

Decision No. W 8/2007

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN

ALAN JOHN BARTON

(RMA 011/03)

Appellant

AND

THE WELLINGTON REGIONAL

COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge B P Dwyer

Environment Commissioner J D Rowan

HEARING at WELLINGTON on 22 November 2006

COUNSEL/APPEARANCES

A J Barton (in person)

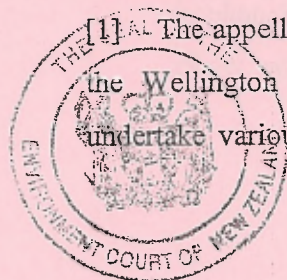
J W Tizard for respondent (applicant)

A J L Beatson for respondent (consent authority)

DECISION

Introduction

[1] The appellant, Alan John Barton (Mr Barton), has filed an appeal against a decision of the Wellington Regional Council (the Regional Council) granting consent to itself to undertake various river control works in an area known as Scaddens Bend, Ruamahanga



River, South Wairarapa. The application received consent after a hearing before an independent commissioner.

[2] The reason for Mr Barton's opposition to the application is that he considers that the works to be undertaken by the Regional Council will have the effect of preventing lawful use of a paper road which runs along the banks of the river and which potentially gives access to Mr Barton's farm property.

[3] As the result of various interlocutory proceedings before the Court (more specifically Decision W 050/2006), the matter to be determined by us at this appeal hearing is restricted to the following:

- d) *Whether the Hearing Commissioner erred in granting the resource consent in that she failed to have regard to the fact that the proposed work to extend the bed of the river will extend the river onto land which is a legal road such as to prevent lawful use of the road in breach of the Local Government Act 2002 and Upper Hutt City Council v Akatarawa Recreational Access Committee Incorporated [2003] NZRMA 405.*

[4] All other aspects of the appeal filed by Mr Barton were struck out by Decision W 050/2006.

Background

[5] The Regional Council is a catchment board pursuant to the Soil Conservation and Rivers Control Act 1941. As part of its catchment board functions, it manages a river control scheme known as the Lower Wairarapa Valley Development Scheme which provides river protection to some 40,000ha of land in South Wairarapa. Part of that scheme involves works on the Ruamahanga River including a stopbank system at Scaddens Bend approximately 5km east of Martinborough. It is these works which give rise to this appeal.

[6] The Regional Council, its predecessors and the adjoining property owner (Scaddens) have maintained river protection works at Scaddens Bend for many years. The works included earth stopbanks and a concrete wall which was part of Scaddens cowshed.



[7] Scaddens Bend is an area which is vulnerable to erosion from flood flows and had been identified for some time as a priority area in terms of improvement of the river protection works. In particular, the Regional Council had identified the need to reconstruct the existing stopbank further back from the river and form a bench along the bank around the bend.

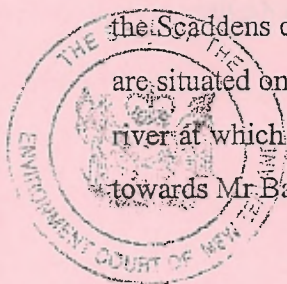
[8] In October 2003 and August 2004 there were floods in the Ruamahanga River. These floods exposed weaknesses in the flood defences at Scaddens Bend, particularly relating to the concrete wall. This further elevated the need for the previously identified improvements to be undertaken as a matter of urgency.

[9] In October 2004 a new stopbank replacing the old stopbank and concrete wall was constructed pursuant to the Regional Council's powers to undertake emergency works (s330 RMA). Further works involving benching between the new stopbank and the river and removal of redundant parts of the old stopbank have not as yet been completed pending the outcome of this application and (now) appeal. Until such time as the redundant parts of the old stopbank are removed and benching is complete, the new stopbank has a high degree of vulnerability to attack from flood as the result of excessive turbulence generated by the uneven landform in its present state.

[10] The old stopbank (now partially removed) was established on unformed legal road. Such unformed roads are commonly known as paper roads. We understand that the new bank is also largely (but not entirely) established on the same paper road. The paper road has been in existence since 1882.

[11] The paper road in question is an unformed extension of a legal road called Hikunui Road which runs in an approximately northwesterly direction through the adjoining Scadden property.

[12] The formed Hikunui Road appears to stop some distance back from the river although it seems from aerial photographs of the site that a farm track runs from the formed road down to the Scaddens cowshed on the paper road. It also appears that some of the farm improvements are situated on the paper road. In any event the legal but unformed road proceeds down to the river at which point it takes a turn to the (approximate) northeast and follows the river along towards Mr Barton's property.



