Decision No. A147/2004

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **EYRES ECO-PARK LIMITED**

(RMA 0552/03)

Appellant

AND **RODNEY DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)
Environment Commissioner A H Hackett
Environment Commissioner R M Dunlop

HEARING at Auckland on 8 - 11 June 2004 and 22 June 2004

APPEARANCES

K M Littlejohn for the Appellant
R B Enright and A W Braggins for the Respondent
J A Burns and L S Fraser for the Auckland Regional Council [ss.271A and 274]
G M Houghton for Director-General of Conservation [s274]
A Clark for herself and D Clark [s274]
B Lupton for Carter Holt Harvey Limited [s274] (given leave to withdraw)
G McDonald for a claimed tangata whenua interest [s274]
T Walker for himself [s274]

INTERIM DECISION

Introduction

[1] This is an appeal by the applicant against the respondent's decision declining consent to the subdivision and use of land for an "eco-tourist lodge" venture, adjacent to a prominent headland on the north east Rodney coastline. Approval of the application in the form placed before us would introduce development to a

coastal environment but at the same time enable protection and enhancement of some quite extensive bush and freshwater areas on the land and enhance public access to, and expand, a public reserve.

[2] The case may then be seen as one in which two strongly competing matters of high interest (in terms of Part II of the Act) must be weighed and balanced. While the respondent brought a complex and voluminous case in opposition (especially in its legal submissions and planning evidence), key aspects of its case (landscape and ecological) were less absolute.

[3] We very much regret the time that it has taken us to release this decision. The delay has been occasioned by (amongst other things), pressure of Court business and the huge volume of materials placed before us (particularly by the respondent) – on which we will comment further in this decision). The last factor also bears upon the length of this decision, which is also something we regret having regard to the length of the hearing.

[4] The following preliminary matters arose at the commencement of the hearing:

- Mr and Mrs D and A Clark, who own the subject site, withdrew their own appeal and remained as a party in support of the applicant (the present appellant);

- Carter Holt Harvey Limited was granted leave to withdraw;

- Whether the appeal should be determined in accordance with the law prior to the RMAA 2003 as contended by counsel;

- Application of s.112 RMAA to the Auckland Regional Council's notice that it wished to join the appeal. More particularly, the ARC requested that the Court either confirm that it was entitled to appear and be heard under s. 274 in its form prior to the RMAA 2003, or grant a waiver pursuant to s. 281(1)(a)(iia) as to the time within which it must give notice under s. 274 post-amendment;

- Mr McDonald's status in the same terms, and as to whether he represents an aspect of the public interest under s.274.

[5] Rather than delay the hearing unduly the Court proceeded to hear the substantive matter, and our decision on all aspects follows.

<u>Issues in the Appeal</u>

[6] For ease of understanding we set out the issues in the case in summary form. The list is not intended to be exhaustive, or in any order of priority or importance. They are:

- Application of s.112 RMAA 2003 to the appeal and the status of the ARC and Mr McDonald as s.274 parties.

- Weight to be afforded the three applicable district planning instruments.

- Allotment entitlement under the plans (based on protection of natural features).

- Existing use rights

- Permitted baseline

- Effects on the environment:
  - ecology
  - visual and landscape
  - natural character of the coastal environment, wetlands and margins
  - Maori cultural issues
  - cumulative effects
  - precedent/integrity of plan

- Objectives, policies, rules and other provisions of the 3 district planing instruments.

- Other statutes and statutory instruments:
  - Hauraki Gulf Marine Park Act 2000

- New Zealand Coastal Policy Statement

- Auckland Regional Policy Statement

- Auckland Regional Plan: Coastal

- Jurisdictional gateways – s.105(2A) (pre RMAA 2003) and s.104D (post Amendment)

- Part II RMA

- Exercise of s.105(1)(c) discretion

Application of s.112 RMAA 2003

[7] There have been 3 decisions of the Environment Court in recent times concerning this difficult transitional provision. They are ***Omokoroa Ratepayers Association v The Western Bay of Plenty District Council & Anor***[1], ***NZ Nut Producers Ltd v Otago Regional Council***[2], and ***Environmental Defence Society Inc v Far North District Council***[3].

[8] The difficulties of interpretation of s.112 are underlined by the fact that two of those decisions reach one conclusion, and the third a different one, concerning the applicable law (RMA pre-or post-2003 Amendment Act) for appeals lodged after 1 August 2003.

[9] All counsel in this case tended to favour the approach that subsequent to our hearing was followed in ***NZ Nut Producers*** (not cited as it had not been decided at the time of our hearing). Judge Newhook (sitting alone) has also subsequently issued the ***Environmental Defence Society*** decision (which takes a similar path to that in ***Omokoroa***).

[10] We intend to follow ***Environmental Defence Society and Omokoroa*** without here setting out the reasoning again. The reader is referred to those decisions to see the reasoning (and for that matter, ***NZ Nut Producers*** as well).

1 Decision A17/2004 (Judge Sheppard).
2 Decision C99/2004 (Judge Jackson).
3 Decision A112/2004 (Judge Newhook).

[11] Our finding is therefore that the subdivision application must be considered under the RMA pre-2003 Amendment (s.112(3)), and the land use aspects post-2003 Amendment. There are consequences for the waiver applications and substantive consideration of the permitted baseline which are less than easy to resolve, but with which we must grapple. Judge Newhook was not unmindful of those consequences when issuing the ***Environmental Defence Society*** decision[4], and was not persuaded to a different outcome on account of them.

[12] The consequence for the waiver applications will be considered in the next section of this decision. So far as the permitted baseline comparison is concerned, the law prior to the 2003 Amendment Act is as stated in ***Smith Chilcott Ltd v Auckland City Council***[5], and has a mandatory quality about it, while s.104(2) of the Act as amended from 1 August 2003 establishes a discretion to *"disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect"*. One relevant facet of exercising that discretion, we consider, is that because a major part of the proposal overall is the subdivision, and given that the baseline <u>must</u> be considered for that, it seems logical and appropriate to consider baseline for the other somewhat interrelated parts.

[13] An interesting question is posed by s.104(2) (post 2003) referring to what the <u>plan</u> might permit as opposed to what the <u>law</u> might permit.

<u>Status of Auckland Regional Council and Mr. McDonald (s.274)</u>

[14] The ARC gave notice of its wish to be involved in the proceedings under s.271A and/or s.274 on 10 May 04, which was more than the 10 working days before the hearing. There can be no question that it represents a legitimate aspect of the public interest.

[15] Through counsel the applicant agreed to "abide any decision the Court might make on the validity of the ARC's notice". We hold that the ARC validly entered the proceedings so far as the subdivision application is concerned. It is logical that we should grant it a waiver in relation to the requirements of the new s.274 in relation to the land use matters as much on account of the confusion reigning over the interpretation of s.112 of the Amendment Act as anything, in the same manner as Judge Newhook did in the ***Environmental Defence Society*** decision.

[4] See para [25] of that decision.
[5] [2001] NZRMA 503 (CA).

[16] As to the timing of any waiver that might be necessary concerning Mr McDonald's notice, Mr Littlejohn offered a (slightly grudging) oral concession *"I can't let one in [the ARC] and not let both in"*. To the extent that Mr McDonald's notice was late at law, we would therefore waive that lateness.

[17] However Mr McDonald's status also rests on whether he is "a person having any interest in the proceedings greater than the public generally" or "a person representing some relevant aspect of the public interest". He suggested the following qualifying factors:

- "a wider audience of the tangata whenua" (whatever that means)
- "shareholder/landowner of beach frontage on Pakiri Beach"
- "not to [sic] the Ngatiwai Trust Board which is the iwi general trust"
- recognition of him by the Environment Court in ***Arrigato*** as tangata whenua
- "Chairman of all the Waitangi claims within that area. Mahurangi district and Gulf Islands Collective, and that is why I have got another standing under s.274 status because the Mangawhai State Forest is all a part of it as well".

[18] It was Mr. McDonald's expressed intention not to offer any sworn evidence. We therefore received no evidence as to the matters he orally asserted above, and indeed Mr McDonald then departed from the hearing and did not return.

[19] In view of the absence of sworn evidence from Mr McDonald that could be tested in cross-examination, and in view of the conflict of view as to his hapu status on the part of 2 Maori witnesses who did appear (Mr L Haddon and Mr M Wilson), we cannot decide that Mr McDonald was qualified to participate in these proceedings. Therefore, although we would have waived his lateness of notice, we decline to hold that Mr McDonald is qualified to participate. It should be noted that this ruling presents no bar to him asserting status in other proceedings and obtaining rulings as necessary.

<u>Subject Site and Locality</u>

[20] The 52.8 hectare subject site comprises an elevated piece of land on the north east Rodney coast approximately half an hour's drive from Wellsford. Pakiri Beach extends some 5 kilometres to the south and Ocean Beach a similar distance to the

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north. Both are surf beaches with little adjacent development (with occasional exceptions); an unusual characteristic on Auckland's north-east coast.

[21] The site comprises a principal ridge on an east – west axis terminating in two headlands that extend seawards beyond the site. The northern of these is Eyres Point and the southern Te Arai Point. The latter is occupied by a council reserve that extends some 200m inland and incorporates the Te Arai Point Swamp. Parts of the reserve were quarried in the past and the council is now implementing a re-vegetation programme. Two relatively small dune lakes are located on the site's lower southern bush-covered slopes. On its northern side the site adjoins Te Arai Road which provides access to a public car park, beachside toilet facilities, and Ocean Beach. On its southern side the site shares a boundary with a pine plantation through which the public gain access to the southern side of Te Arai Point and Pakiri Beach. The beaches and reserve are popular for a range of recreational activities (surfing, swimming, fishing, and walking) year round.

[22] Approximately 46.2 hectares of the site has been classified as Significant Natural Area (SNA) in the Proposed Rodney District Plan 2000 (PDP). This comprises regenerating native bush of various qualities inter-mixed with areas of gorse and rough pasture. The best of the bush is in north facing gullies on western and central portions of the site and on the south facing slopes where there is puriri and kanuka forest/scrub. The lakes are fringed by puriri-kahikatea forest, kahikatea swamp forest and manuka swamp forest. Vegetation on the north eastern slopes above Eyres Point is largely rank grassland and low gorse scrub. The site's southern boundary adjacent to the pine plantation is predominantly a mix of wilding pines, kanuka forest, and marram grassland with gorse and pohuehue.

[23] The property continues to be farmed, albeit on a modest scale, primarily with goats and cattle. Farm improvements include the Clark's dwelling, a minor household unit and farm shed accessed from Te Arai Road. An internal vehicle access track commencing at the latter road runs south and then east along the central ridge. An unformed legal road bisects the site on a north – south alignment.

[24] Views from the highest point (85m) on the site are notable in most directions with few built elements visible. They include vistas to the north and east over the outer Hauraki Gulf (Bream Tail, Hen and Chickens Islands, Little and Great Barrier Islands); north and south over the previously named ocean beaches; and inland across dune pine plantations and farmland. The headlands together form a

distinctive feature in its own right, framing views to the north and south from the two ocean beaches, and over-looked from the reserve.

The Proposal

Application Strategy

[25] The applicant has taken a particular approach to seeking consents to the proposal, of which there are three principal components: the subdivision, use of the new lots for tourist accommodation, and development of individual buildings. Mr Littlejohn sought to explain the approach in the following terms.

> Future buildings on the lots will require separate resource consent by virtue of the zoning applying to the site. Rather than seek resource consent for each building now, the Applicant has chosen to focus on the subdivision proposal and its primary goal of identifying suitable building sites on the additional titles sought. However, it proposes to constrain and control the *future building development plans to be completed in accordance with the* subdivision consent conditions (secured by consent notice).

Whether the adopted approach satisfies what have become known as ***the AFFCO No. 2*** principles[6], or not, is a matter to which we return. Suffice it to note now that this is a consideration which is part of the reason that this is an interim decision, which prospect Mr Littlejohn raised in his Reply albeit for other reasons. The resource consents presently applied for are:

- to subdivide 9 lots through the protection of SNA, a wetland and vesting of land as reserve.
- for earthworks exceeding $50m^3$ within an SNA to create vehicle access to the lots.
- to use the dwellings established on each of the lots for tourist accommodation.
- for Lot 7 to be 3.2 ha (exceeding the 2 ha maximum).
- to provide access to 7 lots over one right of way.

6 *AFFCO NZ Ltd v Far North District Council* (No. 2) [1994] NZRMA 224.

The Subdivision

[26] The subdivision (plan attached as **Appendix 1**) comprises 9 lots to be developed in accordance with a set of conditions submitted by the applicant early in the hearing and updated at the conclusion of it. It is proposed that Lots 1 to 6 (1.5 ha – 1.9 ha) and one corner of the large Lot 9 (26.5 ha) be developed with eco-tourism lodges accommodating up to 6 persons each. A 2,000m^2 Development Area incorporating a building platform, outdoor living area and ancillary building area is delineated on each of these 7 lots. Lot 7 would be a 3.2 ha rural residential site for the present owners (the Clarks) and contains their existing dwelling and a minor household unit. Lot 8 (12.0 ha) would vest as reserve.

[27] Other salient features advanced include:

- Lot 8 (the proposed reserve) contains significant native bush, connects with the existing headland reserve and incorporates Little Shag Lake (0.4ha) and wetland areas;

- Access to the 7 *development* lots would be over an existing farm track secured by easements (6m legal width, formed to 3m over most of its length with passing bays and approximately 5,000m^3 of earthworks);

- Each lot would be self-sufficient in terms of stormwater and wastewater treatment/disposal. A detailed report would be required to be submitted with engineering plans showing how increased stormwater runoff can be mitigated. A wastewater report would be provided with an indicative design for on-site disposal to ensure no adverse effects on health, groundwater or the Te Arai (headland) reserve;

- Over 29 ha of bush and other ecologically significant vegetation on Lots 3 to 6 and Lot 9 plus Te Arai Point Little Lake and its associated wetland would be protected by covenant;

- Additional areas of re-generating vegetation would be retired permanently from farming on Lot 3, Lots 5 to 6 and Lot 9 to enable their reversion to native bush;

- Grassed areas on Lots 1 and 2 and part of Lot 4 would be re-planted with indigenous vegetation. Before titles issue for Lots 1 and 2 re-vegetation would be required to achieve specified performance measures for canopy height and coverage.

- Weed and pest management plans would be implemented for the covenanted areas with the consent holder providing details of a management structure for on-going integrated management of related programmes, including re-vegetation.

- Areas to be protected and/or retired would be perimeter fenced with no stock kept on Lots 1 to 6 and Lot 9;

- Keeping of domestic animals to be prohibited on Lots 1 to 6 and 9;

- Five areas in Lot 9 totalling 1,220m^2 would be excluded from covenanting. They would be developed for passive recreation purposes with an environmental or educational theme; they have been called "meditation areas";

- Future buildings on the new lots would require separate consent. For Lots 1 to 6 and 9 the applications would be accompanied by a development plan for each lot (Site Development Plan), this plan to identify:

    - Areas of naturally regenerating gorse and plants to be retained as nursery material for regenerating native bush or in the case of Lots 1 and 2 areas already subject to re-vegetation;

    - An area not greater than 2,000m^2 on each lot in which proposed building work, accessory activities and specific landscape mitigation planting to be undertaken ("Development Area");

    - The balance area for re-vegetation (except Lots 1 and 2).

- With respect to the Development Areas, a Site Development Plan is proposed to:

    - Identify the proposed building, accessory buildings, domestic areas and infrastructure, building access, and parking and manoeuvring areas.

- Identify the location and areas of mitigation planting to be done in the Development Area so that when implemented in conjunction with building design and location, the visual effects of the building and services are mitigated

- Specify planting and maintenance programmes; (planting to be completed prior to buildings being occupied).

