BEFORE THE ENVIRONMENT COURT

Decision No: [2013] NZEnvC 66

ENV-2012-WLG-000038

IN THE MATTER of an appeal under section 120 of the Resource Management Act 1991

BETWEEN NEIL and DIANA KIRTON
Appellants

AND NAPIER CITY COUNCIL
Respondent

Heard: at Napier on 19 February 2013

Court: Environment Judge B P Dwyer
Environment Commissioner K A Edmonds
Environment Commissioner I Buchanan

Counsel/ Appearances:
M Williams for N and D Kirton
M Lawson for Napier City Council

INTERIM DECISION OF THE COURT

Decision issued: 22 April 2013

A: Appeal allowed

B: Costs reserved

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Introduction

[1] Neil and Diana Kirton (Mrs and Mrs Kirton/the Appellants) appeal a decision of Napier City Council (the Council) declining a restricted discretionary activity application for subdivision consent. The appeal was made pursuant to s120 Resource Management Act 1991 (RMA).

[2] The only parties to the appeal were the Appellants and the Council. There had been a number of submissions in opposition to the application, but none of the submitters participated in the appeal process.

Background

[3] Mr and Mrs Kirton own a property at 113 Fryer Road, Poraiti, Napier (the site) in the Rural Residential Zone of the Napier District Plan (the District Plan). Poraiti is a hillside suburb on the foothills of the Heretaunga Plains. It is characterised by relatively narrow sealed and winding roads, wide grass berms, established housing and a mixture of residential, rural/residential and lifestyle land holdings.

[4] Title to the site contains 1.5ha and is essentially rectangular in shape, except for a long narrow *leg-in* (73m long x 5m wide) extending from the south western corner of the rectangle out to Boyd Road. Although this leg-in gives both legal and physical access to Boyd Road it is not presently used for that purpose and actual access to the site up until the present time has been obtained from Fryer Road by way of a right-of-way out to that road. Mr and Mrs Kirton have a house on the existing title, whose practical access is from the Fryer Road right-of-way.

[5] The subdivision proposal declined by the Council was to subdivide the site into two lots. For ease of explanation, a copy of the subdivision plan is attached to this interim decision as Appendix 1. It will be seen from Appendix 1 that proposed Lot 1 (5005m^2) could be generally described as boomerang shaped, plus the addition of the leg-in to Boyd Road which is to provide the access to that lot. Proposed Lot 2 (9990m^2) containing the existing dwelling is roughly rectangular in shape and will continue to be accessed via the right-of-way from Fryer Road.

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[6] A physical feature of the site is that it is divided into higher and lower portions. Proposed Lot 1 is situated on the lower part of the site and Lot 2 on an elevated plateau. The boundary line between the two proposed lots follows the physical demarcation on the land itself. Although this gives Lot 1 a somewhat unusual shape, there is no suggestion that this precludes practical use of Lot 1.

[7] A potential building site for a dwelling house was identified on Lot 1 as part of the subdivision application and we did not hear any evidence to suggest that it was not possible to erect a dwelling house on the identified building platform. The Appellants hold a Certificate of Compliance issued by the Council pursuant to s139 RMA confirming that an 87.5m^2 traveller's accommodation unit could be established in the same position as the identified building platform on Lot 1. (We will return to issues raised by the Certificate of Compliance further in this decision.)

[8] A feature of the subdivision application was a proposal to limit development on the two lots by way of a consent notice to be registered against the new titles. It was proposed that the consent notices would limit development on the lots to a single dwelling on each title together with the right to establish visitor accommodation (a permitted use) on Lot 2 at a future date if the property owner desired. Additionally, the Appellants volunteered a further restriction that combined site coverage of buildings on the two lots would not exceed 1000m^2 in footprint area being the maximum permitted site coverage for the one existing lot under the District Plan. Ultimately, it was the consent notice proposal which appeared to us to be at the heart of the Council opposition to the subdivision application and we will return to that issue in more detail.

The District Plan

[9] We have noted that the site is in the Rural Residential Zone of the Napier District Plan. We do not propose to recite the relevant rules of the District Plan in great detail in this decision. We found them quite user unfriendly. Because there was no dispute amongst the planners as to the status of the proposal we simply set out the provisions relevant to our considerations in summary form.

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[10] Rule 35.15 of the District Plan provides that land development, including subdivision, is a controlled activity provided that:

- It complies with the standards and terms specified in Chapter 66 (Volume II);
- It complies in all respects with the relevant conditions in the Rural Residential Activity Table and Condition Table;
- It is assessed according to the matters set out in Chapter 66 (Volume II) over which the Council has reserved its control.

[11] Rule 35.17 of the District Plan provides that subdivision or development which does not comply with all of the relevant conditions in the Rural Residential Zone Activity Table and Condition Table is a restricted discretionary activity.

[12] The Kirton subdivision does not meet the lot size provisions of Chapter 66 which (in summary) allows subdivision in the Rural Residential Zone down to a minimum lot size of 5000m^2 but requires that the minimum average lot size of all lots calculated across the subdivision must be 1.5ha. Obviously, the subdivision of an existing 1.5ha lot into two lots of 5005m^2 and 9990m^2 cannot meet the minimum average lot size of 1.5ha. The subdivision accordingly falls to be determined as a restricted discretionary activity pursuant to Rule 35.17.

[13] Our considerations as to the applicable matters on which discretion had been reserved under the District Plan, were assisted by the planning witnesses, Mr M P Holder (for Mr and Mrs Kirton) and Mr C J Drury (for the Council). The two witnesses participated in a witness conference and provided the Court with a statement identifying the relevant matters on which they agreed and disagreed and the determinative issues for our consideration in this case. That statement provides the template for our determination.

