Baxter v Tasman District Council [2011] NZEnvC 4 (19 January 2011)

Last Updated: 31 January 2011

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 4 ENV-2010-WLG-000060

IN THE MATTER of an appeal against an abatement notice

under section 325 of the Resource Management Act 1991

BETWEEN BRIAN ERIC BAXTER AND JILL

DIANNE BAXTER

Appellants

AND TASMAN DISTRICT COUNCIL

Respondent

Court: Environment Judge B P Dwyer sitting alone under s309 of the Act

Heard: In chambers at Wellington

DECISION

Decision Issued: 19 JAN 2011

A: Stay cancelled.
B: Appeal struck out.
C: Costs reserved.

Introduction

[1] On 8 June 2010 Brian Eric Baxter and Jill Dianne Baxter (Mr and Mrs Baxter) filed a notice of appeal against an abatement notice issued by Tasman District Council (the Council) together with an application for stay of the abatement notice. The application for stay was granted by me on 13 July 2010[1], after I had heard from the Council which did not oppose the stay, provided it was granted on a finite basis.
[2] The appeal and application for stay both involve compliance with a condition of a resource consent which the Council had granted to Mr and Mrs Baxter on 15 January 2009. The resource consent (RM 080962) authorised the construction of a second dwelling on the Baxters' property at 217 Redwood Valley Road, Redwood Valley (the site).
Background

[3] In its decision on RM 080962 the Council stated the following background: *The applicants propose to construct a second dwelling on the subject site, and live in the original dwelling while the new one is being built. They have volunteered a covenant that the second dwelling will not be used as a basis for any future subdivision and that the existing dwelling will be removed from the property when the new dwelling is occupied.* In granting consent to the application the Council imposed the following condition:

2 A covenant under Section 108 of the Resource Management Act

1991 shall be entered into and registered against the certificate of title before building consent is issued for the land on which the new dwelling is to be located. The covenant shall state that:

(a) the second dwelling that is the subject of resource consent

RM080962 shall not provide a basis for any future

subdivision of the title; and

(b) the existing dwelling shall be removed from the properly within three months of the occupation of the new dwelling or the property sold, whichever is the sooner.

The covenant shall be entered into pursuant to section 108 of the Act and shall be registered against the title pursuant to section 109 of the Act. All costs incurred in preparing and registering the covenant shall be paid for by the Consent Holder. (Condition 2)

[5] Condition 2 was not complied with. Baxters moved into the second dwelling on the site in January 2010 so the original dwelling ought to have been removed by the end of April 2010 at the latest. When the Council inspected the site on 14 May 2010 and found the original dwelling *in situ* and occupied by tenants it issued an abatement notice requiring compliance with Condition 2.

[6] Mr and Mrs Baxter acknowledged that they had not complied with Condition 2 within the specified time but in their stay application identified two difficulties in relocating the original dwelling:

- A limited number of sections for sale in the district which do not have covenants preventing relocation of existing dwellings;
- Unavailability of the services of a house removal contractor, and practical difficulties in moving the house off the property over the winter. Mr Baxter provided letters from two house removal firms operating in the district, advising that they were unable to relocate the building until November/December at the earliest.

[7] The Council in its response to the stay application accepted that it might not be currently possible to remove the original dwelling due to wet ground conditions and unavailability of removal contractors and agreed to a stay of the abatement notice until October 2010.

[8] In my decision on the stay application I also recognized the practical difficulty, I made the following comments:

[8]It is reasonable for the Court and the Council to recognise the present practical difficulties in relocating the existing house and to allow an appropriate extension of time for that to happen. Mr and Mrs Baxter must accept, however, that having received the benefit of the resource consent, they must be bound by the corresponding obligations which it imposes. Compliance with the condition cannot be left to drag on indefinitely.

[9]Having regard to the above matters, I hereby grant a stay of the abatement notice until 30 October 2010 being the date suggested by the Council. I reserve leave to Mr and Mrs Baxter to seek a further extension of the stay prior to that date, should that be necessary. If such an application was made I would expect it to be accompanied by concrete evidence of definite arrangements being in place for removal of the existing dwelling in the very near future.

[9] The reservation of leave to seek an extension of the stay was implicitly included to recognise the fact that letters provided to the Court from house movers indicated that it might be November/December before the original dwelling could be removed rather than the October deadline imposed by the Court. Paragraph 9 makes it clear that any application for an extension ought be accompanied by *concrete evidence* of definite arrangements being in place for removal of the building in the very near future. This was intended to provide Mr and Mrs Baxter with some leeway.

> [10] On 10 November 2010, the Council's solicitors filed a memorandum updating the situation in relation to the stay of abatement notice. The Council memorandum identified that the original dwelling remained on the site. The memorandum went on to advise that on 8 September 2010 the Council had received an application for resource consent to retain the original dwelling on the site (with cooking facilities removed) and for it to be used in conjunction with a bed and breakfast operation being run from the new dwelling.

