BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 205

IN THE MATTER	of the Resource Management Act 1991
AND	of two appeals under s120 of the Act
BETWEEN	GRAEME MORRIS TODD, JANE ELLEN TODD AND JOHN WILLIAM TROON
	(ENV-2019-CHC-108)
	MICHAEL CAMERON BRIAL AND EMILY JANE O'NEIL BRIAL
	(ENV-2019-CHC-114)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent
AND	S AND S BLACKLER, B AND K BLACKLER AND TRUSTEES BFT LIMITED
	Applicant

Court:	Environment Judge J J M Hassan Environment Commissioner M C G Mabin
Hearing:	at Queenstown on 2 June 2020
Appearances:	G M Todd and B B Gresson for G Todd, J Todd and J Troon J M G Leckie for M & E Brial Z T Burton for the respondent P E M Walker for the applicant
Date of Decision:	11 December 2020
Date of Issue:	11 December 2020

INTERIM DECISION OF THE ENVIRONMENT COURT

A: On the matters addressed in this decision, the proposal satisfies the requirements of the Act.

B: A teleconference will be convened for the making of case management directions as to the remaining issues for determination.

C: Costs are reserved.

REASONS

Introduction

[1] These RMA[1] appeals are against a decision[2] of the Queenstown Lakes District Council ('QLDC') to grant resource consent for a two-lot subdivision and associated activities[3] at a site ('subject site') on Slopehill Road, Wakatipu Basin, in rural Queenstown.[4] The consent applicants ('Blackler')[5] own the site. The appellants ('Todd'[6] and 'Brial')[7] are adjoining neighbours and seek that consent be declined.[8]

[2] The appeals allege that the proposal has unacceptable effects on landscape values and rural amenity values and is contrary to related objectives and policies. This interim decision determines those community scale issues, leaving aside at this stage the various other grounds of appeal concerning how the proposal would impact on the appellants more directly as neighbours. This staged approach is according to case management arrangements made in discussion with the parties in view of COVID-19 pandemic restrictions. The court is mindful that, due to heavy competing pressures on

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1 Resource Management Act 1991.

2 The decision was made by Commissioner Wendy Baker under delegated authority pursuant to s34A of the RMA 1991 on 19 June 2019

3 Creation of two allotments with associated access, the identification of residential building platforms on each lot with associated access, landscaping and earthworks, and the cancellation of consent notice 936464.2.

4 The site is legally described as Part Lot 2 Deposited Plan 26174 held in Record of Title OT18D/61. The consent application is numbered RM181560 in QLDC's registry of consent applications.

5 S and S Blackler, B and K Blackler and Trustees BFT Limited.

6 Graeme Morris Todd, Jane Ellen Todd and John William Troon.

7 Michael Cameron Brial and Emily Jane O'Neil Brial.

8 There are no other parties to the appeal. William Scott Miller, Robert Keith Miller & Kay Louise Miller as Trustees of the Miller Family Trust joined the Todd appeal under s274, RMA but later withdrew their interest.

court resources, this decision has issued somewhat later than anticipated and regrets any consequential inconvenience this has caused.

The planning context and site and environs

[3] The subject site is gently undulating and terraced rural land some 8.4453 ha in area and is to the edge of the Wakatipu Basin. It sits below the northwest flanks of Slope Hill, some 800m from its peak. Slope Hill is some 625m above sea level. It is locally prominent, rising some 220m above the surrounding foothills, and is an 'Outstanding Natural Feature' ('ONF') under the Queenstown Lakes District Plan ('Plan'). The landscape experts agree, however, that the site is not within the Slope Hill ONF.[9]

[4] The Plan is progressing through a substantial review and, as we explain, that is an important contextual element in the consideration of the appeals. In particular, under a variation notified for the reviewed plan ('PDP') the 'Rural General' zoning for the Wakatipu Basin (of which the site is part) would be replaced by a bespoke Wakatipu Basin Rural Amenity zoning with stringent controls on subdivision and development. This is in order to protect against further loss of the Basin's landscape character and rural amenity values. The variation was underpinned by the Wakatipu Basin Land Use Planning Study (2017) ('2017 Study').

[5] Landscape character and rural amenity values are acknowledged, to some extent, in the ODP by way of a 'Visual Amenity Landscape' ('VAL') overlay. However, on the basis of work reported in the 2017 Study, the PDP maps the Basin into several 'landscape character units' ('LCUs') whose values are described in Sch 24 to the PDP. The site is within what is denoted LCU 11 which pertains to some 566 ha of land in the vicinity of the Slope Hill foothills.

[6] By contrast to neighbouring land, the site is largely undeveloped. It has a generally undulating and terraced form, rising some 28m from west to east, and its vegetation predominantly consists of exotic grasses, tussock and weeds. It is incised by a steep sided central gully that contains an intermittently flowing watercourse, and some self-seeded native shrubs and grasses.[10]

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9 Joint Witness Statement, Landscape ('JWS Landscape') filed 1 November 2019.

10 B Blackler evidence-in-chief ('EIC') at [17], A Leith EIC at [13]-[14].

[7] The site fronts and is accessed via Slopehill Road approximately 500m to the northeast of Lower Shotover Road/Slopehill Road intersection.[11] Slopehill Road provides connection to the popular Queenstown Trail 'Countryside Ride' cycling and pedestrian trail. It also provides vehicular access to several properties, including the Todd property. Most properties in the vicinity are attractively landscaped rural residential homesteads, ranging between 1.0 – 10 ha in area.[12] The Todd property is at 122 Slopehill Road to the immediate west of the site. The Brial property is at 212 Lower Shotover Road, to the south of the site.

The proposal

[8] The site would be subdivided into two allotments, each with an identified building platform. Lot 1 of some 4.08 ha would be to the west of the gully. Lot 2 of some 4.3557 ha would encompass the remainder of the site, including the gully and shared accessway.[13] That accessway from Slopehill Road would run along the present driveway alignment before splitting to provide a separate branch to Lot 2.[14]

[9] Earthworks are designed to mimic the existing natural landform patterns.[15] Residential building platforms would be positioned on the middle and lower slopes of the site some 182m and 282m from the road and 75m and 109m from neighbours.[16] Each platform would have a 1,000m^2 curtilage area within which all domestic landscaping and structures would be confined.[17] These areas are identified on the subdivision plan. Building coverage would be restricted to 45% of each curtilage area (i.e. 450m^2).[18] Building height would be limited to 6m.[19] Buildings would be recessively clad and coloured.[20] An existing consent notice (936464.2) imposed as part of an earlier resource consent would be cancelled. It limits the number and positioning of any future dwellings on the site.

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11 A Leith EIC at [11].
12 S Skelton EIC Attachment C.
13 Leitch EIC at [7].
14 Skelton EIC at [31].
15 Skelton EIC at [32].
16 Skelton EIC, Attachment D.
17 Including but not limited to clothes lines, outdoor seating areas, external lighting, swimming pools, tennis courts, play structures, vehicle parking, pergolas and ornamental or amenity gardens and lawns pursuant to proposed subdivision consent condition 17(k).
18 Proposed subdivision consent condition 17(d).
19 Proposed subdivision consent condition 17(b) and (c).
20 Skelton EIC at [38].

[10] To further assist visual absorption, the proposed landscape plan includes dense planting of indigenous vegetation along the finished slopes behind the building platforms. The planting design also includes medium stature shrubs and a hornbeam hedge south of the proposed Lot 2 building platform. Other groups of rural character trees are proposed on the periphery of the site and south of the Lot 1 building platform. Pin Oaks would form an avenue to the building platforms, although some of these have been removed from the plan to avoid interference with the outlook and views enjoyed from the Brial property. To provide screening for the Brial property against vehicle movement and headlight spill, the planting plan includes Hornbeam hedging along parts of the accessway.[21] All planting on site would be required to be implemented following completion of the earthworks and prior to deposit of the survey plan for title under s224(c), RMA.[22] The gully would be subject to an environmental management plan for eradication of weeds, planting of appropriate indigenous riparian species and prevention of grazing.[23]

Statutory framework

[11] The proposal is a discretionary activity.[24] Hence, we may grant or refuse the consents sought and impose conditions in any grant (ss 104C and 108 RMA). We have the power to cancel the consent notice as a matter included in the application the subject of appeal.[25] We have the same decision-making powers, duties and discretions as QLDC had in its first instance decision. We must have regard to that decision.[26] Section 104 prescribes various matters that we must or may have regard to. These include:[27]

(a) the proposal's actual or potential environmental effects; and

(a) relevant ODP and PDP provisions.

[12] We must have regard to those matters subject to pt 2, RMA. That includes ss 6(b) and 7(c) as follows:

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21 B Blackler EIC at [36]; Skelton EIC at [32].

22 Leith rebuttal at [12]; proposed subdivision consent condition 13(j).

23 Skelton EIC at [32]; proposed subdivision consent condition 17(j).

24 The status of the activity is discretionary under the ODP and non-complying under the PDP. The applicant applied for resource consent prior to the notification of the decisions on Stage 2 of the Plan review (which incorporates Ch 24 on the Wakatipu Basin). Because of that timing the application remains a discretionary activity pursuant to s88A of the RMA.

25 Sections 290, 221, RMA.

26 Sections 290(1), 290A, 104B RMA.

27 We note that none of the provisions of the operative Otago Regional Policy Statement ('RPS') and the proposed regional policy statement ('pRPS') are significant in the determination of the issues. Nor are there any relevant national policy statements or other instruments of the type specified in s104(1)(b) RMA.

6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

...

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to –

...

(c) the maintenance and enhancement of amenity values:

[13] According to the approach of the Supreme Court in *King Salmon*,[28] we apply ss6(b) and 7(c) by reference to related ODP and PDP objectives, policies and assessment matters.

[14] Section 6(b) is in issue because of the proximity of the site to Slope Hill ONF. Section 7(c) is relevant because the proposal is in an area recognised by both the ODP and PDP as having related landscape and visual amenity values. In particular, as noted, the site is within the ODP's VAL and the PDP's LCU 11.

Issues

[15] On the evidence and submissions, the determinative issues for this interim decision can be summarised as follows:

(a) how does the PDP's policy that "an 80 hectare minimum net site area be maintained within the Wakatipu Basin Rural Amenity Zone" bear on consideration of the proposal?
(b) is the site too close to the Slope Hill ONF and would it adversely impact on its landscape values?
(c) would the proposal materially impact on other landscape values or public

[28] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

amenity values particularly as associated with the ODP's VAL and/or the PDP's LCU 11?

The PDP's 80 ha minimum net site area regime

[16] Under the ODP's Rural General Zone and related subdivision controls, there is no minimum allotment size.[29]

[17] By contrast, minimum lot size controls are central to the design of the PDP's Ch 24 for the Wakatipu Basin. Ch 24 was included in the PDP by variation following the undertaking of the 2017 Study.

[18] By way of background, while the Wakatipu Basin had a Rural zoning and VAL overlay under the ODP, it has experienced significant incremental residential subdivision and development over several decades. According to the 24.1 Zone Purpose, Ch 24 seeks to "maintain and enhance the character and amenity of the Wakatipu Basin". It further explains:

> Schedule 24.8 divides the Wakatipu Basin into 23 Landscape Character Units. The Landscape Character Units are a tool to assist identification of the particular landscape character and amenity values sought to be maintained and enhanced. Controls on the location, nature and visual effects of buildings are used to provide a flexible and design led response to those values.
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> ...
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> While the Rural Amenity Zone does not contain Outstanding Natural Features or Landscapes, it is a distinctive and high amenity value landscape located adjacent to, or nearby to, Outstanding Natural Features and Landscapes. There are no specific setback rules for development adjacent to Outstanding Natural Features or Landscapes. However, all buildings except small farm buildings and subdivision require resource consent to ensure that inappropriate buildings and/or subdivision does not occur adjacent to those features and landscapes.

[19] That purpose is reflected in Obj 24.2.1, as to maintaining or enhancing the landscape character and visual amenity values of the zone. Minimum lot size controls for subdivision are central to that purpose. Those controls include rules in Ch 27 on Subdivision & Development.

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29 A Woodford, will say statement at [13].

[20] The controls are comparatively less restrictive within an area denoted the 'Wakatipu Basin Lifestyle Precinct' than for land outside that Precinct. We understand that reflects the greater risk that subdivision outside the Precinct poses for landscapes, including ONF/Ls[30] that border the Basin.

[21] The subject site is outside the Precinct. As such, Pol 24.2.1.1 applies to it and gives this direction:

> Require an 80 hectare minimum net site area be maintained within the Wakatipu Basin Rural Amenity Zone outside of the Precinct.

[22] As for the meaning of 'net site area', Ch 2, PDP includes the following definition:

Net Area (Site or Lot)	Means the total area of the site or lot less any area subject to a designation for any purpose, and/or any area contained in the access to any site or lot, and/or any strip of land less than 6m in width.

[23] The subject site is one of many in the Basin that are already less than 80 ha in area. At least for those sites, any subdivision would inherently conflict with Policy 24.2.1.1.

[24] Subdivision rules to achieve Obj 24.2.1, Pol 24.2.1.1 and related objectives and policies are in Ch 27 Subdivision and Development. Table 27.6 'Rules – Standards for Minimum Lot Areas' specifies an 80 ha minimum lot area for subdivision and related r 27.6.1 specifies:

> No lots to be created by subdivision, including balance lots, shall have a net site area or where specified, an average net site area less than the minimum specified.

[25] Rule 27.5.19 specifies that a subdivision that does not comply with that 80 ha minimum lot standard is a non-complying activity. However, as noted, that rule does not apply in this case, in view of the timing of lodgement of the consent application. Rather, the subdivision is a discretionary activity.

[26] For completeness, in Table 24.5 'Rules – Standards', rr 24.5.1.4 and 24.5.1.5

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30 ONF/L refers to Outstanding Natural Features and/or Outstanding Natural Landscape.

accord non-complying status to residential activities that contravene either of the following standards:

- Any site in the Wakatipu Basin Rural Amenity Zone located wholly outside the Precinct in respect of which the Computer Freehold Register for the site was issued before 21 March 2019 and with an area less than 80 hectares, a maximum of one residential unit per site.
- For that part of all other sites in the Wakatipu Basin Rural Amenity Zone wholly located outside of the Precinct, a maximum of one residential unit per 80 hectares net site area.

[27] Those controls further reflect a policy intention to maintain and enhance the character and amenity of the Wakatipu Basin. The overall emphasis is on stopping any further decay of those landscape values and, indeed, to achieve some remediation on the status quo.

[28] Therefore, the planning witnesses properly describe the PDP regime as denoting "a significant shift in policy".[31]

[29] The assignment of non-complying activity status to subdivisions that would result in lots with a net area less than 80 ha does not make such subdivision inherently unconsentable. However, that activity classification in conjunction with Pol 24.2.1.1 effectively demands, as a prerequisite to consentability, that the subdivision would at least protect any ONL or ONF values and maintain, if not enhance, other landscape and rural amenity values.

[30] That is because the combined effect of Obj 24.2.1 and Pol 24.2.1.1 is that any non-complying subdivision would be capable of negotiating the threshold test in s104D only if it can demonstrate that it would meet the requirements of s104D(1)(a), i.e.:

> the adverse effects of the activity on the environment ... will be minor.

[31] Being satisfied that a proposal would not degrade ONF/L values or relevant LUC landscapes or rural amenity values would be necessary given the purpose of Ch 24 as expressed in the 24.1 Zone Purpose, and expressed through Obj 24.2.1 and Pol 24.2.1.1 and related objectives and policies.

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31 Joint Witness Statement, Planning ('JWS Planning') dated 22 November 2019.

[32] Given the clear direction in Pol 24.2.1.1, non-complying subdivisions would generally struggle to satisfy the alternative threshold test in s104D(1)(b), i.e. that the proposed activity would not be contrary to relevant objectives and policies. Pol 24.2.1.1 can be expected to have such influence given its fundamental importance to the design purpose of Ch 24.

[33] The close scrutiny that Ch 24 demands of subdivisions that do not maintain an 80 ha minimum lot size would extend to matters such as the suitability or otherwise of their location, their scale, intensity and design. It would extend also to consideration of the cumulative effect of granting the subdivision.

[34] In addition to being satisfied the subdivision was consentable in those terms, it can be expected that close attention would also be paid to whether granting consent would uphold or undermine the integrity of the Wakatipu Basin Rural Amenity Zone.

[35] The independent commissioner found that the 80 ha regime of the PDP ought not to be accorded significant weight.[32] The joint witness statement for the planners records agreement with that finding. In essence, that is in view of the breadth of relief pursued in PDP appeals against the 80 ha regime.[33]

[36] Ms Walker for Blackler and Ms Burton for QLDC concur with the planners' position.[34] Ms Walker also notes that QLDC did not seek to have its rules take immediate effect by an application to the Environment Court under s86D(3). For Brial and Todd, counsel submit that the fact that the 80 ha regime represents a significant change in policy weighs in favour of giving this aspect of the PDP significant weight in terms of issues of plan integrity.[35]

[37] We are guided by *Keystone Ridge Limited v Auckland City Council* and *Mapara Valley Preservation Society Inc v Taupo District Council*[36] on relevant principles. As

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32 Decision of the QLDC by Commissioner Baker, dated 19 June 2019 at [48].

33 JWS Planning dated 22 November 2019. There are 735 on the Chapter 24 Wakatipu Basin and approximately 8 appeals on Rule 24.5.1.4 that requires a minimum lot size of 80 ha within the WBRAZ; A Woodford will say statement at [7]-[11].

34 QLDC's closing submissions, [2.8]-[2.10].

35 Todd closing submissions at [20]-[22], Brial closing submissions at [26].

36 *Keystone Ridge Limited v Auckland City Council*, AP24/01 at [16] and [36]; *Mapara Valley Preservation Society Inc v Taupo District Council* A083/07 at [39].

such, we consider the extent of the intended policy shift and its implications, the extent to which that policy shift is at large in appeals, and the rights and interests of the parties before us.

[38] On these matters, we note that Pol 24.2.1.1 is not confined to non-complying activities. Rather, on its face, it is relevant despite the proposal remaining a discretionary activity. Furthermore, s104(1)(b) allows for broad discretion as to the weighting to be given to this policy in that it broadly directs that regard be given to "any relevant provisions" including of the PDP.

[39] Substantially, Ch 24 seeks to make a strategic policy shift in regard to the control and management of subdivision within the Wakatipu Basin. That is in order to prevent further degradation of its landscape and other rural amenity values and, to some extent, help restore those values. In terms of the Supreme Court's analysis in *King Salmon*, Ch 24 seeks to give new policy direction for the purposes of ss 6(b) and 7(c), RMA specific to the context of the Wakatipu Basin. The non-complying activity status rules in Ch 27 are just one aspect of this new approach. Therefore, the fact that QLDC did not seek an order to have the related non-complying activity rule come into immediate effect is not significant to the issue of weighting. In essence, QLDC did not need to do so because relevant policies remain to be considered, and given due effect, even for discretionary activities.

[40] Given the purpose of Ch 24, we find that the importance of giving its policy intentions in regard to minimum lot sizes is overwhelming. That is not diminished by the fact that some appeals essentially seek that this policy shift be reversed or substantially softened. Rather, if in due course such appeals are successful, little if anything is lost by giving Ch 24 significant weight in the meantime. That is the case even for Blackler, in that the net result is that the subdivision remains discretionary, albeit that it would be subjected to much more rigorous scrutiny. On the other hand, an approach of treating the ODP regime as essentially deserving of greater weight potentially compromises the fundamental intentions of Ch 24.

[41] For those reasons, we give significant weight to the shift in policy reflected in the PDP's 80 ha minimum net site area regime. In essence, that means that we fully test the proposal for compatibility or otherwise with all PDP objectives and policies and ascribe contrary ODP objectives and policies relatively little weight or influence. In a relative sense, we find that weighting should prefer the policy intentions of the PDP over those of

the ODP. That includes being satisfied that, on its own and in a cumulative effects sense:

(a) the site would not be adjacent to the Slope Hill ONF and the proposal would protect the associated landscape values;
(b) the proposal would at least maintain the particular landscape character and amenity values of LCU 11; and
(c) in those and other respects, granting consent would maintain the integrity of the Ch 24 zone purpose.

Planning framework for the assessment of effects

[42] The planning experts identified relevant ODP and PDP objectives, policies and assessment matters.[37] We have considered those provisions but focus on those that give relevant direction on the matters in issue. These are summarised in the Annexure. Our evaluation of the proposal with reference to them is at [90]-[92]. Also in the Annexure for reference is the PDP map of Wakatipu Basin LCUs, including LCU 11 and an extract from Sch 24.8 setting out its description of LCU 11's landscape values and related attributes and other matters.

[43] For completeness, we evaluate the various ODP and PDP provisions by reference to their statutory purposes. In particular, objectives set relevant district priorities for pt 2, RMA. Those objectives are served by implementing policies. Both objectives and policies are served by implementing assessment matters (as a form of rule) (ss 75, 76(1), RMA).

Evidence as to effects on ONF and other landscape and visual amenity values

[44] We heard evidence from two landscape experts, Messrs Stephen Brown and Stephen Skelton. Each has considerable experience in the district. After their evidence was tested, we undertook a site visit according to an itinerary proposed by the parties, to view the site and its setting from key public vantage points. We reported on that site visit

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37 These are as set out in the statements of evidence of Amanda Leith (called by Blackler), Kay Panther Knight (called by Brial) and Andrew Woodford (called by QLDC) and related expert conferencing statements. In particular, we refer to their additional JWS – Planning dated 2 June 2020. For the ODP, these include provisions in sections 4 (District Wide), and 5 (Rural Area). Other ODP provisions in sections 15 (Subdivision & Development), and 22 (Earthworks) are not directly relevant to landscape and visual matters and are not addressed in this interim decision. For the PDP, these include Chapters 3 (Strategic Directions), 6 (Landscape and Rural Character), 24 (Wakatipu Basin), 25 (Earthworks) and 27 (Subdivision and Development).

prior to closing submissions.

Preliminary matters as to the scale of allowable buildings under the proposal

[45] One underpinning of the landscape experts' opinions is their understandings of the proposal itself.

[46] Mr Brown's visual effects' assessment includes a photographic montage that includes the transposition onto the site of two grey and white boxes intended to represent a close up view "showing proposed building envelopes".[38] He explained that this depiction was on the basis of the poles that the surveyors had set up on site (and which remained in situ at the time of our site visit). When cross-examined by Ms Walker, Mr Brown explained that his photomontage "represents the building platform that was located on site by the surveyors who were instructed to, I think establish two 450 square metre building platforms". He calculated this as totalling 900m^2.[39]

[47] Mr Brown is correct in his assumptions concerning the building platform areas, but mistook the poles to depict this. In fact, and as Mr Skelton correctly understood, the poles depicted two 1,000m^2 curtilage areas within which the 450m^2 building platforms would be located.[40] This error is significant in that it would tend to lead to an overstatement of true visual effects. This would appear to have been most significant for Mr Brown's assessment of visual effects for near views.

Approach of experts to visual effects' assessment

[48] The landscape experts' analyses is also underpinned by their analyses of the extent to which the proposal would be visible from relevant distances. They agreed on a set of representative public viewpoints for three relevant perspectives:

(a) **long distance views**: Coronet Peak Road and other views beyond the Basin, including from Tuckers Beach.
(b) **middle distance views**: more or less from within the Wakatipu Basin; and
(c) **near views**: close to the site, such as for users of the public cycling trail and

38 Brown EIC attch 23.
39 Transcript, p 39, l 18-29.
40 Skelton EIC at [8].

residents of and travellers along Slope Hill Road.

Long distance views

[49] We can briefly address why we find there are no significant effects for long distance views. The experts agree that these would have a very low or low visual impact.[41] That is confirmed by our site visit. We find the proposal would have no significant impacts for long distance views.

Middle-distance views

[50] For each viewpoint considered in isolation, the experts essentially agree that any visual effects of the proposal would be minor. Mr Brown says:[42]

> In views from such locations as the intersection of Dalefield and Little Road ... Domain Road ... Birchwood Road ... and Korimako Lane, the proposal would only be partially visible. Consequently, the effects associated with such visual interaction would be of a lesser order, at least in relation to the individual vantage points concerned.

[51] However, Mr Brown then aggregates each individual middle-distance viewpoint to derive his assessment that the visual effect of the proposal from middle-distance viewpoints would be moderate overall.[43] Mr Skelton considers it is unsound to aggregate results in this way and, in any case, is satisfied that the effects for middle-distance views would remain low.[44] Their differences are summarised in their JWS as follows:[45]

> 7 Public effects
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> ...
>
> Mr Brown considers that the effects on the public domain relate less to a high level of impact on any one vantage point and more to the cumulative effects arising from exposure to the proposed houses from multiple viewpoints.
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> Mr Skelton does not agree with this and considers that such effects would be very low.

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41 Brown EIC at [61]; Skelton EIC at [61].
42 Brown EIC, at [69].
43 Brown EIC at [71], JWS Landscape at [7].
44 Skelton EIC at [60]-[64].
45 JWS Landscape at [7].

[52] Mr Brown properly points out that views and appreciation of the Slope Hill landscape are "not fixed" but, rather dynamic in the sense that people move about their properties and the road network. He observes that locals were well familiar with how development is pressing up against the "open flanks" of Slope Hill and comments that it would not take long for them to notice the Blackler development as aggravating that. He concludes that the visual effect from middle-distance viewing points would be contrary to what LCU 11 intends.

[53] With respect, we find Mr Brown's conclusion of moderate visual effects significantly overstates what a reasonable viewer would likely experience, even accounting for accumulative viewing impressions.

[54] We accept that road users would frequently take a single journey along Dalefield Road and Domain Road and through the junction of Domain Road and Littles Roads. Other combinations of accumulative viewing experiences can be anticipated, depending on a range of factors such as where a viewer lives and, for travelling viewers, where they are travelling from or to.

[55] However, our site visit confirmed as sound the essential consensus of the experts that the visual effects for each selected viewpoint along these roads would be very low.

[56] The Dalefield Road viewpoint is at an "S" bend some 0.86 km northwest of the junction with Littles Road. It is at a section of steep grade and narrow cross-section requiring close attention by a road user. Given those road safety challenges, it offers no more than a brief glimpse opportunity of the Slope Hill environs. A stationary viewer could observe the Slope Hill environs for longer, but this is a less-than-desirable stopping point in road safety terms. The Domain Road viewpoint is similarly fleeting for road users, albeit on a straight stretch. Stationary views are also partially obscured. The viewpoint at the junction of Dalefield and Littles Roads is at a lower elevation. We observed the site as only partially visible in between and just above numerous trees.

[57] Any view of the proposed dwellings would be highly confined and certainly brief for a road user. Any glimpse would be of a minor addition to the existing cluster of residential dwellings and noticeably more removed from Slope Hill than some of them. We infer that the position would not be materially different for someone viewing the site and environs from stationary viewpoints.

[58] Given that none of these viewpoints offer any more than a brief and obscured glimpse of the general locality of the site, we do not accept as credible Mr Brown's aggregation to derive a moderate effect. In reality, separately or together, none give rise to anything approaching that.

[59] Other viewpoints identified by Mr Brown are not from well-used public roads or areas. The viewing impact is marginally greater than in the more trafficked areas, but still low and for a smaller catchment of likely viewers. Similarly, any view would be of a minor addition to the existing residential cluster.

[60] We are satisfied that the selected viewpoints are properly representative of what a viewer would typically experience.

[61] Therefore, in light of our site visit, we prefer Mr Skelton's opinion and find that the proposal would not have any significant visual effects for middle-distance viewpoints.

[62] As for Mr Brown's opinions on how visual impacts sit with public expectations, the proper benchmark is the policy setting in the PDP including in LCU 11. As such, we refer to our findings at [90]-[92].

Near views

[63] Near views of the site are spatially separated from the middle and long-distance views, due to the intervening topography, vegetation and other viewing obstructions. Slopehill Road is about 1.5 km long and the site is located about half-way along. Viewpoints, whether for motorists, pedestrians or cyclists, occur along the south side of the road. The whole site directly fronts Slope Hill Road for 220m. Mr Skelton considers that the proposal may be visible from vantage points along that road for approximately 415m. Having observed the height poles on our site visit, our impression is that the viewable distance along Slope Hill Road would be less than that, but we accept Mr Skelton's estimate for our purposes.

[64] Mr Brown explains that the Queenstown Cycle Trail "affords the most direct connection between central Queenstown and Arrowtown" and also connects to the national Te Araroa Trail. He observes that many locals would use the road and trails regularly. He also comments that Slope Hill Road is appreciated by tourists and visitors

as an integral part of the trails' circuit. He considers that the new dwellings of the proposal would be "starkly apparent" in the foreground of views of Slope Hill.[46]

[65] By contrast, Mr Skelton, as the author of the proposal's landscape design, is satisfied that the design and location of the building platforms is appropriate for maintaining a sense of openness across the site. He sees no need for further screening or buffering for the intended dwellings.[47]

[66] We find Mr Brown's characterisation of a "starkly apparent" impact somewhat exaggerated. As we have noted, he miscalculated the true extent of the two building platforms.

[67] However, we find both landscape experts have given a sufficiently accurate assessment of the extent of visual change that would occur for near views. We accept that Slopehill Road serves both the properties that front it and as part of the popular Queenstown Cycle Trail. As such, we consider visibility effects as extending to this wider community of interest. We find that the intended dwellings and related site works as proposed would be clearly visible for users of Slopehill Road for a significant distance of the road, in the order of 415m or somewhat less. There would be a clearly apparent change from what is seen now. However, that is in a context of the already-established rural residential dwellings along the flanks of Slopehill Road and, in some cases, at a higher elevation closer to Slope Hill than the proposal.

The experts' opinions on associated landscape and visual amenity effects

[68] As noted, there are different dimensions to consider, namely as are associated with:

(a) the Slope Hill ONF; and
(b) the ODP's VAL and PDP's LCU 11.