[14] Before turning to the determinative matters in contention, we identify (in summary) the relevant matters which were not in dispute between the planning

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witnesses, being that:

- Effects of the subdivision on the owners of nearby properties, 92, 103 and 121 Fryer Road and 56 and 74 Boyd Road, who had provided written consents to the subdivision proposal, might be disregarded;
- The subdivided lots could be suitably serviced for water supply and wastewater and storm water disposal;
- The site is not subject to any hazards which might lead to erosion, falling debris, subsidence, slippage, or inundation. Provided earthworks were undertaken in accordance with the Subdivision Code (incorporated into the District Plan), subsequent use of the land is unlikely to accelerate, worsen, or result in any material damage to land or structures;
- The productive capacity of the site and its soil resources is low and accordingly the soil resource of the City will not be significantly compromised if consent is granted to the subdivision;
- The proposal is not inconsistent with the Regional Policy Statement;
- Sufficient legal and physical access is available to both lots;
- The existing environment includes the activities identified in the Certificate of Compliance previously referred to.

[15] The planners' witness statement identified the following determinative issues which were in dispute:

- The use of consent notices;
- The scale and intensity of permitted development;
- Precedent;
- Cumulative effects of development on rural character and amenity and the safety and efficiency of the roading network. (The witnesses described these last two issues as the *primary points of contention*[1].)

[16] We now turn to address those issues in that order. Before doing so, we make a brief observation about the provisions of the District Plan.

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Para 6, Joint Witness Statement.

[17] The application is for consent to a restricted discretionary activity. It was common ground that in determining to grant or decline consent, our considerations are restricted to the matters over which discretion is reserved in the District Plan (there being no relevant national environmental standards or regulations) and further, that the matters in respect of which we may impose conditions are similarly restricted.

[18] It must be said in this instance, that the matters over which the District Plan purports to restrict the exercise of discretion are so extensive as to make something of a mockery of restricted discretionary activity status in this Plan. We have accepted that the matters identified in the joint statement of the planning witnesses are the relevant matters for our consideration and do not propose to address the array of other matters over which discretion has been restricted which are contained in the District Plan.

The Use of Consent Notices

[19] We have noted that the Appellants proposed to restrict the activities which might be undertaken on the subdivided lots by the registration of a consent notice on the title to each lot. The rationale for the consent notices is to be found in the application for resource consent, which provided as follows:

> *Proposed Consent Notice*
>
> *In respect to proposed Lot 1, a residential care facility, a day care, a rural processing activity, travellers accommodation, a supplementary unit or an educational facility could be built on proposed Lot 1 as of right. These activities could potentially have an impact on the roading network and infrastructure within the Boyd Road area. Therefore it is requested that a Consent Notice pursuant to Section 221 of the Resource Management Act 1991 to be issued by Council and registered against the Certificate of Title to be issued for Lot 1 hereon that reads as follows:*
>
> *"That notwithstanding the provisions of the Operative Napier City Council District Plan the following land use activities shall not be undertaken or established (either individually or in conjunction) on the site:*

- *A Residential Care Facility catering for up to 10 residents (not including staff);*
- *Travellers Accommodation;*
- *A supplementary Unit;*
- *Rural Processing Activities (industrial activities processing agricultural, horticultural or viticultural produce) in buildings of up to 2500m² in gross floor area or 10% of the site, whichever is the lesser;*
- *A Day Care Centre catering for up to 10 people (not including staff); or*
- *An Education Facility.*

In respect to proposed Lot 2, the applicant is happy to accept a Consent Notice pursuant to s221 of the Resource Management Act 1991 to be issued by Council and registered against the Certificate of Title to be issued for Lot 1 hereon that reads as follows:

"That notwithstanding the provisions of the Operative Napier City Council District Plan, the following land use activities shall not be undertaken or established (either individually or in conjunction) on the site;

- *A Residential Care Facility catering for up to 10 residents (not including staff);*
- *A supplementary Unit;*
- *Rural Processing Activities (industrial activities processing agricultural, horticultural or viticultural produce) in buildings of up to 2500m² in gross floor area or 10% of the site, whichever is the lesser;*
- *A Day Care Centre catering for up to 10 people (not including staff); or*
- *An Education Facility.*

[20] In addition to the above restrictions proposed as part of the application itself, at the Council hearing of the application, the Applicants (through Mr Holder) volunteered a further restriction which would constrain development on the two lots to the total area of development presently permitted as of right under the District Plan on one lot. Mr Holder's evidence in that regard to the Council hearing was:

> *50. To completely resolve any doubt on the point, and if there was concern by the Commissioner over an additional level of*

> *development that might occur following subdivision, the applicant could constrain development to 1000m² in terms of both lots through conditions of consent. That is the resulting development over both could be conditioned to ensure a maximum combined site coverage does not exceed 1000m², as permitted to take place now on the site and confirmed by way of certificate of compliance (in terms of permitted activities).*

[21] We understood that the Appellants continued to offer a similar restriction by way of consent notice as part of this appeal. Our decision proceeds on the assumption that is the case.

[22] It will be seen from the information contained in the application that the rationale behind the Applicants offering this particular restriction on the lots was that the activities excluded by the consent notice have the potential to impact on the roading network and infrastructure within the Boyd Road area. Mr Drury identified limitations on the roading network at Poraiti. He advised that the roads in this vicinity were mostly constructed prior to 1931 to serve a handful of farms and provide access to the foreshore. The roads have apparently been sealed but other than that are considered *seriously substandard*[2] in terms of the District Plan and do not contain provision for pedestrians and cyclists.