[11] The memorandum further advised that as a *pragmatic step* the Council would consent to the stay being extended to 30 November to enable the Court to determine appropriate process and for the Council to consider its position.
[12] A memorandum from Counsel for Mr and Mrs Baxter was received by the Court on 17 November 2010, confirming the situation described in the Council memorandum and requesting that the stay be continued to allow the application for resource consent to be determined by the Council.
[13] On 18 November 2010, I had the Court confirm that an extension of the stay of abatement notice was granted to 30 November 2010 with a further status report to be filed on that date.
[14] The Council filed a further status report on 30 November 2010. The Council's status report advised (in summary):

- The Baxters' resource consent application to enable the original dwelling to stay was being processed by the limited notification path and the closing date for submissions was 12 January 2011.
- The Council's decision on the application was accordingly some timeaway and there was possibility of an appeal of the Council decision.
- The Council had advised the Applicant that it was willing to agree to a further extension until the Council's decision was made on the basis that the second dwelling remained unoccupied.
- The Council had received advice from Baxters' Counsel that the second dwelling was occupied by tenants and notice under the Residential Tenancies Act 1986 had to be given before the dwelling could be vacated.

[15] Upon receipt of the above document I arranged for these proceedings to be set down for a judicial conference in Nelson on Thursday 2 December. Mr and Mrs Baxter and the Council were represented at that conference.

[16] At the conference the relevant issues for consideration by the Court were

canvassed and Mr and Mrs Baxter and the Council were given further time to makewritten submissions with regard to those matters. Those submissions have now been received and considered.

[17] The first issue related to tenancy of the original dwelling. At the time the Council inspected the original dwelling in May 2010 it was occupied. The Council's abatement notice recognised that. The tenants had taken up occupancy on the week commencing 10 April 2010 and were still in occupation as at the date of the pre-hearing conference. One of the tenants swore an affidavit on 7 December 2010 deposing that they were still in occupation as at that date.

[18] Counsel for both Mr and Mrs Baxter and the Council made submissions on the status of the tenancy agreement and the ability to have the tenants vacate the property in light of the provisions of the Illegal Contracts Act 1970. However, that issue has now become academic as Counsel for Mr and Mrs Baxter has subsequently advised that the tenants were to vacate the original dwelling by Monday, 20 December 2010.

[19] The second issue dealt with in Counsels' submissions arose out of propositions which I put to Counsel during the course of the pre-hearing conference as to how the Court might deal with these proceedings. I expressed the view that there were three options. Should the Court:

- Grant the application for an extension of the stay as requested by Mr and Mrs Baxter;
- Refuse the application for an extension of the stay thus requiring immediate removal of the original dwelling from the site (or alternatively leave Mr and Mrs Baxter liable to prosecution for breach of the abatement notice); or
- Strike out the application for stay and the appeal as an abuse of process.

Sections 325(3D) and (3E) RMA

[20] The provisions of RMA relevant to my consideration on the stay application are

ss325(3D) and (3E). These provisions provide as follows:

(3D) Before granting a slay, an Environment Judge must consider —

(a) What the likely effect of granting a stay would be on the environment; and

(b) Whether it is unreasonable for the person to comply with the abatement notice pending the decision on the appeal; and

(c) Whether to hear —

(i) The applicant:
(ii) The local authority or consent authority whose abatement notice is appealed against; and
(d) Such other matters as the Judge thinks fit.

(3E) An Environment Judge may grant or refuse a stay and may impose any terms and conditions the Judge thinks fit.

[21] Insofar as the matters set out in s325(3D) (c)(i) and (ii) are concerned, I note
again that I determined to hear the local authority and I have heard submissions from both Mr and Mrs Baxter and the Council on the issue of grant of the stay. I turn now to consider the remaining considerations pursuant to s325(3D)(a), (b) and (d).
What is the likely effect of granting a stay on the environment?

[22] In my original stay decision I observed as follows:
[7] *It would appear that in the short—term there is likely to be no more than minor adverse effect on the environment (in a purely physical sense) of allowing the existing dwelling to stay on the site until it is practicable to have it removed. That comment overlooks (at this stage) the wider implications of allowing ongoing breach of the resource consent condition and breach of the provisions of the District Plan.*

[23] In terms of the short-term physical effects on the environment of granting a stay, a similar comment can probably be made as was made in the earlier decision. However, as signalled in that earlier decision that is not the end of considerations. In its decision on RM080962 the Council noted:

Principal Issues (Actual and Potential Effects on the Environment) *The principal issue(s) associated with the proposed activity involve the actual and potential effects on the environment. For this application these were:*

(a) second dwellings have been a major cause of subdivision proposals that, if granted, can lead to unsustainable land fragmentation of productive rural land.

