXECUTIVE SUMMARY

What are Side Agreements?

People or bodies engaging in activities covered by the Resource Management Act 1991 (RMA) will frequently require resource consent from a consent authority. If the environmental effects are significant, the application for this consent must be notified (publicly advertised) whether or not all those affected give their written approval. Where the environmental effects are likely to be minor, the consent authority may decide that the application need not be notified provided that the applicant obtains the approval of those likely to be affected by the activity. If an applicant provides financial or non-financial incentives to secure the approval of these affected parties, they are entering into a side agreement.

> Side agreements are any agreements which are entered into to obtain the written approval of an affected person. Use of the term in this report does not indicate a judgement as to whether such transactions are good or bad.

Side agreements occur in a variety of settings. They also take a number of forms and are initiated for reasons which range from avoiding notification of an application, or seeking to mitigate adverse environmental effects, to realising opportunities for making a financial gain.

Uncertainty over the effects

The concern which prompted this investigation was that side agreements may detract from proper assessment of environmental effects and result in activities receiving consent without adequate conditions being applied to protect the environment.

What was found suggests that it is too early in the life of the RMA to tell what impact side agreements are having on environmental management and the achievement of environmental benefits. This difficulty in defining impacts arises from the lack of an effective reporting system to record the number and magnitude of side agreements made. It is also difficult to predict with any accuracy what would have happened in the absence of such practices.

However, there is enough uncertainty over the effects of many side agreements to indicate that a potential risk to the environment exists. This risk should not be ignored. This is in spite of widespread

awareness of side agreements and a generally relaxed attitude towards the practice by those working with the RMA.

There is acknowledgment that side agreements can sometimes secure 'win/win' outcomes. Nevertheless a common perception persists that the Assessment of Environmental Effects (AEE) provided with resource consent applications tends to provide less information where those affected give written approval. The investigation added support to the belief that consent authorities tend to give less attention to evaluating AEEs where all those affected have given written approval.

It was found that the RMA creates a climate where there is more incentive towards side agreements than was the case under the more prescriptive Town and Country Planning Act 1977. The RMA imposes on consent authorities a time frame for determining consent applications. It provides consent authorities with wider discretion in determining which applications for consent may be processed without notification and gives greater emphasis to the approval of those affected.

Identifying the affected persons

The identification of those affected is linked to the occurrence of side agreements. The provisions of the RMA encourage applicants to consult and discuss their proposals with others. A natural consequence of the parties discussing the issues is that, in some cases, agreements will be made. Some of these agreements will probably lead to positive environmental outcomes; others may not.

Consent authorities should determine who the affected parties are solely on the basis of the facts and their best judgement. The determination should be independent of whether or not side agreements are likely to occur, or whether some objector is demanding payment for approval.

During the investigation 22 examples of side agreements were identified. Four representative cases were examined to determine the different levels of motivation for entering into negotiations and the influence of side agreements on environmental outcomes.

Disclosure of side agreements

Most practitioners interviewed agreed that the terms of many side agreements are never disclosed to consent authorities. Some practitioners have suggested that any risk side agreements pose to good environmental management would be minimised if the agreements were transparent.

Disclosure of side agreements and their context has the potential to diminish any risks that they pose to effective environmental

management. The disclosure of those objectors' concerns that give rise to the side agreements can help consent authorities to better understand the full effects of a proposal, including cumulative effects, and to minimise those impacts where possible by imposing appropriate conditions.

The Parliamentary Commissioner believes that if the consent authority knows that those affected received compensation in consideration of their approval, it is less likely to assume that there is no environmental risk.

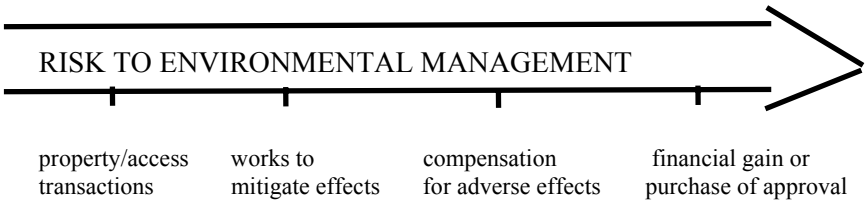
Risks to environmental management

The environmental risks associated with side agreements depend on the council's knowledge and treatment of any contractual arrangements by consent applicants. Good practice by the consent authority can help to minimise these risks. For example, where a private agreement does not necessarily result in effects on the environment being mitigated, consent authorities should impose appropriate conditions to mitigate these effects.

Many incentives for side agreements are about satisfying individual or private rights, rather than about good environmental outcomes. Individuals may well be compensated. However, the sum of these individual compensations does not necessarily equate to better environmental outcomes for the wider community.

Agreements which are more in the nature of property transactions tend to pose fewer risks to environmental management than those which involve financial gain or the purchasing of silence.

Figure 1.



Scrupulous performance by a consent authority of its RMA obligations should reduce the risk that side agreements might pose. A rigorous evaluation of an applicant's AEE should determine the nature and scale of effects and those affected. The evaluation should then lead to consent conditions being set to adequately avoid, remedy or mitigate adverse effects. In practice there are impediments to consent authorities acting optimally, so side agreements could have the effect of undermining adequate environmental management.

Recommendations

To the Minister for the Environment

It is recommended that you:

1 incorporate into your existing monitoring programmes means to identify the extent, nature and potential negative effects on the environment of side agreements between resource consent applicants and those affected by a proposed activity.

2 ensure, within the current review of the Resource Management Act 1991, that there are no restrictions placed on consent authorities to require resource consent applicants to disclose the existence of side agreements.

To all local authorities

It is recommended that:

1 consent authorities should ensure that they are fully informed of all the environmental effects of the proposal before deciding whether the consent application requires notification, irrespective of whether or not those affected have given their written approval or made side agreements with the applicant.

2 a standard approval form be provided to encourage those affected by a proposed activity to describe any adverse effects on the environment, irrespective of whether a side agreement has been made or not.

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1. INTRODUCTION

1.1 Reasons for the investigation

Information about side agreements between consent applicants and affected parties arose during a 1995 Parliamentary Commissioner for the Environment (PCE) investigation into the assessment of environmental effects of resource consent applications.[1] A document sighted during this study showed an affected person seeking a payment of $10,000 to give written approval for a resource consent application.

Further examination showed that the practice of resource consent applicants offering financial or non-financial incentives to secure the written approval of potentially affected parties (referred to in this report as side agreements) was not uncommon.

> Side agreements are any agreements which are entered into to obtain written approval of an affected person. Use of the term in this report does not indicate a judgement as to whether such transactions are good or bad.

A survey of senior planners employed by 20 of New Zealand's largest local authorities revealed that a significant number of respondents were aware of compensation markets operating in their jurisdictions.[2] The paper noted the potential for inequitable outcomes where residents may trade written approval for projects without fully comprehending or being able to foresee the effects of these projects. Comment was also made about "intergenerational" inequities of one-off payments which do not compensate for long-term environmental amenity loss.

Consultations by the PCE with environmental planning, land surveying and law practitioners between June 1997 and February 1998 indicated that side agreements occur in a variety of settings. Agreements also take a number of forms and are initiated for reasons which range from avoiding notification of an application, or seeking to mitigate adverse environmental effects, to realising opportunities for making financial gain. The consultations indicated widespread awareness of side agreements and a generally relaxed attitude towards

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1 Parliamentary Commissioner for the Environment *Assessment of Environmental Effects (AEE): Administration by Three Territorial Authorities* (1995).

2 Brendan J Gleeson *The Commodification of Resource Consent in New Zealand* in New Zealand Geographer 51 (1) 1995 pp 42-48.

the practice. There was acknowledgment that side agreements could secure 'win/win' outcomes, and examples were given of agreements which provided a superior environmental result to that likely to have been obtained by Resource Management Act 1991 (RMA) regulatory processes alone.

Nevertheless, the consultations also showed a common perception that:

- the Assessment of Environmental Effects (AEE) provided with resource consent applications tend to provide less information where those affected give written approval.
- consent authorities tend to give less attention to evaluating AEEs where all those affected have given written approval.

This gives grounds for concern that side agreements may detract from proper assessment of environmental effects and result in activities receiving consent without adequate conditions applied to protect the quality of the environment.

Another significant concern that has been received and noted in monitoring of the news media, is the use of the affected person provisions of the RMA for extracting compensation disproportionate to the loss and inconvenience the affected person may suffer by the granting of the consent. If these claims are substantiated and the practice permitted to go unchecked, this could undermine public confidence in RMA processes and prevent consent authorities from delivering equitable outcomes.

This report is not the result of an empirical study that would allow a judgement to be made as to whether side agreements should or should not be permitted to occur. Rather it teases out the nature of side agreements, identifies the opportunities for side agreements to occur, and assesses the implications for effective environmental management.

One underlying assumption of this study is that, for a number of reasons, local authorities do not always fulfil their responsibilities under the RMA to the level required by the Act. This is not a criticism of local authorities but recognises the demands placed on them by the Act. Local authorities are faced with a prescribed time frame within which they are required to process resource consent applications. They are constrained by other statutory obligations, the level of their financial resources (which is reflected in the number and level of experience of staff they are able to employ), and, in many cases, large numbers of resource consent applications to deal with.

1.2 Investigation methodology and goals

Preliminary research carried out for the investigation indicated the need to gather reliable information on side agreements. The transactions are essentially private agreements made outside statutory RMA proceedings. Complete information on side agreements would not therefore be obtainable from local government RMA databases.

Another difficulty is that parties to a side agreement may not necessarily document the transaction nor want details of it disclosed in the public domain. Where there is documentation, it may contain a condition explicitly binding the parties to maintain confidentiality.