[69] Mr Skelton considers the site sufficiently separate from the Slope Hill ONF so as to not bring s6(b) RMA and related objectives and policies into play. As part of informing that opinion, he calculated the extent of horizontal and vertical separation between the

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46 Brown EIC at [73].
47 Skelton EIC at [33]-[37].

site and the boundary of the ONF. He explains that the peak of Slope Hill is some 800m from and 210m above the proposed building platforms.[48] Furthermore, he considers the fact that there are already 15 existing dwellings between the site and the ONF provides proper contextual separation.[49] As to this aspect, he considers the two proposed dwellings would fill "the gap" or insert the "missing tooth" [or perhaps "teeth"] of rural living in this part of the landscape".[50]

[70] Mr Brown did not challenge Mr Skelton's calculations as to horizontal and vertical separation from Slope Hill. However, he variously describes the site as adjacent[51] to the ONF, reasonably close to its core[52] and in the vicinity of the ONF.[53] He also interprets the proposal and its relationship to existing dwellings in the vicinity in entirely different terms. His overall opinion can be summarised by the following extracts:[54]

> 12. Focusing on the ONF values of Slope Hill, it is my assessment that the Blackler's proposal would also have an adverse effect on:
>
> a) Public perception of Slope Hill's biophysical characteristics;
> b) Its legibility and perceived extent as a feature;
> c) Its expressiveness and articulation of its formative processes; and
> d) Its aesthetic character and appeal.
>
> 13. Such effects would impact on the perceived value of the ONF as whole and would exacerbate a pattern of development near, and on parts of, Slope Hill that already appears somewhat disconnected and ad-hoc in places. These effects would be significant in my assessment.
>
> ...
>
> 68. Inevitably, therefore, the proposal would exacerbate the proliferation of development across Slope Hill's lower slopes and terraces, in direct contravention to what is envisaged for the LCU 11. In so doing, it would also compound the isolation of Slope Hill and its open grassland crown. Some of the feature's intrinsic naturalness and expressiveness – related to the legibility of its formative processes – would also be lost in the process of such change.
>
> ...

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48 Skelton EIC at [50]-[51].
49 Skelton EIC at [53].
50 Skelton EIC at [83], p 20, p 22 and [89].
51 JWS Landscape at [1].
52 Brown EIC at [26].
53 Brown EIC at [10].
54 Brown EIC at [12], [13], [68], [74], [76] and [77].

74. Instead of 'filling in a gap', it is my opinion that the subdivision and development would further erode key qualities associated with the sequence of views to Slope Hill from next to the [Blackler] property. This sequence is not limited to a glimpse or fleeting view; rather it is part of a continuum of views to Slope Hill that are experienced in the course of traveling up its namesake road – up and over the ridge at the top of the roadway. In my assessment, the proposed dwellings would compound the feeling of encroachment already apparent in relation to development on the edge of the hill's open crown.

...

76. In my assessment, these effects would be significant. In addition to adversely affecting views towards the hill from Slopehill Road and thus appreciably reducing both the values of the hill as a feature and the rural character of its apron, they would influence perceptions of the local environment by a much wider array of locals than just those who live on Slopehill Road. Naturally, they would also affect and impair visitors' appreciation of the local area and a key feature of its landscape.

77. To summarise, therefore, it is my assessment that the Blackler proposal would have a Moderate-High impact on the Slope Hill 'Foothills' LCU experienced from Slopehill Road and the Queenstown Trail.

The planning witnesses' related evaluations

[71] The planning witnesses for Blackler and Brial relied on the opinions of Messrs Skelton and Brown respectively as the foundation for their divergent opinions on related ODP and PDP provisions. Similarly, our findings on those provisions draws from our evidential findings. Meaning no disrespect to either planner, therefore, it is unnecessary for us to traverse their analysis of those provisions and their related conclusions.

Legal submissions

[72] There is no substantive difference on primary principles, other than as to the weighting to be given to the PDP minimum lot size regime. Rather, submissions as to the appropriateness or inappropriateness of the proposal, in terms of pt 2 RMA (particularly ss 6(b) and 7(c)) and related ODP and PDP provisions rely upon the sustainability of the respective landscape opinions. That is:

(a) Ms Walker for the applicant submits that the subdivision and proposed dwellings can be absorbed into the receiving environment landscape and

the proposal is appropriate;

(b) counsel for Brial submit that the proposal conflicts with s6(b). They submit it would have significant adverse effects on landscape character and visual amenity, including cumulative effects. Thus they contend the proposal is contrary to the majority of the relevant ODP and PDP provisions and to pt 2, RMA;

(c) counsel for Todd echo that position, submitting that the adverse effects of the proposal would be unacceptable and could not be sufficiently avoided, remedied, or mitigated; and

(d) Ms Burton for QLDC takes an essentially neutral position but submits that the issue is primarily one between disputing neighbours.

Findings and discussion

Summary of findings as to visibility

[73] In summary, and having regard to the form and relative density of the proposal, and its location relative to established residential dwellings on the foothills of Slope Hill, we find:

Viewpoints	Visibility
Long distance	Insignificant
Middle-distance	Insignificant
Near -distance	Noticeable change in a context of an already-established enclave of residential buildings

Findings as to relevant landscape values

[74] The consideration of how a proposal would affect an ONF or other identified feature or landscape is heavily judgment-laden. Much turns on what is sought to be protected. On those matters, we refer in particular to the Supreme Court's decision in *King Salmon,*[55] the Court of Appeal decision in *Man O'War Station Limited*[56] and the discussion on those and other cases, and related principles, in *Upper Clutha Environmental Soc Inc.*[57] For instance, identifying values is important for understanding

55 *King Salmon* at [101].

56 *Man O'War Station Limited v Auckland City Council* [2017] NZCA 24 at [86].

57 *Upper Clutha Environmental Society Inc & Ors v Queenstown Lakes District Council* [2019] NZEnvC 205, at [105]-[111].

what would effectively protect an ONF or maintain or enhance a LCU (or VAL). The ODP offers only minimal direction on these matters. The PDP does not, at this stage, specify landscape values for its ONFs. It is somewhat more helpful for LCU 11. Therefore, we draw significantly from the landscape witnesses' opinions on these matters in making our findings.

Slope Hill ONF

[75] Both landscape witnesses drew from the work undertaken by another landscape architect, Ms Helen Mellsop, for their identification of the relevant landscape values for Slope Hill ONF.[58] Ms Mellsop did this work to inform the Plan review. Her description, quoted by Mr Skelton, is:[59]

> (a) the rôche moutonée glacial landform, with a smooth 'up-ice' slope to the south-west, and a steeper rough 'plucked' slope to the east adjacent to Lake Hayes;
> (b) the openness and pastoral character of the landform that allow the underlying formative processes to be clearly legible;
> (c) the relative lack of built form and landform modification; and
> (d) the high level of visibility of the hill from within the Wakatipu Basin, particularly from SH6 west of the Shotover River…Ladies Mile, and the Lake Hayes area. This visibility is associated with a high level of shared and recognised scenic value

[76] Both witnesses add their further observations, but these do not substantially alter what Ms Mellsop ably described.

[77] In summary, therefore, we find its significant values concern its:

(a) highly legible glacial origins, including its smooth rôche moutonée top and upper slopes;
(b) predominant pastoral open character, largely devoid of buildings and other landform modifications; and
(c) high visibility and prominence, including in its framing of the foothills and Basin.

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58 Brown EIC at [40]-[41].

59 Skelton EIC at [46] quoting from Ms Mellsop's evidence for "Hearing Stream 14" for QLDC's hearing of submissions in the plan review.

PDP LCU 11 Slope Hill foothills – landscape values

[78] Messrs Skelton and Brown largely refer to and endorse the description of landscape values for the Slope Hill foothills as is set out in the PDP's Sch 24.8. Similarly, relevant PDP policies direct us to Sch 24.8 for an understanding of those values. Sch 24.8 traverses a range of matters, extending beyond values to descriptions of existing patterns of land use and an overall statement that the capacity of this landscape unit to absorb change is low. However, we find the following summary from Mr Brown's evidence helpful:[60]

> ***Visibility / prominence***
> *Visibility varies across the landscape unit. The elevated nature of the unit and its location adjacent a flat plain on its western side means that this part of the area is visually prominent.*
>
> *The steep hillslopes and escarpment faces edging Speargrass Flat to the north and Lake Hayes to the east, together with Slope Hill itself, serve to limit visibility of the balance of the unit from the wider basin landscape.*
>
> ***Views***
> *Key views relate to the open vistas available from parts of Hawthorn Triangle environs to the western portion of the unit.*
>
> *The unit affords attractive long-range views out over the basin to the surrounding ONL mountain setting as well as open views of the nearby Slope Hill ONF from some public locations.*
>
> ***Sense of Place***
> *Generally, the area reads as a mixed rural and rural residential landscape.*
>
> *The elevated portions of the area read as a rural residential landscape 'at, or very near, its limit'.*
>
> *The lower-lying stream valley area to the east remains largely undeveloped, and functions as somewhat of a 'foil' for the more intensive rural residential landscape associated with the surrounding elevated slopes.*
>
> ***Capability to absorb additional development***
> *Low*

60 Brown EIC at [29].

[79] We add that Sch 24.8 also refers to the following associated values:

(a) a variable sense of openness and enclosure, including that landforms in the central and eastern areas provide containment at a macro scale; and
(b) relative complexity in landform patterning.

[80] We also agree with Mr Brown that Slope Hill contributes "appreciably" to the values of LCU 11. That is evident, for example from statements in Sch 24.8, including to the effect that LCU 11 "adjoins" Slope Hill ONF and that it is important to retain existing open views to Slope Hill. Furthermore, as Sch 24.8 also recognises, there is a landform pattern relationship between Slope Hill and the foothills. Sch 24.8 describes this in the sense of a complex patterning of hills ranging from moderate to steeply sloping in places, including an elevated hummocky pattern throughout central portion (with remnant kettle lakes).

Related VAL values

[81] Comparatively speaking, the ODP's description of landscape values for the VAL is more generic. It is not based on identified LCUs. There is a helpful summary of the ODP's approach in Mr Brown's evidence.[61] Broadly, VALs generally have picturesque 'Arcardian' qualities. That pertains to their patterning of houses and trees and other human modifications. They also generally have prominence because they are adjacent to ONF/Ls and/or include ridges, hills, downlands and/or terraces.

[82] Further guidance as to what the ODP intends as priorities for maintenance or enhancement of VAL values is found in the assessment matters in r 5.4.2, we have already assessed matters as to the visibility, form and density of the development. The remaining assessment matters are as to:[62]

(a) effects on natural and pastoral character;
(b) cumulative effects of development on the landscape; and
(c) rural amenities.

[83] We find that we should give comparatively less weight to these aspects of the

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61 Brown EIC at [31].
62 ODP section 5.4.2.2 (3) Visual Amenity Landscapes.

ODP, in light of the PDP's more specific focus on landscape and amenity values identified as associated with particular LCUs.

The proposal is not adjacent to and would not materially impact the Slope Hill ONF

[84] We prefer Mr Skelton's opinion that the proposal is not adjacent or in material proximity to the Slope Hill ONF. Rather, as his unchallenged calculations demonstrated, it is sufficiently separated horizontally and vertically. It is also perceptually separated by other intervening well-established rural living. That is the case for long distance, middle-distance and near distance views.

[85] We also accept his opinion that the proposal would not adversely affect the ONF's outstanding visual or character values to a more than low degree.[63] More clearly, we find the proposal to have no adverse effect on those values. Therefore, on the evidence, we find the site does not trigger s6(b), RMA nor its related objectives and policies. We now set out our related findings on those before returning to the landscape evidence.

Findings on the evidence as to effects on LUC 11 landscape values

[86] We accept Mr Skelton's evidence that the site is located in a part of LCU 11 that is comparatively enclosed. That is reinforced by our findings that the proposal would not have any significant impact when viewed from long distance and middle-distance viewpoints. In effect, whilst acknowledging that the site is in an elevated part of LCU 11 and close to Slope Hill ONF, we find that it would be effectively absorbed such as to not give rise to any material impact on associated landscape values from those viewing distances. Hence, any associated effects on landscape values associated with LUC 11 are confined to how the proposal would be perceived from Slopehill Road.

[87] At that near view scale, we find that the proposal would change the present view across open pastoral land to a limited but acceptable extent. We do not entirely accept Mr Skelton's opinion that, despite the additional dwellings, the site would retain its sense of openness. Rather, Mr Brown fairly observes that the proposed dwellings would sit "in the middle of" the site.[64] To that extent, the proposal would render the site less open that it currently is, as a matter of fact. However, several factors combine to satisfy us that the

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63 Skelton Summary Statement, at [11].

64 Transcript, p 38 l 3.

proposal sufficiently maintains openness in a way that is sympathetic to landform and effectively ensures absorption of this land use change. Those factors are:

(a) the locality of the site itself, both in regard to the Slope Hill ONF and Slope Hill Road. Specifically, we find the site is sufficiently distant from the Slope Hill ONF and in keeping with the existing pattern of development along the road;
(b) the natural attributes of the site, including its undulating and terraced contour and reasonably close proximity to Slope Hill Road;
(c) the effective integration of earthworks with the existing landform, and adequate open areas;
(d) the related softening influence of the landscape plantings, and restoration and enhancement of the gully's riparian plantings;
(e) the relative lack of residential intensification proposed, in that only two dwellings would be added, each on sites that are no less generous than most in the vicinity; and
(f) effective controls on building bulk, height and recessive colour treatments.

[88] Overall, preferring Mr Skelton's evidence in relevant respects, we find the landscape and visual amenity effects of the proposal would be no more than minor. Specifically, that is in the sense that the proposal will properly respect all relevant landscape values and at least maintain landscape and other amenity values (and for the gully and stream, enhance those values).

[89] For similar reasons, we find that the proposal would not have any adverse cumulative effects on landscape and related amenity values. In summary, that is because it is a small sensitively-designed proposal located in an area that, in some contrast to the typical absorptive capacity in LCU 11, is capable of absorbing it. As such, it does not degrade the values associated with Slope Hill ONF or LCU 11 nor set any platform for future cumulative degradation.

Findings in relation to ODP and PDP objectives and policies

[90] It follows that we are satisfied that the proposal is properly compatible with all relevant ODP and PDP objectives and policies. Our findings are:

ODP

Provisions	*Findings*
Obj 4.2.5	Accords with and assists to achieve
Pol 1	Accords with and assists to achieve
Pol 2	Does not conflict with
Pol 3	Does not conflict with
Pol 4	Accords with and assists to achieve
Pol 5	Accords with and assists to achieve
Pol 8	Accords with and assists to achieve
Ch 5 Obj 1	Does not conflict with
Pols 1.4, 1.6 and 1.7	Accords with and assists to achieve

PDP

Provisions	*Description*
Strategic Direction Ch 3 Objectives	
Obj 3.2.5.1	Does not conflict with
Pol 3.3.23	Does not conflict with
Pol 3.3.24	Does not conflict with
Ch 24 Wakatipu Basin	
Obj 24.2.1	Accords with and assists to achieve
Implementing policies	
Pol 24.2.1.1	In conflict with
Pol 24.2.1.2	Does not conflict with
Pol 24.2.1.3	Accords with and assists to achieve
Pol 24.2.1.4	Accords with and assists to achieve
Pol 24.2.1.5	Does not conflict with
Pol 24.2.1.11	Does not conflict with

Conflict with Pol 24.2.1.1 is not significant

[91] The proposal, seeking subdivision of a site already well less than 80 ha in area, inherently cannot accord with Pol 24.2.1.1. However, in the design of Ch 24, as we have discussed, that does not condemn the proposal. Rather, it allows for the proposal to be consented subject to it proving satisfactory in terms of the matters addressed in this

interim decision.

Plan integrity

[92] On that basis we find that granting consent would not impact on the integrity of Ch 24 or the PDP as a whole. As such, it does not pose any precedent risk.

Part 2 RMA

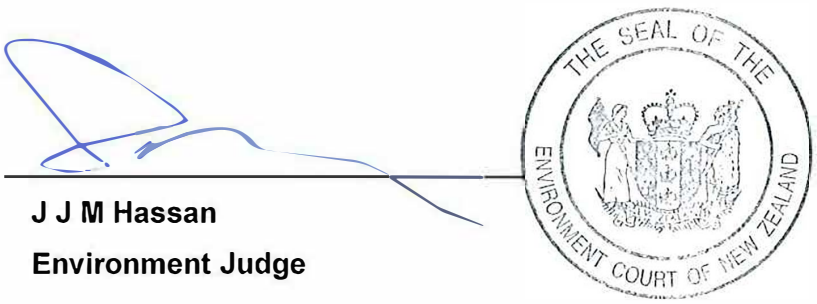
[93] On that basis, it follows that we find that the proposal does not conflict with s6(b), or any other relevant provisions of pt 2, RMA.

Conclusion

[94] We find that, on the matters addressed by this decision, the proposal satisfies the RMA's requirements. The matters remaining for determination under the appeals are of a comparatively localised nature. Primarily, they concern the impacts of the proposal on the appellants' amenity values and enjoyment of their properties. They also concern the specifics of the proposal in those terms and related consent conditions. Given that focus, we consider an appropriate first step is to convene a teleconference. That is to discuss appropriate case management steps, including whether and to what extent further hearing time is required. The Registrar will contact the parties to arrange a teleconference for that purpose.

[95] Costs are reserved, and a timetable will be set in due course.

For the court:



J J M Hassan
Environment Judge

Annexure

Summary of ODP and PDP objectives, policies and assessment matters

ODP

Provisions	*Description*
Obj 4.2.5	subdivision, use and development avoids, remedies or mitigates adverse effects of subdivision use and development on landscape and visual amenity values
Implementing policies	
Pol 1	directs to avoid, remedy or mitigate effects of development and/or subdivision in areas where landscape and visual amenity values are vulnerable to degradation, and to encourage development/subdivision in areas that have greater potential to absorb change. Seeks to ensure development/subdivision harmonises with local topography;
Pol 2	directs to maintain present openness where ONF/Ls[65] have an open character and to recognise and provide for the protection of naturalness and enhance the amenity of views of ONF/Ls from public roads; seeks to avoid subdivision/development where ONLs have little or no capacity to absorb change and allow for limited subdivision/development where there is higher absorption capacity;
Pol 3	directs to avoid subdivision/development on ONF/Ls of the Wakatipu Basin unless the effects on landscape values and natural character and visual amenity values are only minor. Specifies such outcomes are important for buildings and structures and associated roading, the importance of avoiding cumulative deterioration, the importance of protecting and enhancing naturalness and enhancing views from public places and roads. Directs to maintain openness where ONF/Ls have present open character and to remedy and mitigate past inappropriate subdivision/development;
Pol 4	directs that adverse effects of subdivision and development are avoided, remedied, or mitigated in VALs that are highly visible from public areas and visible from public roads. It also requires mitigation of loss of or enhancement of natural character by appropriate planting and landscaping;
Pol 5	directs that subdivision be avoided in the vicinity of ONFs including Slope Hill, unless it will not result in adverse effects that are no more than minor on landscape values, natural character, and visual amenity values;
Pol 8	directs that in applying inter alia Pols 1, 4, and 5 the density of subdivision does not lead to over domestication of the landscape.
Ch 5 Obj 1	to protect character and landscape value by promoting sustainable development and controlling adverse effects of inappropriate activities
Implementing policies	
Pols 1.4 - 1.7	seek to ensure activities occur where the character of the rural area will not be adversely impacted, adverse effects on the District's landscapes are avoided, remedied or mitigated, and the visual coherence of the landscape is preserved.

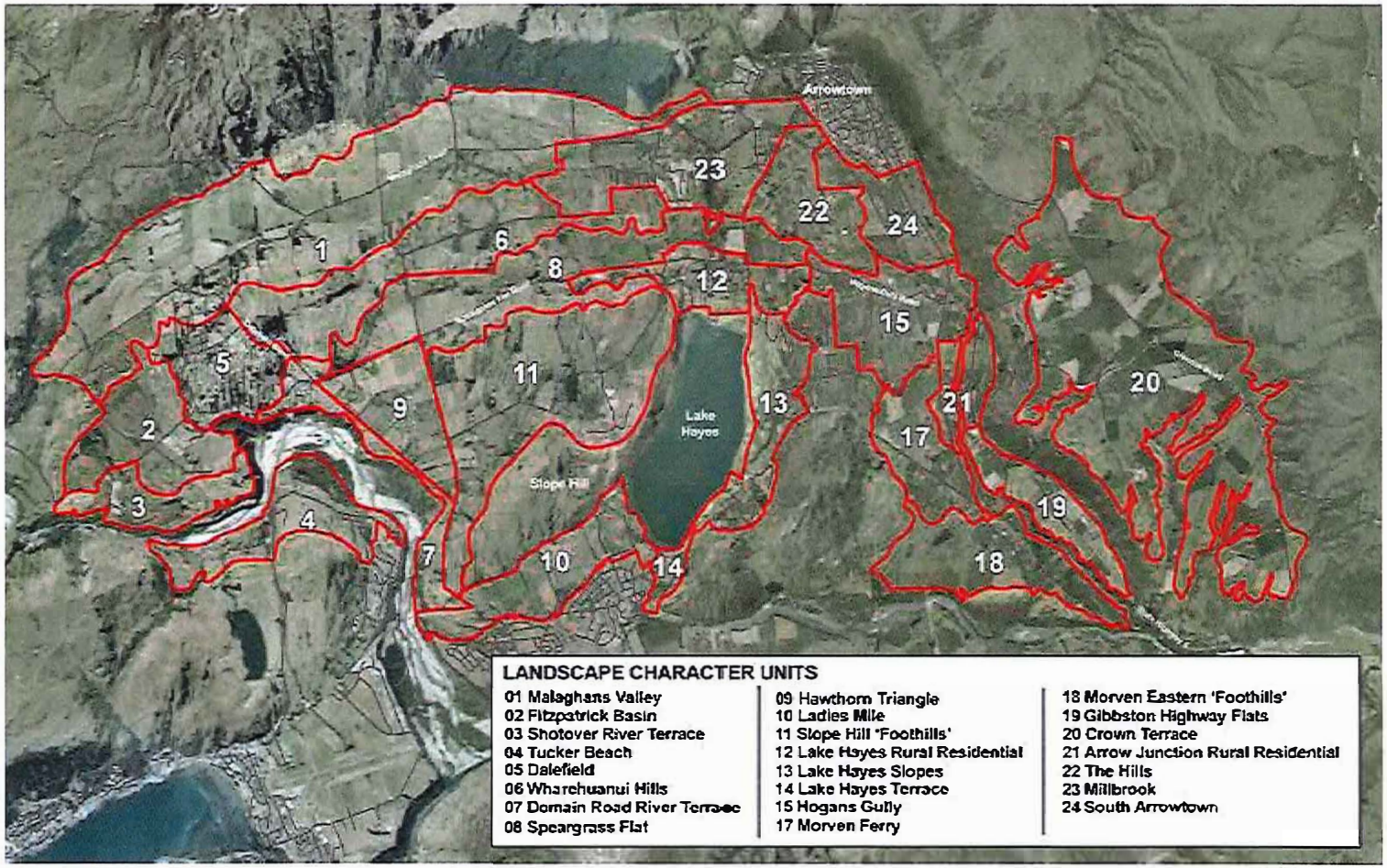
[65] Outstanding Natural Features and Outstanding Natural Landscapes.

Assessment matters and other rules	
R 5.4.2	related assessment matters direct that assessment be as to: (a) effects on natural and pastoral character; (b) visibility of development; (c) form and density of development; (d) cumulative effects of development on the landscape; and (e) rural amenities.

PDP

Provisions	***Description***
Strategic Direction Ch 3 Objectives	
Obj 3.2.5.1	refers to landscape and visual amenity values in relation to ONLs and ONFs.
Implementing policies	
Pol 3.3.23	seeks to identify areas that cannot absorb further change and avoid residential development there.
Pol 3.3.24	seeks to ensure cumulative effects of subdivision and development do not result in areas losing their rural character.
Ch 24 Wakatipu Basin	
Obj 24.2.1	seeks to maintain or enhance landscape character and visual amenity values in the Wakatipu Basin Rural Amenity Zone.
Implementing policies	
Pol 24.2.1.1	requires a minimum net site area of 80 ha be maintained within the Wakatipu Basin Rural Amenity Zone outside of the Precinct.
Pol 24.2.1.2	seeks to ensure subdivision and development is designed to minimise inappropriate modification to the natural landform.
Pol 24.2.1.3	seeks to ensure subdivision and development maintains or enhances landscape character and visual amenity values identified in PDP Sch 24.8 Landscape Character Units.
Pol 24.2.1.4	seeks to maintain or enhance landscape character and visual amenity values associated with the Rural Amenity Zone inter alia by the control of the colour, scale, form, coverage, location (including setbacks from boundaries) and height of buildings and associated infrastructure, vegetation and landscape elements.
Pol 24.2.1.5	requires buildings to be located and designed so they do not compromise the landscape and amenity values and natural character of an ONF or ONL that are adjacent or where the building is in the foreground of views from a public road or reserve of the ONF or ONL.
Pol 24.2.1.11	provides for activities whose built form is subservient to natural landscape elements and that, in areas Schedule 24.8 identifies as having a sense of openness and spaciousness, maintain those qualities.

24.8 Schedule 24.8 Landscape Character Units



Landscape Character Unit	11: Slope Hill 'Foothills'
Landform patterns	Elevated and complex patterning of hills ranging from moderate to steeply sloping in places. Elevated hummock pattern throughout central portion with remnant kettle lakes.
Vegetation patterns	Exotic shelterbelts, woodlots, remnant gully vegetation, and exotic amenity plantings around older rural residential dwellings. Predominantly grazed grass although smaller lots tends to be mown.
Hydrology	Numerous streams, ponds and localised wet areas.
Proximity to ONL/ONF	Adjoins Slope Hill/Lake Hayes ONF.
Adjoins Slope Hill/Lake Hayes ONF.	North: Ridgeline crest. East: Ridgeline crest/ONF. South: Toe of Slope Hill ONF. West: Lower Shotover Road.
Land use	Mix of rural and rural residential.
Settlement patterns	Dwellings generally located to enjoy long-range basin and mountain views. Older rural residential development tends to be well integrated by planting and/or localised landform patterns. Newer rural residential is considerably more exposed, with buildings sited to exploit landform screening (where possible). Clustered development evident in places. Numerous consented but unbuilt platforms (43). Typical lot sizes: evenly distributed mix. One property 100-500ha range, another 50-100ha. Balance typically shared lots or 4-10ha range.
Proximity to key route	Located away from key vehicular route.
Heritage features	No heritage buildings/features identified in PDP
Recreation features	A Council walkway/cycleway runs along Slope Hill Road (forms part of the Queenstown Trail 'Countryside Ride')
Infrastructure features	Reticulated water, sewer and stormwater in places
Existing zoning	PDP: Western slopes overlooking Hawthorn Triangle: Rural Lifestyle (no defensible edges). Balance of the unit: Rural.
Visibility/prominence	Visibility varies across the landscape unit. The elevated nature of the unit and its location adjacent a flat plain on its western side means that this part of the area is visually prominent. The steep hillslopes and escarpment faces edging Speargrass Flat to the north and Lake Hayes to the east, together with Slope Hill itself, serve to limit visibility of the balance of the unit from the wider basin landscape.
Views	Key views relate to the open vistas available from parts of Hawthorn Triangle environs to the western portion of the unit. The unit affords attractive long-range views out over the basin to the surrounding ONL mountain setting as well as open views of the nearby Slope Hill ONF from some public locations.

Enclosure/openness	A variable sense of openness and enclosure. The older and more established rural residential development throughout the elevated slopes on the western side of the unit are reasonably enclosed, despite their elevation. Throughout the central and eastern areas, landform provides containment at a macro scale.
Complexity	Generally, a relatively complex unit due to the landform patterning. Vegetation patterns add to the complexity in places.
Coherence	The coordination of landform and vegetation patterns in places (associated with gully plantings), contributes a degree of landscape coherence. Elsewhere the discordant vegetation and landform patterning means that there is a limited perception of landscape coherence.
Naturalness	A variable sense of naturalness, largely dependent on how well buildings are integrated into the landscape. The large number of consented but unbuilt platforms suggest that a perception of naturalness could reduce appreciably in time.
Sense of Place	Generally, the area reads as a mixed rural and rural residential landscape. The elevated portions of the area read as a rural residential landscape 'at, or very near, its limit'. The lower-lying stream valley area to the east remains largely undeveloped, and functions as somewhat of a 'foil' for the more intensive rural residential landscape associated with the surrounding elevated slopes.
Potential landscape issues and constraints associated with additional development	DoC ownership of part of low lying stream valley to the east. Drainage in places (e.g. low-lying stream valley to east). Potential visibility of development throughout western hillslopes in particular. Importance of the western slopes as a contrasting and highly attractive backdrop to the intensive patterning throughout the Hawthorne Triangle, particularly in views from within the triangle. Importance of existing open views to Slope Hill. Proximity of popular walkway/cycleway route. Environment Court history suggest that the capacity has been fully exploited in most parts of the LCU.
Potential landscape opportunities and benefits associated with additional development	Riparian restoration potential. Large-scaled lots suggest potential for subdivision. Improved landscape legibility via gully and steep slope planting.
Environmental characteristics and visual amenity values to be maintained and enhanced	Landform pattern. Careful integration of buildings with landform and planting. Set back of buildings from ridgeline crests to north and east of unit. Retention of existing open views to Slope Hill.
Capability to absorb additional development	Low

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BEFORE THE ENVIRONMENT COURT

Decision No. A 083 /2007

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	THE MAPARA VALLEY PRESERVATION SOCIETY INCORPORATED
	(ENV-2006-AKL-000668)
	Appellant
AND	TAUPO DISTRICT COUNCIL
	Respondent
AND	PORONUI TRUST
	Applicant

Hearing at: Taupo on 28-30 May and 14 August 2007

Court: Environment Judge R G Whiting (presiding)
Environment Commissioner M P Oliver
Environment Commissioner I D Stewart

Counsel: Mr AFS Vane and Mr N McAdie for the Taupo District Council
Mr A S Menzies and Ms A V Twaddle for Poronui Trust
Mr J Burns and Ms Schlaepher for the Mapara Valley Preservation Society Incorporated

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INTERIM DECISION OF THE ENVIRONMENT COURT

A. The appeal is allowed to the extent that the 6-lot subdivision granted by the Council is disallowed. Accordingly, the Council's decision is quashed.

