

**BEFORE THE COMMISSIONERS APPOINTED ON BEHALF OF
CENTRAL OTAGO DISTRICT COUNCIL**

Under	The Resource Management Act 1991 (the Act)
In the Matter	of an application for subdivision and land use consents to undertake a two-lot subdivision around existing buildings
Between	MARK GERARD SUGRUE, IMOGENE GRACE SUGRUE and DUNMORE TRUSTEES LIMITED Applicant
And	CENTRAL OTAGO DISTRICT COUNCIL Local Authority

BUNDLE OF AUTHORITIES

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BUNDLE OF AUTHORITIES

Tab	Description
Legislation	
1.	Resource Management Act 1991 ss 84, 104(1)(c), 104D, 108AA
2.	Central Otago District Plan Rule 4.7.2(b); 4.7.4(i); 4.7.5(iii) Objective 4.3.3 Policy 4.4.2; 4.4.10(c)
Case law	
3.	Dye v Auckland Regional Council CA86/01, 11 September 2001
4.	Rodney District Council v Gould (2004) 11 ELRNZ 165 (1)
5.	Beacham v Hastings District Council ENC Wellington W075/09, 5 October 2009
6.	Blueskin Bay Forest Heights Ltd v Dunedin City Council [2010] NZEnvC 177
7.	Ahuareka Trustees (No 2) Ltd v Auckland Council [2017] NZEnvC 205

Section 82(6): amended, on 19 April 2017, by section 67(8) of the Resource Legislation Amendment Act 2017 (2017 No 15).

82A Dispute relating to review under section 79A

[Repealed]

Section 82A: repealed, on 1 April 2011, by section 128 of the Marine and Coastal Area (Takutai Moana) Act 2011 (2011 No 3).

83 Procedural requirements deemed to be observed

A policy statement or plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with Schedule 1 and shall not be challenged except by an application for an enforcement order under section 316(3).

84 Local authorities to observe their own policy statements and plans

- (1) While a policy statement or a plan is operative, the regional council or territorial authority concerned, and every consent authority, shall observe and, to the extent of its authority, enforce the observance of the policy statement or plan.
- (2) No purported grant of a resource consent, and no waiver or sufferance or departure from a policy statement or plan, whether written or otherwise, shall, unless authorised by this Act, have effect in so far as it is contrary to subsection (1).

85 Environment Court may give directions in respect of land subject to controls

- (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.
- (2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—
 - (a) in a submission made under Schedule 1 in respect of a proposed plan or change to a plan; or
 - (b) in an application to change a plan made under clause 21 of Schedule 1.
- (3) Subsection (3A) applies in the following cases:
 - (a) on an application to the Environment Court to change a plan under clause 21 of Schedule 1;
 - (b) on an appeal to the Environment Court in relation to a provision of a proposed plan or change to a plan.
- (3A) The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—

- (4) A person who has made a submission and who is intending to call expert evidence must provide briefs of the evidence (the **submitter's evidence**) to the consent authority and the applicant at least 5 working days before the hearing.
- (5) The consent authority must make the following available at its office to the persons specified:
 - (a) the authority's evidence, to any person who made a submission and did not state a wish to be heard:
 - (b) the applicant's evidence, to any person who made a submission:
 - (c) any submitter's evidence, to any other person who made a submission.
- (6) The consent authority must give written or electronic notice that evidence is available at its office to each person to whom the evidence is made available.
- (7) This section overrides sections 41B and 42A(3) to (5).

Section 103B: inserted, on 3 March 2015, by section 102 of the Resource Management Amendment Act 2013 (2013 No 63).

Decisions

104 Consideration of applications

- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to—
 - (a) any actual and potential effects on the environment of allowing the activity; and
 - (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
 - (b) any relevant provisions of—
 - (i) a national environmental standard:
 - (ia) a wastewater environmental performance standard:
 - (ib) a stormwater environmental performance standard:
 - (ic) an infrastructure design solution:
 - (ii) other regulations:
 - (iii) a national policy statement:
 - (iv) a New Zealand coastal policy statement:
 - (v) a regional policy statement or proposed regional policy statement:
 - (vi) a plan or proposed plan; and
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

- (b) it has restricted the exercise of its discretion in its plan or proposed plan.
- (2) The consent authority may grant or refuse the application.
- (3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which—
 - (a) a discretion is restricted in national environmental standards, wastewater environmental performance standards, stormwater environmental performance standards, infrastructure design solutions, or other regulations:
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.

Section 104C: replaced, on 1 October 2009, by section 85 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 104C(1)(a): amended, on 27 August 2025, by section 82 of the Local Government (Water Services) (Repeals and Amendments) Act 2025 (2025 No 43).

Section 104C(3)(a): amended, on 27 August 2025, by section 82 of the Local Government (Water Services) (Repeals and Amendments) Act 2025 (2025 No 43).

104D Particular restrictions for non-complying activities

- (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
 - (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of—
 - (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
 - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
 - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
- (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

Section 104D: inserted, on 1 August 2003, by section 44 of the Resource Management Amendment Act 2003 (2003 No 23).

Section 104D(1): amended, on 18 October 2017, by section 144 of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 104D(1): amended, on 1 October 2009, by section 150 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 104D(1)(a): amended, on 1 October 2009, by section 150 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

- (b) the level of contribution is determined in the manner described in the plan or proposed plan.

Section 108(1): replaced, on 17 December 1997, by section 24(1) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(1): amended, on 27 August 2025, by section 86 of the Local Government (Water Services) (Repeals and Amendments) Act 2025 (2025 No 43).

Section 108(1): amended, on 18 October 2017, by section 146 of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 108(2): replaced, on 17 December 1997, by section 24(1) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(2)(b): replaced, on 1 August 2003, by section 45(1) of the Resource Management Amendment Act 2003 (2003 No 23).

Section 108(2)(da): inserted, on 21 August 2025, by section 42 of the Resource Management (Consenting and Other System Changes) Amendment Act 2025 (2025 No 41).

Section 108(2)(f): amended, on 1 October 2009, by section 150 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 (2009 No 31).

Section 108(2)(h): amended, on 1 April 2011, by section 128 of the Marine and Coastal Area (Takutai Moana) Act 2011 (2011 No 3).

Section 108(3): replaced, on 7 July 1993, by section 58(6) of the Resource Management Amendment Act 1993 (1993 No 65).

Section 108(4): replaced, on 7 July 1993, by section 58(6) of the Resource Management Amendment Act 1993 (1993 No 65).

Section 108(5): replaced, on 7 July 1993, by section 58(6) of the Resource Management Amendment Act 1993 (1993 No 65).

Section 108(6): repealed, on 1 August 2003, by section 45(3) of the Resource Management Amendment Act 2003 (2003 No 23).

Section 108(7): amended, on 17 December 1997, by section 24(3) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(8): amended, on 20 August 1998, by section 24(4)(a) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(8): amended, on 17 December 1997, by section 24(4)(b) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(9): replaced, on 17 December 1997, by section 24(5) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(10): inserted, on 17 December 1997, by section 24(5) of the Resource Management Amendment Act 1997 (1997 No 104).

Section 108(10)(a): amended, on 1 August 2003, by section 45(4) of the Resource Management Amendment Act 2003 (2003 No 23).

Section 108(10)(b): amended, on 1 August 2003, by section 45(5) of the Resource Management Amendment Act 2003 (2003 No 23).

108AA Requirements for conditions of resource consents

- (1) A consent authority must not include a condition in a resource consent for an activity unless—
- (a) the applicant for the resource consent agrees to the condition; or
 - (b) the condition is directly connected to 1 or more of the following:

- (i) an adverse effect of the activity on the environment:
 - (ii) an applicable district or regional rule, or a national environmental standard:
 - (iii) a wastewater environmental performance standard made under section 138 of the Water Services Act 2021:
 - (iv) a stormwater environmental performance standard made under section 139A of the Water Services Act 2021:
 - (v) an infrastructure design solution; or
- (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.
- (2) Subsection (1) does not limit this Act or regulations made under it.
- (3) This section does not limit section 77A (power to make rules to apply to classes of activities and specify conditions), 106 (consent authority may refuse subdivision consent in certain circumstances), 106A (consent authority may refuse land use consent in certain circumstances), or 220 (condition of subdivision consents).
- (4) For the purpose of this section, a district or regional rule or a national environmental standard is **applicable** if the application of that rule or standard to the activity is the reason, or one of the reasons, that a resource consent is required for the activity.
- (5) Nothing in this section affects section 108(2)(a) (which enables a resource consent to include a condition requiring a financial contribution).

Section 108AA: inserted, on 18 October 2017, by section 147 of the Resource Legislation Amendment Act 2017 (2017 No 15).

Section 108AA(1)(b): replaced, on 15 November 2021, by section 206(1) of the Water Services Act 2021 (2021 No 36).

Section 108AA(1)(b)(iv): inserted, on 17 February 2024, by section 12(1) of the Water Services Acts Repeal Act 2024 (2024 No 2).

Section 108AA(1)(b)(v): inserted, on 27 August 2025, by section 87 of the Local Government (Water Services) (Repeals and Amendments) Act 2025 (2025 No 43).

Section 108AA(3): amended, on 21 August 2025, by section 43 of the Resource Management (Consenting and Other System Changes) Amendment Act 2025 (2025 No 41).

108A Bonds

- (1) A bond required under section 108(2)(b) may be given for the performance of any 1 or more conditions the consent authority considers appropriate and may continue after the expiry of the resource consent to secure the ongoing performance of conditions relating to long-term effects, including—
 - (a) a condition relating to the alteration or removal of structures:
 - (b) a condition relating to remedial, restoration, or maintenance work:
 - (c) a condition providing for ongoing monitoring of long-term effects.

potential to compromise the landscape and amenity values of the District. Such development also has potentially adverse affects on water quality and the roading network. Control in respect of colour and location will ensure impact on landscape values is kept to a minimum. With respect to "Rural Residential" areas identified on the planning maps, Council recognises that these areas are more intensively developed and a 50 metre separation distance will provide privacy for adjoining property owners.

Council has also retained the ability to require new residential activities to make some allowance for the fact that they are located in a rural environment within which some activities generate noise, dust, odour, and use chemical sprays and the like. The new developer who locates next to an existing activity is expected to accept the disturbance, irritation, discomfort and inconvenience of living in a developing rural area. That person may be required to take steps to mitigate the effects of the existing activity.

ia. Residential Activity in Rural Resource Area (3)

Residential activity is a controlled activity in the Rural Resource Area (3) provided the following standards are complied with:

a. Building Platform/Development Zone

Breach: discretionary activity see Rule 4.7.4.i

The dwelling and any accessory building is located within a building platform as shown on the concept plan attached as Schedule 19.20 or is located in the Development Zone shown on the concept plan attached as Schedule 19.20 provided that a separation distance of 50 metres or greater is achieved between building platforms. Identified (numbered) building platform 4 as shown on the concept plan attached as Schedule 19.20 shall not exceed 10m x 28m and any other building platform shall not exceed 30m x 40m.

b. Access/Covenant

Breach: discretionary activity see Rule 4.7.4.i

The dwelling and accessory building is located on a site that:

- i. Has legal access in the position shown on the concept plan attached as Schedule 19.20 provided that the position of the access to the Development Zone on Lot 18 DP 15301 is indicative only.
- ii. Has no formed access to State Highway 8.
- iii. Is subject to a covenant that serves to protect natural values and open space on the site or on land held in common by the owner of the site and other sites in Rural Resource Area (3) except for identified (numbered) building platform 25 as shown on the concept plan attached as Schedule 19.20. Any covenant shall be registered on the certificate of title for the site and shall permit the dwelling and any accessory building and associated curtilage to occupy no more than the following areas in relation to building platforms identified (numbered) or located in the Development Zone on the concept plan attached as Schedule 19.20-

Building Platform Area for Buildings and Curtilage

1-7, 13-22, 26, 29,	3000m ²
30	4000m ²
23, 24, 27, 28 and	
31	

c. Height

Breach: discretionary activity see Rule 4.7.4.i

Any dwelling or accessory building shall not exceed the height specified below for building platform as identified (numbered) or located in the Development Zone on the concept plan attached as Schedule 19.20-

Building Platform	Maximum Height
4	4 metres
1, 2 & 5	4.5 metres
3, 6, 7, 13-22, 24-26, 29 & 30	6.0 metres
23, 27, 28 & 31	8.0 metres

d. Colour and Finish of Buildings

Breach: discretionary activity see Rule 4.7.4.i

The following colour and finish of buildings (including accessory buildings) shall apply:

All buildings shall be finished in any of the following materials:

- i. Timber (vertical and horizontal)
- ii. Plaster/Adobe
- iii. Schist Stone
- iv. Corrugated iron: Desert Sand, Lichen, Sandstone Grey, Kauri, Grey Friars, New Denim Blue, (Coloursteel colours).

Detailing around verandahs, windows and doors may differ. The exterior walls, accents and trim for all buildings shall comply with the following colour palette:-

Schooner Resene	5B030*	Putty Resene	3-042
Sandstone Resene	4B030*	Granite Green	4-049
El Salva Resene	3RO30*	Teak Resene	3-043
Laser Resene	4Y020*	Toast Resene	4RO10*
Sandrift Resene	2-027		

provided that any part of a building on the identified (numbered) building platforms 1, 2 or 4 on the concept plan attached as Schedule 19.20 that is visible from State Highway 8 shall be clad in schist stone or stone that presents the same appearance as schist, when viewed from a distance.

Note: All colours are British Standard 2660 (101 colour range) unless marked otherwise by asterisk.

*Resene Colour Charts. Like colours from other manufacturers' colour charts are acceptable.

- architectural and landscaping heritage of Central Otago — of both the rural high country and townships.
4. The extent to which the Design Plan promotes the use of a range of materials historically used in buildings in Central Otago.
 5. The extent to which the Design Plan promotes colours that are based on the natural palette to be found in the surrounding landscape.
 6. The extent to which the proposed landscaping appropriately mitigates visual effects of development when viewed from McArthur Road.
 7. The extent to which the proposed landscaping maintains and/or enhances historic or cultural patterns.
 8. The extent to which the design provides for a network of walking, cycle and bridle trails.
 9. The extent to which the design facilitates convenient, safe and efficient vehicle access and maintains and enhances the safety and convenience of pedestrians, cyclists and motorists.
 10. The extent to which car parking areas are convenient, accessible, safe and efficient for users.
 11. The location and form of buildings, and any associated outdoor living areas or outdoor gathering areas, and walking, cycling or bridle trails, in relation to the location of the golf course, to take into account the safety of people located in areas in proximity to the golf course.
 12. The location of buildings and activities in relation to any vineyards and the provision of mechanisms (in the form of covenants and other legal instruments) to maintain the viability of the vineyards (bird scaring, spraying, frost fighting etc).
 13. The provision of adequate utility services, including water supply, wastewater disposal, power and telecommunications.
 14. The extent to which buildings for residential activities and their associated private open spaces are oriented to the sun and daylight access.
 15. The extent of private open space for residential or travellers accommodation units.
 16. Whether any proposed signage will be consistent with an overall theme.
 17. The extent to which any flood hazard has been avoided or mitigated.
 18. The extent to which yard setbacks between buildings and existing or proposed boundaries will maintain public and private amenities.

x. Any activity that fails to comply with Rule 4.7.6A.I within Rural Resource Area (5) is a discretionary (restricted) activity.

Council shall restrict the exercise of its discretion to the effect on the following matters:

1. The effect on the amenity values of neighbouring properties;
2. The effect on landscape values;
3. Any mitigation proposed to avoid, remedy or mitigate the effects on matters 1 and 2; and
4. Reverse sensitivity effects arising from the non-compliance with Rule 4.7.6A.I.

4.7.4 Discretionary Activities

Cross Reference: Policies: 4.4.1, 4.4.2, 4.4.3, 4.4.4, 4.4.6, 4.4.8, 4.4.10, 4.4.18

i. Breach of Standards

Any activity that fails to comply with the following rules:

- 4.7.2.i Residential Activities b, c, e and f
- 4.7.2.ia Residential Activities in Rural Resource Area (3) a, b, c, d, e and f
- 4.7.2.ib.a Residential Activities in Rural Resource Area (5)
- 4.7.2.ib.b Residential Activities within Building Platforms in Rural Resource Area (5)
- 4.7.2.ib.c Site Coverage in Rural Lifestyle Production Area in Rural Resource Area (5)
- 4.7.2.ib.e
- 4.7.2.ii.a.vii Landscaping Plan in Rural Resource Area (5)
- Building Platforms within Rural Resource Area (5)
- 4.7.2.vi Outstanding Natural Landscapes, and Land in the Upper Manorburn/Lake Onslow Landscape Management Area
- 4.7.2.vii.b Accommodation Facilities
- 4.7.3.vii.b-d Residential Activity, Residential Building Platform & Accommodation Facilities
- 4.7.6.A Bulk and Location Requirements c and d
- 4.7.6.B Traffic Generation and Characteristics of Activities
- 4.7.6.J Earthworks for Access Tracks & Extractive Activity b Extraction and Displacement Activities
- 4.7.6.K Areas of Significant Indigenous Vegetation, Habitats of Indigenous Fauna and Wetlands
- 4.7.6.L Outstanding Landscapes, Land Over 900 metres and Land in the Upper Manorburn/Lake Onslow Landscape Management Area

is a discretionary activity.

Any application made relating to a breach of Rule 4.7.2.ia.a — c, e and f will generally be publicly notified.

Reason

Breach of the standards listed in these rules can have significant adverse effects on the environment.

ii. Noxious Effects

Cross Reference: Policy 17.4.5

Any activity that:

- a. uses, stores or generates quantities of hazardous substances that exceeds the limits specified in Schedule 19.14, OR
- b. requires a licence as an offensive trade within the meaning of the Third Schedule of the Health Act 1956, OR
- c. provides less than 120% spill containment where hazardous substances are stored within 50 metres of any surface water body and within the Ettrick or Roxburgh

Reason

Locating buildings in known land subject to a hazard can compromise the health and safety of people and communities. Establishment of buildings in these areas would need to avoid, remedy or mitigate risk before being permitted.

ii. Waste Disposal and Hazardous Substances on Land Subject to Hazards

Cross Reference: Policy 17.4.5

Any activity that involves the disposal or storage of waste or the storage or use of commercial quantities of hazardous goods or substances in any area identified on the planning maps as being subject to a hazard or involves land that is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage or inundation from any source, is a non-complying activity.

Provided that this rule does not apply to cleanfill landfills, farm tips, silage pits and offal pits permitted by the Regional Waste Plan.

For the purpose of this rule “commercial quantities” means quantities used or stored for the purpose of supplying or offering a service to the general public and does not include substances or goods to be used solely on the property upon which it is kept for the purpose of maintaining or improving the health of stock, crops, land quality or for eradicating pests and/or undesirable weeds or plants from that property.

Note: Consent from the Regional Council may be required to authorise any discharge of contaminants.

Reason

The effects of these activities have great potential to cause significant environmental damage if associated with a natural hazard. Council considers the best means to avoid such effects is not to permit activities of this nature in actual or potential natural hazard sites unless all risk is avoided. Small scale farm landfills and offal pits have been excluded on the basis that they would have minimal effect as opposed to large public waste disposal areas.

iii. Subdivision

Cross Reference: Policies: 4.4.2, 4.4.10

Except as otherwise provided for in Rule 4.7.2.ii.b subdivision that creates:

- an allotment or allotments with an average area less than 2 hectares in areas identified as “Rural Residential” ([RR]) on the planning maps;
 - an allotment or allotments with an average area less than 8 hectares and/or with an area less than 2 hectares in an area in the Rural Resource Area not identified on the planning maps as Rural Residential ([RR]), or
 - an allotment that breaches Rule 4.7.2.ii.a.i as it relates to Rural Resource Area (1) Rural Resource Area (2) or Residential Resource Area (5), or
 - an allotment in excess of 160 allotments used for residential purposes in Rural Resource Area (5)
- is a non-complying activity.

Reason

Intensive subdivision results in future development that has a significant potential effect on landscape and amenity values, the transport network, and ground water quality.

iv. Retail Activity

Retail activity not provided for by Rule 4.7.2.iii or Rule 4.7.4.iv is a non-complying activity.

Reason

Retail activities can have a significant adverse effect on the safe and efficient operation of the roading network through generating large volumes of traffic (including heavy service vehicles). Landscape and amenity values can also be compromised through a proliferation of signs and large buildings, and the generation of noise and waste. They can also have significant implications in terms of energy consumption and convenience by requiring people to travel significant distances to shop.

v. Tree Planting

Tree planting with Scots pine (*Pinus sylvestris*) and/or Swiss Mountain pine (*Pinus mugo*) is a non-complying activity.

Reason

Tree planting with species that have significant spreading vigour has the potential for adverse effects in terms of wilding spread.

vi. Building on an Outstanding Natural Feature

Any building on an outstanding natural feature as shown on the planning maps is a non-complying activity.

Reason

These features have been identified as outstanding natural features of the Central Otago landscape worthy of greater protection than the landscape as a whole. The effect of any building activity is unlikely to be suitable in visual terms.

vii. Rural Resource Area (4)

Any activity that breaches any of the three provisos in Rule 4.7.3.ix is a non-complying activity.

viii. Buildings in the Rural Resource Area in the Wooing Tree Overlay Area.

Any building in the Rural Resource Area in the Wooing Tree Overlay Area is a non-complying activity.

Reason

The Rural Resource Area in the Wooing Tree Overlay Area has been designed to be an open space buffer from the adjoining State Highways and existing residential activities to the north. As such it is appropriate to strongly discourage buildings within this area to

development, and protection of land in the Rural Resource Area;

Section 3.3	(Manawhenua)
Section 12.3	(District Wide Issues)
Section 13.3	(Infrastructure, Energy and Utilities)
Section 14.3	(Heritage)
Section 15.3	(Financial Contributions)
Section 16.3	(Subdivision)
Section 17.3	(Hazards)

4.3.1 Objective - Needs of the District's People and Communities

Cross Reference: Issues: 4.2.1 to 4.2.16, Policies: 4.4.1 to 4.4.16, 4.4.18

To recognise that communities need to provide for their social, economic and cultural wellbeing, and for their health and safety at the same time as ensuring environmental quality is maintained and enhanced.

4.3.2 Objective — Outstanding Natural Landscapes and Outstanding Natural Features, and Land in the Upper Manorburn/Lake Onslow Landscape Management Area

Cross Reference: Issues: 4.2.1, 4.2.3, 4.2.13, Policies: 4.4.1, 4.4.14, 4.4.18

To protect the Districts outstanding natural landscapes and outstanding natural features, and land in the Upper Manorburn/Lake Onslow Landscape Management Area (including landforms) from the adverse effects of inappropriate subdivision, use and development.

4.3.3 Objective - Landscape and Amenity Values

Cross Reference: Issues: {Link, 7979,4.2.2, {Link, 7985,4.2.4, {Link, 8009,4.2.12, {Link, 8012,4.2.13, 4.2.15, 4.2.16, Policies: 4.4.1, 4.4.2, 4.4.3, 4.4.8, 4.4.9, 4.4.10, 4.4.11, 4.4.12, 4.4.14, 4.4.18

To maintain and where practicable enhance rural amenity values created by the open space, landscape, natural character and built environment values of the District's rural environment, and to maintain the open natural character of the hills and ranges.

4.3.4 Objective - Recreation Resources

Cross Reference: Issues: 4.2.7, 4.2.8, 4.2.9, 4.2.10, 4.2.13, 4.2.15, Policies: 4.4.2, 4.4.4, 4.4.13, 4.4.14, 4.4.15, 4.4.18

To maintain and enhance the quality of the District's recreation resources and public access to those resources.

4.3.5 Objective - Water Resources

Cross Reference: Issues: 4.2.4, 4.2.7, 4.2.8, 4.2.10, 4.2.13, 4.2.16, Policies: 4.4.2, 4.4.4, 4.4.5, 4.4.7, 4.4.10

To maintain and enhance the quality of the District's water resources by avoiding,

The policies contained in this section apply to the Rural Resource Area. Some of these policies also apply in the Water Surface and Margin Resource Area. The policies contained in the following sections are also relevant to the subdivision, use, development and protection of land in the Rural Resource Area;

Section 3.4	(Manawhenua)
Section 12.4	(District Wide Issues)
Section 13.4	(Infrastructure, Energy and Utilities)
Section 14.4	(Heritage)
Section 15.4	(Financial Contributions)
Section 16.4	(Subdivision)
Section 17.4	(Hazards)

4.4.1 Policy - Outstanding Natural Landscapes and Outstanding Natural Features and Land in the Upper Manorburn/Lake Onslow Landscape Management Area

Cross Reference: Objectives: 4.3.1, 4.3.2, Method: 4.5.6, Rule: 4.7.6.L

To recognise the District's outstanding natural landscapes and outstanding natural features and land in the Upper Manorburn/Lake Onslow Landscape Management Area which:

- a. Are unique to the district, region or New Zealand; or
- b. Are representative of a particular landform or land cover occurring in the Central Otago District or of the collective characteristics and features which give the District its particular character; or
- c. Represent areas of cultural or historic significance in the district, region or New Zealand; or
- d. Contain visually or scientifically outstanding geological features; or
- e. Have characteristics of cultural, historical and spiritual value that are significant to Kai Tahu ki Otago;
- f. Have high natural character values and high landscape quality that can be distinguished from the general landscapes of the Central Otago District and provide protection for them from inappropriate subdivision, use and development.

Explanation

Section 6(b) of the Act requires Council to recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development as a matter of national importance. There are activities that have the potential to compromise the values of these areas. In these circumstances resource consents will be required to enable a thorough environmental impact assessment to take place. This assessment must include recognition of the fact that people and communities often utilise these areas to provide for their social, economic and cultural wellbeing. Landscapes and natural features considered to be outstanding in the Central Otago District are identified in Sections 2.3.1 and 2.3.2 and are identified on the planning maps. Land in the Upper Manorburn/Lake Onslow Management Area is also identified on the planning maps.

4.4.2 Policy — Landscape and Amenity Values

Cross Reference: Objectives: 4.3.1, 4.3.3, 4.3.4, 4.3.5, 4.3.8, Method: 4.5.6, Rules: 4.7.1 to 4.7.6

To manage the effects of land use activities and subdivision to ensure that adverse

effects on the open space, landscape, natural character and amenity values of the rural environment are avoided, remedied or mitigated through:

- a. The design and location of structures and works, particularly in respect of the open natural character of hills and ranges, skylines, prominent places and natural features,
- b. Development which is compatible with the surrounding environment including the amenity values of adjoining properties,
- c. The ability to adequately dispose of effluent on site,
- d. Controlling the generation of noise in back country areas,
- e. The location of tree planting, particularly in respect of landscape values, natural features and ecological values,
- f. Controlling the spread of wilding trees.
- g. Encouraging the location and design of buildings to maintain the open natural character of hills and ranges without compromising the landscape and amenity values of prominent hillsides and terraces.
- h. Strongly discouraging buildings in the Rural Resource Area of the Wooing Tree Overlay Area to ensure a vineyard or treed park-like character with an absence of built form.

Explanation

Central Otago has a unique landscape in the context of New Zealand. The District is dominated by parallel mountain ranges separated by broad valley basins and has a semi-arid character. This type of landscape is sensitive to modification. To sustainably manage what is considered a significant resource of the District, for both present and future generations, care must be taken with respect to the impact of activities on landscape and natural character.

The open space and natural character of the rural environment is also seen as a significant resource of the District. These values are capable of being compromised by commercial, industrial and/or residential forms of development not traditionally found in a rural context.

Some activities, particularly those involving motorised vehicles, can also adversely impact on the amenity values of back country areas. The effects of such activities need to be addressed through the resource consent process.

4.4.3 Policy — Sustainable Management of Infrastructure

Cross Reference: Objectives 4.3.1, 4.3.3, Policy 4.4.13, Section 12 District Wide Rules and Performance Standards, Section 13 Infrastructure, Energy and Utilities, Section 15 Financial Contributions, Section 16 Subdivision

To ensure that the development of infrastructure in the rural environment promotes sustainable management by:

- a. Requiring developers to contribute a fair and reasonable proportion of the costs involved, and
- b. Maintaining and enhancing the safe and efficient operation of the infrastructure network (including roading), while avoiding, remedying or mitigating adverse effects.

Explanation

Developers will be responsible for the provision of adequate services such as water supply, roading and foul sewage disposal for any dwelling or other development in the

4.4.9 Policy - Effects of Rural Activities

Cross Reference: Objectives 4.3.1, 4.3.3, Method 4.5.6, Rules 4.7.2.i, 4.7.6.E

To recognise that some rural activities, particularly those of a short duration or seasonal nature, often generate noise and other effects that can disturb neighbours by ensuring that new developments locating near such activities recognise and accept the prevailing environmental characteristics associated with production and other activities found in the Rural Resource Area.

Explanation

With the recent trend towards country living, traditional agriculture, mining, horticulture, viticulture, utilities and energy generation and transmission activities may be subject to an increasing number of complaints in respect of the effects of their day to day activities. The effects of these activities often cannot be readily avoided, remedied or mitigated by the person undertaking the activity without causing significant adverse economic effects. If people choose to live in the rural area of the Central Otago District, they should be prepared to accept the inconveniences, discomforts, disturbances or irritation that are caused and will be caused by such operations as a normal and necessary aspect of living in a district with strong rural character and a healthy developing agricultural/horticultural/viticultural sector and utility and energy generation/transmission activities. Although such inconveniences, discomforts, disturbances or irritations may not be acceptable in an urban area, they are to be expected in rural areas. It is therefore considered appropriate that those activities that locate adjacent to an existing rural activity should take steps to mitigate the effects that the existing rural activity may have upon them.

4.4.10 Policy — Rural Subdivision and Development

Cross Reference: Objectives: 4.3.1, 4.3.3, 4.3.5, 4.3.6, 4.3.7, Method 4.5.6, Rules 4.7.2.ii and ib, 4.7.4.iii & 4.7.5.iii, Section 16 Subdivision

To ensure that the subdivision and use of land in the Rural Resource Area avoids, remedies or mitigates adverse effects on:

- a. The open space, landscape and natural character amenity values of the rural environment in particular the hills and ranges,
- b. The natural character and values of the District's wetlands, lakes, rivers and their margins,
- c. The production and amenity values of neighbouring properties,
- d. The safety and efficiency of the roading network,
- e. The loss of soils with special qualities,
- f. The ecological values of significant indigenous vegetation and significant habitats of indigenous fauna,
- g. The heritage and cultural values of the District,
- h. The water quality of the District's surface and groundwater resources, and
- i. Public access to or along the rivers and lakes of the District, particularly through the use of minimum (and average) allotment sizes.

Explanation

Council's duty under the Resource Management Act is to control the effects of activities. The creation of a new allotment on a plan has, in itself, no real direct effect on the

BETWEEN RUSSELL DYE

Appellant

AND AUCKLAND REGIONAL COUNCIL

First Respondent

AND RODNEY DISTRICT COUNCIL

Second Respondent

Hearing: 26 July 2001

Coram: Gault J
 Keith J
 Tipping J

Appearances: R B Brabant and K R M Littlejohn for Appellant
 B I J Cowper and J A Burns for First Respondent
 W S Loutit and A J Bull for Second Respondent

Judgment: 11 September 2001

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

[1] This appeal from Chambers J in resource management proceedings concerns three questions of law, in respect of which the Judge gave leave to appeal to this Court. We will describe the history of the case only to the extent necessary to put the legal questions in sufficient context.

[2] The appellant, Mr Dye, owns with his wife a property comprising 16.48 hectares at 94 Pomana Road, Kumeu. The locality was described by the Environment Court:

as having the characteristics of peri-urban zone in transition from an earlier generation of town supply dairy farms, small orchards and vineyards to the present relatively small blocks occupied by an

increasing number of large modern houses on properties used for low-intensity agriculture, stud farming, some remnant horticulture and casual “hobby” grazing.

[3] Within 400 metres of the site are two quite substantial restaurants, one catering for up to 100 people and the other for up to 60 people. Each has substantial off-street parking facilities. Other properties in the vicinity on Pomana Road were described as comprising a range of older and newer dwellings on small “lifestyle” sections, generally from 2 hectares to 4 hectares, with the largest being a little under 7 hectares.

[4] Mr Dye applied to the second respondent, the Rodney District Council (RDC), to subdivide the land into five lots ranging in size from 1.4 hectares to 6.4 hectares with an access lot of 0.57 hectares. The 6.4 hectare lot was identified as being suitable for horticultural use. The land is zoned rural in the operative plan and similarly in what was then a proposed change, now operative, known as Change 55. In both cases the subdivision was a non-complying activity. The RDC declined to grant a resource consent, Mr Dye’s application having been opposed by the first respondent, the Auckland Regional Council (ARC). On Mr Dye’s appeal to the Environment Court the ARC also appeared in opposition. When the Environment Court granted consent, the ARC appealed to the High Court on questions of law. Its appeal was allowed by Chambers J and Mr Dye then obtained leave to appeal to this Court on the three questions of law to which we will refer a little later.

[5] As Mr Dye’s application was for consent to a non-complying activity, it had to pass through one or other of the gateways referred to in paras (a) and (b) of s105(2A) of the Resource Management Act 1991 (the Act). If neither gateway was satisfied the application would fail. If the application passed through either gateway Mr Dye then had to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s104(1) and in terms of the overall discretion inherent in s105(1)(c) of the Act. These matters are more fully discussed in the case of *Arrigato Investments Ltd & Anor v Auckland Regional Council & Ors*, CA84/01 which was heard immediately before the present appeal and in which judgment is being given contemporaneously. The two cases involved a partial

overlap of issues and were argued by the same counsel. The Environment Court found that the Dyes' development would be in keeping with the existing environment in Pomana Road. The Court further held, on unchallenged evidence, that because of slope and soil type, continued stock grazing would have adverse effects on the property.

[6] The RDC, supported by the ARC, had contended that the adverse effects of the proposal would be loss of rural character, loss of amenity, and removal of most of the land from present production. The Court found that the particular neighbourhood was already one characterised by rural residential lifestyle use and, as earlier noted, already contained two restaurants in the close vicinity of the subject land. In view of these various factors the Court found that the development would not adversely affect rural character or amenity values. With regard to loss of present production, the Court found that the land in question had relatively little productive potential and also that retiring the poorer parts of the land into areas of regenerating native bush would enhance environmental values. In the light of these views the Court held that the proposal satisfied gateway (a) in s105(2A) in that any adverse effects on the environment would be minor; indeed the Court was of the view that no adverse effects would ensue. This conclusion was also relevant and helpful to the Dyes in relation to s104(1)(a) which requires that when considering an application, the consent authority have regard to any actual and potential effects on the environment of allowing the activity concerned.

[7] In spite of finding that the proposal satisfied gateway (a), the Environment Court considered gateway (b) on a precautionary basis lest it be wrong in relation to gateway (a). The Court held that the proposed development was not contrary to the objectives and policies of the RDC's plan. Chambers J found that the Court had misinterpreted or misunderstood those objectives and policies and had thus erred in law. The first question on the appeal to this Court is whether the Judge himself erred in law in coming to that conclusion.

Question 1 : objectives and policies

[8] The formal question on which leave to appeal was given is in these terms:

(a) Was the High Court correct in holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the District Plan in the overall context of Part II of the Resource Management Act 1991 and the statutory documents formulated under the Resource Management Act with the consequence that Mr Dye's application was wrongly assessed under ss104(1) and 105(2A)(b)?

[9] The Environment Court set out the relevant provisions of the plan in its decision. The general objective of the General Rural Activity Area in which the land lies is:

... to ensure the long term protection and enhancement of the soil, water, air, natural features, indigenous fauna and general rural character of the area, while maintaining flexibility to accommodate future rural land use options and a level of amenity which enables rural production to be effectively and efficiently undertaken. This objective complements the objectives of the Plan in relation to metropolitan Auckland and the urban areas and settlements within the District together with the opportunities for countryside living and lifestyle activities.

[10] Of further relevance is the provision which limits subdivisions to those which:

(i) Will facilitate primary production ...

...

(iii) Will provide a limited pool of rural-residential sites which, while available on the market generally, will enable those with a need or wish to live in a particular locality, such as rural workers or retiring farmers, to find sites locally ...

(iv) Will provide for the legal preservation of areas of good native bush or other significant natural features.

...

[11] There are two relevant policies described as policy 2 and policy 4. Policy 2 provides:

Maintain and enhance the overall character and productive capacities of the main rural production area. Land, soil, mineral and water resources will be managed so that they remain available for a wide range of rural production activities (including mineral extraction) now and in the future. The number, diversity of size, and location of sites is considered to be generally adequate for existing and foreseeable

productive needs as well as contributing significantly to the character of much of the rural area. Consequently the opportunities for further rural subdivision are limited to the following instances:

- (a) Some dispersed countryside living;
- (b) Indigenous bush and natural feature protection;
- (c) Household units on Maori land associated with a Marae;
- (d) Horse training sites in the Boord Crescent area;
- (e) Boundary relocations;
- (f) Various “one-off” activities permitted or with resource consent;
- (g) The creation of sites in excess of 120 hectares.

It is recognised that there will be from time to time intensive productive activity proposals which are reliant upon special climatic or physical conditions which are not found on existing sites of an appropriate size. Applications for non-complying activity resource consent will in part be assessed against the tests that any subdivided site is used for the purpose specified, and that consent would not result in loss of existing rural character or significant adverse effects on the sustainability of primary production potential, either singly, or cumulatively with other applications that could be expected in the vicinity.

And policy 4:

Facilitate countryside living opportunities focused on specified areas where pressures on rural production activities (including mineral extraction) are or can be limited, and a rural character is maintained. The extension or intensification of countryside living areas shall:

- (a) Avoid use of land of moderate to high value for primary production, (as defined by the New Zealand Land Resource Inventory worksheets) so far as practicable;
- (b) Not result in significant adverse effects on regionally or locally significant landscape, heritage values, or biological and ecological resources;
- (c) Protect the operational needs of rural production activities (including mineral extraction) from lifestyle amenity expectations;
- (d) Not limit the likely land needs for growth of urban centres or settlements;

- (e) Not adversely affect the safe and efficient operation of existing and future infrastructure;
- (f) Not require reticulated wastewater and effluent treatment and disposal services;
- (g) Avoid or mitigate any increase in immediate and downstream flooding effects;
- (h) Avoid adverse traffic impacts on local roads and State Highways; and
- (i) Have regard to the advantages of efficient use of physical resources such as sealed roads, schools and commercial services;
- (j) Avoid use of land that is incompatible with existing rural production activities.