[23] There was no dispute between the parties that the adverse effect (including any cumulative adverse effect) which a subdivision might have on the roading network was a matter in respect of which the Council had reserved a discretion. Mr Drury advised that the minimum lot size framework applicable to the Rural Residential Zone was a method by which Council sought to manage the effects of rural subdivision. His evidence was consistent with the Commentary to Objective 33.5 of the District Plan, which notes in a section headed ***Principal Reasons for Methods*** that:

> *A minimum lot size is applied in existing rural settlement and rural residential areas to enable the existing infrastructure to service the*

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[2] Para 21, Drury EIC.

> *areas without a financial commitment from the Council to provide urban services*[3].

[24] Mr Drury advised that the upgrading of Fryer Road and Boyd Road is not budgeted or planned to occur within the period expiring in 2019.

[25] The issue of traffic to be generated by the subdivision was addressed by a statement of rebuttal evidence from Mr A G Prosser (a traffic engineer called by the Appellants). Mr Prosser had provided a report to the initial Council hearing. His evidence before us was not contradicted by any contrary evidence, although he was cross-examined on aspects of his statement of evidence by Mr Lawson, for the Council.

[26] In summary, it was Mr Prosser's evidence that the volume of traffic generated by the proposed subdivision itself could easily be accommodated by the existing road network in and around the site. Mr Prosser told us that Boyd Road (which would provide the access to Lot 1) could accommodate about 150 vehicles per day (vpd). He estimated that Lot 1 would generate about 8 vpd which would take total vehicle usage of Boyd Road up to about 120vpd. We did not understand that evidence to be challenged. What was at issue was the cumulative effect of the subdivision on the roading network and we will return to that issue in due course.

[27] The purpose of the consent notice proposed by the Appellants was to constrain the extent of potential traffic generating activities which could take place on Lot 1 and in effect limit the use of the two subdivided lots to one dwelling on each, together with a possible supplementary unit on Lot 2.

[28] The Council was opposed to the imposition of a consent notice condition as proposed by the Appellants. It emerged that the Council's position on suitability of the consent notice had three aspects to it, namely concerns about:

- The durability of conditions imposed by way of consent notices generally;
- The vires and appropriateness of the condition proposed in this case;

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[3] Page 33.0-14 District Plan.

- Whether the condition satisfied the *Newbury* tests.

Durability of conditions

[29] The concern about durability was expressed in the evidence of Mr Drury who noted that an application to change a consent notice can be made under ss127 or 221 RMA (depending on what state a subdivision was at). He said that because an application to change a condition imposing a consent notice may be made *...there is no certainty around the durability of Consent Notices over time*[4]. He said that he would expect it to be difficult to deny a future owner of Lot 1 permission to construct a supplementary unit if that owner needed to care for a dependent relative in the future. It was his view that it would be difficult to see why such an activity would not be subsequently approved when considered in isolation from the original subdivision activity and that an application under ss127 or 221 RMA does not enable reconsideration of the effects of the original subdivision as a whole.

[30] A consent authority's ability to impose conditions on resource consents is founded in s108 RMA which relevantly provides:

> *(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).*

(Subsection 2 then goes on to identity a series of specific conditions which may be imposed in certain identified circumstances).

[31] Section 220(1) RMA then identifies a series of specific conditions which may be imposed on subdivision consents (as opposed to other resource consents). It should be noted however, that s220(1) does not purport to limit s108 in any way.

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[4] Para 44, EIC.

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[32] Finally, s221 RMA relevantly provides:

221 Territorial authority to issue a consent notice

(1) Where a subdivision consent is granted subject to a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners after the deposit of a survey plan (not being a condition in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued), the territorial authority shall, for the purposes of section 224, issue a consent notice specifying any such condition.

(3) At any time after the deposit of the survey plan,—

(a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:

(b) the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.

(3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3).

(4) Every consent notice shall be deemed—

(a) To be an instrument creating an interest in the land within the meaning of section 62 of the Land Transfer Act 1952, and may be registered accordingly; and

(b) To be a covenant running with the land when registered under the Land Transfer Act 1952, and shall, notwithstanding anything to the contrary in section 105 of the Land Transfer Act 1952, bind all subsequent owners of the land.

[33] Section 221 applies to conditions which are to be *...complied with on a continuing basis by the subdividing owner and subsequent owners*[5]. Any consent notice containing such a continuing condition once registered against the title to land is deemed to be a covenant running with the land, which shall *...bind all subsequent owners*[6].

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[5] Section 221(1) RMA.
[6] Section 221(4)(b) RMA.

[34] These identified provisions create a mechanism enabling conditions to be imposed on subdivision consents, which apply on a continuing basis and are binding on subsequent owners of the subdivided land.

[35] The Council's objection to the use of this mechanism by the Kirtons was that the owner of a subdivided lot may, at any time, apply to vary or cancel any condition contained in such a consent notice. (It should also be noted that the Council may similarly review any such condition and seek to vary or cancel it.) The Council contended that the possibility of variation or cancellation meant that the condition was not durable.

[36] This submission appears contrary to the clear intention of Parliament (as expressed s221) that there should be the opportunity to *revisit* such conditions. There appear to be at least two reasons why it is appropriate for there to be such opportunities:

- Firstly, ss221(3) and (3A) in essence, merely provide that *consent notice conditions* are subject to the same rights and powers of review as are all other resource consent conditions which may be reviewed and varied (including change and cancellation) pursuant to ss127 and 128 RMA. It is difficult to see why a condition of a land use consent, which is also intended to be complied with on a continuing basis and which is deemed to run with the land should be variable or reviewable, whereas a condition of a subdivision consent which is intended to run with the title to land is not so variable or reviewable;
- The alternative to having a power of variation or review is that such conditions must be locked in place in perpetuity, notwithstanding any change of circumstances.