[24] Accordingly, although there may not be any immediate physical impact on the environment by allowing the status quo to remain, in the long term there are potential environmental effects which must be taken into account. Arguably, the time to do that is when the Council considers the Baxters' resource consent application.

Is it unreasonable for the Baxters to comply with the abatement notice pending the decision on their appeal?

[25] Firstly, it must be acknowledged that it is unlikely that Mr and Mrs Baxter can comply with the abatement notice pending resolution of their appeal. The ongoing presence of the original dwelling on the site breaches the conditions of RM080962 and that situation cannot be remedied overnight whether by removal of the building or by its demolition. Removal cannot be effected until January or February and even the considerably more drastic remedial action of demolishing the building would presumably take some time to accomplish.

[26] However, the test posed in s352(3D)(b) is not whether the Baxters can comply with the abatement notice pending the decision on their appeal but whether it is unreasonable for them to do so. That raises different questions:

• Condition 2 of RM080962 was a condition proposed by the

Baxters as part of their resource consent application. The requirement that they move the original dwelling was not only known to them, it was one which they tendered as part of their application.

- RM080962 was approved by the Council on the basis that allowing the original dwelling to stay on site, while the new dwelling was being constructed, would enable Mr and Mrs Baxter to live in the original dwelling over the construction period. This enabled the Baxters to avoid the inconvenience and cost of having to find alternative accommodation over that period so was to their considerable advantage. The trade-off for that advantage was the requirement that the original dwelling be removed within three months of the Baxters moving into the new dwelling.
- The Baxters have not given any reason at all why they were unable to comply with Condition 2 within three months of moving into the new dwelling. When the Council visited the site in late April 2010, far from having taken steps to have had the original dwelling removed in accordance with Condition 2, Mr and Mrs Baxter had entered into a tenancy of the original dwelling.
- It would have been feasible for the Baxters to have calculated the likely date of completion of their new dwelling house and to have put arrangements in place for removal of the original dwelling well in advance. As it was they had three months after completion in January 2010 and still failed to do anything. It is significant that the letters from the two removal companies advising that they were unable to remove the house until November/December 2010 are dated 1 June 2010 and 2 June 2010 respectively, after the date of issue of the Council abatement notice.
- Nothing contained in Mr and Mrs Baxter's notice of appeal challenges the validity of the abatement notice or the vires of the condition upon which it is based, in any way. The

appeal simply sought more time to comply, time which the Court granted.

- In summary, the Baxters' current inability to comply with the abatement notice is entirely the result of their own failure to take any steps to comply with the condition as to removal of the original dwelling which they themselves tendered as part of their resource consent application.

[27] Nothing in the information provided to the Court by Mr and Mrs Baxter established that it is unreasonable for them to comply with the condition which they themselves proffered. Any inability to comply on their part is a direct result of their failure to take any steps to do so.

[28] As an aside, I refer only briefly to the suggestion made on behalf of Mr and Mrs Baxter that if the kitchen of the existing dwelling was removed then that building would no longer be a dwelling and condition 2 would not apply. I reject that suggestion. It is clear that condition 2 applies to the building described in application RM080962 as the *original dwelling* or the *existing dwelling* at the time consent was granted. It is that building which must be removed. If the Appellants wished their application to be considered on the basis that they would decommission the kitchen they should have provided so in their application.

Such Other Matters as the Judge Thinks Fit

[29] Under this head, I have considered the wider policy implications of granting a further stay to the Baxters in this case. To a certain extent that requires restatement of some of the issues addressed before.

[30] Allowing ongoing non-compliance with the condition of resource consent, which was clearly a significant factor in the grant of approval, challenges the integrity of the resource consent process. Counsel for the Council referred to the following passage from *Sutton v Moule*[2]

Landowners cannot, having obtained approval to a particular use subject to specified conditions, then seek to erode those conditions by adopting the stratagem of repeating the

substantive application. This must be particularly so when the conditions were an integral part of the original approval. In such cases it is entirely appropriate that the applicant should be required to demonstrate that there has been a change in circumstances which has caused the conditions to become inappropriate or unnecessary before they are varied or cancelled.