[12] Change 55 makes specific provision for rural residential development in what is called the Countryside Living 2 (Town) Activity Area, the general objective of which is, in relevant part:

Provision is made in such a way that adverse impacts on natural resources and rural character are minimised, undue pressure to upgrade the rural roading network or provide reticulated water supply or stormwater or sewage disposal services is avoided, and the future expansion of existing urban settlements is not prejudiced. By concentrating lifestyle blocks at a limited number of locations it is intended to minimise the potential for friction between lifestylers and full-time farmers over the impact of amenity values of some farming operations. Also, by offering lifestylers the opportunity of obtaining a site in a Countryside Living Activity Area some of the pressure for sites for countryside living in the Production, Special Character and Conservation Activity Areas that make up the rest of the rural area of the District may be reduced, with benefits to the natural character and economics of farming in those areas.

[13] There are 8 such areas. The Environment Court concluded that while provision for rural residential dwellings was specifically provided for in these 8 areas, Change 55 “nevertheless recognises that some rural-residential subdivisions can be expected to occur in the general rural activity area”. The key issue in relation to question 1, is whether that conclusion was correct as a matter of law. If it was, Chambers J was in error in coming to the view that the Environment Court misinterpreted or misunderstood the relevant objectives and policies. As in the

Arrigato case, we consider that the decision of the High Court represents more of an independent assessment by the Judge than a consideration by him of whether the conclusion to which the Environment Court came was open to it in law. The Judge did not interpret the objectives and policies and then identify the manner in which they had been misinterpreted or misunderstood by the Environment Court. Rather he worked backwards. He reasoned that because the proposal was not consistent with the objectives and policies, as he saw them, the Court must have misinterpreted or misunderstood them. There is a difficulty with that reasoning. The Environment Court may well have taken a different view from the Judge about whether the proposal was contrary to the objectives and policies. It was not for the Judge to differ on an appeal limited to questions of law.

[14] The Judge also appears not to have given sufficient attention to the fact that in the case of a non-complying activity, one cannot expect to find support for the activity in the plan. The crucial question was whether the proposed development was contrary to the objectives and policies of the plan. If it was, the proposal did not satisfy gateway (b) and, although s104(1)(d) requires the consent authority only to have regard to any relevant objectives and policies, the error at the gateway stage must be regarded as having infected the s104 consideration.

[15] The key focus is therefore on whether it was open to the Environment Court to take the view that the proposal was not contrary to the relevant objectives and policies. The Judge in effect held that it was not open to the Court to do so; albeit, as we have said, his judgment did not address the matter quite in that way. We have come to the view, after a careful consideration of the objectives and policies, that the Environment Court's conclusion that the proposal was not contrary to them, did not represent any misconstruction of their terms. Thus in reaching its conclusion the Environment Court did not err in law.

[16] The general objective set out above signals a desire to maintain flexibility to accommodate future rural land use options. Thus rural residential type activities are not ruled out altogether at the general level. Indeed at the end of the general objective, there is specific reference to opportunities for countryside living and lifestyle activities. The general reference to subdivisions signals an intent to limit

them but such limitation itself contemplates a limited pool of rural-residential sites. The phrase “such as” which introduces examples of those wishing to utilise such sites, does not involve any limitation to the examples given. The two relevant policies continue the same theme. Policy 2 contemplates some “dispersed” countryside living and one-off activities, not necessarily confined to the 8 specifically designated areas.

[17] Although the Environment Court noted that policy 2 was subject to appeal, we were informed that all appeals have now been resolved and there was no suggestion that policy 2 had undergone any material change. Policy 4 refers to the facilitation of countryside living opportunities focused on specified areas. Those areas have been provided for in the plan. But the policy, in its reference to the extension of countryside living areas and its earlier reference to focussing on specified areas, does not indicate that the policy is to confine countryside living to such areas or to place a complete embargo on such activity outside those areas. Indeed the general objective of the specified areas is to reduce “some of the pressure” on the ordinary rural area.

[18] The question of law before us relates to RDC’s plan and whether the Environment Court misinterpreted or misunderstood its objectives and policies. We do not therefore consider it necessary to go wider into regional documents, there being no suggestion that there was any clash between such regional documents and the plan under consideration.

[19] After he had set out his summary of the Environment Court’s reasoning, the Judge said:

That reasoning demonstrates a clear misunderstanding of the objectives and policies of the transitional plan and Change 55. It ignores the principal objective of the Rural 1 (General Rural) zone which is ‘to preserve the capacity of the land for food and other forms of primary production’. It ignores the fact that the district council, after public consultation, has provided rules for rural-residential subdivision of land which is of lower quality for food production. Those standards are set out at paragraph 14 above. It ignores the fact that this subdivision proposal is quite at odds with those standards. It ignores the fact that the council has provided for rural-residential development by the enactment of special zones. No doubt those zones

were selected following ‘an integrated consideration of the relevant issues’ with extensive input from those living in the district. It has ignored the overall thrust of the planning documents, both at regional level and at district level to contain urbanisation of the countryside to specific areas.

[20] We must say, with respect, that the Judge’s repeated use of the word “ignores” is problematic. We do not think the Judge can have intended to use the word literally because the Environment Court expressly referred to many of the matters said to have been ignored. The concept of ignoring is also difficult to reconcile with the Judge’s ultimate conclusion that the Court had misinterpreted or misunderstood the objectives and policies. If the Judge intended to convey by his use of the word “ignores” the proposition that the Environment Court had given no or insufficient weight to the matters he listed, he either fell into the error of substituting his own assessment of what weight certain factors should have for that of the Court, or in reality found an error of law different from that which he said formed the basis of his conclusion. Failing to give any weight to a relevant consideration is broadly equivalent to failing to take account of a relevant consideration. It is not equivalent to misunderstanding or misinterpreting a plan provision to which, *ex hypothesi*, you have given consideration.

[21] Another issue was whether the Judge was correct in saying at his para [28] that the restorative tree planting dimension was the crucial factor leading to the success of the application. The Environment Court was not however influenced in its conclusion that Change 55 recognised that some rural residential subdivisions could be expected to occur in the general rural activity area by its separate emphasis on the tree planting dimension. The conclusion in question came after a careful and detailed examination of the relevant objectives and policies which the Court had set out in full. That aspect of the decision contained no reference to tree planting at all. Whether the Judge was correct in saying that the restorative tree planting dimension was the crucial factor is of no present moment. What can be said is that the tree planting dimension did not improperly influence the Court’s approach to gateway (b) and s104(1)(d).

[22] At the end of his para [33], the Judge implied that the Environment Court had been selective in its reading of what he called the statutory documents. He also said

that to do so would be a perverse exercise of the discretion given to a consent authority. This implied criticism of the Environment Court was unjustified. The use of the word “perverse” was unfortunate. Even if the Court had misunderstood or misinterpreted the documents, it can hardly be said to have been selective in its reading of them or to have acted perversely.

[23] In reaching our conclusions we have given full consideration to the submissions of Mr Cowper for ARC and Mr Loutit for RDC. As a general observation we do not consider those submissions focused sharply enough on the actual provisions of the relevant objectives and policies. The question of law inherent in question 1 is a confined one. It focuses on the “district plan”, meaning RDC’s operative plan and specifically Change 55. While we accept that regional and national documents and the provisions of Part II of the Act can have a bearing on what is contained in a plan, the starting point when considering the objectives and policies of the plan must surely be with those objectives and policies themselves. Nor do we consider the Councils’ submissions took sufficiently into account that this was an application for a non-complying activity which, ex hypothesi, was not going to comply with the plan. The essential question was whether it was contrary to the objectives and policies of the plan properly construed.

[24] We do not have before us, and therefore do not need to consider, what the situation would be if the objectives and policies of a plan are inconsistent with or contrary to the terms of a regional or other document or indeed the provisions of Part II. As pointed out in *Arrigato*, Part II, in its reference in s6(a) to subdivisions, refers to the protection of the specified values from inappropriate subdivision and s11 contemplates that a subdivision may be allowed by a rule in a district plan or by a resource consent and such a consent can of course be given to a non-complying activity, subject always to the provisions of ss104 and 105. There was no suggestion in the present case that the objectives and policies of the district plan were contrary to higher level planning factors. It was suggested that the proposal itself was contrary to those higher level documents, but the essential focus for present purposes is on the objectives and policies of the district plan which were not said to be inconsistent with those higher level matters.

[25] In summary, the Environment Court was fully mindful of the basic thrust of the relevant objectives and policies which was to confine rural residential activities to the designated areas. The Court considered that the objectives and policies allowed for the possibility, albeit limited, that such activities might nevertheless appropriately be allowed to occur outside the designated areas and in the general rural part of the district. Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances. It is implicit in its approach that the Environment Court did not see the relevant objectives and policies as precluding altogether developments not falling within a designated area. The objectives and policies themselves recognised that some wider development might be appropriate. If the Court found a particular proposal to be appropriate, it could not be said to be contrary to the objectives and policies on the basis that it was outside the particular controls which were designed to implement them. We are unable to conclude that in approaching the matter in that way the Environment Court misunderstood or misinterpreted the objectives and policies. The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law.

[26] For these reasons our answer to question 1 is that the High Court was not correct in holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the district plan. The application was therefore not wrongly assessed under ss104(1)(a) and 105(2A)(b).

Questions 2 and 3 : precedent and cumulative effects

[27] These two questions can be dealt with together as they effectively cover the same ground. Question 2 is whether the High Court was correct in holding that the Environment Court had made an error of law in limiting its consideration of cumulative effects solely to “rural character”, and in failing to consider all of the cumulative effects of the proposed subdivision. Question 3 asks whether the High Court was correct in holding that the Environment Court had made an error of law in finding that the application would not give rise to “precedent” effects under s104 of the Act.

[28] The Environment Court found that to grant consent to the subdivision would not result in a loss of rural character, either in relation to the particular subdivision or from the point of view of the effects the granting of the present application might have on future applications of a like nature. Chambers J held that the Environment Court had erred in law in not having regard to:

the cumulative wastewater, stormwater, ecological, roading and surfacing [sc: servicing] effects of the change in land use and in the population densities which might result from the number of restorative subdivision proposals which might follow from allowing this one.

[29] The Judge continued:

Mr Cowper submitted that these additional cumulative effects had to be addressed in a comprehensive manner. He said that had been done in the regional policy statement and the conclusion that the regional council had there come to was quite different from the approach of the Environment Court. The court had simply ignored the regional council" and district council" conclusions as expressed in their respective planning documents.

Mr Cowper said that while the concept of restorative subdivision might be innovative and beneficial in respect of one particular property in an area, that did not mean the repetition of that idea throughout the area on an ad hoc site by site basis would necessarily be beneficial as well. Unless an area-wide assessment was carried out with input from all relevant areas of expertise, the consequences of, for example, the increase in population density resulting from all like proposals might have adverse effects which are quite unforeseen when restorative subdivision is looked at in respect of an individual site.

In my view, that criticism is justified and the Environment Court did fail adequately to consider all the cumulative effects of this grant of a resource consent. In limiting itself to a consideration of cumulative effects solely to 'rural character', the court made an error of law. This error means that the court will need to reconsider the 'effects' of allowing the activity in terms of s104(1)(a). In addition, the court will need to reassess the first threshold test (s105(2A)(a)) as to whether 'the adverse effects on the environment' of the non-complying activity will be minor.

[30] The Environment Court proceeded on the basis that the evidence before it in relation to each of the matters referred to by the Judge, ie. wastewater, stormwater and so on, was that no extension of public infrastructure was required to service the lots to be created by the proposed subdivision. Notwithstanding this assessment by

the Environment Court, the High Court held that it was an error in law not to have made an area-wide assessment with input from all relevant areas of expertise. It should be noted at the outset that the Judge's approach would substantially increase the ambit and cost of an application such as the present, and indeed make such applications significantly more extensive and complicated.

[31] There are really two legal aspects to the issues which were raised by the parties when they argued questions 2 and 3. The first concerns the concept of precedent in this field, and the second concerns the concept of effects and in particular that of cumulative effects. It is convenient to deal with precedent first.

Precedent

[32] The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have 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 the 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. The present application had a number of particular features which have already been noted. The most significant of them for present purposes are the lack of any need for extension of the public infrastructure, the poor productive quality of much of the relevant land, the largely rural residential character of the locality, and the existence of the two nearby restaurants. The Environment Court's view on the question of precedent effect was:

In this instance we do not consider that a precedent will be set by granting the application. As we have said, the proposal:

- does not detract from the rural character;
- does not exclude land of high productive capacity from primary production;

- makes detailed provision for substantial restoration of land that has suffered from the debilitating effects of past development.

[33] We consider that the Environment Court was entitled in law to come to the conclusion that no precedent would be set by granting the application. The suggestion that the 3 bullet points comprise a checklist and any other application satisfying those 3 points would have to be granted is unpersuasive. The Court was obviously emphasising the matters that it regarded as particularly relevant to the instant case. Even if those three same matters could be found in another case, it would be naïve to suggest that this would require the consent authority to grant approval, irrespective of all the particular features of the application. It is self evident that the Environment Court was not endeavouring to set out a checklist for future cases. There was also a criticism of the Court because it had failed to refer to the issue of cumulative effects in the so-called checklist. We will address that issue separately a little later.

[34] We cannot accept Chambers J's conclusion that the Court was:

wrong if it considered that no precedent was being set by the granting of this application. The evidence before the court was that Mr Dye's land, including its productive capacity, is typical of land throughout the Rodney District. There was nothing exceptional about this farmland.

[35] The Judge was of course concerned only with errors of law. His reference to the Environment Court being "wrong" was not in terms a finding that the Court was wrong in law. Indeed the Judge's reference, in the very next sentence, to the evidence before the Court reinforces the impression that the Judge was moving outside the scope of matters of law. The Judge expressed the view that the Court's decision "if it stood would have significant precedent effect". That was his own assessment. What he should have been considering was whether the Environment Court was wrong in law in holding that its decision would have no precedent effect. What is more, we cannot identify anything in the Environment Court's decision to justify the Judge's statement of fact that the Dyes' land, including its productive capacity, was typical of land throughout the Rodney district.

[36] For these reasons we are of the view that the Judge was himself in error of law when he held that the Environment Court had made an error of law in finding that the Dyes' application would not give rise to "precedent effects" under s104 of the Act. We turn now to the topic of effects and cumulative effects.

Effects and cumulative effects

[37] Section 3 of the Act defines the term "effect" in a non-exhaustive way:

3 Meaning of "effect"

In this Act, unless the context otherwise requires, the term "effect" includes—

- (a) Any positive or adverse effect; and
- (b) Any temporary or permanent effect; and
- (c) Any past, present, or future effect; and
- (d) Any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

- (e) Any potential effect of high probability; and
- (f) Any potential effect of low probability which has a high potential impact.

[38] The present issue is the way the word "effects" should be construed in ss104 and 105 of the Act. Each section is concerned, in its relevant part, with effects on the environment. In s104(1)(a) the focus is on "any actual and potential effects on the environment of allowing the activity". In s105(2A)(b) it is on "the adverse effects on the environment". The definition of effect includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. 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. The same connotation derives from the words “regardless of the scale, intensity, duration or frequency of the effect”.

[39] Potential effects by contrast are effects which may happen or they may not. Their definition incorporates levels of probability of occurrence. A high probability of occurrence is enough to qualify the potential effect as an effect, whereas a potential effect which has a low probability of occurrence qualifies as an effect only if its occurrence would have a high potential impact. The definition is such that any ‘precedent’ effect which may result from the granting of a resource consent is not within the concept of a cumulative effect. That concept is confined to the effect of the activity itself on the environment. If the precedent effect of granting a resource consent is to fit within the definition at all, it must do so by dint of its potential effect and it would then have to satisfy the probability and, if applicable, the potential impact criteria. It is unnecessary to say more at a general level.

[40] The present case involves a consideration of the concept of effect for the purposes of ss104 and 105. It is logical to start with s105. The question in gateway (a) is whether the adverse effects on the environment will be no more than minor. This question, as discussed above, is directed to the effect of the non-complying activity itself. It is concerned with the effects of that activity as it impacts on the environment. The question cannot reasonably be regarded as involving any precedent effect deriving from the granting of the resource consent. That in context would involve an unnatural and unintended extension of the concept of the environment.

[41] As noted, s104(1)(a) requires the consent authority to have regard to “any actual and potential effects on the environment of allowing the activity” in question. In this respect we consider Parliament has implicitly abandoned the s3 definition of effect which only applies unless the context otherwise requires. Had Parliament wished to adopt the definition, it would have used simply the word “effects” (as in

s105(2A)) rather than the words “any actual or potential effects”. Indeed if the definition is invoked it would have the awkward consequence that s104(1)(a) would be dealing with actual potential effects and potential potential effects. Everything points to a deliberate intention here to address only effects which are “actual” and “potential”; albeit putting the matter that way is in any case inherently very wide and capable of capturing some, if not all, of the subtleties of the s3 definition. So far therefore, in spite of the seemingly deliberate decision not to rest on the defined term “effect”, it is not easy to see what confining purpose the legislature may have had.

[42] The next point is the same as that which applies to s105(2A)(a). It is the effects on the environment which are being addressed. Section 104(1)(a) was brought into line with s105(2A)(a) in this respect by the 1993 amendment to the Act. Furthermore, the focus is on the effects on the environment of allowing the relevant activity. The use of the words “of allowing the activity” could be thought to signal an intention that precedent effects are here intended to be brought into account. The words used are not “any ... effects of the activity on the environment”. However, we consider such a conclusion would be too subtle and not in accordance with the purpose and policy of s104(1)(a) viewed as a whole. As with gateway (a), we consider para (a) of s104(1) is concerned with the impact of the particular activity on the environment. It is not concerned with the effect which allowing the activity might have on the fate of subsequent applications for resource consents. If there is a concern at precedent effect, it should be addressed under para (d) of s104(1) which is similar in concept to gateway (b) in s105(2A); albeit para (d) does not have the same constraining effect as gateway (b). Alternatively precedent concerns may be addressed under para (i) of s104(1).

[43] How then does all this relate to the question before us? The approach adopted by Chambers J resulted in his finding that the Environment Court had erred in law. It did so, in his view, by failing to have regard to:

the cumulative wastewater, stormwater, ecological, roading and surfacing [sc: servicing] effects of the change in land use and in the population densities which might result from the number of restorative subdivision proposals which might follow from allowing this one.

[44] The Judge was of the view that it was necessary for the Environment Court to carry out what he described as an area-wide assessment with input from all relevant areas of expertise. He said that the increase in population density resulting from all like proposals might have adverse effects which were quite unforeseen when the matter was looked at from the point of view of an individual site.

[45] In order to be able to hold that the Environment Court's failure to make the Judge's "area wide assessment" amounted to an error of law, the Judge must have been of the view that what had been omitted was a mandatory requirement. We cannot accept that proposition. The correct approach to the concept of effects, as described in our earlier discussion, does not make it mandatory to adopt the sort of exercise the Judge had in mind. Nor does s104(1)(d) have that consequence, the more so in the light of the Environment Court's conclusion, which we have held not to have been erroneous in law, that the proposed subdivision was not contrary to the objectives and policies of the plan. There are good policy reasons why such an inquiry as that contemplated by the Judge should not be regarded as mandatory in present circumstances. Compliance with the manifold requirements of the Resource Management Act is already complicated and expensive enough as it is; some would say too complicated and expensive. To require applicants for consent to non-complying activities to entertain, on a mandatory basis, an area-wide inquiry to deal with all the possible future implications of the granting of the particular consent, would impose very considerable additional burdens on all concerned. It would also be a rather speculative exercise.

[46] We are reinforced in the view we take by the following passage from the decision of the Environment Court in *Wellington Regional Council (Bulkwater) v Seafresh NZ Ltd* (unreported decision no. W03/98):

For our part, we cannot see any rush of applications for resource consents for abstraction but if there were and if they were of significance, then each would need to be considered on its merits. We do not accept that the RMA allows us to arbitrarily refuse an application for a resource consent on the basis that hypothetical applicants may appear and be granted consents based on a grant of this consent without further examination of the capacity of the resource. It is our opinion that the 1993 amendment to the RMA by including the word "environment" in s104(1)(a) clearly intended to restrict the word

“effect” (which was previously unqualified). This brought s104 into line with s105(2)(b)(i) relating to adverse effects on the environment. That evinced a deliberate legislative intent and it is our opinion that to now attempt to define the word “effect” in s3 as referring to conjectural future actions by persons unknown who are not even parties to proceedings is stretching the intention of Parliament beyond that intended by this Act. The word “effect” has now the s104 qualification that it must be “on the environment”. Furthermore, to even consider future applications as a potential effect or a cumulative effect is to make a totally untenable assumption that the consent authority will allow the dike to be breached without evincing any further interest and control, merely because it has granted one consent.

[47] We were informed by Mr Brabant that this case had been cited to Chambers J; albeit he did not refer to it in his judgment. We agree with the views of the Environment Court in this passage, the last sentence of which seems particularly apt to the matters we are now considering. In coming to its conclusions the Environment Court was not required as a matter of law to take into account what were characterised in argument as potential cumulative precedent effects. Mr Burns for the ARC put it that his client was concerned with the macro issues which the case raised, such as population increases outside the areas designated for rural residential living. We do not consider that the facts of the present case were such that the Environment Court erred in law by not specifically addressing that sort of issue.

[48] Mr Burns asked rhetorically to what extent the activity consented to was likely to be repeated throughout the area and if it was to any appreciable extent, what the consequences would be of that. Conversely he asked rhetorically whether this case represented a genuine one-off situation. We infer that the Environment Court considered on the evidence that the case was in a genuine one-off category, and its present ruling can properly be viewed in that light. We cannot accept counsel’s submission that the Environment Court was establishing a precedent while at the same time saying it was not doing so. In coming to our conclusions, we have also taken into account the submissions made by Mr Loutit on behalf of the RDC which it is not necessary to address separately.

[49] We can summarise our views on both questions 2 and 3 in the following way. The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when

considering an application for consent to a non-complying activity. The issue falls for consideration under s105(2A)(b) and s104(1)(d). Cumulative effects properly understood should also be taken into account pursuant to s105(2A)(a) and s104(1)(a). But in taking those matters into account, the consent authority has no mandatory obligation to conduct an area-wide investigation involving a consideration of what others may seek to do in the future in unspecified places and unspecified ways in reliance on the granting of the application before it. The High Court was not correct in its conclusion that the Environment Court had erred in law in failing to consider, in the sense adopted by the High Court, “all of the cumulative effects of the proposed subdivision”. Nor was the High Court correct in holding that the Environment Court had erred in law in finding that Mr Dye’s application would not give rise to “precedent effects under s104 of the Act”.

Formal orders

[50] For the reasons given each of the questions is answered no – the High Court was not correct. The appeal is accordingly allowed. The orders made in the High Court are set aside. In their place we substitute an order dismissing the appeal from the Environment Court to the High Court. Mr Dye is entitled to costs in this Court in the sum of \$5000, plus disbursements including the reasonable travel and accommodation expenses of two counsel to be fixed if necessary by the Registrar. Those costs and disbursements to be paid equally by ARC and RDC. Costs in the High Court are to be fixed, if necessary, in that Court in the light of this decision.

Solicitors

Harkness & Peterson, Wellington, for Appellant

Bell Gully, Auckland, for First Respondent

Simpson Grierson, Auckland, for Second Respondent

	Appellant	Rodney District Council
	Respondent	Gould, KF and Gillain, FYP as trustees of the A and A Young Family Trust
	Decision Number	CIV2003-485-2182
5	Court	Cooper J; High Court Auckland
	Judgment Date	11/10/2004
	Counsel/Appearances	Enright, RB; Littlejohn, KRM; Verry, JF
	Cases Cited	Arrigato Investments Ltd v Auckland RC 11/09/01, CA84/01, [2002] 1 NZLR 323, (2001) ELRNZ 193, [2001] NZRMA 481, 6 NZED 689; Auckland CC v Wotherspoon 22/09/89, Fisher J, HC Auckland AP26/89, [1990] 1 NZLR 76; Bachelor v Tauranga DC (No 2) 12/11/92, Barker, Henry and Blanchard JJ, HC Wellington AP189/92, [1993] 2 NZLR 84, (1992) 2 NZRMA 137 (HC); Body Corporate 97010 v Auckland CC 17/08/00, CA64/00, [2000] 3 NZLR 513, 6 ELRNZ 303, [2000] NZRMA 529, 5 NZED 695; Clifford Bay Marine Farms Ltd v Marlborough DC C131/03, 9 NZED 153; DJ Heaney v Rodney DC 16/03/04, Gendall J, HC Auckland CIV2003-404-3480, 9 NZED 377; Dye v Auckland RC 11/09/01, CA86/01, [2002] 1 NZLR 337, 7 ELRNZ 209, [2001] 11 NZRMA 513, 6 NZED 698; Hopper Nominees Ltd v Rodney DC 09/02/96, Tomkins J, HC Auckland HC105/95, 2 ELRNZ 73, [1996] NZRMA 179, 4 NZPTD 397; Manos v Waitakere CC 09/10/95, CA212/94, [1996] NZRMA 145, 3 NZPTD 495; McGregor v Rodney DC 24/02/04, Harrison J, HC Auckland CIV2003-485-1040, [2004] NZRMA 481, 9 NZED 393; Murphy v Rodney DC 04/06/04, Baragwanath J, HC Auckland CIV2003-404-1929, [2004] 3 NZLR 421, [2004] NZRMA 393, 9 NZED 609; NZ Rail Ltd v Marlborough DC 04/11/93, Greig J, HC Wellington AP169/93, [1993] 2 NZLR 641, [1994] NZRMA 70, 1&2 NZPTD 720; O'Shea v Auckland CC A105/01, [2002] NZRMA 117, 7 NZED 45; Reith v Ashburton DC C034/94, 1B ELRNZ 216, [1994] NZRMA 241, 3 NZPTD 424; Wellington RC (Bulk Water) v Wellington RC W003/98, 3 NZED 182
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40	Statutes	Resource Management Act 1991, s 2 "amenity values", s 5, s 6, s 7, s 7(b), s 7(c), s 7(f), s 7(g), s 8, s 104, s 104(1), s 104(1)(a), s 104(1)(d), s 104(1)(i), s 104(4)(a), s 104(4)(b), s 104(6), s 105, s 105(2)(b), s 105(2)(c), s 105(2A), s 105(2A)(a), s 105(2A)(b),

s 120, s 125, s 125(1), s 125(1)(b), s 125(1)(b)(iii),
s 272, s 299, s 300(5); Resource Management
Amendment Act 1993; Resource Management
Amendment Act 1997

5 Full text pages: 44 + 4 pgs annexures

Keywords

appeal procedure; subdivision; error; precedent; effect cumulative; district
plan; environmental impact

Significant in Law, s 104 RMA

10 *A cumulative effect must be one that arises as an effect of the application
for which consent is sought. It is not legitimate to consider, as cumulative
effects in relation to a particular application, any effects relating to possible
future applications.*

SYNOPSIS

15 This was an appeal by the council against an interim decision of the
Environment Court allowing an appeal by the respondents against the
council's refusal to consent to the subdivision of a 2.34ha property situated
at 155 Spur Road, Stillwater.

20 The issues raised concerned alleged errors of law in the way the
Environment Court: interpreted the district plan; considered the precedent
implications of the proposal; dealt with the council's arguments about
cumulative effects; and failed to carry out its mandatory duty to consider s 7
RMA. In particular, the council argued that the Environment Court had, in
its decision, explicitly said that it had not considered all aspects of s 7.

25 The Court considered the Environment Court's interpretation of the district
plan and found no interpretive error. The Court concluded that the clear
linkage between s 105(2A)(b) and s 104(1)(d) and the deliberate and logical
exclusion of references to rules in the former, in contrast to the inclusion of
rules in the latter, meant that the reference to "objectives and policies" in
30 s 105(2A)(b) excluded the rules from consideration.

The Court found no errors in the way the Environment Court dealt with the
precedent implications and arguments on the cumulative effects of the
proposal. The Court rejected arguments that *Dye v Auckland RC* 11/09/01,
CA86/01, [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA
35 513 could be distinguished on its facts and concluded that the approach to
ss 104 and 105 RMA set out in *Dye* was intended to be of general
application [11 ELRNZ 198 at 20]. The Court stated that *Dye* clearly held
that a cumulative effect must be one that arises as an effect of the
application for which consent is sought, and which is being considered in
40 the particular case before the consent authority. It was not legitimate to

consider, as cumulative effects on the environment of one application, effects of possible future applications which may be made [11 ELRNZ 196 at 39]. The Court concluded that an effect which may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a cumulative effect.

On the question of the Environment Court's consideration of s 7, the Court noted that the proposed subdivision's low environmental impact meant that it passed the s 105(2A) test. Given this, the Court considered that when the Environment Court had said that its attention had not been drawn to aspects of s 7 that the proposal would offend, it was in effect finding that the proposal did not offend against that section. Accordingly, the Court found no error of law in the Environment Court's consideration of s 7.

The appeal was dismissed. The Court considered that the respondents were entitled to costs.

FULL TEXT OF CIV2003-485-2182

[1] The appellant ("the Council") appeals under s 299 of the Resource Management Act 1991 from an interim decision made by the Environment Court on 22 September 2003. By its decision, the Environment Court allowed an appeal by the present respondents against the refusal by the Council to consent to the subdivision, into two lots, of a 2.34 hectare property situated at 155 Spur Road, Stillwater.

[2] The numerous questions contained in the appeal are set out in the appendix to this judgment. The issues raised concern alleged errors of law in the way that the Environment Court interpreted the district plan, considered the precedent implications of the proposal, and dealt with the Council's arguments about cumulative effects. Issues are also raised concerning the manner in which the Court dealt with some of the evidence. Because an appeal from the Environment Court can only raise questions of law, the questions about the evidence consist of allegations that the Court ignored, or failed to take certain evidence into account: the Council accepts that the weight to be accorded the evidence was a matter for the Environment Court, unable to be challenged on appeal. Finally, the Council argues that the Court failed to carry out its mandatory duty to consider s 7 of the Act, and this is said to be a fatal error.

Background

[3] The subdivision proposal was that the land be divided into lots of respectively 1.1 hectares and 1.24 hectares in area. Such a subdivision required consent, if it was to proceed, as a non-complying activity under the relevant provisions of the Council's district plan. At all relevant times, there were an operative transitional district plan, a proposed change to that district plan (known as proposed plan change 55) and a proposed district plan

which had been publicly notified in 2000. The proposed subdivision required non-complying activity consent under all of these instruments. However, the main thrust of the argument in the Environment Court concerned the meaning and proper application of proposed change 55, and the proposed district plan. That has been the case in this Court as well.

[4] In its decision, the Environment Court held that any adverse effects of the subdivision on the environment would be no more than minor and that, in the case of plan change 55 and the proposed district plan, the proposal would not be contrary to their objectives and policies. Holding as a consequence that the jurisdictional hurdles in both paras (a) and (b) of s 105(2A) of the Resource Management Act had been cleared, the Court then went on to consider the merits of the application under s 104 of the Act. It held that the relevant district plan provisions to which it had been referred did not stand in the way of consent being granted under s 104(1)(d). It was, of course, a proposal which was admittedly contrary to the relevant rules, but the Environment Court applied the decision of the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, to reject an argument which had been advanced on behalf of the Council that the appropriate enquiry under s 104(1)(d) was to consider whether or not a proposal is supported or envisaged by, aligned with, or accords with the spirit of the district plan. In the Environment Court's view, although the proposal was not "entirely supported by the generality of issues and explanations", when the matters raised by s 104(1)(d) were properly considered, they were not such as to lead to consent being declined.

[5] The Environment Court rejected an argument which had been made to it by the Council that adverse cumulative effects would flow from the grant of consent. Applying the decision of the Court of Appeal in *Dye v Auckland Regional Council* [2002] 1 NZLR 337, it held that cumulative effects could not embrace what counsel for the Council had described as "effects on community expectations". Further, it held that the issues of precedent and the integrity of the District Plan should be addressed in the context of s 104(1)(d) and (i), but not under s 104(1)(a).

[6] The Court found that there would be no adverse effect on the environment which, considered under s 104(1)(a), should lead to consent being declined.

[7] In so far as the issues of precedent and the integrity of the district plan were concerned, the Environment Court's decision tended to treat those issues as two aspects of the same thing. In any event, it found that there were a number of characteristics of the subject proposal which took it

outside the generality of cases, with the consequence that precedent effects of the kind held relevant in *Dye v Auckland Regional Council* would not arise.

[8] In summary, the proposal's differentiating factors were first, that the actual and potential effects on the environment of the proposal would be less than minor. Second, the site was located in an area where subdivision to the average lot size proposed was already relatively common and, proportionately, would not be significantly altered by the proposal. Third, every adjoining neighbour had given express written approval to the development. Finally, the Council itself had recently publicly adopted a policy of increased density for countryside living which was consistent with the "intent" of the application.

[9] The Environment Court referred briefly to Part II of the Act, stating that its attention had not been drawn to aspects of ss 6, 7, or 8 against which the proposal would offend. It said that it was satisfied that the proposal met the purpose of the Act, which by s 5 is stated to be promoting the sustainable management of natural and physical resources. Expressing its conclusions about s 5, the Court said:

We consider that this is achieved in the sense that the use, development and protection of natural and physical resources is achieved in a way which enables the appellants to provide for their social and economic well-being, and that the proposal adequately sustains the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations, and avoids adverse effects on the environment. In addition, there was no evidence that the proposal would not safeguard the life supporting capacity of air, water, soil or eco-systems.

[10] The Court then held that consent should be granted and reversed the Council's decision. Its decision was made an interim one, however, to enable the parties to confer about the conditions to which the consent should be subject.

The appeal

[11] The Council lodged an appeal in this Court against the Environment Court's decision. By its notice of appeal dated 9 October 2003, the Council identified approximately twenty five errors of law.

[12] In accordance with procedural directions made for the disposal of the appeal in this Court, counsel for the Council lodged written submissions prior to the hearing, some sixty three pages long. In response to the respondents' submissions, also filed prior to the hearing, counsel lodged another twenty page document, said to be in "rebuttal", and attached to that document was a schedule setting out amended questions of law.

[13] The matter was argued before me on 13 May, having been set down for one day. During the argument further changes were sought to be made to the questions to be determined. At the end of that day, the appellant's submissions were not finished and a further day was allocated for the matter to be completed on 18 June 2004. For the resumed hearing, counsel filed additional submissions. Again, during argument on 18 June 2004, the questions of law underwent further change, and some were deleted.

[14] Mr Littlejohn, for the respondents, did not oppose the various changes which the Council proposed to the questions and consequently I allowed the amendments to be made. It is not to be supposed that the Court would in future adopt a similarly tolerant approach to frequent changes sought to be made to an appeal under s 299 of the Act, especially if the amendments were opposed by the respondent. Section 299 of the Resource Management Act is limited to appeals on a point of law. Section 300(5) requires that a notice of appeal shall specify the error of law alleged, the question of law to be resolved, and the grounds of the appeal with sufficient particularity for the Court and other parties to understand them. It is the notice of appeal when filed which should contain those matters, and it will not generally be appropriate for an iterative approach to be taken, as was the case here, to the formulation of the questions.

[15] Even as amended, and as counsel for the Council claimed "refined", the questions are numerous. In the circumstances, I have attached them to this judgment in the form of an appendix. That appendix reflects the final form in which counsel for the appellant was content to leave them, including the numbering. In the judgment which follows, I adopt the headings dividing the questions between the "first question of law" to the "seventh question of law", as set out in the appendix. There is no third question. The appeal as filed had raised the issue of effects on "community expectations", but the question was abandoned.

First question of law

[16] It can be seen from the appendix that the issues raised under the first question of law give rise to not one but a variety of legal issues. There is an apparent confusion in the drafting. The question commences by raising the issue of error in the interpretation of plan change 55 and the proposed district plan, but then implies that the error in interpretation was a failure to have regard to the "relevant considerations" which are then listed in paragraph 1.1 and the following paragraphs. Normally, one would draw a distinction between an error in interpretation and a failure to have regard to relevant considerations. However, having heard Mr Enright's argument, I gather that what is suggested is that the Environment Court fell into error in its interpretation of the planning instruments, because it failed to have

regard to or properly take into account the various provisions in those planning instruments which are itemised in paragraphs 1.1 to 1.5 within the first question of law. I will proceed to deal with the matter on that basis.

[17] The other preliminary observation which I think should be made is that even if the gist of the first question of law is as I have just described it, paragraph 1.5 raises a different kind of consideration altogether. The Council argues that its planning witness, Mr Simmons, had given evidence on the question of whether the proposed subdivision was (for the purposes of s 105(2A)(b)), contrary to the objectives and policies of the proposed district plan, and that the Environment Court wrongly concluded that there was no such evidence.

[18] A conclusion that there was no evidence on a particular issue may be an error of law. If there was such evidence and it was relevant to an issue in the case, then failing to consider the evidence would be an error of law if the evidence might have affected the decision. However, that is a wholly different argument from one which is based on alleged interpretative error, which the first question of law plainly is. Put simply, I do not see how a court can err on a matter of interpretation, by wrongly concluding that there was no evidence about something. Such a proposition simply confuses law and fact. At paragraph [20] of its decision in *Dye v Auckland Regional Council*, the Court of Appeal distinguished between the concepts of failing to take account of a relevant consideration, and misinterpreting the objectives and policies in a district plan. As the Court put it:

Failing to give any weight to a relevant consideration is broadly equivalent to failing to take account of a relevant consideration. It is not equivalent to misunderstanding or misinterpreting a plan provision to which ex hypothesis, you have given consideration.

[19] I do not consider that the issue raised by paragraph 1.5 requires any further consideration. In my view, the Environment Court could not have misinterpreted the relevant planning instruments, on the basis alleged.