B. The applicant Trust is given 30 working days from the date of this decision to amend its application.

C. Costs are reserved.

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Introduction

[1] The Mapara Valley Preservation Society Incorporated ("the Society) is a society set up by, and representing those citizens of Mapara Valley who are concerned about their environment. The Society has appealed a decision of the Taupo District Council ("the Council") dated December 2005, given under the delegated authority of a Hearing Commissioner, to grant consent to Poronui Trust ("the Trust") to subdivide a 20.8109-hectare property owned by the Trust. The property is situated on Tukairangi Road in the Mapara Valley.

[2] The Society appealed the Council's decision on a number of grounds. However, the real issue before us was what effect would the proposed density of development have on the landscape, amenity and rural character of the area. The Society argued that the consent would undermine the relevant planning instruments, particularly Variations 19 and 21, which reflect the Council's intention to put in place a strategy for managing growth in the Taupo District.

The proposal

[3] Originally, consent was sought for subdivision of the 20-hectare property into 10 lots, including one access lot. A copy of the original application for subdivision is attached to this decision as Appendix 1. The subdivision was to create two lots of 4 hectares, one lot of 5 hectares, including the existing dwelling, six lots of approximately 1 hectare, and an access lot. After consent was granted and the decision was appealed, the applicant applied to the Council for a complying subdivision (as a controlled activity) to divide the property into four lots: the two proposed four-hectare lots; a 5-hectare lot with the existing house; and one lot of approximately 7.3 hectares. The complying subdivision, is, thus, effectively Stage 1 of the original application.

[4] The controlled subdivision had the consequential effect of reducing the subject of the appeal to the remaining six lots of approximately 1 hectare and the access lot. Attached to this decision as Appendix 2 is a plan of the balance of the original subdivision application less the part approved by the Council.

[5] The 1-hectare lots will be serviced with improved wastewater systems. Water will be provided to the site by Council reticulation. Five lots will share an accessway with the existing house lot and one will use a separate access.

[6] The original subdivision application included extensive tree planting designed to mitigate the introduction of eight new dwellings and ancillary buildings into the existing environment. The proposed planting consists of two types of trees, described in the key on the landscape development concept plan as indigenous evergreen species and exotic deciduous species. The tree plantings are principally grouped along the proposed lot boundaries and road frontage, with more regular spacing (10m apart) along the northern side of the existing driveway and the southern side of part of the consented accessway.

The site and surrounding area

[7] The property is located on Tukairangi Road in the Mapara Valley, to the west of Taupo. It is situated on the eastern side of Tukairangi Road, approximately 1km from the Mapara Road junction.

[8] The site sits at the base of Punatekahi Hill. The larger consented lots and the existing house are all located up the slope of the hill. By contrast, the "cluster of small lots"[1] are located on the valley floor.

[9] To either side of the property are small, dry stock units of approximately 56 hectares and 20 hectares, while directly across the road are three smaller lots ranging in size from 1.3070 to 1.8910 hectares.

[10] The area surrounding the site comprises a mixture of lot sizes. The upper slopes of Punatekahi Hill, to the east and above the subject property, are marked by recent rural residential subdivision: the Marapa Heights Subdivision and another to the south have been consented to. Little planting or mitigation treatment appears to have taken place.

[11] Despite these developments, Ms Absolum, a landscape architect called by the Society, had this to say:

[1] Absolum, EiC, paragraph 4.1.

> Despite these unfortunate developments, the clearly visible landform contributes to the distinctive character of this landscape which is both attractive and memorable. The open, grazed, flat and highly visible flat land of the valley floor and its juxtaposition to the abrupt toe of Punatekahi Hill is highly expressive of the geological forces which have formed it. This landscape is clearly rural with grazing animals, fenced paddocks, shade trees, modest dwellings and small scale farm buildings. It displays high amenity values which, as can be seen from the evidence of two local residents, is highly valued by the local community. It is a predominantly natural landscape and in my opinion, one which is worthy of protection from inappropriate development.[2]

[12] To the north of Tukairangi Road, the lot sizes are larger rural blocks. Proximate to the subject site are eight lots between the road and the Mapara Stream, with lot sizes of 1.5391, 1.9388, 1.3070, 1.8910, 1.7040, 3.851, 4.0015 and 4.58910 hectares.

[13] The flat area of the subject property is divided into a series of fenced paddocks either side of the existing driveway. The paddocks are currently grazed with deer.

The relevant planning instruments

[14] There are two plans under which this application must be considered: the Taupo District Plan and the Proposed District Plan.

[15] The relevant part of the Transitional Plan was made operative on 6 September 1990. It was therefore promulgated before the Resource Management Act 1991 was passed.

[16] The Proposed District Plan was notified in July 2000. A variation to the rural environment section (Variation 8) was notified in October 2004 and the rural environment section was withdrawn. Thus, at the time the application was heard by the Hearing Commissioner, the relevant provisions of the Proposed District Plan included Variation 8.

[17] On 12 January 2007, Variation 8 was withdrawn and Variations 19 and 21 were notified by the Council. Variations 19 and 21 introduced a more prescriptive resource management strategy for managing growth, and the effects of growth, in the rural environment of the Taupo District. Variation 19 provides new subdivision rules and

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[2] Absolum, EiC, paragraph 4.9.

Variation 21 provides new objectives and policies for the management of growth in the Taupo District.

[18] Accordingly, pursuant to clause 16B(2) of the First Schedule to the Act, regard is to be had to the Proposed District Plan as if it had been altered by Variations 19 and 21. Thus, it is not necessary to have regard to the Proposed District Plan as it was before those Variations.[3]

Activity status

[19] It was common ground that at the time of the Council hearing the activity status of the proposal was discretionary under the Proposed District Plan as it then existed. It was also common ground that the application would now be considered as a non-complying activity under the proposed plan as amended by Variations 19 and 21. However, we must have regard to section 88A of the Resource Management Act. Accordingly, the proposal retains the status it had at the time when the application was made: discretionary. The parties agreed that we must have regard to the current provisions of the Proposed District Plan when determining this matter in accordance with section 104(1)(b).

[20] The status under the transitional plan is more problematic. The Council and the Trust argued that under the transitional plan the proposal was discretionary, whereas the Society argued that it was non-complying.

[21] The site of the proposed subdivision is in the Rural A zone of the transitional plan. Subdivisions are not listed under rule 2.4.3 as either predominant or conditional uses. Interestingly, the transitional plan lists a number of "General Conditions" relating to both conditional uses and subdivisions.

[3] See *Awly Investments Ltd v Christchurch City Council*, Environment Court, Decision No. C103/2002.

2.4.4 Conditions Relating to Conditional Uses and Subdivision of Land [refer also Clause 2.4.3.12 "Subdivision of Land"

The following conditions shall apply for conditional uses and subdivisions:

[except those referred to in Ordinance 2.4.3.12(f)"] in a Rural A zone.

[22] Mr Vane, for the Council, and Mr Menzies, for the Trust, argued that by implication subdivisional applications should be treated as conditional uses (now known as discretionary activities) under the transitional plan. However, we think that such a construction is an oversimplification and that the words of this clause need to be read in the context of the subdivision of land provisions set out in clause 2.4.3.12.

[23] Clause 2.4.3.12(c) sets out the design requirements for the Rural A zone. Relevantly, it says:

[c] Subdivision Design Requirements

(i) minimum lot size – 4 ha of useable land [excludes access and land required to be set aside for soil conservation purposes].

...

[24] Clause 2.4.3.12(d) then says:

[d] Grounds on which Council may Decline a Subdivision

The Council **may** decline any rural subdivision which:

fails to meet the criteria for subdivision, and/or is contrary to the rural planning strategy or policy statements [2.2.3 – 2.2.16].

[The highlighting is ours.]

[25] It was argued that the highlighted word ("may") appears to give a wide discretion. At first sight the discretion does appear to be wide. However, it is limited by clause 2.4.3.12(f), which says:

> **(f) Exceptions**
>
> In this zone Council may permit the subdivision of land which does not comply with the subdivision design requirements ***only*** where:
>
> ...
>
> [The highlighting is ours.]

There then follows the four exceptions which alone permit the Council to allow a subdivision that does not comply with the design requirements (ie, minimum lot size of 4 hectares):

(i) where the purpose of the subdivision is intended solely for some purpose of public utility; or

(ii) the proposed lot is severed from the balance of a property in terms of topography, natural features or public road; or

(iii) the proposed lot is part of a Kaianga/Farm Park proposal; or

(iv) the subdivision is for the purpose of erecting a dwelling house on land which is Maori land in multiple ownership.

[26] The proposed subdivision does not come within any of the exceptions set out in clause 2.4.3.12(f). Accordingly the discretion does not apply. To allow the proposal would be contrary to clause 2.4.3.12(f).

[27] While the relevant transitional plan provisions provide for a limited discretion, they do not express any activity categorisation for subdivisions. That being the case, section 405 of the Act "***Transitional Provisions for Subdivisions***", applies. Section 405(2) states:

> Notwithstanding anything in section 374(3) or (4), in respect of any district plan–
>
> **(a) Every subdivision of land that is contrary to the provisions of the district plan shall be deemed to be a non-complying activity in respect of that plan; and**
>
> Every subdivision of land which is subject to a discretion contained in the provisions of that district plan relating to the approval or refusal of a subdivision of land is deemed to be a discretionary activity in respect of that plan; and
>
> Every other subdivision of land shall be deemed to be a controlled activity in respect of that plan.
>
> [The highlighting is ours.]

[28] In our view, section 405(2)(a) applies. The proposed subdivision is contrary to clause 2.4.3.12(f) of the transitional plan. Accordingly, it is to be deemed a non-complying activity under the transitional plan.

[29] Mr Menzies supported by Mr Vane, further argued that section 405 must be read subject to section 77C which was introduced by the 2003 amendment to the Act. Relevantly, section 77C states:

> (1) An application for a resource consent for an activity must, with the necessary modifications, be treated as an application for a resource consent for a discretionary activity if—
>
> (a) Part 3 requires a resource consent to be obtained for an activity and there is no plan or proposed plan, or no relevant rule in a plan or proposed plan; or
>
> (b) a plan or proposed plan requires a resource consent to be obtained for an activity, but does not classify the activity as controlled, restricted discretionary, discretionary, or non-complying under section 77B; or
>
> (c) a rule in a proposed plan describes the activity as a prohibited activity and that rule has not become operative.

[30] Section 77C applies to *"a plan"* or *"a proposed plan"*. Those terms are defined in section 2 of the Act. They do not include *"transitional plans"*. However, as was pointed out, section 373 provides that where an operative district scheme is in force immediately before the date of the commencement of the Act it shall be *"deemed"* a district plan. The Planning Tribunal determined in ***Foodstuffs (Otago Southland)***

Properties Limited v Dunedin City Council[4] that, pursuant to section 373, transitional district plans are generally not to be treated differently from district plans. Accordingly, it was argued that section 77C applies.

[31] The deeming provision section 373 is followed by a further deeming provision, section 374, which deems certain activities to be controlled, discretionary or non-complying activities. However, so far as subdivision is concerned, sections 373 and 374 are subject to another deeming provision, section 405, to which we have already referred. Section 405 relevantly says:

> **Transitional provisions for subdivisions**
>
> ...
>
> (2) Notwithstanding anything in section 374(3) or (4), in respect of any district plan...
>
> [The highlighting is ours.]

[32] In our view, the word "notwithstanding", highlighted by us, shows a clear legislative indication that the transitional provisions for subdivision are to be treated separately from land use activities.

[33] Accordingly, in our view, the subdivision deeming provisions stand alone. To the extent that section 77C may be inconsistent with the deeming provisions for the activity status of subdivisions in transitional plans, the deeming provisions must prevail. Section 77C was introduced by the 2003 amendment to the Act. It did not purport to repeal the transitional provisions of the Act.

[34] If we are wrong, there would exist a conflict between section 405 and section 77C. If that were the case, section 405, being a specific provision dealing with transitional plans, would prevail over the more general provision of section 77C.

[35] Accordingly, we find that section 405 sets out the deemed activity status for subdivisions with respect to the transitional plan. For the reasons already set out we find that the proposal is a non-complying activity.

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[4] [1993] 2 NZRMA 334.

[36] We thus have the position where:

(i) we must assess the proposal as a discretionary activity under the Proposed District Plan but in terms of section 88A(2), we must have regard to the Proposed District Plan which now exists when considering the proposal in accordance with section 104(1)(b); and

(ii) we must assess the proposal as a non-complying activity under the transitional plan.

[37] Where a proposal is subject to a transitional plan and a proposed plan, consent is required under both, and consent under one plan may be given yet denied under the other.[5]

Weight to be given to Variations 19 and 21

[38] All parties agreed that the objectives and policies of Variations 19 and 21 are matters to which we must have regard. The question in issue is what weight should be given to them. In ***Keystone Watch Group v Auckland City Council***[6] this division of the Environment Court (differently constituted) reviewed the principles to be taken into account in determining the weight to be given to proposed plans. The Court said:

> The Act does not accord proposed plans of equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.
>
> The extent to which the provisions of the proposed plan are relevant should be considered on a case by case basis and might include:
>
> (i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision making;
>
> (ii) circumstances of injustice;
>
> (iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.

[39] In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there has been a significant shift in

[5] See *Stokes v The Christchurch City Council,* Environment Court, Decision No. 108/1999.
[6] Environment Court, Decision No. A0007/2001.

Council policy and the new provisions are in accord with Part 2 of the Act, the Court may give more weight to the proposed plan.

[40] The merits of a particular case need to be assessed in their factual context. It is therefore necessary to look at the historical development that led to the Variations being notified.

[41] The original Proposed District Plan, notified in 2000, did not control a minimum site size in the rural environment. This was based on the presumption that subdivision per se did not create environmental effects. The Council seems to have subsequently recognised that subdivision does have the potential to create adverse effects, later introducing Variation 8 to the Proposed District Plan. The effects of subdivision identified in the published background to Variation 8 included:

(i) degrading the amenity and rural character for those who already live there, or frequent the area;

(ii) degrading water quality;

(iii) undermining the mana and quality of features or areas that are of cultural, landscape or natural significance;

(iv) fragmenting the land into smaller land parcels, thereby limiting its potential to be used for some rural activities that require larger economies of scale to be viable.

[42] The methods Variation 8 used to manage these identified adverse effects included:

(i) a minimum lot size (4 hectares) of subdivision as a controlled activity (with other subdivision a discretionary activity);

(ii) allowing the 4 hectares standard to be represented through the concept of "nominal allotments";

(iii) a reviewed rural effects area radius rule; and

(iv) new policies and assessment criteria relating to amenity and rural character, water quality and effects in areas identified as being of cultural, historical, landscape or ecological significance.

[43] At the time the experts filed their evidence with the Court, Variation 8 was still extant. Mr Raeburn, the planning consultant called by the Society, had this to say:

> The provisions of the rural environment are not only intended to manage significant variations in location, landscape and character, but also, surprisingly, the development of new urban growth areas. I am aware of no other district plan in an area subject to intense growth pressure that is so unsophisticated. This lack of direction is regrettable and has in my view encouraged a number of development applications in the district that are quite inappropriate to sustainable management.[7]

This is an opinion with which we entirely agree. Apparently, so too did the Council.

[44] In June 2006, the Council published in three volumes a District Growth Management Strategy called ***Taupo District 2050***. It said in the "Overview":

> Taupo District is facing a critical period in its history as it seeks to balance the reality of continued growth with the desire to maintain the existing character of the District and the high quality environment that it sits within.
>
> Poorly managed growth has the potential to impede economic and tourism development unless managed appropriately. The lack of direction for future growth management will also have significant adverse environmental effects.
>
> Philosophically Taupo District 2050 has meant a shift in the way that the Taupo District Council addresses growth. The Council is seeking to provide greater leadership about the nature and location of growth, moving from a reactive to a proactive approach to growth management.

[45] Variations 19 and 21, notified on 12 January 2007, reflect some of the recommendations made in the District Growth Management Strategy. The Variations have introduced a planning/resource management strategy for managing growth, and the effects of growth, in the Taupo district. This approach is explained in the following new statement to appear in section 1.5 of the Proposed District Plan:

> The Plan, as publicly notified in 2000, had an effects based approach to planning. Land was not identified for urban growth, but rather, resource consent applications could be made for activities on any land provided such developments cause no more than minor adverse effects on the pre-existing

[7] Raeburn, EiC, paragraph 5.2.

> environment. While flexible, this approach made it very difficult to take the cumulative effects of growth into consideration. Following the adoption of TD 2050, which strategically identified areas of future urban growth of the District, the Plan has moved, at a macro level, to strategic zoning. This has been supplemented by changes to the categorisation of activity status and a tightening of subdivision provisions in the rural environment.[8]

[46] Procedures to be adopted through the district plan therefore now expect that, apart from those areas where urban development is expected and provided for through a structure plan process, the remaining rural environment will remain "rural". Subdivision in a rural environment to site sizes less than 4 hectares is a non-complying activity. Even 4 hectare subdivisions will now require discretionary activity consent (controlled activity category is limited to a minimum size of 10 hectares). Clearly, this is a major change from the previous provisions that provided for subdivision to a minimum lot size of 4 hectares as a controlled activity, and below that as a discretionary activity.

[47] We now apply the principles enunciated in ***Keystone*** to this case. We acknowledge that Variations 19 and 21 are at a relatively early stage in the process, with submissions and cross submissions not yet heard. While this is a fact mitigating against greater weight being given to those provisions, it is, as Mr Burns said for the Society, not necessarily determinative.

[48] Variations 19 and 21:

(i) are aimed at implementing a coherent strategy of objectives and policies in the Taupo district plan where none previously existed;

(ii) represent a significant shift in Council policy; and

(iii) are, in contrast to the provisions they are replacing, in accordance with Part 2 of the Act.

[49] We agree with Mr Raeburn[9] that the Variations have introduced a planning/resource management strategy for managing growth, and the effects of growth, in the Taupo district, which up until now has been absent. In our view, Variations 19 and 21 are based on, and informed by, a comprehensive growth strategy which the Council

[8] Variation 21.
[9] Raeburn, EiC, paragraph 3.1.

has carried out for its district. We acknowledge it is not a statutory document. However, it is based upon professional reports the Council has received, including an extensive landscape study referred to by Ms Maresca in her evidence. The TD2050 was publicly notified for consultation in conjunction with the 2006-16 Long Term Council Community Plan using the special consultative procedures under the Local Government Act 2002. We thus find that the Variations should be given substantial respect and weight.

[50] We acknowledge that the position might change and that the Variations are still going through the process of determination of their final form. However, that does not, in our view, outweigh the other factors requiring that the Variations be given substantial weight.

[51] Finally, for completeness, we refer to the remaining factor referred to in the principles of the *Keystone* case, which is "*circumstances of injustice*" or, as it has been referred to in other cases, "*fairness or prejudice*", to the applicants.[10] It is inevitable that sometimes developers will get caught between a change in regulation. Planning is a dynamic institution constantly changing with new ideas and philosophies designed to give effect to the single purpose of the Act – sustainable management. An apparent injustice to an applicant caught between changing "playing fields" needs to be weighed against the manner in which the new provisions show a significant shift in Council policy towards establishing new provisions in the plan that are more in accord with Part II of the Act.

[52] The prejudice to the Trust in this case would be the possibility that the more focussed and directive provisions of Variations 19 and 21 might well preclude further subdivision of the Trust's land than would have been the case under the earlier provisions – provisions that we consider were ineffective and not in accord with the single purpose of the Act. We consider that such injustice, if any, is by no means commensurate with the need to ensure careful and staged growth in accordance with Part 2 of the Act.

Effect on character and amenity

[53] As we have said, the effect on character and amenity is the key issue for our consideration. We were assisted by expert evidence from three qualified landscape

[10] *Peat v Waitakere City Council* Environment Court, Decision No. A082/2004.

architects, and also benefited from the advice of three planners; and, importantly, from the evidence of two local residents.

[54] Ms Maresca, a landscape architect called by the Council, described the Mapara Valley floor within the context of a district-wide landscape assessment. Her evidence did not include a specific analysis of the landscape or visual amenity values of the proposed site, or the effect of the proposal on the local character and amenity. Ms Maresca did not identify the site as part of either an "outstanding natural landscape" or an "amenity landscape"[11].

[55] In cross-examination, Ms Maresca agreed that under her ranking system, the Mapara Valley floor almost scored highly enough to be considered an "amenity landscape" and that there was an element of judgment in scoring within the ranking. She also agreed that the adjoining Punatekahi Hill scored as an amenity landscape and there was an interrelationship ("edge effect") between the two landscapes[12].

[56] Mr Pryor, the landscape architect called by the Trust, described the site and surrounding environment and concluded:

> The landscape context and existing visual environment into which this subdivision is proposed to be located is largely rural in character with pastoral activities – horses, sheep, pigs, cattle and deer; residential dwellings; ancillary buildings and farm sheds set within the lake terraces and adjacent rolling hillsides. The varied rural nature of the land is evident with open pasture, isolated stands of tree plantings and remnant pines, shelterbelt plantings and the extensively vegetated stream gully.[13]

[57] Mr Pryor then went on to identify the key physical components that *"shape the character of the site and its surrounding environment"* as:

- The predominantly rural nature of the area characterised by open pasture interspersed with shelterbelts and isolated stands of pines, wattles, macrocarpa and eucalypt, stream side plantings, amenity plantings of birches, oaks and other exotic specimen trees;
- The scattered rural dwellings, utility and implement sheds and other ancillary structures with varying architectural styles and character set within the landscape;

[11] Maresca, first rebuttal evidence, paragraph 10.
[12] Transcript, pages 64 and 65.
[13] Pryor, EiC, paragraph 3.9.

- Isolated stands of remnant bush interspersed among the surrounding pastoral landscape and planting in the steep gullies;
- The adjacent Mapara Heights subdivision extending across the hillside with dominant roading cuts and highly visible dwellings; and
- The localised roading network.[14]

[58] In his rebuttal evidence Mr Pryor also noted that the landform of the *"flat land hard up against a steeply rising ridge"* is *"highly distinctive"*[15].

[59] Mr Pryor undertook an evaluation of the effect of the proposed subdivision from three viewpoints: Tukairangi Road, Mapara Heights subdivision and Mapara Road. He concluded that the visual impacts of the subdivision would be low for the Mapara Heights and Mapara Road viewpoints and would be initially moderate for the Tukairangi Road viewpoint but would be reduced to low after mitigation tree planting became established[16].

[60] He concluded that:

> Overall the visual and landscape effects would be no more than minor and the proposed subdivision is visually acceptable in the context of the existing landscape and visual environment.[17]

[61] Ms Absolum, the landscape architect called by the Society, agreed that the evaluation methodology used by Mr Pryor was appropriate. But she criticised Mr Pryor for not adequately considering the non-visual elements of the landscape. She also criticised the viewpoints selected by him both on Tukairangi Road and on Mapara Road. These viewpoints, she said, resulted in an underestimate of the visual impacts of the proposed subdivision[18].

[62] Ms Absolum considered the proposed subdivision site from a number of viewpoints in both Tukairangi Road and Mapara Road. She concluded that from both roads there are extensive views of the site which reveal a number of distinctive characteristics including a prevalence of open pasture along the eastern side of

[14] Pryor, EiC, paragraph 4.2.
[15] Pryor, rebuttal evidence, paragraph 2.3.
[16] Pryor, EiC, paragraphs 10.1-10.12.
[17] Pryor, EiC, paragraph 12.6.
[18] Absolum, EiC, paragraphs 5.3-5.7.

Tukairangi Road, with more mixed deciduous and evergreen trees along the Mapara Stream corridor, and houses on both sides of the road surrounded by rural activities[19].

[63] Ms Absolum concluded:

> The eastern side of the Mapara Valley has a highly distinctive landform with an unusual juxtaposition of very flat land hard up against the very steep slopes of the Punatekahi Hill. The area has a distinctive and strongly rural character which is memorable and attractive.

And:

> The proposed subdivision would result in a cluster of residential development incongruously placed in the middle of the open, attractive rural setting, resulting in adverse visual, landscape and amenity effects.[20]

[64] Ms Absolum did not confine her evidence just to visual effects. She included in her landscape assessment the effects of the proposal on amenity. Amenity was the concern of the two local residents who gave evidence for the Society – Mr Chris Marshall and Ms Sarah Foreman.

[65] The definition of amenity values in the Act is *"those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes"*. As Ms Absolum said, it is clear from the use of the words *"...people's appreciation of its pleasantness"* that the reaction of people, their feelings and responses to a place are anticipated to be an integral part of any assessment of impacts on amenity values[21]. The definition of *"amenity values"* in the Act is complemented by the rewording of ***"Issue 1 – Amenity and Character"*** in section 2.3 (Variation 21) of the Proposed District Plan.

[66] The immediate adjacent neighbours provided written approval for the Trust's proposal. Accordingly, direct adverse effects on these neighbours must be disregarded. However, character and amenity are not confined to immediate neighbours. The two local residents who gave evidence were not immediate neighbours.

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[19] Absolum, EiC, paragraphs 5.13-5.15.
[20] Absolum, EiC, paragraphs 7.1 and 7.3.
[21] Absolum, EiC, paragraph 5.13.

[67] Mr Marshall and Ms Foreman canvassed a range of impacts which they considered the development would have on the area including:

(i) Its effect on the existing open space of the area;

(ii) The changes to the incidents and types of noises which will be heard;

(iii) Increased light levels arising from a cluster of dwellings in close proximity to each other with their associated indoor and outdoor lighting; and

(iv) The increase in traffic on what is currently a road relatively free of traffic.

[68] Mr Raeburn, when dealing with the effects on local amenity and character had this to say:

> An area's character is enjoyed most by its local community. It is significant here that a concerned group of the community – the Mapara Valley Preservation Society – has been set up as a result of concerns about past, present and threatened proposals for development in the Mapara Valley area. …That, in itself, is a clear indication that there is something special about this area.

And:

> These qualities are in my opinion explained very well in the evidence of Sarah Foreman and Christopher Marshall. The existing environment has very much a rural "feel" or, as the district plan puts it, a "sense of place". The road is relatively free of traffic, noises are rural noises and what one sees is the odd house positioned in an attractive farm landscape. That "feel" will change to one that in my opinion could not be described as rural. I agree with the opinions expressed in parts 5.1-5.3 of Chris Marshall's evidence that there will be a change in amenity effects such as traffic on the road and what one sees and hears. The character will be more urban than rural.[22]

[69] We have had regard to the evidence adduced by the residents, bearing in mind the risk of subjectivity which underlays the evidence relating to amenity and character. We also have had regard to the evidence relating to the approval of a new school in Tukairangi Road.

[22] Raeburn, EiC, paragraphs 4.12 and 4.13.

Evaluation

[70] In assessing the evidence relating to landscape and rural character and amenity, we were greatly assisted by our site visit. Our assessment has regard to the proposed mitigation measures.

[71] With regard to landscape effects, we agree with the view expressed by Ms Absolum that a further six developed sites on the valley floor will have an obvious and significant impact on the presently open landscape character of the area.

[72] With regard to character and amenity effects, we agree with Mr Raeburn that the proposal would compromise many of the attributes of the area, in that:

(i) the aesthetic attribute of open space would be lost and replaced by a significantly higher incidence of buildings and structural clutter; and

(ii) the resulting character will appear more urban rather than rural – exhibited not only by what one sees as a physical environment but also by what one sees and hears in terms of people-related activities.

Permitted baseline

[73] Having identified the actual and potential effects on the environment of allowing the proposed subdivision, we now consider the extent (if any) to which they are to be disregarded. Section 104(2) of the Act gives us the power to disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

[74] This is known as the permitted baseline effect. The power to disregard the permitted baseline effect is discretionary, not mandatory[23]. Like any discretionary powers conferred on those exercising public functions, a decision to exercise or not to exercise the power to disregard such effects has to be made deliberately and in a measured way for the purpose for which the power is conferred[24].

[23] See *Rodney District Council v Eyres Eco-Park*, HC Auckland, 13/03/2006, Allan J.
[24] *The Chief Executive of the Ministry of Agriculture and Forestry v Waikato District Council*, Environment Court, Decision No. A133/2006.

[75] Before exercising our discretion, we must first identify the activities that the plan permits and the adverse effects this may have on the environment. "Plan" is defined in section 2 of the Act as meaning - *"regional plan or a district plan"*. A "district plan" means an operative plan. The operative plan for the Taupo District Council is the transitional plan. However, pursuant to section 19 of the Act, the bulk and location performance standards contained in the proposed district plan for the rural environment are to be treated as operative because they are beyond challenge.

[76] Surprisingly, neither of the planning consultants called by the applicant Trust and the Council addressed the "permitted baseline" and the exercise of our discretion.

[77] In his opening submissions for the applicant Trust, Mr Menzies confined his remarks on this matter to:

> The present "open rural landscape/view" could be modified as of right by permitted activities under the District Plan, such as buildings associated with rural production, horticultural crops or planting trees.[25]

[78] For the Council, Mr Vane was more explicit in his opening submissions. He told us that under the proposed plan there is no limit on the number or types of use of buildings in the rural environment – referring to rule 4b.1, other than residential dwellings. Their bulk and location is regulated by rule 4b.3:

- 2.5% total site coverage with any building not to exceed 1000m^2;
- 10 metre height;
- 25 metres frontyard; and
- 15 metres other yards.

[79] Mr Vane cross-examined Ms Absolum and Mr Raeburn on the permitted baseline[26] and established that:

- shelterbelts and forestry would be permitted;
- buildings and structures can be placed on the land as of right; and

[25] Menzies, opening submissions, paragraph 5.21(b).
[26] See transcript, pages 112-115 and pages 153-156.