Preliminary research has, however, yielded considerable anecdotal information on side agreements. This information, supported by interviews with representatives of side agreement participants and examination of resource consent records held by local authorities, provides a basis to assess RMA resource consent processes for:

- opportunities that are provided for side agreements, and
- the associated risks to local government environmental management under the RMA.

The following approach has been taken in this investigation:

i. analysis of RMA consent processes to identify opportunities/incentives for side agreements
ii. definition of the term "side agreement", illustrating this by way of case studies
iii. assessment of the reasons for side agreements, and the effect they have on the various parties and on effective environmental management.

1.3 Terms of Reference

1. The terms of reference for the investigation are to:

   a) Identify the circumstances where monetary or service-in-kind payments are offered to, or requested by those affected in exchange for agreement to support or refrain from opposing resource consent applications under the Resource Management Act 1991; and to

   b) Identify the nature, range and magnitude of such transactions.

2. To identify if there are circumstances where monetary or service-in-kind payments offered to, or requested by those affected, deflect the full evaluation of resource consent applications and the appropriate management of adverse effects on the environment, under the Resource Management Act 1991.

3. To report to regional councils, territorial authorities and the Minister for the Environment on the findings of the investigation.

1.4 Overview of report

This report begins with an outline of the demand for written approval of affected parties. This is considered within the context of the former Town and Country Planning Act 1977 (T&CPA) and the more recently introduced RMA. It is found that provisions were put in the RMA to create a climate where there is greater incentive towards side agreements than was the case under the more prescriptive T&CPA. The reasons for this are examined in Chapter 3, where consideration is given to those sections of the RMA that help determine affected parties and the range of effects on the environment.

The nature of side agreements is dealt with in Chapter 4, along with the identification of 22 examples. In particular, four representative case studies are examined to determine the different levels of motivation for entering into negotiations and the influence of side agreements on environmental outcomes. Details of these examples are provided as attachments in Appendix 2.

Potential or purported reasons for side agreements are covered in Chapter 5. None of the evidence that has come to light during this investigation suggests that extortionate behaviour by objectors is widespread.

In Chapter 6 consideration is given to the effects of side agreements on the various parties involved. Ideally, scrupulous adherence to a consent authority's RMA obligations should reduce the risk that side agreements might pose. Unfortunately, consent authorities rarely operate optimally, so side agreements may have the potential to undermine adequate environmental management. These and other implications of side agreements are the focus of Chapter 7.

A set of conclusions is provided in Chapter 8.

2 BACKGROUND

2.1 Written approval as a tradeable commodity

A market for written approval is based upon consent applicants "purchasing" the written approval of individuals likely to be affected by the proposed development. Gleeson (1995) considers this practice amounts to

> consent purchasing, and the acquisition process may be described as a 'compensation market', where the sellers are potentially 'adversely affected' parties, the buyers are resource applicants, and the commodity is 'written approval'. The emergence of this practice seems to signal the commodification of planning's regulatory keystone, the resource consent.[3]

The Minister for the Environment acknowledges that

> the provisions were put in the [Resource Management] Act so that the market could generate compensation for lost property rights. Why force councils to intervene if individuals can sort things out amongst themselves – for example, if one neighbour is happy to pay for a hedge to screen an unsightly shed from another.
>
> The principle becomes less desirable if allegedly affected parties hold developers to ransom by claiming sums of money disproportionate to the inconvenience they will suffer. This amounts to rent seeking. Pure and simple.[4]

In this same address he went on to say that

> when applicants are forced to become unwilling parties to a deal (because the alternative regulatory process seems worse) there will be cries of extortion. The experience with consent buying shows that the market approach is not without its transaction costs. Those who would have us move to a more market based approach would have to acknowledge that rent seeking practices such as consent buying would escalate.[5]

2.2 Elements of risk in the consent process

Many view the consent process as an uncertain and risky procedure involving considerable sums of money (Ministry for the Environment, 1994). The applicant in the consent process will always be conscious of the costs and time delays involved with getting approvals from the consent authority. The RMA gives a consent authority 70 working days to process notified resource consent applications and 20 working days for non-notified applications. Twenty-four percent[6] of all

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3 ibid, p 46

4 Hon Simon Upton, Minister for the Environment. Address to the New Zealand Master Builders Federation Annual Conference, Hamilton, April 1997

5 ibid

6 Annual Survey of Local Authorities 1996/97. Ministry for the Environment 1998

resource consent applications are processed outside the statutory limits.

Other risks for the applicant in the consent process include the uncertainty (political risk) over the decision of the consent authority, additional costs of rewriting/redesigning the proposal to suit objectors, risk of notification opening the doors to enable any person to participate, and the length of time needed for negotiations with affected parties.

The risk for affected parties is that they may not all be identified by the consent authority and thus may be excluded from the process.

Side agreements may adversely affect environmental management performance where councils put insufficient resources into administration of RMA functions (by, for example, employing underqualified staff and making inadequate provision for staff training and development), and priority is given to achieving process goals (for example, cost savings and consent processing timeliness targets) rather than environmental results.

Where this occurs the primary, perhaps only, source of information for decision makers is the resource consent application and the applicant's assessment of the proposed activity's environmental effects. By their nature, side agreements will shape and constrain the information provided in assessments. This has the potential to mask cases where adverse effects on the environment are not localised.

2.3 Legislative history of written approvals

Town and Country Planning Act 1977

Under the Town and Country Planning Act 1977 (T&CPA), councils were able to grant dispensations and waivers where the district schemes expressly provided for these.[7] District schemes could also allow applications for dispensations and waivers to be made without public notice.[8] As these matters had to be provided for in the district schemes, there was an opportunity for public submissions to affect the scope of non-notification.

Subject to the district scheme, a council was authorised to grant its consent to a dispensation or waiver if it was satisfied, inter alia, that:[9]

- the dispensation or waiver would not detract from the amenities of the neighbourhood, and would have little town and country planning significance upon the immediate vicinity of the land concerned.

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7 Section 36(6) Town and Country Planning Act 1977 (T&CPA).
8 Section 36(7) T&CPA.
9 Section 76(2)(b) T&CPA.

The council could consider a non-notified application only if:[10]

- the written consent of every body or person whose interests might be prejudiced by the proposed dispensation or waiver had first been lodged with the council, unless the council considered that it was unreasonable in the circumstances to require such consents to be obtained.

The parameters of councils' powers to grant dispensations and waivers under the T&CPA were circumscribed by the requirements of the Act and their district schemes.

Resource Management Act 1991

Compared with the T&CPA, the RMA vests consent authorities with wider discretion to determine that applications for a wider range of activities may be dealt with without notification.[11] Although district plans may specify that some classes of applications be considered without the approval of those affected, decisions on notification are made on a case-by-case basis.[12]

As was the case under the T&CPA, there is nothing in the RMA that precludes people from entering into side agreements. In *BP Oil New Zealand Ltd v Palmerston North City Council*,[13] Judge Treadwell commented that "this is open to a developer in terms of the Act because a person who considers he may be adversely affected can effectively be compensated for that fear".

Essentially, applicants enter into agreements for the purchase of approval from those affected for one of two reasons:

- **applicants want to avoid having their applications notified**
- **if notification is likely or unavoidable, applicants want to minimise or avoid time delays and costs by overcoming opposition to, or obtaining support for, their application.**

By providing consent authorities with wider discretion in determining which applications for consent may be processed without notification, and by placing greater emphasis on the approval of those affected,[14] the RMA creates a climate where there is greater incentive to enter into private agreements to

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10 Section 76(3) T&CPA.

11 Richard Brabant "Process, purpose and non-notification under the RMA" (1997) 2 BRMB 73, 74.

12 Section 94 RMA.

13 [1995] NZRMA 504, 508.

14 See s 94(1)(c)(ii), 94(2)(b), 94(3)(c), and 94(4) RMA.

obtain approval than was the case under the more prescriptive T&CPA.

3 THE APPROVAL MARKET UNDER THE RESOURCE MANAGEMENT ACT

3.1 Section 94 and the notification decision

One of the intentions of the RMA was to enable broad participation by the public in matters to do with planning and the environment. On this basis, it is presumed that every application for consent will be notified in accordance with s 93, unless the application falls within one of the exceptions in s 94.[15] The High Court has noted that decisions made about resource management "are best made if informed by a participative process in which matters of legitimate concern under the Act can be ventilated".[16] Notification enables the public to perform a useful function in resource management: it enables people to put further information before the decision-maker, and allows them to act as auditors of the applicant's AEE, which forms part of the application.[17]

Exceptions to the requirement to notify are generally activities that do not have significant effects (if they are discretionary and non-complying activities), or have been approved in principle in the district or regional plan (controlled and restricted discretionary activities). Contention tends to arise where the consent authority is making a discretionary decision, as provided for in s 94(2):[18]

> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and
>
> > (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
> >
> > (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

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15 *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433; *Brookes v Queenstown-Lakes District Council* C81/94.

16 *Murray v Whakatane District Council* [1997] NZRMA 433, 467.

17 *Hubbard v Tasman District Council* W1/95, 14 February 1995, Judge Kenderdine.

18 Section 94(1)(c) (as to some controlled activities) and s 93(3) (where there is no relevant plan or proposed plan) also contain a requirement in the same terms as s 94(2)(b).

To ensure that an application can be dealt with without notification, the applicant must satisfy the consent authority of two matters: that the effects are minor, and that those affected have all granted their approval (unless it is unreasonable in the circumstances to require the obtaining of every such approval). However, the responsibility for these two discretionary decisions falls on the consent authority. If it is not satisfied on either matter, then the application must be notified.

According to the Ministry for the Environment's annual survey of local authorities (1996/97) there is a wide variation in local authority performance. During the 1996/97 year a total of 57,461 resource consent applications was received by local authorities. Most were for land use consents (58%) and subdivision consents (29%). Of the 57,461 resource consents, 2,988 (5.2%) were notified (compared to 8% in 1995/96), and 78% of these generated submissions.