[20] Returning then to the principal issues raised by the first question of law, there is, I think, a more fundamental difficulty. That is that the Council did not, in the course of its voluminous written and lengthy oral submissions, identify what the error in interpretation of plan change 55 and the proposed district plan was. An error in interpretation of a district plan (or any other instrument, for that matter) must involve giving the wrong meaning to some words which have been used in it. To establish that such an error has occurred, I would have thought that it was necessary to identify the particular words said to have been wrongly interpreted, to explain how or in what way they had been wrongly interpreted, and to demonstrate by means of argument what the correct interpretation, for which the appellant contends, is. The appellant has done none of those things.

[21] I apprehend that the Council is concerned that, in its discussion of what it thought were the relevant objectives and policies in the district plan, the Environment Court said that it could find no clearly articulated difference between zones called (in proposed change 55) respectively the Countryside Living 1 (Rural) Activity Area, and the Countryside Living 2 (Town) Activity Area. In this regard, Mr Enright points to two paragraphs in the Environment Court's decision:

(a) Paragraph [42](e), in which the Court held that the quantified subdivision provisions in the rules were really the only point of difference between the two zones.

(b) Paragraph [43], in which the Environment Court said:

In essence, the similarity in the Countryside Living 1 and 2 Activity Area materials described allows of no strong basis for differentiating between the two Areas and, in particular, the form of development each is intended to accommodate. A sharper difference in the objectives, policies, Environmental Performance Criteria (EPC) and Intended Environmental Results (IER) would have provided a more robust basis for achieving different outcomes. (It might also have been different if the rules had been aligned in a more discernible manner with specific policies and objectives, and actively supported by them).

[22] Then, in relation to the objectives and policies in the proposed district plan, the Environment Court held at para [46](e):

Once again, none of the Countryside Living Zones — General Objectives and Policies contained in Section 7.8.5, elucidate the difference between the two Countryside Living zones, including as to their minimum subdivision lot sizes.

[23] As I understand Mr Enright's argument, it is that if the Environment Court had properly taken into account the matters itemised as paragraphs 1.1 to 1.4 within the first question of law, then it might have reached conclusions different to those that are recorded above. However, the reasons for the Environment Court's conclusion, and the detailed basis which it set out for arriving at it are not of themselves alleged to be wrong. Clearly, the conclusions which I have earlier identified reflected a detailed reasoning process, the elements of which are not themselves subject to challenge in the first question of law. But in order to hold that there had been some error of interpretation, this Court would have to be satisfied, as I have already indicated, as to what the provision misinterpreted was and what its proper interpretation should be.

[24] Any other approach is likely to lead to the error which the Court of Appeal held had occurred in the High Court in both *Arrigato Investments Ltd v Auckland Regional Council* and in *Dye v Auckland Regional Council*. To quote from paragraph [13] of the latter:

5 *The Judge did not interpret the objectives and policies and then identify the manner in which they had been misinterpreted or misunderstood by the Environment Court. Rather he worked backwards. He reasoned that because the proposal was not*
10 *consistent with the objectives and policies, as he saw them, the Court must have misinterpreted or misunderstood them. There is a difficulty with that reasoning. The Environment Court may well have taken a different view from the Judge about whether the proposal was contrary to the objectives and policies. It was not for the Judge to differ on an appeal limited to questions of law.*

15 [25] The Council's approach on this part of the appeal is similar to that which was criticised by the Court of Appeal. An outcome with which the Council is not comfortable is impugned on the basis that because the result is unsatisfactory, that must be as a result of misinterpretation or misunderstanding of the relevant objectives and policies. But that is not a
20 legitimate approach.

 [26] For the reasons I have already given, it is my view that the various questions posed under the heading "First question of law" should be answered in the negative. However, in case there is any error in my approach I go on to address the questions on the basis of particular issues
25 raised in argument by Mr Enright. For this purpose, paragraphs 1.1 and 1.4 can conveniently be dealt with first, because each relates to objectives and/or policies in the proposed district plan. I will then consider paragraph 1.3, also based on an alleged failure to consider a policy; and finally paragraph 1.2 which raises a different issue, based on the district plan rules.

30 **Paragraph 1.1 — Objective 7.3.7/Policy 7.4.7**

[27] Objective 7.3.7 in the proposed district plan is expressed in the following terms:

35 *To maintain and enhance a land tenure pattern which enables the rural land resource to be used for a range of activities on a sustainable basis for present and future generations.*

[28] Policy 7.4.7 seeks to achieve that objective. It reads:

40 *The rural land resource should remain in a land tenure pattern that has a range of site sizes so that a wide range of appropriate relationship activities and different demands by present and future generations can be accommodated on the land.*

[29] Mr Enright did not present a developed argument that the Environment Court had made an error of law in failing to refer to this objective and policy, beyond asserting that they should have been expressly considered, because they are “clearly relevant”.

5 [30] Objective 7.3.7 is one of thirteen objectives stated in the proposed district plan for the rural part of the Council’s district. Policy 7.4.7 (which seeks to achieve objective 7.3.7) is one of nineteen stated policies by which the rural objectives are sought to be achieved. More detailed objectives and policies for the particular rural zones and policy areas in the proposed
10 district plan are provided in part 7.8 of the plan. At the relatively high level of abstraction where objective 7.3.7 and policy 7.4.7 are placed, the drafting clearly avoided differentiating between the various zones.

[31] While it is correct that neither objective 7.3.7 nor Policy 7.4.7 were referred to in the Environment Court’s decision, each is expressed in very
15 general language. As is apparent from the decision, the Environment Court concluded that, as with proposed change 55, the proposed district plan did not clearly differentiate between the two Countryside Living zones in terms of the objectives and policies applicable to each. The only real difference was in the rules.

20 [32] That was a conclusion open to the Environment Court on the basis of the reasoning set out at paragraphs [24] to [44] of its decision in the case of proposed change 55, and paragraphs [45] to [47] in the case of the proposed district plan. The Environment Court is not obliged to refer in its decision to every objective or policy of a district plan which might be of
25 marginal relevance to its decision. Such is the complexity and some would say prolixity of such plans that to impose so strict a requirement would be unworkable, and would serve no useful purpose. It is enough if the main reasons which have led the Environment Court to reach a particular conclusion are set out, and that was done in the present case.

30 [33] In *O’Shea v Auckland City Council* [2002] NZRMA 117 the Environment Court explained the approach it had felt obliged to take in the case of a district plan which, it was said by the Council itself, contained so many objectives and policies relevant to the application that it would have been practically impossible to assess the proposal against each one
35 individually. The Court said:

40 *[79] Our present purpose is to explain as clearly as we can the process by which we arrive at our decision, and showing that we have complied with Parliament’s procedural directions. Quoting in full, with context, all of the contents of the district plan which may be relevant, and explaining the place in reaching the decision of*

even those of peripheral relevance, of trite generality, or of repetitive content, would make this a very lengthy document, but would not necessarily advance that purpose.

5 *[80] A possible solution would be to have regard to all of the contents of the district plan that are cited and relied on by any of the parties or any of the expert witnesses. However, in our experience that course risks giving attention to statements of such generality, arguable relevance, or repetition that they do not*
10 *provide a helpful guide to decision-making. Such a course would also provide an incentive to some parties to draw out hearings unduly.*

15 *[81] We have concluded that despite the City Council's warning, the only practical course, for the purpose of explaining that step in the process by which the outcome was arrived at, is to refer to those which we consider should influence the decision. We apply the combined expertise of the members of the Court to choose contents for mention. In doing that we will be guided by submissions by the parties, and by evidence of expert witnesses called by them. Also, in doing so we aim to read the document*
20 *fairly and understand its contents in context.*

I see no error in such an approach.

25 [34] In view of the expressed basis for the Court's conclusion in the present case that there was no significant policy difference between the two zones, it is not possible, in my view, to argue that either objective 7.3.7 or policy 7.4.7 should have led to a different conclusion. Their language is too broad for that to be said. Even if they were relevant, their terms do not deal with (and would have made no difference to) the issue which the Environment Court identified. Both Countryside Living zones apply to parts of the Council's district identified as appropriate for "countryside living". It
30 is difficult to see how either the objective 7.3.7 or policy 7.4.7 could have had any effect on the Environment Court's conclusion that there was no clear policy differentiation between the two zones. If the Court could conclude that the proposal was not repugnant to the objectives and policies of the relevant zone, there is nothing in either the objective or the policy
35 (which come from a general section of the plan) which would have required a different conclusion.

Paragraph 1.4 — Policies 7.8.5.3.2.2/7.8.5.4.2.2

40 [35] Policies 7.8.5.3.2.2 and 7.8.5.4.2.2 of the proposed district plan apply respectively to the Countryside Living (Rural) and Countryside Living (Town) zones. The former states that sites should be no smaller than

2 hectares in order to retain the open space nature of the zone; the latter that sites should be no smaller than 1.5 hectares in order to retain the open space nature of the zone, unless transferable title rights are obtained.

[36] However, those policies are said not to apply until a financial contributions regime initiated under the Resource Management Act 1991 is able to be applied, a position which has not yet been reached: this follows from rule 22.17.3 of the proposed district plan, as the Environment Court expressly recognised at paragraph [47] of its decision. Until then, policies which have the same number, but a different wording, apply as “alternative” policies. The alternative policy 7.8.5.3.2.2 states that no subdivision of land below 4 hectares should occur in the Countryside Living (Rural) zone until the new financial contributions regime is able to be applied. Alternative policy 7.8.5.4.2.2 is in exactly the same terms in respect of the Countryside Living (Town) zone.

[37] Mr Enright correctly submits that the Environment Court in its decision did not refer to both of the “alternative” policies, and he argues that the proposed subdivision would “on the face of it” be contrary to both policies. He submits that, while that is an issue for the Environment Court to assess, the alternative policies should have been expressly considered.

[38] The Environment Court referred to policies 7.8.5.3.2.2 and 7.8.5.3.2.3, at paragraph [46](f) of its decision, as part of its reasoned basis for concluding that there was not a clear differentiation between the two countryside living zones. It expressly noted that those policies would not come into effect until a variation was notified relating to financial contributions. The Council does not appeal on the failure to refer to alternative policy 7.8.5.3.2.3, and so I do not discuss it further. The argument is that alternative policies 7.8.5.3.2.2 and 7.8.5.4.2.2 should have been expressly referred to, and the proposal assessed against them.

[39] Mr Enright frankly acknowledged that neither of these alternative policies had been drawn to the attention of the Environment Court in his submissions. Nor had they been referred to in the evidence of the Council’s expert planning witness, Mr Simmons. However, he submitted that they had been produced to the Court in an agreed bundle and hence were before the Court. In response to a question from the Bench, he submitted that while the Environment Court is entitled to have material provisions drawn to its attention by counsel, that might not be the sole consideration. The other considerations, he argued, include the purpose of the Act.

[40] The bundle of documents which was handed to me for the purpose of this appeal on questions of law comprised two volumes, totalling 764 pages. Of those, pages 278 to 682 (404 pages) consisted of extracts from the district plan in its various forms. The bundle included, in addition, the

Silverdale Structure plan, 81 pages long, not part of the district plan and not so far as I can tell, relevant to any of the questions I need to decide. In this Court, faced with such a plethora of material, one simply adopts the defensive posture of not referring to anything which is not made a part of the argument of the parties.

[41] The Environment Court is a busy one, and from time to time its resources have been under pressure. Although its jurisdiction is in a majority of cases an appellate one, it customarily hears matters afresh; on an appeal under s 120 of the Act, it forms its own view as to whether a proposal should be consented to. In making its judgment it is sometimes said that the Court has duties in the public interest not to confine itself strictly to the arguments and evidence presented by the parties, and that must indeed often be the case when the Court comes to apply the expertise it has as a specialist Court in considering resource consent application appeals and district plan references in accordance with the requirements of the Act. Doubtless the Court has an ability to take that approach whenever it considers that achieving the purpose of the Act requires it, although procedural fairness will often require the parties to be given the right to be heard on particular matters considered by the Court to be important, if they had not been canvassed in the hearing.

[42] These are different propositions, however, to that advanced by Mr Enright. Put simply, his argument is that the Environment Court has a duty to decide the question of whether a proposed activity is contrary to district plan objectives and policies on the basis of provisions of that plan not relied on by the parties in the hearing; and it commits an error of law liable to be corrected on appeal to this Court if it does not comply with that duty.

[43] I reject that argument which would have widespread implications for the ability of the Environment Court to perform its functions under the Act, having regard to the complexity and length of the planning instruments with which it has to deal. In the case of district plan provisions, the Court must be able to rely on the parties bringing what is allegedly relevant and important to its attention; that must be one of the principal reasons for the Court conducting a hearing on an appeal, something it is obliged to do by s 272 of the Act.

[44] It is apposite here to refer again to what was said by the Environment Court in *O'Shea v Auckland City Council*, in the passage quoted above. The passage indicates in general terms the detailed nature of district plans, and the enormity of the task that might have to be assumed if the Environment Court were held to have the duty contended for by Mr Enright.

[45] Mr Enright supported his argument by reference to two cases: the decision of the Court of Appeal in *Dye v Auckland Regional Council*, and the decision of the High Court in *D J Heaney v Rodney District Council and Stevenson* (unreported, High Court, Auckland Registry, CIV2003-404-003480, 16 March 2004, Gendall J). In so far as *Dye* is concerned, Mr Enright relied on the passage I have already quoted in paragraph [18] above. He argued that since the two policies referred to were relevant, a failure to consider them by the Environment Court was an error of law, even if they had not been referred to by the parties.

[46] However, the point being made at paragraph [20] of *Dye* was that failing to take into account a relevant consideration is to be distinguished from interpretative error. As I have already pointed out, the first question of law alleges the latter. Although the precise nature of the interpretative error was not defined in the Council's argument, I have inferred that the error alleged consisted in the conclusion that there was no clear policy difference between the two Countryside Living zones. That being the case, since the alternative policies 7.8.5.3.2.2 and 7.8.5.4.2.2 use exactly the same language, and both stipulate that no subdivision should occur below 4 hectares, they were in fact a further indication that the Environment Court's conclusion about the lack of difference between the zones was correct. Consequently, there can be no foundation for an argument that a failure to take the policies into account can have contributed to the alleged error.

[47] This case is different from *D J Heaney v Rodney District Council & Stevenson*, the other case on which Mr Enright relied. There, the High Court was able to conclude that the Environment Court had wrongly held in one part of its decision that there was no provision in the district plan for new helicopter operations of the kind proposed, when in other parts of its decision it had recognised that there were such provisions. Because the former conclusion was material to the Environment Court's reasoning and was held to be incorrect, Gendall J concluded that an error of law had "inexplicably" occurred, even though in other parts of the decision the Environment Court had referred to the correct position: see paragraphs [43] to [49] of the decision.

[48] However, unlike that case, the alleged error in the present case is not apparent on the face of the Court's decision. It arises from policies said not to have been considered, and where the parties themselves did not refer to them. Perhaps the provisions were considered by the Court, but simply not mentioned in its decision, a perfectly reasonable reaction to something not referred to by the parties. But fundamentally, the argument breaks down when it is accepted, as it must be, that the policies in question would have reinforced and not detracted from the conclusion said to be in error.

[49] For the reasons given, I do not consider that the failure to consider alternative policies 7.8.5.3.2.2 and 7.8.5.4.2.2 of the proposed district plan (if indeed they were not considered) amounted to an error of law.

Paragraph 1.3 — Policy 5

5 [50] Paragraph 1.3 refers to policy 5 in proposed plan change 55. Leaving aside the rules themselves (to be addressed under questions 1.2), it is the only part of the proposed plan change relied on by the Council in the first question of law.

10 [51] Policy 5 in plan change 55 is headed “Transferable Title Rights”. It sets out a policy of enabling the amalgamation of existing small sites with adjacent sites in the Production, Special Character, and Conservation Activity Areas. In exchange, it contemplates transfer of the title right foregone to land within the Countryside Living (Town) Activity Area, subject to certain standards. Those standards include a requirement that the
15 title right be transferred to one of the two Countryside Living (Town) Activity Areas closest to the site to be amalgamated, and a stipulation that the number of sites created in the Countryside Living (Town) Activity Area:

20 *... shall not exceed a ratio specified as being adequate to provide an incentive for the transfer to occur while not resulting in adverse effects on natural and physical resources.*

[52] The “ratio” referred to in the part of the proposed plan change just quoted is contained in rule 11.1.5(ii). It enables up to two sites to be created under transferable title rights additional to the number which would be able to be created by virtue of the normal subdivision rules contained in rule
25 11.1.5, provided that no site so created may have an area less than one hectare.

[53] It is correct that Policy 5 was not referred to in the Environment Court’s decision. Mr Enright argues that it should have been. He submits that the policy was a relevant consideration for the Court in analysing the
30 essential differences between the two Countryside Living Activity Areas, and that it provides a “strong linkage” with the “1 hectare site size imposed in the Countryside Living (Town) Zone”.

[54] Once again, Mr Enright was forced to concede that Policy 5 had not been referred to in any of the submissions made or expert evidence
35 called in the Environment Court. The observations made in respect of such an omission in addressing paragraph 1.4 of the appeal are equally applicable here. However, even if it were now appropriate for the issue to be addressed, I would be far from satisfied that the Environment Court’s omission to refer to it is a matter of any significance.

[55] I say that because it is apparent that the main purpose of the policy is to encourage the amalgamation of sites in the Production, Special Character and Conservation Activity Areas. Thus the opening words of the policy announce its intent to “limit the potential adverse effects of sporadic countryside living in the Production, Special Character, and Conservation Activity Areas by enabling the amalgamation of existing small sites without household units units with adjacent sites.”

[56] It is correct to observe that the Countryside Living (Town) Activity Area is the zone in which transferable title rights are provided for, and that such rights are not available in the Countryside Living (Rural) Activity Area, but the thrust of the policy is really to encourage amalgamation of sites in the other zones referred to. If there was to be a policy framework encouraging such amalgamations, then it was no doubt appropriate to provide for the transferred rights to be available in the Countryside Living (Town) Activity Area which provides for a greater intensity of development than the Countryside Living (Rural) Activity Area. However, the alleged error made by the Environment Court was its failure to find a clearly articulated difference between the objectives and policies applicable to the two Countryside Living Activity Areas. Policy 5 itself contains no explanation of the difference, and could not, by its terms, detract from the Environment Court’s detailed reasoning, at paragraphs [24] to [44], for the conclusion it reached.

[57] In my view, the Environment Court was not in error in omitting to discuss Policy 5.

Paragraph 1.2 — the rules

[58] Paragraph 1.2 stands apart from the other issues raised under the first question of law, because it is based on the rules of proposed plan change 55 and the proposed district plan, and not the objectives and policies. In essence, the Council argues that the rules should have been referred to by the Environment Court as a guide to the interpretation of the objectives and policies. As I have earlier observed in relation to the first question of law as a whole, the argument is not based on any articulated difference in the interpretation of the objectives and policies themselves, which would have followed from consideration of the rules. Rather, it is simply asserted that the Court might have concluded that there was a significant difference between the objectives and policies for the respective zones had it taken account of the rules applicable to each. Why, how, or in what manner reference to the rules would have had this result was not explained.

[59] Unlike the matters discussed under paragraphs 1.3 and 1.4, this argument was put by the Council to the Environment Court, and firmly rejected at paragraphs [48] and [50] of its decision. At paragraph [48], the Court said:

5 *Mr Enright, on behalf of the Council, endeavoured to draw upon evidence given by Mr Simmonds [sic] to make a submission that the proposal would be contrary (in the sense of repugnancy in accordance with the test formulated in NZ Rail v Marlborough District Council [1994] NZRMA 70) to the relevant objectives and*
10 *policies of each district plan instrument. Emphasis having been placed, in that evidence, on the objectives and policies of PC 55, Mr Enright underlined Mr Simmonds' [sic] strongly expressed wish (as we term it) that a strong case for differentiation in lot sizes as between the CL Rural and CL Town zones, be recognised*
15 *as coming from the rules as to lot sizes and averaging. Mr Enright called those rules an "interpretative signal" in PC 55, carried through into the proposed plan.*

And at paragraph [50], the Court referred to the Council's reliance on the rules to "shore up the clear shortcomings of the objectives and policies."

20 [60] The Council's argument is encapsulated in the following extract from Mr Enright's primary written submissions:

25 *In fact a central theme in the evidence, accepted as correct by the Environment Court, was that the primary differentiation between the Countryside Living Rural and Town zones arises from the methods of implementation — ie the district plan rules. Hence, it was vital that the Court have regard to those rules, in order to understand and apply the differences between the two zones, in particular when interpreting the objectives and policies.*

30 He further submitted that the rules were "a relevant consideration when interpreting the objectives and policies under the s 105(2A) gateway test."

35 [61] Under s 104(1)(d) of the Act, the Environment Court was, of course, obliged to consider not only the objectives and policies, but also the rules of the district plan. However, the focus of Mr Enright's argument was that the rules should also have been considered when considering the objectives and policies under s 105(2A).

[62] Section 105(2A) in the form it had at the times relevant to this appeal provided as follows:

40 *Notwithstanding any decision made under section 94(2)(a), a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that—*

(a) *The adverse effects on the environment (other than any effect to which section 104(6) applies) will be minor; or*

(b) *The application is for an activity which will not be contrary to the objectives and policies of,—*

5 (i) *Where there is only a relevant plan, the relevant plan; or*

(ii) *Where there is only a relevant proposed plan, the relevant proposed plan; or*

(iii) *Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan.*

10 [63] It may be contrasted with s 104(1)(d), which provided simply that, subject to Part II, when considering an application for resource consent the consent authority shall have regard to:

Any relevant objectives, policies, rules or other provisions of a plan or proposed plan.

15 [64] The reference to “objectives and policies” in s 105(2A)(b) has, so far as I am aware, always been thought to exclude the rules from consideration. Section 105(2A) is a provision with particular and exclusive application to non-complying activities. Those are activities which by definition do not comply with the rules. It makes no sense in such cases to
20 require that the application would not be contrary to the rules, at the jurisdictional or threshold stage to which s 105(2A) applies.

[65] That point has probably not been better made than it was by Greig J in *NZ Rail v Marlborough District Council* [1994] NZRMA 70, at 80:

25 *... the essential question was whether the consent to the proposed use and development was “contrary” or not to the relevant objectives and policies. The Tribunal correctly I think, with respect, accepted that that should not be restrictively defined and that it contemplated being opposed to in nature, different to or opposite. The Oxford English Dictionary in its definition of*
30 *“contrary” refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. “Contrary” therefore means something more than just non-complying.*

35 [66] In *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 Tipping J, writing for the Court, referred to s 105(2A)(b) at paragraph [18] as recognising that:

A non-complying activity will not be permitted by the plan, yet it may be granted provided it will not be contrary to the objectives and policies of the plan.

[67] Section 105(2A) prevents the grant of resource consent to a non-complying activity unless one or the other of its paragraphs is satisfied. Since councils are empowered to grant resource consents for such activities, it would have defeated the statutory purpose if paragraph (b) were to have included a reference to rules: it is of the nature of a non-complying activity that it is contrary to a rule, and requiring that non-complying activities be not contrary to a rule would have created in effect a prohibited activity. But the Act provides separately for those, defines them, and provides simply and directly that they may not be consented to: s 105(2)(c).

[68] In enacting s 104(1)(d), the legislature provided for the rules to be one kind of the plan provisions to which regard was to be had, as one of a number of relevant considerations on a resource consent application. But this point is only reached once the threshold of s 105(2A) has been passed and, in the appropriate case, a proposal has been held to be not contrary to the objectives and policies of the district plan.

[69] Given the relationship between s 105(2A) and s 104(1), it is not sensible to suppose that the omission of reference to rules in s 105(2A)(b), and inclusion of such a reference in s 104(1)(d) was anything other than deliberate, and logical. Mr Enright, I think, ultimately accepted that that was so. His argument, however, was that the rules should nevertheless be considered under s 105(2A)(b) to assist in the interpretation of objectives and policies. However, in that formulation of his position, I do not see what it adds to say that that consideration should occur “under s 105(2A)(b).”

[70] If, as I consider the position to be, rules are not part of the s 105(2A)(b) considerations, the only question which needs to be answered is whether a proposal is contrary to the objectives and policies. It is necessary to decide what the objectives and policies mean before that issue can be resolved. Deciding the meaning, in other words, must occur before s 105(2A)(b) is applied, not as part of applying it.

[71] While there have been a number of cases in which objectives and policies have been resorted to for the purpose of resolving ambiguities in rules, I am not aware of cases in which the reverse process has been applied and rules have been used to resolve ambiguities in objectives and policies.

[72] However, the Council asserted that the decisions of this Court and of the Court of Appeal in *Body Corporate 97010 v Auckland City Council*, respectively [2000] NZRMA 202, and [2000] 3 NZLR 513, were authority for the proposition that rules can be taken into account as a relevant consideration, to assist in the interpretation of objectives and policies.

[73] A multitude of issues fell for determination in that litigation. One of them concerned the proper approach to s 125 of the Act, which deals with the lapse of resource consents. At the relevant time, s 125(1) provided as a general rule for the lapse of unimplemented resource consents on the expiry of two years. However, under s 125(1)(b), the period could be extended if the consent authority were satisfied as to three matters, the last of which was that the “effect of the extension on the policies and objectives of any plan” was minor (s 125(1)(b)(iii)).

[74] In the High Court, Randerson J rejected a submission made by both the developer and the Council that only the objectives and policies were required to be considered under s 125(1)(b)(iii), and not the rules. At paragraph [149], he said:

It was submitted for STC and the Council that the consent holder is required only to consider objectives and policies and not rules. It followed that the Council was not required to consider the rule in the Proposed Plan which reduced the maximum height limit to 15 metres. In my view, this is to take an unduly narrow view of s 125(1)(b)(iii) because the rules in the District Plan are the means by which its objectives and policies are implemented. To the extent that the rules give substance to and define the objectives and policies, they ought to be considered by the consent authority. The real question is whether the Council and its reporting officer gave adequate consideration to the effect of the extension on the Proposed District Plan.

[75] The Court of Appeal expressly endorsed Randerson J’s approach, stating as follows at paragraph [82]:

He then rejected the argument that the council was not obliged to consider the effect on the 15 m height limit in the proposed plan, rightly saying that this was to take an unduly narrow view of s 125(1)(b)(iii) because the rules in that plan are the means by which its objectives and policies are implemented and that, to the extent that the rules give substance to and define the objectives and policies, they ought to be considered.

[76] However, I am not persuaded that the reasoning followed in that case can appropriately be applied in the different setting of s 105(2A)(b). I say that principally because of the clear linkage between s 105(2A)(b) and s 104(1)(d), and what I have described as the deliberate and logical exclusion of reference to rules in the former, which is to be contrasted with inclusion of rules in the latter. Put simply, the scheme of the Act for non-complying activities does not work if rules are included among the matters to be considered under s 105 (2A)(b).

[77] Further, I do not consider that in *Body Corporate 97010* either Randerson J or the Court of Appeal were indicating that the rules should be referred to in order to resolve any ambiguity or difficulty in the meaning of relevant rules or objectives. Rather, the approach taken was to say that the rules should be considered, as well as the objectives and policies, under s 125(1)(b)(iii) as part of the consideration of the effect of the extension of the resource consent on the policies and objectives of the district plan. The reasons given by both Courts for adopting that approach are included in the passages which I have set out above. They do not indicate any conclusion that the rules needed to be referred to so as to assist in the interpretation of the objectives and policies. Consequently, the judgments are not in my view authority for the proposition that Mr Enright sought to advance, and I reject it.

[78] The various questions posed within the first question of law are ultimately directed to alleged interpretative error. I do not consider that in any of the respects alleged the Environment Court erred in law.

Second and fourth questions of law (combined)

[79] As amended the appeal asks six questions under this heading which are broadly related to precedent, and the effect of granting consent to the proposed subdivision on the integrity of the district plan. The Council argues that the Court erred by fusing its consideration of these two issues when it should have dealt with each separately; that it erred by failing to consider either matter under s 105(2A)(b); that it erred by failing to make a finding on district plan integrity, and by failing to consider whether, as a result of the grant of consent, public confidence in the administration of the relevant planning instruments would be “shaken or challenged”. A subsidiary issue was also relied on, that in its consideration of the precedent effect of granting consent, the Court wrongly took into account the fact that the owners of the land adjoining the site of the proposed subdivision had given written approval to it.

[80] In its decision, the Environment Court dealt first with the issue of whether the proposal’s adverse effects on the environment would be minor, and concluded that they would be. The requirement of s 105(2A)(a) was accordingly satisfied: paragraph [19] of the decision. It then embarked on a discussion of the district plan provisions, at paragraphs [20] to [47] before expressing separately its conclusions about the s 105(2A)(b) gateway (paragraphs [48] to [51]) and under s 104(1)(d) (paragraphs [52] to [55]). The Court’s intent to structure the decision in this way had been foreshadowed at paragraph [14], and in that paragraph, paragraph [20] and paragraph [52], the observations made by the Court show that it was well aware that the consideration of district plan objectives and policies was necessarily to be broader under s 104(1)(d) than under s 105(2A)(b).

[81] At paragraph [50] of its decision, the Court expressed its conclusion that, having regard to its analysis of the objectives and policies relating to the Countryside Living Rural Activity Area, there was no basis for holding the proposal repugnant to them. It then recorded its view that while there was no conflict between those objectives and policies, and the more general objectives and policies, the specific ones did not flow clearly from the general ones. Then it said:

We can go further, and hold that even if our task were to be to consider the objectives and policies of PC 55 and the proposed plan in the wider sense for the purposes of 105(2A)(b), there would be no basis for holding the proposal to be repugnant to them.

[82] It was after this discussion that the Court recorded its conclusion that the proposal met the s 105(2A)(b) gateway. It moved next to consider the proposal under s 104(1)(d), concluding “at this stage” that analysis under that provision would not “produce a result that is negative to an exercise of discretion to grant consent”. That was the conclusion “at that stage” because the Court had yet to consider the issue of precedent, “so far as it may be relevant under s 104(1)(d)” (paragraph [55]).

[83] That issue was then the subject of the discussion in paragraphs [56] to [70] of the decision. In those paragraphs the Court dealt first with an argument evidently given some emphasis by the Council, but not pursued in this Court: that an effect on “community expectations” about the Countryside Living Rural environment, should be taken into account under s 104(1)(a). The Court rejected that approach, holding that it was an attempt to bring the issues of precedent and integrity of the district plan into s 104(1)(a), which the Court held would be contrary to the decision of the Court of Appeal in *Dye v Auckland Regional Council* [2002] 1 NZLR 337.

[84] Then, at paragraph [60] the Court began to address specifically the issues of precedent and integrity of the district plan, noting that they were to be considered in the context of s 104(1)(d) and (i) of the Act. It rejected a submission made by the Council that an applicant for a non-complying activity consent needed to demonstrate uniqueness, holding that it would be sufficient if there were shown to be some clear distinctions between the subject land and application and that of potential neighbouring applicants. The Court then listed four matters which had been relied on by Mr Littlejohn for the applicant, as taking the proposal outside the generality of cases. They were:

- The actual and potential effects on the environment of the proposal (including visual and landscape) are less than minor.

- It is set in an area where subdivision to the average lot size proposed is relatively common, and proportionately, will not be significantly altered by this proposal.
- Every adjoining neighbour has given express written approval to the development.
- It is set in an area where Council has publicly adopted a forward policy of increased Countryside Living density, which is consistent with the intent of the application.

[85] The Court considered each of those matters, and essentially found that they were sufficient, taken in combination, clearly to distinguish the subject site and application from other potential sites and applications. Although it did not say so in precise terms, it is in my view a fair reading of paragraphs [63] to [69] of the decision to say that, because of the four matters which it identified and discussed, the Court was satisfied that granting consent to the proposal would not create a precedent.

[86] In this Court, the Council attacked this reasoning process on the basis reflected in the various issues raised under the second and fourth questions of law (combined). Mr Enright argued first that the fact that all six adjoining landowners had given consent was irrelevant to the issue of whether there would be impacts of precedent and on plan integrity. Secondly, the Court had wrongly “fused” its consideration of precedent and integrity. Thirdly, it had failed in fact to make a finding on plan integrity. Finally, although the Court had correctly directed itself as to the requirement to consider precedent and integrity under s 105(2A)(b), it failed actually to consider either matter when evaluating the proposal under that provision. Each of these matters was said to amount to error of law.

[87] As to the approvals of neighbouring landowners, Mr Enright argued that the approval of neighbours is only relevant to the issue of adverse effects on that neighbour. He contended that if it is relevant under s 105(2A)(a) and s 104(1)(a), then it cannot be considered, in terms of precedent or plan integrity under s 105(2A)(b) and s 104(1)(d) and (i). He submitted that this was confirmed by s 104(6), which provides that where a person has given a written approval, the consent authority must not have regard to any actual or potential effect on that person, and any such effect shall not be a relevant ground to refuse consent. He argued that s 104(6) has the effect that approvals from adjacent neighbours cannot be considered in relation to plan and integrity and precedent.

[88] I do not consider that s 104(6) has the consequence for which Mr Enright contended. The subsection is confined to the issue of adverse effects on persons who have given written approvals to an application, and

provides that such effects shall not be had regard to, nor be relevant grounds for refusing consent. It has no greater object, or consequence.

[89] Leaving s 104(6) on one side, I do not accept that the existence of written approvals of neighbours is a consideration which is necessarily irrelevant to issues of district plan integrity and precedent. Mr Enright appeared to argue that if an issue is relevant for consideration under s 105(2A)(a) and s 104(1)(a), then it follows that the same issue can not again be considered under s 105(2A)(b) and s 104(1)(d) and (i). However, that cannot be correct. District plan objectives and policies often concern actual or potential adverse effects on the environment, as is hardly surprising given that they are made under the authority of a statute which has as its purpose promoting the sustainable management of natural and physical resources. Matters relevant to the question of whether a proposal will be contrary to a district plan's objectives and policies will often also be relevant to the issue of the proposal's effect on the environment, and the relevant considerations will not neatly arrange themselves into those solely relevant to the former and those solely relevant to the latter.

[90] In the specific case of written approvals of neighbours it is not hard to think of situations in which they might be relevant to issues of precedent and plan integrity. Take, for example, the common case of a district plan rule limiting the height of buildings in relation to the boundaries of their sites. Such rules are often the method by which policies aimed at preventing dominance and shadowing on neighbouring properties are given effect. In an appropriate case the written approval of the neighbours whose properties would be adversely affected by a development contrary to the rule would result in there being no relevant adverse effect (because of s 104(6), s 104(1)(a) would be satisfied) and at the same time no adverse precedent or threat to the integrity of the plan, because the district plan's objective of protecting neighbouring properties from adverse effects would not be called into question in this particular case. Different considerations might apply of course, if in addition to the goal of protecting neighbouring properties from adverse effects on their amenity, the policy sought to achieve some wider purpose of urban design which would be threatened by the grant of consent, and it is always necessary for the relevant objectives and policies to be properly interpreted and applied. Nevertheless, in the example I have given, where the policies were aimed only at preventing dominance and shadowing it could legitimately be said that the existence of the neighbour's written approval could properly be taken into account for the purposes of considering the issues of district plan integrity and precedent.

[91] If written approvals can be taken into account in assessing the precedent effect of granting consent and effect on district plan integrity, then the question of whether they should be taken into account in any given case, and the weight which should then be given them will generally be

matters for the consent authority, and for the Environment Court on appeal. But it was Mr Enright's argument that they were irrelevant as a matter of law. I reject that argument for the reasons I have given.

[92] The foregoing discussion has reflected the Council's contention that the issues of precedent and the integrity of the district plan are separate and discrete, and that the Environmental Court, being legally obliged to consider each, erred when it "fused" its consideration of them (paragraph 3.4 of the appeal). That is an issue, however, which must now be confronted.

[93] Mr Enright referred in this part of his argument to the decision of the Full Court in *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84. He relied in particular on a passage in the judgment in which the Court had rejected an argument that the then Planning Tribunal had misdirected itself as to the weight to be afforded to the statement of general purpose of the Act set out in s5 when interpreting s 104 and s 105(2)(b) of the Act, in the form in which it had been first enacted. The basis on which it was contended that the alleged misdirection had occurred emerges from the observations on which Mr Enright relied at page 89, of the judgment:

It is difficult to see how this could constitute an error of law. The Act does not either expressly or inferentially specify the weight which is to be attached to its general purpose when applying the requirements of s 104. Mr Cavanagh submitted that the introduction of the concept of the coherence and integrity of, and public confidence in, the plan was erroneous because the Act was primarily concerned with effects on the environment. Section 104(1) requires that regard be had to the "effects" (widely, but not comprehensively, defined in s 3) of allowing the particular activity. Section 104(4)(a) and (b) require that regard also be had to the rules of a plan and to its relevant policies or objectives. In our view, those provisions envisage consideration of the integrity of the plan. The weight to be given to any effect on that integrity must be a matter of judgment for the consent authority or the tribunal.

[94] It is plain, as Mr Enright submitted, that the Full Court considered that, in combination, s 104(1) and s 104(4)(a) and (b) of the Act, in the form in which they then stood, contemplated that the integrity of the district plan was a relevant matter to be considered in deciding whether or not a resource consent should be granted.

[95] Next, Mr Enright referred to the decision of the High Court in *Hopper Nominees Ltd v Rodney District Council* [1996] NZRMA 179, a case decided after the enactment of the Resource Management Amendment Act 1993, which had substantially amended s 104 of the Act. What had previously been a reference in s 104(1) to "actual and potential effects of

allowing the activity”, was now replaced by a new s 104(1)(a) in which the requirement was to have regard to the “actual and potential effects on the environment of allowing the activity”. Given the addition of the words “on the environment”, the appellant argued that the paragraph was no longer sufficiently wide to include the integrity of the district plan, or public confidence in its consistent administration, amongst the relevant considerations.

[96] Tompkins J rejected that argument. He held (at 186-187) that it was clear from the judgment of the Full Court in *Batchelor* that consideration of the integrity of the district plan was a relevant consideration under what was then (following the Resource Management Amendment Act 1993) s 104(1)(d), which required consent authorities to have regard to any relevant objectives, policies, rules or other provisions of a district plan. Tompkins J found support for this conclusion in the judgment of the Court of Appeal in *Manos v Waitakere City Council* [1996] NZRMA 145 at 148 where Gault J had concluded that “the potential precedent impact” of a decision granting consent to an application could be taken into account under s 104(4)(b) (referring to the Act as it stood prior to its amendment in 1993).