- there is no restriction on non-rural activities such as industrial or commercial activities.

[80] Mr Vane maintained that applying the generous standards of the Proposed District Plan would enable large buildings, such as glasshouses, horse stables, or animal breeding buildings, or industrial and commercial activities, such as trucking businesses to be established as of right. He then submitted:

> It is evident from that analysis that the environment permitted by the transitional district plan and the proposed district plan **does not protect or preserve the relatively open pastoral vista presently existing** on the east side of Tukairangi Road. In short, the existing character and amenity arising from the visual landscape is not immune from permitted change.[27] [The highlighting is ours.]

[81] Mr Vane cross-examined both Ms Absolum and Mr Raeburn on whether the permitted activities were "fanciful". Ms Absolum had this to say about rural buildings and structures:

> This goes back to the question of likely rural structures that might locate there that you had some discussion with both the Judge and Mr Raeburn earlier. Given that we are talking about six houses, six driveways, potentially six separate garages and a separate building for the boat and ride on mower, possibly swimming pools and tennis courts, given the easy contour upon which those things could be constructed, we are talking about a fairly substantial collection of man-made elements that will be instead of the natural elements that are currently there. I think it is if not fanciful, it is getting close to it to assume that the same level of reduction of natural elements will actually arise from what might be described as legitimate rural activities.[28]

[82] Mr Raeburn had this to say about a commercial trucking operation:

> It appears that would be possible. Whether it is non-fanciful I would have to probably carry out an analysis of this location relative to others that may be more appropriate for the establishment of that activity. Recognising that the rural environment covers the bulk of this district and there would be a great number of choices available. My feeling at the moment is that this would not be a likely location for that sort of activity.[29]

---

[27] Vane, opening submissions, paragraph 44.
[28] Transcript, page 155, lines 26-38.
[29] Transcript, page 112, lines 29-34.

And:

> Well if you are asking the question of whether it is fanciful or non-fanciful, you need to look at whether there is any likelihood that that would actually happen. So I am acknowledging that it would be possible but whether it would happen or not, I have a real question about that.[30]

[83] Section 104(2) does not distinguish between fanciful and non-fanciful permitted activities. That distinction may, in appropriate cases, have a bearing on the exercise of discretion[31] but it may not, by any means, be determinative. No guidance is given as to the exercise of the discretion. It is to be exercised on a case-by-case basis by considering the effects as a whole, while not being restricted by the former formulaic approach.

[84] The Environment Court in ***Lyttelton Harbour Landscape Protection Association Incorporated v Christchurch City Council***[32], after analysing a number of cases, summarised in a non-exhaustive way useful questions for the Court to consider when exercising the discretion:

- Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effects can conceivably be drawn?[33]
- Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?[34]
- If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effects, and if not, where do the merits lie over the area of disagreement?[35]
- Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?[36]

---

[30] Transcript, page 113, lines 4-8.
[31] See *Ducks in a Row Limited v Queenstown Lakes District Council*, Environment Court, Decision No. C103/2005, paragraph [33], and *Eyres Eco-Park Limited*, cited above.
[32] Environment Court, Decision No. C055/2006.
[33] Refer *Rem Developments Limited v Rodney District Council*, Environment Court, Decision No. W075/2005, paragraph [12] and *Munro v Christchurch City Council*, Environment Court, Decision No. C071/2005, paragraph [29].
[34] See *New Zealand Fire Service Commission v Tauranga City Council*, Environment Court, Decision No. A158/2004.
[35] See *Whakatipu Environmental Society Inc v Queenstown Lakes District Council*, Environment Court, Decision No. C036/2005.
[36] Refer *Ohope Beach Development Society Incorporated v Whakatane District Council*, Environment Court, Decision No. A136/2002.

- Is a permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not be invoked?[37]

- Might application of the baseline have the effect of overriding Part 2 of the RMA?

[85] In the present case the "permitted baseline" was used by the Trust and the Council to negate the effects on "open space" – a rural amenity identified in the proposed plan which reflects sections 7(c) and (f) of the Act. We exercise our discretion against a comparison with the permitted baseline for the following reasons:

(i) the strategy of the transitional plan, and more importantly the Proposed District Plan, are both structured to provide for subdivision sites at a minimum of 4 hectares;

(ii) the establishment of rural structures which would fit within the plans' strategies are to be expected, whereas six houses, six driveways with the potential for six separate garages, and a separate building for the boat and ride on mower, together with the possibility of swimming pools and tennis courts, do not provide for an adequate comparison; and

(iii) the likelihood of rural structures that might locate there was not canvassed at any length in the evidence and only in cross-examination. We agree with Ms Absolum that, if not fanciful, it is getting close to fanciful to assume that legitimate rural activities would arise that would produce the same level of reduction of natural elements as the proposed subdivision. .

[86] Having found that the proposed subdivision would compromise the landscape, amenity and character values of the area, we now assess the proposal under the transitional plan and the Proposed District Plan as varied by Variations 19 and 21.

[37] Refer *Kapiti Environmental Action Incorporated v Kapiti Coast District Council* [2002] NZRMA 289.

The transitional plan and the proposed district plan

Transitional District Plan

[87] Although Mr R Marshall, a planner called by the Trust, briefly assessed the proposal under the transitional plan and considered it "*sufficiently consistent*" to support granting consent[38], in our view none of the planning experts[39] comprehensively considered the transitional district plan provisions. This reflected the insignificant weight they attached to the plan, preferring to give significant weight to the Proposed District Plan. In response to a request from the Court, counsel for the parties filed a joint memorandum, dated 25 June 2007, listing the relevant provisions of the transitional plan. We have taken that material into account in our consideration of the transitional plan.

[88] Part 2.2.3 of the transitional district plan sets out that the "Rural Planning Strategy" is aimed at:

- Encouraging development of rural land use opportunities.
- Encouraging investment in and conservation of rural land for future generations.
- Encouraging increased production from rural land.
- Encouraging diversification of rural activities.
- Encouraging repopulation of the rural area.
- Supporting rural communities, rural services, and special accommodation and recreation uses.

[89] Also in that part of the plan is further explanation of circumstances that form the basis of this strategy, including:

> The provision of a choice of rural lot sizes and servicing.
>
> i) Rural Residential zone 0.8 ha [2 acres minimum].
> ii) Farm and Farmlet zone 2ha [5 acres minimum].
> iii) Balance Rural areas [Rural A zone], 4.0 ha [10 acres minimum] with provision for farm park/kainga proposals.

[90] Part 2.2.4, Rural Areas Policy Statement: Development and Conservation, sets out that the Council's objective is:

---

[38] Marshall, EiC, paragraphs 4.1-4.5.

[39] Mr R S Marshall for the Trust, Mr P D Raeburn for the Society, and Mr D J Forrest for the Council.

To encourage both development of rural land [in terms of increasing production, diversification of rural land uses], and investment in and conservation of rural land for future generations.

In encouraging increased utilisation of land primary consideration is given to:
a) The limitations of the climate, topography, and soils of the District.
b) The economic needs for diversification in the rural sector and the continued development of new technology.
c) The desirability of encouraging investment in rural land.
d) Encouraging increased production from the land.
e) Matters of National importance relating to the undesirability of sporadic urban subdivision in rural areas.

[91] Part 2.4.3 sets out an explanatory statement for the Rural A zone:

The Rural A zone is the primary Rural zone applying throughout the District. In permitting and restricting uses within the zone the objective of the Council is to support the development of the rural community by providing for a wide range of rural land uses, encouraging the investment in the conservation of rural land, and encouraging the repopulation of the rural area. A wide range of rural development opportunities is provided while ensuring availability of the necessary servicing facilities. Provision is made for reserves and soil and water conservation and recreation accommodation and education.

[92] More specifically relating to subdivision in the Rural A zone, Part 2.4.3.12, which we have referred to earlier, sets out the minimum lot size of 4 hectares of usable land and a shape factor of a 100m diameter circle. It also contains criteria to have regard to in considering the capability of the land and the proposed uses, including:

i) Soil type and land use capability [See Appendix G].
ii) Climatic features in the locality.
iii) Topography.
iv) Established land use.
v) Existing rural services.
vi) Erosion and erosion potential.
vii) The objectives of supporting increased productivity from utilisation of rural land.
viii) The objective of encouraging investment in conservation of rural land for future generations.
ix) The objective of encouraging diversification of rural land use development opportunities.

Evaluation

[93] We acknowledge that the transitional plan was prepared under a former planning regime with different philosophies to those that prevail under the Resource Management Act. Nonetheless, the strategy of the transitional plan is quite clear and is structured to

provide for subdivision of sites to a minimum of 4 hectares in the main Rural A zone, and to provide for sites of less than 4 hectares to be established in the locations zoned for "Farm and Farmlet" and "Rural Residential" (in addition to the more conventional urban and settlement zones). This structure reflects the objectives and policies, particularly of the Rural Areas Section and the Rural A Zone, which emphasise the productive use of rural land.

[94] In our view, to allow this current proposal, which is essentially a concentration of six small lots, each of approximately 1 hectare and likely to be used primarily for rural/residential activities, in this part of the Rural A zone, would be contrary to the strategy of that plan, as expressed through its objectives and policies. We are concerned that to allow this subdivision without there being any unusual circumstances would undermine the integrity of the transitional plan and adversely affect public confidence in its administration.

The proposed district plan

[95] At the request of the Court, the three planners called by the respective parties provided supplementary statements of evidence evaluating the proposed subdivision against the objectives and policies introduced in Variations 19 and 21.

[96] All three of the expert planners agreed that Variations 19 and 21 fundamentally change the way in which the plan considers urban growth by introducing a strategic approach based on the non-statutory document "TD2050", with residential development being centred upon indicative growth areas through a structure planning process and rural residential growth being located at the margins of these areas.

[97] Mr Raeburn considered that due to the density of development, the current proposal should be considered more urban than rural, and should therefore be considered in light of the urban development policies[40]. This view was not supported by either Mr Marshall or Mr Forest.

[98] We consider that the density of development is not urban but is clearly rural residential.

[40] Raeburn, supplementary statement of evidence, paragraph 3.6.

[99] The most relevant objectives and policies were identified as:

Objective 3b.2.1

The protection of the Rural Environment to maintain and enhance the rural amenity and character.

Policy i

Maintain and enhance the amenity and character of the Rural Environment by providing land use performance standards and subdivision rules to manage the scale and density of development.

Policy iii

Maintain the dispersed building character by setting minimum lot sizes.

Objective 3b.2.2

Manage the subdivision of rural land to reflect rural amenity values, rural land use and appropriate levels of infrastructure.

Policy i

Enable the subdivision of rural land in a manner that encourages a diversity of lot sizes that reflects the rural amenity and character of the area, and the landform.

Objective 3b.2.3

Provide for the future urban growth requirements of the Taupo District.

Policy i

Avoid creation of allotments below 10 ha in TD2050 Urban Growth Areas identified in 3e.6 thereby preventing land fragmentation which will adversely affect the ability of the District to provide for the future urban growth needs.

Objective 3e.2.2

Ensure that the subdivision and development of TD2050 Urban Growth Areas for new urban growth occurs by way of a comprehensive TD2050 Structure Plan Process and plan change.

Policy iii

That a range of residential densities, location of rural residential opportunities and the staging of the development of the TD2050 Urban Growth Areas shall be determined by the TD2050 Structure Plan Process as described in Section 3e.7.

[100] The key effects addressed in the relevant objectives and policies are protecting rural amenity and character, and providing a strategic approach for urban growth.

[101] With regard to the effects of the proposal on amenity and character, the advice of the three planners closely followed the evidence of the landscape architects which they adopted. Mr Marshall[41] and Mr Forrest[42] aligned with the views of Mr Pryor that the effects would be no more than minor. Mr Raeburn adopted the evidence of Ms Absolum that the area has considerable landscape value which will be compromised by the proposed subdivision[43].

[102] In line with our finding regarding the effect of the proposal on landscape and rural character and amenity we prefer the evidence of Ms Absolum to that of Mr Pryor. Consequently we find that the proposed application is not consistent with the objectives and policies which are designed to protect the rural area amenity and character.

[103] There is an urban growth area identified in the Mapara Valley. However, this is tentatively identified as being to the north of the site of the proposed subdivision. The plan also makes it clear the boundaries of the urban growth area are to be determined by "future structure planning".[44]

[104] Mr Marshall stated that he was:

> ...strongly of the view that the proposed subdivision or development will not prematurely restrict the extent of the MVUGA (Mapara Valley Urban Growth Area)[45]

[105] However, in our view the proposed subdivision is in direct conflict with proposed plan Objective 3e.2.2 and supporting Policy (iii). We find that the proposal does not support the provisions of the plan which are intended to provide the strategic direction for development through the structure plan process.

[106] Overall, we find that the proposal is not supported by the provisions of the Proposed District Plan as expressed through the relevant objectives and policies.

---

[41] Marshall, supplementary evidence, paragraph 2.3.
[42] Forrest, supplementary evidence, paragraph 4.1.
[43] Raeburn, supplementary evidence, paragraph 3.28.
[44] Variation 21, 3e.6.1.
[45] Marshall, supplementary evidence, paragraph 3.4.4.

Exercise of discretion

[107] In exercising our discretion we are mindful of the Council's decision at first instance. Importantly, in this regard, following the adoption of "TD2050", which strategically identifies areas of future urban growth, the Proposed District Plan has moved on. Importantly, for present purposes, the change of categorisation of activity status and a tightening of subdivision provisions in the rural environment have been introduced into the plan.

[108] We are also conscious of section 7(c) and (f) which are now more robustly reflected in the Proposed District Plan. We are also conscious of the strategy of both plans which are structured to provide for subdivisions of sites to a minimum of 4 hectares in the relevant zone.

[109] We have found that the proposed subdivision will give rise to unacceptable adverse effects on the landscape, amenity and character values of the local environment. Thus, to allow the proposal would, in our view, compromise both plans. With regard to the transitional plan, we find that the proposal would fail to pass through the gateway tests of section 104D. Even if it did it would, as we have said, be contrary to the strategy of the plan. With regard to the Proposed District Plan, to grant this proposal would undermine the strategic direction the Council is now endeavouring to implement.

[110] Accordingly, we allow the appeal to the extent that the proposed subdivision in its present form, as allowed by the Council, should be disallowed. However, during the hearing, as a result of questions from the Court, the expert witnesses for the Society tentatively indicated that a very much less intensive subdivision may be appropriate. To enable the Trust to investigate that possibility, we give an interim decision.

Determination

[111] The appeal is allowed to the extent that the six-lot subdivision granted by the Council is disallowed. Accordingly the Council's decision is quashed.

[112] The Trust is given 30 working days from the date of this decision to amend its application if it so desires. An appropriate application and supporting documents will have to be lodged with the Court and served on all parties within that time.

[113] Costs are reserved.

DATED at Auckland this 1st day of October 2007.

For the Court:

R Gordon Whiting
Environment Judge

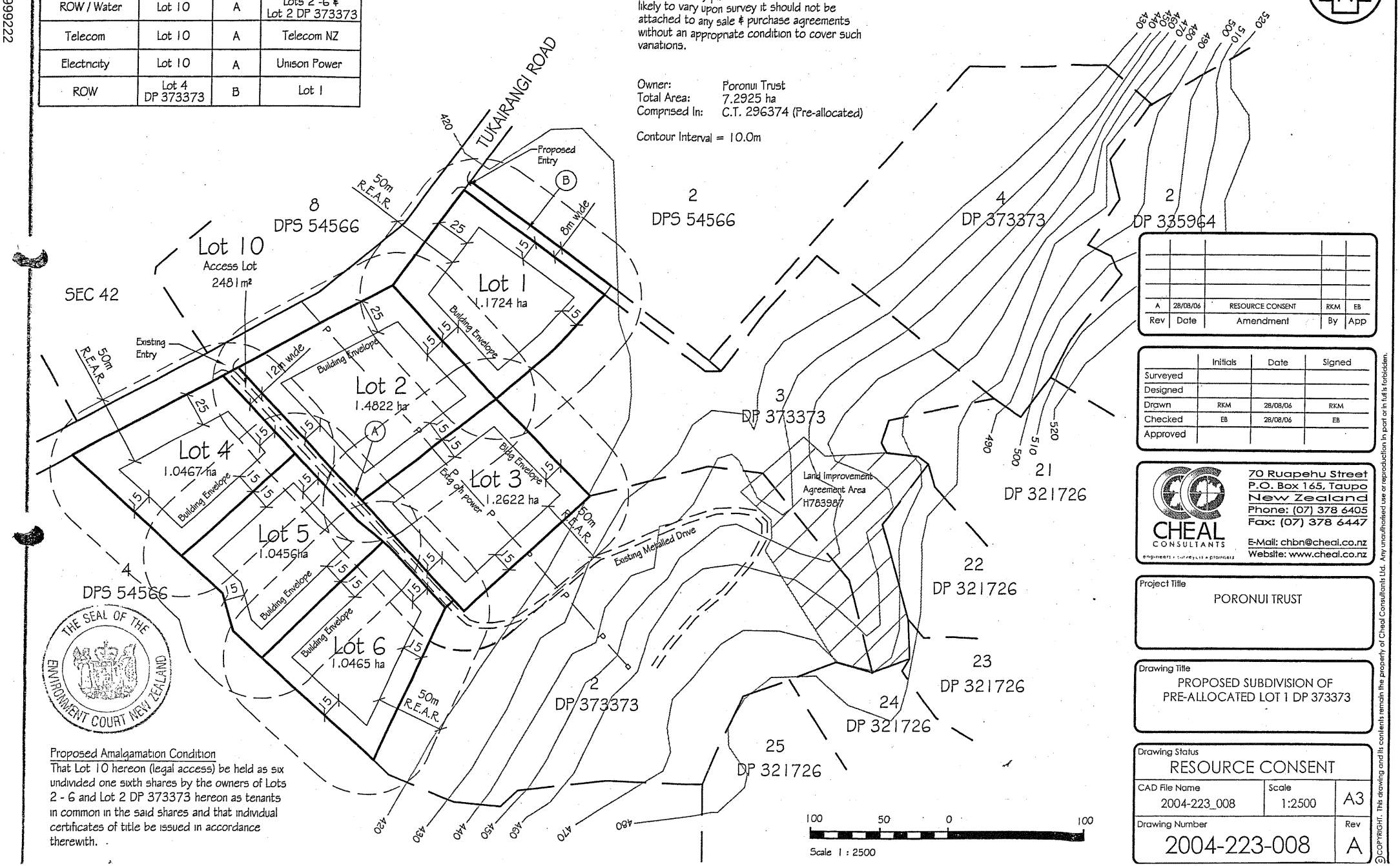
APPENDIX 2

MEMORANDUM OF EASEMENTS			
Purpose	Serv. Tene.	Shown	Dom. Tene.
ROW / Water	Lot 10	A	Lots 2 -6 & Lot 2 DP 373373
Telecom	Lot 10	A	Telecom NZ
Electricity	Lot 10	A	Unison Power
ROW	Lot 4 DP 373373	B	Lot 1

Warning:
This plan has been prepared for the purpose of a resource consent application only. It is not a precise survey plan. As areas and dimensions are likely to vary upon survey it should not be attached to any sale & purchase agreements without an appropriate condition to cover such variations.

Owner: Poronui Trust
Total Area: 7.2925 ha
Comprised In: C.T. 296374 (Pre-allocated)

Contour Interval = 10.0m



Proposed Amalgamation Condition
That Lot 10 hereon (legal access) be held as six undivided one sixth shares by the owners of Lots 2 - 6 and Lot 2 DP 373373 hereon as tenants in common in the said shares and that individual certificates of title be issued in accordance therewith.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

100 50 0 100
Scale 1 : 2500

Rev	Date	Amendment	By	App
A	28/08/06	RESOURCE CONSENT	RKM	EB

	Initials	Date	Signed
Surveyed			
Designed			
Drawn	RKM	28/08/06	RKM
Checked	EB	28/08/06	EB
Approved			

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Project Title
PORONUI TRUST

Drawing Title
PROPOSED SUBDIVISION OF PRE-ALLOCATED LOT 1 DP 373373

Drawing Status
RESOURCE CONSENT

CAD File Name	Scale	
2004-223_008	1:2500	A3
Drawing Number		Rev
2004-223-008		A

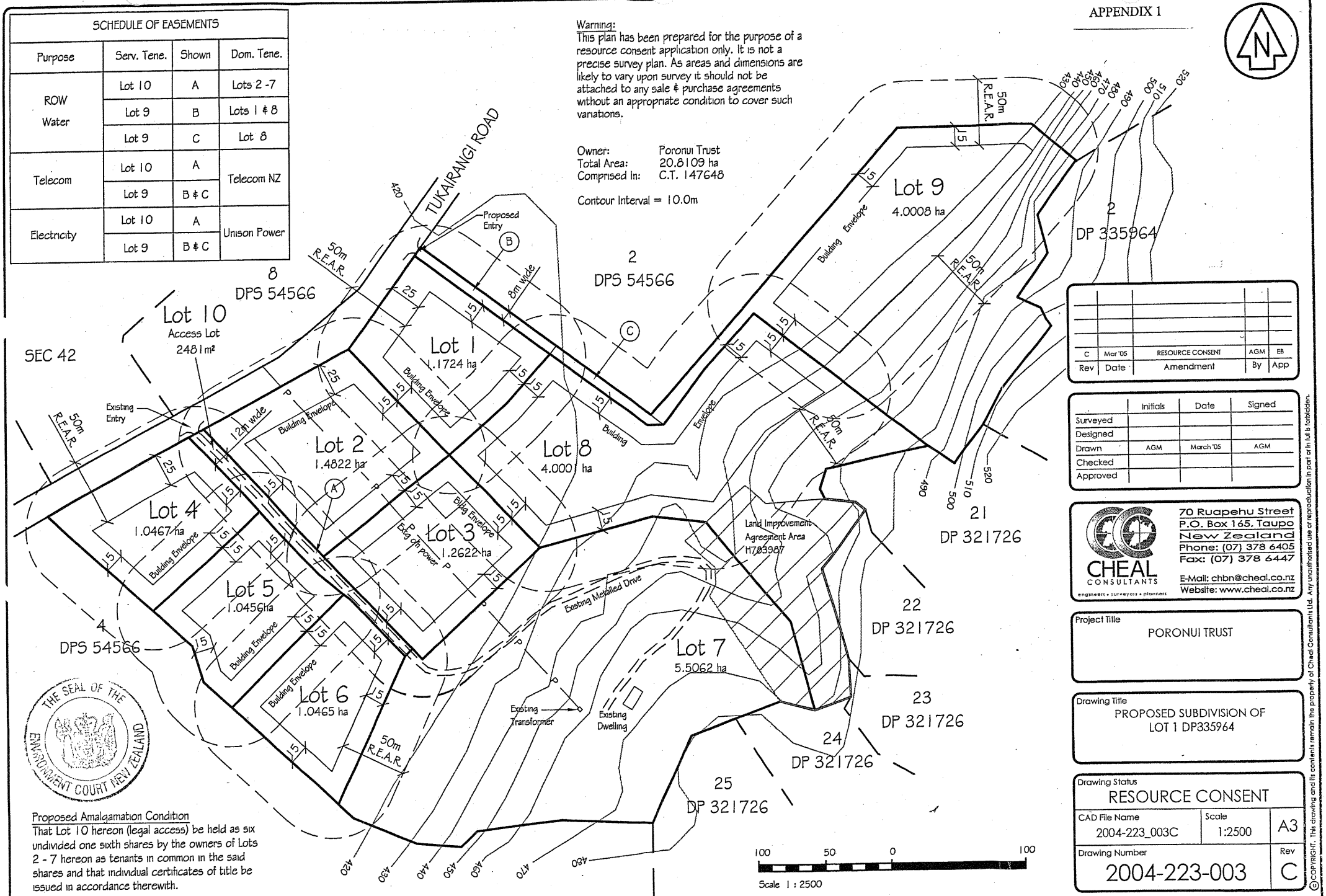
APPENDIX 1

SCHEDULE OF EASEMENTS			
Purpose	Serv. Tene.	Shown	Dom. Tene.
ROW Water	Lot 10	A	Lots 2 -7
	Lot 9	B	Lots 1 & 8
	Lot 9	C	Lot 8
Telecom	Lot 10	A	Telecom NZ
	Lot 9	B & C	
Electricity	Lot 10	A	Unison Power
	Lot 9	B & C	

Warning:
This plan has been prepared for the purpose of a resource consent application only. It is not a precise survey plan. As areas and dimensions are likely to vary upon survey it should not be attached to any sale & purchase agreements without an appropriate condition to cover such variations.

Owner: Poronui Trust
Total Area: 20.8109 ha
Comprised In: C.T. 147648

Contour Interval = 10.0m



Proposed Amalgamation Condition
That Lot 10 hereon (legal access) be held as six undivided one sixth shares by the owners of Lots 2 - 7 hereon as tenants in common in the said shares and that individual certificates of title be issued in accordance therewith.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Rev	Date	Amendment	By	App
C	Mar '05	RESOURCE CONSENT	AGM	EB

	Initials	Date	Signed
Surveyed			
Designed			
Drawn	AGM	March '05	AGM
Checked			
Approved			

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Project Title
PORONUI TRUST

Drawing Title
PROPOSED SUBDIVISION OF LOT 1 DP335964

Drawing Status
RESOURCE CONSENT

CAD File Name	Scale	
2004-223_003C	1:2500	A3
Drawing Number		Rev
2004-223-003		C

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2021] NZEnvC 18

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declarations under section 311 of the Act
BETWEEN	JAMES AND REBECCA HADLEY
	(ENV-2020-CHC-84)
	Applicants
AND	WATERFALL PARK DEVELOPMENTS LIMITED
	First respondent
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Second respondent

Court:	Environment Judge J J M Hassan (Sitting alone pursuant to s309(1) of the Act)
Hearing:	In Chambers at Christchurch
Date of Decision:	5 March 2021
Date of Issue:	5 March 2021

DECISION OF THE ENVIRONMENT COURT

A: The application is granted insofar as declarations are made at [61].

B: Costs are reserved and a timetable is set.

REASONS

Introduction

[1] During 2019 and 2020, Waterfall Park Development Limited ('WPD') planted some trees ('Planting') along the western boundary of some land[1] ('Site') that it owns adjacent to the Queenstown Trail ('Trail').[2] The Trail is administered by the Queenstown Trails Trust and is well used for walking and cycling.[3] It is generally on public road although, in the case of some encroachments into the Site, QLDC has a right-of-way easement.[4] The Site forms part of what is known as 'Ayrburn Farm', a block of three titles comprising some 42.2 ha.[5] The Planting comprises two parallel rows of Leyland Cypress and Portuguese Laurel, of some 250m, and a double row of Mountain Beech, of some 300m. The Portuguese Laurel and Leyland Cypress, planted in May 2020, border the flat and straight section of the Trail from its entrance at Speargrass Flat Road.[6] The Mountain Beech, planted over the 2019/2020 summer, borders the more winding steeper section of the Trail towards Christine Hill. This is as generally shown on the plan in the Annexure.[7]

[2] James and Rebecca Hadley ('Hadleys') live adjacent to the Trail at 509 Speargrass Flat Road, Lake Hayes.[8] They seek declarations under s311, RMA to the following effect:[9]

---

1 Lot 4 Deposited Plan 540788.
2 Notice of opposition for WPD dated 9 July 2020 at [2](a).
3 The QTT is a charitable trust set up by the Council to develop, establish and maintain the interconnected network of trails in the Queenstown Lakes area.
4 C S Meehan affidavit sworn 10 July 2020, Exhibit E.
5 C S Meehan affidavit sworn 10 July 2020 at [10]. Ayrburn Farm includes the Site as well as Lots 2 and 3 DP540788.
6 R Hadley affidavit sworn 26 May 2020 at [14], [15] and [18].
7 The Annexure is a reproduction of Attachment 11 to the affidavit of R Hadley sworn 26 May 2020.
8 Lot 2 DP 447353 held in Record of Title 564544. The applicants also own the adjoining properties at 509A Speargrass Flat Road, Lot 1 DP 447353 held in Record of Title 564543.
9 Application for declarations dated 29 May 2020.

(a) That [Planting][10] work comprising linear planting of:

(i) A row of Leyland Cypress (*Cupresses X Leylandii*) trees planted on or about April 2020 over a distance of approximately 205 metres; and

(ii) A double row of native Mountain Beech trees (*Fuscospora cliffortioides*) planted over summer 2019/2020 over a distance of approximately 300 metres; and

(iii) A row of Portuguese Laurel (*Prunus lusitanica*) planted on or about May 2020 planted inside the row of Leyland Cypress, over a distance of approximately 205 metres …

individually and collectively referred to as the **[Planting]**

carried out adjacent to the western boundary of Lot 4 Deposited Plan 540788 contained within Record of Title 929491 (the **property**) by the First Respondent was a non-complying activity pursuant to rule 24.4.1 of the Queenstown Lakes District Council Proposed District Plan (**PDP**)

(b) The [Planting] was and remains a use of land not expressly authorised by any resource consent and is in breach of section 9(3) of the Act.

(c) That the [Planting] within the property was not pursuant to a farming activity or residential activity as defined in the PDP at the time the [Planting] was carried out.

[3] QLDC[11] supports the Hadleys' application.[12] WPD opposes it.[13] The parties agreed to a hearing on the papers. Evidence and submissions were filed in advance, by affidavit. I undertook a site visit in January 2021, guided by a suggested itinerary provided by the parties.

---

10 The application uses the word 'Landscaping', which I replace with the more neutral term 'Planting'.

11 Queenstown Lakes District Council.

12 QLDC notice of support dated 31 July 2020.

13 WPD notice of opposition dated 9 July 2020.

Statutory framework and legal principles

[4] Any person may apply to the Environment Court for a declaration (s311(1), RMA). The court's powers are discretionary. After hearing the parties, the court may make a declaration modifying what is sought, make another declaration, or decline to make a declaration (s313, RMA). The scope and effect of a declaration are set out in s310, RMA. A declaration may, inter alia, declare whether or not an act (or omission):

(a) is a permitted activity, controlled activity, discretionary activity, non-complying activity or prohibited activity (s310(d)); or
(b) contravenes the RMA, or a rule in a plan or proposed plan (s310(c)).