- Buildings to comply with specified design and location criteria, including requirements that structures be sunk into the land and not obtrude above the skyline ridge when viewed from either of the beaches.

- All new network utility services to be placed underground.

The Eco-lodge Concept

[28] The proprietor of the applicant company, Mr Wadman, holds qualifications in accounting, management and marketing, and in recent years has been involved in the hospitality and tourism sectors. He explained how he became aware of a move amongst international travellers towards eco-tourism, and the increasing demand for top quality tourism and travel experiences. He considered that common features included:

- Beautiful natural surroundings

- Highly contemporary design sensitive to the environment

- Appeal to guests for whom price is not the basis for decision-making

- Imparting an understanding of natural surroundings through subtle education.

[29] The site is considered by Mr Wadman to have the requisite natural qualities for, and to be capable of, development as an eco-lodge complex.

[30] Mr Wadman explained how financial institutions in New Zealand would generally only lend against tangible assets (preferably land), and it was for this reason that an essential aspect of the proposal was the creation of separate titles

capable of being used as security. There is presently no guarantee, however, that once created, the titles would be developed for the purpose described.

[31] Mr G F North, an architect, has assisted with the preparation of "guiding principles" and illustrative concept plans for the eco-lodges. Mr. North's professional practice emphasises "environmentally responsible and responsive architecture and healthy houses, with particular emphasis on earth and strawbale building, and the integration of buildings and productive *livingscapes"*. Mr North described his architectural response to the overall eco-park proposal (summarised) as involving soft outlines, sinking the buildings into the ground, and use of vegetation (including on roofs).

[32] Mr North's evidence included "two sample preliminary conceptual plans" for the purpose of illustrating his envisaged design approach; one for a well appointed *"hide-away"* for a couple and one for either a family with children or a group. He also provided sketch elevations.

[33] Mr North opined that through measures of this type it would be possible to enable the proposed sites "to be built on in a way that will complement rather than detract from the high visual sensitivity of this overall site".

Weight to be accorded the plans

[34] Three district plans apply to the site, namely:

- The Operative Rodney District Plan 1993 (operative plan) (originally promulgated in 1988 under the Town and Country Planning Act 1977) which applies two zonings to the site. The land areas are zoned Rural Conservation 3 (Coastal Landscape Protection), and the Lakes Rural Conservation 1 (Nature Conservation). The former zone extends a considerable distance north and south of the site, and inland.

- Proposed Plan Change 55 (PC 55) which was prepared under the RMA and publicly notified in 1995. PC 55 places the site in a Mangawhai – Pakiri Special Character Activity Area that extends in a broad band southwards from Mangawhai to Pakiri and up to 2 kilometres inland. The lakes are within an Inland Waterway Activity Area. Only a few references on the Change remain to be heard by the Environment Court.

- The Proposed Rodney District Plan (proposed plan), which was notified in November 2000 has a similar pattern of zoning to PC55 but employs different names. The land areas are zoned Landscape Protection Rural and Inland Waters (Protection). Relevantly the proposed plan has not progressed beyond the council's hearing of some submissions.

[35] We accept the parties' agreed position that PC55 is the dominant document, given that it was the first for rural parts of the district prepared under the RMA, most of its relevant provisions are beyond challenge and the proposed plan has travelled only a modest distance towards becoming operative (in nearly 5 years). In coming to this position, we note that the respondent's planning witness, Mr R B Scott asserted that there is an undetermined appeal by Manaia Properties Limited concerning the subdivision rule in PC55 for lots associated with native bush or natural feature protection. Mr Scott considered that *"this renders greater status to the Operative Plan than would normally be the case although in my view Plan Change 55 should still be considered the dominant planning instrument"*. (We have checked the Manaia Properties appeal in the Court's records. It was in fact fully resolved in October 2001, with the bush lot subdivision aspects actually being withdrawn in favour of having them revisited in the context of the PDP. PC55 must obviously therefore prevail).

Activity Status of Proposal

[36] There was ultimately a consensus that overall the applications fall to be assessed as non-complying. This was a view put to us in the opening submissions of Mr Enright and one which Mr Littlejohn belatedly appeared to accept in respect of the proposed subdivision. This was also the view of the two planning witnesses, namely Mr Scott for the respondent and Ms Sedgley for the applicant. Within this overall position, we note that individual elements of the applications range between restricted discretionary and non-complying (and have varying status as among the 3 planning instruments), for instance:

(i) Visitor accommodation whilst non-complying under PC55 is a discretionary activity under the PDP;

(ii) Ms Sedgley opined contrary to Mr Scott that subdivision of the new sites would be a limited discretionary activity (RDA) under both PC55 and the PDP but only becoming non-complying because:

- Lot 7 (3.2ha) exceeds the 2.0 hectares maximum permitted, and

- Building platforms on Lots 4 – 6 are located within SNA (PDP only).

(The activity status of the subdivision turns on the complex allotment entitlement provisions of the different plans, which we address subsequently).

(iii) It was Ms Sedgley's evidence that discretionary activity consent is also required:

- To exceed the permitted number of lots (5) having frontage to a road over a private ROW (applied for);

- For earthworks exceeding 50m^3 within the PDP SNA and Special Character Area (applied for).

(iv) It was Mr. Scott's uncontroverted evidence that the following additional activities would also require council land use consent (not yet applied for), namely:

- Discretionary activity for earthworks in excess of 200m^3 to create road access and building platforms (operative plan, PC55);

- Discretionary activity for clearance of native bush over 500m^2 for building platforms, infrastructure or driveways (operative plan, PC55, PDP);

- Restricted discretionary activity for earthworks for the vehicle ROW in excess of the permitted threshold under Rule 7.9.4.2.2 (PDP).

(v) It was Mr Scott's further evidence that consents would need to be sought from the ARC for stormwater discharges and for sediment and erosion control associated with land disturbance.

[37] The parties were ultimately agreed it must be assessed overall as non-complying. Guided by the decision in ***Body Corporate v Auckland City Council***[7] we find there is a significant overlap between the matters that require to be taken into

[7] CA 64/2000.

account when assessing the effects of different components of the application and it would be inappropriate to approach these in anything other than an holistic manner, on a non-complying activity basis.

<u>Allotment Entitlement (Protection of Natural Features)</u>

[38] There was considerable evidence and submissions on the number of rural residential ("R/R") lots the applicant might be entitled to create under the different plan provisions in return for permanently protecting valued natural features (reserve, bush, wetland). Unsurprisingly, the applicant contended for more and the council for fewer. We remind ourselves that the outcome does not affect the application's activity status.

[39] Ms Sedgley contended for 7 R/R lots under both PC55 and the PDP. Mr Scott contended for 5 under both plans. For reasons of weight we are little concerned with the provisions of the transitional plan on this matter.

[40] The witnesses were agreed on a number of matters that can be summarised in this manner:

- There exists approximately 46 ha of vegetation on the site, plus lakes and wetlands that qualify for protection under both plans.

- A feature, for example a qualifying wetland, should not be counted within the area of surrounding bush being protected. Put colloquially, there should be no "double dipping".

- Application of the rules to the vesting of reserves (PC 55 Rule 11.2.6, PDP Rule 7.14.8.6) provides that for every 4 hectares of reserve vested an applicant may create one further R/R lot. Various areas were given for Lot 8 (the new proposed reserve), all in excess of 12 ha; hence the agreed 3 lot entitlement.

[41] The precise areas of bush and other features proposed for protection have not been subject to legal survey. The areas given varied during the course of the hearing through clarification of the proposal and evidence in reply. The differences were not major in the overall context of the proposal.

[42] The difference between the parties resulted from their interpretation of the respective PC55 and PDP rules that apply to protection of native bush and significant natural features, particularly under PC55 (the dominant document). The provisions are quite similar but relevantly three differences are that:

- The PC55 provisions for larger areas of bush and other significant natural features, exist in a single rule (Rule 11.1);
- The corresponding PDP provisions apply separately to bush (Rule 7.14.3.2.1) and wetlands (Rule 7.14.3.3.2);
- There is a paucity of support for the PDP rules, from objectives and policies in that document.

[43] PC55 Rule 11.1.2 provides:

> 11.1.2 <u>Number of sites allowed</u>
>
> (a) One rural residential site shall be allowed on any site with at least 2 ha and up to 11.9999 ha of significant native bush or other natural features which is not already legally protected.
>
> (b) Where any site contains over 11.9999 ha of significant native bush or other natural features which is not already legally protected in perpetuity an additional rural residential site shall be permitted for every additional 10 ha (above the first 11.9999 ha) of significant native bush, or other natural feature existing.

The issue in dispute was whether limb (b) authorises separate additional lots for areas of native bush and for *"other natural features existing"* located in the bush. Ms Sedgley said "yes" relying largely on past experience with administering the provision. Mr Scott said "no" on the basis that if the natural feature was in an area of bush to be protected this amounted to double counting.

[44] We are satisfied the applicant could claim 6 lots as a restricted discretionary activity under both plans on the basis that 3 lots (12 ha of reserve) + 3 lots (30.6 ha SSNB/SNA protected) = 6 lots.

[45] We turn now to the claimed 7th lot under PC55. Ms Sedgley contended that either of the dune lakes would trigger Rule 11.1.3(a) supported by Issue 4.5, and its Policy 1. Given that Little Shag Lake is within Lot 8 (reserve) it is presumably Te Arai Point Little Lake (3,407m^2) that is to be protected and claimed. Mr Scott did not contest that the latter satisfies the qualifying criteria referenced in Rule 11.1.3(a). In fact he appeared to accept Mr Littlejohn's proposition that it is scheduled for protection in PC55, although no such schedule was pointed to in evidence. Rather

Mr Scott's challenge was based on Te Arai Point Little Lake not meeting the requisite size threshold in Rule 11.1.6.

> 11.1.6 Number of sites
>
> (a) The minimum area of native bush or other feature to be protected shall be 2 ha...

The applicant has an apparent difficulty on that score, and we had no evidence on whether the protected area might be legitimately increased from 3,407m^2 to 2 ha by incorporating adjacent wetland ecotones without upsetting other aspects of the application.

[46] Mr Littlejohn made extensive submissions on the correct legal interpretation of Rule 11.1.2(b) with the objective of persuading us it can properly be applied disjunctively. One of his arguments warrants particular mention, namely the rule should not be interpreted to preclude what an applicant could achieve if they were to proceed sequentially by first protecting one feature and then another that adjoins it or surrounds it. We find this compelling.

[47] Is there an unequivocal answer? Probably not that is required on these proceedings. We find Mr Littlejohn's cited submission persuasive but are mindful that Te Arai Point Little Lake fails to meet the minimum size. Countering that is the alleged scheduling of the lake as a qualifying feature and the broad thrust of the PC55 provisions concerned with permanently protecting valued natural features of the type in question. We will place the issue "in the mix" when considering the application on a non-complying basis. We turn now to the PDP.

[48] We find that there is sufficient SNA to justify 3 R/R lots but not 4 under the PDP. The plan requires over 32 ha to produce 4 lots and we are not confident on the evidence that this area is available [Rule 7.14.3.2.1 (b)]. We note Mr Littlejohn's concession in submissions in opening and again in reply that there exists approximately 30.6ha. The principal point of difference between the parties was again the correct interpretation of the wetland protection provisions:

> Rule 7.14.3.2.8: Subdivision of Sites for the Protection of Significant Wetlands
>
> One rural residential site shall be allowed on any site with at least 500m^2 of significant wetland which is not already legally protected, meeting the criteria set out in Appendix 7C.

It was Ms Sedgley's evidence that the site contains 4 wetlands that satisfy the rule but she did not indicate their location or size. Instead she relied on the broad assertion that Te Arai Point Little Lake qualifies, which we accept on the basis that the area to be covenanted is based on the lake (3,407m^2), adjoining 400m^2 wetland shown on the scheme plan, and possibly other neighbouring ecotones mapped by Ms Flynn. We accept that the rule's "500m^2 to 1.9999 ha" area requirements can be met.

[49] Separation of the SNA and wetland protection measures in Rule 7.14.3 largely avoids the interpretation difficulties presented by the corresponding provisions in PC55. The council in submissions and evidence maintained the position that qualifying features could not reside in the same area to be protected.

However, we find Mr Littlejohn's submissions more logical, namely:

- The provisions are clearly expressed disjunctively;
- There is no advice in the relevant rules that application for one (SNA) precludes reliance on the other (wetland), which would have been a relatively simple provision to include if it were intended;
- An applicant should not be denied the opportunity to achieve simultaneously what they could properly achieve sequentially.

We accordingly find there is support in the PDP for 7 R/R sites.

Existing use Rights

[50] Mr Enright conceded that the Clark's existing use rights may form part of the "existing environment" and thereby part of the permitted baseline[8]. He did this somewhat hesitantly, noting that he was unaware of any Court decision holding that. For our part we see no difficulty with finding that the "existing environment" element of the permitted baseline as explained in that case by the Court of Appeal, would embrace existing use rights:

> [29] Thus the permitted baseline in terms of Bayley, as supplemented by Smith Chilcott Limited, is the **existing environment** overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The

[8] *Arrigato Investments Ltd v Auckland Regional Council* [2001] NZRMA 481 at para [29].

> consequence is that only other or further adverse effects emanating *from the proposal under consideration are brought into account.* (Emphasis added)

[51] Mrs Clark described historical farming practices and some moderately high stocking rates although these have dropped somewhat in the last 18 months, and work to keep paddocks and tracks clear for farming is now occurring less frequently than in the past. The current lower levels of grazing are having an effect on regeneration of native flora which the ecologist witnesses (Dr A Julian for the Council and Ms S M Flynn for the appellant) recognised as noticeable but which Dr Julian considered not unduly serious.

[52] If consent were not granted, it was Mrs Clark's evidence that they would have to continue to farm the property...

> ...as we have in the past. Ultimately it will become necessary to increase the intensity of farming so as to ensure that the property remains financially viable, which will involve clawing back much of the regenerating scrub and gorse. As the property is zoned for rural activities we would continue to stock the property with cattle, goats and sheep and maintain existing pasture and track areas on the property to facilitate that farming use.
>
> Given the cost of doing so and the work involved, it is unlikely that we would construct additional fences around the bush areas to ensure that they are protected for revegetation."

[53] Mr Scott offered a different view about the lawful use of the site for future farming activities, especially practices involving vegetation clearance. He reviewed the three relevant plans and told us that:

- The operative plan provides for farming as a permitted activity but it is subject to a control that limits the removal of individual native trees up to 3 metres in height up to a maximum of $500m^2$. These rules effectively prevent intensive grazing on most of the subject site where significant native vegetation is present, unless a prior resource consent is obtained ...

- PC55 also provides for farming as a permitted activity but subject to a control that limits the removal of individual native trees up to 3 metres in height up to a maximum of $500m^2$". Again, intensive grazing...would not be permitted as of right on most of the subject site which is covered in significant native bush.

- Under the PDP, farming remains a permitted activity but a number of development controls apply. Specifically as a permitted activity within a Significant Natural Area it is only permitted to cut, damage and destroy any individual native tree or number of trees constituting native bush, which is less than or equal to 3 metres in height; and less than or equal to $100m^2$ in area. ... Again, intensive grazing...would not be permitted as of right on most of the subject site which is covered in native vegetation.

[54] Clearly there are controls in the proposed plans that effectively limit the clearance of vegetation for farming and other activities without resource consent. Mr Littlejohn submitted that the controls regulate vegetation removal by mechanical or deliberate human act, the inference being that grazing by animals is not caught. The actual words in PC55 Section 3.3(i)(5) specify the maximum area that *"can be cut, damaged, injured or destroyed."* The corresponding PDP Rule 7.9.4.1 reads similarly but omits reference to *"injured"*. To graze stock in the subject areas would undoubtedly damage injure or destroy just as surely as embarking on that course by mechanical means. We also note that the definition of *"vegetation removal"* in PDP is not exclusive and refers to "mechanisms" not mechanical means, although the examples given have the latter characteristic. Whilst the Clarks have lodged a submission against the PDP SNA provisions, the outcome of that process cannot be foreseen and in any event the parallel PC55 provisions apply. It is not necessary finally to decide the point because of the existing use right situation, but if the latter were not present it is conceivable that the permitted activity of farming might be subject to the significant limitations imposed by the SNA controls.