[97] Tompkins J went on, at 187, to record his view that confidence in the consistent administration of a district plan could also be considered under s 104(1)(i). He noted that in a particular case the consent authority might properly consider this to be another matter relevant and reasonably necessary to determine the application. He approved a statement of the Planning Tribunal in *Reith v Ashburton District Council* [1994] NZRMA 241 at 255 that it might still be relevant and reasonably necessary to have regard to the effect of consenting to an activity where to do so would create a serious conflict with the relevant objectives and policies of the plan or adversely affect the public perception of its consistent administration. For the various reasons to which he had referred, Tompkins J concluded that in the case before him, the Planning Tribunal had not erred when having regard to public confidence in the plan.

[98] Both *Batchelor v Tauranga District Council* and *Hopper Nominees Ltd v Rodney District Council* were cases in which it was argued by the appellant that the Planning Tribunal had erred in considering the concepts of the coherence and integrity of, and public confidence in the district plan. They contained no discussion or analysis of differences between those two concepts themselves, or any differences which might exist between them and the concept of precedent. Inasmuch as they simply decide that all those matters may be considered, they cannot be taken as authorities for the proposition that any one or all of them must be considered in any particular case.

[99] The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s 104(1)(d) or s 105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, a reasoned decision which held that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent. Consequently, I am not prepared to hold that the Environment Court erred in any way by "fusing its consideration of plan integrity and precedent (failing to separately consider each doctrine)" as the Council alleges. Neither do I think that it was obliged to make a specific finding on plan integrity, or as to whether public confidence in the administration of the relevant planning instruments would be shaken or challenged, which are the subject of separate questions raised by the appeal under this heading.

[100] No doubt the Environment Court will continue to advert in appropriate cases to the concepts of the integrity and coherence of the district plan, public confidence in its consistent administration, and precedent. I do not suggest that there is any error in taking that course. I do not think, however, that the statute requires those matters to be referred to and the present case is one in which that course did not need to be followed.

[101] The decision of the Full Court in *Batchelor v Tauranga District Council* was given in an appeal on questions of law from a decision of the Planning Tribunal made early in the life of what was then new legislation. The Planning Tribunal, presided over by the then Principal Planning Judge, no doubt conscious that to some extent new territory was being charted, contained a careful analysis of the approach which should taken to the grant of consents for non-complying activities under the Act. It is worth setting out what the Tribunal said at pages 270-271 of its decision:

By s 104(4), a consent authority is directed to have regard to any relevant rules, policies and objectives of a Plan. In general a District Plan containing rules which prohibit, regulate or allow activities in the way contemplated by s 76 (whether zoning is used or not) will be implementing policies designed to achieve stated objectives. General observance to the rules will depend at least in part on confidence that they will generally be observed, and that if necessary the administering body will (as required by s 84) enforce observance of the Plan.

In many classes of case where a non-complying activity would pass the constraints of s 105(2)(b), the grant of consent would not affect that confidence. That is because the circumstances of the particular case can be seen as having some unusual quality, such that the consent authority's action in granting consent cannot be perceived as inconsistent with its continuing to require general observance of the rule.

However, other cases for non-complying activities may lack such an evident unusual quality. If a consent authority were to consent to those activities, public confidence in its consistent application of the rules may be impaired. Also, the District Plan may lose coherence if compliance with some rules is excused by the consent authority in cases where that conflicts with the policy which the rules are intended to implement.

[102] Successive amendments to the Resource Management Act mean that the particular statutory provisions to which the Tribunal was there referring are no longer accurate. But the essence of the approach described remained valid down to and including the amendments enacted by the Resource Management Amendment Act 1997 (the form of the statute relevant to this appeal). It is to be observed that on this approach, it is where the circumstances of a particular case lack any evident unusual quality that granting consent may give rise to concerns about public confidence in the consistent application of the rules in the district plan. Conversely, where the circumstances of the particular case can be seen as having some unusual quality, the constraints of what is now s 105(2A)(b) may be overcome. In an appropriate case the Environment Court can decide that there are aspects of a proposal which take it outside the generality of cases, so that the case may be seen as exceptional and if it can be said that the proposal is not contrary to the objectives and policies of the district plan, it will not be necessary also to consider and make findings, on the issues of public confidence in the administration of the district plan and district plan integrity. Concerns about precedent, about coherence, about like cases being treated alike are all legitimate matters able to be taken into account, as the recent decision of Baragwanath J in *Murphy v Rodney District Council* [2004] 3 NZLR 421 again emphasises. But if a case is truly exceptional, and can properly be said to be not contrary to the objectives and policies of the district plan, such concerns may be mitigated, may not even exist.

[103] That is essentially the approach which the Environment Court took in this case. It identified the four considerations which in its view took the application outside the generality of cases, and decided that the proposal was not contrary to the relevant objectives and policies. That was an

approach which it was entitled to take. In my view the decision was not wrong in law on the basis of any of the matters raised under the second and fourth questions of law.

Fifth question of law

5 [104] The questions raised under this heading concern the way in which the Environment Court dealt with the Council's evidence and submissions on the issue of cumulative effects. The Council argues first that that the Environment Court wrongly concluded that there was no evidence from its expert planning witness, Mr Simmons, on the issue of cumulative effects of
10 the proposal on rural character and amenity. Secondly, it argues that the Environment Court erred by requiring evidence that future effects "will happen" rather than accepting, as sufficient, evidence that there is "sufficient probability" that the future effects will happen.

[105] Next, it is said that the Environment Court erred in finding that
15 there were no cumulative effects by applying the test set out by the Court of Appeal in *Dye v Auckland Regional Council* [2002] 1 NZLR 337. It was argued that *Dye* could be distinguished on its facts, and that it was not intended to be of general application. Alternatively, it was argued that what was said by the Court of Appeal in that case although binding on both the
20 Environment Court and, of course, this Court, was erroneous in four specified respects. Mr Enright advised that those are matters which the Council might wish to pursue on appeal to the Court of Appeal in the hope that that Court could be persuaded to depart from the view that it expressed in that case.

25 [106] The first error of law alleged is that the Environment Court wrongly concluded that there was no evidence from the Council's witness, Mr Simmons, on the issue of cumulative effects to rural character and amenity. The Court addressed the actual and potential effects on the environment of allowing the subdivision in question at paragraphs [15] to
30 [18] of its decision.

[107] At paragraph [15], the Court said that actual and potential effects, in the sense of physical affects on the environment resulting from the future development of an additional site, were not really an issue and that the Council had "conceded in a careful way" that such effects would be no
35 more than minor. It then recorded the evidence which had been given by Ms Jenkins, a planning witness called by the present respondents in the Environment Court. Having recorded the particular bases upon which Ms Jenkins had concluded that there would be no adverse effects on the immediate environment of the application site, the Court then referred to the
40 evidence of Mr Simmons as being that there would be no "immediate effects" on the directly adjacent environment that would be any more than

minor. Evidently it also accepted Mr Simmons' view that development on the newly subdivided lots would be unlikely to be noticed beyond the land to be subdivided and the land owned by those who had given written consent. However, in a passage in paragraph [17] which was at the forefront of Mr Enright's criticisms, the Environment Court then said:

It was Mr Simmond's [sic] view that the effects on the environment likely to arise would be cumulative and occur over a long time frame. This in our view was a misuse of the term "cumulative effects". Cumulative effects, (correctly understood) are as defined in paragraph [38] of the Court of Appeal decision in Dye v Auckland Regional Council are [sic] concerned with things that will occur, not things that may occur. Mr Simmonds [sic] was addressing the latter — unknown future possibilities. We heard no evidence that would allow us to find that there would be the former type of effect to any extent more than minor.

[108] Mr Enright submitted that it was apparent from the passage quoted that the Environment Court did not accept the evidence given by Mr Simmons as involving cumulative effects at all. It was, Mr Enright submitted, tantamount to a finding that there was no evidence as to cumulative impacts.

[109] This, it was said, was incorrect, because Mr Simmons had given evidence of an adverse effect on rural character which would arise from a grant of consent to the subject application. In this respect, Mr Enright referred to three brief paragraphs in the statement of evidence read by Mr Simmons in the Environment Court hearing. They were:

- (a) A statement that instead of being solely concerned with the immediate effects upon the local environment, the appeal was more concerned with longer term environment effects, by altering the character and amenity of the area, and community expectations for subdivision within the Countryside Living 1 (Rural) zone; and effects that are "double those envisaged as appropriate under the permitted baseline".
- (b) A statement that the proposal would adversely affect both community expectations (heightened expectation of subdivision potential) and character (because it would exceed the permitted baseline by a factor of two).
- (c) A conclusion expressed, under the heading "Consistent Administration of the Plan, Plan Integrity and Precedent" which reads as follows:

The longer term effects on the environment will be to gradually change the character and amenities of this locality from one of “Rural” countryside living to one of “Town” countryside living, and change community expectations.

[110] As I have earlier observed, issues concerning “community expectations”, although evidently emphasised before the Environment Court have not been pursued in this Court. It would be wrong, however, for the Environment Court decision to be read now as if community expectations had not been raised by the Council. In that Court, the Council’s argument about cumulative effects had been substantially based on what community expectations were alleged to be. It was the change in those community expectations that would have resulted in the cumulative effects upon which the Council purported to rely. That this is so is apparent from a consideration of paragraph [57] of the Environment Court’s decision in which it was observed:

[57] It was also the case for the Council that there would be adverse cumulative effects, despite the high level of agreement that there would be lack of immediate actual effects in the physical sense. This submission was bound up with the Council’s submissions about “effects on community expectations” and its perception that a grant of consent would have the potential effect of causing people to have an altered expectation for the CL 1 (Rural) environment if, in Mr Simmond’s [sic] words:

... the differences between the “Rural” and “Town” versions of the zone become blurred.

[111] The passages of Mr Simmons’ evidence referred to me by Mr Enright, confirmed what the Environment Court said at paragraph [57] in summarising the Council’s position. All three passages contained a reference to “community expectations”. The Court held that the alleged effects on community expectations, potentially causing people to have an altered expectation for the Countryside Living (Rural) zone were not “cumulative effects” able to be taken into account pursuant to the Court of Appeal’s decision in *Dye v Auckland Regional Council*. In paragraph [58] of its decision, the Environment Court recorded its agreement with submissions which had been made to it by Mr Littlejohn that cumulative effects (able to be considered under s 104(1)(a)) were different from “precedent effects”, the latter only arising for consideration under s 105(2A)(b) and s 104(1)(d) and (i), and not to be brought into account under s 105(2A)(a) and s 104(1)(a).

[112] Given the evidence of Mr Simmons on community expectations in the passages to which I have referred, I think the Environment Court was entitled to regard the evidence on those issues as being matters relevant to district plan integrity and precedent sought to be pursued under the guise of a cumulative effect. I do not consider that such an approach is consistent with the decision of the Court of Appeal in *Dye v Auckland Regional Council*, and I consider that the Environment Court was correct to reject it.

[113] However, Mr Enright argued that the Court had erred in not specifically considering the aspect of the evidence that had not referred to community expectations, but had mentioned an adverse effect on rural character. Referring to paragraphs [57] to [59] of the decision he submitted that the Court had apparently ignored that aspect of the evidence. There are a number of difficulties with that submission. First, of course, it is axiomatic that no Court is obliged to make a finding of fact (unless the issue concerns a jurisdictional fact) and a failure to do so will not generally give rise to an error of law: *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76, at 88-89. Secondly, and partly as a consequence, it is not possible to conclude that the Court did not consider evidence that is not referred to in its decision. It might have considered the evidence but not have thought it worthy of mention; there is no general duty on a Court to recite all the evidence it has heard, and give reasons for accepting or rejecting each statement made to it by a witness. Thirdly, when one looks at the passages in question if, as Mr Enright argues, the evidence about rural character was indeed advanced as a matter separate from the community expectations issue, it must have been based on something other than an adverse effect arising from the subject application because even Mr Simmons agreed that there would be no adverse effect on the environment noticeable outside the boundaries of the subject land and that of the neighbours who had given written approval. In other words, the evidence allegedly not considered must have been relied on to support the Council's case based on precedent or cumulative effect. If that is the case, then the Court has made factual findings which show that in its view there would be no precedent effect, and the Court of Appeal's decision in *Dye v Auckland Regional Council* stands in the way of precedent effects being separately considered as cumulative effects, whether under s 105(2A)(a) or s 104(1)(a).

[114] The decision of the Court of Appeal in *Dye* clearly holds that a cumulative effect must be one which arises as an effect of the application for which consent is sought, and which is being considered in the particular case before the consent authority. It is not legitimate to consider, as cumulative effects on the environment of one application, effects of possible future applications which may or may not be made. So much is clear from what was said at paragraphs [38] and [39] of the decision:

[38] The present issue is the way the word “effects” should be construed in ss 104 and 105 of the Act. Each section is concerned, in its relevant part, with effects on the environment. In s 104(1)(a) the focus is on “any actual and potential effects on the environment of allowing the activity”. In 105(2A)(b) it is on “the adverse effects on the environment”. The definition of effect includes “any cumulative effect which arises over time or in combination with other effects”. The first thing, which should be noted, is that a cumulative effect is not the same as a potential effect. This is self-evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. 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. The same connotation derives from the words “regardless of the scale, intensity, duration or frequency of the effect”.

[39] Potential effects by contrast are effects which may happen or they may not. Their definition incorporates levels of probability of occurrence. A high probability of occurrence is enough to qualify the potential effect as an effect, whereas a potential effect which has a low probability of occurrence qualifies as an effect only if its occurrence would have a high potential impact. The definition is such that any ‘precedent’ effect which may result from the granting of a resource consent is not within the concept of a cumulative effect. That concept is confined to the effect of the activity itself on the environment. If the precedent effect of granting a resource consent is to fit within the definition at all, it must do so by dint of its potential effect and it would then have to satisfy the probability and, if applicable, the potential impact criteria. It is unnecessary to say more at a general level.

[115] It seems plain from the context that the reference to s 105(2A)(b) in the third sentence of paragraph [38] is an error in the report. The provision quoted is obviously s 105(2A)(a), since that refers to “the adverse effects on the environment”, and s 105(2A)(b) contains no such words.

[116] At paragraph [40] of the judgment, the Court held that s 105(2A)(a) is directed to the “non-complying activity itself” and does not extend to any precedent effect deriving from the grant of the resource

consent; to hold otherwise would involve an “unnatural and unintended extension of the concept of the environment.” Then at paragraphs [41] and [42], the Court held that s 104(1)(a) (“any actual and potential effects on the environment of allowing the activity”) was to be construed as embracing only effects which are actual, or potential, and again, the effects to be considered were effects of the particular activity for which consent was sought. The provision did not include effects that allowing the particular application might have on “the fate of subsequent applications for resource consents.” Such precedent concerns, if they arose, were to be addressed under s 104(1)(d) or (i), or at the threshold stage under s 105(2A)(b), as the Court made clear at paragraph [49] of the judgment.

[117] It is clear that in the passages to which I have referred the Court of Appeal was setting out to explain the relevant statutory provisions, and in particular to construe the word effects as it is used in ss 104 and 105 of the Act. In the course of doing so the Court distinguished between cumulative effects and potential effects, and pointed out that any concerns about the precedent effects of applications were to be addressed as a matter relating to the district plan under s 105(2A)(b) and s 104(1)(d) or (i). Before this part of the decision, the Court had set out its views on the role of precedent at paragraphs [32] to [36] of the judgment. I cannot see any merit in the proposition advanced by Mr Enright that the judgment can be “distinguished on its facts and is not intended to be of general application”, given the detailed analysis that it contains of the statutory provisions in question. I was not referred to any important factual distinction that would justify any departure in the present case from the law as explained in *Dye*. Further, it seems obvious that in that case the Court of Appeal deliberately set out to explain the proper approach to ss 104 and 105 in a way which was intended to be of general application. Consequently, I reject the assertion that the Environment Court erred in the manner alleged in paragraph 5.1 of the appeal.

[118] The appropriate course for the Environment Court to follow was of course to apply the law as the Court of Appeal had explained it to be. In my view it did so correctly. This Court is also bound by the Court of Appeal’s decision, and I must apply it to hold that there is no error of law in the Environment Court’s decision. In the circumstances, although the Council in the amended form of the appeal now alleges that the Court of Appeal’s decision is incorrect, that is not an argument that I can entertain. The matters raised in paragraphs (a) to (d) inclusive of paragraph 5.3 appear to me to be directly contrary to the Court’s of Appeal’s reasoning in paragraphs [38] and [39] of *Dye* which I have set out above, and cannot therefore be accepted as correct in this Court. Beyond commenting that the assertions that they contain appear to overlook the simple fact that both s 104(1)(a) and s 105(2A)(a) invite consideration of the effects on the

environment of the particular application for which consent is sought and do not contemplate consideration of the effects of other applications, I do not consider that anything else can usefully be said.

[119] That leaves for consideration one further issue under the fifth question of law, the matter that is raised by paragraph 4.2, which asks whether the Environment Court applied the wrong legal test in its consideration of cumulative effects by requiring evidence that “the future effects will happen”, as opposed to evidence that “there is sufficient probability that the future effects will happen.” I have already held that the Environment Court did not err in the manner in which it reached its conclusion that the matters raised by the Council as cumulative effects did not properly arise. Its determination in that respect was partly based upon its conclusion that the proposal would have no effect on the environment beyond the subject site, and the adjoining land whose owners had consented to the application. In addition, applying *Dye v Auckland Regional Council*, the Court concluded that the application could be regarded as exceptional and that the matters that the Council sought to advance were not legitimately to be regarded as cumulative effects. I do not read the Environment Court’s decision as turning on the degree of certainty required to establish a cumulative effect.

[120] It is correct that in paragraph [17] of its decision the Environment Court referred to *Dye* as holding that cumulative effects are things that *will* occur, not things that *may* occur. That was a perfectly accurate reflection of paragraph [38] of the Court of Appeal’s decision. But *Dye* did not turn on the standard of proof required to establish that an effect will happen, and there is nothing in the decision which suggests that that issue needs to be determined other than in accordance with the normal standard of proof applicable in non-criminal proceedings, namely the balance of probabilities. On that issue, I respectfully agree with the observations of Harrison J in *McGregor v Rodney District Council* (unreported, High Court, Auckland Registry, CIV-2003-485-1040, 24 February 2004) at paragraph [34]. Contrary to Mr Enright’s submissions, I do not consider that anything that was said by Harrison J in that case amounted to a “reading down” of the decision in *Dye*. For the reasons that it explained, the Court of Appeal held that a cumulative effect had to be an effect on the environment that would arise from the subject proposal. It said nothing about the standard of proof required to establish that such an effect would arise.

[121] The Court of Appeal’s remarks about “cumulative effects” being effects that will occur must be read in the context of the argument with which the Court had to deal in that case. In summary the proposition made to it was that issues of a precedent nature, and the effects of future proposals not yet made that might be encouraged if consent were confirmed for the subject proposal, were to be brought into account as possible adverse effects

on the environment of the subject proposal. That proposition was rejected, inter alia, because it could not be said that such effects would arise. “Cumulative effects” were to be contrasted with “potential effects” which, under s 3 of the Act, might be of high or low probability. Further, both s 104(1)(a) and s 105(2A)(a) were concerned with the effects of the activity for which consent is sought, that is effects on the environment which could be said to arise from that activity or, as the Court put it at paragraph [38], “effects which are going to happen as a result of the activity which is under consideration.” It is not possible to say, referring to what might happen if future applications are encouraged, or their path to consent smoothed, by an earlier precedent, that that is an effect that will occur. Apart from anything else, the actual applications might never come into existence, and even if they do, whether or not they achieve consent will depend on the circumstances when they are considered. So it cannot be said that such alleged effects will ever occur, and it is essentially for this reason that such remote outcomes cannot qualify as cumulative effects on the environment.

[122] Contrary to what was concluded by the Environment Court in *Clifford Bay Marine Farms Ltd & ors v Marlborough District Council* (Decision No. C131/2003, 24 September 2003-see in particular the discussion at paragraphs [49] to [51]) I do not consider that the Court of Appeal was suggesting that the prediction of the adverse effects on the environment arising from an activity can be assessed on any basis akin to mathematical certainty, and that only those effects which can be established as certain can be taken into account. I consider that all that was said in *Dye* was that an effect that may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a “cumulative effect.”

[123] The Court of Appeal quoted with explicit approval the passage from the decision of the Environment Court in *Wellington Regional Council(Bulkwater) v Wellington Regional Council* (Decision No. W3/98, 7 January 1998) which it set out at paragraph [46] of its judgment. Notwithstanding what Baragwanath J said in *Murphy v Rodney District Council* [2004] 3 NZLR 421 at paragraphs [36] to [38], the *Wellington Regional Council* decision seems to me to be in general accordance with what the Court of Appeal held the law to be, insofar as it relates to the assessments of effects on the environment *under s 104(1)(a) and s 105(2A)(a)*. But s 104(1)(d) and s 105(2A)(b) are different. It is under those sections that precedent impacts can legitimately be considered, as the Court of Appeal expressly contemplated in *Dye*, and Baragwanath J confirmed in *Murphy*.

[124] I can see nothing in the Environment Court's decision which suggests that its approach was affected by any misunderstanding of *Dye*, and I do not consider that the Environment Court erred in the manner alleged in this part of the Council's appeal.

5 **Sixth question of law**

[125] The issues raised under the heading "sixth question of law" can be dealt with comparatively briefly. The Council alleges that the Environment Court failed to have regard to s 7 of the Act, and that that failure is apparently intended to be particularised by assertions that the Court:

- 10 (a) failed to give reasons for rejecting the evidence of Mr Simmons on s 7 in the written brief from which he had read to the Court, or wrongly concluded that there was no such evidence; and
- (b) failed to analyse the relevance of s 7 and make a determination as to whether it applied.

15 [126] In advancing these contentions Mr Enright focused on paragraph [71] of the Environment Court's decision in which it said that its attention had not been drawn to aspects of ss 6, 7 or 8 of the Act that the proposal would offend, recorded its satisfaction that the proposal would meet the purpose of the Act and then explained why that was so in the passage that I have already quoted in paragraph [8] above. Then, counsel referred to part

20 of the evidence of Mr Simmons in which he had set out the text of s 7(b),(c),(f) and (g) and continued as follows:

25 *[They] are all relevant because these matters have guided the approach to sustainable management that has resulted in the character and amenity basis behind the zoning and subdivision provisions of the Plans.*

It is my conclusion that in terms of Part II of the Act this proposal does not promote sustainable management, nor does it maintain or enhance the amenity values of the quality of the local countryside living environment.

30

[127] Mr Enright submitted that by stating that its attention had not been drawn to aspects of s 7 that the proposal would offend, the Environment Court was confirming that it did not consider s 7 at all. Because the provisions within Part II of the Act are, as he put it, mandatory

35 considerations for resource consent applications by virtue of s 104(1), the Court's failure to have regard to s 7 (b), (c), (f) and (g) was an error of law. To a submission advanced by Mr Littlejohn that the Court had implicitly considered s 7, Mr Enright responded that there had been no express finding on s 7 matters, and that the omission was fatal.

[128] Again, I do not think that there is anything of substance in the Council's argument. Section 7(b), (c), (f) and (g) refer respectively to the efficient use and development of natural and physical resources, the maintenance of amenity values, the maintenance and enhancement of the quality of the environment and any finite characteristics of natural and physical resources. The substance of those considerations was, in my view, addressed at various places in the Environment Court's decision.

[129] In this respect, Mr Littlejohn referred me to paragraphs [15] to [17] of the Environment Court's decision in which the Court had:

- (a) recorded that the actual and potential physical effects of the proposal on the environment were not really an issue;
- (b) noted the Council's concession that such effects would be no more than minor;
- (c) recorded the evidence of Ms Jenkins about the lack of productive soils in the locality, the proposal's lack of effect on the existing character of the area, its no more than minor effect on local amenity, and the existence of mature screening vegetation on the land with resultant absence of visual impact from public viewing points;
- (d) added its own observation about the distance of the property from the local road, and the orientation of the property, which avoided an immediate viewing audience;
- (e) held that there would be no traffic or access difficulties, no noise effects or difficulties for infrastructural services; and
- (f) recorded Mr Simmons' view that there would be no immediate effects on the directly adjacent environment that would be any more than minor, in fact that the development would be unlikely to be noticed beyond the subject site and those properties whose owners had given written approval.

[130] Leaving aside the Council's argument about cumulative effects, which the Court rejected (for the reasons that I have already discussed and upheld) this was clearly a proposal with a very low environmental impact, as the Council's own expert witness had agreed. So, in the Court's view, it passed through the s 105(2A) gateway (paragraph [19] of the decision). Given this finding and the reasons for it, I consider that when the Court said that its attention had not been drawn to aspects of s 7 that the proposal would offend it was in effect finding that the proposal did not offend against that section. I disagree that that statement should be seen as "confirming" that the Court did not consider s 7, as Mr Enright submitted.

[131] Mr Enright did not refer me to any factual matter that would have been relevant under s 7 but which had not been considered by the Court. He did submit that s 7 is clearly relevant to the issue of rural character, and referred to the definition of “amenity values” in s 2 of the Act in that context. However, the character of the subject site’s location was a matter specifically addressed by the Court in discussing Ms Jenkins’ evidence at paragraph [15] of the decision, and if, as Mr Simmons told the Environment Court, the proposal would be unlikely to be noticed beyond the subject site and the properties of the approving neighbours, it is impossible in my view to say that there was any error of omission in the Environment Courts treatment of the amenity issue.

[132] I do not consider that the Court made the errors alleged by the Council under this heading.

Seventh question of law

[133] The final question of law is expressed as being contingent on there being an error in the Environment Court’s analysis of s 105(2A)(b). Because I have found that there was no such error in the Court’s decision, this question must also be answered in the negative.

Result

[134] The Council has not established that the Environment Court erred in law in any of the respects alleged in the appeal. The appeal is dismissed accordingly.

[135] The respondents are entitled to costs. If costs cannot be agreed, I will receive a memorandum from the respondents on that issue within twenty-one days of the delivery of this judgment. The Council may respond to that memorandum within fourteen days after it is served.

APPENDIX

First question of law

1. Whether the Environment Court erred in its interpretation of Plan Change 55 and the Proposed District Plan by failing to have regard to the following as relevant considerations:

1.1 General objectives and policies in the Proposed Plan (ie Objective 7.3.7, Policy 7.4.7).

1.2 Relevant rules, as a guide to interpretation of objectives and policies, in the Countryside Living Rural and Town zones for Plan Change 55 and the equivalent zones in the Proposed District Plan.

1.3 Policy 5 in Plan Change 55.

1.4 Policy 7.8.5.3.2.2 and 7.8.5.4.2.2 in the Proposed District Plan.

1.5 By wrongly concluding that there was no evidence at all from the Appellant's planning witness on whether the proposed subdivision was (for the purposes of s 105(2A)(b)) contrary to the objectives and policies of the Proposed District Plan.

Second and fourth questions of law (combined)

2. Whether the Environment Court erred in its approach taken to precedent by:

2.1 Having regard to the following irrelevant considerations:

a. the existence of written approvals to the subdivision from adjoining landowners;

3. Whether the Environment Court erred in its approach taken to plan integrity by:

3.1 Having regard to the following irrelevant considerations:

a. the existence of written approvals to the subdivision from adjoining landowners;

3.2 Failing to consider relevant considerations, namely

a. the district plan instruments (the Transitional Plan, Plan Change 55, and the Proposed District Plan) and whether public confidence in their administration would be shaken or challenged.

3.3 Failing to make a finding on plan integrity (instead simply finding there were clear distinctions applicable to the subject site).

3.4 Whether the Environment Court erred by fusing its consideration of plan integrity and precedent (failing to separately consider each doctrine).

3.5 Whether the Environment Court erred by failing to consider either plan integrity or precedent, as relevant considerations, under s 105(2A)(b).

Fifth question of law

4. Whether the Environment Court erred in finding that there were no cumulative effects by:

- 4.1 Wrongly concluding that there was no evidence by Mr Simmons on the issue of cumulative effects to rural character and amenity;
- 5 4.2 If the Environment Court did consider Mr Simmons' evidence, then in adopting the wrong definition (wrong legal test) for cumulative effects by requiring evidence that the future effects 'will happen' rather than requiring evidence that there is sufficient probability that the future effects 'will happen'.
- 10 5. Whether the Environment Court erred in finding that there were no cumulative effects by applying the test in *Dye* (para 17, 57-58 of Judgment). The *Dye* test:
- 15 5.1 Can be distinguished on its facts and is not intended to be of general application, with cumulative effects to be assessed on a case by case basis.
- 5.2 In the alternative:
- 5.3 The *Dye* test is binding on this Court, but is erroneous including for the following reasons:
- 20 a. The definition of 'cumulative effects' in s 3 applies for the purposes of s 105(2A)(a) and s 104(1)(a) (namely '... any cumulative effect which arises over time or in combination with other effects ... regardless of the scale intensity duration or frequency of the effect ...').
- 25 b. S 105(2A)(a) does not refer to 'actual or potential' effects thus the general definition in s 3 of cumulative effect applies for the purposes of non-complying activities under s 105(2A)(a).
- 30 c. The definition of 'environment' imports cumulative effects into both s 105(2A)(a) and s 104(1)(a).
- d. Cumulative effects include future potential or actual effects, on either the subject site or other relevant sites.
- 35 **Sixth question of law**
6. Whether the Environment Court erred in failing to have regard to s 7 Resource Management Act, as a relevant consideration to which it must have 'particular regard' by:

6.1 Failing to give reasons for rejecting the evidence of Mr Simmons on s 7 in his written brief or wrongly concluding that there was no such evidence;

5 6.2 S 7 Resource Management Act having been put in issue, by failing to analyse the relevance of s 7 and make a determination as to whether it applied.

Seventh question of law

10 7. Whether (as a consequential error of law) if the Environment Court erred in its analysis of s 105(2A)(b), this led to error in its analysis of s 104(1)(d).

BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision No: W 075 /2009
ENV-2009-WLG-000013

IN THE MATTER of an appeal under s120 of the Resource
Management Act 1991

BETWEEN G M BEACHAM
Appellant

AND THE HASTINGS DISTRICT COUNCIL
Respondent

Court: Principal Environment Judge C J Thompson
Environment Commissioner M P Oliver
Environment Commissioner S J Watson

Heard at: Hastings on 9 September 2009. Site visit 9 September 2009

Counsel/Appearances:

M B Lawson for G M Beacham
G W Richardson – s274 party
B W Gilmour for the Hastings District Council

DECISION OF THE COURT

Decision issued: 05 OCT 2009

A. The appeal is allowed
B. Costs are reserved



Introduction

[1] In a decision dated 19 December 2008 the Hastings District Council declined an application made by Dr Gregory Beacham for resource consent to operate a car restoration activity on his property at 1424 Maraekakaho Road, Hastings. This is an appeal against that decision. Dr Beacham's business has an international reputation for the expert restoration and refitting of classic motor cars, particularly Jaguars. The proposal is to operate the business within three recently constructed buildings, with an attached amenities block. Together the buildings occupy about 1096m² and form three sides of a rectangle, semi-enclosing a sealed courtyard onto which they open. The proposal would consolidate the car restoration business onto the one site at Maraekakaho Road.

[2] The property is 9.3457ha in area and the majority of it is operated as an orchard on which Dr Beacham and his family also live. Dr Beacham has recently leased out the orchard, to be operated in conjunction with others, so he no longer requires to store as much orchard-related material and machinery on site for his own use. The site is set among other similar activities and is immediately adjacent to the Mangaroa Prison, on the outskirts of Hastings City.

The present arrangements

[3] In 1988 Dr Beacham obtained a *specified departure* under the then planning legislation from the Hawkes Bay County Council for the operation of the (then much smaller) car restoration business from the generous but still residential scale garaging existing on the site. However, as the business grew, relocation of part of it was required and part of the property at 96 Algernon Road, also in orchard country south of Hastings, was taken on lease. The building on that site was originally a packhouse for the orchard on that property. Presently, the restoration business itself is conducted at Algernon Road and some vehicles awaiting restoration, and parts, are stored in the buildings at Maraekakaho Road.

[4] A *non-complying* resource consent for use of the Algernon Road property was granted in 2004 and enables the consent holder to operate the restoration business employing 15 staff within a 905m² building between the hours of 7.30 am and 6 pm Monday to Thursday. The site is within the *Plains* zone of the Hastings District. This consent would be surrendered if the appeal succeeds.



Zoning and Planning Status

[5] The Maraekakaho Road property is situated within the *Plains* zone of the Hastings District Plan, operative since 2003. There are no identified sites of significance or designations affecting the property.

[6] It is common ground that the application falls within the definition of *industrial activities* contained in Chapter 18 of the Plan as: *The use of land and buildings for the manufacturing, fabricating, processing, packing or storage of substances, into new products and the servicing and repair of goods and vehicles, whether by machinery or hand and includes transport depots and the production of energy but excludes helicopter depots.* It is also common ground that Rule 6.9.5(1) contains the specific performance standards applicable to industrial activities. Industrial activities other than the processing storage and packaging of crops are confined to a maximum gross floor area per site of 100m² and require that no more than three non-resident employees may be employed on site. Plainly the proposal would fail to comply with those performance standards and under Rule 6.7.5 the proposed activity becomes a *non-complying* activity.

[7] Plan Change 46, relating to the *Plains* zone, was notified on 26 June 2008, almost exactly one month before Dr Beacham's application was lodged. The Council notified its decisions on submissions on 23 May 2009. There is only one appeal, and it is not relevant to this proposal. The Plan Change, although not altering the wording of the objectives and policies, sought to limit all *permitted* industrial activities to buildings of not more than 100m² GFA and to clarify that only rural crop/produce-related industrial buildings larger than 100m² GFA are provided for (as a *restricted discretionary* activity). The Plan Change did not relevantly affect the performance standards, nor the status of the activity relevant to this proposal, which therefore remains *non-complying*.

[8] That being so, the application must pass one or other of the two thresholds contained in s104D before it can be considered for a resource consent under s104. That is, its adverse effects on the environment must be no more than minor, or it must be shown to be not contrary to the relevant objectives and policies of the District Plan, when read as a whole. In this case the expert planning witnesses agree that the adverse effects of the proposal are not



more than minor - so we may pass directly to a consideration of the application under s104 and leave a consideration of the Plans objectives and policies until a later point.

Section 104(1)(a)- effects on the environment

[9] We have mentioned that the expert planning witnesses agree that any adverse effects on the environment would not be more than minor. This is not surprising given that the buildings already exist – they are part of the existing environment. That is not to say that the issue of effects on the environment can be ignored. Mr Richardson, a s274 party who lives opposite the Maraekakaho Road property, raised issues about traffic generation and the use of chemicals on the site as possible adverse effects in his original submission to the Council. There was no evidence about those issues, and in the apparent absence of any issues arising from them in the 20 plus year history of this enterprise, we cannot sensibly give such vaguely expressed concerns any real weight now.

[10] Nor, of course, is it to be overlooked that this activity has positive effects. In terms of the purpose of the Act, as expressed in s5, it contributes towards enabling people and communities to provide for at least their social and economic wellbeing and, depending on one's degree of enthusiasm for classic cars, perhaps their cultural wellbeing as well. It does so by providing employment for highly skilled staff, and business for suppliers. According to Dr Beacham's unchallenged evidence, the business has over its lifetime contributed of the order of \$50M to the general economy in export earnings.

Permitted baseline

[11] It may seem a little pointless to discuss the concept of the *permitted baseline* in a situation where it is agreed that the adverse effects will not be more than minor, but the concept has a resonance when it comes to considering issues such as Plan integrity. Section 104(2) gives a consent authority the discretion to disregard an adverse effect created by the proposal...*if the plan permits an activity with that effect*. The adverse effect of the proposal which is argued to be so inimical to the thrust of the *Plains* zone provisions as to threaten the integrity of the Plan is the loss of the productive capacity of the zone's soils by erecting buildings over them.



[12] The operative provisions of the *Plains* zone do permit the erection of buildings, quite apart from houses and ancillary buildings. Mr Macdonald confirmed that there are no size or building coverage limits on accessory buildings associated with residential activities permitted on a site of this size. Industrial buildings for the ...*Processing, storage and packaging of crops, produce and agricultural materials...* with a GFA of up to 2500m² per site are permitted on any site (no matter what size) in the zone under Rule 6.9.5. The justification for that is that such a rural industry activity is directly related to the production of primary produce on the land, and that is valid and understandable. But the *permitted* activities underline the point that *Plains* zone land is not absolutely inviolable. These were the very provisions which enabled Dr Beacham to construct the existing buildings as *permitted* activities. That seems to us to be a relevant point to consider. We hasten to add that we have not overlooked the subsequent *tightening* of the provisions under proposed Plan Change 46.

Affected person approvals

[13] Section 104(3)(b) provides that a consent authority (in this case, the Court) shall not have regard to any effect on a person who has given written approval to the application. There are four such persons; Mr Brian Clearkin, the owner and occupier of an orchard property on the corner of Maraekakaho and Stock Roads, Mr Grant Taylor (on behalf of the Luton Trust) the owner and occupier of a property to the east of the subject site, Mr T and Mrs M M Hyland, the owners and occupiers of a property immediately opposite the site on Maraekakaho Road, and the Department of Corrections in respect of the Mangaroa Prison, which surrounds the site on three of its boundaries. We have mentioned that Mr Richardson, also a neighbouring owner, opposes the application so the local support is certainly not unanimous. Nevertheless, the fact that its closest neighbours give it their consent is a reasonable indication that its effects, albeit at a reduced scale, have not proved problematic in the past.