The Barton Property

[13] Mr Barton farms a property adjacent to the Ruamahanga River which has been in his family since 1869. Part of the Barton property is a parcel of land known as Ongaha Block 78N (Block 78N). The paper road to which we have referred runs from Scaddens Bend to Block 78N. The distance involved is approximately 300m.

[14] In 1997 Mr Barton built a new milking shed on Block 78N. It was his intention that milk tankers would access the shed via the paper road, along the river and then out to the formed Hikunui Road.

[15] Mr Barton's evidence was that prior to making these arrangements he had inspected a Survey Plan 74628 of the area which indicated that there was a 20m wide road along the bank of the river which allowed sufficient room to accommodate both the stopbank which was already in place and to enable formation of what Mr Barton referred to as a *tanker road*. Mr Barton went ahead and commenced construction of his milking shed on the assumption that the *tanker road* could be formed in this area. We understood him to say that he was of the view that this would be formed and maintained by him.

[16] Unfortunately for Mr Barton Survey Plan 74628 omitted to show that part of the paper road on which he was relying for access had in fact been eroded into the river so that it was not feasible to form the *tanker road* as he had intended although access could still have been obtained to Block 78N along this general route if the stopbank itself could be used by tankers for a distance of approximately 70m.

[17] Since 1997 there has been ongoing correspondence, debate and litigation between Mr Barton, the Regional Council and the District Council regarding Mr Barton's endeavours to obtain access for milk tankers along the stopbank and paper road. In the meantime tankers visiting the milking shed have been required to use alternative access. The Barton property has both legal and physical access from two other formed roads in the area. The milking shed however is situated in a position on the farm where access from those roads is unsatisfactory and does not meet Fonterra's access requirements. We understand that Fonterra could decline to accept Mr Barton's milk due to the unsatisfactory access, should it wish to do so.



[18] The reason why Mr Barton has objected to and appealed the Regional Council consent for the new river works is that the works will have the effect of physically precluding vehicle access along the paper road to his property so that whatever hope he might have of obtaining dairy tanker access along the paper road will be defeated.

The Paper Road

[19] Section 316 Local Government Act 1974 (LGA 1974) provides:

316. Property in roads—

(1) *Subject to section 318 of this Act, all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple in the council of the district in which they are situated. There shall also vest in the council all materials placed or laid on any road in order to be used for the purposes thereof.*

(Section 318 is not relevant in this instance).

[20] Accordingly the paper road running along the Ruamahanga River at Scaddens Bend is land vested in fee simple in the South Wairarapa District Council.

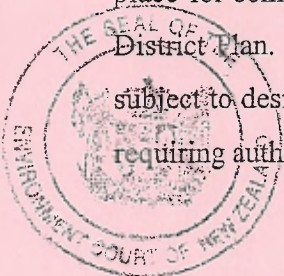
[21] Section 319 LGA 1974 grants a wide range of powers to Councils in respect of roads. For the purposes of this decision, particularly relevant powers are those found in subs(a) and (h), which provide as follows:

319. General powers of councils in respect of roads—

The council shall have power in respect of roads to do the following things:

- (a) *To construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit:*
- (h) *To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and the Tenth Schedule to this Act:*

[22] There is a further *gloss* which needs to be taken into account in respect of the paper road. That is that the road is subject to a designation brought down by the Regional Council for soil conservation and river control works. We are advised that the designation has been in place for some time and was included in documents predating the current South Wairarapa District Plan. Although there may seem to be some inherent conflict in having a legal road subject to designation for other purposes, there is no apparent restriction on the ability of the requiring authority to impose such a designation.



[23] It is clear that in planning to position his milking shed where he did Mr Barton made two assumptions. The first was that there was an adequate width of paper road along the riverbank to allow establishment of a *tanker road* and the second assumption was that he would be allowed to form such a *tanker road*. He acknowledged as much in cross-examination¹. Both assumptions were incorrect. A further difficulty for Mr Barton is the need to obtain the consent of the Regional Council, as requiring authority, to any works which might interfere with the designated works.

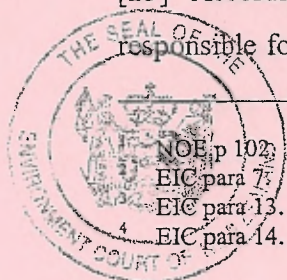
[24] During the course of the hearing Mr Barton claimed to have a letter from South Wairarapa District Council (or possibly one of its predecessors) authorising him to undertake work on the road in 1997. The nature and extent of the work was not clear nor was the letter produced by Mr Barton. In any event the present attitude of the South Wairarapa District Council to the possibility of a road being formed on the paper road was made absolutely clear in the evidence of Mr G B Page, Chief Executive Officer of that Council. Mr Page stated that the Council had no intention of developing the unformed section of Hikunui Road in question². He went on to comment that:

- *It could not be demonstrated to the Council's satisfaction that the unformed section of Hikunui Road could be developed as an economical road, would qualify for LTNZ subsidy or be a proper expenditure of ratepayer's funds;*³

And further:

- *The Council believes the provision and maintenance by the Regional Council of an effective stopbank and flood protection system, even though it traverses the unformed section of Hikunui Road, is of far greater benefit to the public and ratepayers of its district than extending the formed section of the road so as to permit regular vehicular access along the unformed section.*⁴

[25] Accordingly the position of the authority which owns the land and which would be responsible for any roadworks on it is that there is no basis to form this particular road. As



Mr Page pointed out if a road is physically formed it must be done to appropriate roading standards. It cannot be just a private *tanker road* serving the Barton property.

[26] Mr Page's evidence simply stated the obvious. It seems to us that there has always been an air of unreality about Mr Barton's expectations of being able to establish and maintain some form of private *tanker road* on the legal road even if he was prepared to do so at his own expense. Such a road would need to be formed to the appropriate standards, the public would be entitled to use it and the District Council would be responsible for what happened on it. Even if we disagreed with the District Council's views as to formation of the road (which we do not), those views are not subject to review by us.

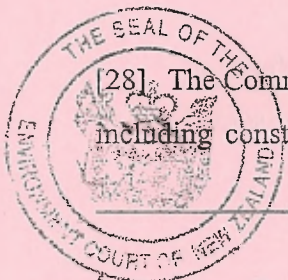
*... Local authorities are in general not subject to the jurisdiction of the Environment Court in relation to their functions as a roading authority. Those functions include determining when they will fund work on designated roads.*⁵

Consents Required

[27] The Commissioner's decision⁶ contains a detailed analysis of the river protection works to be undertaken and which aspects of those works require consent. Mr Barton has not challenged that analysis and rather than repeat it we simply say that we concur with it. The analysis shows that the following aspects of the river control works require resource consent:

- The removal of material that is not *natural* from the section of riverbed in the near vicinity of the concrete retaining wall and the reshaping of the beach there to create the berm profile proposed.
- Disturbance of the riverbed associated with altering the original stopbank and wall to the extent that such works exceed the parameters set out in Rule 22 of the Regional Freshwater Plan.
- Diversion of the river by the replacement stopbank structure.

[28] The Commissioner held that other aspects of the works do not require resource consent including construction of the replacement stopbank and removal of parts of the original



⁵ *Wāitakere City Council v Estate Homes Limited* [2006] NZSC 112. *Coleman v Tasman District Council* NZRMA 39.

⁶ Paras 6 – 9.

stopbank which lie outside the defined riverbed. By and large that analysis is in accordance with the evidence given to us by Mr S M Thawley, the planner who gave evidence on behalf of the Regional Council.

[29] Although the extent of the works requiring consent is limited, those works go to the heart of Mr Barton's appeal in that they have the effect of increasing the degree of encroachment of the river onto the paper road thereby precluding formation of Mr Barton's (theoretical) *tanker road* in that area.

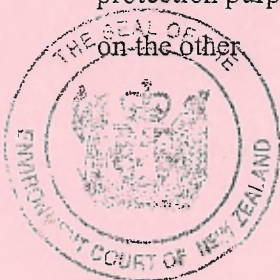
Alternatives

[30] A possible alternative means of carrying out the river protection works in question was to establish a rock groyne on the bend which would have precluded further encroachment of the river onto the paper road. In Mr Barton's view the groyne method should have been used rather than the bench and planting proposed by the Regional Council.

[31] Evidence in support of the Regional Council's proposal was given by Mr J G Williams, an engineer with over thirty years experience in river management. Mr Williams is well acquainted with the Lower Wairarapa Valley Development Scheme having been involved in its design and construction. He was familiar with both the Ruamahanga River and Scaddens Bend.

[32] Mr Williams was cross-examined at some length by Mr Barton. He was also quite extensively questioned by the Court. His evidence highlighted the futility of Mr Barton's position. Mr Williams queried at a practical engineering level the desirability of establishing an access track to carry heavy milk tankers along a narrow strip of stopbank and road subject to ongoing attack from the river. Mr Williams appeared to accept that it would be physically possible to build up the stopbanks to sufficient strength to accommodate a milk tanker and to protect the route by putting groynes in the river. He questioned the wisdom of doing so.

[33] Mr Williams pointed out the very different requirements of undertaking works for river protection purposes on the one hand and those required to establish and maintain a viable road



[34] It was very clear from Mr Williams' evidence that:

- There was a need for river protection works to be done at Scaddens Bend.
- The works proposed by the Regional Council are appropriate works to be undertaken for river protection purposes.
- The groyne system proposed by Mr Barton would be required purely to protect any formed road which might be established along the paper road and is not otherwise required for river protection purposes.