[55] Section 10 RMA relevantly provides that land can be used in contravention of a rule in a district plan or a proposed district plan if:

> (a) Either
>
> > (i) The use was lawfully established before the rule became operative or the proposed plan was notified; and
> >
> > (ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified;
>
> (2) Subject to sections 357 and 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless:

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(a) An application has been made to the territorial authority within 2 years of the activity first being discontinued; and

(b) The territorial authority has granted an extension upon being satisfied that ...

[56] The respondent appeared to contend that the Clark's existing use rights are limited to the current low levels of grazing. However, the comparison that is called for under s.10 is with the character, intensity, and scale of activities prior to notification of the proposed rule which would be contravened were it not for the existing use rights[9]. The vegetation clearance controls had their genesis in the Transitional Plan which started life as a proposed plan in September 1988. Mrs Clark's evidence was that she and her husband had farmed the property for *"more than 20 years"*, and in particular that *"through the 1980s we ran 200 to 300 cattle on the property...we also had pigs on it from time to time"*. The other factor of importance is that there does not appear to have been a **cessation** of activities. There has been a lessening, but there does not appear to be a legislative consequence for that. We find that the farming activities can be maintained at a character, intensity and scale more or less as described by Mrs Clark as pertaining in the 1980s.

Other facets of the Permitted Baseline

[57] We refer again to the authoritative statement concerning the permitted baseline in ***Arrigato Investments Limited v Auckland Regional Council***[10]. We have already discussed one facet, existing use rights.

[58] There was no evidence of unimplemented consents requiring consideration.

[59] Each of the planning witnesses provided detailed evidence on the permitted baseline to help identify effects arising from non-fanciful permitted activities which should be excluded from consideration, as it is only other or further effects resulting from the proposal that would be taken into account. Because none of the plans provide for subdivision as a permitted activity we need only review land use aspects.

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[9] See for instance *Russell v Manukau City Council* [1996] NZRMA 35 (HC).
[10] See para [29] of that decision, quoted in our para [38] above.

Permitted Activities in the Transitional Plan

[60] Mr Scott informed us that the transitional plan limits permitted activities to farming, forestry and a number of low impact activities, including:

- Childcare (up to 10 children at any one time);
- Farmstay or homestay accommodation (up to 10 people provided that the activity does not require the provision of further facilities or buildings);
- Marae;
- Outdoor recreation;
- Remote campsite (no more than 120 people at one time and subject to compliance with Rule 20); and
- Reserves.

[61] Buildings are not permitted activities. Mr Scott told us that permitted activities are constrained by a number of development controls (Clause 10.6.2). Under these controls excavation or depositing of topsoil, soil or other materials is limited to quantities up to 200m^3 (excluding farm silage pits or farm filling pits). Consent is also required to cut, damage, injure or destroy *".... individual native trees and/or areas of native trees over 3m in height; and/or [for] cutting, damaging, injuring or destroying other native vegetation within a contiguous area of native bush exceeding 500m^2 in area"*. Mr Scott omitted to mention that the following "exemptions and exclusions" apply:

- The management and harvesting of forests planted for that purpose including the formation of forestry roads in exotic forests existing at 21 September 1988;
- The clearing of an area not exceeding 2.5% of native trees and other native vegetation existing on a site on 18 December 1984, and the harvesting of manuka and kanuka which is not an integral and functioning part of <u>native bush</u> [as defined in Section 20]. (Underlining added).

[62] Section 20 defines Native Trees, Bush and Vegetation as *"All species of indigenous flora regardless of size"*. (There is no separate definition of native bush).

[63] Against the permitted baseline, the environmental effects of at least 5,000m^3 of earthworks must be taken into account together with the proposed buildings. The position regarding tree removal is less straightforward. The effect of Section 10.6.2 is to require consent for removal of any significant area of native vegetation. However, consideration must be given to the exemption provisions. It is problematic as to whether the manuka and kanuka on site are by definition an integral and functioning part of native bush on the property. There was no evidence on the extent of native trees or vegetative cover on the site in 1984, but if it were fully covered the maximum area that could be cleared under the exemption would be 1.325 ha. If the control were applied to the current 46.2 ha of SNA some 11,550m2 could be cleared within the permitted baseline. This exceeds the assessed area of approximately 6,000m^2 proposed for clearance. On this basis there would be no tree removal effects to be taken into account under the operative plan.

Permitted Activities in Plan Change 55

[64] It was the evidence of both Mr Scott and Ms Sedgley, that in the Mangawhai – Pakiri Special Character Activity Area permitted activities are limited to the following:

- Farming and forestry [excluding buildings];
- Childcare facility for not more than 10 children at any one time within existing buildings;
- Farmstay or homestay accommodation for not more than 10 people inclusive of the owner, family and staff, provided that the activity does not require the provision of further buildings or a substantial increase (over 50%) in floor area of existing buildings;
- Home occupation accommodated within existing buildings;
- Prospecting and exploration for minerals not involving the use of explosives;

- Outdoor recreation;
- Reserves;
- Utility Services.

[65] The listed activities must also comply with various performance standards in Section 3.3 which Mr Scott summarised as including *"limits to activities that excavate or deposit topsoil, spoil, soil or other materials to no more than 200m^3"* plus the previously cited control that *"limits the removal of individual native trees up to 3 metres in height up to a maximum of 500m^2".* Accordingly in terms of the permitted baseline analysis the environmental effects of at least some 5,000m^3 of earthworks should be taken into account, together with the effects of 5 - 6,000m^2 of native bush removal and the future proposed buildings (eco lodges, dwellings).

Permitted Activities in the Proposed Plan

[66] Permitted activities in the PDP's Landscape Protection Rural Zone closely follow those in PC55, namely farming and forestry (excluding buildings) together with the following:

- Childcare facility for not more than 10 children at any one time within existing buildings;
- Farmstay or homestay accommodation for not more than 10 guests accommodated within an existing household unit;
- Greenhouse production of plants/plant crops either in the soil or in artificial media where the greenhouse is a maximum of 50m^2 in area;
- Home occupations;
- Horse training where the horses are kept permanently on the site;
- Outdoor recreation not involving buildings
- Prospecting and exploration for minerals not involving the use of explosives;

- Use of a site on not more than a total of 3 days within any 12 month period for events such as festivals, carnivals, markets, race meetings and rallies .....provided that the number of persons catered for and attending such events does not exceed 200 for each event.

[67] The permitted activities are subject to various tree and bush removal performance standards in SNA's as previously described (Rule 7.9.4.1.3.1(b)) and the Excavation or Deposition of Soil, Spoil or Earth (Rule 7.9.4.2.2). The latter allows up to $50m^3$ of work in a SNA during any 12 month period and up to $200m^3$ in the Landscape Protection Rural over the same time frame. Accordingly in terms of the permitted baseline analysis the environmental effects of at least $5,000m^3$ of earthworks should be taken into account (assuming they cannot be staged to avoid the rule) together with the effects of some 5 - $6,000m^2$ of native bush removal and proposed buildings (eco lodges, dwellings).

[68] Ms Sedgley offered us a different view. She opined that the permitted level of land use activities for the site is consistent across the planning documents, and

> As the site exists today it would be possible for the landowners to run cattle, pigs, sheep and goats throughout the bush and utilise the dune lakes and wetlands as natural watering areas for stock. It would also be possible to plant the headland that is not....SNA...in a variety of horticultural plants or establish this area in forestry and set up a temporary sawmill on the headland to mill the trees for a maximum period of three months once they matured. It would also be possible to disturb rock, soil and clay for the purposes of discovering minerals as long as explosives were not used.

[69] We have already made a finding concerning farming activities as existing use rights. Ms Sedgley's opinion expressed above is in our view correct concerning the running and watering of quite considerable stock numbers. It would also apply to maintaining farm tracks, and (again from Mrs Clark's evidence) mechanical clearing (spraying, rotary slashing, bulldozing and crushing) of scrub to maintain pasture levels over approximately 35% of the land as paddocks and tracks.

[70] Ms Sedgley's examples of future possible forestry and quarrying would be prevented from establishing as of right on much of the property by the SNA controls, and we are inclined to regard a timber mill as fanciful on the headland given its topography. Horticulture may also be fanciful given the topography and harsh climatic conditions on much of the property, but we were not much assisted by evidence either way. We are inclined to discount those matters. Nevertheless we are left with the farming activities within the permitted baseline.

Effects on the Environment

Visual and Landscape

Background

[71] What effect would the proposal have on the visual and landscape qualities of the site and the locality? It is necessary to consider:

- The character and quality of the landscape(s) concerned, including a consideration of whether section 6(b) RMA is triggered, whereby as a matter of national importance we must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

- Whether section 6(a) RMA is triggered, whereby as a matter of national importance we must recognise and provide for the preservation of the natural character of the coastal environment...

- The physical works required to give effect to the subdivision and future buildings,

- Mitigation measures proposed and their likely effectiveness,

- Degree of effect and temporal factors (short, medium and long term).

In terms of what may occur on the land, it is necessary to consider what effects could result from buildings and ancillary structures in nominated Development Areas; earthworks required to form building platforms and access ways; and associated vegetation removal. (Utility services would apparently be underground). Some potentially positive landscape effects include regeneration resulting from the cessation of grazing, active re-vegetation and screen planting proposed to mitigate the preceding works, and benefits resulting from permanent protection of the site's natural resources (native bush, lakes, wetlands and the proposed reserve).

[72] Four lots (1, 2, 3 and 9) and their respective Development Areas are proposed on the northern side of the central ridge facing Ocean Beach. Lots 1 and 2 are in

some proximity to, and very visible from, that beach and the public carpark that serves it. The respondent's landscape witness Mr S K Brown put it this way:

> ...buildings ... would sit on elevated, visually very prominent (perhaps even dominant) positions on a slope that provides a strong backdrop to the beach, dune and parking areas.

[73] Lots 4 and 5 are situated on inland slopes looking directly to the council reserve and Lot 6 is located below the crest of a spur facing southeast. Improvements already exist on Lot 7.

[74] The principal visual catchments and viewing audiences are to the north and east. These coincide with the orientation of the most visible building sites towards the sea as well as to the main public access to Ocean Beach, the picnic place, parking areas and toilet facilities. Views westwards from the council reserve in the direction of Lots 4, 5 and 6 are also important. Views of the building sites from further south on Pakiri Beach, northwards, are fleeting and of least consequence.

[75] Mr Brown and the appellant's landscape witness Mr R J Pryor, each produced photomontages to illustrate visual and landscape effects. Mr Pryor did this to illustrate his predictions for Years 7 to 10 and Mr Brown for Year 1, Years 7 to 8, and approximately Year 15.

[76] It was common ground that north-eastern parts of the site closest to the foreshore and immediately visible from it fall within the coastal environment. The association lessens to the west beyond Lot 7. Both the Auckland Regional Policy Statement and Auckland Regional Plan: Coastal, classify the Te Arai - Eyres Point sea/coast interface (but not the hinterland/ridge system immediately inland) as a regionally significant landscape feature. The adjoining lengths of Pakiri and Ocean Beach are classified as *outstanding*. These classifications are based on surveys undertaken in 1982 to 1984 at a "coarse regional level" according to Mr Brown, and may not, in his opinion, fully capture the sensitivity of the site or contemporary perceptions. Putting these aspects in perspective, Mr Brown opined:

> This means that even though the subject site is not Outstanding or Regionally Significant in its own right, it still interacts visually with those more "important" parts of the Coastal Environment, exerts considerable influence over public perception of the coastal landscape as a whole and is centrally located within a wider coastline that is fundamentally outstanding. The elevation and proximity of most proposed lodge sites to those areas that have been ascribed Outstanding and Regionally Significant status is, in fact, a key issue ...

Mr Brown also told us that:

> ...while there is real drama and interest evident in the interface of the rock shoals, cliffs and coves at the seaward end of Eyres Point with both the sea and the curving expanse of Pakiri Beach, I do not regard the inland part of the headland/ridge as particularly noteworthy per se. Certainly it is less than outstanding".

[77] We accept those opinions, confirmed as they were by our detailed site visit.

[78] The variation in quality as one proceeds inland from the sea is in our view not only a characteristic of the property, but also of the locality at large. Inland from the beaches, both to north and south of the property, are large areas of exotic pine forest. Viewed from the property and from Te Arai Headland/Reserve, the forest can be seen to "march" in lines across the landscape. From other viewpoints it simply appears as a mass of pine trees. We are mindful of the decisions of the Environment Court in ***Wakatipu Environmental Society Inc v Queenstown Lakes District Council***[11] and ***Harrison v Tasman District Council***[12] (cited in ***Wakatipu***), about the meaning of "natural" in s.6(b) RMA. We agree in a general way with what was there said that it would be wrong to equate natural with endemic to NewZealand; also that "natural" does not necessarily equate with "pristine"; and that the absence of certain vegetation, landforms, or water features (listed in ***Wakatipu***) may simply mean that a landscape is "less natural" rather than non-natural. Subject to whatever the landscape evidence on any given occasion may be, it is possible in our view that there may arise a question as to whether a hand-planted or wilding exotic forest may be sufficiently natural to qualify for the purpose of protection as a matter of national importance; or at the very least as to whether the landscape may qualify as "outstanding" for those purposes.

[11] [2000] NZRMA 59 at para [87] to [89].
[12] [1994] NZRMA 193 at 197.

[79] In answer to questions from the Court Mr Brown conceded the presence of a moderate degree of intervention by man, in the lines of pines visible from high points on the reserve, but countered that one's focus tended to be drawn more towards the sea and headland/beach interface which, he said, is "quite dramatic".

[80] We consider that "naturalness" in the hinterland is at least strongly diminished, to the point where there is no question of the hinterland landscape being outstanding. We feel able to leave open the question of whether or not it is natural because its lack of outstanding character takes it outside the protection afforded by s.6(b) in any event. The two beaches, headland and seascape, comprise the key element for consideration in that regard.

[81] Mr Brown described an update of the regional landscape assessment that he is currently assisting with. That work is currently in draft and lacks statutory weight, but apparently accords both the Pakiri coastline and Te Arai – Eyres Point an "Outstanding" classification. Mr Brown also recently assisted the ARC in (2003) with an assessment of the natural character of the north-eastern Rodney coastline in which both Pakiri Beach and Te Arai – Eyres Point are identified as having "High" natural character value (based on natural land cover, natural landforms, areas of sea and water, land uses, evident processes, transient/ephemeral elements, feelings of remoteness/wilderness/wildness). In reply to a question from Mr Enright, Mr Brown stated that a key component of the natural character of this area is *"... an absence of human structures more than anything else"*. We accept that view, but note again that the outstanding landscape qualities are confined quite strongly to areas on and near the coastal edge.

[82] Finally, by way of background, we note there were significant information gaps in the proposal pertinent to an assessment of visual and landscape effects. These included lack of specification of mitigation planting for individual Development Areas; uncertainty in relation to building design and location of structures in Development Areas; building platform size (as distinct from the 2,000m^2 Development Areas); accessory activities (outdoor entertainment/recreation/domestic facilities, vehicle manoeuvring and parking areas); and the design and construction of access ways. Our view is that a good understanding of effects from these would be germane to our primary task, and are not matters better left to subsequent land use consents for individual buildings and Site Development Plans, as the applicant intends.

[83] We advance the assessment from this point by considering the lots in two separate geographic groupings.