Regional councils notified over four times as many applications as territorial authorities. This was due to the public resource (coastal, water, air discharge) nature of regional resource consents, which often makes it difficult to identify individual affected parties.

Resource consent applications notified

	% 1995/96	**% 1996/97**
regional councils	15.9	11.7
unitary authorities	17.8	15.4
territorial authorities	4.8	2.8

source: MfE, *Annual Survey of Local Authorities*

Although these figures show that most applications are not notified, they also reveal that local authorities are increasingly exercising more controls by requiring written approval of those affected and making use of prehearing processes.

Recently, Richard Brabant (1997) proposed the introduction of a limited right of review of notification decisions. His suggested procedure would involve consent authorities publishing on a weekly basis a list of those applications which were to be considered for non-notification. This would allow submissions to be made, and enable those who made submissions to object under s 357, with a restricted right of appeal against the consent authority's decision to the Environment Court. This procedure was not suggested as an antidote to the prevalence of agreements, but it could reduce the risk to the environment of consent authorities failing to identify all those affected by the application.

The Minister for the Environment has put forward a proposal for a form of limited notification[19] which would have the effect of reducing the number of people with standing[20] to make a submission on proposals for activities with minor effects. Only those affected would be able to make a submission. Limited notification would apply where one or more of those affected refused to give their approval to a proposal, which, under the law as it is at present, would mean that the application should be notified publicly. However, the success of limited notification would depend on the rigour of councils' processes in assessing the level of effects and identifying those affected. Limited notification would be in addition to non-notification and public notification, giving councils three options for dealing with applications.

In theory, the Minister's proposal could be taken a step further by doing away with non-notified applications altogether. This would require councils to provide for a greater range of activities as permitted activities in their plans. The result would be that all applications for consent would either be notified to those affected, or notified publicly, with activities of no or little environmental effect being able to be undertaken without consent. This option would have the draw back of removing the flexibility to deal with activities of minor effect which were not included as permitted activities in the plan.

3.2 Determination of affected parties

The identification of affected parties is linked to the occurrence of side agreements. Irrespective of whether agreements occur, the proper and fair identification of affected parties is essential to the process of adequately considering the environmental effects of proposals.

The fact that approval from those identified as affected by a proposal has been sought and not obtained does not prevent the council from changing its mind and deciding that those people are not affected after all.[21] However, that decision could be challenged as being unreasonable in the same way as if the council had come to that decision before approvals were sought.

The rider to s 94(2)(b) allows the consent authority to dispense with the requirement for an affected person's written approval if "the authority considers it is unreasonable in the circumstances to require

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19 Ministry for the Environment. *Resource Management Act 1991 - Proposal to include a limited notification procedure for resource consents - A discussion document,* December 1997.

20 The word "standing" is used to indicate who has the right to make a submission (ie any person) or lodge an appeal (any person who has made a submission or the applicant), or who may participate in an appeal lodged by someone else (the criteria are set out in s 274 of the RMA).

21 *Carter v North Shore City Council* M1112/93, Anderson J, HC Auckland, 10/5/94.

the obtaining of every such approval". The Ministry for the Environment's approach to this provision is that it is not directed at the reasonableness of an affected person's refusal to give written approval, but to the impracticality of obtaining that approval, for example, if the affected person is overseas. It is not open to a consent authority to determine that an affected person's approval is not required simply because that person is demanding money in exchange.

The Minister for the Environment (1997) has suggested that, because "identification as an affected party confers considerable status and possible financial benefit", the determination should be "accurate but not overzealous". To ensure that apprehension about potential side agreements does not cloud the discharge of councils' duties to the public, **consent authorities should determine who are adversely affected solely on the basis of the facts and their best judgement. The determination should be independent of whether or not side agreements are likely to occur, or some objector is demanding payment for approval.**

Consent authorities should provide 'approval' forms that applicants may use when seeking the written approval for the proposed activity from those affected by the granting of the resource consent. The forms should have space for a very brief description of the project, and for the affected parties to confirm whether they have seen a final plan and AEE of the proposed activity. It should also encourage those affected to describe any adverse effects on the environment, irrespective of whether a side agreement has been made or not.

In assessing the significance of the effects and identifying who is adversely affected, the consent authority is likely to rely on its evaluation of the AEE provided by the applicant.[22]

The value to the applicant of obtaining the approval of those affected is enhanced by s 94(4), which provides:

> 94(4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2)(a) or subsection (3)(b) a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2)(b) or subsection (3)(c).

Essentially, this means that there could be a significant effect on a person or persons, but if they have given their written approval to the proposal, and in the absence of other effects, the environmental effects of the proposal will be taken as minor.

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[22] Every application for consent should include an assessment of the environmental effects of the proposal (AEE) prepared in accordance with the Fourth Schedule to the RMA (s 88).

3.3 The significance of section 104

Some applications will have to be notified, whether or not all those affected give their written approval, for example, where the adverse effects on the environment will be major or the plan requires the consent application to be notified. Councils also have a residual discretion to require notification if they consider that there are special circumstances which favour notification.[23] In many of these situations, it will still be beneficial to applicants to defuse as much opposition as possible, so as to improve their chances of obtaining consent from the council and to reduce the likelihood of an appeal against the granting of consent.

Section 104 sets out the matters a consent authority must consider when an application for resource consent and any submissions relating to it are submitted. Section 104(6) recognises that the written approval of those affected is not only relevant to the decision on notification, but that approval may be expressed through submissions supporting an application or "in any other manner to the satisfaction of the consent authority". Where an affected person has indicated approval in any of these ways, the consent authority is not to have regard to any actual or potential effects on that person.

The 'approval' forms should advise those affected that their approval will bar the consent authority from taking into account the effects on that person in further consideration of the application (s 94(4) and s 104(6)). It should also note that s 104(7) provides for the withdrawal of approval before a hearing or determination of an application by written notice to the council (see Chapter 7.3).

Section 104(7) provides:

> (7) Subsection (6) shall not apply where a person has given written approval in accordance with subsection (6) 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.

Where an affected person has sold their approval, the general law of contract will apply and may operate to prevent those affected from withdrawing approval, depending on the terms of the agreement. In *McLean v Auckland City Council,* as the applicant had effectively repudiated the contract with the affected person, the applicant was not able to rely on the contract to prevent the affected person from withdrawing his approval and participating in proceedings.[24]

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23 Section 94(5) RMA.

24 A136/97, Judge Whiting, 21 November 1997.

3.4 The role of plans

The relevant regional or district plan will determine the need for a resource consent and the criteria by which an application is assessed.

Activities are classified in plans according to their potential effects on the environment, the plan's objectives and policies, and the form of assessment required. The classifications comprise permitted, controlled, discretionary, non-complying and prohibited activities. The level of assessment and control increases from permitted activities, for which resource consent is not necessary through to non-complying activities, ie those which contravene a rule and which may be undertaken only if a resource consent is obtained. The level of preventive measures and remedial action to be taken by the applicant to address the concerns of those affected is also likely to increase. As the level of effects increases from controlled through to non-complying activities, so does the likelihood of the application being notified for public comment.

The plan can expressly permit consideration of the application without the need to obtain the written approval of those affected[25]. **It is likely to be the degree of non-compliance with a rule or standard in a plan that provides the basis for a side agreement and potential compensation.**

Plans are intended to safeguard public and community values. However, a plan may not always foresee effects of particular projects or anticipate values placed by individuals and groups on natural resources. These values may also provide the basis for a side agreement and potential compensation.

3.5 The role of the assessment of environmental effects (AEE)

An AEE is required as part of the application to show any actual or potential effects that the activity may have on the environment, and the way in which any adverse effects may be mitigated.[26] For a controlled activity or a discretionary activity (where the consent authority has restricted the exercise of its discretion) the AEE is only required to address those matters specified in a plan or proposed plan over which the consent authority has retained control, or to which it has restricted the right to exercise its discretion.[27] The AEE for an activity is required to provide detail in proportion to the scale and significance of the actual or potential effects on the environment. The AEE must also be prepared in accordance with the Fourth Schedule to the Act.[28]

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25 Section 94 (1) (b) Controlled activities.
Section 94 (1A) (b) Restricted and discretionary activities.

26 Section 88 (4) (b)

27 Section 88(5)

28 Section 88(6)

The AEE will be influential in the decision to grant or refuse a consent and in the identification of those likely to be interested in or affected by a proposal, who should be consulted. The information disclosed in the AEE, if adequate, will also help determine whether an application should be notified.

However, it is recognised that the AEE is a document prepared by or on behalf of the applicant to support the application. It may not provide a sufficient basis for a consent authority to make a fair and reasonable assessment of the nature of the effects and those affected. The Planning Tribunal in *McFarland v Napier City Council*[29] commented that "the applicant is under no obligation to become a devil's advocate in order to destroy his own application before he has even started".

The existence of a transaction involving the purchase of an affected person's approval may be indicated in the AEE. In the AEE, the applicant is asked to identify those interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted.[30]

It may be useful for consent authorities to know that a side agreement has been entered into, and this information should be included in the AEE as required by the Fourth Schedule. It may not be necessary for councils to know the details of the transaction, although, to the extent that it involves direct measures to mitigate adverse environmental effects, this may also be helpful. If a consent authority knows that those affected received compensation in consideration for their approval, it is more likely to assume that they did so because there were environmental effects. (See Chapter 7.2 for further comments on disclosure)

Where the AEE is not adequate (for example it does not disclose the response to the concerns of those affected as required by the Fourth Schedule), the consent authority may seek further information from the applicant under s 92. This may include information about any consultation undertaken by the applicant and the outcome of that consultation.[31]

In *Aqua King Ltd v Marlborough District Council,* Judge Kenderdine discussed the nature of consultation required. She held that **clause 1(h) of the Fourth Schedule requires more than just sending out notice of an application and seeking comment. It indicates that consultation is to be undertaken and the applicant is to respond to the views of those consulted.**

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29 (1993) 2 NZRMA 440, 442.