[35] We record that to the extent that Mr Williams' evidence is in conflict with that of Mr Barton we prefer the evidence of Mr Williams. Mr Barton acknowledged Mr Williams' expertise and it is clear that Mr Barton's objectivity in these matters is clouded.

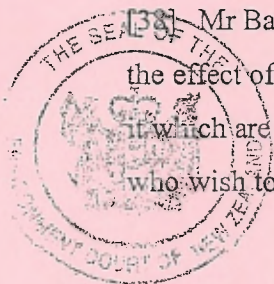
Discussion

[36] It is relevant at this point to come back to the issue to be determined by us on appeal in the light of the various findings set out above:

- d) *Whether the Hearing Commissioner erred in granting the resource consent in that she failed to have regard to the fact that the proposed work to extend the bed of the river will extend the river onto land which is a legal road such as to prevent lawful use of the road in breach of the Local Government Act 2002 and Upper Hutt City Council v Akatarawa Recreational Access Committee Incorporated [2003] NZRMA 405.*

[37] The first point to be made is that the issue on appeal is fundamentally misconceived. The Upper Hutt City Council case referred to is a case which relates to stopping roads under the Tenth Schedule of the Local Government Act 1974. Road stopping is a process whereby the legal road ceases to have the status of road. There is no proposal to change the legal status of road in this case.

[38] Mr Barton contended that the works to be undertaken by the Regional Council will have the effect of *stopping* the road. That is not the case. The paper road (including those parts of it which are already in the river) will continue to have the status of a legal road. Those people who wish to use the paper road for access along the Ruamahanga River will be able to do so.



Vehicle access will not be available however as the District Council has made it abundantly clear that it has no intention of forming the road to accommodate vehicles.

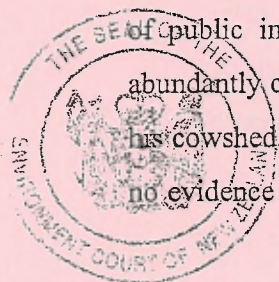
[39] It is accepted that completion of the river protection works will give rise to further encroachment of the river onto the legal road and will physically diminish the width of usable road in what is already a bottleneck on the road. That however is the unfortunate result of the road being surveyed in the position which it is, on a bend which is vulnerable to attack from the river.

[40] In considering this matter, we considered the provisions of s6(d) RMA which provides that the maintenance and enhancement of public access to and along rivers is a matter of national importance. Although Mr Barton did not refer us to this section it is clearly something to which we need to have regard. However, it appeared to us that unless river protection works were undertaken the issue of access along the river would be academic as in this particular area the paper road might ultimately be consumed by the river in any event.

[41] Notwithstanding the way in which the issue was presented by Mr Barton we must remind ourselves that this is a resource management case. The purpose of RMA is to promote sustainable management of natural and physical resources. Section 5(2) RMA defines sustainable management in these terms:

- (2) *In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—*
- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
 - (b) *Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
 - (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

[42] Although Mr Barton (somewhat belatedly) endeavoured to suggest that there was a level of public interest in access along this particular part of the Ruamahanga River, it was abundantly clear to us that his interest was in obtaining vehicular access for dairy tankers to his cowshed. Mr Barton's evidence was directed almost exclusively at that issue. There was no evidence given that any other properties might benefit from the formation of such access.



Foot access will still remain along the riverbank for those who wish to use it although there was no credible evidence given to us about any such usage.

[43] In our view, establishment and maintenance of an effective flood protection system in this area is an integral component of enabling the people of the Wairarapa community to provide for their social and economic wellbeing and for their health and safety. The river protection works at Scaddens Bend directly protect 140ha of land from flooding but more significantly a breach of the system at this point could have severe flow on effects elsewhere. To the extent that establishing such works may interfere with any rights of public access along the paper road, the benefits of the works (in this case) overwhelmingly outweigh any detriment even having regard to s6(d) RMA.

[44] We do not find that there is any merit to this appeal. Although there was some hint of public interest, in ground of appeal (d), the only interest which Mr Barton had in mind was that of obtaining access along the paper road to his milking shed. The appeal must be dismissed.

[45] We invite the respondent to make any costs application within 15 working days of the date of this decision. The appellant will have 15 working days in which to respond to any such costs application with the respondent having a final right of reply to be exercised within 10 working days of receipt of any submissions from Mr Barton.

DATED at WELLINGTON this 12th day of February 2007

For the Court:



B P Dwyer

Environment Judge