Lots 1, 2, 3 and 9

[84] There were differences of opinion between the witnesses on the nature and extent of likely effects, especially over time. Mr Pryor's analysis of the lots as viewed from Ocean Beach took into account various existing features, including the long expanse of beach, the sea, gorse-covered slopes, farm access track, the past quarry, an area of production forest, the two Clark dwellings, the reserve car park, and toilet buildings. While the beach is highly natural Mr Pryor opined that the existing modifications of the type noted must also be taken into account. He acknowledged that buildings on the proposed lots would be visible but opined that they would be difficult to pick out due to their "architecturally organic form" and natural earthy tones, as illustrated by his photomontages. These are matters on which the applicant offered its proposed condition 6(h) (limitations on building development). It was also his opinion that:

> The mitigation planting around the dwellings will visually assist to integrate the houses into the surrounding landscape and the gorse-covered slopes will provide a sheltered habitat for natural regeneration to occur over time and further assist in integrating the buildings into the surrounding landscape.
>
> Being set into the slope, no part of the buildings will protrude into the sensitive skyline ridge when viewed from these lower elevations.

[85] Mr Pryor assessed the visual and landscape effects on the Ocean Beach viewpoint as initially moderate, reducing to low to moderate following re-vegetation. On Mr Pryor's scale, a low effect is one that has *"No more than minor visual effect"* and a moderate effect has *"visual effects of some significance"*. For the purposes of s.105(2A)(a) of the Act pre-2003 we deduce that he considers that in the long-term the visual and landscape effects will reduce, but could remain more than minor.

[86] Mr Pryor accepted that Mr Brown's depiction of the visual effect of development on Lots 3 and 9 in Year 1 was reasonably accurate, including bare earth resulting from site works. We find this effect more than minor and if consent were granted it would need to be at least mitigated by hydro-seeding or some similar contemporary method. Mr Pryor did not accept Mr Brown's depiction of Year 1 effects for Lots 1 and 2 because of the regeneration he expected to occur prior to the delayed construction and staged release of titles required by condition 5(b). We find

however *that native vegetation approximately 1.5m high will not effectively* integrate buildings on Lots 1 and 2 into their sites in the short term or redress the effect of the sites' prominent locations relative to the important public viewpoints. In saying this we would not be inclined to look for buildings to be entirely screened from view, but consider that they would simply be too visible in these prominent locations immediately above the beach.

[87] It was Mr Brown's evidence that development on these 4 north facing lots would be visible from the most public part of central Pakiri Beach, (which we take as a reference to the beach north of Eyres Point known as Ocean Beach). He opined that the elevated sites for the proposed buildings, when viewed in conjunction with earthworks and vegetation clearance required for building platforms and access ways, have the potential to impart a marked sense of human incursion into the wider coastal environment. This could be exacerbated, he said, by human activity and vehicle movements within the curtilage of each building. Applying his opinion on public perceptions of landscape quality and value, Mr Brown believed that this would result in:

- The proposal having a significant negative impact on overall feelings of naturalness within the coastal environment;

- The creation of new landscape patterns associated with the lodges and accessways that would fragment and degrade the slopes of Eyres Point rather than order and unify them; and

- There would be no appreciable enhancement of endemic/native values until regeneration had eventually occurred.

Devoid of truly effective mitigation in the short to (quite lengthy) medium term, the proposed lodges and access ways would, therefore, have a pervasive and deleterious impact on public appreciation of the wider qualities of Ocean Beach and the Eyres Point headland.

[88] Mr Brown was also concerned that owners might not allow regenerating vegetation to wrap around and grow in front of buildings in the manner contemplated by the applicant, because such vegetation would restrict views. He considered such restrictions incongruent with the value of the properties and something their owners were likely to resist. In contrast Mr Pryor considered that they would be content to

look around and past the bush. He pointed to the requirements of proposed conditions such as 6(a) that would preclude interference without council consent. Mr Brown referred to his practical experience in similar situations elsewhere and to the difficulties of regulating pruning as distinct from removal. As already noted, we have a concern that regenerating bush in proximity to buildings might not be sufficient to mitigate adverse effects in the case of Lots 1 and 2, even when undertaken in conjunction with pergola and roof-top planting as envisaged by Mr North in his "indicative" view of them.

[89] However, Mr Brown's primary concern was with perceptions of change and intrusion within the wider coastal environment in a strategic sense. He aligned Pakiri Beach's classification as an Outstanding landscape with s.6(b) RMA and Eyres/Te Arai Points Regionally Significant classification with s.7(c) considerations, and said:

> As a whole, this coastal landscape currently enjoys a sense of unity and cohesion that matches its physical scale and grandeur. Within this setting I believe that the proposed development, with its high level of public exposure, must inevitably have a significant adverse effect on such core values, regardless of the site's partially degraded state.

We interpret the latter sentence to be directly relevant to s.105(2A)(a). Failure to address the matters of concern meant for Mr. Brown that:

> ...the proposal has the potential to create a ground breaking level of incursion and intrusion into a coastal environment that has consistently been identified as both outstanding in its nature and highly sensitive in terms of the location and type of development that it can accommodate.

<u>Re-vegetation on Lots 1, 2 ,3 and 9</u>

[90] Mr Brown had particular regard to whether re-vegetation could be successful as a mitigation measure on these north-facing lots. He was especially concerned about the current dominance of exotic species, paucity of native plants and absence of re-generation. He considered their "impoverished state" to be compounded by their exposure to salt spray and the drying effects of summer wind on soil and vegetation. He opined that significant regeneration would require intensive weed management and active re-vegetation at close plant spacings. He deposed that in the absence of such measures, re-vegetation would not be as effective in mitigating the impact of proposed development as portrayed by Mr Pryor's photomontages and that the "*gorse, kikuyu and potentially privet will be the dominant species on the ridge crest and north-facing slopes for years, if not decades to come*". This evidence was only

relevant to the extent that it imparted an understanding of the consequences of unsuccessful planting because managed re-vegetation became a key feature of the proposal through further conditions offered.

[91] Dr Julian's opinion was that *"the likely timeframe for effective maturity, as depicted on Rob Pryor's photomontages, if undertaken pursuant to a comprehensive planting and maintenance plan, would be of the order of decades".* She also believed that the same outcome and timeframe would apply if the lots were left to natural regeneration processes. This suggested that few if any benefits would accrue from active management, which we struggle to accept as correct. It was also inconsistent with her answer to Mr Enright under examination-in-chief, that *"the length of time it takes to achieve that kind of canopy is also dependent upon the degree of management – the intensity of management. For example, if there's really rigorous release from weeds, ongoing mulching and watering, that three-year level could be attained. It's somewhat site-dependent and management intensity dependent".* We suspect the latter view is the more accurate one. Regrettably, the contradictions detracted from the weight we could accord her evidence on this matter.

[92] It was Mr Pryor's opinion that managed re-generation could proceed more quickly than Dr Julian was suggesting. To illustrate the rate of vegetative change occurring naturally, Mr Pryor drew our attention to the extent that gorse (as a nurse crop) had spread across the north-facing slopes between October 2002 and May 2004. We would normally prefer the evidence of a suitably qualified and experienced specialist expert witness. It was for this reason we found Ms Flynn's evidence in combination with her candour, more compelling:

> Specifying a timeframe for regeneration at any site is always a matter of taking an educated guess, as many factors influence vegetation establishment and growth, such as site fertility, degree of exposure, available seed sources, existing vegetation cover, current and prior land use and the presence of grazing animals. However, in my view, natural regeneration of indigenous bush is unlikely to take many "decades" to "more than a century" as Dr Julian suggests, given the current rate of regeneration of both gorse and native scrub ...

[93] Ms Flynn also gave as her opinion that successful re-vegetation at this location would be assisted if the density of proposed planting was increased from that allowed for in Condition 5(a) (not less than 5,000 stems/hectare) and if smaller plants were used in preference to larger specimens that might struggle (more) to establish in the new, challenging growing environment. She also acknowledged the

advantages of artificial watering for re-vegetation in this location while alerting us to associated cost and logistical considerations.

[94] Regrettably, there remains a wide divergence of opinion on how long regeneration might take on Lots 1, 2, 3 and 9, how successful it might ultimately prove to be, and when effective mitigation of buildings on them might ultimately occur (assuming we knew with some specificity the nature of the works). Particular concern remains concerning Lots 1 and 2, recognising that they are more prominent and less well vegetated than the other two. Condition 5(a) would require a replanting programme capable of producing 75% canopy cover within 7 years. Condition 5(b) would authorise the council to refrain from releasing titles until (re)vegetation has achieved an average canopy height of 1.5m over no less than 75% of the area identified for planting. It is conceivable that titles for these lots might never issue, although this is not the applicant's expectation.

[95] Having carefully considered all the competing evidence we have concerns about the prospect of successful re-vegetation on Lots 1 and 2 on account of their exposed location and physical condition. More importantly, we are concerned about their extremely prominent location above Ocean Beach, such that even with the proposed screening, there would be a considerable adverse potential effect resulting from implementation of consent for those two lots.

[96] Taking all the preceding visual/landscape and re-vegetation considerations into account we find Mr Brown's effects assessment to be the more realistic and better representing the likely outcome than Mr Pryor's. The latter we find to be too optimistic given the proximity of development to the principal viewpoints, prominence of the building sites, re-vegetation challenges inherent in this site and its coastal setting - notwithstanding the degree of existing modification and degraded vegetation. More particularly, we find that buildings on Lots 1, and 2, and buildings in the precise positions proposed on 3 and 9, would have significant adverse effects because of a probable absence of effective mitigation from vegetation. In the longer term adverse effects from Lots 3 and 9 would be reduced but not to an extent sufficient to satisfy the effects of concern. Re-location of the Development Areas on those 2 lots to better mitigate the effects may overcome that however, and we will discuss that further.

[97] We heard evidence, particularly from Mr Brown, on how the proposal could be modified to lessen the effects of buildings on Lots 1, 2, 3 and 9. He identified two broad alternatives; a proposal similar to that submitted but with fewer structures, and moving them away from the sensitive headlands; or a wholly residential development set back from the coast. More particularly, in response to questions from the Court he indicated it would be desirable to:

- Re-locate the development area on Lot 3 about 20m to the west and slightly lower down the slope, where it would be viewed more in conjunction with existing buildings on Lot 7 and (we would add) existing large conifer trees;

- Consider placing two or three further buildings in the Lot 9 meditation/recreation areas because they are served by the existing farm access track and are in an area of SNA where, on the evidence of Ms Flynn, further clearance might have minimal adverse effects.

These opinions found some favour with us when considering the graphics provided by both landscape witnesses, and were quite strongly confirmed by what we saw during our site visit. We find there would also be merit in moving the presently proposed Lot 9 development area some distance northwards and downhill. We observe that siting structures in these two amended locations (on Lots 3 and 9) would be consistent with Mr Brown's opinion that the inland part of the headland/ridge is not *"...particularly noteworthy per se. Certainly, it is less than outstanding"*.

[98] Overall we find that development of Lots 1 and 2 would have significant adverse visual and landscape effects, and would impact adversely on the natural character of this part of the coastal environment. We are not satisfied that the development areas as presently proposed on Lots 3 and 9 would be suitably located to avoid, remedy or mitigate adverse effects, but find that that could be achieved with the changes to them discussed above.

<u>Lots 4, 5 and 6</u>

[99] Mr Pryor's assessment was appropriately made from the highest point within Te Arai Reserve. Relevant features looking west from the viewpoint are the site's regenerating eastern slopes running down to a wetland on the reserve boundary; a

large grove of pohutakawa on the same slope(s); the pine forest to the south; and distant farmland. One is also conscious of the expansive views north, south and east over the coast and sea. Mr Pryor acknowledged that proposed building sites on Lots 4, 5 and 6 will initially be visible but opined:

> ...due to their physical and visual characteristics they will not detract from the wider landscape nor reduce the amenity values of the surrounding landscape. From here the modified land uses are very apparent...and this sets the context within which the Eco Park will be viewed. Lots 5 and 6 will be readily screened by the existing regenerating vegetation and proposed mitigation planting. Lot 4, being the closest and most visually exposed will take longer to fully integrate into the surrounding landscape, however, its visual and landscape effects will be no more than minor.

He expected that the buildings and access ways would not be visible when viewed from lower elevations on the reserve walking track. It was Mr Pryor's overall assessment that the visual effects would be moderate initially, reducing to low to moderate over time as the mitigation planting and regenerating vegetation matured.

[100] Mr Brown took the wetland as his initial viewpoint. He described it as being in a vegetated amphitheatre imbued with a secluded, natural character. It was his evidence that existing vegetation would partially buffer views of development on lot 6 and possibly Lot 5 but the lodges proposed for this sector would:

> ...loom over the wetland area on the much higher slopes and spurs that surround it to the north and west, and the integrity of this physically contained catchment would be very appreciably eroded.

In his view the changes would also be evident from other parts of the reserve at a higher elevation, causing a diminution in the reserve's naturalness and endemic value. As a result:

> ...*the lodges on Lots 4, 5 and 6 would generate a wholly new,* ground-breaking, type and level of intrusion into the reserve.

[101] There is an apparent conflict in Mr Pryor's evidence about the initial visibility of buildings on Lots 5 and 6 and his opinion they would be readily screened by existing regenerating vegetation and mitigation planting. This caused us to consider the situation during our site visit with particular care. When viewed from an elevated position on the reserve, Lot 4 appears closer than either Lots 5 or 6 and therefore a building there would be more noticeable. However the building platforms on Lots 5 and 6 are also visible as evidenced by Mr Pryor's Figure 10. From the high point of the reserve, development of all three lots would have varying adverse visual and landscape effects in the short term with Lot 4 being significant.

Lots 5 and 6 could, subject to detailed further assessment, have less significant effects. We do not presently have sufficient evidence to determine that those effects would be no more than minor. We will discuss this aspect further.

Ecological Effects

[102] Expert ecological evidence was called by both parties. From their evidence, it is our task to consider the:

- Nature of likely ecological effects both positive and negative and their significance;

- Scope to avoid, remedy or mitigate adverse effects of consequence.

[103] First, some common ground and some areas of minor difference. It was agreed that the site incorporates some 46ha of SNA comprised primarily of indigenous vegetation, but including fringe gorse areas. In addition there are wetlands and dune lakes containing high natural values.

We understand from the evidence that:

- There may be a presence of the threatened and sparse spotless crake on Little Shag Lake.

- There may be significant internal vegetative connections which Dr Julian described as "highly significant ecotones from dry ridge top vegetation along the crest of the main ridge down to dune lakes and wetlands..."

The potential for regeneration to enhance the site's natural values was recognised by all parties and reflected particularly in Ms Flynn's opinion that *"vigorous regeneration will occur throughout the natural areas of the property if grazing pressure is removed, and excluded from the property in perpetuity"*.

[104] Ms Flynn produced a helpful map of the site's many and varied terrestrial/wetland species and botanical associations. Dr Julian agreed with the map and accompanying explanations except for a number of relatively minor points, the most significant being:

[105] Ms Flynn stated that while the Lot 4 and Lot 6 development areas were outside the SNA this was not the case for Lot 5. Consequently, she suggested its development area be relocated some 40m north west to the edge of the bush as shown on Exhibit 2 (an aerial photo with cadastral details superimposed). That may well be desirable from the mitigation point of view.

[106] The application was at that stage further amended by the applicant accepting that the additional 4.46 ha of SNA on Lots 4, 5 and 6, identified by Dr Julian and recognised by Ms Flynn, should be covenanted.

[107] The witnesses were also agreed on the ecological benefits of affording legal protection to Lot 8 as reserve. Dr Julian recognised that if certain prerequisites were met, public management could be effective but expressed concern should the council adopt an inappropriate classification resulting in excessive public use. She saw covenanting as an equally valid mechanism that in some circumstances "*...can be very effective*". Ms Flynn acknowledged the validity of either mechanism but continued:

> ...vesting in public reserve provides a degree of long term certainty with regard to appropriate management that private ownership does not, the benefits of which should not be undervalued.