30 Fourth Schedule cl 1(h).

31 *Aqua King Ltd and Fleetwing Farms Ltd v Marlborough District Council* [1995] NZRMA 314, 319.

3.6 Effects on the person v effects on the environment

As discussed above, side agreements can have an effect on the range of impacts a council is permitted to consider when deciding whether to notify an application or whether to grant consent. A council is not able to consider the effects on any person who has given written approval to an application for consent when determining whether effects on the environment are more than minor. However, the RMA does not clarify the relationship between effects on the person and effects on the environment. Nor has the Environment Court addressed the issue at length.

In the early days of the RMA, Professor Kenneth Palmer expressed the view that effects on a person who has given written approval to an activity would not include effects on the land occupied by that person, "as the consent authority should have regard broadly to actual and potential effects on all land and on other people using the land in the future".[32]

The relationship between "effects on a person" and "effects on the environment" lacks clarity. Both s 94(4) and s 104(6) seem to suggest that effects on those affected are constituent parts of effects on the environment. Although this is strictly true, the whole in this case is greater than the sum of the parts and adverse cumulative effects may result.

Wakatipu Environmental Society Inc v Queenstown-Lakes District Council[33] can be seen as an expression of the distinction between effects on the environment and the effects on a person. In this case the applicant had offered to contribute $50,000 to the Society to advance its conservation interests if the Society withdrew its appeal against the grant of the consents. The Society refused to be bought off. This may indicate they could not make a decision, but it is more likely that groups concerned about effects on the environment appreciate that it is not appropriate for them to trade their approval to an activity for money, which will not have the effect of mitigating the adverse effects on the environment.[34]

In practice, the distinction between effects on the environment and effects on a person may be difficult, or even impossible, to draw. The definition of "effect" in s 3 is very broad. In particular, it includes "any cumulative effect which arises over time or in

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32 Kenneth Palmer *Local Government Law in New Zealand* 2nd ed The Law Book Co Ltd (Sydney, 1993) 608.

33 [1997] NZRMA 132.

34 Judge Skelton expressed concern over the applicant's offer and noted that the Society's refusal of the offer demonstrated its bona fides. The Judge saw the applicant's seeking of an order for security for costs against the Society as a further effort to pressure the Society into dropping its appeal and refused to make the order.

combination with other effects". The effects of a number of activities on people who have given their approval in each case could constitute an effect on the environment when taken together. For example, it has been held by the Environment Court that the effect of granting one application for an infill development in an area where there were a number of sites equally suitable for such development could have a precedent effect; that is, having granted one consent it could be difficult for the consent authority to refuse to grant any subsequent applications.[35] The cumulative effects of a number of infill developments in one area could have implications for the wider environment.

Several aspects of this relationship are cause for concern. The first two concerns, analysis of cumulative effects of a project, and consideration of effects on future generations, are dealt with later under Chapter 7 of this report.

A third arises from the suggestion that a distinction should be drawn between an effect on a person and an effect on property owned, occupied, or otherwise controlled by that person. Effects on property, such as stormwater runoff onto adjacent land, are different in kind from effects on people, such as noise or odour. The definition of "environment" in the RMA includes "all natural and physical resources".[36] Therefore effects on physical resources, including land, air and water, should be considered, whether or not the person who owns, occupies, uses or controls the physical resources has granted written approval.

Although mindful of the exceptions, most of the effects on people covered by this investigation concern subjective amenity values (noise, odour, views), while effects on the environment largely concern biophysical values.

3.7 Consultation and dispute resolution

The RMA encourages public participation in resource management and specifically provides mechanisms to encourage applicants and those interested to negotiate and resolve disputes relating to proposed activities.

Section 99 enables consent authorities to invite those interested in a consent application to a pre-hearing meeting "for the purpose of clarifying, mediating, or facilitating resolution of any matter or issue". The outcome of the meeting may be reported to the consent authority.

Section 268 provides for "additional dispute resolution" of proceedings which have been commenced in the Environment Court. The Environment Court may refer the proceedings to mediation,

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35 *Lee v Auckland City Council* [1995] NZRMA 241, 250.

36 Section 2, RMA 1991

conciliation or facilitation in the interests of encouraging a settlement. Any settlement which purports to change the decision of the consent authority would require the endorsement of the Environment Court through a consent order. The Environment Court does not automatically endorse agreements arrived at by the parties, but considers them from the perspective of the environment.[37]

The PCE's 1996 report, *Public Participation under the Resource Management Act 1991 – The Management of Conflict*, recommended that councils encourage pre-application consultation. Such consultation may result in improvements being made to the design of a project from an environmental point of view, but it may equally result in an agreement which does not benefit the environment. Consultation of those affected by applicants for consent is endorsed by clause 1(h) of the Fourth Schedule of the RMA (see Chapter 3.5 above).

A natural consequence of the parties discussing the issues is that, in some cases, agreements will be made. Some of these agreements will probably lead to positive environmental outcomes. Other agreements may amount to buying off those affected.

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[37] *Bonifant Investments Ltd v Canterbury Meat Packers* C78/6 Judge Skelton 5/11/96

4 WHAT CONSTITUTES A SIDE AGREEMENT

4.1 The nature of the transaction

The essence or nature of any particular side agreement is not always easy to identify. A continually emerging theme during this investigation was that side agreements are not always what they first appear to be. Indeed, as the case studies below demonstrate, once all the facts are known, agreements that appear simple often involve many different variables. Careful analysis of all the facts is necessary before judgement can be passed on whether any particular side agreement might have undesirable environmental consequences.

Some agreements involve straightforward property transactions. These usually include the acquisition of land or access rights to another person's land for purposes related to an applicant's proposal. For example, a side agreement may compensate an "affected party" for actual, physical use of his or her property by a project applicant. This was the case in one reported instance, where a telecommunications company made a payment to a church for use of its steeple to site a microwave relay transmitter. Such an access transaction might properly be considered "rent".

Where an agreement relates purely to a property transaction, it is not a side agreement as that term is used in this report. However, property may be purchased or access acquired solely or partly in order to secure the owner's approval to a proposal, and property agreements may contain some elements of a side agreement.

Other side agreements involve compensation for actual or anticipated adverse effects on a person or property affected by an applicant's proposal. This compensation may be for the fear or risk that an adverse effect will occur or will be greater than expected. Alternatively, the compensation may be for a reduction in the value of the property that will bear the adverse effect.

Side agreements can involve action to avoid, remedy or mitigate adverse effects. This can happen either directly or indirectly. Where an applicant agrees to alter a proposal or to perform works on the affected person's property to reduce the adverse effects, the action to avoid, remedy or mitigate is direct. Where an applicant agrees to pay an affected person a sum of money and that person then uses the money to mitigate adverse effects, the action is an indirect consequence of the side agreement. This would occur, for example, where the height of a house extension shades a neighbour's yard and

the shaded neighbour uses money obtained in a side agreement to enlarge a window or install a skylight.

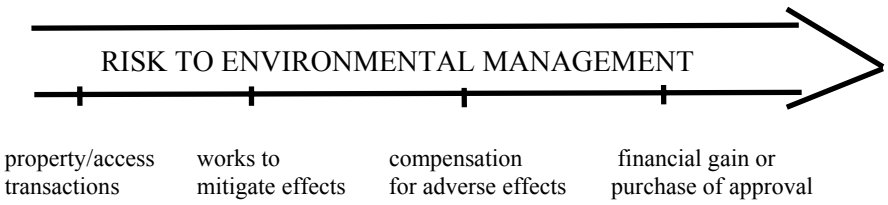
Written approval sometimes involves agreements by those affected not to participate in RMA processes or even to support an application. The High Court has held that such agreements are not contrary to public policy and do not violate the New Zealand Bill of Rights Act 1990.[38]

Although the characteristics outlined above are typical of side agreements, most agreements reflect more than one of these elements. For example, in the above example of the telecommunications facility and the church, it would appear that the transaction is primarily one to secure property or access rights for the applicant. However, in addition to a basic rental arrangement, there is also the provision of written approval by the church and the agreement to support the application. In this instance it is not surprising, since a person or organisation which leases its property for a particular activity can be presumed not to oppose that activity.

In thinking about the essence of any particular side agreement, it is helpful to consider where it fits along a continuum from property transactions to agreements not to participate, as shown in Figure 1.

In general, the more a particular side agreement resembles a pure property transaction, the fewer risks it poses to environmental management. The more it resembles financial gain or the purchasing of silence, the less likely a transaction is to address environmental risks.

Figure 1.



4.2 Timing of the agreement

The timing of side agreements can impact on the consideration of environmental effects. Side agreements completed before the application is lodged should be disclosed to the council in the AEE, as required by the Fourth Schedule. Where consultations result in an agreement only after an application is lodged, the agreement may not ever be disclosed to the consent authority. However, the AEE should

[38] *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145.

set out the effects on people who have not agreed to the activity at the time the application was lodged. The written approval of those who later agree to the proposal would be provided to the consent authority.

4.3 Enforceability of agreed terms

Another important issue regarding the nature of transactions involves the "enforceability" of agreed terms or conditions of a written approval. This is an issue with clear implications for environmental management. Research by Bevan (1998) indicates that one of the reasons applicants seek to enter into side agreements is to pre-empt consent conditions. As noted in Chapters 5.2 and 6.2 below, conditions agreed upon in side agreements will normally not be enforceable under contract unless they are also adopted as consent conditions by the consent authority.

To ensure adequate opportunities for enforcement of agreement conditions which address environmental effects, it would be preferable for councils, where appropriate, to adopt them as conditions of resource consents.