[37] The concerns which the Council has expressed in respect of conditions secured by consent notice apply equally to other conditions imposed on resource consents generally. If Councils decline to approve resource consents subject to ongoing conditions on the basis that such conditions might be subject to application

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for variation in the future, few if any resource consents (whether subdivision or otherwise) would ever be granted.

[38] Further, it should be noted that there is no guarantee that any potential application for variation of a condition will be successful. Any such application must be undertaken in accordance with the variation and review provisions of RMA where there is provision for participation by previously interested parties (or their successors). Such an application must be determined by a consent authority in accordance with statutory criteria, including the matters in s104 RMA[7], which in turn is subject to Part 2.

[39] In that respect the decision of the Court in *McKinlay Family Trust and Others v Tauranga City Council*[8] is instructive. In *McKinlay*, an Applicant sought consent to subdivide a lot of approximately 1.5ha into three lots. The proposed subdivision was a controlled activity under current planning provisions (as of 2006), but was precluded by a consent notice placed on the title to the lot by the Environment Court in approving a subdivision of land in 2002. The Applicant sought to have the consent notice cancelled on the grounds (inter alia) that the proposed subdivision was now a controlled activity.

[40] In declining to do so, the Court made the following relevant observations:

> [52] *For our part, we have concluded that the ability of people and communities to rely on conditions of consent proffered by applicants and imposed by agreement by consent authorities or the Court when making significant investment decisions is central to the enabling purpose of the Act. Such conditions should only be set aside when there are clear benefits to the environment and to the persons who have acted in reliance on them.*
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> And further:
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> [55] *We have concluded that the Council officers* (who had agreed to uplift the consent notice) *have wrongly focused on the current Plan while*

[7] Section 131(1)(a) RMA.
[8] Decision No A 119/2008.

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overlooking the consent notice itself and its purpose. Flexibility as permitted by a plan can always be subject to restraints by consent notice or conditions. Often such constraints justify a development that would otherwise be a step of creeping incrementalism. This wide purpose of consent notices is one clearly recognised by the Council hearing panel in their decision. We agree entirely with the hearing panel decision and consider they correctly appreciated the issues surrounding the release of the consent notice.

[41] It is apparent from *McKinlay* that the cancellation of conditions imposed by consent notice is not a matter of mere formality and that in considering applications to do so, close consideration must be given to the reason why the consent notice was imposed in the first place and the extent to which other parties had relied on it. We concur entirely with that approach and reject the Council's proposition that a condition imposed by way of consent notice might be inappropriate because it could be subject to an application for variation in the future.

Vires and Appropriateness of Condition

[42] The second leg of the Council's position on use of the consent notice was that the consent notice imposed in this case was ultra vires and was an *inappropriate instrument*. The first element to the Council's position on the vires of the consent notice was a contention that where a consent notice purports to preclude a landowner from using land for activities, which would otherwise be permitted under a District Plan, it is in effect creating a *spot zoning* for the land in question. The basis for that contention is that notwithstanding this site is in the Rural Residential Zone, activities which would otherwise be permitted in that zone are excluded by operation of the consent notice.

[43] The implication which we drew from Mr Lawson's submission was that a future purchaser or occupier of the lots might be unknowingly constrained from undertaking activities, which were otherwise permitted in the Rural Residential Zone, as a consequence of operation of the consent notice.

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[44] We accept that such a person who had checked the Planning Maps and Rules of the District Plan in isolation, might not be aware of the restrictions which would

apply to these lots. However, one of the obvious purposes of the consent notice provisions of RMA is to enable registration on the title to a lot of an instrument indicating restrictions applicable to that lot, thereby giving due notice to persons who might wish to acquire an interest in it. Such a notice no more creates a spot zone than does a registered private covenant between land owners restricting various aspects of activities which might be undertaken or buildings which might be constructed on land, irrespective of District Plan provisions.

[45] Further, it has long been recognised that in imposing conditions on resource consent applications, consent authorities could apply stricter standards than might otherwise be permitted as of right under the relevant planning instruments. A number of cases have recognised that following the leading decision of the (now) High Court in *Smeaton and Others v Queenstown Borough Council and Others*[9] where Beattie J said:

> *The standards in the particular Ordinance are a general guide to be taken into account when that discretion comes to be exercised under an application for conditional use consent. At that time, certainly more stringent standards could be laid down or less stringent standards also*[10].

[46] The Court in *Smeaton* was dealing with conditional use (now discretionary activity) consent. This Court has accepted that principle in a number of cases, including *Horn v Marlborough District Council*[11] (a non-complying activity case), where Judge Kenderdine observed:

> *We think that in appropriate cases, a non-complying land use consent may include conditions that restrict permitted activities. That is because, as Smeaton holds, the activity is wholly discretionary and must pass vigorous tests to be considered appropriate*[12].

[47] We are not aware of any reason why a similar principle would not apply to restricted discretionary activities, subject only to the caveat that the imposition of such a condition must arise out of a matter in respect of which the consent authority

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9 (1972) 4 NZTPA 410 (SC).
10 At page 421.
11 Decision No W 30/2005.
12 At [136].

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has restricted the exercise of its discretion. In this case, the proposed restriction on otherwise permitted activities seeks to minimise the traffic generating potential of the new lots and there is no dispute that the management of traffic effects is one of the matters in respect of which the Council has retained discretion.

[48] The third leg of Mr Lawson's submission regarding this aspect of the case was a query as to the appropriateness of imposing restrictions on land use as a condition of subdivision consent. He referred to the provisions of s9 RMA and in particular s9(3). He observed that s9 RMA starts from the premise that land may be used for any purpose which does not contravene a district rule and that use of the subdivided lots for activities such as visitor accommodation or a second dwelling is expressly allowed in this case by a district rule, so that such uses are not restricted in terms of s9 RMA.