[5] The applicant bears the onus of proving, on the balance of probabilities, the factual matters needed to justify the declarations sought.[14]

Rules whose interpretation is disputed

[6] It is not in dispute that WPD did not secure resource consent for the Planting. Nor does it assert that it has existing use rights under s10, RMA. The Hadleys would make a case for a declaration of contravention with s9(3), RMA if the Planting contravenes a district plan rule.

[7] The Site is within the proposed Wakatipu Basin Rural Amenity Zone ('WBRAZ') under the district plan. It is accepted that the relevant rules are those of the proposed WBRAZ which are set out in Ch 24. The proposed WBRAZ (including Ch 24) was notified, as part of the district plan review, in November 2017. The version of Ch 24 updated by decisions on submissions ('Decision Version') was ratified by QLDC in March 2019.[15] As QLDC's decisions on Ch 24 have been issued, its rules are in legal effect (which was also the position at the time the Planting was carried out).[16]

---

14 *KB Furniture Ltd v Tauranga District Council* [1993] 3 NZLR 197 (HC).
15 Legal submissions for the Council dated 9 October 2020 at [16].
16 Section 86C(2) RMA.

[8] Tables 24.1 and 24.2 in Ch 24 set out rules that assign activity classifications to listed activities. The proper interpretation of the following rules, and their related definitions, is central to the determination of the application:

(a) r 24.4.2, which provides that "Farming Activity" (as defined) is a permitted activity;

(b) r 24.4.3, which relevantly provides that "the use of land … for residential activity except as otherwise provided for in Table 24.1 and Table 24.2 and subject to the standards in Table 24.3" is a permitted activity; and

(c) r 24.4.1, which provides that "any activity not listed in Tables 24.1 and 24.2" is a non-complying activity.

[9] For "Farming Activity", there are no associated rules specifying performance standards. Rather, a land use qualifies as Farming Activity simply if it comes within the following definition:[17]

> … the use of land and buildings for the primary purpose of the production of vegetative matters and/or commercial livestock. Excludes residential activity, home occupations, factory farming and forestry activity. Means the use of lakes and rivers for access for farming activities.

[10] In this case, the issues centre on whether the Planting is "for the primary purpose of the production of vegetative matters and/or commercial livestock".

[11] "Residential Activity" is relevantly defined to mean:[18]

> the use of land and buildings by people for the purpose of permanent residential accommodation, including all associated accessory buildings, recreational activities and the keeping of domestic livestock.

[12] For Residential Activity, Table 24.2 specifies different activity classifications

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17 PDP Ch 2, p 2-10.

18 PDP Ch 2, p 2-30.

for residential flats. It classifies as a restricted discretionary activity certain clearance of exotic vegetation (including "significant trimming" of vegetation exceeding 4m in height). Further, Table 24.3 specifies standards for certain types of residential activity. Generally, these pertain to buildings and their usage. The standards relate to residential density, building alterations outside a building platform, building material and colours, building size, height and coverage, and building setbacks. Notably, there is a setback standard in relation to the Queenstown Trail for buildings but not for boundary plantings. Table 24.3 also specifies standards in relation to farm buildings, home occupations, retail sales, lighting and glare, residential visitor accommodation and homestays. Breach of these specified standards triggers a different activity classification requiring consent to be secured.

[13] In summary, the positions of the parties are as follows:

(a) the Hadleys say the Planting is a non-complying activity under r 24.4.1;
(b) QLDC agrees;
(c) WPD says that the Planting is a permitted activity under r 24.4.2.

Principles as to the interpretation of district plan rules

[14] The interpretation of plan rules is according to principles for the interpretation of subordinate statutory instruments, including as expressed in the Interpretation Act 1999. The Environment Court in *Auckland Council v J Budden and ors*[19] succinctly summarised those principles, including as expressed in the leading Court of Appeal decisions in *Rattray*[20] and *Powell*:[21]

> [36] The principles for the interpretation of a subordinate RMA planning instrument are also well settled and not contentious. We are guided by the Interpretation Act 1999 ('IA'), particularly s 5 on purposive interpretation. The principles are also as set out in the leading Court of Appeal authorities of *Rattray*

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19 [2017] NZEnvC 209 at [36]-[37].
20 *J Rattray and Son Ltd v Christchurch City Council* (1984) 10 NZPTA 59 at 61.
21 *Powell v Dunedin City Council* [2005] NZRMA 174 (CA) at [35].

(decided pre-RMA) and the more recent decision in *Powell* (where *Rattray* was applied and interpreted in relation to an RMA district plan matter). In particular, we apply the approach described in the following passage in *Powell*:

> ... while we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray,* regard must be had to the immediate context ... and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Rattray* or with the requirements of the Interpretation Act.
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> [37] We add that, for subordinate legislation, where examination of the immediate context of the plan leaves some uncertainty, it is also permissible to consider provisions in light of the purpose they fulfil in the authorising legislation (in this case, the RMA). Similarly, the fact that a district plan is to give effect to a [regional policy statement] can make the latter of some relevance to the interpretation of the former.

[15] In *Brownlee v Christchurch City Council,* the Environment Court identified a broad list of factors to be considered when interpreting rules in a plan.[22] The High Court in *North Canterbury Clay Target Association Incorporated v Waimakariri District Council*[23] affirmed those factors as being:

- the text of the relevant provision in its immediate context;
- the purpose of the provision;
- the context and scheme of the plan and any other indications in it;
- the history of the plan;

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22 *Brownlee v Christchurch City Council* [2001] NZRMA 539 at [25].

23 [2014] NZHC 3021 at [18] endorsing the approach of the Environment Court in *Queenstown River Surfing Limited v Central Otago District Council* [2006] NZRMA 1 at [7] which summarised the factors from *Brownlee* and *First Light Holdings Limited v Thames Coromandel District Council* A130/2004.

- the purpose and scheme of the Act;
- any other permissible guides to meaning.

The evidence

[16] The affidavit evidence is as follows:

Hadleys	Ms Rebecca Hadley	Also on behalf of Mr James Hadley, sworn 26 May 2020
	Mr J A Glendining	Farm practices expert, former Farm Manager at Ayrburn Farm, affirmed 17 June 2020
	Mr A Cleland	Horticultural expert, sworn 18 June 2020
QLDC	Ms B M Gilbert	Landscape architect expert, sworn 31 July 2020
	Ms A M Standish	Planning expert, sworn 3 August 2020
WPD	Mr C S Meehan	WDC director, sworn 10 July 2020

[17] WPD owns Ayrburn Farm and the adjacent Waterfall Park. Mr Meehan explains that Ayrburn Farm is a remnant of a larger farm property and was being farmed when WPD purchased it and that continues today. However, he acknowledges that it has "little, if any, value as an economically viable farming property on its own, due to its small size".[24] That is reflected in the contractual arrangements in place for its farming usage. These were entered into in December 2017 and remain in place.

[18] A copy of the licence agreement, dated 11 December 2017, is attached to Mr Meehan's affidavit together with a "Schedule of Ayrburn Farming Activities December 2017 – April 2020". The agreement is between Mr and Mrs Scott (the owners of Loch Linnhe Station) and Winton Partners (an associated company of WPD). It allows the Scotts to graze sheep (and also to undertake sheep management, cropping, irrigation, haymaking and fencing) subject to various specified obligations "in lieu of rental payments". The agreement also records that Winton's purpose in enabling this grazing on Ayrburn Farm is to "control the growth of vegetation by

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24 C S Meehan affidavit sworn 10 July 2020 at [11].

grazing sheep, to increase the visual amenity values". There is no mention of shelterbelts. The schedule records the Scotts have, from time to time, transported stock to and from Ayrburn Farm and used it for grazing and cutting and baling lucerne and hay.

[19] Mr Meehan attests:[25]

> Winton wanted to ensure that the properties would be properly maintained and looked after. Winton was not concerned about how intensively or productively Ayrburn Farm was farmed and managed. It was left to [Loch Linnhe] Station to decide how to manage Ayrburn Farm, and what extent of productive farming activities were carried out on Ayrburn Farm, provided that Ayrburn Farm was generally looked after and kept in a tidy state as required by the Arrangement. Winton's objective was simply to ensure that the properties were adequately and properly looked after while Winton pursued separate property development aspirations for the properties.

[20] As a neighbour, Ms Hadley observes the Site on a daily basis. She has not observed any farming activity that might benefit from tree shelter being established.[26]

[21] WPD is pursuing a staged development strategy for Ayrburn Farm and Waterfall Park.[27] To those ends, it has resource consent for, and has largely completed construction of, an access road to serve its intended developments. Those include a 380-room hotel at Waterfall Park for which it has secured consent. For this land, there is a bespoke proposed Waterfall Park Zone included in the district plan review. It enables development of up to 100 residential units, plus approximately 114 visitor accommodation units. For Ayrburn Farm, including the Site, WPD has submitted in the plan review, seeking a rezoning that would enable up to 200 residential homes, a retirement village of equivalent size, or rural lifestyle development.

[22] Mr Meehan says the future of Ayrburn Farm is dependent on the outcome of

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25 C S Meehan affidavit sworn 10 July 2020 at [25].
26 R Hadley affidavit sworn 26 May 2020 at [19].
27 C S Meehan affidavit sworn 10 July 2020 at [17]–[18].

the plan review process. If WPD does not achieve the rezoning it seeks, the options for use of the land would be "essentially limited to farming options". Should WPD then elect to sell the land, the future of Ayrburn Farm would depend on what any future purchaser would pursue.[28] WPD wanted to make the Site attractive to potential buyers and private for future residents.[29]

[23] Mr Glendining was the farm manager at Ayrburn Farm between 2005 and 2017. He does not consider the Planting serves any useful farming shelterbelt purpose. That is because the Site already has the benefit of existing shelter from planting on adjoining properties as well as natural wind protection from the topography of the land.[30] He further comments that the evergreen species chosen, particularly Leyland Cypress, would create frost issues in the winter and block the wind that helps keep stock cool in summer. Were a shelterbelt needed, he would have recommended a single row of deciduous trees.[31]

[24] Mr Cleland agrees that the Planting is neither necessary nor suitable as a shelterbelt.[32] He notes that Leyland Cypress would be dense and reach a height of 5m at maturity. He says there would be issues as to root competition and dominance given the proximity to the Portuguese Laurel, saying the Leyland Cypress will quickly out-compete the former.[33] As Mountain Beech is evergreen, it would result in shading.[34] In his view, the double row would effectively create a screen not a shelter belt.[35] As the Planting would block morning winter sun (until approximately 1 pm), it would impede the drying of the Trail. That would give rise to "frost heave" (which is the uplift of soil) and make the Trail muddy.[36] As context for that last point, the site visit revealed that the Trail has a clay/soil base and pea gravel surface over much of its relevant length. Like Mr Glendining, were Mr Cleland to consider a shelterbelt

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28 C S Meehan affidavit sworn 10 July 2020 at [26]–[31].
29 C S Meehan affidavit sworn 10 July 2020 at [33]–[39].
30 J A Glendining affidavit affirmed 17 June 2020 at [13].
31 J A Glendining affidavit affirmed 17 June 2020 at [19].
32 A Cleland affidavit sworn 18 June 2020 at [28].
33 A Cleland affidavit sworn 18 June 2020 at [19].
34 A Cleland affidavit sworn 18 June 2020 at [22].
35 A Cleland affidavit sworn 18 June 2020 at [24].
36 A Cleland affidavit sworn 18 June 2020 at [18].

was needed for farming of the Site, he would have recommended tall deciduous trees, such as poplar and alder. These species are used in the shelterbelt to the west of the Trail.

[25] Mr Meehan acknowledges that he is not a farmer. However, he comments that he has purchased enough farms to be knowledgeable about them. He deposes that Ayrburn Farm is exposed to the relatively frequent cold westerly and south-westerly winds. As such, he does not agree that deciduous trees would be more suitable as shelterbelts, commenting that they would offer little shelter in winter when leafless.[37] He says that Leyland Cypress is a common boundary and shelterbelt planting in the Wakatipu Basin and there are also many examples of similar evergreen species on farming properties in the area.[38] He says the Mountain Beech was chosen as it will result in a natural look, more appropriate to the relatively steep slope of Christine's Hill.[39] He comments that, in addition to giving shelter to stock from the prevailing winds, the Planting would help protect stock from the adverse presence of people and/or dogs on the Trail.[40] As for maintenance, he comments that the Planting would be easily able to be trimmed to desired heights and widths.[41]

[26] He points out that he could not rely on existing shelterbelts on nearby properties as their retention is not within his control.

[27] Ms Gilbert, a landscape architect, opines that, in character terms, the Planting is akin to screen planting or the ornamental type of planting associated with rural residential living, rather than a shelterbelt. That is in terms of the choice of species and their large grade nature, together with their location and arrangement. [42]

[28] She points out that the only existing dwelling on the Site is at a considerable distance from the Planting and is surrounded by a "generous patterning of large-scale

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37 C S Meehan affidavit sworn 10 July 2020 at [47].
38 C S Meehan affidavit sworn 10 July 2020 at [41].
39 C S Meehan affidavit sworn 10 July 2020 at [53].
40 C S Meehan affidavit sworn 10 July 2020 at [33].
41 C S Meehan affidavit sworn 10 July 2020 at [44] and [46].
42 B Gilbert affidavit sworn 31 July 2020 at [44].

mature trees". As such, she says the Planting does not offer any wind protection, visual screening, and/or privacy to that dwelling.[43]

[29] QLDC's planner, Ms Standish, accepts Mr Meehan's evidence that the Site is being used for production and livestock purposes and that the primary present use of the Site is farming. However, she does not consider the Planting to be within the plan's definition of "Farming Activity". She points out that the definition requires that the primary purpose of the land use be "the production of vegetative matters and/or commercial livestock". From her review of the evidence, she does not consider the Planting to be for that primary purpose. Her analysis of the relevant Ch 24 objectives and policies reinforces her opinion that the Planting is a non-complying activity.[44]

Submissions

[30] In summary:

(a) the Hadleys submit that the Planting is not Farming Activity because it is not "for the primary purpose of the production of vegetative matters and/or commercial livestock" and it is not Residential Activity because "there are no residential units or buildings" located on the Site and as such "there is no 'permanent residential accommodation'". Hence, they say the Planting is a non-complying activity under r 24.4.1;

(b) QLDC essentially agrees with that;

(c) WPD submits that the Planting is Farming Activity and hence a permitted activity under r 24.4.2 (not claiming that it is also permitted as a form of Residential Activity).

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43 B Gilbert affidavit sworn 31 July 2020 at [46].

44 A M Standish affidavit sworn 3 August 2020 at [50] and [51].

The Hadleys

[31] For the Hadleys, Mr Page submits that the proper activity classification for the Planting must be determined on the facts prevailing at the time the Planting was undertaken. He points out that the grazing licence and associated schedule (attached to Mr Meehan's evidence) reveal that the Planting was not for any farming purpose undertaken by the Scotts.[45] At the time the Planting was undertaken, therefore, it was not for the primary purpose of "the production of vegetative matters and/or commercial livestock." He adds that Messrs Cleland and Glendining consider that the Planting does not serve any useful farming purpose. Mr Page also refers to Ms Gilbert's affidavit in submitting that the true purpose of the Planting is to screen buildings and activities that WPD would intend to establish according to its development strategy.

[32] For all those reasons, Mr Page submits that the Planting must default to a non-complying activity under r 24.4.1.[46]

[33] Mr Page submits that WPD is simply trying to bypass capacity for its landscape screening to be regulated or controlled under consenting processes and related plan rules. [47] He submits that it is invalid for WPD to seek to rely on what any future landowner may choose to do on the Site in the event that its rezoning ambitions fail. He characterises WPD's position on those matters as purely speculative.

QLDC

[34] For QLDC, Ms Hockly submits that it is relevant to consider the interpretation of r 24.4.2 and the meaning of "primary purpose" in light of the approach to statutory interpretation outlined in *Powell.* Taking the plain meaning of the words "primary purpose" in the context of the definition and related rules, Ms Hockly submits that a

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45 Submissions on behalf of the applicants dated 9 October 2020 at [70].
46 Submissions on behalf of the applicants dated 9 October 2020 at [62].
47 Submissions on behalf of the applicants dated 9 October 2020 at [40]–[53].

relatively high threshold must be met to establish that a land use has such a purpose.[48] She describes this as necessitating a "direct" "nexus" between the land use activity and the production of vegetative matters/commercial livestock. She further submits that "Farming Activity", as defined for the purposes of r 24.4.2, does not encompass uses of land which are merely ancillary to production of vegetative matters and commercial livestock. Rather, whether the activity is maintenance of a tractor or planting of vegetation, it would be within the definition of Farming Activity only if the primary purpose of the activity is production.[49]

[35] Ms Hockly submits that QLDC's interpretation of "primary purpose" in the definition of "Farming Activity" is consistent with the relevant district plan objectives and policies as identified by Ms Standish.

WPD

[36] For WPD, Mr Goldsmith submits that it is legitimate for his client to prepare for the prospect that its rezoning initiatives fail. As such, it was entitled to undertake the Planting so as to make the Site attractive for any purchaser who would undertake farming use. He notes that the Site presently has very limited capacity to be developed for Residential Activity. Unless it is rezoned as WPD seeks, its future potential would be largely confined to farming usage. He points out that WPD faces significant opposition to its rezoning submission, including from QLDC and Otago Regional Council and a number of other submitters. Hence, it is far from certain that WPD would realise its rezoning ambitions.

[37] Mr Goldsmith submits that the Planting is ancillary to a future Farming Activity and is properly to be treated as part of a permitted Farming Activity.[50] He submits that it would not be logical to treat the Planting as non-complying now only to have it become a permitted activity in future once the farming it would benefit is

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48 Submissions on behalf of the Council dated 9 October 2020 at [35].
49 Reply submissions on behalf of the Council dated 4 November 2020 at [23].
50 Submissions on behalf of WPD dated 23 October 2020 at [60]–[66].

established.[51] As for the reference in the definition of 'Farming Activity' to 'primary purpose', Mr Goldsmith submits that this does not have the constraining consequences claimed by QLDC. Rather, he says those words in the definition simply provide a ranking.[52] They still allow for a range of activities to be carried out on a rural property ancillary to a Farming Activity.[53]

[38] Mr Goldsmith criticises Ms Standish's interpretation of the plan rules, submitting that it does not accord with statutory interpretation principles. The thrust of his submission is that Ms Standish invalidly divines a plan intention to prevent the planting of trees "other than trees which are part of a Farming Activity or a Residential Activity" by relying simply on "generic references" in Obj 24.2.1 and Pol 24.2.1.6 to "maintaining or enhancing landscape, character and visual amenity values" and the default consent status rule.[54] He characterises the interpretations offered by other counsel as similarly flawed, albeit in a context of an "almost complete policy vacuum in the WBRAZ".[55] He submits that these alternative interpretations give rise to potentially "ridiculous" policy consequences beyond the WBRAZ.[56] The interpretations would have implications for how activities in all of the Rural zones (comprising the Rural Zone – Ch 21, the Rural Residential and Rural Lifestyle Zones – Ch 22 and the WBRAZ) could be treated.[57]

Replies

[39] In reply, Mr Page says the Hadleys' approach has been misconstrued. The interpretation of a rule must commence with the plain reading of the rule in its immediate context, before considering the wider policy framework that the rule implements.[58] He further submits that WPD's approach of "measuring regulatory compliance according to whether the shelterbelt is useful is problematic" in that it

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51 Submissions on behalf of WPD dated 23 October 2020 at [59].
52 Submissions on behalf of WPD dated 23 October 2020 at [38].
53 Submissions on behalf of WPD dated 23 October 2020 at [40].
54 Submissions on behalf of WPD dated 23 October 2020 at [41].
55 Submissions on behalf of WPD dated 23 October 2020 at [29].
56 Submissions on behalf of WPD dated 23 October 2020 at [67].
57 Submissions on behalf of WPD dated 23 October 2020 at [7].
58 Reply submissions on behalf of the applicants dated 4 November 2020 at [5]–[7].

would lead to differences of opinion on acceptable utility and thus uncertainty.[59] He notes that rules should be certain and the point of evaluating the utility of the shelterbelt in this case is to test the credibility of any claim that "what is evidently Landscaping is in fact serving a permitted purpose".

[40] In reply, Ms Hockly points out that Ms Standish does not rely simply on the fact that the Planting is being carried out in advance of any intended future farming. Rather, she also draws from Mr Meehan's acknowledgement that "he has a number of purposes for the Planting".[60] Hence, the Planting does not have either a present or future primary purpose of Farming Activity. Mr Hockly further observes that Mr Goldsmith has not substantiated his claims that there would be broad ranging consequences beyond simply the WBRAZ.[61]

Discussion

[41] There is some uncertainty in the degree to which the rules in Ch 24 seek to control land uses which do not involve usage of associated buildings. Specifically, for Farming Activity, that is in relation to whether vegetation planted in anticipation of potential future production of vegetative matters and/or commercial livestock is a permitted activity.

[42] Additionally, while WPD did not argue that the Planting is a form of Residential Activity, there is some uncertainty as to how rules apply when there are no associated residential units on site. Mr Page interprets the presence of such units as a prerequisite for being able to treat a land use as a form of permitted Residential Activity. There is support for that interpretation in the fact that the relevant definition specifies a prerequisite that the use of land and buildings must be "for the purpose of permanent residential accommodation". However, that purpose does not necessarily exclude the possibility of things being done in preparation for that purpose. Furthermore, the permitted activity rule would appear to assign permitted activity

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59 Submissions on behalf of the applicants dated 9 October 2020 at [69].
60 Reply submissions on behalf of the Council dated 4 November 2020 at [17].
61 Reply submissions on behalf of the Council dated 4 November 2020 at [8].

status to any "use of land … for residential activity" subject to various performance standards which may not be triggered for all types of land use undertaken in preparation for permanent residential accommodation.

[43] In view of those uncertainties, it is important that I consider the rules in the context of related objectives and policies whose purpose the rules (and their related definitions) serve to achieve (s76, RMA).

[44] The expressed purpose of the WBRAZ is to maintain and enhance the character and amenity of the Wakatipu Basin.[62] Within the WBRAZ, areas are allocated to mapped Landscape Character Units ('LCUs'). The Site is located within LCU 8 which is described as having a low absorption capacity in terms of additional development. Those LCUs are in order to recognise relevant landscape character and visual amenity values so as to give proper context for the application of related objectives and policies and their serving rules.

[45] In Ch 24, Obj 24.2.1 is that "landscape character and visual amenity values in the Wakatipu Basin Rural Amenity Zone are maintained or enhanced". Related Policies:

(a) seek to maintain or enhance landscape character and visual amenity values. That includes Pol 24.2.1.4 which, inter alia, specifies this is to be by controlling the colour, scale, form, coverage, location (including setbacks from boundaries) and height of buildings and associated infrastructure, **vegetation** and landscape elements" (my **emphasis**); and

(b) provide for farming and other activities that rely on the rural land resource, but "subject to maintaining or enhancing landscape character and visual amenity values" (Pol 24.2.1.6);

(c) allow for rural residential subdivision and development but on a similarly

62 PDP Ch 24 at 24.1, Zone Purpose.

qualified basis (e.g. Pols 24.2.5.1[63], 24.2.5.2).[64]

[46] Hence, Ch 24 recognises the special landscape character and related visual amenity values of the Wakatipu Basin and its setting, and their vulnerability to change, and seeks to give priority to maintaining and enhancing that character and values. That is to be achieved through the related rules as to including activity classifications. The rules are intended to allow for careful scrutiny and control of not only subdivision and development, but also the undertaking of day-to-day land uses and activities. That can include the planting of vegetation, as signalled in Pol 24.2.1.6.

[47] For "Farming Activity", there are no associated rules specifying performance standards. Rather, a land use qualifies as Farming Activity simply if it comes within the following definition:[65]

> ... the use of land and buildings for the primary purpose of the production of vegetative matters and/or commercial livestock. Excludes residential activity, home occupations, factory farming and forestry activity. Means the use of lakes and rivers for access for farming activities.

[48] The words "primary purpose" are intentional and have their ordinary meanings. They direct attention to the purpose served by the land use itself. In ordinary usage, "purpose" is "an object to be attained or thing intended" and "primary" qualifies that. The "primary purpose" is the purpose of "first importance" or the "chief" purpose.[66] Hence, close examination is intended of both the land use in issue and what it is primarily intended to serve.

[49] An intended land use (including planting of trees others than forestry) will not

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63 Provide for rural living, subdivision, development and use of land where it maintains or enhances the landscape character and visual amenity values identified in Schedule 24.8 – Landscape Character Units.

64 Promote design-led and innovative patterns of subdivision and development that maintain or enhance the landscape character and visual amenity values of the Wakatipu Basin overall.

65 PDP Ch 2, p 2-10.

66 New Zealand Oxford Dictionary.

qualify as permitted activity unless its primary purpose is demonstrated to be the production of vegetative matter and/or commercial livestock. As noted, that stringency in land use control recognises the vulnerability of the landscape character and amenity values of the Wakatipu Basin and its setting to change. In regard to the Site, that is in the context of LCU 8 which is identified as having a low absorption capacity in terms of additional development. More broadly, it is in a context that recognises that even activities such as boundary planting can prejudice the ability to maintain or enhance the Basin's landscape character and visual amenity values.

[50] Hence, it is a deliberate aspect of the design of Ch 24 that any land use that does not meet the 'primary purpose' test (or otherwise qualify as a permitted activity) defaults to non-complying activity. That is in order to ensure that consent applications for such activities are made and are then subject to the s104D RMA threshold test for consentability. All such applications are intended to be rigorously scrutinised with reference to their adverse effects and compatibility or otherwise with relevant district plan objectives and policies. That stringency of control is in order to serve Ch 24's purposes for the maintenance or enhancement of the landscape character and visual amenity values of the Basin and its LCUs.

[51] As to whether the Planting is "for the primary purpose of the production of vegetative matters and/or commercial livestock", it is clear that it is not needed for the relatively limited grazing being undertaken on the Site at present. It is up to the licensee what grazing use is made of the Site so long as it remains tidy. There are no obligations or expectations set under the grazing licence in regard to any shelterbelt planting. Nor is any rent required to be paid. In any case, the Planting is some years away from providing any effective shelter either for the production of vegetative matter or commercial livestock. Hence, if the question of whether the Planting comes within the definition of Farming Activity was to be determined only by reference to present farming activity, the answer would readily be that the Planting falls outside that definition.

[52] However, the critical difference between the parties on the interpretation of "Farming Activity" is as to whether it is relevant to consider the potential for the

Planting to serve any future farming on the Site. That is in the event that WPD fails to secure the rezoning it is pursuing for its development strategy.

[53] The evidence is clear that WPD undertook the Planting for several purposes. It is also clear that the farming usage that continues to be undertaken on the Site does not warrant a shelterbelt. Furthermore, Ayrburn Farm (of which the Site is part) has little, if any, economic value as a farm in its own right, due to its small size. The nil-rental grazing licensing arrangements that have been in place since late 2017 attest to that. I infer from the evidence that the future farming value of the Site is, at best, likely to be confined to any value it may have to a larger farming operation seeking to use additional land for grazing or other supportive purposes.

[54] I agree with Mr Page that WPD's argument that the Planting would serve a future farming use is speculative at best. There is no evidential basis for inferring that a future owner would find the Planting to materially enhance what the Scotts have used Ayrburn Farm for since late 2017. Furthermore, as to the suitability of the chosen species as a shelterbelt, the evidence reveals potentially divergent preferences. Messrs Glendining and Cleland favour deciduous trees over evergreens because the latter produce adverse shade in winter and impede cooling winds in summer. Mr Meehan favours his choice of Planting, as he values the greater sheltering evergreens provide. In the wider environment, there are ample examples of each preference. While Mr Meehan favours the choice he has made, he wishes to keep his options open as to whether or not he would keep ownership of the Site or sell it on if WPD does not secure the development rezoning it is pursuing. As such, the evidence does not satisfy the 'primary purpose' test insofar as any future use WPD may choose to make of the Site. It is speculative what any incoming purchaser may prefer to do with the Site. The evidence demonstrates that farming has been undertaken over many years, including under the grazing licence, without a shelterbelt in this locality. Therefore, absent evidence, it is speculative whether or not a purchaser would find the Planting to significantly benefit farming or other rural uses of the Site.

[55] I accept that a sensible reading of r 24.2.2 allows for a land owner to undertake farm improvement and other land uses in anticipation of how the farm may be used

in future. In that sense, "primary purpose" is not necessarily confined to how the farm is being used for the time being. However, there must be a sound evidential basis for inferring that the "primary purpose" test would likely be met in the future. That cannot be left to pure speculation. The Ch 24 rules I have discussed intend that any proposed land use, including planting trees, satisfies the prerequisites of the definition of Farming Activity so as to achieve their related objectives and policies. On the evidence, I find that the Planting fails to do so, having regard to both the established farming activities on the Site and the realistic potential of the Site for farming purposes.

[56] WPD bears the responsibility to ensure that its activities comply with the RMA. The activity classifications in the rules in Table 24.1 apply to the land uses being carried out on the Site, namely licensed grazing, and applied to the Planting carried out by WPD. Insofar as any person, whether WPD or someone else, chooses at some future time to change how the Site is being farmed, the rules then applicable would apply. If those rules would treat what is then done as a permitted activity, no consent would be required at that time. Hence, I do not accept Mr Goldsmith's submission that it would be illogical to assign a non-complying activity classification to the Planting at this stage in view of any prospect that the Planting may satisfy the permitted activity standards in the future. Should that eventuate, that would simply mean that any trees then remaining would no longer contravene the RMA.

[57] I do not accept Mr Goldsmith's submission that the interpretation favoured by the Hadleys and QLDC poses wider implications for rural activities in other zones. Rather, as I have explained, r 24.4.1 serves the specific objectives and policies of Ch 24 applicable to the WBRAZ.