Whether a council may legally adopt a condition which forms part of a side agreement as a consent condition is not entirely clear. Section 108 permits a consent authority to impose any condition it "considers appropriate". However, the Environment Court has recognised that the conditions must

1. be for a resource management, rather than an ulterior, purpose
2. fairly and reasonably relate to the development authorised by the consent to which the condition is attached, and
3. not be so unreasonable that no reasonable consent authority, duly appreciating its statutory duties, could have approved it. (*Coote v Marlborough District Council*, W96/94, citing *Newbury District Council v Secretary of State for the Environment*, [1980] 1 All ER 731 (HL)).

Because a consent authority is prohibited from considering the adverse effects on a person who has given written approval when it is determining whether environmental effects are more than minor, it could be argued that imposing any condition to mitigate such an effect would be unreasonable.

When an agreement is reached between an objector and an applicant after an appeal has been lodged with the Environment Court, the Court is provided with the opportunity to review the terms of the agreement, and to adopt them as part of a consent order to the extent that they meet the requirements of valid conditions. The Court has no greater power, duty or discretion on appeal than the consent authority. Therefore, by implication, the consent authority may also adopt appropriate provisions of side agreements.

In *Bonifant v Canterbury Regional Council*[39], the Court emphasised the importance of carefully scrutinising the terms of side agreements that would end the dispute giving rise to the appeal. Among the concerns the Court raised was the need to consider the enforceability of the terms of the side agreement.

In extra-judicial comments, Principal Planning Judge Sheppard has further indicated that the Environment Court will not "rubber stamp" consent orders presented to the Court by parties to an appeal who have reached a side agreement, saying that the Court's emphasis is on sustainable management of the environment and that the Court may order further evidence and alter the terms of an agreed settlement if it determines they are not adequate.[40]

4.4 Overview of known side agreements

In understanding the breadth of concerns about side agreements, it is useful to start with an overview of the actual agreements that have been identified by people consulted during research for the investigation. A total of 22 transactions were identified (see Appendix 1).

Information was difficult to collect on several of these agreements. An interesting feature of others is that they appear to start out with the person affected seeking a financial gain in excess of reasonable compensation as an opening bid. These negotiations develop into agreements on mitigation and better environmental outcomes. An overall impression was that many centred on works rather than cash.

Four of these side agreements have been selected as case studies to illustrate both a representative range of rural and urban environmental contexts in which side agreements are negotiated, and the variety of motivations for entering into negotiations (financial, defusing opposition, mitigation of adverse environmental effects). Each of the four are described in greater detail in Appendix 2. A summary of the four case studies follows below. Relevant features of these case studies are cited in shaded boxes in subsequent chapters to illustrate the discussion.

All case studies raise the issue of whether compensation relates to the value the applicant places upon the proposal, or to the loss or disadvantage the affected party will suffer. Case studies three and four relate to residential amenity values.

Effects on amenity values are the most common concern of affected parties. These issues and the desire to avoid notification of the resource consent for smaller projects appear to make up the bulk of side agreements.

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39 C 78/96, Judge Skelton, 5 November 1996

40 "Judge Speaks Out for 'People's Court'," *NZ Herald*, 2 June 1998, p. A11

4.5 Summary of four case studies

Case study one: Macraes Flat gold mine

A mining company planned to increase the area and scale of its operation. It purchased 26 properties as part of its pre-application programme. These were properties within the proposed mining area, and others nearby were included to create a buffer zone. Covenants signed at purchase limited the rights of the vendor to submit an objection to further mine expansion. Water supply concerns of two farmers resulted in additional agreements. The community as an incorporated society argued to secure the town's post-mine future and sustain and enhance its amenities and character. This argument was reflected in the conditions of the resource consent.

There were two appeals against the council decision: one concerned an historic reserve, the other related to the road, monitoring of ground water and placement of waste rock. The scale of the proposal meant that the consent applications were always going to be notified. One result of the property purchase covenants was a reduction in the number of submissions. It also lessened the likelihood of appeals to the Environment Court. Active participation of the community group reduced the risk of less favourable environmental outcomes that might have resulted from purchasing silence.

See Appendix 2, page A5 for a full description of this case study.

Case study two: Te Kuiti lime works

An application for a water discharge permit proposed retaining the current management system, which involved draining stormwater, after settling of sediments, to wet, boggy ground on a neighbouring property. The council believed the whanau trust owners of the boggy ground to be the only affected party and required written approval from them for the application to proceed without notification. The owners of the boggy ground refused to give written approval, claiming that the discharges had caused environmental damage for some years and that they were not aware they could require the applicant to stop.

After negotiation the two parties reached an agreement whereby the applicant was to provide the neighbouring owners with use of earthmoving equipment, pay rental for a small part of the land being used as a stockpile and introduce an improved waste management system. It was the view of the applicant that in hindsight it would have been simpler to have gone through a notified process without the requirement for any written approvals.

See Appendix 2, page A8 for a full description of this case study.

Case study three: Karori fire station

A resource consent application for a fire station (subsequently withdrawn) raised concerns from adjoining neighbours about noise, traffic effects, shading and impacts on property values. Amendments were made to the plans following discussions with affected parties. These amendments were included in a new application. The proposal had the status of a discretionary activity with all consents to be processed without notification. Written approval of adjoining property owners was required.

The revised design and location included various suggestions put forward by council officials to minimise the visual impact on the adjoining public cemetery. In addition the applicant agreed to earth-mounding within the cemetery property and payment of a cash contribution towards landscaping. Neighbours expressed concern that a noise-shielding wall would shade their courtyard. The applicant agreed to relocate the wall 1 metre in from the boundary on fire station land. In this case the agreements reached with property owners meant a non-notified consent process was quicker and less expensive than notification of the application.

See Appendix 2, page A12 for a full description of this case study.

Case study four: Newtown apartments

The proposal was to construct a 24-unit residential development in an inner city residential area. In this case, although the application was a discretionary activity and the consents were to be processed as non-notified, no written approvals were required as the council considered the application would have minor effects on the environment. Two public meetings were held by the developer with all adjoining property owners and council officials. Amendments were then made to the proposal to address design issues and to reduce the impact on adjoining properties.

On the western boundary of the development, a child-care centre was concerned about loss of sunlight, potential lack of privacy, disruption during construction and possible future legal action against the child-care centre by new unit owners (reverse sensitivity). Negotiations were undertaken but no agreement was reached over possible alterations to the centre to mitigate loss of sunlight or the reverse sensitivity issue. Instead, the applicant amended the proposal to eliminate the non-compliance with the district plan rule necessitating negotiations.

See Appendix 2, page A14 for a full description of this case study.

5 POTENTIAL OR PURPORTED REASONS FOR SIDE AGREEMENTS

5.1 Purchasing silence

Some practitioners believe side agreements pose a threat to adequate environmental management because they result in less overall public participation in the RMA process. Bevan (1998) has found that applicants are sometimes motivated to enter into side agreements by the desire to reduce opposition to their applications or to "buy silence". The examples of side agreements identified in this investigation show that the non-participation of an interested or affected party is sometimes an express term of an agreement.[41]

> Case Study One: Macraes Flat gold mine
>
> The result of agreements with property owners meant fewer instances of the same issues for the Macraes Mining Company to deal with by way of submission at the hearing and hence a speedier process. It also lessened the likelihood of appeals to the Environment Court.

As noted briefly above, however, it is not always easy to determine whether an agreement on non-participation is essential, even where it is an express term of the agreement. In some cases, a non-participation term may be "boilerplate" language (extra assurance) added onto an agreement which serves to avoid, mitigate or remedy the particular effect about which an affected party would have complained.

Because both s 94 and s 104 of the RMA prohibit consent authorities from considering the effects of granting a consent on those who have given their written approval, the impact of any such term of non-participation is questionable. Arguably, any negative effects of non-participation follow from the granting of written approval, irrespective of whether a side agreement explicitly prohibits participation.

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[41] An example of an agreement which included a term buying silence is discussed in *McLean v Auckland City Council* A136/97. The agreement required the affected person not to object to any development on the site that complied with certain specifications as to height and for the affected person to procure similar approvals from his successors in title.

Beyond obtaining written approval and prohibiting consideration of the effects on the person giving approval, there may be little value to the applicant in "buying silence".

Nonetheless, in certain instances, the contractual limitation of public participation beyond securing written approval has the potential to make environmental management less effective. It can decrease the total amount of information available to consent authorities and deprive the consent authority of local knowledge. Thus, the **purchasing of silence is potentially more dangerous where the consent authority does not carefully and independently evaluate and exercise judgement regarding the effects of a proposal**.

Many practitioners believe that consent authorities are prone to use the amount of opposition to or the number of submissions on an application as a proxy for environmental effects (see Chapter 7.4). This practice is contrary to the requirements of the RMA that consent authorities must satisfy themselves as to the nature and level of effects and those affected.

The question arises as to whether an individual who has given approval to an activity may provide information and assistance to a community group in making its submissions on the application. The answer may depend on the nature of the assistance provided and the terms of the side agreement with the applicant. Where the affected person has provided information to the community group for its submission, the consent authority is still constrained by s 104(6) and will not be able to consider the effects on that person, even if they are raised by the community group.

Where an affected person has agreed to maintain silence in connection with a proposal and has been paid for remaining silent, it may be contrary to the terms of the side agreement for that person to assist the community group in objecting to the proposal.

5.2 Pre-empting consent conditions

It has been suggested that some applicants pursue side agreements in order to pre-empt the imposition of equally or more stringent consent conditions by the consent authority.[42] By this reasoning, applicants sometimes prefer making cash payments and/or entering into contractual obligations to subjecting themselves to consent conditions imposed by the council.

This preference perhaps reflects their judgement that contractual conditions present fewer enforcement risks than consent conditions. Indeed, in the event of breach, public options for enforcing a contractual condition are fewer than for a consent condition.