We consider that it is not necessary presently to make a decision as between the two kinds of protection mechanisms. Much might depend on formal reserve classification on the one hand, while protective mechanisms in perpetuity might be adequate in this location depending on the detail of them. We are sufficiently convinced of the value of creating the proposed reserve, that if the council were to reverse its recent resolution to accept vesting, or were to seek to impose unreasonable conditions on same, we might consider requiring covenanting, while retaining the number of lots that a reserve might have generated.

[108] Apart from Dr Julian's concerns about clearing SNA for development sites, her reservations about the proposal focused primarily on Lots 4, 5 and 6 and use of one of the Lot 9 mediation/recreation areas (Area 3). This position was summarised in her concluding statement.

> Proposed Lots 1, 2 and 3 and 9 will have minor adverse effects from an ecological perspective. Lot 4 will have moderate adverse effects. Lots 5 and 6 will have significant adverse effects that will persist and accumulate in the future.

Dr Julian's position on Lot 9 became more clearly expressed in her reply to Mr Littlejohn's cross-examination about meditation areas, as follows:

> I can certainly agree that if structures are going to be part of the proposal that's approved within the body of the SNA, then certainly 1, 2 and 4 seem to me to be relatively appropriate. 3 is, in my mind, inappropriate, and 5 is marginal.

Concerning Area 5, Dr Julian subsequently expressed the significant opinion in cross-examination that a building site within Area 5 could be mitigated.

[109] We now turn to the areas where there were significant differences between the parties and make our findings. Those matters are:

- The effect of wastewater and stormwater runoff from Lots 4, 5 and 6 on the Te Arai Point Swamp;

- The implications for vegetation edges and connections of development on Lots 4, 5 and 6 plus the lot 9 mediation/recreation areas;

- Requirements for planting maintenance and weed management plans;

- Whether a better ecological outcome might result from current management practice or the proposal;

Runoff Effects

[110] It was Dr Julian's evidence that development on Lots 5 and 6 and to a lesser extent Lot 4 would result in nutrient runoff into the Te Arai Point Swamp (the dune wetland on council reserve) causing eutrophication to proceed more rapidly, with significant adverse ecological effects. Dr Julian judged the swamp to be in good condition, with vegetation indicative of low nutrient conditions relative to similar features elsewhere impacted by pastoral farming. The swamp, which Dr Julian described as *very rare* on account of its indigenous vegetated catchment, is also a North Island fernbird (threatened species) habitat. Dr Julian assumed a maximum wastewater runoff volume of 18 persons (presumably being 3 times the 6 person capacity of Mr North's larger conceptual eco-lodge). In practice, no certainty attaches to the occupancy of future buildings and the volume is at best indicative. Similarly, because she had no precise knowledge of current animal stocking rates, or

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more relevantly, those authorised by existing use rights, Dr Julian could not assist with a comparison of what she perceived could occur, with farm effluent effects.

[111] Dr Julian also expressed concern about stormwater runoff from impervious surfaces on Lots, 4, 5 and 6 altering the Swamp's hydrological regime and, in turn, the wetland vegetation/biota. She was initially categorical that such runoff would reach the wetland but in response to questions from the Court acknowledged this was more appropriately a matter for engineering assessment.

[112] Mr Wyborn, a professional engineer with 22 years experience was called by the applicant to give evidence on wastewater and stormwater matters. Mr Wyborn advised that site specific investigations have not yet been conducted and the selection of particular treatment and discharge methods would not occur until the detailed design stage. He addressed the concerns expressed by Dr Julian and Mr Scott, in his evidence in reply, in the following manner:

> However, at this stage I do not believe that there is a specific risk of contamination from effluent disposal runoff on these lots [being 4, 5 and 6] because:
>
> (a) There is a minimum of 100m – 200m separation from the proposed house site to the swamp wetland;
>
> (b) The final selection for the proposed treatment plant could use drip irrigation disposal, thus not relying on any soakage capability of the soil;
>
> (c) A high quality effluent discharge can be achieved and contaminated runoff avoided through careful detailing of the wastewater treatment proposals.

Mr Wyborn also drew our attention to proposed Condition 2(g) which would have to be complied with prior to the grant of council's section 223 approval.

[113] We have paid careful attention to the evidence of all witnesses on the potential effects of contaminants discharging to the swamp, but Mr Wyborn's evidence is preferred on what may occur upstream of that point, given his engineering qualifications and Dr Julian's concession in answer to questions from the Court that Mr Wyborn's qualifications should be preferred to her views on what might happen.

[114] The applicant has put forward draft conditions concerning wastewater and stormwater. Condition 2(g) would provide for a registered engineer's indicative design for on-site disposal of treated wastewater in accordance with specified environmental performance standards.

[115] The stormwater matters of concern to Dr Julian might potentially be addressed by Condition 2(f), which requires increased flows, volume and timing from the construction of accessways to be mitigated to council's approval in compliance with publication Management of Stormwater in Countryside Living (Rural and Town) Zones – a Toolbox of Methods. The proposed condition might require further scrutiny in the course of further applications.

[116] Regrettably, we are unable to make a conclusive finding on the potential ecological effects of stormwater because a regional consent for this purpose has not yet been sought. We learnt that a regional earthworks consent is also outstanding. Both have the potential to impact on the site's ecology, including the wetland in the catchment of Lots 4, 5 and 6. One of these consents as a restricted discretionary activity, and possibly both of them, have the potential to come before the Court. The applicant and consent authorities have known that this was the situation since at least May 2003. Collectively these matters thwart the integrated approach required by the RMA and compound the consequences of land use consents not having yet been sought for related buildings. We consider that the respondent could have used s.91 to deal with the absence of regional consent applications, and the ARC could have advocated for the same. Our overall view is best summarised in the decision of Randerson J in ***Waitakere City Council v Kitewaho Bush Reserve Company Limited and Others***[13] which we respectfully adopt:

> [27] I agree with the views expressed by the Environment Court in AFFCO NZ Ltd v Far North District Council [1994] NZRMA 224, 233 – 235 that good resource management practice requires that in general, all resource consents required should be carefully identified from the outset and applications made so they may be considered together or, at least, in circumstances where one application informs the others: see also the Court of Appeal decision in **Bayley v Manukau City Council** [1999] 1 NZLR 568, 579 – 580 and my own decision in **King v Auckland City Council.**[14]

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[13] HC Auckland, AP 23/2002.
[14] (HC Auckland, AP 23/2002).

We also note that the requirements of s 88(4)(d) (pre-2003 Amendment) (concerning a statement in an application for resource consent as to all other resource consents that may be required) have not been observed by the applicant. Indeed the application submitted to the council contains the patently incorrect statement *"No other consents are required in relation to this activity"*.

Edge Effects and Planting

[117] Dr Julian identified that development work on Lots 4, 5 and 6 would require the clearing of up to 2,000m^2 on each lot, of bush classified as SNA, contrary to Rule 11.1.4(a)(ii) of PC 55. Further clearance would result from formation of the lots' individual accesses. In addition to this effect it was her evidence that:

> Clearance of this vegetation would also create permanent edges within the vegetation that would ongoingly create harsher conditions in the surrounding forest than would otherwise exist. These conditions would be drier, hotter, windier and brighter than beneath a closed, continuous canopy and would encourage the more common species of the bush edge to grow at the expense of the species that to flourish require shadier, cooler, moister forest interiors. These edge effects usually extend over 50m into the vegetation.

Dr Julian expressed similar concerns regarding development of the five meditation/recreation areas on Lot 9. She particularly noted that Area 3 and its accessway are covered in indigenous vegetation being 5 to 8m tall kanuka with some emergent totara over a subcanopy of ponga. She anticipated the same types of adverse effect in these areas as she had described for Lots 4, 5 and 6, with the degree proportional to the extent of clearance.

[118] Mr Wadman responded to Dr Julian's concerns in his evidence in reply by specifying that Meditation Areas 1 to 5 would total 1,220m^2 as opposed to the 5,500m^2 calculated previously by council witnesses. Dr Julian agreed with Mr Littlejohn that this would reduce the degree of adverse edge effects.

[119] Ms Flynn concurred with Dr Julian that partial vegetation clearance produces *"edge effects"* with the impact proportional to the area cleared. Specifically as regards Meditation Areas 1 to 5 she noted potential effects would be influenced by:

- Avoidance of wholesale clearance. Native trees higher than 3m would have to be retained or resource consent obtained for their removal;

- In the medium to long term, vegetation would close in around the proposed meditation/recreation structures;

- Clearings would retain an irregular shape comparable to a natural treefall gap;

- The built structures envisaged are not dissimilar to those found elsewhere on the Conservation Estate (platforms and boardwalks).

[120] Dr Julian considered that this was an incomplete list, and recommended controls limiting clearance to the minimum area necessary, and re-vegetation. The first suggestion was simply a corollary of Ms Flynn's initial point above. However, Dr Julian usefully elaborated on the potential role of re-vegetation by clarifying that it might also occur elsewhere on the site by way of mitigation. In practice, we apprehend there is no great difference between the parties on re-vegetation for this purpose. It was specifically identified by Ms Flynn as a suitable method for mitigating edge effects along the 900m principal accessway, where she saw the greatest potential for edge and fragmentation effects. It was her evidence that:

> *Establishment of a dense, shrubby buffer of species such as hangehange and mahoe is proposed to minimise edge effects and assist with weed suppression.*

[121] Under cross-examination Ms Flynn elaborated that such planting would assist by providing a dense shrubby buffer, enhancing the microclimate within the adjacent bush. Ms Flynn acknowledged that the existing 13m wide accessway exhibits degraded vegetative margins, and we accept her evidence that the proposal to remedy this by edge planting, and by reducing the accessway to a formed width of 6m, will have a positive ecological effect. Indeed, as suggested by Mr Littlejohn in opening, the accessway could be reduced to a formed width of 3m plus passing bays.

[122] We find the re-vegetation technique necessary, appropriate and feasible to mitigate edge effects in equal measure around the Lot 4, 5 and 6 development areas, their accessways, the Lot 9 meditation/recreation areas and the main accessway. Conditions to this end would mitigate the effects of concern to Dr Julian and ensure they were not greater than minor.

Planting and Pest/Weed Maintenance Plans

[123] Initially there appeared to be a difference between the parties on these matters. However, through the processes of evidence in reply and revision of conditions, agreement emerged that comprehensive planting and maintenance plans (including pest/weed control) are required for both development areas and covenanted areas. Without finally endorsing their detail, we note that these requirements are addressed in proposed Condition 5(a) and various limbs of proposed Condition 6, namely (a), (c), (e), (g) (j) and (l). Condition 6(j) addresses Dr Julian's concerns about the absence of an effective mechanism integrating the responsibilities of the developer and subsequent owners over time. It reads:

> (j) (Management Structure) The consent holder shall provide details of a management structure or arrangements to the satisfaction of the Rodney District Council that will ensure the ongoing management of the weed and pest control and re-vegetation/regeneration proposed on Lots 1 – 6 and 9 to achieve the objectives of planting, maintenance and monitoring set out in these conditions.

This condition appears satisfactorily to address the subject, which was justifiably of concern to Dr Julian, and we endorse its intent. If properly managed and controlled, we find that effects of this type will be no greater than minor.

The Better Ecological Outcome: Current Management or the Proposal?

[124] It was Dr Julian's evidence that "the overall adverse ecological effect of the proposal will be significant, including in the long term, even if a comprehensive planting and maintenance programme is adopted for Lots 1, 2, 3 and 9". She expressed specific reservations about the proposal's adverse implications for Te Arai Point Little Lake and Little Shag Lake on the basis that:

- PC55 Appendix 3 describes the lakes as vulnerable to excessive recreational usage during the wildlife breeding season;
- Little Shag Lake is a spotless crake habitat; a threatened species characterised by small, widely scattered, *sparse* populations as a result of habitat drainage;
- Being the most secluded dune lakes in the area it may not be desirable to encourage public access.

[125] For the avoidance of doubt we reiterate that the proposal allows for only Little Shag Lake to be reserved with public access. Dr Julian was asked by the Court whether a grant of consent would result overall in a better ecological outcome than current management utilising existing use rights. It was her opinion that stocking at the low intensity practiced over the last year would cause relatively little damage. Consequently it was her preference that low levels of stock remain and there be "..... *no houses emptying either effluent or stormwater and no runoff from roads down into catchments of the .... dune wetland lakes"*.

[126] In the event it is not appropriate for us to make final findings on the net ecological effects of the proposal when the aspects of stormwater and wastewater runoff and earthworks effects remain to be addressed in detail through regional applications.

[127] Subject to what we may ultimately hear on these matters, Ms Flynn's evidence on this subject seemed balanced, and assisted our immediate decision. In summarising her evidence she emphasised that even occasional or intermittent stock grazing in natural areas has significant adverse effects on the condition and composition of wetlands and bush, processes of forest regeneration, plant species diversity, nutrient enrichment of water bodies, soil compaction and impeded drainage. She noted in particular the impact of existing use rights meaning the absence of any current requirement to protect gorse, a crop which is important to the regeneration process.

[128] In her evidence in reply, having considered the matters raised by council witnesses and the applicant's responses, Ms Flynn concluded that the mitigation measures proposed:

> ...more than compensate for the likely or potential adverse effects of the proposed development, producing an outcome with a net environmental benefit.

[129] Subject to one qualification, our preliminary view is that we agree with her overall assessment, and consider that the proposal may result in a better ecological outcome than if the owners continued to exercise existing use rights for farming. The qualification, of course, is that wastewater, stormwater and earthworks effects may need further detailed assessment in separate proceedings, and the final overall outcome is therefore yet to be assessed.

[130] One final matter remains concerning ecological effects. Lot 8 has been offered as a reserve. We naturally needed to know whether the respondent district council would accept it for vesting, and were treated to an amazing coyness, even resistance, on the part of the council, to being told the outcome of a council committee's deliberation that had occurred on the issue. Having overcome that problem we were informed that the committee's resolution was (without prejudice to the council's opposition to the appeal) to agree to receive this land as reserve, conditional upon a number of things including the vesting of a further strip of land to add a new access to reserves in the vicinity. In view of Dr Julian's concerns to discourage further public access to the dune-lakes, and uncertainty about council taking Lot 8 as a reserve if the additional strip is not vested, we refrain for now from coming to a view about the future of Lot 8. As we have already noted, some other mechanism such as covenanting may ensure protection equally well, and we leave further consideration for a later time.

Maori Cultural Effects

[131] The applicant called two witnesses on this subject; Mr L Haddon and Mr M Wilson. Mr Haddon has lived at Pakiri all his life. He is kaumata of Te Kiri Marae at Leigh and represents that Marae on the Ngatiwai Trust Board. He gave evidence primarily as the senior kaumatua and rangatira of the Manuhiri hapu but also in his capacity as Chair of the Trust Board supporting the evidence of Mr Wilson. It was Mr Haddon's evidence that:

- He was consulted personally on the proposal by the applicant prior to the resource consent application being lodged;
- An assessment of the application was undertaken by Mr Wilson and a Mr Parata for the Ngatiwai Trust Board's Resource Management Unit (RMU).
- Mr Wilson is no longer employed by the RMU;
- He has read the report prepared by the RMU and Mr Wilson's evidence and *"endorses the comments and assessments therein"*. Notwithstanding Mr Wilson's departure from the Trust Board his views and opinions in this instance could be taken as representing those of the Board on behalf of Ngatiwai iwi.