[31] In this case, having obtained approval to establish a second dwelling on the site, Mr and Mrs Baxter made no serious endeavours to comply with the condition which was integral to the grant of that approval. Indeed, their entering a tenancy arrangement in respect of the original dwelling suggests that they had no intention of complying with the condition.
[32] It was only after the Council issued its abatement notice that any serious steps were taken to arrange for removal companies to move the original dwelling from the property. As I have noted, the letters from the removal companies are dated 1 June and 2 June 2010 respectively, some months after the original dwelling was due to have been removed.
[33] Similarly, after the grant of stay of abatement notice on 13 July 2010, no apparent steps to arrange removal (of the dwelling or the tenants) were made by Mr and Mrs Baxter until about 15 November 2010, notwithstanding that the original stay of abatement notice was granted only until 30 October 2010. It seems apparent from Mr Baxter's own affidavit that nothing was done to meet the deadline imposed by the Court's stay decision (presumably on the basis that a resource consent had been sought to enable retention of the building) until such time as the Court sought a status report in regard to these proceedings.
[34] The imposition of conditions seeking to avoid, remedy or mitigate adverse effects on the environment is a fundamental part of the resource consent process. Resource consents are granted on an assumption that the conditions which form part of them will be complied with. If resource consents may be complied with at the whim of consent holders or simply ignored, the integrity of the resource consent process is called into

question.

[35] It is sometimes the case that situations occur where conditions imposed on resource consents are no longer appropriate. RMA recognises that and enables applications to be made for changes to conditions or alternatively for new resource fits to replace resource consents which are no longer adequate in some way.

> [36] In this case the Court is dealing with a resource consent where a condition which was integral to the grant of consent was simply ignored from the outset. There is no suggestion of any change of circumstances, only a change of heart on the part of Mr and Mrs Baxter who sought to evade compliance with the condition which they had proposed as part of their application.
>
> [37] The Council had initially indicated that it would agree to a further stay of the abatement notice until resolution of the Baxters' current resource consent application on the basis that the original dwelling remained unoccupied. In light of Mr and Mrs Baxter's failure to make any real attempt to comply with the condition during the period of the original stay the Council has changed its stance in that regard and now considers that no further stay should be granted.
>
> [38] The Council submits that ... *Where a party is seeking a further indulgence from the Court, that party can expect its actions to be the subject of particular scrutiny. The Court is entitled to expect full disclosure of all relevant circumstances. The Appellants sought a stay on the basis that further time was required to comply with condition 2. They have instead used the time to explore options for undoing the condition that is to be complied with. The Appellants can expect no further indulgence from the Court*. I concur with that statement.

Outcome of application for further stay

[39] When all of the above factors are taken into account, I believe that it is inevitable that no further stay be granted. The

application for a further stay is hereby declined accordingly.
The Appeal

[40] That then brings me to consider the status of the appeal against the abatement notice. As I have noted previously (para [26] supra) the appeal against the abatement notice does not challenge the validity of the abatement notice nor the vires of the condition upon which it is based.
[41] Although the notice of appeal sought cancellation of the abatement notice, it is apparent that when the appeal document is read in its entirety together with Mr Baxter's affidavit in support, that what the Appellants sought pursuant to the appeal was more time to comply with Condition 2. They were granted that time and I have declined to grant them any further extension of time.

[42] Section 279(4) RMA provides that:

(4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks lit, order that the whole or any part of that person's case be struck out if the Judge considers —

(a) Mat it is frivolous or vexatious; or
(b) That it discloses no reasonable or relevant case in respect of the proceedings; or
(c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.
I consider that the matters raised in s279(4)(b) and (c) are both relevant in this case.

[43] Firstly, I consider that the notice of appeal discloses no relevant or reasonable

case. The appeal essentially sought more time for the Baxters to comply with the abatement notice and more time was granted. In the absence of any challenge as to the validity of the abatement notice Of the vires of the condition upon which it is

founded, I consider that the notice of appeal discloses no reasonable or relevant case.

[44] Abatement notice appeals are not infrequently lodged in situations where appellants have sought resource consent to legitimise activities which are the subject of the abatement notices. In that situation, it is not uncommon for stays to be granted and appeals to remain extant until resolution of any relevant resource consent application. That, however, was not the basis on which this particular abatement notice was appealed and it is only since the grant of the Court's initial stay that the Baxters have sought resource consent to negate Condition 2.

[45] Secondly, there is the matter of abuse of process. The term *abuse of process* is not defined in RMA. It is an expression identifying circumstances in which the Court's process is misused in some way. I consider that the situation where:

- The appeal against abatement notice is being used by Mr and Mrs Baxter as part of a process to undo the condition volunteered by them;
- The condition was integral to the grant of consent;
- The Baxters have taken no reasonable steps to comply with the condition; and
- There has been no change of circumstances which makes the condition inappropriate or otiose;

constitutes an abuse of process.

[46] Having regard to the above matters, I determine that the Baxters' appeal discloses no reasonable or relevant case in respect on the proceedings and that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further. Accordingly I strike out the appeal.

Costs

[47] Costs are reserved. If the Council wishes to pursue costs it should do so, Mr and Mrs Baxter respond and the Council reply in accordance with para 4.5.6 of the Court's Consolidated

Practice Note 2006.
DATED at Wellington this 19th day of January 2011

[1] Decision [2010] NZEnvC 238[2] (1992) 2 NZRMA 41