[58] WPD has not sought to argue that the Planting is permitted as a form of Residential Activity. For completeness, I record that I largely agree with Mr Page's interpretation of the related rules, to the effect that it would not. On a broad reading of r 24.4.3, in isolation from the definition of Residential Activity, the Planting could arguably be a "use of land … for residential activity" if it served to provide screening for any residential activity. However, as Ms Gilbert explains, the Planting has no value

in those terms for the existing residential activity. Whether any further residential activity is developed on the Site is contingent on a successful plan change. As such, it is clearly beyond the district plan, as it stands, to treat the Planting as being "for the purpose of permanent residential accommodation". Hence, the Planting is not properly treated as a form of Residential Activity.

[59] As the Planting is not a permitted activity under either r 24.4.2 or 24.4.3, it defaults to a non-complying activity under r 24.4.1.

[60] The evidence demonstrates that the Planting could adversely impact upon the quality of the Queenstown Trail. The site visit revealed it is already having some impact at least as a plainly visible edge to the Site. There is a broader plan integrity dimension in regard to best ensuring the intentions of the WBRAZ are fulfilled through proper application of the plan rules. As such, I find that it is appropriate that I make a declaration. To achieve greater clarity, I have expressed this in somewhat different terms to that sought in the application.

Declaration and outcome

[61] The application is granted insofar as it is declared:

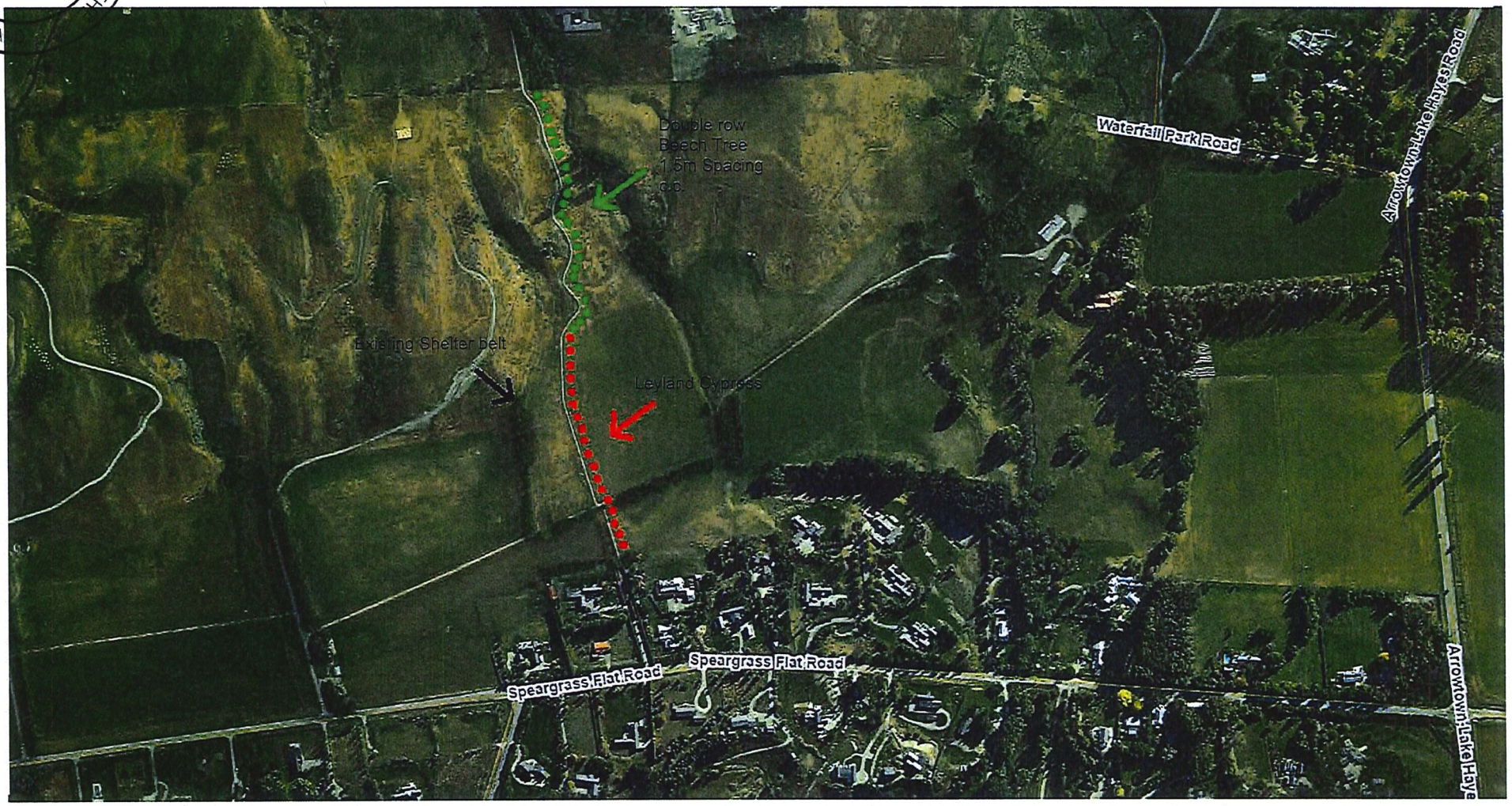
(a) the First Respondent's planting of trees (namely Leyland Cypress (*Cupresses X Leylandii*) Portuguese Laurel (*Prunus lusitanica*) and Mountain Beech (*Fuscospora cliffortioides*)) ('Trees') adjacent to the western boundary of Lot 4 Deposited Plan 540788 contained within Record of Title 929491 was and remains a non-complying activity by operation of rule 24.4.1 in proposed Chapter 24 of the Queenstown Lakes District Plan;

(b) the Trees were planted in breach of section 9(3) of the Resource Management Act 1991 and remain in breach.

[62] Costs are reserved. Any application for costs is to be made within fifteen (15) working days and any reply within a further ten (10) working days.

J J M Hassan
Environment Judge

Annexure – map showing planting



A 7/2001

Decision No. A 7/2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 121 of the Act

BETWEEN **KEYSTONE WATCH GROUP**

(RMA 771/99)

Appellant

AND **THE AUCKLAND CITY COUNCIL**

Respondent

AND **KEYSTONE RIDGE LIMITED**

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner J R Dart
Environment Commissioner R F Gapes

HEARING at **AUCKLAND** on 21 to 25 August 2000 inclusive, and 27 to 29 November inclusive.

APPEARANCES

R Brabant for Keystone Ridge Ltd.
W J Embling for Auckland City Council
L J B Paterson & N B Paterson for Keystone Watch Group

DECISION

Introduction

[1] This is an appeal by Keystone Watch Group ("the appellant") against Auckland City Council's ("the Council") decision to permit Keystone Ridge Ltd

("the applicant") to substantially demolish a former supermarket building at 3 Keystone Ave, Mt Roskill, and to replace it with three apartment blocks containing a total of 66 residential units. It is proposed that the complex consist of 15 two-bedroom units, 36 one-bedroom units and 15 studios, together with associated car-parking and a gymnasium.

[2] The front, 3 storey, block, which is to be sited parallel to Keystone Ave, will include the gymnasium and will be built above the existing semi-basement parking area. The two rear, 4 storey, blocks, will run parallel with the eastern and western boundaries, respectively, and will be built above the rear, ground level, parking area. There is provision for a total of 105 off-street parking spaces, including 7 visitor spaces. There is no separate provision for loading spaces. The sole vehicular access to and from the site will be via the existing driveway on the site's eastern boundary.

The Site and Environs

[3] The site is on the southern side of Keystone Ave, some 50 metres east of the avenue's intersection with Dominion Rd. The intersection marks the near, northern limit of the Dominion Rd/Mt Albert Rd suburban shopping centre. The site rises steeply from street level to an existing excavated terrace at the rear. An existing high, 5.4 metre, retaining wall extends the length of the southern boundary. It is topped by a 3-metre mesh and barbed wire fence, separating that part of the site from its rear neighbour, the Dominion Rd Primary School. The existing retaining wall on the site's eastern boundary rises from 2 metres at its street frontage to 5.4 metres at its rear. It is topped by a close-boarded, 1.8 metre high fence separating it from two single-storey houses at 5 and 5A Keystone Ave. Immediately over the site's western boundary is a driveway giving vehicular access to the rear of numerous commercial buildings fronting Dominion Rd.

[4] In the mid-1970s, substantial excavation of the site, which has an area of 2576m^2 and a frontage to Keystone Ave of 47.17m, was carried out prior to the construction of a single building, flush with the street boundary and 9.1m in height, for occupation as a supermarket. That use was abandoned some 3-4 years ago. The whole now presents as a derelict and rubbish-strewn site with the building covered with graffiti and posters and in a state of neglect and disrepair.

[5] With the exception of the properties at its intersection with Dominion Rd, Keystone Ave, which is some 340 metres long, is a typical suburban residential street of well-established houses with some minor, relatively recent, in-filling. At its eastern end, where it links with Akarana Ave, is Fearon Park, an extensive recreation reserve, accommodating the Roskill District Rugby Club's rooms, rugby fields, a softball field, and a children's playground. Akarana Ave, in turn, links with Mt Albert Rd. A traffic-calming installation opposite 5 Keystone Ave, generally, marks the break between the short-term, on-street, parking associated with the commercial development to the street's west and the residentially-related parking to its east. Its existing traffic volumes are estimated to be 2000-3000 vehicles per day.

[6] The site is zoned Business 2 in the Operative Auckland District Plan (Isthmus Section) ("the operative plan") as are the properties to its west. Apart from that, and the bank on the northern corner of its intersection with Dominion Rd, the whole of Keystone and Akarana Avenues are zoned Residential 6a. The school to the rear of the site is zoned Special Purpose 2.

Status of Proposal

[7] Under the operative plan residential units are provided for as a restricted controlled activity in the Business 2 zone. There is no control on the density of residential activity in the business zone.

[8] In addition, the proposal requires a number of resource consents under the operative plan, which are conveniently set out in the evidence of Mr McCarrison the planning consultant called by the Council. These are:

- Maximum Height
  - A discretionary activity as a development control modification[1] is required to allow the building fronting Keystone Avenue to exceed the 12.5 maximum height limit set out in rule 8.8.1.1 of the operative plan by 0.62 metres.

[1] See Part 4.3.1.2B of the operative plan.

- Streetscape Improvement

  - A discretionary activity as a development control modification to allow the provision of landscaping and tiered planters well above the ground level, on portions of the existing building in lieu of the requirement under the streetscape improvement control 8.8.1.3 which provides that not less than 50% of that part of the site between the road boundary and a parallel line 3 metres therefrom is to be appropriately landscaped.

- Earthworks

  - A discretionary activity under Part 4A.2B to allow earthworks totalling 500m^3 which exceeds the maximum 25m^3 provided for as a permitted activity.

- Excavations

  - Controlled activity consents under rules 4A.2 and 8.7.1 to allow excavations within 20 metres of a site boundary where the slope below ground level at the boundary exceeds the one vertical to two horizontal line as follows:

    - the excavation on the eastern side exceeds the one in two plane by a depth of 0.8 metres tapering to 0.0 metres over a distance of 35 metres.

    - the excavation on the western side exceeds the one in two plane by a depth of 1.3 metres tapering to 0.0 metres over 15.5 metres.

    - the excavation on the southern boundary exceeds the plane by up to a depth of between 1.30 metres to 0.8 metres.

- Parking

  - A discretionary activity under rule 12.9.1.1 to allow provision of 105 car parking spaces in lieu of the required 132 under rule 12.8.1.1.

- A controlled activity under rule 12.9.1.1A to allow the provision of car-parking spaces for more than 100 vehicles as provided for under rule 12.9.1.1.A.

- Stacked Parking

  - A restricted discretionary activity under rule 12.9.1.1 to allow provision for 25 stacked car parking spaces in lieu of the requirement under rule 12.8.1.3 for the formation of the parking spaces to be in accordance with figures 12.2a and 12.2b of the plan.

- Access

  - A discretionary activity as a development control modification to allow vehicle access to the site at a gradient of one in six in lieu of the requirements under rule 12.8.2.1(c) for the grade of access to be not steeper than one in eight and where it terminates at the road boundary for the provision of a 6 metre wide platform not steeper than one in twenty.

[9] The site is also affected by Plan Change T003 (Change 3) which was notified on 15 November 1999, and which seeks to apply additional controls at the interface between residential and business zones. These controls include making any activity within 30 metres of a residential zone a restricted discretionary activity, and imposing a more restrictive "building in relation to boundary" rule, the breach of which is to be considered as a discretionary activity. The proposal is within the 30 metres prescribed by the former and breaches the latter by a depth of 150 mm along 6.75 metres of frontage. The proposal therefore requires resource consent in terms of Change 3, as follows:

- To allow an activity in a business zone within 30 metres of a residential zone under Plan Change 3 rule 8.7.1. This is to be considered as a restricted discretionary activity under rule 8.7.3.2.

- A discretionary activity to allow the building fronting Keystone Avenue to infringe the proposed building in relation to boundary rule 8.8.1.12 under Plan Change 3 by a depth of 150mm over a length of 6.75 metres.

Multiple Consents

[10] Clearly this is a case where multiple consents are sought in a single application. Both the applicant and the Council presented their case on the basis that overall the application is a discretionary activity and accordingly requires, as a whole, to be assessed as a discretionary activity. This is in accordance with the approach taken by Cooke J under the former legislation in ***Locke v Avon Motor Lodge Limited*** (1973) 3 NZPTRA 17. Cooke J had held that where a particular feature of a development proposal made it non-complying (in that case a non-complying side yard), so that a conditional use application was necessary, then the whole use of the property was non-complying. Cooke J stated that a "hybrid concept" would add an unnecessary complication to legislation which was already complicated and said:

> *On a conditional use application the fact that there is only minor non-compliance for the predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive.*

[11] The Environment Court, in ***Rudolph Steiner School v Auckland City Council*** (1997) 3 ELRNZ 85, adopted ***Locke*** where it said that a discretionary activity in respect of which the Council has not restricted its discretion is wholly discretionary, and that in exercising the discretion to grant or refuse consent and to impose conditions a consent authority is to have regard to all the matters listed in section 104(1) relevant to the circumstances.

[12] Salmon J in ***Aley v North Shore City Council*** (1998) NZRMA 361 approved the Environment Court's adoption of ***Locke*** in ***Rudolph Steiner School*** and commented at page 377:

> *Just because a plan allows for the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. If the nature of a proposal requires a discretionary activity consent application to be made in overall exercise of discretion under sections 104 and 105 an application of the principles in **Locke** and **Rudolph Steiner** could mean that full advantage might not be able to be taken of the maximum provisions set by the rules.*
>
> *On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists. The "activity for which consent is sought" is in the present instance the building that is proposed not just those aspects of development which have had the effect of requiring a discretionary activity.*

[13] The Court of Appeal in ***Bayley*** added to the penultimate sentence the words *"or as it would exist if the land were used in a manner permitted as of right by the plan"*.

[14] It was on this basis that the appellant submitted that as there is non-compliance, some of which require discretionary activity applications, it is necessary to look at the whole of what the applicant is proposing to do and take a "holistic approach". It was submitted on behalf of the appellant that a failure to meet one or other of the development controls enables a greater intensity of development than is envisioned by the operative plan as a whole. Mr L.J.B Paterson (Paterson Snr) submitted:

> *It is not a case of ticking off items in isolation and saying they have only a minor effect after considering each of the controlled activities but the application as a whole must be considered.*

He submitted the importance of having regard to the cumulative effect of the non-compliance.

[15] In his closing address Mr Brabant took issue with this approach and submitted that this is an appropriate case where the required consents can be dealt with separately. The effect of this is, he said, that the primary consent application for residential units is properly considered as a restricted controlled activity. This is contrary to his opening submission where he said:

> *Overall the proposal requires consent as a discretionary activity.*

[16] Similarly, Ms Embling shifted her stance on behalf of the Council. The evidence adduced on behalf of the Council was on the basis that the development was to be assessed overall as a discretionary activity. Such a shift in stance is understandable from the point of view of the applicant and the Council as it has the effect of compartmentalising the activities for which different consents are required. This may, depending on the circumstances, limit the scope of the consent authorities, and this Court's discretion.

[17] The issue of multiple consents was addressed in ***Bayley v Manukau City Council*** (1999) 1 NZLR 568 (CA) and in two recent decisions of Randerson J in the High Court: ***King and others v Auckland City Council and anor*** (unreported, High Court, Auckland CP519/99, 1 December 1999); and ***Body Corporate 970101 v***

Auckland City Council and anor (2000) 6 ELRNZ 189. In ***King's*** case Randerson J referred to the observation of the Court of Appeal in ***Bayley*** at 579-580:

> *Such a course may be inappropriate where another form of consent is also being sought or is necessary. The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.*

[18] Randerson J then went on to say that the approach as expressed in the comments by the Court of Appeal is consistent with the clear statutory intention of the Act to treat the sustainable management of natural and physical resources in a comprehensive manner. He then said:

> *I have no doubt in the present case that a compartmentalised approach would not have been appropriate. Indeed, both PDL as applicant and the Council's planning officer accepted that the applications were to be dealt with as a whole and should be treated overall as an application for consent to a discretionary activity.*
>
> ...
>
> *Plainly, this was a case where the consents overlapped in the sense described in* ***Bayley*** *to such an extent that they could not realistically or properly be separated ... for the grant of the consents themselves.*[2]

[19] In ***Body Corporate 970101*** Randerson J said:

> *Where there is an overlap between the two consents such that consideration of one may affect the outcome of the other, it will generally be appropriate to treat the application as a whole requiring the entire proposal to be assessed as a discretionary activity.*[3]

[20] Randerson J's views were approved by the Court of Appeal in ***Body Corporate 970101 v Auckland City Council and anor*** (unreported, Court of Appeal, CA 64/00, 17 August 2000).

[21] We are satisfied that in the present case a compartmentalised approach is not appropriate for the following reasons:

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[2] Page 18 and 19.
[3] Ibid. page 192.

- First, the applicant and the Council presented their case on the basis that the development was to be assessed overall as a discretionary activity. The evidence did not therefore specifically address the question of overlap or the manner in which the large number of consents should be dealt with separately.

- Secondly, putting aside the height restrictions under the operative plan and Change 3 (matters which we consider not to be of major significance), discretionary consent is required for the 500m^3 earthworks, the failure to comply with the street-scaping improvement control and the shortfall in car-parking and access. There is in our view an overlap in the sense described in ***Bayley*** between the earthworks consent and the streetscape improvement control with the development as a whole. They relate to the proposed construction of the buildings. They enable the designing of a structure that has a greater impact on the environment than would otherwise be the case because of the more intense use of the site. In addition, for reasons given later in this judgment we are not satisfied to the requisite degree that the parking shortfall and access will not have adverse effects beyond the site boundaries.

- Thirdly, there is a close relationship between the discretionary consents required and the other numerous consents required that not to look at it in the round would, to use the Court of Appeal's words in ***Bayley***, "split it artificially into pieces".

Basis for Decision

[22] As we consider the proposal should be considered overall as a discretionary activity we are required to consider the matters set out in section 104(1) of the RMA. The following matters are relevant:

- Part II matters – section 104(1) – (subject to Part II);

- The actual and potential effects on the environment – section 104(1)(a);

- The Auckland Regional Policy Statement – section 104(1)(c);

- The relevant objectives, policies, rules and other provisions of the operative plan and Proposed Change 3 – section 104(1)(d);

[23] Following a consideration of the relevant matters set out in section 104(1) we are then required to exercise our discretion pursuant to section 105(1).

The Operative Plan

[24] Part II of the operative plan sets out the manner in which the Council is to carry out its functions under the RMA. It addresses the issues that face the city and sets the principal objectives and the strategy of the Council to achieve the "*sustainable management*" of the resources of the isthmus. The relevant issues include those set out in Part 2.2:

- *The need to accommodate ongoing change within the urban area while maintaining and enhancing the quality of the present environment.*
- *The need to encourage intensification of use within the Isthmus while recognising the pressure on existing infrastructure, transportation and utility services that such intensification brings.*
- *The need to manage the physical growth of the Isthmus in a way which recognises the value of the existing resource while providing the flexibility to meet a variety of community aspirations.*
- *The need to ensure that business growth does not compromise the protection and enhancement of the environment.*

[25] Part 2.3 sets out the principal objectives of the Council. Objective 2.3.3 headed "Community" includes such objectives as: the achievement of a healthy and safe living environment; allowing for the development of a range of residential neighbourhoods and environments; the protection and enhancement of residential amenities and allowing maximum flexibility for individual site development without adversely impacting on neighbouring activities.

[26] The residential strategy under Part 2.4 recognises that the existing housing density is low; that the regional aim is to discourage unconstrained urban expansion; and that the intensification of residential areas is permitted where appropriate. The operative plan recognises that people require different types of housing. The business zoned areas make provision for housing that can be provided without the usual development constraints imposed on residentially zoned properties such as minimum open space area and landscape area. The expected outcomes for the strategy are set out in Part 2.5 of the plan which in part says:

> *The community will enjoy flexibility and choice in locations for work, leisure and living, secure in the knowledge that certain levels of amenity will be attained.*

Overall the strategy will benefit the wider community and will leave a suitable legacy for future generations.

[27] Part 6 of the plan, "Human Environment", recognises the importance of managing the opportunity for the provision of housing and infrastructure to ensure that an acceptable quality of life is maintained. Part 6.2.3 headed "Housing" recognises the provision of housing to meet the change in requirements of the community while seeking to ensure that residential environmental standards are not compromised. It says in part:

- *Housing meets the fundamental human need of shelter. If it is to perform this role properly it must be economically accessible, physically suitable to the users and sited where it can maximise opportunities for employment and recreation. For example, the housing market must be responsive to socio-economic changes in the district in recent years, which have produced a range of household sizes from extended families to small one and two person households, by providing a suitable range of housing. Resource management policies must also be sufficiently flexible so that the housing market can respond quickly to future shifts in the pattern of demand.*

- *Wide opportunities for housing are provided in the plan. Residential densities are not arbitrarily defined but are related to the maintenance and enhancement of existing standards of amenity. The current amenity and environmental standards within the residential neighbourhoods of the Isthmus will not be compromised by those provisions which open up opportunity.*

[28] Part 6.2.8 headed "Infrastructure" says in part:

- *The urban area provides an environment in which people can live and work. It depends on its infrastructure of transport and network utility services for water supply, drainage, energy and telecommunication and radio communication systems. Without this infrastructure and these network utility services, an acceptable quality of life could not be maintained, and adverse environmental effects could occur.*

[29] Part 8 of the operative plan contains the objectives, polices and provisions relating to business activity. The plan recognises that business activity through its effects can seriously impact on the quality of the environment and measures must be adopted to remove, reduce or mitigate those effects[4]. Part 8.2, headed "Resource Management Issues", recognises the need for transitional measures that promote and encourage sustainable alternative use of redundant industrial land. This is further emphasised in Objective 8.3.1 which seeks to foster the service employment and productive potential of business activity while at the same time ensuring the sustainable management of the natural and physical resources of the city. One of the policies under this objective is:

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[4] Part 8.1.

- *By offering incentives for the comprehensive redevelopment of large, vacant, under-utilised or derelict industrial sites within the Isthmus.*

This reflects one of the resource management issues in Part 8.2 of the plan, which says:

- *The need for transitional measures which promote and encourage suitable alternative use of redundant industrial land.*

[30] The use of a "zoning technique" is to allow the district plan to create bundles of activities considered generally appropriate in each zone or area, in recognising the constraints of the environment and that some activities may not be appropriate in every location. As previously mentioned the western end of Keystone Avenue and Dominion Road has been zoned Business 2 to reflect this area's suitability to accommodate the range of activities offered under this zoning. One of the objectives of the business zone is to provide for retailing office and commercial service activity at a medium intensity suburban level[5]. One of the policies emanating from this objective is:

- *By permitting a wide range of business and non-business activities within these centres.*

[31] A further objective is to ensure that any adverse environment or amenity impact of business activity on adjacent residential or open space is prevented or reduced to an acceptable level[6]. The policies emanating from this objective are:

- *By adopting controls which limit the intensity and scale of development to a level appropriate to the zone's proximity to residential zoned properties and open space areas.*
- *By requiring acceptable noise levels at the interface between residential zones and business zones.*
- *By adopting controls which seek to protect residential zones' privacy and amenity.*
- *By adopting parking and traffic measures which seek to avoid congestion and parking problems.*

[32] As previously mentioned the subject site interfaces with two environments in addition to Business 2, being Residential 6a and Special Purpose 2. The Residential 6a zone is the most common classification of land on the Isthmus. Within it,

[5] 8.6.2.1(a).
[6] 8.6.2.1(e).

medium intensity activity such as multi-unit residential development is encouraged. This zone recognises the need for further development while retaining and sustaining a reasonable level of amenity.

[33] The Dominion Road Primary School to the rear of the site and contiguous with the southern boundary is zoned Special Purpose 2 (Education). The school is visually separated from the site due to the difference in ground level and the mature pohutukawa trees and security fence along the southern boundary.

[34] Transport is a major issue for the city and Part 12 of the operative plan is devoted to transportation. It emphasises the need to protect corridors for the provision of regular and efficient public transport services and the plan recognises the need to control activities that may adversely impact on the efficient functioning of the existing traffic network with considerable emphasis on off-site parking for proposed developments.

[35] As previously mentioned residential units are a restricted controlled activity. Rules 8.7.2.1 and 8.7.2.2(3) set out assessment criteria relating to controlled activities of which the following are relevant:

- Site layout with special emphasis on parking and vehicle circulation areas to ensure that the effects of the proposal are internalised and do not impact on the adjacent roadway or adjacent sites;

- Car-parking to be located remotely from residential zoned boundaries or where this is impracticable adequate screening is to be provided to reduce adverse aural or visual impacts on residentially zoned land;

- Internal circulation of the parking areas is to be designed to ensure safe and efficient vehicle circulation;

- Conditions may be imposed to ensure no minor adverse effects on the environment occur as a result of the proposal;

- Where the subject site adjoins other business zoned sites adequate measures to the satisfaction of the Council should be incorporated into the design and/or location to ensure indoor acoustic privacy.

[36] The matters contained in Part 2 of the operative plan establish an approach that is consistent with Part II of the Act and in particular the sustainable management of natural and physical resources. Emphasis is given to securing certain levels of amenity for the community and protecting these for future generations. The provision of housing to meet the change in requirements of the community is recognised in Part 6 of the operative plan while seeking to ensure that residential environmental standards are not compromised. We were told by Mr McCarrison that:

> *It is recognised that apartment complexes within appropriate located business zoned areas in the last five years have enabled provision of a style and character of residential living that is not able to be provided on residentially zoned land.*[8]

[37] The market demand for such residential units is reflected in the popularity of this form of housing. We were also told by Mr McCarrison that:

> *A clear focus and message of the objectives, policies and general strategy of Part II of the district plan and those specific Residential 6a and Business 2 zones is the expectation to provide the opportunity for additional housing; to maintain and improve the amenity of the residential areas and business centres over time.*[8]

[38] Mr Green, the consultant planner for the applicant, had this to say:

> *The plan identifies the investment and infrastructure and existing shopping centres as being significant in the context of the Business Activity 2 zone. In my opinion the introduction into the Business Activity 2 zone of an increased catchment of family units and individuals likely to make use of the nearby shopping centre will do much to revitalise the retail outlets currently in existence and may cause them to improve and diversify the goods and services that they provide to the community. In my opinion this is a sustainable use of an existing resource consistent with the provisions of the district plan.*

[39] We were told that the existing centres, such as the Mt Roskill end of Dominion Road, where commercial activity has traditionally been retail-centred, are going through dramatic change due to the alteration in the organisation of retailing such as shopping malls, large stores and technology. Thus, the district plan aims to increase the opportunity for a wider range of activities to establish in these areas where it is appropriate[9]. Residential units, which were a non-complying activity under previous plans, now have restricted controlled activity status in the Business 2 zones of the operative plan.

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[8] McCarrison, paragraph 5.12.
[8] McCarrison, paragraph 5.25.
[9] See in particular Part 8.2 & 8.3 of the Operative Plan.

[40] We are of the view that the proposal is generally in accord with those relevant parts of the operative plan which aim: to encourage intensification of residential use in parts of the Isthmus; to encourage alternative use of redundant land in appropriate located business zoned land; and to encourage residential development in close proximity to main traffic routes. However, there is a constant thread throughout the objectives and policies of the operative plan which emphasise such matters as: the maintenance and enhancement of the present environment[10]; the protection and enhancement of residential amenities[11]; the achievement of a healthy and safe living environment[12]; allowing site development without adversely impacting on neighbouring activities[13]; and assessing that business activity does not adversely impact on adjacent residentially zoned properties.[14].

[41] Of concern is the effect of the proposal on the amenity of the adjacent residentially zoned land. It is the effect on the amenity of the adjacent residentially zoned land that is at the heart of this appeal. The appellant maintains that the proposal has been designed beyond the potential of the site. The effect of this, the appellant says, is that the bulk, height and density of the proposal has an overpowering effect on the residential amenities of the Residential 6a zone located to the east and north of the site. Further, the effects on visual and oral privacy to the north and east are considerable, as is the effect on parking and traffic congestion in Keystone Avenue. The numerous conditions that the consent was made subject to will it says not sufficiently mitigate or avoid these adverse effects. The non-compliance of the development controls are in each case not of relevant significance on their own says the appellant but their combined effect reflects an over development of the site. One of the appellant's witnesses, Mr G W Pederson, a resident at 20A Keystone Avenue, Mt Roskill said:

> *... I support the development of apartments in principle. However, it is my view that the developer is attempting to over develop this site.*

[42] It is therefore necessary for us to consider what adverse effects will flow from allowing the proposal and, if they are, the extent to which those effects will affect the adjacent residential environment. We deal with this later under the heading "Potential Effects".

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[10] 2.2.
[11] 2.2.3.
[12] 2.2.3.
[13] 2.2.2.
[14] 6.2.1(e).