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42 Bevan, 1998

Although only the parties to a contract may enforce a contractual condition, action to enforce consent conditions may generally be brought by "any person".

The environmental risks associated with this practice depend on the council's knowledge and treatment of any contractual arrangements by consent applicants. Good practice can help to minimise these risks. For example, where a side agreement does not necessarily result in effects on the environment being mitigated, consent authorities should impose appropriate conditions to mitigate these effects.

Councils should consider whether the agreed conditions disclosed are adequate to avoid, remedy or mitigate adverse environmental effects.

Where the affected person has given written approval to an application on the understanding of a specific action being taken by the applicant, the consent authority may have jurisdiction to impose action as a condition on the consent since without it the affected person has not given true approval. However, there are risks in this approach for the affected person who has given up the right to participate in council proceedings. If the condition is not imposed for any reason, the consent authority might still treat the affected person as having given approval.

The consent authority should ensure that the consent conditions on their own are adequate to avoid, remedy or mitigate adverse effects on the environment of the activity, since the side agreement will not be enforceable by the council or the public generally.

This may mean that the consent authority should adopt some or all of the conditions contained in the side agreement, or impose different or more stringent conditions. The consent authority is clearly not bound by the terms of the side agreement.

5.3 Fostering of goodwill and encouraging support

Attempts to avoid conflict and show flexibility by accommodating concerns of others during the consultation stages of a proposal can foster good relations. Concessions being offered by the applicant can reflect a desire for an ongoing positive relationship beyond the actual period of the consent application. Similarly, offering the affected party an inducement can be an effective negotiation tool, encourage support and possibly even achieve affected party "buy-in" to the process. These signs of good intentions may help sway a council's decision in favour of the applicant, particularly where the decision could go either way.

Case study two: Te Kuiti lime works

The applicant offered the use of earthmoving equipment and rental payment for a small part of the Trust's land occupied by a stock pile.

5.4 Creating certainty in an uncertain process

Broad discretionary powers given to consent authorities under the RMA for determining whether third parties may participate in the consent process result in uncertainties for applicants of resource consents. If a side agreement can remove one more person or potential obstacle, this helps make the resource consent process more certain for the applicant.

Removing or reducing uncertainty is also an incentive for those affected to enter into side agreements. They do not know whether consent authorities will agree that they have the status of an affected person or that their preferred conditions for avoiding and mitigating adverse effects will be imposed on consents.

5.5 Vexatious or extortionate behaviour

A commonly voiced concern about side agreements is that they are associated with extortionate behaviour by some objectors who seek sums of money far in excess of compensation.

None of the evidence that has come to light during this investigation suggests that extortionate behaviour is widespread. This is not altogether surprising, given the factors that help determine the "market price" of written approval. An objector's ability to demand a high price for approval is limited by the likely costs to the applicant of not obtaining the approval.

A council operating effectively will ensure that the adverse effects of a proposal on an objector will be avoided, remedied, or mitigated by appropriate conditions. The applicant can expect to bear the cost of complying with those imposed conditions. Where the price demanded by the objector is lower than the expected cost of compliance with the conditions, there is no "illegitimate" gain by the objector. In order to avoid the transaction costs (including the incrementally higher cost of a notified process), the applicant may be willing to pay more than the expected cost of compliance with any conditions. Capturing those transaction costs in the price of approval provides the only opportunity for any "illegitimate" or unfair gain by the objector.

A fictional example is illustrative. Suppose applicant A's proposal, which requires a resource consent, will have adverse effects on neighbour N's property, such that the property will be devalued by

$5,000 or, alternatively may be mitigated by screening and landscaping costing $5,000. Suppose further, that the value to A of avoiding notification – because of cost savings, time savings, and decreased risk of appeal – is $1,000. As long as A expects that the council will impose screening and landscaping as a condition of consent, he or she will be willing to "make a deal" for any amount up to $6,000. N would be willing to make a deal for anything more than $5,000, but might try to "hold out" for $6,000. The only arguably illegitimate, or "windfall" gain would be the amount by which the agreed price of approval exceeds $5,000.

In itself, exercising vexatious or extortionate behaviour may not necessarily increase environmental risk. However, if it results in public perception of RMA mechanisms being abused, it may lead to a loss of public confidence in the Act.

5.6 Reverse sensitivity

A unique element of side agreements is an issue known as "reverse sensitivity". Reverse sensitivity refers to the potential for existing, high-impact land uses, such as airports (because of noise) or pig farms (because of odour) to cause future complaints related to proposed inconsistent uses, such as residential subdivision, of neighbouring industrial land. Thus, an airport company may object to a residential subdivision on the grounds that home owners might become future critics of the airport's noise level. This may lead to negotiations designed to protect the high-impact user from future complaints.

Case study two: Te Kuiti lime works

A beneficiary of Green-Vue Whanau Trust advised Mintech of their intention to build a house about 200 metres in direct line of sight of the lime-processing plant. Mintech objected to this building proposal because of (reverse sensitivity) concern that noise emitted by the plant could be grounds for the occupants of the house to bring noise abatement proceedings.

In some instances, an agreement may be reached that allows for the low-impact use such as a subdivision to occur, provided the rights of the higher impact user are not diminished. For example, in return for written approval of a subdivision, the subdivider might agree to insulate proposed houses against airport noise, or enter into a covenant acknowledging the airport's operations. It has been suggested that, **where reverse sensitivity arrangements are made to provide for the continuation of a high-impact resource use, easements or covenants should be registered on the title of the subdivided lots to ensure that agreements are binding on future owners.**

In the case of Christchurch International Airport, where the airport had been established on a greenfields site and had operated for some time, pressure was mounting for the subdivision and conversion to residential use of much of the rural land around the airport. The airport company sought to impose a condition on subdivision consents which would require the houses to be constructed with noise attenuation features and would require the owners not to complain about the noise.

The Planning Tribunal found the condition preventing complaints to be contrary to the New Zealand Bill of Rights Act 1990. On appeal the High Court found that although such a condition took away the consent holder's freedom of action, it was not contrary to the Bill of Rights if the consent holder had voluntarily agreed to such a constraint.[43]

In *Rowell v Tasman District Council*[44] the Planning Tribunal made the terms of the side agreement associated with a grant of the easement a condition of the consent. In this case a quarry owner sought an easement for dust and noise emissions over the neighbouring properties in return for withdrawal of opposition to the proposed subdivision on those properties. One neighbour agreed to grant such an easement and the quarry owner withdrew his opposition particular to that property.

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43 *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145.

44 W 65/94, Judge Treadwell, 3 August 1994

6 IMPLICATIONS OF SIDE AGREEMENTS FOR THE VARIOUS PARTIES

6.1 The applicant

Applicants may enter into side agreements to avoid notification of their applications and the greater uncertainty associated with a notified process. If an application is notified, any person may make a submission. There is no requirement that a submitter demonstrate an interest in the application. Provided the submitter is able to point to environmental effects which may result from the activity, his or her motive is irrelevant. Even if an application is notified, the applicant may decide to enter into an agreement with those identified as affected or otherwise likely to oppose the application in order to avoid adverse submissions. To obtain the agreement of such people to refrain from making an opposing submission, the applicant may offer money, or goods and services as compensation.

Case study two: Te Kuiti lime works

The applicant company's representative expressed frustration with the process of non-notification and the length of time involved. It was his view that it would have been simpler to have gone through a notified consent process without the requirement for any written approvals. It is not always going to be cheaper to negotiate, but negotiation has other benefits. Most importantly it creates buy-in or ownership of the resulting outcome by all the parties involved.

The applicant may be subject to contractual obligations as a result of purchasing the approval of potential objectors. However, any contractual obligation may be enforced only by the other party to the contract (the affected person). This is attractive to the applicant, who would prefer to be bound contractually than by a consent condition.

The price applicants are willing to pay will be primarily influenced by their analysis of the expected risks and costs of the alternatives – not obtaining approval, or obtaining approval following a lengthier and more expensive process. An assessment of alternative costs will normally include consideration of several factors including, but not limited to:

- the costs of a notified process, including the cost (if any) of delay

- the costs of a possible appeal by a submitter, including litigation costs and additional delay
- the risk of an adverse outcome in the event of appeal
- the likely cost of complying with conditions of consent expected to be imposed by a council.

Applicants who cannot afford to compensate those affected by their proposal will have to notify. Alternatively, the applicant can redesign the proposal to avoid or mitigate adverse effects to the extent that no person is affected.

6.2 The affected person(s)

The price an affected party is willing to accept in exchange for written approval will normally include consideration of several factors, including but not limited to:

- the perceived effects of the proposal on the affected party's property, surroundings or personal interest and the cost to the affected party of mitigating or remedying those effects
- the value of any potential uses of their land that might be precluded by the applicant's proposal
- the risk that a council will not heed the affected party's objections even if approval is withheld
- compensation for transaction costs to the affected party, including the cost of determining effects of the proposal and the time spent dealing with the issue.

If an affected person sells their approval to a proposal that is then dealt with by the consent authority without notification, there is no opportunity for those affected or any other person to make a submission on the proposal. Where the application is notified, the affected person may not make a submission opposing the proposal. Depending on the terms of the agreement with the applicant, an affected person may be required to make a submission supporting the proposal. Only those who have made a submission on an application have standing to appeal against the decision of the consent authority.

However, the proposal approved by the affected person may be subject to changes in the pre-application consultation phase, the decision-making phase, or on appeal. As a result of submissions and the evidence presented at the hearing, the consent authority may recommend alterations to the proposal to address some adverse environmental effects, or may attach conditions not contemplated by the affected person that may disadvantage him or her. If the decision of the consent authority is subject to appeal, the Environment Court may overturn the decision or amend it, either following a hearing or by way of a consent order. However, the terms of the decision of the consent authority or the Environment Court are limited by the scope

of the application for consent: a consent cannot be granted which authorises more than was applied for.[45]

In these circumstances the affected person has no remedy through the RMA, but must look to the terms of the contract with the applicant. If the affected person seeks to enforce the contractual obligations of the applicant in court, it is unlikely that a court would order specific performance of the contract, since that might conflict with the decision of the consent authority or the Environment Court. At most, the affected person might obtain an award of damages for breach of contract.