[49] Mr Lawson went on to contend that:

> *26 Further, the ultimate sanction in terms of enforceability of consent conditions is enforcement by way of an infringement notice or an information alleging an offence against Section 338 of the Resource Management Act. Section 338(1) creates the offence of contravening or permitting the contravention of (inter alia) Section 9. There is no offence of failing to comply with the conditions of a resource consent or even a failing to comply with a resource consent.*
>
> *27 It would not be possible to bring a prosecution under Section 338 for the contravention of Section 9 because Section 9 does not actually restrict activities that do not contravene the Rules in the Plan. All of this highlights the inappropriateness of conditions which seek to prohibit what would otherwise be permitted activities within the zone.*

[50] We do not accept Mr Lawson's proposition that failure of a land owner to comply with restrictions of the kind which the Appellants seek to impose by way of the consent notice condition in this case, might not be subject to the *ultimate sanction* of infringement notice or an information under s338. We acknowledge that breach

of the consent notice condition, of itself, might not be a breach of s338(1), but that is not the end of the matter.

[51] Any person (including a consent authority) may apply for an enforcement order requiring a person to cease any activity which contravenes or is likely to contravene a resource consent or alternatively require a person to do something which is necessary to comply with a resource consent. Alternatively, an enforcement officer may serve an abatement notice on any person requiring that person to cease an activity which contravenes a resource consent. In each case, failure to comply with a condition imposed by consent notice could be enforced through the enforcement order or abatement notice provisions of RMA. Also in each case, failure to comply with any enforcement order or abatement notice constitutes an offence against either s338(1)(b) or 338(1)(c) and may accordingly be subject to the ultimate sanction identified by Mr Lawson.

[52] Nor do we accept the proposition advanced by Mr Lawson that conditions may not be imposed on subdivision consents which restrict land use activities. Mr Lawson cited a number of authorities including *Darrington v Waitakere City Council*[13] as examples of the Court's reluctance to do so. However, it is apparent that any such reluctance has been overtaken by time and practice. Conditions restricting land use are commonly imposed on subdivision consents. That is precisely what the Court did in *Horn*.

[53] It appears to us that the determinative issue is whether or not a condition addresses effects arising out of any particular subdivision, it being long recognised that the effects of subdivisions extend beyond just the drawing of lines on paper. In this case the creation of an additional title will potentially enable an increase in traffic generating activities which may be undertaken as of right on the site and the Appellants seek to restrict such an effect.

[54] That approach seems consistent with the approach identified by the Court in *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council*[14]

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13 Decision No W68/96.
14 Decision No C 100/2001.

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where Judge Jackson observed that whether it was appropriate to impose a land use condition of a subdivision consent was *a question of reasonableness in the circumstances*[15].

The Newbury tests

[55] However, that proposition in turn led to Mr Lawson submitting that the condition to be secured by consent notice was not reasonable and could not satisfy the well known tests identified in *Newbury District Council v Secretary of State for the Environment*[16]. In summary, Mr Lawson contended that:

- There was no resource management purpose for the condition which was suggested solely for the purpose of bringing the proposal within the permitted baseline established by the Certificate of Compliance. We disagree. The purpose of the condition is to restrict the traffic generating activities which might be undertaken on site, traffic effects being one of the matters in respect of which the Council has restricted its discretion;
- The proposed condition does not fairly and reasonably relate to the subdivision for which consent is sought. We disagree with that proposition for the reasons set out in para [53] (above);
- The condition is so unreasonable that no reasonable consent authority could have imposed it because it sought to restrict activities which were otherwise permitted activities and created two titles in the Rural Residential Zone which were subject to different rules than other land in the zone (i.e. the spot zone argument). We disagree with those propositions for the reasons set out in paras [42]-[47] (above).

For these reasons, we consider that the proposed condition would satisfy the *Newbury* tests.

[56] Even if it did not, there was a further hurdle that Mr Lawson had to overcome in advancing the various propositions that he did, namely that the condition in question is an *Augier* condition, volunteered by the Appellants, which would be binding on them even if it could not have lawfully been imposed by the Council.

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15 At [43].
16 [1981] AC 578, [1980] 1 All ER 731 (HL).

Mr Lawson's response to that proposition was that *...even if a condition is volunteered by an applicant under the Augier principle it may not be enforceable against or may be challenged by a subsequent landowner if the condition does not satisfy the Newbury tests*[17].

[57] We do not accept that proposition. If Mr Lawson is correct there would be no point in any applicant offering (or any consent authority imposing at the request of an applicant) a condition which could not otherwise be imposed by a consent authority. We do not think that is a desirable outcome. By way of example, it is not uncommon for applicants to volunteer conditions which offer environmental compensation or betterment sometimes not directly related to the consent being sought. Such proposals would be meaningless if they could be challenged by a subsequent owner.

[58] Ultimately, we consider that the proposition advanced by Mr Lawson is contrary to authority in any event. We refer to the statement of Randerson J in *Springs Promotions Ltd v Springs Stadium Residents Association*[18]:

> *That case* (Augier) *is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority which is relied upon in granting the permission, is estopped from later asserting that there was no power to grant the permission subject to a condition based on the undertaking.*

[59] Such an undertaking must also be binding on successors who take the benefit of such permissions. Section 221(4)(b) RMA, which provides that ongoing conditions secured by consent notice create a covenant running with the land which binds all subsequent owners, provides a statutory underpinning of that principle.

[60] Finally on this issue of vires and appropriateness of the restriction imposed by the consent notice in this case, Mr Lawson had this to say:

> *The "horse trading" of permitted activities inherent in this application does not promote sustainable management of resources and has much wider*

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17 Page 41, NoE.
18 [2006] NZRMA 101, at [76].