Proposed Plan Change 3

[43] Plan Change 3 was publicly notified on 15 November 1999. It replaced proposed Variation 164 that had been publicly notified on 23 June 1997 and was withdrawn to allow the district plan to become operative. Both the plan change and withdrawn variation reflected Council's concern to protect the amenity of residentially zoned properties from the potential adverse effects of activities within the business zones. Both the plan change and withdrawn variation require that all permitted and controlled business activities on sites within 30 metres of a residentially zoned property be considered as at least a restricted discretionary activity. The change sets out some ten criteria against which any proposal is to be assessed. These relate to such matters as:

[a] the effect on infrastructure, particularly wastewater and stormwater drainage systems;

[b] compliance with development controls, particularly zonal height, floor area ratio and required parking and noise controls;

[c] the intensity level of the adjacent residential zone for permitted or controlled activities is to be used as a guide but such an intensity assessment does not need to be undertaken for activities which satisfy off-street parking requirements and infrastructure considerations;

[d] the bulk colour and design of buildings;

[e] traffic and parking considerations and the location and design of vehicular access and car-parking;

[f] the cumulative effects of activities, particularly traffic and noise and the proximity to public transport.

The explanation given for the criteria is:

Some activities and buildings have the potential to adversely affect surrounding residential areas due to building dominance, shadowing reduces access to sunlight, and loss of privacy. Other impacts can include streetscape, visual design, heritage values, noise, traffic and parking, intensity of development and cumulative effects. The Council may impose conditions to ensure that the effect on neighbouring residential zoned properties is addressed and in some circumstances where the effects cannot be mitigated or avoided the activity may be refused consent.

[44] The plan change provides specific rules and criteria for controlling development at the interface of residential and business zones. Hitherto the plan addressed this issue in only a general way.[15]

[45] The plan change has reached the stage where the Council's officers are assessing and preparing reports on the submissions. It has yet to be subjected to independent decision-making and testing through the various processes required by the Resource Management Act. In considering the weight that we give to it we take into account the following principles which arise from the various cases:

- The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process[16].

- The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:

  (i) The extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;

  (ii) Circumstances of injustice;

  (iii) The extent to which a new measure, or the absence of one might implement a coherent pattern of objectives and policies in a plan[17].

- In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan[18].

[46] In considering the weight to be given to proposed Change 3 we have regard to the stage it has reached through the objection and appeal process. We note that it does reflect the general provisions of the operative plan relating to the clear intent of the plan to protect the amenity of residentially zoned properties from the potential

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[15] See Objective 8.6.2.1(e) and policies emanating therefrom.
[16] See *Hanton v Auckland City Council* A010/94 3 NZPTD 240 adopted in *Burton v Auckland City Council* 1994 12 NZRMA 544.
[17] See *Burton v Auckland City Council* (supra).
[18] See *Lee v Auckland City Council* W014/94 4 NZPTD 178, 1995 NZRMA 241.

adverse effects of activities in the business zones. This requires us to carefully consider the potential effects of the proposal on the adjacent Residential 6a zones, which we will consider in some detail later in this judgment.

Auckland Regional Policy Statement

[47] Chapter 2 of the ARPS is headed "Regional Overview and Strategic Direction" and makes specific reference to "*higher density, infill housing*". It acknowledges under section 2.6.3 that Auckland's low-density urban areas have been wasteful of land ... "*and this has led to inefficient travel patterns and use of energy*". Urban intensification is supported "*so that better utilisation is encouraged of the substantial reservoir of under-utilised land within the urban area. Much of this land is in areas where the existing utility systems and transport network have capacity to service more intensive or infilled development. Intensification can enable more efficient use of physical resources including infrastructure and also shift the emphasis of development of metropolitan Auckland toward an urban form which is more efficient in transport and energy terms*".

[48] There is further comment in section 2.6.3 that infill and intensification needs to be carefully planned "*to avoid, remedy or mitigate adverse effects which can stem from loss of trees and bush, overloading of utility systems (especially drainage and stormwater), traffic congestion and reduction of space around buildings*".

[49] The sentiments of the ARPS are to some extent mirrored in the document adopted by the respondent in June 2000 and called "Growing Our City – Through Liveable Communities 2050". This document sets out a strategy for managing the growth of Auckland City into the new millennium. Using a number of criteria, it proposes to encourage redevelopment in specific locations so as to safeguard identified environmental and amenity features and at the same time ensuring land use development will be integrated with transport planning and infrastructure improvements. Keystone Avenue and the Dominion Road area is identified as being within one of seven strategic growth management areas spread throughout the city. A strategic growth management area is considered to be a place where the existing development pattern and infrastructure is conducive to supporting denser, mixed use, pedestrian friendly environments and where there is easy access to public transport. This area is forecast to be able to accommodate 3311 additional households by 2050 and this in turn reflects the Council's intent of working towards achieving a higher intensity of housing to meet expected population growth.

[50] We agree with Mr McCarrison when he says that in his opinion ... "*the proposed development meets many of the policies of the regional policy statement with regard to the intensified use of the land adjacent to a major arterial road and where the infrastructure can accommodate such development*". This view was underlined by the evidence we heard, and which was not challenged, that Dominion Road is a strategic arterial road providing the opportunity for an efficient private vehicle and public transport system. It is the effects of the proposed activity on the adjacent residential zoned areas that are therefore the important issue in this case. We now turn to the potential effects of the proposal.

Baseline

[51] Before discussing the potential adverse effects of the proposal it is necessary to address the submissions of counsel for the applicant and the respondent with respect to what is now become known as the "baseline" against which adverse effects are to be compared. We were referred to ***Bayley*** at 576 where the Court of Appeal said:

> *The appropriate comparison of the activity for which consent is sought is with what either is being lawfully done on the land or could be done there as of right.*

[52] We have already referred to the Court of Appeal's qualification of Salmon J's words in ***Aley***. We have also considered the numerous decisions of the High Court[19] and the Environment Court[20] on this issue. The comments in ***Bayley*** were made in relation to section 94 of the Act. In this case we are dealing with the exercise of discretion under section 105 and the consideration of effects pursuant to section 104(1)(a). Salmon J considered the comments had relevance to the exercise of discretion under section 105 and the consideration of effects pursuant to section 104(1)(a) in ***Smith Chilcott Ltd***, which was cited with approval by Chambers J in ***Arrigato***.

[53] We consider the proper approach is as stated by the High Court in ***Barrett*** where the Court stated by reference to the Court of Appeal decision in ***Bayley***:

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[19] Including *McAlpine v North Shore City Council*, M1583/98, Auckland Registry; *Low & ors v Dunedin City Council*, CP51/98, Dunedin Registry; *King & ors v Auckland City Council*, CP 519/99, Auckland Registry; *Barrett v Wellington City Council*, CP 31/00, Wellington Registry; and *Smith Chilcott Ltd v Auckland City Council & Anor*, AP 74-SW/00, Auckland Registry; *Auckland Regional Council v Arrigato Investments Limited & Others, AP 138/99, Auckland Registry.*

[20] *Arrigato Investments Ltd v Rodney District Council*, A115/99; *Martinez & Anor v Auckland City Council*, A32/00; *Contact Energy Limited v Waikato Regional Council & Anor*, A04/00.

But I accept that when the Court of Appeal is referring to what could be done on the site as of right it had in mind credible developments, not purely hypothetical possibilities which are out of touch with the reality of the situation. A test based on theory rather than reality would place an intolerable burden on consent authorities.

[54] We are also mindful of the comments of the High Court in ***King,*** where Randerson J noted that the "as of right" approach assumes that the applicant would proceed with the development to the extent permitted as of right, and that there are no other advantages to be gained from the non-complying aspects of the proposal such as increased density or more intensive use of the site which would not be available if the relevant controls are observed. He further commented at page 15:

*All of this suggests that some care will be needed by consent authorities in applying the "as of right" principle in **Bayley** at least until some further guidance is available from the Court of Appeal as to its application in particular cases.*

[55] Although Mr Brabant did not make specific submissions on the point, the expert evidence of the applicant was adduced on the basis that when assessing a discretionary activity, the Court should not consider environmental effects from a building that complies with the development controls.. We are not persuaded that ***Bayley*** overruled the principle stemming from ***Locke*** and reiterated by Salmon J in ***Aley*** (already quoted), that where a proposal requires a discretionary activity consent, then the overall exercise of discretion under sections 104 and 105 could mean that full advantage might not be able to be taken of the maximum provisions set by the rules. With respect we consider the position was correctly and pragmatically stated by the Environment Court in ***Wouldes and ors v North Shore City Council & anor***, unreported, A58/98 where Judge Bollard and his Commissioner colleagues said:

In granting consent at first instance, the Council apparently felt that the proposal's overall compliance with the development control guidelines was of major import. Given the detailed nature of the plan, we can appreciate this viewpoint. If a plan is drawn with a degree of elaboration that this one is, a would-be applicant may generally be expected to have comparative confidence in formulating a proposal such as the present. Yet, such a plan cannot be expected to operate as a cast iron guarantee to success, having regard to the full range of matters relevant under section 104(1) in affording due primacy to Part II of the Act. Compliance for such guideline criteria is site coverage, maximum height, height in relation to boundary, yard provision, building length, and so forth, will doubtless assist in the quest of formulating a proposal that will be all the more likely to minimise adverse effects on the environment in accordance with the plan's intent. Even so, we repeat that in discretionary activity cases the plan cannot be expected to operate as an infallible blueprint or mechanism to a given end. Cases may still be expected to occur from time to time where, despite careful attention to the guideline provisions, resultant effects on adjacent owners are nonetheless found to be unsatisfactory in the final analysis.

[56] The ***Locke*** principle enables a consent authority and, thus the Court, to exercise its overall discretion taking into account all the matters set out in section 104(1) and Part II of the Act. To negate the ***Locke*** principle may well, in certain circumstances, result in the plan rules having primacy over Part II matters. The rules are arbitrary prescriptions which may not in particular circumstances give the protection to the environment which reflects the clear purpose of the Act as enunciated in Part II. In such cases, when the Court is exercising its discretion under section 105, the Part II matters must prevail.

[57] Conversely, in some circumstances, the rules may be unduly restrictive and to apply them would be contrary to the enabling provisions of section 5 and the principles of sustainable development as set out in Part II. Again Part II should prevail.[21]

Potential Effects

[58] It was the potential adverse effects of the proposal on the adjacent Residential 6a zones immediately to the east and across Keystone Avenue to the north of the site that was the major concern of the appellant. The appellant was represented by Mr L J B Paterson supported by his son Mr N B Paterson. Mr Paterson Snr is an architect and Mr N B Paterson is a registered engineer. They presented detailed submissions and evidence to the Court. The essence of their case is succinctly encapsulated in the following paragraph of their submissions:

> *It is for this Environment Court to decide whether the applicant has designed, scaled and landscaped his development to be sympathetic to the surrounding residential sites or whether he just designed the biggest blocks and the greatest number of apartments he could.*[22]

[59] They asserted that the size and scale of the proposal will result in a number of adverse effects and the following were addressed at some length in the evidence of all parties:

- The building – its dominance, its visual effects and its effects of overshadowing adjacent properties;

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[21] See for example such cases as: *Minister of Conservation & Ors v Kapiti Coast District Council,* A024/94; *Price v Auckland City Council,* W180/96, 2 ELRNZ 443; and *Russell Protection Society Inc v Far North District Council,* A125/98.

[22] Appellant's submissions, page 8.

- The effect on the aural and visual privacy of the adjacent dwellings;
- Traffic, including parking, and effects on pedestrian and road usage;
- The effect on infrastructure, particularly sewerage and stormwater;
- The effect of lighting on neighbouring properties;
- Noise.

We deal with each in turn.

The Building

[60] In this respect we heard evidence from Associate Professor C A Bird who lectures in Architecture and Urban Design at the University of Auckland School of Architecture. He gave architectural and urban design evidence on behalf of the applicant. Mr S J Cocker, a landscape architect, also gave evidence for the applicant in this respect. For the appellant we heard evidence from both Mr Paterson Snr and Mr N B Paterson and a number of residents. Of particular concern to the appellant were the bulk and the dominance of the building, its visual effects occasioned by its size and inadequate landscaping, and its shadowing effect on those properties to the east. Associated Professor Bird addressed these issues. As to dominance he said:

> *In this context "dominance" might best be described as a quality or characteristic of a building which is perceived by a viewer of that building. Architectural characteristics which may or may not give rise to a perception of dominance include "bulk", "colour", and "design", ...*

[61] He said that as the proposed development generally complies with the development controls its bulk was contemplated by the plan. He then explained in some detail how the colour and design of the building effectively reduces what would otherwise be an "over-dominant building" to one which is "architecturally and urbanistically appropriate to its site and surroundings".

[62] Mr Cocker discussed the proposed landscaping of the building which he said "will assist in ameliorating the potential impact of the building".

[63] Mr Paterson Snr, himself an architect, pointed out that Keystone Avenue consists mainly of single storey residential buildings. He also pointed out the location of the site in relation to the different types of zone and the topography of the

site and its surrounds. The site is located on a slope extending south towards the top of Keystone Ridge and is thus higher than the residential land to the north. All these factors, he said, added to the dominance of the buildings. He opined that the mitigation attempts, including architectural design measures such as the modulation of the building façades and landscaping, are "woefully inadequate" to ensure that the generated effects of the application are no more than minor.

[64] In assessing the evidence we are mindful that visual perceptions of buildings and such matters as building dominance can be influenced by the subjective disposition of the beholder. We have concluded that the visual effect of the building will be quite significant and the form of the building will be dominant in the streetscape, thus adversely affecting the amenity of this residential neighbourhood.

[65] With regard to overshadowing, Associate Professor Bird acknowledged that in the late afternoon, when the sun is at a low angle, there will be some overshadowing of the properties to the east of the site. Mr Paterson Snr referred to shading diagrams drawn up by the applicant's architect, Mr Brown, and attested that there would be significant shadowing created in the afternoon for most of the year starting from about 4.00pm in most afternoons from the 21 March to 21 September. We agree that the shadowing effect is significant.

Privacy

[66] The issue of privacy was addressed by a number of witnesses, in particular, Mr Brown, Mr McCarrison , Mr Paterson Snr, Mr S D Watson and Mr A J Wootton for the appellant.

[67] We find that the surrounding properties will be considerably impacted by lack of privacy. This will be exacerbated by a number of factors including the following:

- The height of the buildings above the predominantly single-storey dwellings;
- The design of the proposal which includes decks facing outwards from the north and east sides of the site;
- The intensity of the development. The density of the proposal is approximately $39m^2$ per unit as compared to the Residential 6a density of $375m^2$ per unit.

[68] Recognising the effect on privacy the applicant has taken measures to mitigate any such effects. The impact to the north is not as bad as to the east. The properties to the north are already overlooked by the public space of the road although not nearly to the extent of the proposed apartments. Further, the dwellings tend to have their private space orientated to take advantage of the views, sun and privacy to the north. In addition, tree and shrub planting and fencing provide some privacy to the front yard areas and rooms of each dwelling that face the street. Additional street planting is also proposed. The properties to the east will be most affected. They will be overlooked from a higher building and the evidence indicated that this is likely to be from 17 units on the eastern side. Recognising this possibility the applicant has taken measures to mitigate any effects including:

- Ensuring a separation distance of approximately 11.5 metres between the eastern boundary and the proposed new residential block running parallel with the eastern boundary;

- By making provision for balconies, 1 metre wide by approximately 7 metres in length, to all units between the glazed areas of the proposed building and the surrounding environs to provide a "buffer zone". The balustrades of the balconies are to be either frosted glass or solid to provide a visual screen. As Mr Brown pointed out the balconies are designed for use more as outlook courts, rather than the significant external space that the traditional suburban deck implies. According to Mr Brown the balconies will allow a graduated shift from interior to exterior that helps blur the boundary and enable the exterior to invade the interior space rather than vice versa;

- It is proposed to plant a 100mm strip at the top of the retaining wall adjacent to the eastern boundary with trees and other vegetation, including pittosporums growing to 5 metres in height. These, it was asserted, will provide some additional privacy and visual amenity in the medium to long term. Quite apart from the questionable practicality of such a proposal, such planting would, of course, have to be with the consent of the owner and occupier of the affected property.

[69] On the evidence, assisted by our site visit, we find that the proposal will result in an increased loss of privacy primarily to the east and, to a lesser extent to the north of the site. We conclude that the increased loss of privacy will be

significant. The mitigating measures proposed will not sufficiently ameliorate the loss of privacy particularly to the east.

Traffic

[70] For the applicant, we had the benefit of expert evidence from Ms B Coomer-Smit who has had 13 years experience as a specialist traffic and transportation engineer. She described for us relevant surrounding street details, including that Keystone Avenue is a traditional 20 metre wide suburban street with footpaths, berms and kerb-side parking on both sides, as well as one moving traffic lane in each direction. She also told us that the 'traffic-calming' structure just east of the site, already referred to, was installed to discourage motorists from using Keystone Ave and Akarana Rd to bypass the signalised intersection of Dominion Rd with Mt Albert Rd. She also drew to our attention the fact that Dominion Rd is a well-served public transport route and that the nearest bus stops are only some 2 to 3 minutes walking distance from the site. Based upon peak period traffic counts carried out under her direction in September 1998 and August 2000, she estimated that Keystone Avenue carries around 2000 vehicles per day.

[71] Turning now to the issue of the traffic that is expected to be generated by the development. Ms Coomer-Smit told us that to assist her in her calculations, she had adopted the trip generation rates for medium density housing contained in the New South Wales Roads and Traffic Authority's "Guide to Traffic Generating Developments". She asserted that it was extensively used in New Zealand. Based upon that study, she arrived at a morning and evening peak trip rate of 0.45 per unit and concluded that:

> *The additional traffic to be generated during the peak hours can be equated to one vehicle turning into or from the development every 2 minutes. In terms of the effects of the additionally generated traffic on existing Keystone Avenue flows, the proposed development will add no more than 21 vehicle movements per hour, to any single section of Keystone Avenue. In fact these flows could even be less if one considers that the development is well serviced by public transport and that some of the trips generated by the development could well be public transport trips. ... consequently, ... these small volumes of added traffic flows will be imperceptible to the casual observer, and will have no discernible impact to (sic) the performance of the intersection at Dominion Rd.*[23]

[23] Par. 32

[72] It was her overall conclusion that the development would have no more than minor adverse effects on the function, capacity or safety of the local traffic environment.

[73] Similarly, she told us of the traffic accidents that have been recorded over the past 5 years, of which there was only one reported in each of the past 3 years, and concluded that *the addition of a comparatively small number of traffic movements due to the proposed development will not compromise this road safety history in any way.* [24]

[74] Turning to on-site considerations and dealing first with parking, as already noted, the development provides for only 105 parking spaces compared with the 2 per unit, or 132 spaces, required by the district plan. 28 of the spaces will be at basement level and the remaining 77, of which 25, or 24%, will be stacked, together with 7 visitor spaces, will be at ground level. Responding to the shortfall of 27 spaces, or, 20%, Ms Coomer-Smit reasoned that, based upon an analysis of 1996 census data equating the number of bedrooms against car ownership, *and conservatively assuming that all units have at least one car*, the actual expected parking demand would total 75 spaces distributed as follows:

> Of the 51 one-bedroom or studio units, 46 will have one space and the remaining 5, two spaces; and
>
> Of the 15 two-bedroom units, 11 would have one space and the remaining 4, two spaces.

[75] Regarding the proposed stacked parking, it was her opinion that it was appropriate for this residential development and would result in an efficient use of the site. In that context, she also drew our attention to clause 12.9.1.2(d) of the district plan, which states, in part, that:

> *Stacked parking may be allowed for one of the two required parking spaces for any residential development where each residential unit has two parking spaces physically associated with it.*

[76] It is not clear from the evidence which are intended to be the units that will be assigned two parking spaces. In our opinion, none of the stacked spaces would be *physically associated* with them, being separated by a minimum of one storey and a

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[24] Par. 25

maximum of four storeys. In other words, we find that "physically associated" is not synonymous with "assigned" or "allocated". Therefore, in that regard, the proposed parking does not comply with the district plan's discretionary clause quoted above.

[77] Ms Coomer-Smit did not, however, draw our attention to the criterion stated in the previous paragraph, namely, that

> *Stacked parking will generally only be allowed in special circumstances in order to alleviate adverse effects, where no feasible alternative exists.*

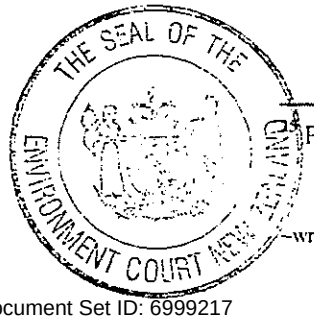
[78] It was not made clear to us what would constitute *adverse effects* in this context other than the obvious overflow to off-site, kerb-side, parking, and, given the proposed intensity of the development, there certainly appear to be no feasible on-site alternatives.

[79] Returning to the 105 spaces that are proposed, she allotted them as follows:

> *(i)* *Each of the 15 two-bedroomed units will have two spaces. Of these two spaces per unit, one space will be a stacked parking space.*
>
> *(ii)* *Ten of the single bedroomed units will have two spaces with one of the spaces being a stacked space.*
>
> *(iii)* *The remaining 41 units will be allocated a single carpark each.*
>
> *(iv)* *Seven spaces will be allocated as visitor parking spaces.*
>
> *(v)* *The remaining seven spaces can either be allocated to a single bedroom unit or can be used as visitor parking spaces.* [25]

[80] And concluded that, *Given the nature of the activity as proposed, and the levels of traffic activities at the site, ... the parking arrangements as intended will provide a suitable and appropriate solution to the vehicle demands that will be generated.*

[81] We note, here, that only the seven visitor spaces would have unimpeded overhead clearance. The remaining 70 spaces at ground level and the serving aisles for all but 11 of them would have a maximum vertical height of approximately 2 metres, insufficient, in our view, to constitute *a suitable and appropriate solution* to the parking allocation problem.



[25] Par. 47

[82] Notwithstanding the district plan's requirement, no dedicated loading space is proposed. Ms Coomer-Smit responded to that omission by suggesting that there is generally little need for such in residential developments *since most loading is minor in nature and can be readily accommodated from a visitor parking space* and, therefore, given that *there will almost always be a practical excess of parking on the site* ... (it would be) *both unnecessary and wasteful ... for a separate loading space to be provided.*[26]

[83] Quite apart from the weekly collection of the contents of 66 wheelie bins, truck-generated movements would include, from time to time, furniture vans, goods delivery, servicing and emergency vehicles, and the like, to meet the needs of the occupants of the 66 apartments. We find it difficult to reconcile that prospect with such a conclusion.

[84] The district plan requires that *no loading space shall be less than 3.5m in width, or such greater width as is required for adequate manoeuvring and that no loading space shall be less than 3.8m in height.*[27] Assuming a weekly 'wheelie bin' rubbish collection, Ms Coomer-Smit noted that a 90 percentile truck would need to park adjacent to the visitor parking spaces to load from the 66 waiting bins assembled there. Having completed that lengthy task, it was her evidence that, in order to leave the building, the truck would then have to perform an awkward 4-point manoeuvre, the successful execution of which would also necessitate the driver having to turn the truck's wheels whilst stationary ie. the available aisle space would be insufficient to meet the minimum 90 percentile truck geometry required by the district plan. Elsewhere, we were told that the rubbish would be collected by private arrangement involving the use of smaller vehicles, but of what dimensions, we know not. Regardless of the size of the collecting vehicle, that part of the site could be obstructed for a considerable time on one day each week. We record here, the appellants' apprehension that the on-site collection process would prove to be so unsatisfactory that the kerb-side siting of at least some bins on collection days would be an inevitable result.

[85] We note in passing, that there are six "rubbish rooms" all located on the ground floor, intended to serve 66 units. There is no provision for the storage of rubbish on any of the three residential floors and access to and fro is by way of stairwells only; there is no provision for elevators. We cannot avoid the conclusion

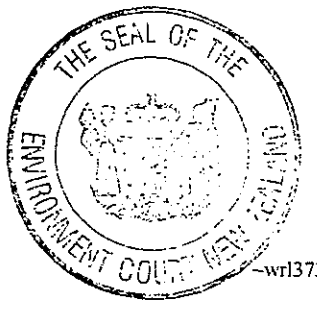
[26] Par. 49
[27] 12.8.1.3 (e) & (f)

that, overall, the proposed servicing of the 66 apartments is not to such a standard as to persuade us that there will not be off-site effects which will be more than minor. Nor are we able to reconcile it with Clause 12.8.1.3 dealing with the *Size and Access to Parking and Loading Space* provisions which stipulates, at 12.8.1.3 (iv), that *Each loading space shall be adjacent to an adequate area for goods handling and shall be convenient to any service area or service lift.* Nor with the requirement that *Such required parking areas must be kept clear and available at all times, free ... of impediment ... .*

[86] Access to and from the site, which will be security gate-controlled, is intended to be via the existing ramped driveway, which is 5.5 metres wide at its narrowest point and has a grade of 1:6. The district plan requires a minimum grade of 1:4 for residential zones and 1:8 for all other zones. In addition, clause 12.8.2.1 of the district plan requires that ramps terminating on a grade steeper than 1:20 shall be provided with a platform not steeper than 1:20 adjacent to the road boundary, such platform being not less than 4 metres long in the case of residential zones, and not less than 6 metres for all other zones. This requirement is of particular relevance for visitors who will need to leave their vehicles on that 1:6 slope in order to activate the entrance gate. Nevertheless, it was Ms Coomer-Smit's evidence that, even although the site is in a Business 2 zone, the residential character of the development is such that residentially zoned standards would be more appropriate. Again, we are not satisfied that, in view of the magnitude of the development, accommodating, as it will, at least 150 people, so simple a conclusion may be drawn. In any case, with regard to the minimum platform requirement, even the residential standard is not met.

[87] Whilst on the subject of truck-generated on-site movement, we record, in passing, that the first floor plans presented to us show that there is insufficient aisle space for a 90 percentile truck to gain access to two of the three blocks.

[88] Finally, we refer to 'headlight wash' caused after dark as headlight beams from vehicles leaving the site sweep across houses on the opposite of Keystone Avenue. Ms Coomer-Smit acknowledged that they would , and she observed that street planting on that side of the road, in time, would go some way towards alleviating the problem.



[89] Mr S D D Hewett, also a consultant traffic engineer with 13 years experience, appeared on behalf of the city council. His evidence, although not as detailed, closely mirrored that of Ms Coomer-Smit's, although he calculates that, not 75, but 95 on-site spaces would be necessary. He had a survey made in January 1999 of traffic movements at the Dominion Rd/Keystone Ave intersection and he also concluded that the development would have no more than a minor effect on the surrounding road network. With regard to on-site pedestrian safety, a matter not covered by Ms Coomer-Smit, Mr Hewitt drew our attention to a condition attached to the council's consent. It requires that a separate pedestrian access-way from Keystone Ave, of at least a metre in width, shall be agreed upon prior to the beginning of any construction work. As a consequence, it is likely that the effective vehicular entrance width will be reduced to a maximum of 4.5 metres and therefore insufficient for 2-way movement. Also as a consequence, occasional queuing of vehicles seeking to enter the site is likely. He, in turn, was silent on the requirement for a (near) level platform at the driveway's entrance to the site.

[90] Mr Hewitt also acknowledged that two of the ground floor parking bays (the stacked bay, numbered 36 on Plan (SK2) 03, did not meet the minimum district plan requirements. Nevertheless, he asserted that *The technical deficiency for space 36 would not however prevent vehicles manoeuvring into this on site parking space.*[28]

[91] Mr NB Paterson, who is a professional consulting engineer, although without any particular traffic engineering expertise, gave evidence on traffic and other engineering matters on behalf of the appellants. He challenged claims regarding the parking provisions, noting, inter alia, that the existence of the six structural columns at basement level is such that 12 of the 28 parking bays fail to meet even the 90 percentile design standard's overall minimum width of 3 metres. It was also his evidence that 18 of the 77 spaces at ground level would be similarly adversely affected and that the 4-point manoeuvre of the rubbish truck, earlier referred to, would not be possible because of there being insufficient clearance between columns and the first of the visitor spaces. In that context, we note that movement to and from the four bays, numbered 53 to 54, would not be possible whilst the rubbish truck was loading. He further observed that the failure to provide for any 99-percentile cars on site, was an unrealistic reflection of likely ownership patterns.

[28] Par. 27

[92] Mr Paterson went on to challenge, at length, the evidence of the two traffic engineers regarding the traffic that would be generated by the development and its impact upon Keystone Avenue and its intersections with Dominion and Mt Albert Roads. He pointed out that the intersection counts at Dominion Rd by Mr Hewitt's firm were taken in January and therefore were not typical, but appeared to overlook Ms Coomer-Smit's work in that regard. He did not produce the results of alternative studies in support of his assertions, being largely content to conclude that since the development would more than double the number of residential units in Keystone Avenue from the existing 46 to 112, the number of cars, and therefore the total traffic, would increase proportionately. He felt that would inevitably result in a more than minor adverse effect on the environment.

[93] Mr W Fletcher of No. 2 Keystone Avenue, expressed concern about the existing excessive demands on kerbside parking. Likewise, Mr R. Thomas of #5 Keystone Ave, immediately east of the site, expressed concern regarding the impact of the development on the street's amenities, stating that ... *it is near impossible to get street parking most days of the week our garage entry is often blocked by cars parking over it.* (sic) He, and other residents, also drew attention to what they claimed to be the existing hazards and delays involving right-hand turning movements into Dominion Rd and their apprehensions regarding the more than doubling of traffic movements that the development would generate. However, their evidence, in each case, although sincerely held, did not extend beyond generalisations.