[132] Mr Haddon also told us that Te Arai is a "very special place for Ngatiwai. In Maori, Te Arai means "beyond the veil"; a hiding place. He added, *"it is proper that this location should be used for the rest, relaxation and education of visitors to this area as it was used in the past by my ancestors".*

[133] Mr Wilson advised that, with one other person, he was responsible as the (then) RMU Manager for initial consultation on, and cultural assessment of, the applications referred to Ngatiwai Trust Board in consultation. He confirmed that the site is within the Ngatiwai rohe. It was his evidence that Te Arai Point was one of the homes of a distinguished ancestor Tahuhu nui Arangi, a grandson of Manaia in this district. Tahuhu nui Arangi favoured Te Arai as a home on account of the abundance of food available from the coast and wetlands. Mr Wilson explained that *"because of the internment of Tahuhu nui Arangi at Te Arai Point this remains a particularly sacred place to the Ngati Manaia and today the Ngatiwai people".* In addition *"the wetland fore-dune lakes were important in providing for Te Arai, not only with a larder but also for other significant ritualised uses".* Subject to concerns subsequently addressed by the applicant (nature of work in Areas 1 to 5, Lot 9, koiwi protocols and weed/pest control) Mr Wilson expressed support for the proposal in the following terms:

> ..., Ngatiwai is proud that this land at Te Arai might become a flag ship for tourism for visitors to New Zealand and for visitors within New Zealand. Ngatiwai welcomes newcomers to this area where their intentions are such as this applicant.

[134] Mr Wilson confirmed in cross-examination that the eco-lodge and ecotourism components of the proposal were important aspects in the view of the Trust. Conversely, he stated that if the proposal were for a 7 lot rural residential subdivision able to be sold separately, he would have to check with the Trustees but it was probable their position would be reversed. The reasons he gave for this included reference to the site's SNA, PC55 provisions *"and also the cultural values that are there"* protected under sections 6, 7 and 8 of the RMA. When elaborating, Mr Wilson explained:

> The other concerns were that these areas are part of an overall landscape from Te Arai Point. Te Arai Point is the sensitive area in terms of Tahu, whose grave being there, and also there is a ridge pa to the front. It's the most prominent land spit. His [Mr Wadman's] eco [lodge] is a little back from there. I'm not a hundred percent sure whether a ridge pa ever existed on Eyres Point. I would say that there would have been some sort of lookout there at some stage, but that is a blind guess. However, the whole area, as I just said to you, is considered to be a landscape that is attached to Te Arai.

[135] It was evident from other answers to cross-examination that Mr Wilson personally considered there was too much *"inappropriate development"* occurring in the area in the form of residential dwellings in coastal locations, and that a concentrated rural residential development on the subject site would be contrary to natural character values important to Maori.

[136] Mr Enright cross-examined Mr Wilson on an aspect of the Archaeology Report attached to the application, namely that *"there are a number of archaeological sites recorded in the general area, including a pa, terraces and midden. The pa on Eyres – Te Arai Point has largely been quarried away, but the area is now a reserve".* Mr Wilson accepted on the basis of the report that there would have been a pa site directly adjacent to the subject site and that its existence would probably make the subject site even more sensitive from a hapu perspective. However, he qualified his answers by stating that because the report had not been collaborated by tangata whenua it could not be considered a *"true cultural account".*

[137] What then are the likely Maori cultural effects of the proposal? The Eyres – Te Arai Points area is clearly significant by virtue of its past occupation, usage and the presence of Tahuhu nui Arangi's burial site on the council reserve. There would be no direct impact on known cultural resources, but tangata whenua have a concern that the area be managed in a way that respects those matters valued by Maori, including the landscape and related cultural associations. There was no evidence that eco-tourism will enable Maori to better provide for their social, economic or cultural wellbeing. We have already found – and the applicant accepts – there is no guarantee eco lodges will result. Whatever form future development takes it will introduce new structures and occupants. There may be differences in the structures' built form and the occupants' behaviour and values. That is one reason (amongst many) why the applicant should seek resource consents for the proposed lodge buildings now, so that all effects can be assessed in the round.

[138] In these circumstances, we cannot discern any reason why the effect of the proposal on Maori cultural values will be greater than minor, if after all necessary applications have been considered and have been processed in as holistic a fashion as circumstances now allow, it appears appropriate to consent to the eco-lodge and subdivision as a package.

Precedent and Plan Integrity

[139] Counsel were agreed that it is a permissible consideration under s.104 to assess any potential precedent aspect of granting consent. The law as determined in ***Dye v Auckland Regional Council***[15] at para [32] is:

> [32] ...The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have a consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities...
>
> [42] ...If there is a concern at precedent effect, it should be addressed under para (d) of s.104(1) which is similar in concept to gateway (b) in s.105(2A) ; ... Alternatively precedent concerns may be addressed under para (i) of s.104(1).

[140] We say "permissible" (as opposed to "mandatory") having regard to the recent decisions of the High Court in ***Murphy v Rodney District Council***[16], and ***Rodney District Council v Gould and Gillain.***[17]

[141] The key factors in Mr Enright's submission are the influence that approval would have on the outcome of subsequent applications and consideration of distinguishing features attaching to the current proposal, ie the presence (or not) of evident unusual features.

[142] The respondent called Ms Baker, a planner with experience in processing consent applications for the council, to give evidence on this matter. It was her opinion that approval would create a precedent effect because nothing differentiates the site from others in the zone, and it would consequently

> ... be difficult for the Council to refuse subdivision consent for other sites in the locality that are set further back from the beach, are not part of the coastal environment and are not identified as a significant natural area.

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[15] [2002] 1 NZLR 337; [2001] NZRMA 513, at paras [32] and [42].
[16] HC Auckland, 4 June 2004, CIV 2003-404-1929 (Baragwanath J).
[17] HC Auckland 11 October 2004, CIV 2003-485-2182 (Cooper J).

[143] By inference, the precedent effect foreseen by Ms Baker was an adverse one. An attachment to Ms Baker's evidence, however, shows the subject site containing the only area of SNA in the coastal environment in this part of the zone. We find that it is the coincidence of the latter factors that differentiates this application and, if consent were to be granted, it would result from a careful weighing of the benefits of permanently protecting one at the expense of any adverse effects on the other. These considerations go well beyond the matters such as lot entitlement, which turns on legal interpretation, and building platforms in SNAs that Ms Baker mentioned as germane under cross-examination. The evidence of Mr Scott on this matter, and to a lesser degree Mr Brown, largely followed that of Ms Baker. We were persuaded however on the evidence of Ms Sedgley that the site contains a number of unusual and distinguishable features in combination. She said:

> Very few sites exist in the locality that contain the same large number of natural features (that warrant protection) or are located adjacent to a reserve system so that the linking of the area into a reserve system would provide such significant public benefit. It is unlikely that another site will be able to utilise the combination of subdivision provisions contained in the planning documents, as this application has. Therefore, I consider that it is unlikely (sic) it will be very rare that this application could be relied on for justification for approval of another.

[144] We find that there would be no precedent created if consent were granted. The site and the proposal have strong unusual qualities in combination – perhaps even unique (although "uniqueness" is a more stringent test than is called for). The strong unusual qualities in combination produce the result in our view that there are clear distinctions between the subject land and application and potential applicants in the district.

[145] It was also Ms Baker's evidence that consent would have a *"plan integrity effect, through eroding the integrity of the objectives and policies that govern development in this area"*. We do not accept that view because in this case approval could only result from a considered assessment and weighing of a number of competing factors with a decision made having full regard for the many issues relevant in connection with the purpose and principles in Part II of the Act. There are some plan provisions that support the proposal and some that do not. We will consider them in a later section of this decision. There is no sound reason why a favourable decision should adversely affect public confidence in either the consistent administration or integrity of the plans, especially after full consideration has been given to the many complex factors of this case.

[146] The ***Gould and Gillain*** decision previously referred to makes it clear that this issue, like precedent, is a legitimate matter to be taken into account (although not mandatory). We have formed the view that the issue is relevant for consideration, but the answer is that no problem is found when the evidence is fully considered.

Cumulative Effects

[147] It was Ms Sedgley's evidence that adverse cumulative effects would not result because of measures taken to blend the proposal into the landscape and because it has been designed very much in accordance with the provisions of the district plan, *"which document has identified the level of development that is appropriate in this area"*. Alas the matter is not so straight forward.

[148] Cumulative effects correctly understood are those described in ***Dye v Auckland Regional Council***[18]:

> [38] ...A cumulative effect is concerned with things that will occur rather than with something which may occur, ... This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build-up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration.

[149] It was Mr Scott's evidence that in combination the visual, ecological, earthworks, roading and construction works will have an adverse cumulative effect on the subject site and adjacent area. He anticipated additional adverse cumulative effects may also result from specific building designs, access arrangements within the lots and wastewater disposal provisions. We are not persuaded that adverse cumulative effects of an ecological nature will necessarily result, although the question remains open pending further applications. We accept Mr Scott's opinion, however, that adverse visual cumulative effects would result from a combination of the different built elements (earthworks, access formation, buildings) in the absence of modifications to the proposal. Some of these may well occur over time notwithstanding the intention of conditions designed to avoid or mitigate them. We are also mindful that while Lots 1,2, 3 and 9 and Lots 4, 5 and 6 are not visible from any one viewpoint, visitors move around the area (beach, car park, council reserve). Without the modifications we have previously considered, the proposal would have

[18] [2002] 1 NZLR 337; [2001] NZRMA 513, at para [38].

an adverse cumulative effect in the sense that, for some visitors at least, views of some parts of the site would combine sequentially with views of other parts collectively to impact on natural character and the sense of remoteness.

[150] Our findings on cumulative effects cannot however be complete until we have an understanding of the outstanding applications to the ARC for earthworks, wastewater and stormwater activities, and the district council for land use consents.

District Plan Objectives, Policies, Rules and Other Provisions

[151] Section 104(1)(d) requires that we take into account relevant provisions of the operative plan, PC 55 and the proposed plan. To avoid excessive repetition in a congested statutory framework we pay particular regard to the PC 55 provisions, consistent with our earlier findings on weight. The references are drawn largely from the planning evidence where there was a measure of overlap, albeit with differences in emphasis and interpretation.

Operative Plan

[152] Ms Sedgley elected not to address this plan. Mr Scott and Ms Baker outlined what they considered to be the relevant objectives and policies. Whilst mindful of the plan's diminished statutory weight, it was Mr Scott's opinion that the provisions are part of a consistent planning strategy for protection of:

- Areas in the coastal environment with high natural character, and
- Significant landscapes.

[153] The zone statement for the Rural Conservation 3 – Coastal Landscape Protection zone refers to a range of natural assets that are sensitive to development and require special protection including native bush, remote coastal landscapes and wildlife habitats. The purpose of the zone is [Operative Plan para 10.1.3, p.347]:

> ...to protect coastal areas of high landscape quality from unnecessary and/or insensitive development. The zone covers a large proportion of coastal land in the district. It is the Council's intention to restrict further development in the zone to those activities which do not conflict or compete with those qualities of open space and remoteness of the landscape.

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We note the presence of the word "unnecessary", a hangover from the provisions of the Town and Country Planning Act 1977, under which this plan was first promulgated.

[154] *Specific measures are set out in Appendix 1 to this decision:*

Proposed Plan Change 55

[155] The terrestrial component of the site is in the Mangawhai – Pakiri Special Character Activity Area and the dune lakes are mapped as an Inland Waterway Activity Area. No plan provisions or evidence were provided on the latter but we have looked at them and note a conservation emphasis with some recreational and rural activity mentioned. Background material on the Mangawhai-Pakiri Activity Area includes a description of the Area and its specific resource management issues. The latter include:

> Issue (ii):The area has high natural environmental value, and high landscape quality. These features make an attractive living environment and an attractive recreation/tourism destination. However, one of the contributing factors to the high natural environmental values and landscape quality is the relative lack of urban type structures and activities. The introduction of further living opportunities and other non-rural production based activities, has the potential to detrimentally affect the high natural environmental values and landscape quality in the area.

> The general objective for the Activity Area reads:

> Objective: To retain the open, and remote coastal/non-urban character of the area and the high landscape and natural environmental values present whilst enabling the continued operation of the productive activities undertaken.

It is followed by two further objectives the first of which is supported by ten policies. Relevantly these include:

> 5.1 Objective: To protect and retain the natural, coastal, non-urban and remote character of the Pakiri Coastline and surrounding rural backdrop.
> 5.2 Policies: (ii) Protection of the quality of water and water habitat in the streams in the area ......by controlling earthworks, bush and vegetation removal, siting of buildings and landform modification along .....the river and streams
>
> (iii) Protection of features and areas of high natural environment value and wildlife habitats including riparian vegetation through controls on earthworks and bush and vegetation removal and limitations on activities and subdivision.
>
> (iv) Protection of the high quality coastal landscape – in particular the extensive sandy beach and dunes with a varied rural backdrop

of bush, pasture and exotic forest – from significant change or modification from its present state.

(vi) Retention of the "remote" and non-urban character of the Activity Area by limiting the creation of additional sites and by limiting the range of activities to those largely occurring at present and making no provision for extensive urban settlement or activities that would draw large numbers of people to a site.

(vii) Using subdivision as an incentive to legally and physically protect native bush and vegetation and other natural features by providing for the subdivision of additional sites on landholdings where native bush and vegetation and other natural features are legally and physically protected through the use of covenants.

(x) Landscaping, planting and developing Eyres Point as a public reserve now that quarrying of the area has ceased.

[156] Section 7 of the Mangawhai – Pakiri Special Character Activity Area provisions include Intended Environmental Results and Environmental Performance Criteria. The section was both an appendix to Mr Scott's evidence and included in the Bundle of Agreed Documents. Whilst being neither objectives nor policies, the material constitutes *"other provisions of a …… proposed plan"*.

Proposed District Plan

[157] In addition to the general Rural provisions our attention was drawn to certain following specific provisions of the Landscape Protection Rural Zone which expressly apply. They are set out in Appendix 2 to this decision.

Notably, no comparable provision to Policy 5.2(vii) of PC55, which expressly provides for subdivision as an incentive to protect native bush and other natural features, was drawn to our attention. We did however note for ourselves Objective 7.8.3.1.1 which (in a rather backward-looking manner) sets out to "protect and retain" [certain natural, coastal…character] in the relevant area. This is supported by the slightly more pro-active Policy 7.8.3.2.1 which provides that "activities and subdivision should not affect **and, wherever possible, should enhance the high quality landscape in the zone…** (emphasis added).

[158] Interestingly the PDP contains a Dune Lakes Zone pertaining to both the Kaipara South Head and Tomarata dune lakes, but not the Te Arai Lakes even though the council has gone to the trouble of providing a large-scale map of them (Map 42). The Dune Lakes Zone has provided its own Objective (7.8.4.1.1) and Policies (7.8.4.2.1-4) which address protection of landscape and natural character values, but acknowledging the "continuation of appropriately located rural activities, and limiting new activities and structures".

New Zealand Coastal Policy Statement

[159] As the site is located within the coastal environment, regard is to had to the provisions of the New Zealand Coastal Policy Statement [s.104(1)(c)]. The planning witnesses and Ms Houghton, counsel for the Director-General of Conservation, assisted with identification of relevant provisions which we have set out in Appendix 3 to this decision, being Policies 1.1.1, 1.1.2, 1.1.3, and 1.1.5.

[160] Ms Sedgley also identified Policy 3.1.2 as relevant. It deals with activities involving subdivision, use and development in the coastal environment in the following manner:

> Policy 3.1.2
>
> Policy statements and plans should identify (in the coastal environment) those scenic, recreational and historic areas, areas of spiritual or cultural significance and those scientific and landscape features, which are important to the region or district and which should therefore be given special protection; and that policy statements and plans should give them appropriate protection.

Subsequent Policies 3.2.1 and 3.2.2 provide, inter alia, that:

- Policy statements and plans should define what forms of subdivision and use are *appropriate in the coastal environment* and in what locations.

- Related adverse effects should as far as practicable be avoided and where this is not possible they should be mitigated.