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> *practice. It should not be encouraged or even countenanced by the granting of this consent.*

[61] We understood Mr Lawson to be expressing a concern that the Appellants were seeking to *buy* consent to their subdivision by trading off other hypothetical rights which they were unlikely to exercise in any event. He suggested that this was becoming something of a common practice in this area, although we heard no hard evidence to support that.

[62] We can appreciate why such a practice might be of a concern to a consent authority however in this case, we see the Appellants' proposals in a somewhat different light than does Mr Lawson. Although the Appellants have expressed their consent notice in terms of excluding a series of identified and otherwise permitted activities, we consider that what they have done in reality is simply to restrict the activities which might be undertaken on the subdivided lots to 1 house on each lot plus the possibility of a supplementary unit on Lot 2. Indeed it may be more appropriate for the consent notice to be worded accordingly. In addition, the Appellants now propose a maximum permitted combined site coverage for the lots of $1000m^2$. Presumably this is to be allocated equally between the two lots, but there was no discussion of this at the hearing. This needs to be resolved between the Appellants and the Council if consent is granted.

[63] The effects of such a proposal can be readily ascertained and assessed. It appears to us in this instance, that the determinative matter for the Court is the traffic effects of the proposal. The Appellants seek to ensure through use of the consent notice that the traffic effects generated by this subdivision will be limited to those arising out of the development of no more than two houses and one supplementary unit on the site.

[64] We concur with Mr Lawson to the extent that we agree that the Appellants should receive no additional credit in our considerations for having given up what might only be hypothetical or remote possibilities. The important matter for our considerations is that the traffic movements to be generated by the subdivision will be limited by restricting the use of the lots as proposed.

Scale and Intensity of Permitted Development

[65] There remained a dispute between the planners as to whether the proposed scale and intensity of the subdivision would generate effects greater than those permitted under the District Plan.

[66] This baseline argument arose out of the Certificate of Compliance obtained by Mr and Mrs Kirton confirming the further additional activities which might be permitted on the site as of right[19]. Mr Lawson suggested that there was a certain artificial element about the Certificate of Compliance in submitting that *...the Applicant has effectively tried to haul its case up by its proverbial boot straps by contending that if you limit all of the activities on the proposed site that would otherwise be permitted within the zone, it falls within the permitted baseline created by buildings such as visitor accommodation facilities, supplementary houses or granny flats and other activities*[20].

[67] A certificate of compliance confirms that a particular *...activity can be done lawfully in a particular location without a resource consent*[21]. We assume that in this case, the Certificate of Compliance was obtained solely for the purpose of establishing a permitted baseline for the purposes of s104(2) RMA, as we were given no evidence at all of any actual intention on the part of Mr and Mrs Kirton to undertake such activities. We accept that there is a certain artificial element about that which presumably gives rise to Mr Lawson's comments about hauling the case up by its proverbial bootstraps, however we see nothing in s139 which precludes certificates of compliance being obtained for just that purpose. In this case the Certificate of Compliance satisfies us that the District Plan permits the establishment of a traveller's accommodation unit and a supplementary residential unit on the site so that we may disregard the equivalent adverse effects of this proposal, should we see fit.

[68] We do not propose to disregard the permitted baseline in our considerations, but nor will we give it any significant weight. There are two reasons for that:

[19] See para [7] above.
[20] Para 12, Respondent's Submissions.
[21] Section 139(3) RMA.

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- We have no evidence to determine whether or not the certified activities are *credible* or not at least insofar as the certified tourist accommodation facility is concerned. Although the Council appears to accept the possibility of a supplementary unit we were given no evidence whatever to determine how feasible it was that a traveller's accommodation unit might be established on this site in this locality;
- Secondly, it appeared to us, that the effects of this particular subdivision proposal were so limited as to make application of the permitted baseline something of an *overkill*. We will return to that issue in our discussion of cumulative effects.

Precedent and District Plan Integrity

[69] The third determinative issue identified in the planner's statement is that of precedent. This issue was principally articulated in the evidence of Mr Drury for the Council. He acknowledged that effects of precedent are not usually associated with applications for restricted discretionary activity, but contended that because this particular District Plan does not include any non-complying activities *...it should not be discounted that a restricted discretionary activity, in this case, could lead to such issues* (i.e. precedent)[22]. Mr Drury went on to contend that the effects in issue in this case were cumulative effects on rural character and amenity values and on safety and efficiency of the roading network.

[70] Mr Holder rejected Mr Drury's contentions in this regard in both his evidence in chief and his rebuttal evidence. Both he and Mr Williams (in his submissions) referred to the finding of this Court in *Campbell v Napier City Council*[23] that:

> *Our finding is that "precedent" or "district plan integrity" or "consistent administration of the district plans" are not raised by the relevant provisions of the district plans.*

[71] Put another way, the Court in *Campbell* found that the precedent effect of granting consent was not one of the matters over which the Council had retained discretion in this District Plan and we concur with that. Mr Williams submitted that

22 Para 94, EIC.
23 Decision W067/2005, at [65].

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as a matter of jurisdiction there was no power to refuse consent to this proposal arising out of precedent concerns. We accept the evidence of Mr Drury and the submissions of Mr Williams in this regard.

[72] In any event, it is apparent that both the Commissioner in the first instance and Mr Drury have conflated the concepts of precedent and cumulative effects. All of the Courts which have addressed these issues have made it clear that a precedent effect is not a cumulative effect. To the extent necessary we refer to the comments of the Court of Appeal in paragraphs 37 - 49 of *Dye v Auckland Regional Council*[24].

[73] The fundamental premise underlying the Council decision and Mr Drury's evidence was that granting consent to this subdivision (with its lower than average controlled activity subdivision size), might lead to further such subdivision applications. It was contended that the grant of such applications would undermine the strategy contained in the District Plan for protecting the amenity and roading network of the Rural Residential Zone in Poraiti.