Section 104(1)(b) – planning documents

[14] There are no relevant national statements, nor is the Coastal Policy Statement relevant. Brief mentions were made of the Hawkes Bay Regional Resource Management Plan by Mr Alan Matheson, the Council's Consultant Planner, who referred to Objective 38 – *The sustainable management of the land resource so as to avoid compromising future use and water quality...* and to its accompanying Policies 67 and 68; and by Mr Matthew Holder, the Council's consultant planner. He referred to Objective 16 – *for future activities, the*



avoidance or mitigation of nuisance effects arising from the location of conflicting land use activities. We agree with Mr Holder's view that Objective 16 is not a live issue here. Mr Matheson says that the Regional Plan supports the District Plan provisions about the *Plains* zone soil resource. We agree with that view also.

[15] The District Plan was the focus of attention. Many of its provisions were mentioned, but particularly relevant objectives include:

- RO1 To promote the maintenance of the life-supporting capacity of the Hastings District's rural resources at sustainable levels.
- RO2 To enable the efficient, and innovative use and development of rural resources while ensuring that adverse effects associated with activities are avoided, remedied or mitigated.
- RO4 To ensure that the natural, physical and cultural resources of the rural area that are of significance to the Hastings District are protected and maintained.
- PLO1 To maintain the life-supporting capacity of the unique resource balance of the Heretaunga Plains.
- PLO2 To avoid, remedy or mitigate potential adverse effects of land use activities on the rural community, adjoining activities, marae, and the economy.
- PLO3 To provide for the establishment of landholdings on the Plains which can accommodate a wider range of activities that can retain the life-supporting capacity of the Plains resources.

The principal supporting policies are:

- RP3 Provide for a wide range of activities to establish which complement the resources of the rural area, provided that the sustainability of the natural and physical resources of the area is safeguarded.
- PLP1 Enable the establishment of a wide range of activities provided they maintain the life-supporting capacity of the soil resource of the Heretaunga Plains for future use.
- PLP4 Control the adverse effects of activities on the community, adjoining activities, and the environment.
- PLP5 Activities locating in the Plains Zone will need to accept existing amenity levels associated with well established land use management practices involved with the sustainable use of the soil resource.
- PLP6 Limit the scale and intensity of the effects of Commercial Activities in the Plains Zone in order to ensure the sustainable management of the soil resource and to mitigate adverse effects.



PLP7 Provide for the establishment and development of Industrial Activities on the Plains Zone, in a manner that complements the sustainable management of the soil resource, adjacent activities and protects the amenity of the zone.

[16] In summary, we accept that those provisions aim to promote the sustainable management of the Heretaunga Plains land resource, finite in nature and with a productive and life-supporting capacity, not just for the present but also for future generations. Also, as Mr Matheson put it *...commercial and industrial activities are limited in relation to the type and size of those activities, particularly those that do not support the sustainable use of the versatile soils resource.*

[17] This is an issue thoroughly traversed in a number of relatively recent decisions of the Court. For instance, in *McKenna v Hastings DC* (W16/2008) and *Ngatarawa Development Trust Ltd v Hastings DC* (W17/2008), the Court found that the proposals then before it were so contrary to the thrust of the Plan provisions that they should not be given resource consents. The scenario in *H B Land Protection Society Inc v Hastings DC* (W57/2009) was different, in that what was before the Court was a Council-initiated Plan Change to enable the establishment of a regional sports park. Nevertheless, what was at stake was some 30ha of *Plains* zone land, the productive capacity of much of which would, for all real purposes, be lost if the park was built. In that instance, the Court found that while the productive capacity of the soil was undoubtedly important, countervailing values prevailed. The point to be made here is that the protection of the capacity of the *Plains* soils is not an absolute, and other activities are not *prohibited*.

[18] In each case, it is a question of assessing effects and of considering the Plan provisions. If the adverse effects significantly outweigh the positives, and/or the proposal is in irreconcilable conflict with the Plan provisions, then a negative answer is plainly indicated. If things are not that bleak, then it may be that a proposal can still be regarded as promoting the purpose of the Act – the sustainable management of resources.

Section 104(1)(c) – plan integrity

[19] The real issue in this appeal is whether allowing this application would be so contrary to the relevant objectives, policies and other provisions of the District Plan that it would harm its



integrity and effectiveness as an instrument enabling the Council to avoid, rather than to remedy or mitigate, the adverse effects the Plan formation process has identified.

[20] This was at the core of the dispute between the parties, and the fundamental reason why the Council declined the application. The decision of 19 December 2008 records:

... the application would have the potential to create an adverse precedent effect. It was felt that the qualities of the proposal could be readily replicated on other sites in the Plains Zone and were not sufficiently unique to this site. Therefore the Council, being consistent in its approach, would find it difficult to refuse consent to similar applications.

[21] We need to begin a consideration of this issue by recalling that the original Maraekakaho Road operation was sanctioned by a *specified departure* granted by the then County Council in 1988. A *specified departure* was, loosely, the equivalent of a *non-complying* consent under the current legislation. We have mentioned also that the Algernon Road operation received a *non-complying* consent from this Council in 2004.

[22] Mr Ian Macdonald, the Council's Environmental Manager, expressed the view that the earlier consents were materially different from the present application because they both utilised existing buildings on the two properties, and thus did not involve taking more land out of production. We see the same circumstances here. Dr Beacham made no secret of his real intent in constructing these buildings, but they were built as storage sheds, and thus were *permitted* in the zone. Now, as has happened twice before, an application has been made to convert them to some other use.

[23] We accept of course the administrative law principle that like applications should be treated alike, but that principle applies both ways. Given that this operation has twice before been regarded as sufficiently outside the run of foreseeable non-complying proposals that it could be examined, and approved, on its merits we must ask why it should be differently regarded now. We heard no suggestion at all that the grant of either of those consents had led to any, let alone a deluge of, applications for similar consents in respect of other properties.

The enterprise's own history has discounted the *floodgates* hypothesis, and makes it difficult, if not impossible, for the Council to mount a credible argument that the integrity of the Plan will be imperilled if this consent is granted.



[24] We have said before, and must say again, that the *floodgates* argument does tend to be somewhat overused, and needs to be treated with some reserve. The short and inescapable point is that each proposal has to be considered on its own merits. If a proposal can pass one or other of the s104D thresholds, then its proponent should be able to have it considered against the s104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides for it as a true exception to what the District Plan generally provides for. Decision-makers need to be conscious of the views expressed in cases such as *Dye v Auckland RC* [2001] NZRMA 513 that there is no true concept of precedent in this area of the law. Cases such as *Rodney DC v Gould* [2006] NZRMA 217 also make it clear that it is not necessary for a site being considered for a *non-complying* activity to be truly *unique* before Plan integrity ceases to be a potentially important factor. Nevertheless, as the Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

[25] Only in the clearest of cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined.

[26] That was the position the Court found to exist in its decision in *McKenna v Hastings DC* (W16/2008). There too the adverse effects of the application itself were found to be not more than minor, but there was a direct clash with the provisions relating to the *Plains* zone and the avoidance of the fragmentation of its landholdings and the productive capacity of its soils. A somewhat similar, if less crisply defined, position was found to exist in *Ngatarawa Development Trust Ltd v Hastings DC* (W17/2008).

[27] It is not just the history of this operation that leads us to discount the Plan integrity argument in this instance. This proposal has current features that, individually and collectively, make it unlikely that a materially indistinguishable proposal would come over the horizon. We have in mind factors such as: that it can be conducted in existing buildings; that the soils in this front part of the Beacham orchard are, according to Mr William Wilton, a horticultural consultant engaged by Dr Beacham, poor and of inferior productive capacity; that



the proposal will not fragment the ownership of the land, as a residential subdivision would; that it is a reorganisation and continuance of a longstanding local business; that the two existing resource consents will be surrendered, thus bringing about a close to neutral net *non-complying* position for the operation, and that Dr Beacham is prepared to offer a restrictive condition that there be no further development on the property, even though that could be permitted by the Plan.

Section 104(1) – Part 2

[28] There are no issues relevant to Māori under s8 or s6(e), nor are there matters of national importance under the other paragraphs of s6. Of the matters to be given particular regard under s7 we can list as relevant:

- (b) The efficient use and development of natural and physical resources:
- (c) The maintenance and enhancement of amenity values:
- (f) Maintenance and enhancement of the quality of the environment:
- (g) Any finite characteristics of natural and physical resources:

[29] Arguably, it is more efficient to use the area of poorer soils on the property for a purpose other than for a second rate productive purpose. That has been tried and produced an inferior product. We do not though put any particular weight on that issue. The issues of amenity values and the quality of the environment do not arise on the evidence we heard. The *Plains* zone soils are a finite resource and that, as will be apparent, has been the focus of the hearing and our considerations.

Section 290A – the Council’s decision

[30] Section 290A requires the Court to have regard to the Council’s decision. That does not create a presumption that it is correct but it does, implicitly at least, call for an explanation if we should come to disagree with it. We have already quoted the central reason from the Council’s decision declining the application – see para [20]. It is apparent that the issue of Plan integrity was critical in its thinking and, for the reasons we have outlined – see paras [19] to [27] – we do not regard that issue in the same light.



Result

[31] The effective, and likely permanent, loss of the life-supporting capacity of *Plains* zone soils, even of such a small area as this, to a non-rural industry is not to be accepted lightly – we must have accumulative effects in mind. For many proposals that factor alone would likely be decisive. But for the reasons we have outlined, we do not see this proposal as being in such conflict with the Plan provisions as to create a Plan integrity issue if it is granted. Further, the factors we have listed in para [27] put it in a category which, while not unique, is sufficiently outside the likely mainstream of proposals that it can fairly be considered as a *non-complying* proposition. We conclude that, in the overall weighing process under s5 of the Act, the positive factors of the proposal outweigh its negatives and that the resource consent can be granted.

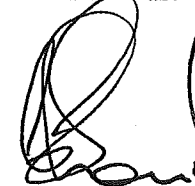
[32] For those reasons, the decision of the Council is not upheld and the resource consent should be granted. The conditions of the consent require thought – for instance to give effect to Dr Beacham's offer of a restriction on further development, as mentioned in para [27]. We ask that Counsel confer and present a set of conditions for approval by 23 October 2009.

Costs

[33] In the circumstances we do not encourage an application for costs, but as a matter of formality they are reserved. Any application should be lodged by 23 October 2009, and any response lodged by 6 November 2009.

Dated at Wellington this ^{5th} day of October 2009

For the Court



C J Thompson

Principal Environment Judge



BEFORE THE ENVIRONMENT COURT

ORIGINAL

Decision [2010] NZEnvC177

ENV-2009-CHC 000098

IN THE MATTER

of an appeal under s120 of the Resource
Management Act 1991

BETWEEN

BLUESKIN BAY FOREST HEIGHTS
LIMITED

Appellant

AND

THE DUNEDIN CITY COUNCIL

Respondent

Court: Principal Environment Judge C J Thompson,
Environment Commissioner K A Edmonds,
Deputy Environment Commissioner O M Borlase

Hearing: at Dunedin 19 & 20 April 2010. Site visit: 20 April 2010

Closing submissions received: 6 May 2010

Counsel/Appearances:

P J Page and B Irving for Blueskin Bay Forest Heights Ltd

K M Lloyd for Blueskin Farm Ltd - s274 party

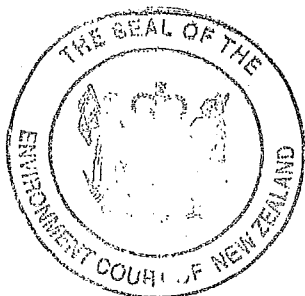
M R Garbett and J E St John for the Dunedin City Council

DECISION OF THE COURT

Decision issued: 21 May 2010

The appeal is allowed and the Council's decision is not upheld

Costs are reserved



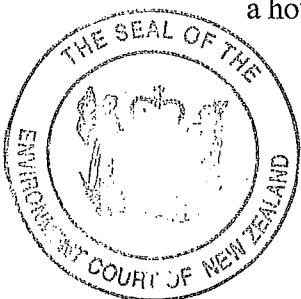
Introduction

[1] This appeal concerns an application for a land use resource consent, necessary to develop the lots created by a subdivision resource consent granted as long ago as 2004. The land in question is a block of about 82.4ha, on Jones Road (although the longest frontage is to Wright Road) near Evansdale, some 24km north of Dunedin City. The crest of the land is quite elevated, having an outlook over Blueskin Bay to the east. It is presently partly in production forestry. The original proposal was for a total of 12 lots of a minimum of 6ha each, intended for rural-residential use. There is one residence on the land at present.

Background

[2] Some background history is required to understand how matters have arrived at their present state. The applicant/appellant (Blueskin Bay) applied for resource consents for this proposed subdivision at a time when the land in question was zoned *Rural F* under the then Transitional Plan, and *Rural* under the then Proposed Plan. The essential significance of that was that under the Transitional Plan the subdivision was a *non-complying* activity and also required a land use consent, because of the lot sizes proposed for the subdivision. That Plan had a minimum lot size of 15 ha for a house. The proposal as dealt with in 2004 was divided into two stages. Stage 1 produced Lot 1 and a balance lot. Lot 1 is the site of the one existing house and that plays no further part in the saga. Stage 2 comprised the subdivision of the balance lot into eleven sites and that is the land we are concerned with.

[3] The Proposed Plan had been notified with a minimum lot size of 15ha also, but Variation 9A reduced it to 6ha, meaning that under the Proposed Plan, if read together with Variation 9A, land use (the construction of houses and ancillary buildings) was a *Permitted* activity and did not require a land use resource consent. Under that regime the subdivision was a *Discretionary (Restricted)* activity and did require a consent, and that was the position when the subdivision resource consent was granted by the Council in September 2004. Matters did not remain that way however. Variation 9A was eventually defeated on appeal in this Court in November 2004, and the minimum lot size of 15ha for a house was reinstated.



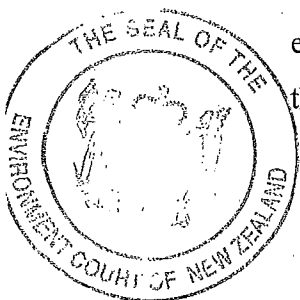
[4] The end result of all of that was that, for reasons which remain obscure, a land use consent had not been granted at all, leaving Blueskin Bay with a subdivision consent for a total of 11 lots, but without a land use consent authorising the construction of houses on them. It was not until sometime in 2007 that this unhappy position became apparent to the relevant parties.

[5] An application was made for the (now) *non-complying* land use consent and that was declined by the Council in a decision made on 25 February 2009. That is the decision now under appeal. At the hearing of that application, Blueskin Bay elected not to pursue one of the lots (Lot 2, which is in common ownership with Lot 1) so the application was finalised on the basis that only 10 lots would be built on.

The parties' positions

[6] There is a degree of finger-pointing between Blueskin Bay and the Council as to how this situation came to pass. A director of Blueskin Bay, Mr Bryan Rapsey, said that he knew nothing of Variation 9A or its implications and had always proceeded on the assumption that, post the Council decision of September 2004, the company had all the consents it needed to proceed with a fully authorised and saleable subdivision. He points out that in lodging the original application, the company's surveyors had specifically mentioned that the land use consent was necessary, although describing it as *technical* and suggesting that no processing fee should be charged for it.

[7] That such consents were then regarded as *technical* was confirmed by Mr Kevin Tiffen who was, at the time, a planner for the Council and was the Council officer responsible for processing the application. His recollection was that the Transitional Plan was then regarded as waning in importance and that, encouraged by decisions of this Court, more emphasis was being placed on the Proposed Plan, as modified by Variation 9A, because of its then stage of progress through the post-notification process. His comment was that such land use consents were *rubber-stamped*. He regarded this application, while not being for a *permitted* or *controlled* activity, as being a good *fit* with the then proposed Plan regime of 6ha minima as a *restricted discretionary* application and that he had no hesitation in recommending that it be granted. For reasons he cannot now explain, he says that somehow the necessity for the complementary land use consent for the proposal was missed.



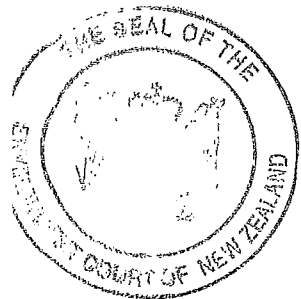
[8] The Council's view seems to be that Blueskin Bay got what it applied for and should not now be complaining that it has been required to go through an application process requiring consideration of the District Plan in its present form.

[9] We find it difficult to understand how such a situation could have come about. It is as plain as it possibly could be that the Council was being asked to, and did, process an application for residential use. There could be no other explanation for the subdivision consent having carefully delineated building platforms, conditions about such matters as roading upgrades, and advice notes about water supply, wastewater and sewage disposal, and domestic refuse disposal. How it could not have followed through with the necessary land use consent (even if being then *rubber-stamped* as a *technicality*) is inexplicable.

[10] It has to be said too that the Council's present position is internally conflicted. In 2004 it granted the subdivision consent, on a non-notified basis and in the full knowledge of what was proposed. Its overall assessment, consistent with its decision that the application need not be notified, included the statement that ... *the effect of the proposal on the environment will be no more than minor*. It now declines a resource consent necessary to make use of that decision, for exactly the same proposal (save that there is to be one fewer lot built on) on the basis that the proposal has adverse effects that are *more than minor* (a phrase to which we shall return) and which are ... *not adequately addressed by the proposed mitigation*.

[11] Equally, how the company's advisors could not have realised that the land use consent had not been granted in 2004 is a mystery. It is possible, we suppose, that it was realised, but an election was made not to pursue the issue on the assumption that the expected approval of Variation 9A through the appeal process would cure the problem. Mr Page disputes that there is evidence to objectively support that conclusion, and we have to agree that it would be surmise to conclude that such was the case.

[12] It is not our function to allocate blame, and in the end it does not really matter how it came about, but the present situation is that as a cadastral entity the subdivision, with defined building platforms and consent conditions plainly aimed at residential use, exists. Certificates of Title for each lot were issued in late 2009 and the majority of each lot, save



the building platform and curtilage, is covered by a registered consent notice designed to protect the native vegetation on its rather steep slopes.

[13] Activities prohibited within the *Native Bush Protection* area are:

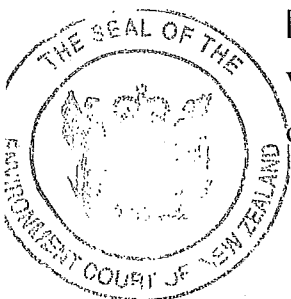
- Construction of vehicle tracks
- Keeping of livestock
- Removal of native bush or indigenous vegetation
- Any earthworks or disturbance of the ground
- Any spraying of weed killer for gorse or weed control
- Any fires or naked flames
- Any motor vehicle
- Any planting of exotic trees
- Any internal fencing involving earthworks or disturbance of vegetation.

Within the *Native Bush Protection* area there are exotic trees planted for forestry purposes. Some of these were extracted before the subdivision was given effect to but not all of them.

[14] From all of that, Blueskin Bay puts its case partly on the basis that, as a matter of equity, the land use consent ought to be granted, and partly on the basis that the Council must be taken to have intended to, and in substance did, grant the land use consent – see *JIT Hillend Investments Ltd v Queenstown Lakes DC* (High Court, Invercargill, CIV-2009-425-479, 15 December 2009, Chisholm J). Both of those propositions strike us as rather tenuous on the facts.

[15] But rather more straightforward is the proposition that the subdivision is now part of the *existing environment* (see *Queenstown Lakes DC v Hawthorn Estate Ltd* [2006] NZRMA 424). If it is part of the existing environment, then the effects of the now implemented subdivision consent, with the twelve lots and covenant, on the environment forms part of the background against which we will assess the effects of the land use consent. Therefore we consider it is part of the existing environment under s104(1)(a).

[16] Blueskin Farm Ltd is company owned and operated by Dr Kelvin Lloyd and his wife, Ms Beatrice Lee. The company leases some 88ha of land owned by a family trust of which Dr Lloyd and Ms Lee are trustees, on Manse Road, a short distance to the south



of the Blueskin Bay land. Both are experienced ecologists, and Ms Lee is also an experienced farmer. They do not live on the land, although they intend to do so in the future. They farm the land, principally fattening lambs and running a small number of cattle. There are also small woodlots, and it is severely gorse infested in parts. This is gradually being cleared. Their concerns are essentially threefold: - the threat to their stock from dogs wandering from the Blueskin Bay properties; the potential for reverse sensitivity impacts on their farming operations, and adverse effects on the amenity values of their land and its surrounding area. Their first choice would be for the land use consent to be declined but if that is not the outcome, they seek the imposition of conditions to meet their concerns. We shall return to those matters in discussing the effects of the proposal.

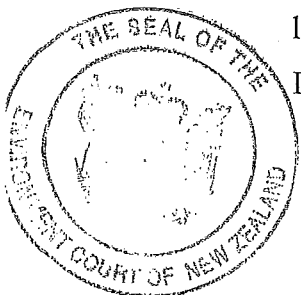
Section 104D – adverse effects more than minor?

[17] We have the view that it cannot be said with confidence that the adverse effects of the proposal on the environment will be not more than minor (see paras [24] to [36]). We can pass directly to consider whether the proposal might pass the other s104D threshold.

Section 104D – contrary to objectives and policies of the District Plan?

[18] Although its consultant planner, Mr Andrew Henderson, had a somewhat different view, the Council's position at the hearing was clearly expressed by Mr Garbett as being that the proposal was not *contrary to* the Objectives and Policies of its Plan. We think that was a concession properly and responsibly made. Given the way in which the property has been subdivided, with the covenant restricting future forestry and farming activity, we do not consider the Objectives and Policies related to providing for activities based on the productive use of rural land are affected. That is also the case for productive activities on Blueskin Farm, which we consider can continue unimpeded by activities on the lots. Neither would the proposal to put houses on the lots be contrary to the Objectives and related Policies dealing with reverse sensitivity. The proposal would also not be contrary to the Objective of maintaining and enhancing the life-supporting capacity of land and water resources.

[19] Mr Barry Knox, landscape architect and a witness for the Council, raised the landscape provisions of the District Plan. However, we accept that the approach in the District Plan is to identify and protect mapped areas. The land concerned is not within the



mapped areas, including the Coastal Landscape Preservation Area, and the proposal would not jeopardise the values of the identified significant landscape areas.

[20] Mr Henderson considered the proposal to be contrary to Objectives and Policies related to amenity values. Of particular note is the Objective to maintain and enhance the amenity values associated with the character of the rural area. The associated Policy 6.3.5 reflects the matters contained in the explanation to this Objective, with the provisions in contention stating:

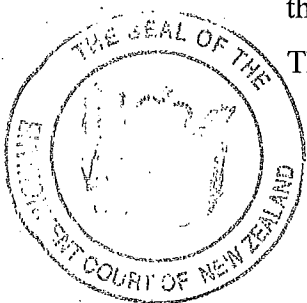
Require rural subdivision and activities to be of a nature, scale, intensity and location consistent with maintaining the character of the rural area and to be undertaken in a manner that avoids, remedies or mitigates adverse effects on rural character. Elements of the rural character of the district include, but are not limited to:

- (a) a predominance of natural features over human made features,
- (b) high ratio of open space relative to the built environment,
- (c) significant areas of vegetation in pasture, crops, forestry and indigenous vegetation,
- (d) presence of large numbers of farmed animals ...

We accept that there will be a change to the character of the rural area once the lots have houses built on them. Clearly there will not be large numbers of farmed animals, but the already covenanted land in front of the building platforms means that significant areas of indigenous vegetation will remain. There will still be an overall impression of open space and natural features, particularly given the constraints on the buildings and associated activities to be imposed by way of consent conditions. We conclude that the proposal would not destroy the amenity values associated with the character of the rural area (as we discuss further when considering the effects).

[21] Mr Don Anderson, planner for the applicant, reiterated many times his view that if the residential uses considered as part of the subdivision proposal met the Objectives and Policies, then they still did. He saw no significance in the change to a 15ha minimum allotment size for a house, unlike Mr Henderson.

[22] We accept that the proposal to put houses on the subdivided lots is not *contrary to* the Objectives and Policies in the District Plan when they are considered in the round. That is a high threshold.



Conclusion on s104D

[23] We can say, then, that the proposal can pass the s104D Objectives and Policies threshold, and can be considered on its merits under s104 and Part 2.

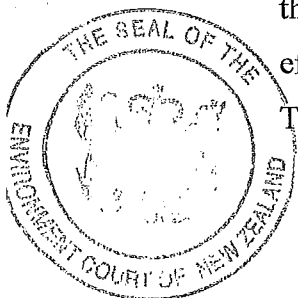
Section 104(1)(a) – effects on the environment

Adverse effects

[24] Because of the topography of the site, the building platforms are placed along, and quite close to, the Wright Road frontage. The road is relatively straight, if slightly undulating. More importantly, it runs along the ridgeline of the first line of hills back from the western edge of Blueskin Bay. Further, because the lots have to be relatively narrow along the road frontage - indicatively, about 100m each - the building platforms are, it is argued, relatively closely spaced when considered in a rural-residential context. The Council's witnesses, four of whom were local residents opposed to the application, protest that, particularly from middle-distance vantage points such as Warrington and Doctors' Point (at the north and south fringes of the Bay respectively), the proposed houses will appear as a row or street of almost suburban form. Mr Robert Knox, a landscape architect for the Council, sums up the point by saying ... *I conclude the proposal introduces a degree of domestication and urbanisation which creates moderate to significant effects on rural character and visual amenity.*

[25] In the course of discussion with the members of the Court, Mr Knox expressed the view that he thought the site could accommodate, say, five houses without suffering effects that were more than minor. Beyond that, he thought there might be a range of up to, say, seven houses where the effects would be what he described as moderate, depending on the levels of mitigation. At ten houses though, he was inclined to think that no amount of mitigation would counter the cumulative adverse effects, making the proposal unacceptable.

[26] We of course respect that opinion, but should make this point about it. The first is that Mr Knox acknowledged that he was using, as his yardstick of acceptability of effects, the phrase ... *not more than minor*. Some care is required with that. The only place (other than in the notification provisions) in which the term ... *minor* ... (in relation to adverse effects) appears in the RMA is in s104D, where it describes one of the two thresholds. There is no such terminology in s104, but the ... *not more than minor*... phrase has slipped



into the RMA lexicon as a shorthand indicator of the level of adverse effects that would dictate whether a proposal should be granted consent, or not. It has to be said that that is not the test. The adverse effects of a proposal could be much more than minor yet, in the right circumstances, the consent could still be granted.

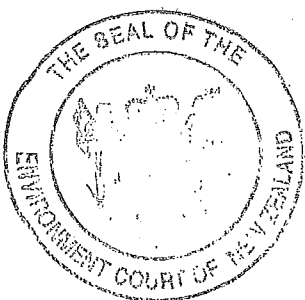
[27] As the Court discussed with Mr Knox in the course of his evidence, there is truth in the view that numbers (in this case, of houses) are not the definitive factor in assessing effects. Five very large houses of obtrusive height, colour and reflectivity, with no or minimal mitigation planting, would almost certainly be far more visually discordant in this environment than 10 well designed and well mitigated properties.

[28] Ms Nikki Smetham, a consultant landscape architect called for Blueskin Bay, had a somewhat different approach, which she summarised in this way:

Typical views of the site within the visual catchment are mostly over 2 km where the proposed dwellings are a minor component of a wider view. At these distances an awareness of the dwellings would not have a marked effect on the overall scenic quality of the rural or coastal landscapes. They appear as small scale elements in a large scale background and do not typically appear on the skyline. Access tracks to dwellings are not an issue because the lots and building platforms are easily and directly accessible from the rear, off Wright Road. Although built structures will contrast with an open background because of their geometric form, the visual impact of this is largely mitigated by building height, use of low reflectance value paint colours, materials, and screen planting. ... Overall for reasons of distance, proposed mitigation and comparison with the permitted baseline I assess the visual impact of the dwellings as moderately low. ... whether a threshold of over-domestication is reached is determined by the density of the proposed dwellings and whether they appear appropriate in the rural zone. The entire ten dwellings are only seen from Viewpoint 5 at the crossroads of Blueskin Bay and Shortcut Roads at a distance of 4.5 km. However, three of these dwellings are only partially glimpsed. In general, all ten dwellings are only seen intermittently which reduces the potential visual impact relating to density.

Ms Smetham goes on to say that overall she considers that:

... because of the overall ability of the site to accommodate change in landscape terms the impact is assessed as moderate and with mitigation the proposal will have a moderately low visual impact.

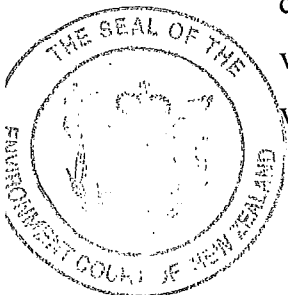


[29] Ms Smetham relies on a number of mitigation measures and the appellant carries these through into the conditions (with some exceptions which we discuss later). Those measures include building design, materials, finishes and earthworks, access, landscape and outdoor lighting treatment that result in a land use more compatible with the rural character of the area.

[30] Observations on the site visit confirmed our tentative view, gained from the photo simulations, that things will not be nearly as dire as the opposing witnesses fear they might be. From the State Highway, as it approaches from the south and then skirts Blueskin Bay, the development will not be visible. For traffic travelling from the north down Kilmog Hill on SH 1 it would be visible as a fleeting glimpse, and somewhat side-on, so that the whole row of houses will not be seen. From points around Blueskin Bay itself, the views to the houses will, as Ms Smetham says, be somewhat distant and not on the skyline. From the Orokonui Ecosanctuary, the site is very distant indeed. More importantly, as the presently distinctive cleared and bare area containing the building platforms becomes softened by vegetation, it will visually merge into its foreground and background. That, coupled with houses sympathetic to their environment in terms of height, recessive colours and reflectivity, should very substantially mitigate such effects on rural/visual amenity as there might otherwise be.

[31] Returning to the adverse effects which Ms Lee and Dr Lloyd fear for Blueskin Farm (see para [16]), we have to start by agreeing with the proposition put to Ms Lee in cross-examination by Mr Page: - ie that we cannot assume that consent holders, or anyone else for that matter, will not comply with their legal obligations. We accept that in the nature of things, it is highly likely that most occupiers of properties on Wright Road will have dogs and that they will be companion dogs, rather than working dogs trained to be in proximity to stock. We accept too that out-of-control dogs worrying and attacking stock can cause great destruction and distress.

[32] But the provisions of the Dog Control Act 1996 are unmistakably clear, and require dogs to be kept under control. Dogs found attacking stock can be seized or destroyed. A concerned farmer will respond to that by saying that such provisions are cold comfort when faced with dead and injured sheep in a paddock and, to a point, we can sympathise with that. But if the Court assumed that the law would not be complied with, and that



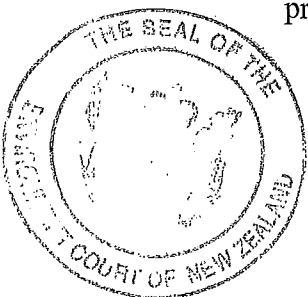
adverse effects would flow from that unlawful activity, it could become all but impossible to grant a resource consent for any activity at all. We have to assume both that the terms of a resource consent will be complied with, and the general law obeyed: - see *NZ Kennel Club v Papakura DC* (A1/2006).

[33] We take some reassurance about that from the factual context of this area. Although the Wright Road houses will not be farm properties they are likely, we would have thought, to be inhabited by people sensitive to rural issues and to the need to keep their dogs within boundaries, if only to prevent them wandering into the adjoining covenanted areas and disturbing the wildlife they presumably hope will find a habitat there.

[34] The issue about reverse sensitivity really traverses the same ground. The sorts of activities that Ms Lee and Dr Lloyd fear might arouse protest from the neighbouring properties are such things as gorse spraying and mulching and the noise of stock and mechanical equipment. Spray drift is an issue of general legal liability. For the reasons already discussed, we must assume that Blueskin Farm and its contractors will comply with their obligations in that regard. The levels of noise likely to be generated from other farm activities would not be likely to be much more significant than the Wright Road properties would themselves generate.

[35] We accept the possibility that the secondary effect of reverse sensitivity may arise. But we think that there does need to be a measure of robust realism about this. Those who might come to this area to live have to expect some rural noise, and just have to accept that as a fact of life, or not come at all.

[36] The effects on rural and visual amenity were also raised. Ms Lee raises the prospect of noise from lawnmowers and the like, and from parties and vehicles, which rarely if ever intrude on their land at present. We have just expressed our views about equipment and vehicle noise, and the prospect of noisy parties, to the extent of seriously disturbing amenity, seems unlikely in this context. These will be relatively expensive residential properties, presumably attractive to people who are attracted to rural amenity themselves.



Positive effects

[37] There will be positive effects also. The proposal will make efficient use of the land, as it now is. It will enable the occupiers of the properties to live in surroundings of their choice.

Permitted baseline

[38] Some trouble was gone to by the witnesses to deal with the concept of the *permitted baseline*, in the sense of what development might be allowed, as of right, in the *Rural* zone. Unfortunately the opinion of some witnesses was predicated on the basis of a house being *permitted* on a lot of 15ha, which of course is not the situation here. There could be potential to amalgamate the lots and at the complying lot size of 15ha there could be five houses and ancillary buildings on the overall site. However we had no evidence on whether a resource consent would be required for proposals involving amalgamation.

[39] As the subdivision now stands, there are 12 lots. Each lot could have, as of right, at least one farm building (ancillary to a *permitted* activity) of substantial size close to the Wright Road frontage. Those buildings could be up to 10m high and would not be subject to controls in terms of colour or reflectivity.

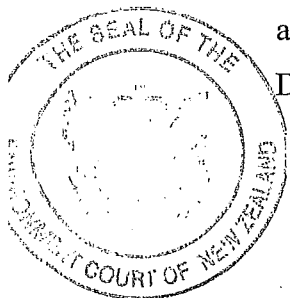
[40] There is a question whether a substantial barn-type building would be a non-fanciful development on lots of this size, and certainly whether it would be fanciful to consider 10, 11, or 12 of them in a row. Perhaps even five might stretch the boundaries of likelihood. To that extent, the concept of the permitted baseline is of rather limited assistance in assessing adverse effects.

Conclusion on effects

[41] We do not pretend that there will be no adverse effects, but we are confident enough to say that the adverse effects will not be significant to the point of justifying, let alone requiring, refusing the resource consent.

Section 104(1)(b) – planning documents

[42] The parties agreed that there were no relevant national documents, nor is there anything of relevance in the regional policy statement. We have already dealt with the District Plan Objectives and Policies in paras [18] to [22] and we need not repeat that.



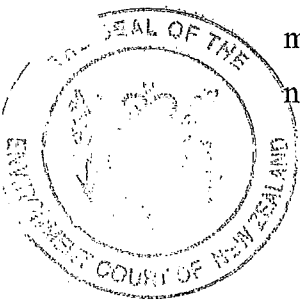
We should though add mention of the Plan's identification of Coastal Landscape Preservation Areas (CLPA). As Planning Map 78 shows, the *Northern Coastal Landscape Preservation Area* covers an area to the north of Warrington, the Warrington Peninsula and Rabbit Island within Blueskin Bay and then, resuming to the east of Doctors' Point, runs down to the western shoreline of Port Chalmers. The point made by Mr Page in cross-examination of Mr Knox was that the Northern CLPA did not include the hills forming the western backdrop of Blueskin Bay – the hills of which the site forms part. The point cannot be taken too far. It certainly does not, as Mr Knox pointed out, mean that those hills may not, as a matter of fact, be a landscape worthy of respect, at the very least: - see eg *Outstanding Landscape Protection Soc v Hastings DC* [2008] NZRMA 8. But it can be taken as an indication that, on a scale of coastal landscapes and features, the drafters of the District Plan did not see these hills as being in the same rank as those forming the coastline to the north and south of the Bay, and as being an area which should be regarded in the same terms as one falling within s6(a) or (b).

Section 104(1)(c) – other relevant matters

[43] A relevant other matter that cannot be ignored is the granted and now implemented subdivision consent. We have described the background to that subdivision consent in paras [2] to [5]. We accept that at the time the subdivision application was lodged, it was processed and considered as being for residential use. While it could be said that when making its application the landowners should have been alive to the possibility that the Proposed Plan may be changed, Mr Page pointed out that it was not possible to obtain a resource consent for the residential development given that on subdivision it would have been a *permitted* activity under the Proposed Plan provisions prevailing at that time. Even if the *non-complying* activity for a land use consent required under the Transitional District Plan had been granted, the applicant would have been left in the position of requiring a resource consent under the current Plan provisions.

[44] The issue of what was argued as plan integrity, sometimes rather unhelpfully described as precedent effect, can also be considered under this head.

[45] We have said before (see, for instance *Beacham v Hastings DC* W075/2009) and must say again, that the plan integrity argument does tend to be somewhat overused, and needs to be treated with some reserve. The short and inescapable point is that each



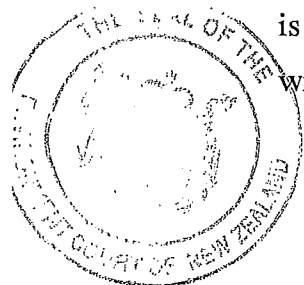
proposal has to be considered on its own merits. If a proposal can pass one or other of the s104D thresholds, then its proponent should be able to have it considered against the s104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides for it as an exception to what the District Plan generally provides for.

[46] Cases such as *Dye v Auckland RC* [2001] NZRMA 513 make it clear that while there is no precedent in the strict sense in this area of the law, there is an expectation that like cases will be treated alike and that the Council will consistently administer the provisions of the Plan. And cases such as *Rodney DC v Gould* [2006] NZRMA 217 also make it clear that it is not necessary for a proposal being considered for a *non-complying* activity to be truly *unique* before Plan integrity ceases to be a potentially important factor. Nevertheless, as that Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

[47] If this matter was beginning afresh, no doubt some argument could be mounted to the effect that there will almost inevitably be other land in the district with similar zoning and characteristics which might be proposed for residential development. If the Blueskin Bay proposal was allowed to go ahead, so the argument would run, the Council would have greater difficulty in declining other, similar proposals. That would be to the detriment of the environment and would impair the effectiveness of the District Plan as an instrument for avoiding, remedying or mitigating adverse effects.

[48] Only in clear cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined. In such a case it is unlikely in the extreme that the resource consent would be granted in any event.