Where the affected person's interests are protected through the contract with the applicant rather than through conditions on the consent, only the affected person may take steps to enforce the contract against the applicant. If the same protection were afforded by a condition on the consent, the consent authority would have responsibility to ensure that the applicant complied with the condition and could enforce the condition by serving an abatement notice.

In addition, the council or any person may enforce the condition by seeking an enforcement order from the Environment Court. In some circumstances, the Environment Court may make an enforcement order notwithstanding that the consent holder is complying with the conditions of the consent.[46] It is not clear whether an affected person who has given approval to an activity, and suffers effects for which he or she has been compensated, could obtain an enforcement order from the Environment Court.

As noted in Chapter 3.3, the RMA allows those affected to withdraw their approval, although the terms of any contractual arrangement may not. It appears from *McLean*[47] that, subject to contractual commitments, an affected person may withdraw their approval after the consent authority has made a decision, and participate in proceedings in the Environment Court.

Some people have the opportunity to gain from an applicant's need for their approval to a proposal; this will not usually include people unless they are identified by the consent authority as affected. However, if the consent authority has properly executed its task of identifying all affected people, those not identified ought not to be affected and therefore ought not to be disadvantaged.

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45 *Pope and Hitchins v Wellington City Council* (1980) 8 NZTPA 3. See also *Clevedon Protection Society Inc v Warren Fowler Ltd* C43/97, Judge Jackson, 23/5/97.

46 Section 314(1) RMA.

47 *McLean v Auckland City Council* A136/97.

6.3 The consent authority

Environmental management involves managing human interventions in large, very complex and highly dynamic systems of bio-physical resources. Under the RMA, regional councils and territorial authorities (councils) have a key role in ensuring that interventions achieve sustainable environmental outcomes as well as meet the economic and social goals of the community and nation. Councils are given broad discretionary powers to regulate the allocation, use and protection of land, air and water including the making and implementation of plans, setting rules for the undertaking of activities and the granting of consents to use environmental resources. There is a significant risk to the maintenance and improvement of environmental quality when councils do not use these powers optimally.

Although mechanisms are provided in the RMA to reduce the risk of unsatisfactory council decision making, for example, review by the Environment Court, there remain a number of factors which fall outside the jurisdiction of the courts that influence the achievement of effective environmental management. These include:

- the competence of council political decision makers
- the competence of council staff advising on plan administration and resource consent applications
- resources provided by the council for carrying out RMA functions
- time frames set in the RMA
- other council policies and programmes.

Good decisions by councils on whether or not to notify an application are dependent on councils correctly identifying who may be adversely affected.

Scrupulous evaluation by the consent authority of the applicant's AEE is important. It ensures that the consent authority has adequate information to make a decision on notification. At the later decision-making stage, a decision not to notify severely restricts the ability of the public to participate.

Over-estimation of the number of people affected could expose the applicant to claims for compensation for effects that do not exist. Conversely, identification of too narrow a group of those affected may result in people who are affected being shut out of the decision making process. The only remedy available to such people is judicial review in the High Court.

Case study four: Newtown apartments

The determination of affected parties in this case was made by the city council on the basis of whether a rule was contravened in the Proposed Plan. This appears to have been an unfortunate outcome. If it had deemed the day-care centre an affected party, negotiations or perhaps council-imposed conditions could have mitigated the adverse effects.

If the application is notified, the consequences of the consent authority's inaccurate identification of those affected may be less serious, because any person may make a submission on a notified application. In such cases, it is in the interests of the applicant to ensure that it has identified all those potentially affected and all possible objectors to the application in order to defuse that opposition. Where those affected demand too high a price for their approval and the applicant refuses to pay, or those affected are opposed to the proposal on principle, they may make submissions and present them to the consent authority.

The effects on a person who has given their approval to a proposal may not be considered by a consent authority in coming to its decision on the application for consent. Section 104(6) is specific in referring to the effects on *a person* as opposed to the effects on the environment. Both the definition of "environment" in s 2 and Part II are focused more on the community than on individuals.[48] This distinction is also made in s 94(2), where paragraph (a) allows the consent authority to dispense with notification where the effects on the environment are minor, and paragraph (b) acknowledges that some individuals may be personally affected and allows them to decide whether or not they are prepared to live with the effects.

It could be argued that the effects to which a person can agree to be subjected and compensated for are those effects which are analogous to an encroachment on private property rights, such as the loss of sunlight to a property. By contrast, it is not appropriate for any person to be able to trade off the effects on the environment, since those effects go beyond property rights.

Where the effects on a person are environmental, that person's approval should have less value to the applicant because the consent authority must consider those effects anyway.

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[48] Caroline Miller discusses this argument in "Consents for Sale – A Reflection" [1997] V(2) *Resource Management News* 24.

6.4 The judiciary

The Environment Court undertakes *de novo* review of consent authorities' decisions on appeal. Like the consent authority, the Court is bound by the provisions of s 104(6) and cannot consider the effects on any person who has given their written approval to an activity, unless that person has withdrawn their approval.

The parties to the appeal may enter into a side agreement following the decision of the consent authority and before the appeal is heard by the Environment Court. Then the Court may resolve the appeal by making a consent order to which all the parties to the proceedings agree. The agreement of those participating in the appeal who are not actually parties is not required.[49]

The Court is not bound by any agreement between the parties. If the agreement simply means that the appeal will be withdrawn, the Environment Court may not have an opportunity to scrutinise the agreement. However, withdrawal of the appeal means that the consent authority's decision will stand. If the agreement necessitates amendment of the consent authority's decision, a consent order will be required. In considering a consent order, the Environment Court has a separate obligation to ensure that the environment is not worse off because of the agreement.

The Court has no greater power to scrutinise the agreement than does the consent authority. Section 290(1) RMA provides that "the Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought".

The Environment Court has recognised that the RMA allows applicants to purchase the approval of those affected by compensating them for adverse effects, whether by cash or other means.[50] The motive of those affected in giving approval does not reduce the importance of their approval.

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49 *Shield v Marlborough District Council* W73/94.

50 *BP Oil NZ Ltd v Palmerston North City Council* [1995] NZRMA 504; *Mackay v North Shore City Council* W146/95, Judge Treadwell, 14/11/95; *Tasman District Council v Askew* W68/97, Judge Kenderdine, 26/6/97.

7 IMPLICATIONS OF SIDE AGREEMENTS FOR EFFECTIVE ENVIRONMENTAL MANAGEMENT

7.1 The "price" of approval

The amount of money or other compensation that changes hands often becomes the focus of concern about side agreements, particularly where the price seems high. In reality, little can be learned from considering the price of a side agreement in isolation. It is important to consider the price in the context of all the facts of a particular transaction.

In most cases, a rational applicant will not agree to pay more to conclude a side agreement than they would expect to pay in the absence of such an agreement. Likewise, a fully informed rational person affected by the application would not accept less in compensation than they would expect to achieve by participating in formal RMA processes. In some cases, where approval is more valuable to the applicant than to the affected party, the price agreed upon may be higher than is adequate to compensate for effects. This can clearly be seen, for example, in the context of applications for proposals with minor environmental effects, which can be processed on a non-notified basis if the written approval is obtained from all affected parties.

If the applicant perceives the potential cost of a notified process (including risk of further appeal and delay) to be high, those affected are likely to obtain a higher "price" for their approval. In other words, **the mere "approval" of affected parties is worth more, irrespective of the amount necessary to compensate those affected for any adverse effects, because it allows the applicant to avoid other costs**. Any premium paid for the "approval" beyond compensation for adverse effects would normally be limited to the incremental cost of proceeding with a notified application.

Sometimes written approval is given in exchange for things other than cash. Where a proposed activity has a particular adverse effect on a neighbouring property, an agreement is sometimes made to alter the proposal (or even the affected property) in such a way that avoids, remedies, or mitigates that effect. **In contrast to monetary transactions, agreements not involving cash pose fewer environmental risks, where the agreement itself requires action to avoid, remedy or mitigate the adverse effect.**

Case study three: Karori fire station

Apart from a lump sum for landscaping works and maintenance transactions, all other agreements centred on works rather than cash. This type of agreement is probably the most common, and subsequent amendments to proposals provide an important transaction outcome.

7.2 Transparency

There is consensus among most practitioners that the terms of many side agreements are never disclosed to consent authorities. Some practitioners have suggested that any risk side agreements pose to good environmental management would be minimised if the agreements were transparent.

Under existing law, the existence of side agreements should normally be revealed to the consent authority. The fact that the Environment Court has indicated that it should carefully scrutinise side agreements lends weight to this, as both the consent authority and the Court should be in full possession of the facts to ensure robust environmental decision making.

The RMA requires that the AEE submitted with each consent application be prepared in accordance with the Fourth Schedule of the Act (s 88(6)(b)). The Fourth Schedule, clause 1, provides that an AEE "should include . . . (h) An identification of those persons interested in or affected by a proposal, the consultation undertaken, and any response to the views of those consulted". Although this arguably falls short of requiring full disclosure of all terms of a side agreement, its breadth suggests that, at a minimum, applicants should provide a narrative description of the consultations and negotiations leading to each side agreement (or lack of one) and the general terms of any agreement reached.

Where money is paid for approval, it might be sufficient to describe the effects that led the would-be objector to demand payment and the fact that compensation was paid in money. Where a proposal is altered or conditions for action to remedy or mitigate adverse effects are agreed upon, these should be disclosed as part of the AEE.