[74] Even if we were inclined to agree that such a contention was a permissible consideration to be taken into account in this restricted discretionary activity application (and we do not) there was no substantive evidence put before us to support that view. We will return to that matter further but we think that it is significant that in his submissions on behalf of the Council, Mr Lawson avoided reference to the precedent argument advanced by Mr Drury and found in the Commissioner's decision.

[75] Finally on the issue of precedent, Mr Drury contended that plan integrity and the effects of precedent are within the realm of matters that are able to be considered in terms of s104(1)(c) RMA, which provides that in considering an application for resource consent a consent authority must, subject to Part 2, have regard to *...any other matter the consent authority considers relevant and reasonably necessary to determine the application.* Mr Drury contended that precedent was an other matter referred to in s104(1)(c).

[24] [2002] 1 NZLR 337, [2001] NZRMA 513, (2001) 7 ELRNZ 209 (CA).

[76] However, s104(1)(c) is not applicable to consideration of restricted discretionary activity applications. Such applications are determined pursuant to s104C which provides that:

> *(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider* <u>*only*</u> (our emphasis) *those matters over which-*
>
> *(a) a discretion is restricted in national environmental standards or other regulations:*
>
> *(b) it has restricted the exercise of its discretion in its plan or proposed plan .*

Accordingly *other matters* under s104(1)(c) are not relevant considerations in the determination of restricted discretionary activity applications which are confined to the matters identified in subsections (a) and (b) of s104C.

[77] We hold that:

- The precedent effect of granting consent is not one of the matters in respect of which the Council has reserved discretion in determining this restricted discretionary activity application;
- Even if it was a relevant consideration, the evidence did not establish that there would be any such precedent effect.

We accordingly propose to disregard any issues of precedent in our considerations.

Cumulative Effects of Further Development on Rural Character and Amenity and Safety and Efficiency of the Roading Network

[78] The issue of cumulative effects related to the effects of the proposal on rural amenity and the roading network.

[79] We had remarkably little evidence before us about potential effects of this proposal on rural amenity, although it was identified in both the Council decision and Mr Drury's evidence as a matter of some moment. Mr Drury appeared to approach this analysis on an assumption that the restrictions proposed by the consent notice

could not be upheld, an approach with which we have disagreed. However, even taking the worse-case scenario adopted by Mr Drury there was little, if any, evidence to support the Council's contention that there would be an adverse effect on rural amenity arising out of this application, either considered in isolation or on a cumulative basis (within the true meaning of that expression).

[80] Mr Drury identified the following adverse effect on rural amenity arising directly from this proposal;

> *I acknowledge that the resultant land use itself will not be foreign to its surrounds, but when we consider the number of lots or house hold units within an 80m radius of the designated building platform on Lot 1, a resultant total of four seems greater than that provided for by the Plan; and in turn, expected by the community.*

[81] Mr Drury did not identify the significance of the 80m radius nor what provision of the District Plan it might offend in some way. Although we have not placed any significant weight on the permitted baseline, the Certificate of Compliance confirms that an accommodation building can be erected on the building platform identified on Lot 1. Mr Drury said that a dwelling on that building platform would be in the foreground of a neighbouring property at 52 Boyd Road, thus exacerbating the effects of greater density in the area.

[82] Effects on the property at 52 Boyd Road need to be assessed in light of the fact that an accommodation building of some sort is allowed on the proposed building platform and in light of Mr Drury's further acknowledgement that development on Lot 1 would more than likely be capable of complying with the requirements of the District Plan as to yards, set-back distances, height, height in relation to boundaries and the provision of open space. Mr Drury acknowledged that there is planting on 52 Boyd Road providing at least some visual barrier between it and Lot 1.

[83] Accordingly, the only evidence before us as to the likely amenity effect of the subdivision was that any dwelling on Lot 1 would be in the foreground of 52 Boyd Road, and would comply with the various bulk and location controls in the

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District Plan, but not with some hypothetical 80m radius requirement identified but not substantiated by Mr Drury. Development on Lot 1 would be restricted by the consent notice requirement that the overall footprint of development on Lots 1 and 2 could not exceed that presently permissible on the existing title.

[84] The Council's position on the amenity effect of the subdivision appeared to be summed up in this provision of Mr Drury's evidence:

> *It may be true that 1000m² of building coverage over a 1.5ha area is not foreign to the Rural Residential zone, but the effects of subdivision and the effects of pure building coverage are not necessarily the same. In his decision ... Commissioner Garland raised the situation of another unit of ownership as an effect of subdivision. I believe an additional unit of ownership is a dimension that must be taken into account in relation to the scale and intensity of development, especially when the consideration of amenity values is entrenched within the matters of discretion and provisions of the Plan. Indeed, it is the separate unit of ownership that establishes the platform for additional development rights, additional vehicle movements, additional vehicle crossings, additional visitors, additional private congregations of people, additional servicing requirements and additional parties to easements; all of which have the potential to risk the qualities and characteristics of an area that contribute to the amenity of nearby parties. Such risk should not be disregarded on the simple basis that the site coverage limit will not be exceeded.*

[85] Again, there was no hard evidence to support many of the contentions raised by Mr Drury and identified in the Council decision. In respect of the identified matters:

- Additional development rights (in terms of total developed area) are to be limited in this case to those presently applicable to the existing site;
- Additional vehicle movements and crossings will be discussed in the following section of our decision relating to traffic issues;
- We accept that there might be some additional visitors and additional private congregations of people with an additional dwelling house, however visitors and private congregations of people are typical incidents

of residential and rural residential activity. Nothing in the evidence which we heard suggested that the addition of one further dwelling house will elevate these incidents beyond a level which might reasonably be anticipated in the zone;

- Finally, in terms of servicing requirements and easements, the agreed statement of the planners recognised that the lots could be suitably serviced in terms of water supply, waste water and storm water disposal and that there was adequate access. If there was any genuine issue as to excessive use of the access ways to the lots, that could be resolved as part of the final conditions of consent by restricting Lot 1 to access from Boyd Road and Lot 2 to access from Fryer Road.