When commenting on the linkage between the NZCPS and other instruments, Ms Sedgley advised us that "The regional planning documents do identify this area as rating 5 (above average) on a scale of 1 to 7 for protection and requires that any development that does occur in this area must be undertaken carefully so as to not detract from the amenity values that have resulted in this landscape".

Hauraki Gulf Marine Park Act 2000 ("HGMP")

[161] By s10 HGMP sections 7 and 8 of that Act comprise a New Zealand Coastal Policy Statement for the purposes of the RMA. By s9(4) HGMP a consent authority must, when considering an application for a resource consent in the Hauraki Gulf or its islands and catchments, have regard to ss7 and 8 in addition to the matters

contained in the RMA. Those sections flow from many of the Part II RMA matters that are relevant in this case, and to a high degree mirror relevant provisions of the NZCPS and the regional planning instruments.

Auckland Regional Policy Statement

[162] Regard is also to be had to relevant provisions of the Auckland Regional Policy Statement [s.104(1)(c)]. Again, the planning witnesses assisted with identification of various provisions, which we have set out in Appendix 4 to this decision.

Auckland Regional Plan - Coastal

[163] Ms Sedgley appraised us in general terms of aspects considered relevant but did not give evidence on specific objectives or policies. She referred to:

- A direction that district planning authorities identify the landward boundary of the coastal environment using criteria in the ARPS (vegetation, habitat, features);

- A provision *"that it is important to avoid the inappropriate siting, scale and design of buildings in these identified areas* (the coastal environment) *and the avoidance of roads or accesses across hill faces."*

[164] We will analyse the proposal against the many provisions of the several statutory instruments, shortly.

Section 104(1)(i): Other Matters

[165] Ms Houghton drew our attention to two matters that she submitted should be taken into account, namely:

(i) The Conservation Management Strategy for Auckland (1995 – 2000), which recognises the landscape of the general area around Eyres Point as being a *"stunning and unique coastal area with excellent unspoilt beaches".* Ms Houghton submitted that the beach environment adjacent to the property includes significant habitat for the New Zealand dotterel, fairy tern and variable oyster catcher, and that

Pingao is also in excellent health and abundance in the area. Ms Houghton called no evidence about this, but the statement is not likely to be controversial.

(ii) The provisions of the HGMP Act which we have already discussed.

<u>Application of s.406</u>

[166] Until the proposed plans become operative, s.406 of the Act provides consent authorities the power to refuse consent if the proposed subdivision would not be in the public interest. We concur with Mr Enright's submission that potentially relevant matters of public interest are largely subsumed by considerations already discussed. However, we cannot determine whether adequate provision has been made for stormwater drainage and wastewater disposal in the absence of the necessary regional consents [s.406(1)(b)]. And despite Mr Wyborn's assurance that adequate provision can be made for the disposal of sewage it would assist the Court with its function under s.406 to know that no consent is required for this activity under a transitional regional plan or the Auckland Proposed Regional Air, Land and Water Plan, or otherwise that consent is forthcoming.

<u>Gateways to the jurisdiction to consent</u>

[167] There are two gateways to a consent authority's jurisdiction to consent to a non-complying activity, through one of which the application must pass [s.105(2A)] (pre-2003 Amendment), which are (slightly summarised):

- If the adverse effects on the environment will be minor, or

- If the activity will not be contrary to the objectives and policies of the relevant plans.

[168] We now consider whether the proposal meets either of these conditions.

Will the adverse effects be minor?

[169] We have found that in some respects there would be actual and potential adverse effects that would be more than minor, resulting from:

(i) The permanent visual and landscape effects of development occurring on proposed Lots 1 and 2 including on the coastal environment. Building work on the lot 3 and lot 9 Development Areas as currently delineated would have a similar effect, certainly in the short to medium term.

(ii) The visual and landscape effects of developing Lot 4 as presently suggested. While expected to lessen with time those effects would remain greater than minor on account of the lot's visibility from the council reserve and its inclusion in the coastal environment.

(iii) Cumulative effects resulting from the preceding matters.

[170] In our view, if the proposal is to proceed further, and for reasons recorded throughout this decision, a number of things need to happen if the stage is to be reached where adverse effects on the environment can be avoided or mitigated to the point where they are no more than minor.

(a) Lots 1 and 2 should be deleted and no development occur on that part of the property. A question would then remain as to whether any kind of revegetation should be promoted there in mitigation of any development on Lots 3 and 9. Our tentative view is that the gorse should simply be left to act as a nurse crop, in which certain natural indigenous revegetation will slowly occur. A programme for removal of weed species other than grasses able to inhibit regeneration, and for follow-up maintenance in this regard, should probably be imposed.

(b) Lots 3 and 9 should be the subject of amendments to development areas that we have described. Sea and land views will remain available from them, but adverse effects in visual terms would be no more than minor.

(c) Lot 5 should be the subject of an amended development area as already described, with the site shifting uphill. Lots 5 and 6 will then produce adverse visual effects that should hopefully be no more than minor (subject to detailed proof in connection with land use consent applications), given the extent of growth of new indigenous vegetation already apparent and likely to continue if appropriately protected. Development of Lot 4 should be deferred pending successful establishment and growth of new vegetation more or less in the manner that the applicant proposed when offering Condition 5 relating to Lots 1 and 2.[19]

(d) Consideration might be given to replacing Lots 1 and 2 as lots for lodge structures, with development areas (and new lots) in more or less the positions of proposed meditation areas 2 and 3, where good vegetative screening exists, and some good sea views north-eastwards will be available (but with adverse visual effects no more than minor, as with the adjusted development areas on Lots 3 and 9). It is our current view that this should be able to be achieved within the jurisdiction of the present application.

(e) Applications ought to be made for consents for the proposed lodge structures and related development so that decisions and findings on those can be factored into the assessment overall.

[171] The various findings (including tentative findings) that we have made on visual, landscape, and some ecological matters, take appropriate account of the permitted baseline that includes existing use rights for quite intensive pastoral farming and for scrub and bush clearance up to 35% of the land area. The pastoral farming aspect includes loss of young indigenous vegetation to foraging stock, and farm effluent reaching the dune lakes and wetland areas.

[172] We have found in a preliminary way that there should be no actual or potential adverse effects greater than minor in respect of wastewater disposal and edge effects/planting. We have found that there should be no such effects concerning Maori cultural matters. Because there are outstanding regional consent matters we are unable to make a definitive finding in respect of potential or cumulative stormwater and earthworks effects, in particular on the ecology of the Te Arai Point Swamp wetland. And for the latter reason we can presently make no finding on overall ecological effects. The absence of an application for consent

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[19] Mr Enright submitted that the decision of the High Court in *Wilbow Corporation NZ Ltd v North Shore City Council* [2002] 1 NZLR 115 is authority to the effect that a subdivision cannot be staged if staging was not a feature of the original application. That misrepresents the central feature of the decision which is that processes subsequent to consent (under s.223) are not to involve staging if staging was not part of the <u>consent</u>. Further, if Mr Enright is impliedly suggesting that there is a jurisdictional problem of the sort discussed in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628, we hold that it is not possible that further persons might have become submitters against the subdivision if staging had been mentioned in the application, because staging (to allow for vegetative screening or mitigation to grow before construction is undertaken) will only mitigate effects, not exacerbate them. This kind of attempted technical points-scoring is unhelpful: the purpose of the Act is not promoted by it.

concerning the form of lodge structures and related development, prevents us from completing what we consider to be a necessary holistic assessment of the proposal on this complex site.

Will the activities be contrary to the objectives and policies?

[173] The alternative gateway is where the activities will not be contrary to the objectives and policies of relevant plans (the transitional plan, proposed Plan Change 55, the proposed district plan, and the proposed Regional Coastal Plan). We remind ourselves that the relevant test is whether the proposal would be contrary in the sense of being "repugnant to, or antagonistic; something more than just non-complying"[20]. The respondent maintained that the proposal would be contrary to objectives/policies of all three district plans, with the following matters amongst those identified by Mr. Scott:

- Maintenance of the remote and non-urban character of the area. It was Mr Scott's evidence that to safeguard these characteristics development should be restricted or prevented, or at least located in areas where it is not readily visible from public viewing places.
- Maintenance of the landscape qualities of the area. Mr Scott opined that whilst PC 55 and the PDP provide for subdivision and development based on the protection/enhancement of native bush and other features, the plans give clear direction that such development should only be approved where the relevant landscape qualities are not compromised. He did not however link this opinion to specific plan provisions.
- Protection of natural values. Whilst recognizing related objectives/policies linked to subdivision, in Mr Scott's opinion potential positive effects are likely to be less than those contended for by the applicant on account of uncertainties and potential adverse effects associated with wastewater disposal, earthworks and stormwater runoff.

[174] Ms Sedgley expressed the opposite opinion while acknowledging close analysis is required on account of the tension between the plans' landscape protection provisions and development facilitated by subdivision to protect valued natural features. Unlike Mr Scott she found no difference in the status of the respective plan provisions. We concur with that view in the sense that no policies

[20] *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70 at p.80.

are expressly ranked higher than others although one would normally expect greater weight to attach to objectives (what is to be achieved) than policies (how something is to be achieved). It was Ms Sedgley's opinion that through the adoption of appropriate location and design parameters the dual objectives of the plans would be met. We are not yet confident that is an accurate assessment, our concerns being those that we have already set forth relating to effects on the environment.

[175] The proposal as currently framed clearly has difficulties satisfying some objectives and policies. More particularly development on Lots 1 and 2, and on Lot 4 if it were to be developed immediately, would be repugnant to transitional plan provisions 10B.1, 10B4(a), 10D.1 and Policy 10B.4(d). The same would apply with PC55 Objective 5.1, which is concerned with protecting and retaining the characteristics Mr Scott highlighted, and Policies 5.2(iv) and (vi). Insofar as the latter are concerned it is evident the proposal (unmodified) would introduce significant change to the present state of the coastal landscape. It would create additional sites in the Mangawhai-Pakiri Activity Area, and not limit the range of activities to those largely existent. However, it is consistent with that part of the PC55 Activity Area general objective concerned with *retaining natural values present* and related Policy 5.2(vii), as well as with Objectives and Policies for the Inland Waterways Activity Area. As tourist accommodation for up to 30 persons is a discretionary activity in the proposed plan it is apparent some new buildings in the zone are anticipated, but only in carefully selected and planned locations.

[176] In the absence of regional consent applications it is not possible to determine whether the proposal is compatible with PC 55 Policies 5.2(ii) and (iii) or proposed plan Objectives and Policies. When the regional applications are made, objectives and policies in the Regional Erosion and Sediment Control Plan and the Proposed Regional Air, Land and Water Plan may also require consideration.

[177] To summarise, the proposal is compatible with some provisions (natural feature protection/enhancement, including the Inland Waterway Activity Area and in PC 55); contrary to others (landscape, coastal environment, rural character); and has undetermined aspects associated with outstanding consents. It is our tentative view that modifications to the proposal could cure such of the contrary qualities as may presently be said to be repugnant to objectives and policies, but those will need to be tested in the course of processing of the further necessary applications, and the finalising of all matters on an holistic basis.

Assessment against the National and Regional Instruments

[178] The relevant portions of the national and regional policy statements and plans derive directly from s.5 and the other relevant portions of Part II of the Act. They are strong statements and provisions of high importance. It is they in turn which give rise to the district plan provisions that we have discussed in detail. If the proposal can be successfully modified along the lines we have suggested, withstand any challenges to the assessments of the necessary further applications, and stack up in terms of final holistic scrutiny that would need to occur, it may meet the required tests concerning the national and regional instruments.

Judgment

[179] Consent cannot presently be granted because without modification the application would not come within the jurisdiction of the Court under s.105(2A). This situation results in part from the absence of necessary district and regional consent applications and related details required to afford a comprehensive understanding of the proposal and its effects. The fact that the matter has reached the Court in this form does not reflect particularly well on either the applicant or the consent authorities. The principles enunciated in the ***AFFCO No. 2*** decision are unambiguous and Sections 91 and 92 enable the authorities to deal effectively with situations of this type.

[180] Nevertheless, we have concluded that the application is not without merit and record that counsel for the respondent said that there were aspects of it of "some quality", in his opening submissions. This was also the tenor of the evidence of Mr Brown an experienced landscape architect familiar with this section of coast. In an amended form it may well satisfy s.105(2A) and the matters relevant to the exercise of discretion, and accord with the purpose of the Act. Mr Littlejohn, in his concluding remarks in reply, invited the Court to allow the applicant an opportunity to make changes if consent could not immediately be granted. We intend to do that.

[181] While the applicant may be disappointed with this outcome in the short term, it is one that is necessary having regard to the strongly competing issues that arise from what is a complex and quite unusual site and set of historical, geographical, and ecological circumstances. We hope that the applicant may be encouraged to fill the unfortunate gaps, make the necessary amendments, and take its innovative proposal to a satisfactory conclusion.

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[182] For this reason we have made this decision an interim one so that the proposal might be kept alive.

[183] Should the application proceed further, it is anticipated there will be appropriate consultation between the parties with the objective of fashioning a proposal with mutual support or at least reducing and sharply defining any outstanding issues. If necessary Court assisted mediation could be made available.

Conditions of Consent

[184] We found the draft conditions submitted by the respondent generally suitable. However, there are some detailed aspects that will require further consideration if the appeal remains before the Court. We will advise the parties of the detail of those matters if or when the need arises.

Determination

[185] For the reasons given consent cannot be granted to the application in its current form. The applicant is to report to the Court by 1 February 2005 as to whether he wishes to keep the appeal alive beyond that date on the basis of making amendments to the proposal. If this election is made a timetable for expeditiously finalising the matter is to accompany the advice. Should the applicant not wish to continue, the Court is to be advised within the same timeframe.

[186] The question of costs is reserved.

Some General Observations

[187] During the course of this decision we have made some passing criticism of the fact that the parties and the Court had to analyse 3 lengthy district planning documents, and also that we were confronted with a huge volume of materials during the 5 hearing days (the latter being caused in part – but not entirely – by the former). We wish to explain those criticisms a little more, and record that we raised them with counsel during the hearing and offered the opportunity for comment.

[188] Leaving aside (but not condoning) the sheer length of, and repetitiveness within, each district plan, we are concerned that the transitional plan remains alive

and requires to be analysed for every application brought, it being a plan promulgated under legislation that had a significantly different purpose to the RMA. The transitional plan remains alive because PC55 has not been made operative, even as to part. We are told that that is the case because PC62 (on financial contributions) has been the subject of long-running references only recently resolved, and there is some link between the two plan changes. We do not know enough about an alleged link to comment, but we are aware that the PC62 references have been finalised.

[189] Quite apart from the waste of time and money in requiring analysis of the outdated provisions of the transitional plan, there is the prospect of genuine unfairness occurring concerning one of the consent gateways that applications for non-complying activities must pass through. Section 104D(1)(b)(iii) makes it clear that an application must not be contrary to objectives and policies in all of a council's plans and proposed plans. Conceivably, and ironically, outdated provisions in the transitional plan could become the rock on which an application founders.

[190] Finally on the subject of the district plans, there must come a point where there is a concern that PC55 (itself now of some age) continues to be treated as the dominant planning document rather than the PDP. The PDP was promulgated nearly 5 years ago but the important rural provisions in it have not yet been made the subject of decisions on submissions. It is to be hoped that this situation can be rectified as soon as possible.

[191] Turning now to the issue of voluminous materials in the case. All counsel must by now be well aware of the case management practices of this Court that require the narrowing of issues in dispute. Hence we were bemused, having heard from counsel for the council that there were some aspects of the present application that were of "some quality" and the subject of agreement, to receive submissions and planning evidence of great length and that seemed to leave no stone unturned in a quest to have the appeal refused. Such an approach necessarily leads other parties to have to answer every point, and the quantities of material confronting the Court become very large indeed. A further consequence can be decisions of the length of this one – a situation we are not happy about.