[49] Here, the distinction between this and any other arguably comparable piece of land is clear and decisive. The undisputed evidence is that there is no other piece of land within the rohe of the Council which has an existing subdivision consent, and issued



Certificates of Title giving it legal (if not practical) effect, but no land use consent. Even if that were not the case it is unlikely that there is land with similar characteristics and history. The grant of a land use consent in those circumstances cannot, of itself, harm the integrity of the Plan, in the sense of establishing a precedent that others might attempt to cite in making future applications.

Part 2 – section 8 and section 6

[50] There are no issues arising under the Treaty of Waitangi, nor are there issues of national importance arising under s6.

Part 2 – section 7

[51] Section 7 contains a set of issues to which decision-makers ... *shall have particular regard* ... in achieving the purpose of the Act. We are inclined to agree with Mr Henderson that those of relevance to this appeal are: ...

(b) The efficient use and development of natural and physical resources:

(c) The maintenance and enhancement of amenity values: ...

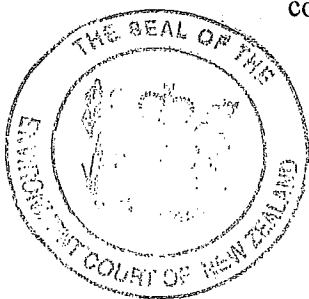
(f) Maintenance and enhancement of the quality of the environment:

We have mentioned our view that, arguably at least, the use of the land, as it is now legally subdivided, for the proposed housing would be an efficient use of the resource. The issues of amenity values and the quality of the environment have been discussed in the course of reviewing effects, and there is nothing to be added to that.

[52] For the reasons we have attempted to set out, we consider that the purpose of the Act encapsulated in s5, of the sustainable management of resources, is best served by granting the necessary resource consent to enable the land to be subdivided, and used, as originally sought in 2004.

Section 290A – the Council's decision

[53] Section 290A requires us to *have regard to* the Council's decision, but that does not create a presumption that it is correct, or mean we have to follow it. We have considered the Council's decision but we do not agree with it. We have come to a different conclusion, for the reasons outlined.



Result

[54] The appeal is allowed and the Council's decision is not upheld. The land use consent necessary to enable the development of the lots for residential purposes should issue.

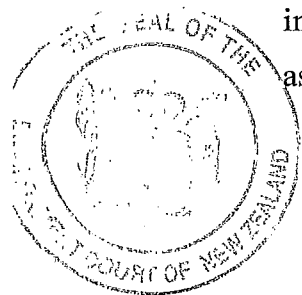
Conditions

[55] We agree with the Council that land use consent conditions are necessary to mitigate adverse effects and achieve the purpose of the Act. With the exceptions to be noted, we accept the consent conditions proposed by the Council and Blueskin Bay. Blueskin Bay did not agree to three changes to the conditions sought by the Council and we now look at these.

[56] The Council proposed that condition 4 be reworded to ensure that restriction of six metres above original ground level to prevent excessively tall buildings (and refers to a three-storey dwelling) could not be subverted through substantial excavation of building platforms. Blueskin Bay states that it adopts the definition of *ground level* in the District Plan and considers that due to the varying slopes of the building platforms it may not be possible to achieve a level building platform if the level of cut/fill is restricted to 500mm. If the problem is a 3 storey dwelling, then we consider that the condition should be amended to limit dwellings to 2 storeys.

[57] For condition 17, the Council considers that while Mr Moore's Landscape Plan gives a good conceptual overview of the landscaping required, a more comprehensive plan is required to ensure it can be given practical effect within an appropriate time frame. Accordingly the Council seeks a Landscape Planting Plan to address the specifics, provide ot owners with necessary detail, and provide certainty of mitigation outcome.

[58] Blueskin Bay responds that the existing conditions require compliance with Mr Moore's landscape mitigation plan including the schedule of species and density of planting. It further states that the estimated growth rates referred to in condition 17 were included in Miss Smetham's evidence to explain the assumptions underlying her assessment and they were not suggested as a performance standard.



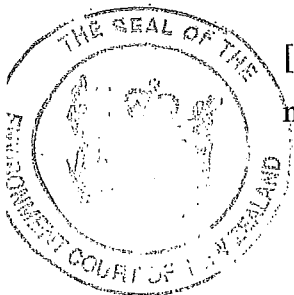
[59] We take the position that the basis on which Miss Smetham assessed the proposal, building on the earlier work done by Mr Moore, underpins the acceptability of it. We therefore agree with the approach taken by the Council in proposed condition 17.

[60] For condition 21 the Council sought a Native Bush Management Plan to ensure lot owners understand their responsibility for the bush area, take responsibility and carry out actions in a manner that ensures a co-ordinated and consistent approach. The provision for removal of exotic trees and control of pests requires active management. The Council sees the management plan as addressing the issues of promoting the condition and expansion of the native bush area and maintaining land stability. It states that removal of exotic trees and effective control of pests and weeds may ultimately promote growth of the native bush area. The slope and geology of the site are such that any exposed areas of ground could contribute to land instability.

[61] Blueskin Bay takes the position that the formation of the native bush protection area was a condition of the subdivision consent and that the Council's suggested condition 21 is really directed at curing deficiencies with the existing consent notices, rather than the effects of this application. Blueskin Bay states that the covenant required under the subdivision consent takes a passive approach to management of the area and therefore the reference to *required work* is somewhat uncertain. It is concerned that the use of a joint management plan blurs liability for a failure to comply with the consent conditions. It says that while it is likely that lot owners will collectively employ a contractor, they should not be compelled to do this if they prefer to carry out their own work. Nor should one lot owner be responsible for the failure of another.

[62] Blueskin Bay has a point when referring to the deficiencies of the treatment of the Native Bush Protection area in the subdivision consent. However, it cannot have things both ways. In referring to its contribution to mitigating the adverse effects of the houses and ancillary buildings, there is a need to ensure that this mitigation occurs and that would justify conditions on the land use consent.

[63] We consider there is a problem with predicating the native bush protection area management conditions on the harvest of the exotic species, as proposed by the appellant.



That could mean it would never occur, particularly given the consent notice restrictions on how those exotic species could be harvested. We refer the conditions on the native bush protection area back to the parties for further consideration.

[64] Dr Lloyd sought three additional conditions. One was a reduced number of residential dwellings, including the amalgamation of Lots 11 and Lot 12 and deletion of the building platform on Lot 12. We do not accept that there is any justification for reducing the number of houses. Neither do we see that a house on Lot 12 would have adverse effects on the amenity or farming operations at Blueskin Farm, particularly given condition 3 proposed by the appellant. The yard requirements mean that a house will be a sufficient distance from the boundary even in the unlikely event that a house is built in close proximity on the Blueskin Farm property.

[65] We have dealt with the issue of direct effects on the farming activities at Blueskin Farm and the potential for reverse sensitivity. We do not accept that Blueskin Bay need place a binding covenant on each lot specifying that no dogs be kept. We do not think the possibility of unjustified complaints is such that a so-called *no complaints* covenant is required.

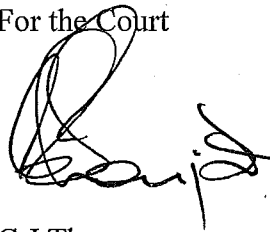
[66] We ask that the parties confer about the conditions and, taking account of what we have said, present a revised set for approval by 4 June 2010.

Costs

[67] In the circumstances we do not encourage any application for costs but if there is to be one, it should be lodged by 4 June 2010, and any response lodged by 18 June 2010.

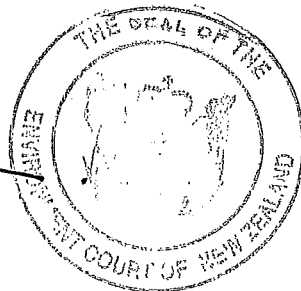
Dated at Wellington the 21st day of May 2010

For the Court



C J Thompson

Principal Environment Judge



BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 205

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s 120 of the Act
BETWEEN AHUAREKA TRUSTEES (NO. 2) LTD
(ENV-2015-AKL-147)
Appellant
AND AUCKLAND COUNCIL
Respondent

Court: Environment Judge B P Dwyer
Environment Commissioner J R Mills
Environment Commissioner E von Dadelszen

Hearing: 27 June - 5 July 2017
Final submissions: 19 July 2017

Appearances: R E Bartlett QC for Ahuareka Trustees Ltd (No 2) Ltd
M J L Dickey and M C Allan for Auckland Council
J M Savage for Whitford Residents and Ratepayers Association

Date of Decision: 15 December 2017

Date of Issue: 15 December 2017

DECISION OF THE ENVIRONMENT COURT

A: Appeal declined

B: Costs reserved

REASONS

Introduction

[1] Ahuareka Trustees (No 2) Limited (Ahuareka) appeals a decision of Auckland Council (the Council) refusing an application for land use and concept subdivision to



AHUAREKA TRUSTEES (NO 2) LTD v AUCKLAND COUNCIL

establish a hamlet of 186 households and ancillary buildings, a country pub and restaurant, retail and commercial units and carpark on a property situated at 650-680 Whitford-Maraetai Road, Whitford (the Property).

[2] In addition to Ahuareka and the Council, the initial parties to these proceedings were:

- Bailifscourt Securities Partnership;
- Maraetai Co Limited;
- Pohutukawa Coast Community Association;
- Whitford Residents and Ratepayers Association.

(Only the latter appeared before us.)

Background

[3] The Property is situated on the western side of Whitford-Maraetai Road in the rural hinterland approximately 22 kms to the east of central Auckland. The settlements of Pine Harbour (approximately 1km or so by road) and Beachlands (approximately 3 kms by road) are situated to the north of the Property and Whitford Village is approximately 10 kms by road to the south of the Property.

[4] The Property is contained in the Countryside Living Zone (CLZ) of the Auckland Unitary Plan – Operative in Part (the Unitary Plan), in a separately identified area called Whitford Sub-precinct B (Sub-precinct B) which is subject to precinct specific provisions in addition to the general provisions applicable in the wider zone. Sub-precinct B is outside of the Rural Urban Boundary (RUB) which identifies land in Auckland which is “potentially suitable for urban development”.¹

[5] Ahuareka is the conditional purchaser of the Property which will comprise just under 80 ha after an approved subdivision to sever the house and immediately surrounding land of the existing registered proprietors has been completed.²

[6] The Property comprises undulating lowland pasture interspersed with gullies. It had been managed as a mixed stock farm by the previous owners, but there was no challenge to the evidence of Mr BA Russell (a representative of Ahuareka) that it is not



¹ Unitary Plan, Part G1.

The expression “the Property” for the rest of this decision is a reference to that portion of the Property being purchased by Ahuareka which is the subject of this application.

economic to run as a farm. The Property is currently grazed by cattle and some horses. It contains a number of rural sheds, a horse dressage ring and yards.

[7] The northern boundary of the Property adjoins the Formosa Country Club, a 170 ha property with a golf course, clubhouse/conference facility and 50 self-contained motel units. On its western boundary the Property abuts a tidal estuary, Waikopua Creek, which flows into Auckland Harbour. The property to the immediate south comprises a 48.7 ha rural block and, as noted, on its eastern side the Property is bordered by the Whitford-Maraetai Road. On the eastern side of the road, the land is largely broken up into rural lifestyle type lots.

[8] The Property rises by steep escarpment to a height of about 40 m above the estuary, after which the land rolls gently back to Whitford-Maraetai Road intersected by a number of gullies containing streams and vegetation, including a significant 12.99 ha pocket of remnant and regenerating indigenous vegetation.

[9] The wider context of the Property was described in these terms in the evidence of Ahuareka's landscape witness, Ms RV de Lambert:

23 In summary the rural and urban wider environment that sets the context for Ahuareka is undergoing considerable current and expected future transition with increased residential development across the spectrum of intensity from intensive, multirise, residential development at Pine Harbour, clustered resort accommodation and clubhouse development at Formosa, through more traditional suburban development with the expansion of Beachlands and more scattered rural residential development across the rural/countryside living landscape. The landscape is generally highly fractured with few large land holdings and an increasing pattern of domestication set within an attractive rural coastal location on the south eastern fringe of Auckland.

[10] In 2011 Ahuareka obtained consent from the Council to subdivide the Property into 26 lots (plus the existing owners' 12ha lot). The lots vary in size from 0.5824 ha up to 18.165 ha. This consent has not yet been given effect to but remains *alive* until 21 December 2019. It was part of Ahuareka's case that the proposal now under consideration gives rise to a better environmental outcome than the consented 26 lot subdivision but that if consent to the current proposal is refused by the Court, then the 26 lot subdivision would proceed.



[11] We think that the best summary description of the proposal is found in the evidence of Mr PD Reaburn (the Council's planning witness). For the sake of convenience we incorporate Mr Reaburn's description into this decision.

7. THE PROPOSAL

7.1 Details of the proposal are given in Paragraph 61 of Rachel de Lambert's evidence.

The application includes:

1. A "hamlet" of 186 households and associated non-residential sites, occupying 16.47ha. The non-residential uses include a community hall/building, hotel/bar and restaurant, two retail units and three commercial units;
2. Areas to be protected by covenant, totalling 33.85ha (of which 12.99ha is existing native vegetation and 20.86ha is proposed revegetation);
3. An area of exotic pine to be retained (0.4ha);
4. A balance area calculated by Ms de Lambert as being 41.58ha to be retained in pasture. The area is in fact somewhat less than this as it includes the Whitford-Maraetai Road intersection and the access road to the village and some of the area is also proposed to be developed with public walkways. As noted by Ms de Lambert, this area includes the area of 12.8125ha accommodating the two existing dwellings remaining on the site which, as noted above, already has a separate subdivision consent (although not, as yet a separate title – see paragraph 9 of Mr Lovett's evidence). It also includes an area of 1.6674ha that was originally proposed as additions to the road reserve, a matter I discuss later in Section 18 of my evidence.

7.2 In order to establish the development, earthworks over 22.06ha are proposed, involving 142,500m³ of cut and 143,300m³ of fill. Topsoil will be spread over a further 14.74ha comprising the wastewater disposal area.

7.3 The village comprises a range of accommodation typologies from more traditional stand-alone residential lots on the periphery, through to the village square and artisans' quarter, which comprise two-storey buildings with ground floor activation and upper level residential accommodation, as well as townhouse type development.

7.4 The proposed "country pub" has 10 guest rooms and a restaurant. The community building has a built area of 300m², and there are two retail units (108m² and 142m²), three commercial service or office tenancies (78m², 49m² and 41m²) and a small 20m² garden shed accompanying the proposed garden allotments. Open pasture, orchards, bush areas and parks would surround the village, incorporating a tree-lined single access road to the village from Whitford-Maraetai Road, an 80 space open carpark and walking, cycle and bridle paths.

7.5 A single access road would provide access to the village from Whitford-Maraetai Road. In all, 828 car parks are proposed around the development – encompassing



on-site, on-street, underground, village entry and garaging.

- 7.6 The village development would occupy 16.47ha, or 20% of the total area of the site. The balance area would be protected against further building development.
- 7.7 The proposed houses have been designed to generally comply with the development controls applicable in terms of the Whitford Precinct and Countryside Living Zone provisions. The application notes that, although there may be some changes to these house designs sought later by individual owners, it is intended that design covenants to be applied ultimately in the subdivision will offer these houses as being “automatically acceptable”.
- 7.8 The Whitford Precinct provisions contain a number of “Indicative Constraints Areas” which signify various areas within which care needs to be taken in locating development. No houses are proposed within the 300 metre Road Corridor Area applying from Whitford – Maraetai Road, nor within the Scenic Coastal or Riparian Management Indicative Constraints Areas. However streamworks are proposed in the heads of gullies, a culvert in one gully and two on-line wetlands, all of which will require regional consents at a later stage. Twenty houses are also proposed within the Slopes Constraints overlay area.
- 7.9 The development is proposed to be self-sufficient with respect to servicing with stormwater, wastewater and water supply. These services, together with roading, common areas, the community hall and landscaping features, the protected balance land with its facilities (including ecological areas, farmed areas, equestrian facilities, walkways and carpark) and an electric bus connection to Beachlands and Pine Harbour would all be owned and become the on-going maintenance responsibility (via an annual levy) of a residents’ association in the manner set out in the attachments to Mr Anthony Nicholson’s evidence for the appellant.
- 7.10 The proposal is supported by detailed architectural plans of all the proposed household units and buildings. Landscape planting is also detailed in the application.
- 7.11 Open pasture, orchards, bush areas and park areas as well as the access road, an 80 space carparking area and walking, cycling and bridal paths are to surround the village on the shared residual allotment. Public access over the residual allotment is proposed to be provided for by means of right of way easements in favour of Auckland Council.

[12] The design concept for the development was explained to us by Mr KJ Crosson, the architect responsible for the proposal. He advised that it was modelled on “the traditional development patterns of small rural settlements adopting a compact organic form that sits appropriately in its natural rural landscape”.³ In para’s 17-35 of his

³ EIC para 13.



Evidence in Chief Mr Crosson explained the rationale for the form of the proposed development. We do not comment further on the information provided as there appeared to be no challenge from any party to these proceedings as to the quality of the proposed development from a purely architectural/aesthetic point of view.

[13] To assist understanding of the application, we attach to this decision Figure 7 of Ms de Lambert's evidence, showing the proposed development in its property context⁴ together with Figure 13 of her evidence which shows in diagrammatic form the layout of the proposed subdivision of the Property to accommodate the development.⁵

[14] It is pertinent to note at this point that although the proposal is founded on the basis that the Property will be subdivided to accommodate the development which we have described and the initial application included consent to a "concept subdivision", there was no subdivision approval sought as part of the appeal before the Court. The concept subdivision process was one which was provided for in the Council's predecessor District Plan which was the relevant planning document at the time Ahuareka lodged its initial proposal with the Council. As a result of this Court's decision *Re Auckland Council*⁶ provision for concept subdivision was removed from the Unitary Plan and was not pursued by Ahuareka in these proceedings. In its opening submission, Ahuareka acknowledged that:

Without subdivision, there would be no viable proposal and it is accepted that implementation of any consent granted on this appeal would only occur if full subdivision consent were ultimately to be granted.⁷

[15] That was an appropriate acknowledgement to be made. During the course of the proceedings the Court suggested to Mr Bartlett QC for Ahuareka that in the event that it determined that consent might be granted, the appropriate process would be for the Court to issue an interim decision indicating that, but delaying any final consent until the necessary subdivision application had "caught up" with this land use consent application. That would enable both proposals to be considered on an integrated basis as many of the conditions necessary to give working effect to Ahuareka's proposals would need to be incorporated into conditions of subdivision consent.



⁴ Attachment A.
⁵ Attachment B.
⁶ *Re Auckland Council* [2016] NZEnvC 65.
⁷ Ahuareka opening submission para 37.

[16] It appeared to be similarly accepted by the other parties before us that completion of the development must ultimately be effected by means of a subdivision into 186 allotments for residential activity together with the allotments for the related non-residential aspects. To some extent the issues that we considered and arguments we heard were ones which might normally be dealt with as part of a subdivision application however, we think that this holistic approach was appropriate in light of the inevitability of a subdivision application should land use consent be granted and we propose approaching our considerations in the same way.

[17] Finally, as a matter of background, we record that the Council decision declining the application issued on 29 October 2015. At that time, the Property was subject to the provisions of the Manukau District Plan (latterly the Manukau Section to the Auckland Council District Plan), rather than the Unitary Plan which the parties agree now applies.⁸

Status of application (excluding subdivision)

[18] The application was considered and declined by the Council as an application for non-complying activity consent. As we understood the Council decision⁹ (which included the application for concept subdivision approval), that was because the concept subdivision was caught by Rule 12A.14.1(iv) of the Manukau District Plan which provided that any subdivision application which did not comply with Rules 12A.14.2.1(i) or (ii) or 12A.14.3 of that Plan (and the concept subdivision did not comply with those Rules) was a non-complying activity. Although the decision does not specifically say so, we have inferred from reading it that the Council decision proceeded on the basis that the land use activity aspects of the proposal were “bundled” with the non-complying status of the concept subdivision proposal and accordingly the whole application was dealt with on a non-complying basis.

[19] Section 88A RMA relevantly provides as follows:

88A Description of type of activity to remain the same

(1) Subsection (1A) applies if –

- (a) an application for a resource consent has been made under section 88 or 145;
- and



⁸ Planning joint witness statement (JWS) para 1(a).

⁹ Paras 33 – 53.

(b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made, or that the application was treated as being made under section 87B, is altered after the application was first lodged as a result of –

- (i) a proposed plan being notified; or
- (ii) a decision being made under clause 10(1) of Schedule 1; or
- (iii) otherwise.

(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.

(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with section 104(1)(b).

[20] In summary, s 88A provides that the status of an application remains as it was at the time it was first filed, but in considering whether or not to grant consent regard must be had to any plan or proposed plan in existence at the time the application is considered. Notwithstanding those apparently clear provisions, a number of decisions of the Court have accepted the proposition that s 88A does not protect the status of activities where a district plan has changed and new provisions are operative, as we understand to be the case in this instance. Whatever the case might be in that regard, we have substantial reservations as to whether or not the land use application before us should be treated as a non-complying activity.

[21] We note that Ahuareka's planning witness (Mr DJ Lovett) predicated his evidence on the basis that the "186 households and 193 lots proposed will require non-complying activity consent for exceeding the Whitford Sub-precinct B subdivision density standard of one lot per 5 ha".¹⁰ We also note that the JWS from the planning witnesses (Mr Lovett, Mr Reaburn and Mr NE Williamson for Whitford Residents and Ratepayers Association) agreed that "overall the application is a non-complying activity".¹¹

[22] We disagree with that proposition. Once the application for concept subdivision consent is removed from the proposal, only the land use aspects of the application remain for consideration by the Court. We refer to the evidence of Mr Reaburn for the



¹⁰

EIC para 24.

¹¹

Planning JWS para 2(b).

Council that other than the proposal to include a restaurant and café in the development, all of the other land use aspects require consent as a discretionary activity. It is only as a result of bundling all of the land use consents together that they become a non-complying activity.

[23] We do not consider that bundling is appropriate in this case. There are two reasons for that:

- Mr Reaburn referred us to General Rule C 1.5(3) in the Unitary Plan which relevantly provides:

C 1.5 Applications for more than one activity

(3) Where different activities within a proposal have effects which do not overlap, the activities will be considered separately.

Restaurants and cafes as not otherwise provided for¹² are a specifically identified activity whose effects clearly do not overlap the other aspects of the proposal, particularly the proposed residential development and accordingly should be separately considered under General Rule C 1.5(3);

- It was apparent from Mr Russell's evidence that the proposals for a country pub, restaurant/café and commercial premises are largely inchoate at this stage¹³ and are ancillary to the much more substantial residential component. Ahuareka's case was largely directed to the residential development, which could proceed irrespective of whether or not the restaurant/café is established. Accordingly, we do not consider that it is appropriate to bundle the restaurant/café with the remaining aspects of the proposal, irrespective of the provisions of Rule C 1.5(3).

[24] We conclude that those aspects of the proposal before the Court other than the restaurant and café, should be considered on the basis that they require consent as a discretionary activity. The application for restaurant and café constitutes a non-complying activity.

[25] Consequently, the discretionary activity aspects of the proposal fall to be determined by regard to ss 104 and 104B RMA and need not pass through the gateway



¹² (As opposed to restaurants and cafes accessory to a farm and carried out on the same site.)
¹³ NOE pages 10 and 11.

test for non-complying activities contained in s 104D. Obviously, the restaurant and café proposal is required to meet the s 104D test before being considered pursuant to s 104.

Assessment of effects

[26] There is a certain academic aspect to the discussion of effects as a result of the findings of the Council hearings panel and the manner in which the case was put to us on appeal.

[27] In its decision at first instance the Council made the following summary findings:

261. The actual and potential effects on the environment of allowing the activity are minor or less than minor and the applicant has proposed relevant and effective conditions of consent.

262. In most respects, the proposal will have better environmental outcomes than a complying subdivision.

In short, the Council found that the proposal (including both concept subdivision and land use) passed through the “effects” gateway of s 104D. The Council refused consent as it found that the application was contrary to relevant objectives and policies and failed to promote the sustainable management framework required by the (then) Whitford Rural Zone.

[28] The finding of the hearings panel was reflected in the Council’s opening submissions before us which acknowledged that “the Ahuareka proposal has been sensitively designed” and that the Council agreed that “it is likely to have adverse effects on the environment that are no more than minor”.¹⁴

[29] The planning witnesses’ JWS recorded agreement that potential adverse effects of the proposed development will be no more than minor¹⁵ and in his evidence for the Council, Mr Reaburn formally agreed with the hearings panel finding that the actual and potential adverse effects on the environment of allowing the activity were minor or less than minor.¹⁶



¹⁴ Council opening submission para 2.

¹⁵ Planning JWS para 3(b).

¹⁶ EIC para 11.6.

[30] Accordingly it was the common position of the parties in these proceedings that whether considered for the purposes of either ss 104(1) or 104D(1)(a) RMA any adverse effects of the proposal will be minor. Although we have some reservations about that proposition in the absence of a detailed and comprehensive subdivision proposal, we accept the parties' common position for the purposes of this decision.

Relevant provisions of the Unitary Plan

[31] Those observations bring us to the primary point of difference between the parties, namely consideration of the application having regard to relevant provisions of a regional policy statement or proposed regional policy statement¹⁷ and of any plan or proposed plan.¹⁸ In this case, the relevant provisions in question are all found in the Unitary Plan which has both regional and district components and is largely (but not entirely) operative for our purposes.

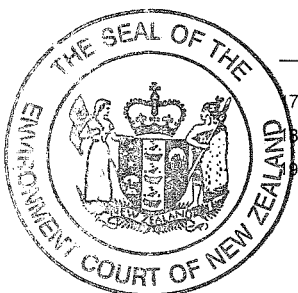
[32] In her opening submission for the Council Ms Dickey submitted that:

4. This case raises an important issue about how a proposal such as this should be advanced in the context of the new AUP, and particularly having regard to provisions in the Regional Policy Statement (**RPS**) component of the AUP, which (broadly speaking):
 - (a) seek to "avoid" urbanisation of land outside the Rural Urban Boundary (**RUB**) and existing rural and coastal towns and villages;
 - (b) While *potentially* providing a pathway for new villages or towns to be established outside these locations, but only by means of structure planning and a plan change, so that the broader implications of new settlement can be considered, and not through the resource consent process.

[33] Ms Dickey's submission was consistent with Mr Lovett's evidence for Ahuareka. In paragraph 268 of his evidence-in-chief, he expressed the view that:

In applying the Objectives and Policies of the RPS from the AUP OIP in my opinion it is fundamental to first decide whether the Ahuareka proposal is urban or rural.

[34] Mr Reaburn agreed that paragraph 268 identified a *key question* for determination in these proceedings.¹⁹ He went on to identify what he considered to be



RMA s 104(1)(b)(v).
RMA s 104(1)(b)(vi).
EIC para 14.1.

three main issues to be addressed in the appeal:

- The first being a policy related one as to whether or not what Mr Reaburn considered as being the significant urban component of the Ahuareka proposal meant that it was contrary to relevant provisions of the Unitary Plan;²⁰
- The second being whether or not a development of the intensity proposed by Ahuareka satisfied environmental enhancement provisions of the Unitary Plan;
- The third being a plan integrity/precedent issue arising out of the scale of urban development proposed and the absence of adequate environmental enhancement.

Mr Reaburn also identified a fourth question relating to conditions of consent which was also relevant, albeit at a lesser level. We do not propose considering the issue of conditions further in this decision other than to record that should consent be granted to this proposal significant refinement to the draft conditions which we have seen would be required.

[35] We intend to address the determinative issues raised by the appeal in the following order:

- We will identify what we consider to be the relevant provisions of the Unitary Plan as they relate to urban growth and form;
- We will make a factual determination as to whether or not the development proposed by Ahuareka is urban or rural in nature (in short, whether or not it constitutes “urbanisation”) whilst assessing how the proposal sits in relation to the relevant provisions;
- We will then consider the issue of environmental enhancement;
- We will then consider the issue of plan integrity/precedent;
- We will then consider the provisions of s290A RMA;
- Finally, we will determine the outcome of the appeal in light of s104 RMA.

The Unitary Plan Provisions

[36] The Unitary Plan is a newly minted document which combines the Regional Policy Statement, Regional Coastal Plan, Regional Plans and District Plans for Auckland City into one Combined Plan. It “has a hierarchical policy framework with the



regional policy statement at the top, then with regional and district plan provisions giving effect to the regional policy statement”.²¹ This hierarchical policy framework is in accordance with the hierarchy contemplated by RMA.

[37] Chapter B of the Unitary Plan is the Regional Policy Statement for Auckland. It contains a number of provisions which are relevant for our considerations. Chapter B 1.4 identifies **Issues of regional significance**, which include “urban growth and form”.²²

[38] Chapter B 1.6 of the RPS identifies the methods which the Unitary Plan will use to implement objectives and policies in the RPS addressing the issues of regional significance. These are contained in **Table B 1.6.1** and include identification of the RUB as a method to address the regionally significant issue of urban growth and form in Auckland.

[39] The provisions of the Unitary Plan relating to the RUB are found in Chapter G (part of the District Plan) which we now set out in its entirety. Chapter G is subject to an appeal seeking an addition to it but neither the planning witnesses nor counsel suggested that the requested addition had any consequences in this case.

G1. Rural Urban Boundary

The Rural Urban Boundary identifies land potentially suitable for urban development.

The location of the Rural Urban Boundary is a district plan land use rule pursuant to section 9(3) of the Resource Management Act 1991.

The planning maps show the Rural Urban Boundary line.

The only method for relocating the Rural Urban Boundary is by way of a plan change pursuant to Schedule 1 of the Resource Management Act 1991.

Any relocation of the Rural Urban Boundary must give effect to the objectives and policies of the regional policy statement which establish it.

Accordingly land outside the RUB (the Property is outside the RUB) is not land which the Unitary Plan has identified as being suitable for residential development.

[40] The issue of urban growth and form is addressed in various objectives and policies contained in Chapter B2 of the Unitary Plan (being part of the RPS component). We identify here what we consider to be relevant provisions for our



²¹ Chapter A 1.3 Structure of the Auckland Unitary Plan.
²² Chapter B 1.4 (1).

consideration. In each case, we make some comment as to our understanding of the provisions in question.

[41] The starting point for consideration is Chapter **B2.1** which identifies the issues which arise under the **Urban growth and form** head. It provides as follows:

Chapter B2.1 Issues

Auckland's growing population increases demand for housing, employment, business, infrastructure, social facilities and services.

Growth needs to be provided for in a way that does all of the following:

- (1) enhances the quality of life for individuals and communities;
- (2) supports integrated planning of land use, infrastructure and development;
- (3) optimises the efficient use of the existing urban area;
- (4) encourages the efficient use of existing social facilities and provides for new social facilities;
- (5) enables provision and use of infrastructure in a way that is efficient, effective and timely;
- (6) maintains and enhances the quality of the environment, both natural and built;
- (7) maintains opportunities for rural production; and
- (8) enables Mana Whenua to participate and their culture and values to be recognised and provided for.

Comment

Chapter B2.1 relevantly identifies issues of:

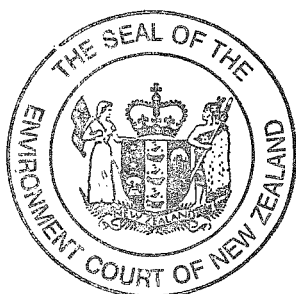
- Integrated planning of land use, infrastructure and development;
- Optimisation of use of the existing urban area;
- Efficient use of infrastructure,

which feature consistently in the succeeding provisions of Chapter B2.

[42] Chapter **B2.2** contains the Council's Objectives and Policies for dealing with these issues. It commences with the following relevant Objectives:

B2.2.1 Objectives

- (1) A quality compact urban form that enables all of the following:
 - (a) a higher quality urban environment;
 - (b) greater productivity and economic growth;
 - (c) better use of existing infrastructure and efficient provision of new infrastructure;
 - (d) improved and more effective public transport;
 - (e) greater social and cultural vitality;



- (f) better maintenance of rural character and rural productivity; and
 - (g) reduced adverse environmental effects.
- (2) Urban growth is primarily focused within the metropolitan area 2010 (as identified in Appendix 1A)
 - (4) Urbanisation is contained within the Rural Urban Boundary, towns, and rural and coastal towns and villages.
 - (5) The development of land within the Rural Urban Boundary, towns, and rural and coastal towns and villages is integrated with the provision of appropriate infrastructure.

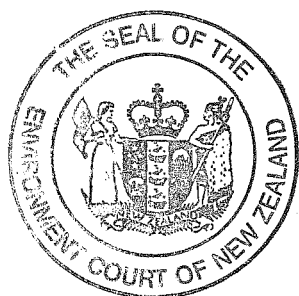
Comments

- The theme of containing urban growth to achieve a “compact urban form” is clear;
- We place no emphasis on Objective B2.2.1(2) as that provision of the Unitary Plan is subject to appeal;
- Objective B2.2.1(4) that “urbanisation is contained” within the RUB and towns and villages is clear and directive;
- The need for efficient and integrated provision of infrastructure is identified in the Objectives.

[43] Policies to give effect to the Objectives are found in Chapter B2.2.2. Relevantly for our consideration they include:

B2.2.2 Policies

- (2) Ensure the location or any relocation of the Rural Urban Boundary achieves a quality compact urban form and identifies land suitable for urbanisation in locations that:
 - (b) integrate land use and transport supporting a range of transport modes;
 - (c) support the efficient provision of infrastructure;
 - (e) follow the structure plan guidelines as set out in Appendix 1;
- (4) Concentrate urban growth and activities within the metropolitan area 2010 (as identified in Appendix 1A), enable urban growth and activities within the Rural Urban Boundary, towns, and rural and coastal towns and villages, and avoid urbanisation outside these areas.
- (5) Enable higher residential intensification:
 - (a) in and around centres;
 - (b) along identified corridors; and
 - (c) close to public transport, social facilities (including open space) and employment opportunities.
- (6) Identify a hierarchy of centres that supports a quality compact urban form:
 - (a) at a regional level through the city centre, metropolitan centres and town



centres which function as commercial, cultural and social focal points for the region or sub-regions; and

- (b) at a local level through local neighbourhood centres that provide for a range of activities to support and serve as focal points for their local communities.

Comments

- We have placed no weight on Policies B2.2.2(2) and (4) in our considerations as both of these provisions are under appeal. We understand, however, that neither of the appeals in question challenge the provision of the RUB and we note that in each case the Policies reflect Objective B2.2.1(4), which is not subject to appeal;
- The theme of concentrating urban (and residential) growth and intensification within the RUB and identified towns and villages (including local and neighbourhood centres) is a clear thrust of the Policies;
- Policy B2.2.2(6) provides for a hierarchy of centres supporting a compact urban form.

[44] Chapter **B2.3** relates to **A quality built environment**. The relevant objectives are:

B2.3.1 Objectives

- (1) A quality built environment where subdivision, use and development do all of the following:
 - (b) reinforce the hierarchy of centres and corridors;
 - (c) contribute to a diverse mix of choice and opportunity for people in communities;
 - (d) maximise resource and infrastructure efficiency;

Comment

- Again, there is an objective of there being a hierarchy of centres and corridors;
- Again, there is an emphasis on infrastructure efficiency.

[45] Chapter **B2.4** then addresses the issue of **Residential growth**. The relevant provisions for the purposes of our consideration are:

B2.4.1 Objectives

- (1) Residential intensification supports a quality compact urban form.
- (3) Land within and adjacent to centres and corridors or in close proximity to public transport and social facilities (including open space) or employment opportunities is the primary focus for residential intensification.



- (4) An increase in housing capacity and the range of housing choice which meets the varied needs and lifestyle of Auckland's diverse and growing population.

Comment

- Objective (1) again supports the concept of compact urban form. Interestingly, this applies not just in the case of urbanisation but also to residential intensification generally, presumably even if it is not urbanisation;
- The “primary focus” for residential intensification is land adjacent to centres (ie towns, villages etc) or in close proximity to public transport etc;
- Objective (4) contemplates that there will be an increase in housing capacity meeting “varied needs and lifestyles”.

[46] Chapter **B2.4.2 Policies** then identifies a number of Policies relating to residential intensification which are relevant for our purposes. They are to:

- (1) Provide a range of residential zones that enable different housing types and intensity that are appropriate to the residential character of the area.
- (2) Enable higher residential intensities in areas closest to centres, the public transport network, large social facilities, education facilities, tertiary education facilities, healthcare facilities and existing or proposed open space.
- (3) Provide for medium residential intensities in area that are within moderate walking distance to centres, public transport, social facilities and open space.
- (4) Provide for lower residential intensity in areas:
 - (a) that are not close to centres and public transport;
 - (b) that are the subject to high environmental constraints;
 - (c) where there are natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage and special character; and
 - (d) where there is a suburban area with an existing neighbourhood character.
- (6) Ensure development is adequately serviced by existing infrastructure or is provided with infrastructure prior to or at the same time as residential intensification.

Comment

- These Policies reflect the consistent hierarchical theme of this chapter of the Unitary Plan. The Policies seek to provide for residential development in a “range of residential zones” (our emphasis) providing a series of different intensities, depending on the factors set out in Policies (2)–(4);
- The Policies contemplate that residential development will happen in residential zones with higher intensities in the areas closest to centres and



lower intensities in areas not close to centres;

- Again, adequate servicing by existing or new infrastructure is promoted.

[47] Chapter **B2.6** relates to **Rural and coastal towns and villages**. Relevant Objectives are found in Chapter **B2.6.1**. They are:

- (1) Growth and development of existing or new rural and coastal towns and villages is enabled in ways that:
 - (a) avoid natural and physical resources that have been scheduled in the Unitary Plan in relation to natural heritage, Mana Whenua, natural resources, coastal environment, historic heritage or special character unless growth and development protects or enhances such values; and
 - (b) avoid elite soils and avoid where practicable prime soils which are significant for their ability to sustain food production; and
 - (c) avoid areas with significant natural hazards;
 - (d) are consistent with the local character of the town or village and the surrounding area; and
 - (e) enables the development and use of Mana Whenua's resources for their economic wellbeing.
- (2) Rural and coastal towns and villages have adequate infrastructure.