[86] Nothing in the evidence which we heard leads us to the conclusion that there is any reason to decline consent to the subdivision having regard to the effects of the proposal on rural residential amenity.

[87] The final issue for consideration is that of the cumulative effects on the roading network of allowing this proposal. We refer to our comments in paras [22]-[26] (above) regarding this issue. Mr Prosser's evidence was that this subdivision proposal was likely to generate something in the order of 8 vpd which was well within the capacity of the roading network to accommodate. He said that Boyd Road had a capacity of somewhere in the order of 150vpd and that with the Kirton subdivision in place it would be required to carry something like 120vpd.

[88] Mr Prosser was not challenged on that particular aspect of his evidence. The questions which Mr Lawson put to him in cross examination rather related to possible other activities which might be undertaken as of right on other land in this vicinity which also used Boyd Road for access. In particular, Mr Lawson put to Mr Prosser that he did not factor into his calculations the possibility that:

- Home occupations;
- Visitor accommodation units;
- Residential care facilities for up to 10 persons;

were all activities which could be established as of right on properties accessing Boyd Road.

[89] Mr Prosser accepted that was the case and that if such activities were to occur there could be an increase in the volume of traffic on the road. He readily conceded that it would not take much to go from 120vpd to 150vpd (being his assessed road capacity) if the developments in question were established as suggested by Mr Lawson in cross examination. Mr Prosser said that it was his brief to evaluate the Kirton proposal on the basis of the current roading network and existing activities being undertaken in the vicinity.

[90] In his evidence in chief, Mr Drury identified that based on a current average lot size of 1.5ha, a further 22 additional lots could be created in the Poraiti area north of Puketitiri Road as a controlled activity. However, that analysis included 4 large titles within a combined area of approximately 100ha which could provide an additional 66 lots, increasing the subdivision potential of the area to 88 lots based on controlled activity rules. In cross examination, Mr Drury conceded that none of the lots having a minimum area of 3ha (being the minimum required to achieve 1.5ha average subdivision lot size) had access off Boyd Road. He also conceded that on a controlled activity (or restricted discretionary activity) subdivision application the Council had power to take a financial contribution for the maintenance of infrastructure, including road infrastructure.

[91] As we understood the cumulative effects argument advanced by the Council, it was based on the proposition that properties using Boyd Road (in particular) for access could establish certain traffic generating activities as of right, namely, home occupations, residential care facilities, day care facilities and others which had traffic generating potential and which could *use up* the surplus in the present capacity of Boyd Road which Mr Prosser had identified.

[92] In a general sense, we understand the point that Mr Lawson was making, that there are a range of permitted activities which could take place on lots using Boyd Road for access which could require the present surplus traffic capacity of the road.

However, there was no analysis whatever provided which enabled us to assess the likelihood of that happening in fact.

[93] In order to proceed as permitted activities, all of the various activities identified by Mr Lawson in cross examination must comply with a range of relevant conditions. For instance, each one of the activities put to Mr Prosser is required to comply with the relevant conditions of the Rural Residential Zone Activity Table and Condition Table which (inter alia) impose standards relating to density of development, yard sizes, height of buildings, site coverage and noise. No analysis was provided by the Council as to the capacity of properties on Boyd Road which might allegedly undertake such activities to comply with the required conditions. Nor were we given any evidence as to the possibility of Boyd Road being subjected to a rush of such activities being established. We had no evidence of ongoing pressure for subdivision of properties using Boyd Road for access. Had there been such evidence we might have viewed this application differently, however we have simply no evidential basis on which to assess the possibility of, or capacity for Boyd Road properties to be subject to further subdivision or developments of the kind suggested by Mr Lawson.

[94] None of the evidence which we heard established that approval of the Kirton subdivision of itself would have any adverse effect on the safety and efficiency of the roading network. Further, any lingering concerns in that regard may be mitigated by a condition requiring that only Lot 1 of the proposed subdivision may use Boyd Road for access. The site is presently entitled to an access point out onto Boyd Road for the dwelling already established and if such a condition is imposed, only one dwelling will continue to have such access.

Section 290A

[95] Section 290A RMA requires us to have regard to the decision which is the subject of this appeal in our considerations. It will be apparent from our earlier comments that we have done so. We disagree with the decision reached by the Commissioner.

Outcome

[96] It will also be apparent from our earlier comments that we do not accept the position adopted by the Council in these proceedings. Once the issues of durability/vires of the consent notice and precedent/plan integrity are set to one side, the only issue of substance in this appeal was that relating to possible effects of the proposal on the roading network and we refer to the conclusion which we have reached in that regard in para [94] (above).

[97] We conclude that the appeal must succeed and consent ought be granted to the subdivision, with consent subject to a consent notice as proposed by the Appellants and any other conditions required to reflect the contents of this decision. We allow a period of 20 working days from the date of this interim decision for the parties to discuss and resolve appropriate conditions. If the parties are unable to agree on conditions either party may advise the Court accordingly at the expiry of the 20 working day period and we will determine any issues relating to conditions although we would hope that it will be unnecessary for us to do so.

Costs

[98] Costs are reserved, to be resolved after the issue of a final decision.

DATED at WELLINGTON this 22nd day of April 2013

For the Court:

B P Dwyer

Environment Judge

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