[192] Finally on this topic we should mention the large numbers of authorities cited by some counsel – again considerably adding to the volumes of material that we are expected to consider. During the hearing we mentioned to counsel the existence of

an instructional web-site, that of the Land and Environment Court of New South Wales (www.agd.nsw.gov.au/lec). Attached as Appendix 5, is an excerpt from a Practice Direction that may be found on that site, concerning citation of authorities:

It is to be hoped that our Court will at some stage issue a Practice Note on the topic, but we offer the quote from the LECNSW source as a well-phrased statement of the issues meantime.

DATED at Auckland 3rd day of December 2004.

For the Court:

L J Newhook
Environment Judge

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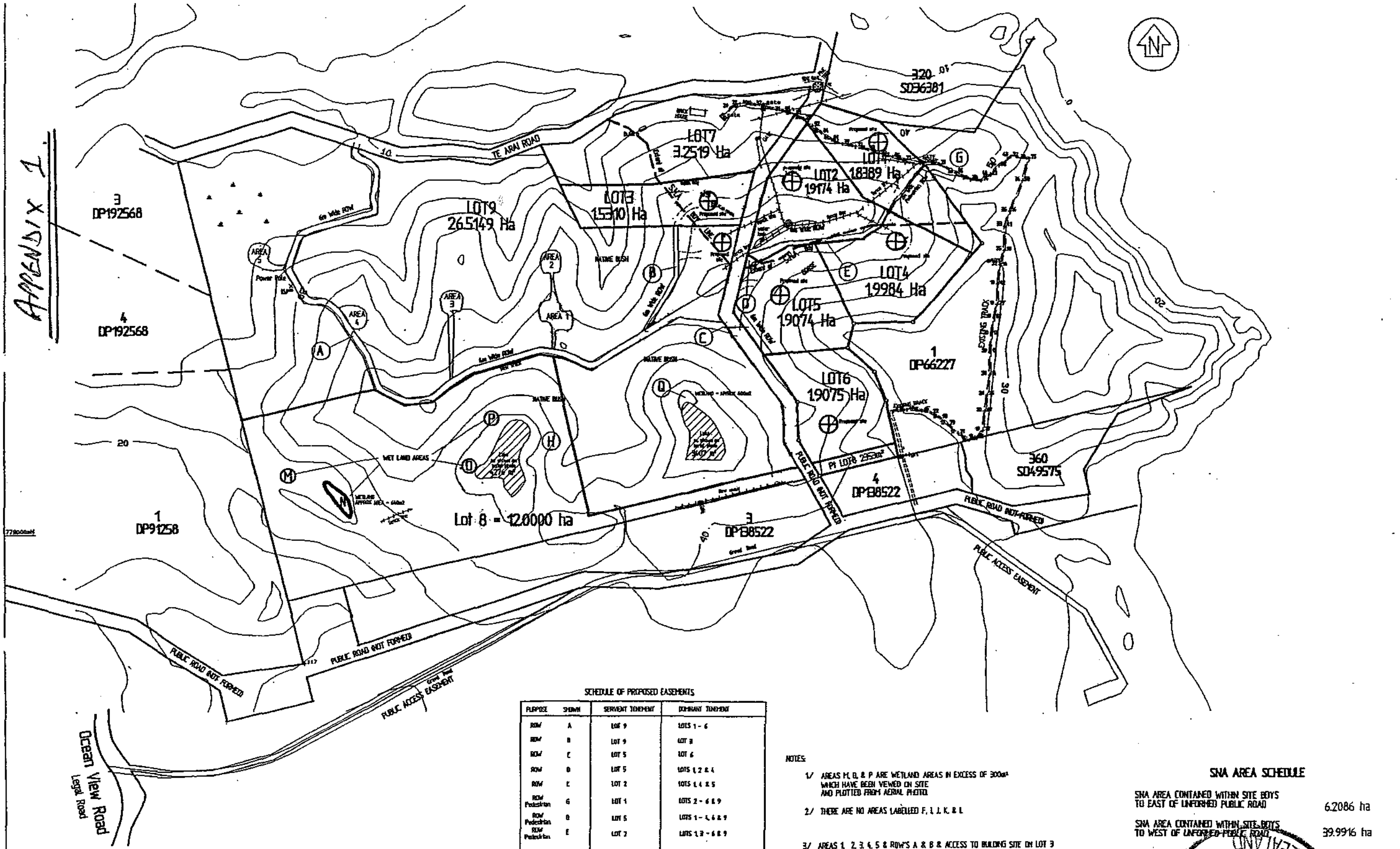
APPENDIX 1



SCHEDULE OF PROPOSED EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
ROW	A	LOT 9	LOTS 1 - 6
ROW	B	LOT 9	LOT 3
ROW	C	LOT 5	LOT 6
ROW	D	LOT 5	LOTS 1, 2 & 4
ROW	E	LOT 2	LOTS 1, 4 & 5
ROW Pedestrian	G	LOT 1	LOTS 2 - 6 & 9
ROW Pedestrian	D	LOT 5	LOTS 1 - 4, 6 & 9
ROW Pedestrian	E	LOT 2	LOTS 1, 3 - 6 & 9

NOTES:

1/ AREAS M, O, & P ARE WETLAND AREAS IN EXCESS OF 300m² WHICH HAVE BEEN VIEWED ON SITE AND PLOTTED FROM AERIAL PHOTO

2/ THERE ARE NO AREAS LABELLED F, I, J, K, & L

3/ AREAS 1, 2, 3, 4, 5 & ROW'S A & B & ACCESS TO BUILDING SITE ON LOT 3 FALL WITHIN THE SNA AREA AND ARE TO BE EXCLUDED FROM BUSH PRESERVATION

4/ ALL BOUNDARY DIMENSIONS & AREAS SHOWN HEREON ARE SUBJECT TO A FULL LAND TRANSFER SURVEY. THE TOTAL PRECALCULATED AND UNAPPROVED AREA OF THE ENTIRE LAND UNDER SURVEY = 52.8674ha WHICH IS COMPILED FROM SURROUNDING GAURANTEED SURVEYS. THE UNDERLYING CT 240/828 = 46.3298ha

5/ LEVELS SHOWN HEREON ARE IN TERMS OF LANDS & SURVEY DATUM 1946.

SNA AREA SCHEDULE

SNA AREA CONTAINED WITHIN SITE BDYS TO EAST OF UNFORMED PUBLIC ROAD	6.2086 ha
SNA AREA CONTAINED WITHIN SITE BDYS TO WEST OF UNFORMED PUBLIC ROAD	39.9916 ha
TOTAL SNA AREA CONTAINED WITHIN SITE BDYS	46.2002 ha

PROPOSED SUBDIVISION OF PART ALLOT 20 & PART NORTH PORTION ALLOT 21 PARISH OF MANGAWHAI

ORIGIN: 778386.359 N 288201.882 ROTATION: 0°
SCALE 1:2500 on A1 sheet 1:300 on A2 sheet

PREPARED BY: HAMPSON & ASSOC.LTD.
PO BOX 302-229, NHPC Ph 4140325 FAX 4140329

Eyres Eco-Park Scheme Plan # 7 - FEB 2004

COMPUTED BY: HH
REFERENCE: 4839

DATE: 4 MAR 2004

Appendix 2

Transitional District Plan

Objectives:

10B.1 To conserve and enhance where practicable those features of the natural environment that contribute significantly to the amenities of the rural and coastal areas.

10B.4(a) To preserve the landscape qualities of open space and remoteness in coastal rural areas.

10B.4(b) To protect significant areas of native bush and trees from unnecessary clearance.

10D.1 To ensure that structures in areas zoned Rural Conservation are not obtrusively sited by limiting their bulk and location and controlling their design and appearance.

10F.1 To promote the appropriate protection and/or development of land through subdivision controls suited to the range of activities allowed.

Policies:

10B.4 Rural Conservation 3 (Coastal Landscape Protection) Zone

(c) To protect significant areas of native bush and trees where they contribute to the amenities of a locality, function as important wildlife habitats, or ......

(d) To preserve the natural character of the coastal environment by prohibiting the obtrusive location of buildings, by limiting their height and bulk, and by controlling their design and external appearance.

(e) To make provision for further subdivision based upon the economic use of the land, or for the preservation of the natural environment.

10C.2

(c) To make provision for a comprehensive range of activities including farming and forestry, however it is Council's intention to restrict further development to those activities which do not conflict or compete with the qualities of open space and remoteness of landscape.

Subdivision **rules** allow for protection of significant stands of native forest or significant natural feature on the basis of one new lot with a minimum area of 2.2 ha for every 20 ha (or part thereof) of qualifying site (Rules 10.7.15.2 and .5).

Appendix 3

Proposed District Plan 2000

Objectives:

7.8.3.1.1 To protect and retain the natural, coastal, non-urban and "remote" character of the Mangawhai to Pakiri (J Greenwood Road) coastline and related inland area on the east coast ...

7.8.3.1.2 To protect and enhance wherever possible, the high value landscapes, and significant natural areas and features, including .....lakes and wetlands within the zone.

Policies

7.8.3.2.1 Activities and subdivision should not adversely affect, and wherever possible, should enhance the high quality landscape in the Zone; in particular ... the coastline, dunelands and inland backdrop from Mangawhai to Pakiri (J Greenwood Road).

7.8.3.2.3 The "remote" and non-urban character of the Zone should be retained by limiting the creation of additional sites and by making no provision for extensive urban settlement or permanent activities which would draw large numbers of people to a site or introduce significant urban elements to the Zone.

7.8.3.2.6 Features and areas of high natural environment value or high landscape value and wildlife habitats including riparian vegetation should be protected and maintained through controls on earthworks and bush and vegetation removal and limitations on activities and subdivision.

7.8.3.2.7 The location, nature and scale of buildings should not adversely affect the high quality landscape within the Zone.

Appendix 4

New Zealand Coastal Policy Statement

Policy 1.1.1

It is a national priority to preserve the natural character of the coastal environment by:

(a) Encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;

(b) Taking into account the potential effects of subdivision, use or development on the values relating to the natural character of the coastal environment, **both within and outside the immediate location**; and

(c) Avoiding cumulative adverse effects of subdivision, use and development in the coastal environment. (emphasis added)

Policy 1.1.2

It is a national priority for the preservation of the natural character of the coastal environment to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna in the environment by:

(a) Avoiding any actual or potential adverse effects of activities on the following areas or habitats:

- Areas and habitats important to the continued survival of any indigenous species; and
- Areas containing nationally vulnerable species or nationally outstanding examples of indigenous community types.

(b) Avoiding or remedying any actual or potential adverse effects of activities on the following areas:

- Outstanding or rare indigenous community types within an ecological region or ecological district;
- Habitat important to regionally endangered or nationally rare species and ecological corridors connecting such areas; and
- Areas important to ...vulnerable stages of common indigenous species, in particular wetlands ....

(c) Protecting ecosystems which are unique to the coastal environment and vulnerable to modification, including .... coastal wetlands, ... and dunes and their margins; and

(d) Recognising that any other areas of predominantly indigenous vegetation or habitats of significant indigenous fauna should be disturbed only to the extent reasonably necessary to carry out approved activities.

Policy 1.1.3

It is a national priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:

(a) Landscapes, seascapes and landforms, including:

- Significant representative examples of each landform which provide the variety in each region;
- Visually or scientifically significant geological features; and
- The collective characteristics which give the coastal environment its natural character including wild and scenic areas;

(b) Characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and

(c) Significant places or areas of historic or cultural significance.

Policy 1.1.5

It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate.

Appendix 5

Auckland Regional Policy Statement

Strategic Objectives (section 2.5.1)

Objective 4

To preserve the natural character of the coastal environment, whilst ensuring that the use of the coastal environment by those industries and activities which serve the needs of the Region and which depend on a coastal location, is appropriate and efficient.

Objective 5

To protect the intrinsic values of the Region's natural resource base, and to make appropriate provisions for the avoidance, remediation or mitigation of adverse effects on the Region's environment, including the identification of significant natural features and landscapes, and areas of significant indigenous vegetation and habitat, and protection of these from inappropriate subdivision, use and development.

Landscape Heritage Policies

For those parts of the Eyres Point coastal environment abutting the subject site that are Regionally Significant, relevant objectives and policies include (Section 6.4.19):

1. Subdivision, use and development of land and related natural and physical resources shall be controlled so that in areas identified in Map Series 2 and 3:

(i) ...

(iii) The quality of regionally significant landscapes (landscape rating 5) is protected by avoiding adverse effects on the elements, features and patterns which contribute to the quality of the landscape unit.

(iv) Regionally significant landscapes with a sensitivity rating of 5 are protected by ensuring that any subdivision, use and development can be visually accommodated within the landscape without adversely affecting the elements, features, and patterns which contribute to the quality of the landscape unit.

6.4.21 Resource Management Reasons

The intention of the policies is to protect the aesthetic and visual quality, character and value of the major and unique landscapes from inappropriate subdivision, use and development. ... In Regionally Significant Landscapes, the emphasis is on protection of the elements, features and patterns which contribute to the quality of the landscape unit ....

Natural Character of the Coastal Environment

Policy 7.4.4

(1) The natural character of the coastal environment shall be preserved, and protected from inappropriate subdivision, use and development by:

(i) In areas of high natural character, avoiding adverse effects on:

(b) Areas of indigenous vegetation and habitats of indigenous fauna and associated processes;

(d) Features, elements and patterns which contribute to landscape value and scenic and visual value.

(e) Natural features, sites and natural areas of historic, aesthetic, cultural or spiritual value.

(i) The healthy functioning of ......coastal wetlands ...

(2) Where appropriate, the natural character of the coastal environment shall be restored and rehabilitated.

Policy 7.4.7

(1) Areas of significant indigenous vegetation, significant habitats of indigenous fauna, significant landforms and geological features, and significant places or areas of historic or cultural significance in the coastal environment shall be preserved and protected by avoiding remedying, or mitigating the adverse effects of subdivision, use and development in a manner consistent with Policies 6.4.1 – 3 and 7.4.4 – 1 (i), (ii) and (iii).

(3) Outstanding and regionally significant landscapes in the coastal environment shall be preserved and protected in accordance with Policy 6.1.19-1.

<u>Appendix 6</u>

<u>Excerpt from a LECNSW Practice Direction:</u>

1. In recent years there has been a substantial growth in the number and availability of reports of judgments in this and other jurisdictions, such reports being available either in published reports or in electronic form. The current weight of available material, whilst increasing the knowledge of the work and decisions of the courts, causes problems both for advocates and for the Court in properly limiting the nature and amount of material used in the preparation of and submissions in subsequent cases.

2. Recent and continuing efforts to increase the efficiency and thus reduce the cost of litigation, whilst maintaining the interest of justice, will be hindered if the Court is burdened by weight of inappropriate and unnecessary authority. The Court has experienced the following:

   (i) Long lists of authorities, but only a small number from the list being referred to by the advocate;

   (ii) The citation of a number of authorities for a single proposition when only one authority (namely the most recent or the most authoritative) would be sufficient;

   (iii) The failure to state the proposition of law for which the authority is cited;

   (iv) The failure to identify the part or parts of the judgment that support the proposition; and

   (v) Authorities referred to in electronic form when the authorised report is available.

ORIGINAL

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **EYRES ECO-PARK LTD**

(RMA 0552/03)

Appellant

AND **RODNEY DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

CORRIGENDUM

The Interim Decision (A 147/2004) issued on 3 December 2004 in respect of this proceeding omitted to list D & A Clark in the appearances at page 1 (as may be apparent from a reading of the first bullet point in para [4] of the decision).

I direct that page 1 of the decision be amended by adding the appearance of A Clark on behalf of herself and D Clark. The decision is then to be amended by replacing the original page 1 with the **attached** corrected version.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Dated at AUCKLAND the 22nd December 2004.

LJ Newhook
Environment Judge