As a matter of practice, it may be to the advantage of applicants to disclose any agreed conditions which have the effect of mitigating, remedying or avoiding environmental effects, because they are likely to reflect well on the application. For this reason, it is likely that most environmentally "beneficial" side agreements are commonly disclosed.

The disclosure of side agreements and their context has the potential to diminish any risks that side agreements pose to effective environmental management. **By providing information to councils, disclosure would reduce the risk that key information is not available. By detailing the objectors' concerns that give rise to the agreement, disclosure under the Fourth Schedule can help the consent authorities better understand the full effects of a proposal, including cumulative effects, and to minimise those impacts (where possible) by imposing appropriate conditions.**

7.3 Adequate information

An important consideration is whether a side agreement is founded on adequate information and knowledge by all parties to the agreement. Markets work efficiently and effectively only if transactions are based on full information that is both accurate and freely available. Some of the people consulted in this investigation voiced concern that some parties to side agreements are granting approval to applications without adequate information.

Adequate information is critical in three areas:

1. The project: an accurate and complete description of the proposal is vital to the analysis of effects, including effects on any affected parties
2. The effects of the proposal and the ways proposed to avoid, remedy or mitigate any adverse effects: this information should be scrutinised by all parties to a side agreement and supplemented if necessary, to ensure that those affected are not approving of applications without a full analysis of how they might be affected
3. The legal implications of giving written approval.

Particular matters which should be explicitly communicated to those affected are the potential loss of appeal rights, the ability to revoke written permission at any time before a hearing on an application by the consent authority, and the fact that side agreements are not enforceable in the Environment Court, but only under general law of contract.

As noted in an earlier PCE report[51], it is good practice for councils to provide forms for those affected to indicate their approval. Such forms should make clear to those affected the legal implications of giving their approval (see Chapter 3.2).

Side agreements which are completed without adequate information changing hands pose a direct threat to managing the environmental effects of a proposal.

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[51] Parliamentary Commissioner for the Environment, 1995, *Assessment of Environmental Effects (AEE),* guideline 8, p76.

It is important for those affected to ensure they have all the relevant information before they give their approval. If the applicant has not made full and accurate information available to those potentially affected, they run the risk of approval being withdrawn before the hearing, or before the decision is made.

7.4 The proxy effect

There is widespread belief among practitioners that consent authorities have a tendency to use the number of affected parties withholding (or granting) approval, or the number of submissions in opposition to (or in support for) a proposal, as an evaluation of the scale and significance (by proxy) of environmental effects when considering whether to grant a consent. To the extent this occurs, it is plainly an improper abdication of the consent authorities' responsibility to protect the public interest, and of their environmental management responsibilities under the RMA.

This improper "shortcut" is not a direct result of side agreements involving written approval, but the perception might fuel the pursuit of side agreements.

7.5 The distancing effect

In addition to the proxy effect, both practitioners and the Environment Court have acknowledged that side agreements have the potential to constrict the scope of effects that a consent authority regards when deciding whether to notify an application or grant a consent. Concern has been expressed that, where a proposal has adverse effects both on adjacent and more distant neighbours, side agreements with those nearest the proposed activity can cause the consent authority, under s 94(4) and s 104(6) of the RMA, to consider only the more distant effects, which are not likely to be as severe.

The "distancing effect" was acknowledged in *BP Oil NZ Ltd v Palmerston North City Council,* where Judge Treadwell commented:

> The obtaining of consents by all persons nearby can facilitate the obtaining of a resource consent because the strength of allegations of adverse effect tend to fade the further one goes from the scene of activity. [52]

If the consent authority is not scrupulous in distinguishing between effects on individuals and effects on the environment, then any "distancing of effects" has the potential to deflect proper analysis of all of the proposal's environmental effects.

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52 [1995] NZRMA 504.

7.6 Cumulative effects

Cumulative effects are the effects of many activities in a given area or region which accumulate to the point where they are not acceptable in the long term.

The nature of cumulative effects means that the range of affected parties might well go beyond the immediate neighbourhood of the proposed activity and give rise to deteriorating environmental quality.

An adequate cumulative effects analysis should include the combined effect of many separate or individual impacts of a similar kind. It should also include consideration of whether an individual impact which may be minor by itself is more serious when accompanied by similar activities. In both respects, environmental effects cannot be considered in isolation from the effects on the person or community involved.

7.7 The effect on future generations

In the course of this investigation, concerns were expressed about "intergenerational" inequity of one-off payments which do not compensate for long-term environmental amenity loss.

Adverse effects on a person today who gives written approval might also have adverse effects on future generations. As the Ministry for the Environment has acknowledged,[53] the effect on future generations must be considered irrespective of any side agreements with today's affected parties.

7.8 Mitigating adverse environmental effects

It would be an over-generalisation to suggest that one kind of side agreement is better than another. Nonetheless, certain concerns merit attention. Where a payment of money is made in exchange for written approval, that money may or may not actually be spent to remedy or mitigate the adverse effects of the proposed activity. If it is spent on other goods or simply saved, an opportunity to remedy or mitigate is lost.

A lost opportunity to remedy or mitigate adverse effects could mean a net loss to the environment, resulting in private gain with no public benefits.

Side agreements involving contractual action to remedy or mitigate adverse effects can raise enforcement issues (see Chapter 4.3). Further, where contractual conditions require physical or "on the ground" actions, there may be environmental effects as a result of

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[53] Ministry for the Environment. *To Notify or Not to Notify Under the Resource Management Act Background Report.* 1997. p33

those actions. For example, the construction of a fence or the planting of trees to screen for privacy may have shading effects. Care must be taken to ensure that those effects are properly considered as part of the overall application. (See MfE Report[54])

Case study two: Te Kuiti lime works

Environment Waikato may have imposed equally good conditions on stormwater discharge in the absence of negotiations, but the side agreement certainly appears to have helped secure an environmentally beneficial outcome.

Case study three: Karori fire station

One neighbour expressed concern that a noise-shielding wall would shade their courtyard. The NZ Fire Service agreed to relocate the wall 1 metre in from the boundary on fire station land. Here is a simple example of what could be a serious issue: a measure to mitigate one effect (noise) results in an adverse effect of another kind (shade).

54 ibid, pp 30, 31

8 CONCLUSIONS

It is too early in the life of the RMA to tell what impact side agreements are having on environmental management and the achievement of desirable environmental benefits. This difficulty in defining impacts arises from not having an effective reporting system to pick up the number and magnitude of side agreements that are made, and from being unable to predict what would have happened in the absence of such practices.

However, there is enough uncertainty over the effects of many side agreements to indicate that a potential risk to the environment exists. This risk should not be ignored.

There are a number of observations from anecdotal and case study evidence about side agreements that can be made.

- Essentially, applicants enter into side agreements to secure approval for one of two reasons: a desire to avoid having their applications notified; and, if notification is likely or unavoidable, a desire to minimise or avoid time delays and costs by overcoming opposition to, or obtaining support for, their application.

- By providing consent authorities with wider discretion in determining which applications for consent may be dealt with without notification, and by placing greater emphasis on the approval of those affected, the RMA creates a climate encouraging applicants to enter into side agreements.

- Further, consent authorities are increasingly creating the opportunity for side agreements by requiring the written approval of those affected and making use of pre-hearing processes. A natural consequence of the parties discussing the issues is that, in some cases, agreements will be made. Some of these agreements may lead to positive environmental outcomes; others may be more in the nature of compensating (or - at its extreme - buying off) those affected, with no environmental benefit.

- Some side agreements pose a greater risk than others. In general, the more a particular side agreement resembles a pure property transaction, the fewer risks it poses to environmental management. The more it resembles financial gain or the purchasing of silence, the less likely a transaction is to address environmental risks. By the same token, in contrast to monetary transactions, agreements not involving cash pose fewer environmental risks, where the

agreement itself requires action to avoid, remedy or mitigate adverse effects.

- Whatever the circumstances, side agreements inherently represent a short-term response to personal and environmental concerns, and seldom address long-term, sustainable environmental outcomes.

- The risk posed by side agreements is increased by indeterminant language in the RMA. In particular, the distinction between effects on a person and effects on the environment lacks clarity. Generally, one is subjectively measured and the other objectively. However, in practice, the distinction may be difficult, even impossible, to draw. Also, in the context of cumulative effects on the environment, there may be no real distinction to be made. This presents an intractable problem for consent authorities.

- Most of the incentives for side agreements are about satisfying individual or private rights, rather than about good environmental outcomes. Individuals may well be compensated. However, the sum of these individual compensations does not necessarily equate to better environmental outcomes for the wider community.

- Scrupulous performance by a consent authority of its RMA obligations should reduce the risk that side agreements might pose. A rigorous evaluation of an applicant's AEE should determine the nature and scale of effects and the affected parties. The evaluation should then lead to consent conditions being set to adequately avoid, remedy or mitigate adverse effects. In practice there are impediments to consent authorities acting optimally, so side agreements could have the effect of undermining adequate environmental management.

This report does not attempt to solve all of the issues but the following recommendations are made in an attempt to help reduce the risk.

To the Minister for the Environment

It is recommended that you:

1 incorporate into your existing monitoring programmes means to identify the extent, nature and potential negative effects on the environment of side agreements between resource consent applicants and those affected by a proposed activity.

2 ensure, within the current review of the Resource Management Act 1991, that there are no restrictions placed on consent authorities to require resource

consent applicants to disclose the existence of side agreements.

To all local authorities

It is recommended that:

1 consent authorities should ensure that they are fully informed of all the environmental effects of the proposal before deciding whether the consent application requires notification, irrespective of whether or not those affected have given their written approval or made side agreements with the applicant.

2 a standard approval form be provided to encourage those affected by a proposed activity to describe any adverse effects on the environment, irrespective of whether a side agreement has been made or not.

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