Comment

- Growth of existing or establishment of new rural or coastal towns or villages is enabled provided the matters set out in Objectives 1(a)-(e) are met;
- Again, there is an emphasis on provision of adequate infrastructure.

[48] There is only one Policy in Chapter B2.6 which we consider to be particularly relevant to our considerations in this case, that is Policy **B2.6.2(3)** which seeks to:

Enable the establishment of new or significant expansions of existing rural and coastal towns and villages through the structure planning and plan change processes in accordance with Appendix 1 Structure plan guidelines.

Comment

- This Policy contemplates that there may be new rural towns and villages established or expansion of existing town and villages, but that such establishment or expansion should take place through structure planning and plan change processes with reference to Appendix 1 of the Unitary Plan;
- Appendix 1 forms part of the RPS. It emphasises the importance of



structure plans as a method for establishing the pattern of land use and service networks in a particular area. Para 1.2(1) of Appendix 1 records that:

The regional policy statement promotes the preparation of structure plans as a precursor to plan changes and to support any of the following:

- (1) identifying greenfield land suitable for urbanisation;

Structure plans guide future development and redevelopment. The level of analysis required needs to be appropriate to the type and scale of development. Refer to the objectives and policies in the regional policy statement B2 Urban growth.

- It is clear from these provisions that the Unitary Plan contemplates that the establishment of new rural towns and/or villages and expansion of existing towns and villages will be driven by the structure planning process which seeks to integrate such developments and their infrastructure with the existing hierarchy of urban development.

[49] Finally on the urban growth provisions of the RPS, we refer to Chapter **B2.9** which is the **Explanation and principal reasons for adoption**. Relevantly for our considerations it states the following:

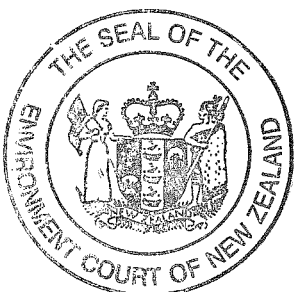
Housing affordability is a significant issue in Auckland. These objectives and policies, as one component of the many things that need to be done to address this issue, seek to enable urban growth, improve development capacity and encourage a variety of housing types and sizes as resource management methods to improve housing affordability.

Urban growth in rural and coastal towns and villages is also anticipated and provided for, but at a much lesser scale than in the main urban centres. Extensions to towns and villages, and proposals for new towns or villages must be considered against factors including ensuring compatibility with existing local character, the protection of areas with identified values (including areas of land containing elite soils) and the avoidance of areas with significant natural hazards. Changes of zoning to accommodate such growth will be the subject of structure planning processes, as for other plan changes.

Comment

There are three themes which are prominent throughout the various Objectives and Policies relating to urban growth which we have identified and which are consistent in their approach. They are that:

- Urbanisation and residential intensification should occur so as to achieve a compact urban form and be contained within the RUB or existing rural and



coastal towns and villages;

- Urban growth should happen in residential zones which provide for a range of residential needs and intensities;
- Urban development and residential intensification elsewhere (including the extension of existing towns and villages) must take place through structure plan and plan change processes to ensure the efficient use and development of infrastructure and to be consistent with the hierarchy for intensity of residential development identified in the Unitary Plan.

We consider that the urban growth provisions of the RPS are the most pertinent for our consideration in these proceedings. For the sake of completeness however, we refer to two Chapters of the District Plan to which we were referred.

[50] Chapter B8 relates to the **Coastal environment**. The Property (or at least part of it) is in the coastal environment. Issue B8.1 of the RPS records that “Subdivision, use and development within the coastal environment need to be in an appropriate location and of an appropriate form”. A series of relevant Objectives and Policies follow in Chapter B8. We take our discussion of those matters no further in light of the common position of the parties that adverse effects on the environment (including the Coastal environment) are no more than minor.

[51] Chapter B9 relates to the – **Rural environment**. We briefly identify a number of relevant objectives and policies contained in Chapter B9:

- Objective B9.2.1(4):

Auckland’s rural areas outside the Rural Urban Boundary and rural and coastal towns and villages are protected from inappropriate subdivision, urban use and development.

- Objective B9.4.1(1):

Further fragmentation of rural land by sporadic and scattered subdivision for urban rural lifestyle living purposes is prevented.

- Policy B9.2.2(1)

Enable a diverse range of activities while avoiding significant adverse effects on and urbanisation of rural areas, including within the coastal environment, and avoiding, remedying, or mitigating other adverse effects on rural character, amenity, landscape and biodiversity values:

- Policy B9.4.2 (4)



Provide for new rural lifestyle subdivision in locations and at scales and densities so as to:

- (a) Avoid areas that would undermine the integrity of the Rural Urban Boundary or compromise the expansion of the satellite towns of Warkworth and Pukekohe, and rural and coastal towns and villages.

[52] Although these Objectives and Policies relate directly to the issue of urban use and seek to avoid urban subdivision outside of the RUB or rural and coastal towns and villages, we place no particular emphasis on them in this case except to note that they are clearly consistent with the earlier Objectives and Policies to which we have referred. However, it is apparent from consideration of the commencing paragraph of the **Issues** of Chapter B9.1 that these particular provisions are specifically directed at the protection of elite soils and rural production values and there was no suggestion that these were under threat from this particular proposal.

[53] We record that Mr Lovett gave very comprehensive consideration to Chapters B8 and B9 in paragraphs 287-325 of his evidence-in-chief. We accept that the Ahuareka proposal generally does not offend the Objectives and Policies which he identified and appears to be largely consistent with them. That said, we do not consider that those considerations are determinative of the outcome of these proceedings.

[54] Significantly in the context of this case, Mr Lovett did not address the provisions of Chapter B2 Urban Growth in his evidence-in-chief. The reason that he did not do so is that he considered that Chapter B2 related to urbanisation and he did not consider that the Ahuareka proposal constituted urbanisation, but was rather rural countryside living.²³ That was a *big call* on his behalf. There can be little doubt that if Ahuareka's proposal constitutes urbanisation or residential intensification of the type which the various identified Objectives and Policies of Chapter B2 address, it is in direct conflict with those Objectives and Policies. We now address that issue.

Does the Ahuareka Proposal Constitute Urbanisation?

[55] We consider that the determinative matter for our consideration in these proceedings is whether or not the Ahuareka proposal constitutes an urban activity, urban development or urbanisation. That determination is complicated by the fact that there is no definition of any of these expressions contained in the Unitary Plan. Mr



²³ EIC para 44.

Bartlett QC drew our attention to a definition of “urban activities” contained in the former Auckland Regional Policy Statement as being “activities, including development, that by their scale, intensity, visual character, trip generation and/or design and appearance of structures, are of an urban character typically associated with urban areas”. He pointed to the somewhat circular character of this definition which, in itself, uses the term “urban”.

[56] By way of comparison, he referred to the definition of Countryside Living also contained in the former Auckland Regional Policy Statement as “low density residential development on rural land. It includes the concepts of rural-residential development, scattered rural-residential lots, farmlets, residential bush lots, retirement lots, large-lot residential development and the like. It is similar to low density residential development where it occurs within urban areas”. He observed that rather than there being a “simplistic urban/non-urban dichotomy” there was a continuum which needed to be considered in determining whether or not a development was urban or non-urban.²⁴ We agree with that observation.

[57] Notwithstanding the absence of a definition of urban or urbanisation in the Unitary Plan, we did not understand there to be any significant difference between the parties as to the meaning of the concept. For the sake of completeness, we confirm our understanding of the terms:

Urban as meaning “of, pertaining to, or constituting a city or town;

Occurring in or characteristic of a city or town;²⁵

Urbanise “make or become urban in character or appearance;

Develop into an urban area; Cause to lose rural character or quality.²⁶

The dictionary definitions are consistent with our understanding that urbanisation is a process whereby (in this context) a developed area acquires characteristics more typical of a town or village and the rural qualities of the developed area are lost. That is the test which we shall apply.

[58] In considering whether the Ahuareka proposal constitutes urbanisation and just where it sits on the continuum between an absolutely rural and absolutely urban area,



²⁴ Ahuareka opening submission para 13.

²⁵ The New Shorter Oxford English Dictionary, Clarendon Press Oxford 1993.

²⁶ The New Shorter Oxford English Dictionary, Clarendon Press Oxford 1993.

we have been conscious of the provisions of the New Zealand Urban Design Protocol²⁷ (NZUDP) which offers the following comment:

Context

Quality urban designs sees buildings, places and spaces not as isolated elements, but as part of the whole town or city. For example, a building is connected to its street, the street to its neighbourhood, the neighbourhood to its city, and the city to its region. Urban Design has a strong spatial dimension and optimises relationships between buildings, places, spaces, activities and networks. It also recognises that towns and cities are part of a constantly evolving relationship between people, land, culture and the wider environment.

We take the reference in the NZUDP to context to indicate that in determining whether or not the proposed development is urbanisation, it is necessary to look not just at the development itself, but also its relationship to the wider environment in a context whereby (in this case) the Unitary Plan seeks to achieve a compact urban form.

[59] As a starting point for our considerations on this matter, we refer to the JWS filed by the landscape witnesses for Ahuareka (Ms de Lambert) and the Council (Mr SK Brown). The witnesses relevantly agreed/disagreed as follows:

ISSUES AGREED BETWEEN THE EXPERTS

7. The following issues were agreed between the expert witnesses:
 - (a) The Ahuareka proposal comprises a village with urban components.
 - (b) Ahuareka grades from a more intensive village centre, through suburban 'fingers' out to the surrounding countryside.

THE ISSUES UPON WHICH THE EXPERTS CANNOT AGREE AND THE REASONS FOR THEIR DISAGREEMENT

8. The following issues were not agreed between the expert witnesses:
 - (a) Rachel regards Ahuareka's urban components as being inextricably linked to a protected rural landscape which is 'part and parcel' of the proposal. Stephen is less certain that the overall outcome will be as clear as this statement indicates.
 - (b) Rachel considers that Ahuareka's design will result in an 'informal' character – more so than the likes of the Stonefields, or similar urban residential developments. Stephen is not convinced that design will offset the fundamental pattern and density of development to result in such an 'informal'



²⁷ Ministry for the Environment, March 2005.

outcome.

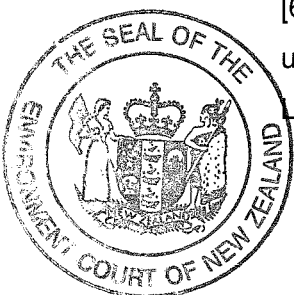
[60] The issue of urbanisation was addressed in the JWS of the planning witnesses, Messrs Lovett and Reaburn and Mr NE Williamson (for Whitford Residents and Ratepayers Association). They had this to say on the subject:

Whether the Proposal Represents a Form of Urbanisation

(b) There are differences of opinion in relation to the relevance and importance of Chapter B2 in the Regional Policy Statement.

- Mr Lovett's view is that the proposal is not a form of urbanization simply due to the presence of urban components. The site and proposal needs to be viewed as a whole, including the on-site protected areas adjacent to the built component of the proposal, and other surrounding rural land and the estuary. Mr Lovett sees the proposal as being a novel form of countryside living. Accordingly his view is that the urbanization / new rural settlement provisions of the RPS (Chapters B2.5 and B2.6) do not apply.
- Mr Lovett's view is that, even if this was to be regarded as a new rural settlement, the location and characteristics of the site, as described in his EIC, and the particular nature of the proposal are such that it can be regarded as a genuine exception to the AUP's urban growth and form provisions, and it does not offend the expectations for rural forms of development in Chapter B9.
- Mr Reaburn's and Mr Williamson's view is that the proposal has an urban form, such that it represents a new rural settlement/ village being introduced into the Whitford Precinct. Their view is that the RPS provisions do apply, including those Chapters B2.5 and B2.6 Rural and Coastal Towns and Villages.
- The subject site is in the Countryside Living Zone, which is a Rural Zone. Chapter B9 addresses the form of development expected in Rural Zones. While the provisions of B2.6 contemplate new rural settlements, Mr Reaburn's and Mr Williamson's concern is that those settlements are not contemplated in the Countryside Living Zone or Whitford Precinct and new rural settlement opportunities need to be assessed through a structure planning exercise which will be undertaken having regard to the wider Whitford area and Auckland as a whole, and a change of zoning (or the introduction of a new Precinct). Mr Reaburn and Mr Williamson consider that there is a possibility the Ahuareka proposal could be accommodated, but necessarily through this process.

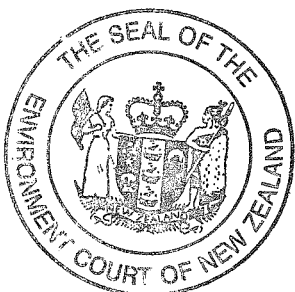
[61] The position of Ahuareka to the issue of whether or not its development was urban or constituted urbanisation was founded on the evidence of Mr Lovett and Ms de Lambert.



[62] Mr Lovett had this to say on the issue:

My Interpretation of “Urban”

273. In the Ahuareka context it is relevant to consider what the development has and what it has not, in coming to a conclusion whether or not it is urban expansion.
274. The application site is intended to provide 186 dwellings on their own sites with an undivided share of a common area, including bush reserve, open space, and walking, cycle and bridle trails.
275. The environmental enhancement areas as well as the common spaces are intended to be protected by conditions of planning consent as well as by covenants (and in the case of the Montgomeries' 12ha parcel, a consent notice preventing further subdivision while the site is outside the RUB).
276. The combination features listed above are not characteristic of any “urban” area or urban development.
277. The development will not have:
- Connections to municipal water supply
 - Connections to municipal waste water systems
 - Connection to municipal stormwater systems
 - Convenience stores
 - General retail
 - Community services
278. Small rural townships, because of their size, will have a smaller range of commercial and social facilities than urban areas within our cities. That is a function of their small populations rather than the result of any planning constraints. Typically small rural towns or settlements are located on a main road from which they are visible and the residential lots that have been developed are not part of a very much larger jointly owned network of open space, equestrian areas, bush land and walking tracks.
279. Non-urban areas frequently provide for papakainga, traveller's accommodation and even large scale resorts. It is my view that the form of the buildings is no reliable determinant as to whether an area has transformed from being rural to urban.
280. It is significant to me that in the AUP the height to boundary controls that previously applied to Countryside Living areas generally have been removed. That provides for dwellings in Countryside Living areas to be as close/closer (?) than previously, and is more liberal than the permitted activity standards for medium intensity residential urban areas.
281. I have considered the Environment Court decision in *Cornerstone v Rodney District Council* where the Court declined to characterise certain buildings as inherently rural or inherently urban (in that instance involving a railway station amongst other buildings). I find the Court's decision in that respect helpful.



282. The RMA, in the tree protection provisions of s.76 (4C) sets out a definition of “urban allotment”. Defining an allotment as “urban” is little different from defining an area as “urban” – but tells us nothing about whether a proposed activity or a proposed development should be treated as “urbanisation”.

283 For the record, s 76 (4C) of the RMA reads:

*“In subsections (4A) and (4B), - **group of trees** means a cluster, grove, or line of trees*

***urban environment allotment** or **allotment** means an allotment within the meaning of Section 218 –*

(a) that is no greater than 4000 m²; and

(b) that is connected to a reticulated water supply system and a reticulated sewerage system; and

(c) on which there is a building used for industrial or commercial purposes or as a dwellinghouse; and

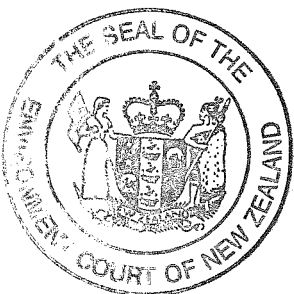
(d) that is not reserve (within the meaning of section 2(1) of the Reserves Act 1977) or subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 or the Reserves Act 1977.

284. Applying this to Ahuareka, no proposed allotments meet (b) as there will be no connection to a reticulated water supply system and reticulated sewerage system. Similarly none would satisfy (d) as there will (initially) be no building used for industrial, commercial or residential purposes. as the allotments. (sic) Meanwhile, depending on whether the undivided share of the common land is counted or not, some but not other lots in the development may satisfy (a).

285. That being so, and in the context of my view that the Ahuareka proposal is neither an urban activity, nor urbanisation, I turn to look at the AUP’s Regional Policy Statement Objectives and Policies from Chapter B of the AUP OIP.

[63] Ms de Lambert’s evidence concentrated largely on the effects of the Ahuareka development on the rural environment in which it is set. We do not dwell on that issue in light of the agreed position of all parties that any adverse effects of the development on that environment would be minor at worst. There were however a number of aspects of Ms de Lambert’s evidence which form the basis of Mr Lovett’s and Ahuareka’s view that the development did not constitute urbanisation. We identify what we think are the relevant aspects:

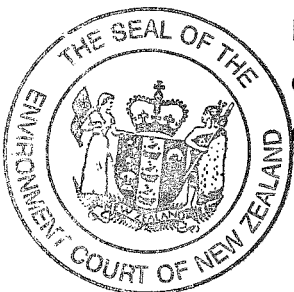
75. In summary, therefore, the proposed Ahuareka development comprises a clustered hamlet of 186 households and an integral, covenanted, rural landscape of some 63.02ha, maintaining in perpetuity a rural landscape context and setting that has public access via walkways. The development area is set well back from the



existing public realm and passing traffic on Whitford Maraetai Road. Ahuareka is publicly accessible and is intended to form an amenity and unique destination as part of the wider Auckland Beachlands / Maraetai and Whitford / Clevedon communities. The proposed design is highly managed to establish a distinctive clustered rural amenity; an appropriate rural vernacular and to avoid buildings standing out in the landscape, although it is recognised and intended that the hamlet be seen – but not in a prominent or dominating way. Significant protection of existing bush as well as planting and revegetation is proposed to enhance the landholding, which will retain a strong rural character and amenity.

142. Overall the proposed development is assessed as being consistent with, and supportive of, the desired urban design outcomes of the New Zealand Urban Design Protocol. Furthermore, the proposal as a whole provides a choice of rural living environment that will be distinctive in the locality and fitting in the context of the evolving character of the Clevedon / Whitford / Beachlands / Maraetai area of South Auckland. It will establish and maintain a quality rural environment with considerable open space values to balance a clustered residential development offering a broad range of housing choice.
158. In my opinion the proposal cannot be divided such that it is considered 'urban' as that proposition divorces the integral rural land, covenanted as a part of Ahuareka, from the clustered rural hamlet. The future residents will have guaranteed access to rural open space as a part of their rural lifestyle, furthermore the wider public will be offered recreational access to the rural commons connecting to the coastal esplanade.
159. I consider an evaluation of the proposal's rural-ness as opposed to urban-ness requires the whole site to be considered as one and as such it is my opinion that the Ahuareka development will maintain a strong and high quality rural character and amenity both for its future residents and for people in the community / passers-by on the Whitford Maraetai Road and people accessing the coastal esplanade on both sides of the Waikōpua Estuary.
165. The particular housing choice provided by this proposal, the ability to live on a smaller lot within a cluster of houses as part of a rural environment cannot be achieved in an urban location. In my opinion Ahuareka provides a unique opportunity to introduce a type of rural housing choice for Auckland that respects and supports the rural amenity of this part of the Auckland region.

It was Ms de Lambert's view that although the Ahuareka proposal undoubtedly had urban elements to it, these needed to be considered in the overall context of the Property which retained a substantial rural character which was connected to the urban elements. We agree that the overall context of the Property (and the wider environment) is a relevant factor in our considerations consistent with NZUDP.



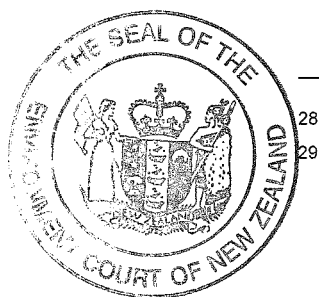
[64] Mr Lovett and Ms de Lambert's evidence form the basis of Ahuareka's position that its proposal constituted a "novel form of countryside living"²⁸ and that in assessing whether or not the proposal was urbanisation, it was necessary to look at the context of the Property overall and not just at the acknowledged urban components of the proposed development.

[65] The Council's position that the Ahuareka development constituted urbanisation was supported by the evidence of Messrs Reaburn and Brown.

[66] Mr Reaburn considered that there was a significant urban component of the proposal which was contrary to the relevant provisions of the Unitary Plan which sought to avoid urban development in rural areas. He testified as follows:

14.6 Considering the scale of development proposed I therefore see no issue in describing the development by way of its obviously different characteristics. Simply put, a visitor to Ahuareka would pass through an area undeveloped with buildings to enter another area closely developed with buildings. While those two areas are held together, and the residents of the latter would enjoy the former, they would still nevertheless be areas with quite different characteristics. Net of roads and other community spaces, the rural village component averages about 670m² per site. Densities reach an apartment scale. Mr Brown concludes that the proposal's "connections with its rural surrounds are tenuous at best: rural activities and productivity would clearly take a 'back seat' to residential occupation".²⁹

14.7 There were various approaches to defining the development across the original application documents. The Boffa Miskell report called it variously a "rural village" and a "small rural village settlement", a "proposed settlement", a "rural settlement", and "proposed Ahuareka village". The traffic report stated: "Together with the residential component the village is envisaged to have a commercial aspect so that Ahuareka Village can function like a true village and have community spaces where trading and social gatherings can take place". It also talked about establishing a "community". All the architectural drawings refer to the development as a "special rural settlement". While there appears to have been an effort to avoid using such terms in the evidence for the appellant and in the appellant's proposed conditions (although still referring to a "hamlet", as do Mr Lovett and Ms de Lambert in their evidence), they do nevertheless, in my opinion, reflect what a typical observer would describe the area as.



²⁸ Lovett Rebuttal para 40.

²⁹ Brown EIC para 72.

14.8 Mr Lovett proceeds with the opinion (Paragraph 277) that this development will not have access to a range of urban activities and services including a water supply, municipal waste water or stormwater system, convenience stores, general retail or community services. In fact, the services to be provided are of a higher standard than many rural villages. They include the on-site availability of reticulated water, stormwater and wastewater and a number of non-residential activities including a hall, a pub and shops. I agree with Mr Lovett (Paragraph 278) that small rural townships, because of their size, will have a smaller range of commercial and social facilities than urban areas within our cities, but that does not mean they are not townships.

14.9 The New Zealand Oxford English Dictionary (OUP, 2005) sets a threshold of “urban” as being “town or city” (the full definition is “of, living in, or situated in a town or city (an urban population) (opp. Rural)”). I have some reservation about whether Ahuareka, at 186 houses, could be described, as it was in some of the original application documents and is now in the appellant’s evidence, as a “hamlet”, which I would see as being a much smaller group of houses. The word “hamlet” is defined in the New Zealand Oxford English Dictionary as “a small village, esp. one without a church”. A “village” would be a more accurate description in my view, although I would agree that Ahuareka would be smaller than a “town”.³⁰ In any case, whether it is a hamlet or a village, I would consider Ahuareka to be a “rural village”.

[67] Mr Brown’s landscape appraisal of the Ahuareka development was undertaken on a somewhat different basis to Ms de Lambert. As we have observed, Ms de Lambert’s evidence primarily addressed the effects of the development on coastal and rural natural character and is consistent with the parties’ common view that development would have only minor adverse effects on these matters. Mr Brown on the other hand did not address the issue of landscape or amenity effects, but rather concentrated on the issue as to whether or not the development fell into the category of urbanisation. He undertook a detailed consideration of the proposal and its features in that light, including some discussion of the concepts of hamlet and village. Those considerations led to the following discussion as to the nature of the proposal:

RURAL VILLAGE OR SUBURBIA?

65. On the basis of this analysis, it is my opinion that the Ahuareka proposal represents a suburban enclave, with urban elements – especially the pub, hotel, village square and artisans quarter – transported to a rural setting. The village would not be integrated with that setting, physically, visually, socially or economically: rather, it would comprise a stand-alone enclave of residential development with a character



³⁰

In *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211 the Court described the proposed Wairoa Canal project, of 270 residences, as a “small township” (at [76]).

and particular features that have appeal both for Ahuareka's inhabitants and the wider regional community. As such, it would be far from unattractive: quite the reverse, I see it having considerable appeal as both a residential lifestyle option / node and as a novel destination for visitors.

...

67. This implies that the open space around the proposed 'village' would visually dilute or offset the residential and commercial development proposed: the 'moat' of open space around the development would make such development less different because it is partly screened and buffered from the Whitford Maraetai Road. In reality, however, all this really means is that one part of the subject site would remain semi-rural in character (as at present), while another part would have a decidedly different, suburban to urban, character. The presence of Ahuareka's commercial / residential enclave would still soon be known by both local and regional communities, regardless of its visibility from that particular road. Such awareness is, after all, key to the viability and functioning of the 'village pub' hotel and other commercial aspects of the Ahuareka proposal.

Those findings led to the following conclusions on Mr Brown's part:

72. In conclusion, it is my opinion that the proposed development would not comprise a 'hamlet'. The term "*hamlet*" has clear connotations of a very compact and distinctly rural, cluster of farm buildings and/or residential development closely linked to farming activities. However, Ahuareka would step well beyond the bounds of any such nodal development. Moreover, Ahuareka's rural character and connections with its rural surrounds are tenuous at best: rural activities and productivity would clearly take a 'back seat' to residential occupation.
73. I also recognise that the proposed settlement is likely to have considerable appeal, both because of its coastal / rural backdrop and amalgam of idyllic internal, features – a pub, square, artisans quarter, etc. However, the matrix of development within the village's confines would have a distinctly urban to suburban character. This urban / suburban character would be exacerbated by the supposedly 'rural' nature of the village's built forms: rather than evolving organically like a true village, the layers of apartment / loft development, mixed lofts, duplex units and detached residential unit would emerge in the Whitford countryside *en masse*, in a wholly artificial fashion – much like any other suburban subdivision.
74. Such impressions would be further amplified by the village's detailing, including its roading and car parking, its pedestrian thoroughfares and concourses, kerbing and channelling, even its retaining and handrails. Consequently, much as the rather bucolic images found in Mr Lovett's AEE report suggest a 'Ye Olde England' village reincarnated at Beachlands, the reality is that the proposed development would be more akin to any number of Auckland suburbs – albeit surrounded by emerging



bush, pines and 'pasture'.

75. Ms de Lambert makes the point that the interplay of a residential 'village' core would be offset or mitigated by its open space surrounds, coastal setting and proposed planting. However, this does not obviate the fact that Ahuareka would be a development of two distinct halves: one more rural to rural-residential in character (the latter more obvious close to Whitford Maraetai Road) and the other distinctly urban / suburban in both form and character. The open space 'half' might help to screen and buffer the latter, but would hardly negate the 'village's' existence and its fundamental character.

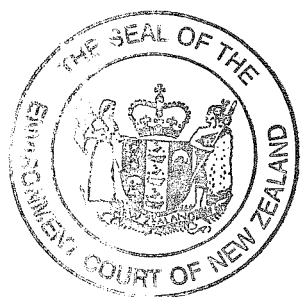
[68] Mr Williamson's evidence put particular emphasis on the Sub-precinct B provisions. He appeared to take something of a middle road between the witnesses for the other parties on the issue of whether or not the Ahuareka development was urban or something else. We refer to the following provisions of his evidence:

Nature of Proposal

89. One of the points of difference between the planning witnesses acting for the Council and the appellant has been whether the proposed development is a 'rural' or 'urban'. The various descriptions of the development used by the applicant's team of advisers are outlined in the original Council's Planning Report. For the most part, they seem to have adopted the term 'hamlet' to describe the proposed development. I agree with the approach taken by the Council in the Planning Report at the consent hearing that the proposal is best described as a "rural settlement". In fact the number of dwellings resulting from the proposal will be greater than many of the existing rural and coastal settlements in Auckland.

[69] Mr Williamson then made the following pertinent observations:

93. The intensive form of built development proposed by the applicant is quite outside any of those contemplated in either the Whitford Precinct of the AUP OIP or the MCC District Plan for a rural coastal location. In my opinion the closest in description would be the Residential Settlement Unserved Zone. The Council's Planning Report at the consent hearing noted that the Auckland Transitional Plan does not provide for the creation of new settlements, particularly outside of the Metropolitan Urban Limits or Rural Urban Boundary. As described previously in my evidence, the AUP OIP does contemplate the establishment of new rural and coastal settlements, albeit by way of a Structure Plan and Plan Change.
96. In my view the proposed development is not a "hybrid refinement of the countryside living approach to growth", but instead is an out of zone proposal for a type of development already provided for in the Countryside Transition Zone. ...
99. I would describe the establishment of a new stand-alone settlement or village as



“urban” if rural and urban were binary terms. In some instances AUP OIP uses the term in a binary way with the RUB being the point at which the term switches. In other instances urban (in the case of rural and coastal villages) forms a subset of the rural area.

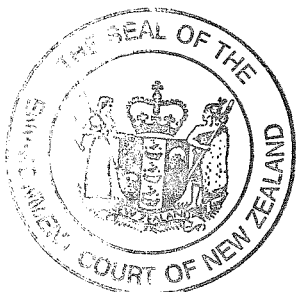
101. If one is to take the view that Ahuareka (like Formosa) are ‘developments located in a rural environment’ one could say the same about most small towns in New Zealand. To me, this again perpetuates the view that the terms ‘urban’ and ‘rural’ are binary, a view which I do not subscribe to. Instead, it is my conclusion that the rural countryside living zone itself contemplates the establishment of settlement patterns including villages, hamlets, and papakāinga. The Flat Bush Sub-Precinct I describes at Policy I412.3.3(1) that the required lower densities and site coverage “*create spacious rural and transitional urban development*”. In my view this “spacious rural and transitional urban” development may be a description that equally applies to the Ahuareka proposal.

139. The proposed style of development is contemplated and provided for in the AUP OIP in other locations such as Flat Bush and Runciman. The proposal is not unique in that respect, but rather a new rural village that is being proposed out of zone. The Ahuareka proposal in my view falls so far outside of the Whitford Precinct provisions that if it is to proceed, it should be annexed from the precinct through a Plan Change process.

[70] In commencing our discussion of the urbanisation issue, we observe the difficulties in dealing with common concepts when they are not defined in planning instruments. However, we accept the accuracy of Mr Williamson’s view that the Ahuareka development might accurately be described as a “new rural village”. He based that observation on a comparison with other rural and coastal towns and villages in Auckland, many of which he observed are smaller in terms of the number of households than the Ahuareka development. Mr Williamson’s evidence in that regard was not challenged. We consider that the scale of the proposed development is a relevant factor to be taken into account by us in determining whether or not it constitutes urban development or urbanisation.

[71] Another matter which we consider is of particular relevance in determining whether the development is urban or rural in character is the density of development which is proposed. This can be looked at in two ways:

- If the density of development is averaged out over the Property as a whole, then it equates to one dwelling every 0.43 ha (or thereabouts). Total



building coverage under the proposal is about 29,000 square metres³¹ being almost 50 times the normal coverage contemplated for the whole of the site (ie 92 ha) under the Sub-precinct B provisions:

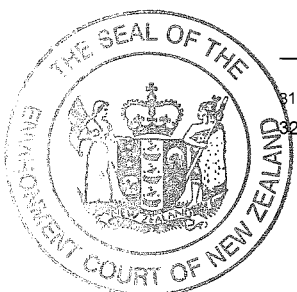
- When the development is considered in light of the subdivision which it is accepted will follow for residential purposes, the average size of lot for those purposes will be somewhere in the order of 0.08 ha. It appears to us that development of that density can only be described as urban in nature and we understood Mr Lovett, for example, to concede this urban element.

[72] We considered that the combined elements of the scale of the proposal in terms of its overall size (186 houses plus pub/restaurant, community building, retail units and commercial units) when combined with the intensity of the development are significant factors in our assessment as to whether or not the development is urban in character.

[73] A significant factor in Ahuareka's case was the contention that although there was an urban element to the development, that had to be considered in conjunction with the remaining undeveloped rural land which form part of the proposal. We agree that it is necessary to look at the proposal "in the round". However, even doing that we do not accept the proposition that the retention of a remnant rural area free of development means that the "development" is itself not urban in nature. We say that for the following reasons:

- We note that the residential and associated non-residential/commercial development which is to take place does so in an approximate area of 16.47 ha. As the Court observed in the *Clevedon Cares Inc v Manukau City Council* case³² the fact is "that a significant number of small lots and dwellings will be located within a small area of land";
- Secondly, we refer to and accept Mr Brown's observation that "the reality is that the proposed development would be more akin to any number of Auckland suburbs – albeit surrounded by emerging bush, pines and 'pasture'".

For these reasons, we do not consider that the retention of a substantial rural element on the Property diminishes the urban nature of the 16.47ha development which is to take place.



³¹ Reaburn EIC para 9.11.

³² *Clevedon Cares Inc v Manukau City Council* [2010] NZEnvC 211.

[74] Amongst the reasons which Mr Lovett gave for his contention that the development was not urban were the propositions that the development would not have:

- Connections to a municipal water supply;
- Connections to municipal wastewater systems;
- Connection to municipal stormwater systems;
- Convenience stores;
- General retail;
- Community services.³³

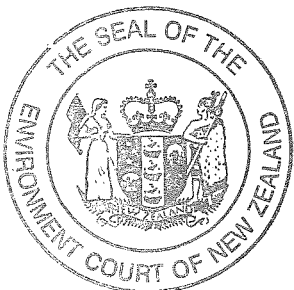
[75] We disagree with those propositions. Although it is correct that there will be no municipal water, wastewater or stormwater systems in the sense that those systems are owned, maintained and operated by a local authority, there will in fact be reticulated, communal provision of all of these services, owned, managed and operated by the inhabitants of the residential development. It is clear from the evidence which we have considered that the development is of such a size as to require these services to be reticulated as one would normally expect in an urban situation. Additionally, and notwithstanding Mr Lovett's contentions, the development is to be serviced by a community building, two retail units and three commercial service or office units. All of these features involve a strong urban component.

[76] Further, in his evidence Mr Lovett referred to the provisions of s 76(4C) RMA which contains the following definition³⁴:

urban environment allotment or allotment or means an allotment within the meaning of s 218 –

- (a) that is no greater than 4000m²; and
- (b) that is connected to a reticulated water supply system and a reticulated sewerage system; and
- (c) on which there is a building use for industrial or commercial purposes or as a dwellinghouse; and
- (d) that is not reserve (within the meaning of section 2(1) of the Reserves Act 1977) or subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 of the Reserves Act 1977.

Mr Lovett advanced the view that allotments which would arise out of the Ahuareka



³³ EIC para 277.

³⁴ EIC para 283.

development were not urban environment allotments within the terms of this definition.

[77] Again we disagree. The allotments within the residential/commercial development will not be greater than 4000m², they will be connected to reticulated water supply and sewerage systems, there will be buildings used for dwelling houses (and some for commercial purposes) on them and they will not be reserves as defined. Although it is not determinative in this case, we find that the Ahuareka allotments would be urban environment allotments as defined by s 76(4C), notwithstanding Mr Lovett's view to the contrary.

[78] During the course of cross-examination, Mr Lovett was referred to Exhibit 1 which was a statement of evidence which he gave to the Independent Hearings Panel on the Unitary Plan in support of a submission on the Plan. In his evidence to the Panel, Mr Lovett contended that "the proposal for 186 houses and ancillary activities which formed the basis of the resource consent at Ahuareka is ready and able to be established, if the Ahuareka property is included in the RUB and given an appropriate urban zoning" (our emphasis). Although Mr Lovett regarded this as a "belt and braces approach"³⁵ he clearly considered that the 186 houses and ancillary activities warranted an appropriate urban zoning.³⁶

[79] Drawing all of these elements together, we reach the conclusion that the development proposed by Ahuareka on the Property is urbanisation of the 16.47 ha which are subject to the residential (and ancillary activities) proposal. The factors which lead us to that conclusion are:

- The intensity of the development, involving 186 residential lots within an area of 16.47ha;
- The nature of the development involving a combination of residential, commercial, retail and community service aspects;
- There was no dispute that the development had urban components. It appeared to be largely agreed that the development constituted a "village";
- The "mix" of the residential component which contains the full range of residential components (stand alone lots, urban lofts, townhouses/apartments) which the Unitary Plan looks to provide in its various Residential Zones;

³⁵ NOE page 58.

³⁶ NOE page 58.



- The size of the development being larger than a number of the rural/coastal villages in Auckland;
- The scale of the development enabling some 29,000m² in building coverage over an area of 16.47ha;
- The urban/residential sizes of the lots being incorporated into the development area;
- The visual character of the developed area which will be distinctly urban/suburban in appearance, comprising 186 closely spaced dwellings;
- The average size of the lots even when considered in the context of the entire Property;
- The need for the provision of reticulated sewage, storm water and water systems to service the development and the extensive nature of the roading, carparking, pedestrian ways, kerbing and channelling works required.

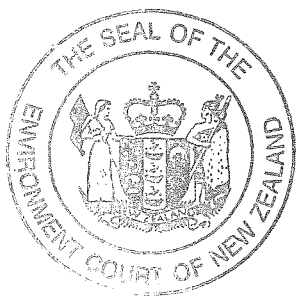
[80] We do not dispute the proposition advanced by Ms de Lambert and Mr Lovett that regard must be had to the remnant rural area in reaching a conclusion as to whether or not the development constitutes urbanisation. We acknowledge that there will be a legal connection tying ownership of the residential lots to ownership of the remnant rural land. However the factors which we have identified above lead us to the view that the developed area will have an overwhelmingly urban character of a kind which the Unitary Plan contemplates will be located within the RUB or within rural or coastal villages. We accept the evidence contained in paragraph 75 of Mr Brown's evidence³⁷ that the Property will have two clearly different aspects to it, one of which will be distinctly urban/suburban. We also concur with many of Mr Williamson's observations as to the nature of the development³⁸ although for the reasons we have identified we take the view that the development is more urban in nature than Mr Williamson views it.

Environmental Enhancement

[81] This issue arises out of requirements of the Unitary Plan relating to environmental maintenance and enhancement in Sub-precinct B. It was explored comprehensively in the evidence of Mssrs Reaburn and Williamson but considerably less so in the evidence for Ahuareka. Additionally we heard background evidence on

³⁷ Para [67] (above).

³⁸ Paras [68] and [69] (above).

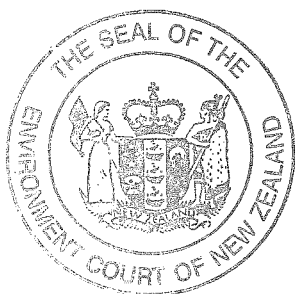


this topic from Mr R D Robertson, Secretary of the Whitford Residents and Ratepayers Association.

[82] Although Mr Williamson is now an independent planning consultant, he was employed for six years (1997-2003) at Manukau City Council (a predecessor to the Auckland Council) within whose boundaries the Property was situated. During his time at Manukau City, Mr Williamson was closely involved in what was known as the Whitford Study, which would ultimately lead to Plan Change 8 to the Manukau District Plan (PC 8), which in turn has been largely “rolled over” into the Unitary Plan. Mr Robertson also testified about the PC 8 process and its outcome. We appreciate that the historic information can take us only so far when interpreting provisions of the Unitary Plan (as Mr Williamson acknowledged to Mr Bartlett QC) however, the evidence of these witnesses was of considerable assistance to us in understanding the genesis of the provisions which we are about to discuss.

[83] PC 8 was brought down to enable a degree of rural residential development in the Whitford area whilst at the same time protecting rural amenity. One of the mechanisms to achieve that was a requirement for environmental mitigation and enhancement within the identified catchment which is now Sub-precinct B. PC 8 (and now the Unitary Plan) did not require such enhancement to be necessarily undertaken on the site being developed, but allowed it to be undertaken somewhere else in the catchment. Mr Robertson testified that “the benefits to the catchment included ecological linkages, improved water quality, improved land stability, enhancement of existing water courses and wetland areas and the provision of significant and sustainable forest in its own right”.³⁹

[84] PC 8 went so far as to include Carrying Capacity Provisions capping the number of allotments which might be established in the Whitford catchment (925), the number equating to the density rules for that area. The numerical cap has not been continued into the Unitary Plan but the enhancement provisions remain applicable.



[85] The **Precinct Description** relating to the Whitford Precinct contained in the Unitary Plan relevantly provides:

I441.1 Precinct Description

The Whitford Precinct covers approximately 3735 ha of rural land that lies entirely within Tūranga, Waikōpua, Te Puru and Beachlands stream catchments, collectively known as the Whitford catchment. The precinct is a rural area located close to the urban areas of Botany, Howick and Flat Bush. The precinct provisions provide for countryside living development, subject to a management framework in order to maintain and enhance landscape character, rural amenity values and the environmental quality of the area.

(second paragraph not relevant)

An incentive is given to encourage improvements to a natural and physical environment through provisions for additional subdivision for significant enhancement planting.

Whitford sub-precinct B

Sub-precinct B lies within both the Te Puru and the Beachlands south stream catchments. It has a coastal edge and includes specific provisions addressing both the landscape character and environmental considerations. An average site size of 5ha is applied to this sub-precinct.

[86] The Whitford Precinct provisions then contain the following relevant Objectives:

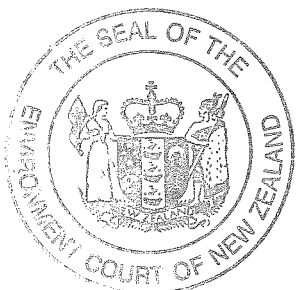
I441.2 Objectives

- (1) Rural countryside living subdivision, use and development of land occurs in a way which ensures that:
 - (a) landscape character and rural amenity values are maintained and enhanced;
 - (c) the natural character and ecological values of native bush and vegetation areas, the streams and coastal waters are maintained and enhanced;

[87] The relevant maintenance and enhancement policies in the Unitary Plan were identified by Mr Reaburn as follows:

- 13.7 As is generally the case with the AUP, the objectives and policies in the Whitford Precinct have been shortened and refined. However the first 3 matters focussed on by the Commissioners have been carried through to the new provisions, albeit sometimes with different wording. Policies 2, 3 and 5 in the Whitford Precinct are particularly relevant, and are:

- (2) *Require land subdivision, use, and development to maintain and*



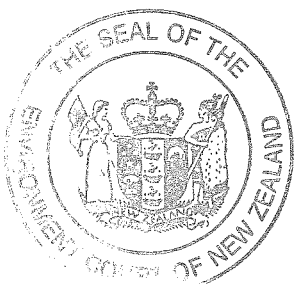
enhance the natural character and ecological values of native bush and vegetation areas, the streams and coastal waters through:

- (a) the setting of limits on density, minimum site size, vegetation maintenance and legal protection of vegetation;*
 - (b) requiring minimum revegetation planting through subdivision standards; and*
 - (c) providing for significant enhancement planting.*
- (3) Require the retention and enhancement of the natural character and ecological values of native vegetation, riparian areas and streams within the precinct.*
- ...
- (5) Provide incentives for biodiversity enhancement.*

[88] A number of relevant rules flow from these provisions. We identify these as follows:

- **I441.6.5.5 Environmental mitigation and enhancement**

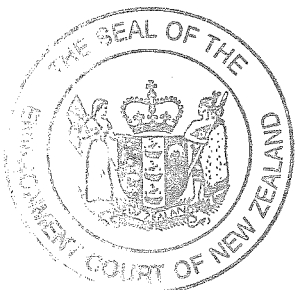
- (1) The permanent protection of all areas of existing native vegetation shown on Whitford Precinct: Precinct plan 2 must be secured by a suitable legal instrument which must be registered on certificates of title and binding on successors in title, and is to provide for the following:
 - (a) a requirement not to destroy or damage existing areas of native vegetation shown on Whitford Precinct, Precinct plan 2, the exact dimensions to be confirmed at the stage of subdivision.
 - (b) all legally protected areas must be fenced unless the council approves an alternative fencing layout which effectively excludes all livestock from such areas.
- (2) Where the area of existing native vegetation to be protected in (1) above is less than 1ha for each additional site created, additional native vegetation planting will be required to provide a minimum of 1ha in Whitford Sub-precinct A and 5000m² in Whitford Sub-precinct B for each additional site.
- (4) The planting requirement must be located within the Whitford Precinct and must be confined to areas where planting will provide:
 - (a) valuable ecological linkages; and/or
 - (b) significant benefits and improvements to water quality and land stability within the Whitford Precinct; and/or
 - (c) enhancement of existing water courses and any wetland areas to ensure their long-term health and viability; and/or
 - (d) a significant and sustainable forest in its own right.



- **I441.6.5.8 Additional subdivision for significant enhancement planting**
We do not set this Rule out in full in this decision. It was common ground that the effect of this Rule was to allow the creation of eight additional sites on the property as it stood at the time of its earlier subdivision approval.
- **I441.7 Assessment – controlled activities**
There are no controlled activities in this precinct.
- **I441.8 Assessment – restricted discretionary activities**
- **I441.8.1 Matters of discretion**
This rule sets out matters of discretion relating to revegetation and enhancement planting. We do not refer to those in detail.

[89] Mr Williamson discussed the Whitford and Sub-precinct B provisions in the following terms:

1. In the Whitford B Sub-Precinct the site density for subdivision requires no more than one site per 5 hectares across the entire existing site. The 79.95ha subject site (the existing parcel less the area being removed via a separate subdivision proposal) could yield 15 household units. The proposal to establish 186 household units on the site equates to an overall site density of 4,300m² per household unit. I understand that the appellant intends to seek subdivision consent (and other necessary resource consents) at a later stage.
2. Rule I441.6.5.5 (Environmental mitigation and enhancement) is one of the key provisions in the Whitford Precinct's catchment management and environmental offsetting approach. It requires the permanent protection of all existing areas of native vegetation shown on Whitford Precinct: Precinct Plan 2, which shall be secured by a suitable legal instrument. Rule I441.6.5.5 also requires that:
 - (2) Where the area of existing native vegetation required to be protected in (1) above is less than 1ha for each additional site created, additional native vegetation planting will be required to provide a minimum of 1ha in Whitford Sub-precinct A and 5000m² in Whitford Sub-precinct B for each additional site.
 - (3) The minimum requirement in (2) above can include:
 - (a) the planting requirement for the riparian management indicative constraints area in Standard I441.6.5.34 above; and/or
 - (b) the planting required for slopes greater than 15 degrees in Standard I441.6.5.76 below; and/or



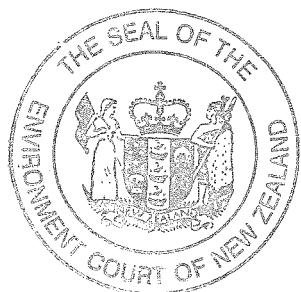
- (c) areas of native vegetation shown to have been specifically planted for enhancing or mitigating provided this does not include any area planted as a condition of any previous resource consent, or through public funding.
- (4) The planting requirement ***must be located within the Whitford Precinct*** and must be confined to areas where planting will provide:
 - (a) valuable ecological linkages; and/or
 - (b) significant benefits and improvements to water quality and land stability within the Whitford Precinct; and/or
 - (c) enhancement of existing water courses and any wetland areas to ensure their long term health and viability; and/or
 - (d) a significant and sustainable forest in its own right.
- (5) Where the planting and revegetation required under this standard will be contiguous over more than three sites, a management structure or other appropriate ongoing arrangement must be established to ensure ongoing integrated management and maintenance of this planting and revegetation.
- (6) For guidance the planting plan for this Standard [are] (sic) contained in the Whitford Precinct guidelines for native revegetation planting.

[Emphasis added]

3. In the case of the Ahuareka proposal, the above rule would require 186 hectares of *existing* native vegetation to be protected, if the area of existing vegetation on site was greater than 186 hectares (1ha per site). Because the amount of existing vegetation being protected on site is only 12.99 hectares, the rule requires additional planting at 5,000m² per for each additional site to be carried out elsewhere in the Whitford Precinct. In other words, the first 12 (say 13) building sites will utilise the 12.99 hectares of existing vegetation to be protected. The additional 173 sites require (173 x 5,000m² =) 86.5 hectares of additional planting within the Whitford Precinct according to the Rule.

(We recognize that the rule under discussion applies at the time of subdivision but it is relevant for our purposes in light of the acceptance on the part of all parties that subdivision must follow to give effect to any land use consent. We think that the parties recognized that in their submissions on the rule.)

[90] The Ahuareka proposal contains a total of 33.85 hectares of enhancement vegetation within the Property, (being 12.99 hectares existing and 20.86 hectares proposed). Mr Williamson calculated that 86.5 hectares additional planting is required



to comply with the rule, 20.86ha hectares of which will be provided by proposed revegetation on site. This leaves what appears to us to be a massive “shortfall” in the order of 65 hectares. Mr N P Goldwater (an ecologist with Wildland Consultants Ltd) testified for Ahuareka that there would be a net ecological gain on site from the development proposal but that does not address the issue of catchment enhancement for landscape character and rural amenity purposes which are the subjects of the provisions we have identified.

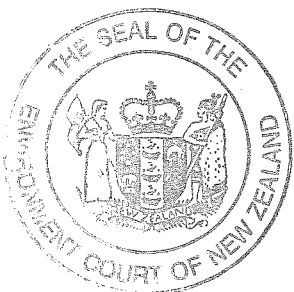
[91] That was the situation at the time of the Council hearing where the Council made the finding that:

263 The application is for an activity that will be contrary to the relevant objectives and policies of the wider Whitford Rural zone regarding the overall environmental remediation and enhancement outcomes sought.

[92] When the matter came to the Court, Ahuareka advanced a further environmental enhancement proposition to be considered in order to address the shortfall. The proposal is for the ecological restoration of the Waikopua Islands, two islands situated in the Waikopua Creek which contain a total of approximately 17.5ha. The proposal was described in the evidence for Ahuareka of Ms de Lambert, Ms S M Flynn (an ecologist at Boffa Miskell) and Mr J Brown (Chairman of Ngāi Tai ki Tāmaki Tribal Trust – the Trust). The islands are not in the Sub-precinct B catchment but sit in the creek which forms its western boundary.

[93] Mr Brown explained that the islands are to vest in the Trust at the time of settlement of Ngāi Tai’s Treaty of Waitangi claim, which at the time of our hearing was awaiting the completion of legislation to give effect to a settlement agreement. Ngāi Tai is committed to the restoration of the islands once it formally takes ownership of them. Annexures 3 and 4 to Mr Brown’s evidence were documents comprising an Iwi Management Plan and a Restoration Implementation Plan for the islands.

[94] It is apparent from the evidence which we considered that the islands are presently in a considerably degraded ecological condition as the result (inter alia) of flax harvesting and pastoral farming activities which were undertaken on them in the 19th and 20th centuries, together with subsequent neglect. Ms Flynn was the author of a Concept Ecological Restoration Plan for the islands which was the foundation for the subsequent Restoration Implementation Plan prepared by Opus Consultants. She

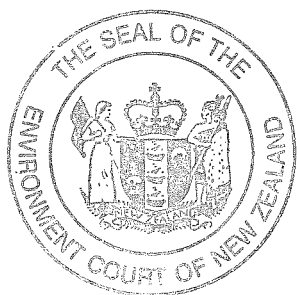


described the current vegetation of the islands in these terms:

17. A description of the current vegetation on the Waikōpua Islands is included in the Concept Plan. In brief, gorse-dominated scrub (about 2 m tall) covers approximately one-third of both islands on slightly higher ground (patches of more mature scrub with woolly nightshade, Chinese privet, kanuka, mahoe and matipo are locally present).
18. Dense, intact swards of searush - dominated saltmarsh extend along the outer portions of the islands and cover one-third of the total island area, the largest patch forming a wide swathe along the western margin of Waikōpua ki Tai. Estuarine shrubland species (saltmarsh ribbonwood, coastal tree daisy, pohuehue) are present throughout this vegetation type but are more common around the perimeter of the islands.
19. A mosaic of exotic grassland and predominantly native saline herbfield covers the remaining one-third of the islands' area (though more extensive on Waikōpua ki Uta) in places that are periodically or permanently wet. Clumps of native sedges and rushes are interspersed throughout this vegetation community, while some large patches of an invasive sedge (*Carex divisa*) were noted around the causeway and along the eastern margin of Waikōpua ki Tai.

[95] Ms Flynn expressed the view that it was likely that the islands were habitat of banded rail and pied stilt. She said that the islands were identified in the Unitary Plan as a significant ecological area due to the presence of saltmarsh and coastal marsh ribbonwood. She considered that the proposed restoration of the islands "is a project of regional significance due to its size and the relative paucity of intact estuarine ecological sequences in the Hunua Ecological District and the wider Auckland Ecological Region."⁴⁰

[96] We have no doubt that when the restoration plan proposed by Ngai Tai proceeds it will be a project of significant ecological benefit to Auckland City and the wider Auckland Region. Ahuareka proposes to provide financial assistance to enable that to happen if it obtains resource consent for this proposal. The details of that proposed assistance were detailed in the evidence of Mr Brown and Mr A J Nicholson (Ahuareka's solicitor). Mr Nicholson produced Exhibit 3 which was a draft agreement for the restoration of the islands.



[97] As we understood the draft agreement, Ahuareka's proposal is that it would pay \$1,000,000 towards the restoration project. This includes payment of a Restoration Sum (\$800,000) by way of an initial payment of \$200,000 plus three further payments of \$200,000 each upon completion of certain phases of work on the project. Then there would be a bond of \$200,000 for "monitoring". We understood this to be a cash bond which would be held by Ahuareka in the joint names of itself and Ngāi Tai. The agreement appeared to contain some inaccuracies in its detail⁴¹. Additionally it is intended that Ahuareka would commit future owners of the developed lots to making a total payment of \$10,000 per annum (CPI adjusted) to Ngāi Tai on account of ongoing maintenance and planting and to comply with the relevant conditions of consent relating to the islands.

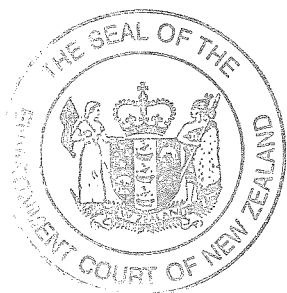
[98] What became apparent to the Court during the evidence of Messrs Brown and Nicholson is that the draft agreement is very much a "work in progress"⁴², the final terms of which are far from settled. We accept that Ahuareka and Ngāi Tai are working in good faith to reach agreement but there is no guarantee that will happen, nor that the current draft agreement will be acceptable to the Council. The agreement constitutes a side agreement, not something which is enforceable through this Court's processes, nevertheless we express our concerns as to a number of aspects of it;

- The agreement apparently envisages that the staged payments to be made by Ahuareka are a "good faith commitment"⁴³ rather than secured in any way. That is unacceptable to the Court which would require payment or absolute surety of payment of all monies due under the agreement, not a good faith arrangement which might rely on the commercial success of the development;
- We have significant reservations as to our ability to require payments of the cash amounts under discussion as part of the terms of this current consent or any subsequent subdivision consent. Such payments would constitute a "financial contribution" which must meet the requirements of s 108(10) RMA;
- The present proposal appears to be that Ahuareka (or possibly its lawyers) would hold any bond (presently intended to be the \$200,000 monitoring

⁴¹ NOE pages 98 and 99.

⁴² NOE page 99.

⁴³ NOE page 99.



amount) as stakeholder. That is unacceptable to the Court. The appropriate body to hold the monitoring amount (and other monies payable) is the Council. We note that Ngāi Tai was “suspicious” about the Council having control of funds which would be used to reimburse it for work it had undertaken⁴⁴;

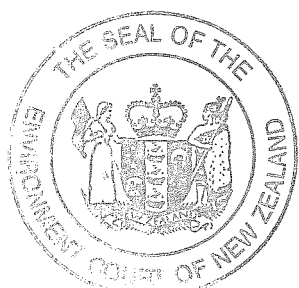
- Even if the full financial contribution could be adequately secured by payment in advance or a bond in a form acceptable to the Council and the Court, the proposal that Stages 2, 3 (in full), 4 (in full) and 5A of the proposed development/subdivision⁴⁵ may be completed and titles issued on the basis of planting trials, vegetation clearance and weed control for the restoration project having been undertaken is unacceptable to the Court. That proposal would allow completion of a very substantial proportion of the proposed development, with limited, if any, guarantee of the final success of, or even satisfactory progress on, the restoration project⁴⁶;
- The proposal that a body other than the Council (Opus International) is to verify compliance with the requirements of the restoration project, which would be the basis on which the Council would issue s 224(c) certificates for various stages of the proposed subdivision, is unacceptable to the Court. It seems to us to be a fundamental requirement that the Council can satisfy itself in the light of its own investigations that the restoration project is proceeding as intended. The agreement does not provide the Council a right of access to the islands at all, although the agreement purports to require it to issue s 224(c) certificates on the basis of works undertaken on them;
- There appear to be a number of inconsistencies between provisions of the proposed agreement and the amended draft conditions of consent appended to Mr Lovett’s rebuttal evidence;
- The agreement does not provide for the execution of any suitable legal protection mechanism to be registered over the islands recording the arrangements for the restoration project. This is an issue for the Council⁴⁷ (and the Court).

⁴⁴ NOE page 90.

⁴⁵ See proposed conditions of consent appended to Lovett Rebuttal Evidence and Schedule 1 of Exhibit 3.

⁴⁶ We were unable to locate in the documents given to the Court the Implementation Calendar which was to be the basis of work in years three to five of the restoration project.

⁴⁷ Council opening submission paras 67 – 71.



[99] We understood that Mr Bartlett QC was confident that issues of this sort could be resolved. Presumably Augier provisions may be used to address some of the concerns we have identified. Whatever the case may be in that regard we consider that there are presently such significant uncertainties as to the proposed agreement that we cannot have any confidence that effect will ultimately be given to it and we have not considered the Waikopua restoration project as part of the enhancement proposal for this development.

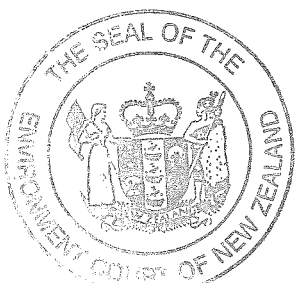
[100] That leaves a situation where there is a notable shortfall in the enhancement being offered as part of the Ahuareka application and which we have identified as being required by the Rule.⁴⁸ The extent of the shortfall was the subject of discussion by both Messrs Reaburn and Williamson whose views on this issue were summarized in the planners' JWS in these terms:

4. The issues upon which the experts cannot agree and the reasons for their disagreement

Environmental Enhancement

(a) There are differences of opinion in relation to the significance of the application's enhancement proposals, including whether the Waikopua Islands' restoration proposals are part of that package, and what that means in terms of alignment with the district plan provisions, in particular Policies 2, 3 and 5 of the Whitford Precinct provisions.

- ...
- Mr Reaburn considers that the on-site enhancement (32ha of protected / restored land) proposed is insufficient to meet the policy expectations of natural resource enhancement (which in turn relate to the enhancement rules in the Precinct). Mr Reaburn considers that, if able to be effectively implemented, the Waikopua Islands' project will address this issue. Mr Reaburn considers that, while there are positive amenity effects, these are not relevant to this issue.
- Mr Williamson agrees with Mr Reaburn, except he considers that the Waikopua Islands' project does not offer sufficient enhancement. The Waikopua Islands' project is not in the Precinct. In his view, the proposal does not have sufficient regard to the catchment management approach of the Precinct. In order to meet the expectations of the Precinct Mr Williamson considers that an extra 80ha of planting (or alternative under Rule 1441.6.5.5.) should be required within the Precinct. This is calculated on the basis set out



in Paragraphs 36 and 37 of Mr Williamson's evidence.

[101] In his rebuttal evidence Mr Lovett rejected the “whole of catchment approach” to the provision of enhancement which he considered Messrs Reaburn and Williamson advocated. His view was summarized in the planners’ JWS in these terms:

Mr Lovett's view is that the enhancement proposed is significant on-site, as described in the appellant's evidence. In his view it is more than is required to address adverse effects, and has additional positive effects, including those that relate to natural resource enhancement and improved amenity, in particular enjoyment of natural resources.

Mr Lovett considered that because there were no more than minor adverse effects on the environment from the Ahuareka proposal “it is hard to see why a significant form of environmental offset would be required in this instance.”⁴⁹

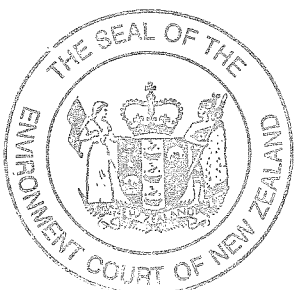
[102] We consider that there are difficulties with the approach of all of the witnesses regarding these provisions. Dealing with Mr Lovett first, we consider that his views ignore the very clear provisions of the precinct description for the overall Whitford Precinct and the Objectives and Policies we have identified in paragraphs [85] – [87] (above). These provisions establish a management framework which actively seeks to achieve not only maintenance but also enhancement of landscape character and rural amenity of the area as part of development in the Precinct. The quid pro quo for development is enhancement of landscape character and rural amenity, not just the avoidance of adverse effects of development as Mr Lovett suggests. We concur with Mr Reaburn’s evidence⁵⁰ that:

Read as a whole, I consider the Whitford Precinct provisions make it very clear that, regardless of whether adverse effects are addressed on-site, there is a policy expectation that development within the Precinct will provide further environmental enhancement, if not on the site, then in appropriate locations elsewhere in the Precinct.

[103] We take the view that Messrs Reaburn and Williamson are correct in their assessment that the Unitary Plan takes a catchment wide approach to this issue. Regrettably the Unitary Plan is of little assistance in enabling us to assess the specific proposals advanced by Ahuareka in this case against the Objectives and Policies which we have identified other than our earlier observation that there is a massive shortfall of

⁴⁹ Rebuttal evidence para 23.

⁵⁰ EIC para 13.16.



some 65 ha between what Rule 1441.6.5.5 contemplates and what Ahuareka proposes. As Mr Bartlett QC pointed out, the 0.5ha enhancement planting in Sub-precinct B is contained in a rule, not an objective or policy and there is nothing in the Objectives and Policies which point to the rationale for the 1ha required in Sub-precinct A and 0.5ha required in Sub-precinct B, nor how to assess a proposal which falls short of the areas of enhancement required by the rule but may for example (as in this case), involve enhancement of a particularly significant environment.

[104] However, Ahuareka did not provide any evidence which enables us to determine that its proposal is consistent with the Objectives and Policies relevant to enhancement of landscape character and rural amenity. Having determined that its retention and planting proposals avoid adverse effects of the development, Ahuareka did not turn its mind to what further might be required by way of enhancement. As Ms Dickey observed in her submissions for the Council⁵¹ the level of enhancement planting for the proposal is essentially the same as provided for the 26 lot subdivision for which consent has been granted. On its face, the shortfall of enhancement planting is so significant as to be contrary to the Objectives and Policies to which we are required to have regard.

Plan Integrity/Precedent

[105] We consider that in this case plan integrity and precedent (jointly called precedent effect) are one and the same. Despite RMA making no explicit reference to precedent effect, the Courts have confirmed that such concerns are legitimate and are generally considered as “other matters” under s 104(1)(c). There is an expectation that Councils will treat like cases alike and so consistently administer the provisions of their plans.

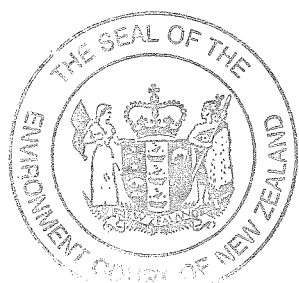
[106] The planning witnesses were unable to agree whether the granting of this proposal will have a precedent effect or undermine the consistent administration of the Unitary Plan.⁵²

[107] Mr Lovett’s view was that the location and characteristics of the Property are such that it can be viewed as a genuine exception. However he also stated⁵³ that there

⁵¹ Council opening submission para 65.

⁵² Planning JWS para 4(c).

⁵³ Lovett EIC para 328



is nothing wrong with a good precedent. He considered ⁵⁴ that there are *only a handful of other sites* for which the Ahuareka proposal may create a precedent. One he listed is the neighboring Formosa site and he considered that the development of this site would produce a good outcome.

[108] Mr Reaburn identified two precedent concerns:

- The first where he endorsed the views of the Council's Hearing Commissioners when they observed in relation to environmental compensation "that to grant this application as sought – that is short of approximately 600 ha of enhancement planting – would likely render the entire bonus enhancement policy nugatory".⁵⁵
- Mr Reaburn's second concern was that this development is not one envisaged⁵⁶ by the Unitary Plan in either Sub-precinct B or the CLZ but if approved might provide a basis for similar applications elsewhere in Sub-precinct B, the CLZ or other Rural Zones. He said that⁵⁷... "With the same careful consideration for design and location within other large sites I am confident it could be argued the same or similar results could be achieved. Overall this could well exacerbate the urbanisation concerns in parts B2 and B9 of the AUP I have referred to above in Section 14 of my evidence."

[109] Ms Dickey submitted that... "notwithstanding the minor nature of the proposal's adverse effects, there is significant scope for any consent granted for this application to be seen as providing an indication that the outcomes sought in the Whitford Precinct can be challenged".⁵⁸

[110] Ahuareka argued, at some length, that there are certain "special" or "exceptional" characteristics of the Property that differentiate it from others. While this was not accepted by Mr Reaburn, it was only part of the Council's concern relating to precedent. The Council also viewed this proposal as a challenge to the environmental enhancement requirements for Sub-precinct B.

⁵⁴ Lovett EIC para 329

⁵⁵ AC decision dated 29 October 2015, para 220. For the purposes of our discussions we have adopted Mr Williamson's estimate of the shortfall.

⁵⁶ Ahuareka's opening submission at para 106-110 took issue with the word "envisaged". While we agree an "outcome not envisaged by the Unitary Plan" is not a statutory test, we understand that what Mr Reaburn was saying in his evidence-in-chief was that the proposal was in conflict with the objectives and policies of the Unitary Plan.

⁵⁷ Raeburn EIC para 17.4

⁵⁸ Council opening submission para 79.



[111] We were far from satisfied that the Property itself had special or exceptional characteristics as suggested. Mr Lovett's comments about development on the Formosa site seem to confirm that. A form of development whereby multiple owners share in a common area is certainly not unique nor even unusual in our experience. Consideration of the impact of approval of this application on plan integrity and precedent must be undertaken in light of our findings that:

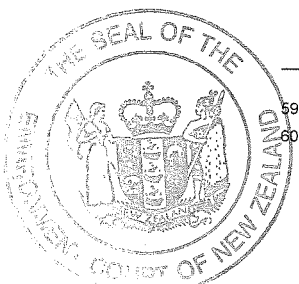
- This proposal constitutes urbanisation;
- The scheme of the Unitary Plan is that new villages will only be accepted after passing through a structure planning process and then, if considered appropriate, a Schedule 1 process;
- The proposed enhancement planting falls massively short of the requirements of the Unitary Plan.

We consider that there are two specific areas to which regard must be had in considering the precedent effect of approving this application.

[112] The first arises out of consideration of the comment from the NZUDP cited in paragraph [58] (above) which stresses the relationship between places. Notwithstanding the claim that the Property could be differentiated from others, it is apparent from Ms de Lambert's evidence⁵⁹ that it is situated in an area which generally is under considerable pressure for residential development and domestication. Within this area there are a number of rural and coastal villages where the Unitary Plan seeks to direct residential development. On the most favorable interpretation for Ahuareka, its proposal is for the establishment of an additional rural village outside of the RUB in a situation where the Unitary Plan seeks to achieve a compact urban form by keeping urban development inside the RUB or existing rural and coastal villages.

[113] We accept the evidence of Mr Reaburn that:⁶⁰

... the proposal is contrary to the general thrust of the AUP, which is that urban development should be focused in existing or planned urban areas, unless, as a result of a structure planning exercise new zonings (and/or precincts) are found to be justified, and are put in place. Failure to follow this process in my view raises serious concerns about the integrity and transparency of the AUP, a position that could be compounded if others see that a lower threshold of examination through resource consent processes is possible.



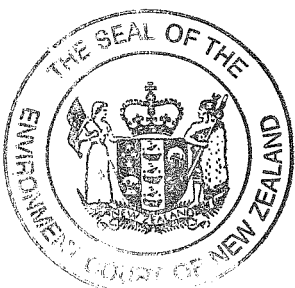
Para [9] (above).
Reaburn EIC para 19.5 – 19.6.

Overall, I consider the proposal in this respect is contrary to the objectives and policies, and should if it is to proceed, be tested first through the AUP structure planning and RMA s32 processes.

[114] We make the observation that the requirement that proposals such as this are tested through plan change and structure planning processes is more than just a technical or bureaucratic requirement. It reflects the emphases which the Unitary Plan places on efficient use of infrastructure, containing residential development within the hierarchy of Residential Zones and achieving a compact urban form.

[115] The second area arises from the shortfall of the proposal in meeting the environmental enhancement requirements of the Unitary Plan which we have identified in paragraphs [85] to [88] (above). Because of the massive extent to which the proposal undershoots the requirements of the Unitary Plan for enhancement planting, we accept Mr Williamson's evidence that "[t]he present proposal seeks to significantly exceed the anticipated yield of site development without providing the equivalent level of environmental offset. The integrity of the plan is certainly at risk of being undermined should this proposal be allowed".⁶¹

[116] We have previously noted that the Unitary Plan is a "newly minted plan". This is not a situation where plan provisions have become dated or have been overtaken by other circumstances. Nor is it a situation where a development proposal has features which take it outside of the considerations which might ordinarily apply. This development proposal must be considered in the context that the Unitary Plan seeks to achieve a compact urban form. Although the development itself might be regarded as compact (containing 186 dwelling houses within an area of 16.47ha), it seeks to expand urban development beyond the RUB and existing rural and coastal villages where the Unitary Plan sets out to contain such development. Further, although the Unitary Plan does not absolutely prohibit residential/urban development beyond those limits it requires that such development occurs through structure planning and plan change processes rather than the ad hoc/stand alone proposal advanced by Ahuareka in this case.



⁶¹ EIC para 133.

[117] We find that this proposal is a direct challenge to the stated intention of the Unitary Plan for a hierarchy of residential development to occur in Residential Zones within a compact urban form and the Objectives and Policies which seek to achieve that. Additionally it undershoots the environmental enhancement provisions of the Unitary Plan in a significant way. If other proposals for urban development of properties in Sub-precinct B outside of the RUB and existing rural or coastal villages were treated consistently with this, that would undermine the integrity of the Unitary Plan.

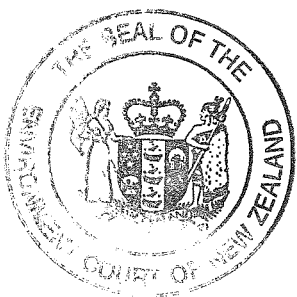
Section 290A RMA

[118] Section 290A requires us to have regard to the decision which is the subject of this appeal when reaching a determination on this matter. To some extent the Council decision is of limited assistance to us in that it revolved around the provisions of the then applicable Manukau District Plan and the matters at issue had refined and changed by the time this appeal came before us. We have accepted the findings of the Council's Hearing Panel as to the effects of the proposal.

[119] There was considerable discussion in the Council decision about the Carrying Capacity Provision. The failure of the proposal to meet the enhancement planting requirements of the Manukau District Plan (by as much as 600ha according to the decision) was found likely to render the entire bonus enhancement policy of the Plan nugatory.

[120] Para 243 of the decision addresses the "urban" issue which has been the focus of our decision and contains the statement that "Thus overall the settled area would be an urban area". We place no reliance on that as it is possible to read this paragraph as being a recital of Mr Reaburn's views on that matter rather than a finding to that effect by the Hearing Panel.

[121] Ultimately we have reached a decision as to the outcome of this appeal on the basis of our own findings on the determinative issues rather than in reliance on findings contained in the Council decision.



Outcome

[122] Section 104(1) RMA provides that:

104 Consideration of applications

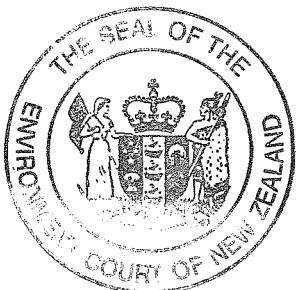
- (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—
 - (a) any actual and potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of—
 - (i) a national environmental standard;
 - (ii) other regulations;
 - (iii) a national policy statement;
 - (iv) a New Zealand coastal policy statement;
 - (v) a regional policy statement or proposed regional policy statement;
 - (vi) a plan or proposed plan; and]]
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[123] In terms of s 104(1)(a) we have accepted the agreed position that any actual or potential adverse effects on the environment from the proposed development will be no more than minor. That position is based on an acceptance by the parties that conditions may be imposed which avoid, remedy or mitigate adverse effects. We have similarly accepted that for the purposes of our consideration.

[124] We also accept that there will be positive actual or potential effects on the environment which arise from the proposal. These largely revolve around the fact the development will offer high quality housing choice together with the advantage of considerable open space in an area where people seek opportunities to live. These benefits were discussed in the evidence of Ms de Lambert and Mr S Brown as well as Mr PD Sullivan (a real estate agent who gave evidence for Ahuareka).

[125] Our consideration of effects is supportive of the grant of consent. The same cannot be said for our considerations pursuant to s 104(1)(b).

[126] We have found that the proposal constitutes urbanization of the 16.4ha of the Property upon which Ahuareka proposes to undertake its development. That finding must be considered in the context that the Unitary Plan seeks to achieve a compact



urban form for Auckland City and for this reason has identified where urban development should take place. The Property is situated:

- Outside of the Residential Zones;
- Outside of the RUB;
- Outside of the rural and coastal villages –

where the Unitary Plan seeks to contain urbanization.

[127] The proposal is for a stand alone residential development advanced by way of resource consent application when the relevant provisions of the Unitary Plan require that such proposals are advanced by way of structure plan and plan change processes to achieve the residential hierarchy identified in the Plan and ensure efficient development of infrastructure.

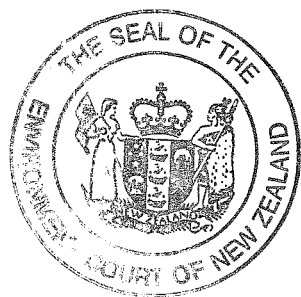
[128] Additionally, the proposal involves a massive undershooting of the requirements of the Unitary Plan for environmental enhancement in conjunction with development in Sub-precinct B.

[129] We find that the proposal is directly contrary to Objectives B2.2.1(4) and (5), B2.3.1(1)(b) and (d) and B2.4.1(1) and (3) and Policies B2.2.2(5) and (6), B2.4.2(2) and B2.6.2(3) of the Unitary Plan.

[130] When all of the relevant provisions of the Unitary Plan (Identification of Issues, Methods, Objectives, Policies, Rules and Explanation) are read holistically, we find that the proposal is contrary to the general thrust of the Plan which seeks to achieve a compact urban form by containing urban development in the manner and by the methods that we have described.

[131] Finally, in terms of s 104(1)(c) we have found that the grant of consent to this proposal would undermine the integrity of the Unitary Plan and provide a precedent for further urbanization of an area which is presently subject to growth pressure.

[132] Considering all of these issues we find that the matters to which we are required to have regard pursuant to s 104(1)(b) and (c) are of such moment in this case that consent should not be granted to the Ahuareka application. The appeal is declined accordingly.

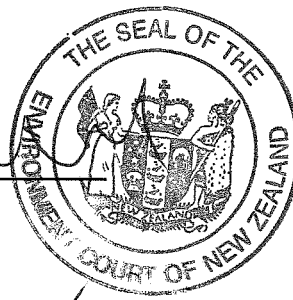


Costs

[133] Costs are reserved in favour of the successful parties. Any costs applications to be lodged and responded to in accordance with the Environment Court Practice Note 2014.

For the Court:

B P Dwyer
Environment Judge



Attachment A

File Ref: A11187_30 Fig7 Proposed Development Property Context.mxd

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Attachment B

File Ref: A11187_Ahuareka_plan_package.indd



LEGEND

-  Public access over walkway through covenanted Ahuareka rural/ ecological restoration lands
-  Public provided access easement over connecting part of Ahuareka hamlet street network
-  Ahuareka Coastal Walkway (in esplanade)
-  Future extensions to coastal walkways