[94] Having listened carefully to all the evidence related to off-site and on-site traffic matters associated with the proposal, and having measured that evidence against the relevant provisions of the district plan and our site inspection, and weighted them accordingly, we find that it will result in adverse off-site effects that will be more than minor. In particular, we find that the shortfall and defects in manoeuvring and parking geometry provisions are such that there are likely to be adverse repercussions on the present use and enjoyment of Keystone Avenue's environment arising from the failure, looked at holistically, of the site's capacity to accommodate the traffic needs that would be generated by 66 apartments in the form envisaged. Specifically, there is a substantial under-design in meeting the minimum geometry necessary to accommodate cars and trucks; there is substantial under-design in the weekly assembly and collection of household rubbish; and, given the security gate control proposal, the steep driveway grade and the absence of a pausing platform, in our opinion, there is a potentially hazardous situation for non-occupier-

owned vehicles entering and leaving the site. Looked at together, those defects are such as to point to such an over-development of the site that, solely on traffic grounds, the off-site adverse impact on what, at present, is typical traditional suburban street of modest houses, will be more than minor.

The Effect on Infrastructure – Sewage and Stormwater

[95] The system in this Keystone Avenue area at the head of the Meola catchment is a so-called "combined system", in which both stormwater and sewage effluents flow in the same pipes until meeting the Auckland Regional Council trunk sewer. It has been so since the early development of the city pipe networks, some of which date from the early 20th century. The systems were sized initially for sewerage flows only. Unfortunately, stormwater infiltration has added to the effects of development of the city. As a result, the system overflows under peak rainstorms, producing raw sewage flows from the public system on to private properties or watercourses.

[96] The evidence established that this pipe network has a history of flooding at Louvain Avenue intersection, implying that the network is working at full capacity under storm conditions. The Appellant evidenced considerable concern about the infra-structural difficulties pertaining to disposal of the effluent and drew attention to these inadequacies of the city's local disposal system, which may not be rectified for many years.

[97] Mr Peter Bishop, owner of properties at the intersection of Dominion Road and Louvain Avenue, spoke of some overflows from the road cesspits on to his low-lying properties. Such sewage and stormwater had then to be pumped from these sites. He felt that further development should not be allowed until the council drainage system was fixed – which he understood might not be for twenty years.

[98] For the applicant, such overflows and overall "combined system" shortcomings had been acknowledged and extensively addressed in preparation of the design of systems on site. In particular, Mr S A Crawford, consulting engineer of Tonkin and Taylor Ltd evidenced a favourable review of design work performed for the applicant by Mr B D Clode, the consulting engineer engaged to perform the design for the development. Mr Crawford attached to his evidence Mr Clode's design report describing the proposed system. He stated that that the design had been subject to separate reviews by the engineering consulting firms, Beca Carter Hollings and Ferner Ltd, and his own employer, Tonkin & Taylor Ltd. The system

was variously described to us as having a detention tank in the sub-floor basement to collect run-off from the site. It would have an orifice sized in accord with Council guidelines to restrict the rate of the gravity outflow in to the "combined system".

[99] The proposed sewerage system had been designed to take cognisance of experience that shows that sewerage system flows tend to reduce to approximately 5% of total capacity at 12 midnight. That provides a basis for mitigation of the potential problem of this development. Thus, sewerage from the development is to be collected through the peak periods of flow (6–24 hour period), and stored in a tank capable of holding a 48 hour dose of foul sewage for eventual release via a pump system in the early morning hours. The pumps are programmed to switch on at midnight and pump the tank empty in approximately 1–2 hours, discharging to the existing 225 diameter combined sewer via a 150 diameter pipe. Should the pumps be activated at the same time as a rainstorm (pipe full) the float switch in the manhole will automatically shut the system down until, at one of its hourly checks, the electronic control indicates a suitable pumping time. When water levels have returned to the predetermined depths the pumps would automatically reactivate and the tank then pumped dry.

[100] Mr N B Patterson gave evidence of his technical reservations about the proposed pumped design details for sewage and his calculations suggesting need for a larger (72 hour capacity) stormwater tank. In that context, the rainfall tables for Auckland were discussed in evidence by him and by others. A view was put to us, that the rainfall event of the combined duration and intensity he suggested had such an extremely low probability as to be "of biblical proportions".

[101] However, Mr Crawford's evidence stated in conclusion that the proposed Clode design[29]:

> *... is consistent with normally acceptable engineering practice, meets Council design requirements and is generally conservative.*
> *If the above design approaches are adopted, then I consider there will be an improvement on the existing situation....*

[102] We find that the evidence satisfies us that the proposed provisions for the two separate systems on site will dispose of both stormwater and sewage flowing from this site without adverse affect.

[29] Crawford evidence 4.1 and 4.11.

Lighting

4.6.1 Resource Management Objectives and Policies

Objective

To ensure that artificial lighting does not have a significant adverse effect on the environment and on the amenity values of the surrounding area.

Policies

- *By controlling the intensity, location and direction of artificial lighting so as to avoid light spill and glare on to other sites.*
- *By controlling where appropriate the use of artificial lighting where it will extend the operation of outdoor activities into night-time hours.*

[103] The operative plan seeks to ensure that artificial lighting does not adversely affect adjoining properties through light spill or glare. The main form of control is via Part 13 of the Auckland City Consolidated By-law, with which the applicant will need to comply. In the present instance all parking areas are located below or screened from neighbouring residential properties. As such the effect of any security lighting in these areas will be limited background wash. As was pointed out by Mr Brown, light levels will be controlled to ensure that residents of the development do not suffer any nuisance as a result of background light levels. As the residential neighbours are at a greater distance from the source of the light it follows that they are unlikely to suffer any ill effects.

Noise

[104] The operative plan sets the noise requirements for the Business 2 zone and rule 8.8.1.4 sets the noise control limits at the residential zone interface as follows:

Monday – Saturday	7am – 10pm	
Sundays and Public Holidays	9am – 6pm -	L_{10} - 50 dBA
At all other times		L_{10} - 40 dBA and
		L_{max}- 75 dBA of the background (L_{95}) plus
		30 dBA whichever is the lower

[105] During construction of the proposed apartments rule 4A.1.(d) of the operative plan prescribes restrictions generally in accordance with NZS 6803P: 1984 "*The*

Measurement and Assessment of Noise Constructions, Maintenance and Demolition Work".

[106] At all times the noise requirements as is set out in the operative plan will need to be complied with.

[107] In our view the evidence clearly establishes that the main period of time when generation of noise may well be of concern is during the construction period. This is particularly so during the excavation of the basement which will include the removal of some rock. This was emphasised by Mr N I Hegley, the acoustic consultant, who gave evidence on behalf of the applicant. Mr Hegley told the Court that until the construction equipment has been selected it is difficult to predict actual noise for residents. He pointed out that in order to ensure compliance with the noise levels the noisier activities will have to be restricted to between the hours of 7.30am and 6pm Monday to Saturday. In the event of any rock removal from the site it will be necessary to construct specific screening to screen the noise to the neighbours and select appropriate rock removal equipment. In order to ensure compliance with the requirements of the district plan during construction, Mr Hegley recommended and the applicant agreed to a condition of consent whereby the applicant is required to provide a construction noise management plan prepared by a registered acoustical engineer. That is to be approved by the Team Leader, Compliance Monitoring, Auckland City Environments. We are satisfied that such a condition will sufficiently mitigate noise during construction.

[108] We agree with Mr Hegley when he said that once the building had been completed there would be very few noise sources. The two potential sources of noise would be from traffic movements on site and activities in the proposed gymnasium that is to be located in the north-eastern corner of the first floor. We accept Mr Hegley's evidence to the effect that noise from the proposed gymnasium would be significantly less than the noise experienced from public gymnasiums as there would not be any organised group activities such as aerobics with loud amplified music. The use of this gymnasium would be casual and for the tenants use only. To ensure that this was the case the applicant agreed to an amendment to condition 3 of the consent conditions as imposed by the respondent which requires the consent holder to submit to the Council for approval a copy of the Body Corporate Rules for Keystone Bridge Apartments by including rules for:

- Restricting the use of the gymnasium to tenants of the apartments only;

- Preventing the use of amplified music within the gymnasium.

[109] Mr Hegley considered the traffic noise from cars on the road and for the use of vehicles on the site. He concluded that the design provides sufficient mitigation to ensure that the vehicles on the site would not be a problem to the residential properties and that any increase in traffic noise, which he estimated at 1 dBA, would not be noticeable. We accept Mr Hegley's evidence, which was not contested.

Assessment of Adverse Effects Against Baseline

[110] We have concluded that a number of potential adverse effects will be felt off-site from the proposal. Mr Brabant pointed out that reference to the activity rule for the Business 2 zone in the operative plan shows that a range of commercial/industrial activities is available on the site as permitted activities. He submitted that those activities could be lawfully established in substantial bulky commercial/industrial buildings resulting in more effects on the amenities of the adjoining residential environment than the consented development.

[111] In considering credible commercial/industrial activities we are mindful of the evidence of Mr McCarrison where he said:

> *The existing centres, such as the Mt Roskill end of Dominion Road, where commercial activity has traditionally been retail centred, are going through dramatic change due to the alteration in the organisation of retail, e.g. shopping malls, large stores, and technology. T he district plan aims to increase the opportunity for a wider range of activities to establish in these areas where it is appropriate. An example of this is residential units, which were a non-complying activity under previous plans but now have controlled activity status in the Business 2 zone of the district plan.*[30]

[112] We also note the words of Mr Green:

> *The intersection with Keystone Avenue and Dominion Road exists almost opposite Jasper Avenue and to the south and to the north are to be found strip shopping as there is further strip shopping on the opposite side of Dominion Road between Mt Albert Road and Jasper Avenue. This commercial enclave constituting the Mt Roskill shopping district. The commercial development in the area appears to date back from the mid to late 1960s, early 1970s with little obvious refurbishment or redevelopment in evidence.*[31]

[113] We are required to consider credible developments that could be done as of right not hypothetical possibilities. There is no evidence before us that would enable

[30] McCarrison, paragraph 5.17.
[31] Green, paragraph 4.6.

us to conclude that the construction of a commercial/industrial building of similar bulk and size is credible.

[114] Furthermore, we note that, with regard to the effect on privacy, a commercial use would operate primarily during standard business hours whereas the proposed residential units with the continual presence of occupation increases the loss of privacy both in the perception and in reality.

Positive Effects

[115] We also recognise that the proposal has a number of positive effects including:

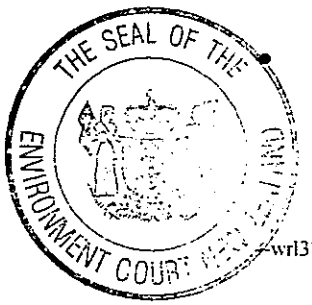
- The introduction of apartment living into the Mt Roskill area. This is an area which stands to benefit in the long term from the resulting influx of residents. Their presence could assist in retaining the commercial viability of the shopping centre. That in turn would have a flow-on and beneficial impact on all parties likely to use those services.
- A derelict supermarket that is commonly agreed to be an eye sore at this time will be replaced by a modern building.
- The location of the site is close to a significant public transport corridor and this provides the opportunity for the use of public transport to and from the site to the principal employment centres of the central business district.

Part II Matters

[116] Part II of the Act promotes the sustainable management of natural and physical resources. Accordingly, both the residential and business zoned land in this part of Auckland are a physical resource that require management for existing and future generations.

[117] It is common ground that there are no section 6 matters of national importance. The following section 7 matters are relevant:

- the efficient use and development of natural and physical resources (section 7(b)).



- the maintenance and enhancement of amenity values (section 7(c)).
- the maintenance and enhancement of the quality of the environment (section 7(f)).

We consider that the proposal is in accord with section 7(b) in that it will provide an opportunity for the broader community to improve the viability of the Mt Roskill commercial environment. The proposal will also remove an unsightly and derelict structure. Notwithstanding this, we consider that the overall effect on the adjacent residential amenity will be contrary to section 7(c) and section 7 (f).

Exercise of Discretion

[118] In the overall exercise of our discretion we have regard to the provisions of the operative plan. We balance those provisions of the plan that the proposal appears to be generally in accord with, against the policies and objectives specifically directed at preventing, or at least reducing to an acceptable level, any adverse impact on residential amenities adjacent to business zones[32].

[119] We have regard to Change No. 3 bearing in mind the stage it has reached during the resource management process. Change No. 3 is of course designed in the instant case to mitigate effects between the Business 2 and Residential 6a interface boundaries.

[120] We have considered the various adverse effects likely to arise from this proposal and have concluded that the effects are such that they will be more than minor and in our view the conditions of consent that are proposed will not sufficiently mitigate such effects.

[121] There is some merit in the criticism by the appellant that the applicant's proposal is an over development of the site, the consequences of which are a number of adverse effects on the adjacent Residential 6a zoned land. The number of minor transgressions of those controls displayed by the proposal underlines this criticism. We have looked carefully at the evidence relating to the potential effects likely to emanate from the proposal both during construction and following its completion. We are of the view that those effects will have an adverse effect on the existing environment contrary to section 5(2)(c) and sections 7(c) and 7(f) of the Act.

[32] See Part 8.6.2.1(e) of the operative plan.

Accordingly, for the reasons given in this decision, we exercise our discretion to refuse consent and allow the appeal.

Determination

[122] We accordingly allow the appeal and the Council decision is set aside.

Costs

[123] Costs are reserved. We do however indicate that our tentative view is that costs should lie where they fall.

DATED at **AUCKLAND** this 11th day of January 2001.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

R Gordon Whiting
Environment Judge

Queenstown-Lakes District Council v Hawthorn Estate Ltd [2006] NZCA 120; (2006) 12 ELRNZ 299; [2006] NZRMA 424 (12 June 2006)

Last Updated: 21 December 2011

IN THE COURT OF APPEAL OF NEW ZEALAND

CA45/05

BETWEEN QUEENSTOWN-LAKES DISTRICT COUNCIL
Appellant

AND HAWTHORN ESTATE LIMITED
First Respondent

AND T BAILEY AND OTHERS
Second Respondents

Hearing: 14 March 2006

Court: William Young P, Robertson and Cooper JJ

Counsel: E D Wylie QC and N S Marquet for Appellant
N H Soper and J R Castiglione for First Respondent
No appearance for Second Respondents

Judgment: 12 June 2006

JUDGMENT OF THE COURT

A The appeal is dismissed.

B. **The appellant is to pay costs to the first respondent in the sum of $6,000 together with usual disbursements. We certify for two counsel.**

REASONS

(Given by Cooper J)

[1] This is an appeal from a judgment of Fogarty J pursuant to leave granted by this Court under s 308 of the Resource Management Act 1991 ("the Act").
[2] Fogarty J had dismissed an appeal by the council and the second respondents against a decision of the Environment Court. The Environment Court had set aside a decision of the Council declining a resource consent application made by the first respondent ("Hawthorn").
[3] As a result of the Environment Court decision, Hawthorn was authorised to proceed to subdivide and carry out subdivision works on a property near Queenstown. Some 32 residential lots were proposed to be created.
[4] This Court gave leave for the following questions to be pursued on appeal:

1. Whether His Honour Justice Fogarty erred in law when he determined (either expressly or by implication):

(a) that the receiving environment should be understood as including not only the environment as it exists but also the reasonably foreseeable environment;

(b) that it was not speculation for the Environment Court to take into account approved building platforms in the triangle and on the outside of the roads that formed it;

(c) that the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline.

2. Whether His Honour Justice Fogarty erred in law when he determined that the Environment Court had not erred in law in concluding that the landscape category it was required to consider was an "Other Rural Landscape".

3. Whether His Honour Justice Fogarty erred in law when he held that the Environment Court had not erred in law when it considered the minimum subdivision standards in the Rural Residential zone in addressing the first respondent's proposal which is in a Rural General zone.

[5] As was observed by the Court in granting leave, the questions are inter-related, and the answers to the second and third questions are in large part dependent on the answer to the constituent parts of the first. The main issue that underlies the appeal is whether a consent authority considering whether or not to grant a resource consent under the Act must restrict its consideration of effects to effects on the environment as it exists at the time of the decision, or whether it is legitimate to consider the future state of the environment.

[6] It was common ground that the three questions fall to be considered under the Act in the form in which it stood prior to the coming into force of the Resource Management Amendment Act 2003.

Background

[7] Hawthorn applied to the Council for both subdivision and land use activity consent in respect of land in the Wakatipu Basin. The land comprises 33.9 hectares, and is situated near the junction of Lower Shotover and Domain Roads, with frontage to both of those roads. It is part of a triangle of land bounded by them and Speargrass Flat Road, known locally as "the triangle".

[8] Hawthorn's development would subdivide the land into 32 separate lots, containing between 0.63 and 1.30 hectares, together with access lots, and a central communal lot containing 12.36 hectares. The application also sought consent to the erection of a residential unit on each of the 32 residential sites, within nominated building platforms that were shown on plans submitted with the application. The proposal required consent as a non-complying activity under the operative district plan, and as a discretionary activity under the proposed district plan.

[9] There was an existing resource consent which allowed subdivision of the land into eight blocks of approximately four hectares in each case. Those approved allotments contained identified building platforms.

[10] The Environment Court recorded that the whole of the land proposed to be subdivided is flat, apart from a small rocky outcrop. The Court observed that "the triangle" had been the subject of considerable development pressure over the past decade, and that within the 166 hectare area so described, 24 houses had been erected, with a further 28 consented to, but not yet built. Outside of the roads that physically form the triangle were a further 35 approved building platforms. It is

unclear from the Environment Court's decision whether any of those had been built on.
[11] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) of the Act, a key question that arose was whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not yet implemented, were implemented in the future. The council had declined consent to the application and on the appeal by Hawthorn to the Environment Court argued that that Court's consideration should be limited to the environment as it existed at the time that the appeal was considered. That proposition was rejected by the Environment Court, and also by Fogarty J.
[12] Before we confront the questions that have been asked directly, we briefly summarise the reasoning in the decisions respectively of the Environment Court and the High Court.

The Environment Court decision

[13] The Environment Court held that the dwellings, and the approved building platforms yet to be developed by the erection of buildings, both within and outside the triangle, were part of the receiving environment. As to the undeveloped sites, that conclusion was founded on evidence that the Court accepted that it was "practically certain that approved building sites in the Wakatipu Basin will be built on." That conclusion, not able to be challenged on appeal, is critical to the arguments advanced in the High Court and in this Court.
[14] The Environment Court held that the eight dwellings for which resource consent had already been granted on the subject site were appropriately considered as part of the "permitted baseline", a concept explained in the decisions of this Court in *Bayley v Manukau City Council* [1999] NZLR 568, *Smith Chilcott Limited v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Limited v Auckland Regional Council* [2002] 1 NZLR 323. However, it rejected an argument by Hawthorn that landowners in the area could have a reasonable expectation that the Council would grant consent to subdivisions that matched the intensity of three other subdivisions in the triangle, for which the Council had recently granted consent. Those subdivisions had an average area of two hectares per allotment. Hawthorn had argued that the present development should be considered in the light of a future environment in which subdivision of that intensity would occur throughout the triangle.
[15] The Court rejected that proposition as being too speculative. Noting that all subdivision in the zone required discretionary activity consent, the Court observed that:

[25] We have no way of knowing whether existing or future allotment holders will apply for consent to subdivide to the extent of two hectare allotments, nor whether they can replicate the conditions which led the Council to grant consent in the cases referred to by Mr Brown, nor at what point the consent authority will

consider that policies requiring avoidance of over-domestication of the landscape have been breached. In general terms we do not consider that reasonable expectations of landowners can go beyond what is permitted by the relevant planning documents or existing consents.

[16] At the time that the appeal was heard before the Environment Court, there was both an operative and a proposed district plan. The Court's focus was properly on the proposed district plan, however, because the relevant provisions in it had passed the stage where they might be further modified by the submission and reference process under the Act. Under the proposed district plan (which we will call simply the "district plan", or "the plan" from this point), it was necessary for the Court to classify the landscape setting of the proposed development. The Court found that the appropriate landscape category was "Other Rural Landscape". In doing so the Court rejected the arguments that had been put to it by the Council and by parties appearing under s 271A of the Act that the proper classification was "Visual Amenity Landscape". Both are terms used and described in the district plan.

[17] Once again, the Court's reasoning was based on what it thought would happen in the future. It held that the "central question in landscape classification" was whether the landscape "when developed to the extent permitted by existing consents" would retain the essential qualities of a Visual Amenity Landscape. That would not be the case here, because of the extent of existing and likely future development of "lifestyle" or "estate" lots both in the triangle and outside it.

[18] The Environment Court then discussed the effects of the development on the environment. It found that the subdivision works would introduce an unnatural element to the landforms in the triangle, but that they would be largely imperceptible, and the landform was not one of the best examples of its type. In terms of visual effects, the Court concluded that, although the development could be seen from positions beyond the site, it would not intrude into significant views, nor dominate natural elements in the landscape. As to the effects on "rural amenity" the Court held that the position was "finely balanced", but after it identified and considered relevant district plan objectives and policies dealing with rural amenity, concluded that the development was marginally compatible with them.

[19] The Court also considered the proposal against relevant assessment criteria in the district plan. It found that the proposal would satisfy most of them. This part of the Court's decision required it to revisit under s 104(1)(d) of the Act matters already dealt with in the inquiry into effects on the environment under s 104(1)(a).

[20] One of the assessment criteria raised as an issue whether the proposed development would be complementary or sympathetic to the character of adjoining or surrounding visual amenity landscape. Another required consideration of whether the proposal would adversely affect the naturalness and rural quality of the landscape through inappropriate landscaping. The Court was able to repeat here conclusions that it had already arrived at earlier in its decision. In particular, it said

that although the effects of the proposal on the retention of the rural qualities of the landscape were "on the cusp":

...in the context of consented development on this and other sites in the vicinity the proposal is just compatible with the level of rural development likely to arise in the area.

[21] Having considered the objectives and policies of the district plan as a whole, the Court concluded that while the proposal was marginal in respect of some significant policies, it was supported by others. Consequently, it was "not contrary to the policies and objectives taken as a whole".
[22] In the balance of its decision the Court rejected an argument of the Council that the decision would create an undesirable precedent. It considered the proposal against the higher level considerations flowing from Part II of the Act, expressed a conclusion that the effects on the environment of allowing the activity would be minor, provided that there was a condition proscribing any further subdivision of the land, and then moved to the exercise of its discretion to grant consent under s 105(1)(c) of the Act. For present purposes it should be noted that the Court's conclusion that there would not be an undesirable precedent set by the grant of consent was expressly justified on the basis that the proposal had been comprehensively designed, and would provide facilities for the public that would link to other facilities in the triangle. The Court considered that it was difficult to imagine that another such comprehensive proposal could be designed for another location, given the "level of subdivision and building that has already occurred within the triangle". Further, the Court's conclusion that adverse effects on the environment would be minor was reached:

[h]aving considered carefully the changes that will occur on the surrounding environment as a result of consents already granted and the "baseline" set by existing resource consents on the land...

[23] So it can be seen that, in respect of the main issues that the Court had to decide, its reasoning in each case was predicated on the ability to assess the development against the future conditions likely to be present in the area.

The High Court decision

[24] The questions earlier set out particularise the challenged conclusions of Fogarty J. On the first issue, as to whether the receiving environment should be understood as including not only the environment as it exists, but also the reasonably foreseeable environment, Fogarty J essentially adhered to his own reasoning in *Wilson v Selwyn District Council* [2005] NZRMA 76. He held in that case that "environment" in s 104 includes potential use and development in the receiving environment.
[25] Accordingly, the Environment Court had not erred when it took into account

the approved building platforms both within and outside of the triangle. In [74] of the judgment Fogarty J said:

In my view the reason why the baseline analysis is abrupt is that the Court had no doubt at all that advantage would be taken of approved building platforms in this very valuable location. Mr Goldsmith's view was not challenged in cross-examination. Ms Kidson, the landscape witness for the Council, took into account that more houses would be built as a result of a number of consents.

[26] Fogarty J went on to observe that the Environment Court's approach did not involve speculation, and that the Court had rejected an argument that it should take into account the possibility of further subdivision as a result of possible future applications for discretionary activity consent. He observed that in that respect, the approach of the Environment Court was more cautious than that which he himself had taken in *Wilson v Selwyn District Council*.

[27] One of the questions that has been raised on the appeal concerns the adequacy of the Environment Court's consideration of the application of what has come to be known as the "permitted baseline". Although that expression was used by Fogarty J in [74], we doubt that he was using the term in the sense that it is normally used, that is with reference to developments that might lawfully occur on the site subject to the resource consent application itself. Rather, Fogarty J appears to have used the expression to refer to the likely developments that would take place beyond the boundary of the subject site, utilising existing resource consents. Nothing turns on the label that the Judge used to refer to lawfully authorised environmental change beyond the subject site. However, it would be prudent to avoid the confusion that might result from using the term other than in its normal sense, addressed in *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council* and *Arrigato Investments Ltd v Auckland Regional Council*. As we will emphasise later in this judgment the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

[28] The second and third questions raised on the appeal have their genesis in particular provisions in the Council's proposed district plan. Under the landscape classification employed by that plan, the Environment Court held that the receiving environment of the subject application should be regarded as an "Other Rural Landscape". In a passage which again uses the expression "baseline" in an unusual context, Fogarty J said at [76]:

Mr Wylie argued that, although there was evidence before the Court on which it could conclude the landscape was Other Rural Landscape that it reached that decision after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. So he was arguing that the much earlier finding of Other Rural Landscape was affected by this same area of baseline analysis. As I do not think that there is any error of baseline analysis, this

point cannot be sustained. It is, however, appropriate to comment on one detail in Mr Wylie's argument in case it be thought I have overlooked it.

[29] The Judge accepted Mr Wylie's argument that the Environment Court had considered their judgment regarding the effect of the proposal on rural amenity as finely balanced. Having observed that the Environment Court was an expert Court, was thoroughly familiar with the Queenstown area and skilled in the assessment of landscape values, Fogarty J said at [79]:

In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on other rural landscape may be infected with an error of law, in a material way.

[30] The Judge had already decided that there was no such error of law, because it was proper for the Environment Court to consider the future state of the environment.
[31] Fogarty J also held that the Environment Court had not erred in assessing the proposed development by reference to the lot sizes permitted in the rural-residential zone. Essentially, he held that this was a legitimate course to follow, because the site was located in an Other Rural Landscape, which is the least sensitive of the landscape categories provided for in the district plan. Using terms that appear in the district plan itself, Fogarty J said at [87]:

Obviously different levels of protection of landscape value will depend on whether the proposed developments impact on romantic landscape, Arcadian landscape or other landscape. Reading the [plan] as a whole one would expect quite significant protection of romantic and Arcadian landscape. The degree of protection of other landscape, including Other Rural Landscape from any further development is less certain.

[32] He noted there were no minimum subdivisional allotment sizes for the rural general zone. It was a zone that contemplated consents being granted for a wide range of activities provided they did not compromise the landscape and other rural amenities. The proposal had been designed to have a park-like appearance and would incorporate planting that would to some extent screen the development from neighbouring land use. He concluded at [90]:

Had the Court been proceeding on the basis of a classification of the landscape as Arcadian, considering Rural Residential Standards could well have been taking into account an irrelevant consideration. But where the Court considers that the

Arcadian character of the landscape has gone and is dealing with a rural landscape already showing some kind of residential character, I do not think it can be said that an expert Court has fallen into error of law by looking at the standards in the rural living area zones, when exercising a judgment as to how to address a proposal which is a discretionary activity in the rural general zone of the [plan].

[33] Mr Wylie contends that in respect of all these determinations Fogarty J's decision was incorrect in law. We discuss the reasons that he advanced for that contention in the context of the questions that we have to answer.

Question 1(a) – The environment

[34] Mr Wylie's principal submission was that Fogarty J erred in holding that the word "environment" includes not only the environment as it exists, but also the reasonably foreseeable environment after allowing for potential use and development. The Council contended that such an approach is not required by the definition of the word "environment" in s 2 of the Act, and that to read the word in that way would be inconsistent with Part II of the Act, in particular with s 7(f).
[35] Mr Wylie further submitted that a purposive approach to the relevant statutory provision would lead to a conclusion that the "environment" must be confined to the environment as it exists. He submitted that the reference to "maintenance and enhancement of the quality of the environment" in s 7(f) of the Act was strongly suggestive that it is the environment as it exists at the date of the exercise of the relevant function or power under the Act which must be relevant. He contended that it would be difficult, perhaps impossible, to have particular regard to the maintenance and enhancement of the quality of a speculative future environment.
[36] Further, referring to the importance of district plans made under the Act and the process of submission in which members of the public may formally participate in the plan preparation process, Mr Wylie argued that when a plan becomes operative, it represents a community consensus as to how development should proceed in the Council's district. Such plans, he submitted, focus on existing environments and put in place a framework for future development. But they do not, as he put it, "assume future putative environments degraded by potential use or development".
[37] In addition, Mr Wylie pointed to practical difficulties that he said would make the approach that found favour with the Environment Court and Fogarty J unworkable. There was, in addition, the potential for "environmental creep" if applicants having secured one resource consent were then able to treat the effects of implementing that consent as something which would alter the future state of the environment whilst returning to the Council on successive occasions to seek further consents "starting with the most benign, but heading towards the most damaging".
[38] Mr Wylie also argued that to uphold Fogarty J's view on the meaning of the word "environment" would be to run counter to authorities which have established rules for priority between applicants, authorities dealing with issues of precedent

and cumulative effect as well as the authorities already mentioned on the "permitted baseline".
[39] Both parties have argued the matter as if the word "environment" in s 2 of the Act ought to be seen as neutral on the issue of whether it requires the future, and future conditions to be taken into account. We think that that is true only in the superficial sense that none of the words used specifically refers to the future.
[40] The definition reads as follows:

"Environment" includes –

(a) Ecosystems and their constituent parts, including people and communities; and

(b) All natural and physical resources; and
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:
[41] This provision must be construed on the basis prescribed by s 5(1) of the Interpretation Act 1999; the meaning of the provision is to be ascertained from its text and in the light of its purpose.
[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the enquiry should be limited to a fixed point in time when considering "the economic conditions which affect people and communities", a matter referred to in paragraph (d) of the definition. The nature of the concepts involved would make that approach artificial.
[43] These views are reinforced by consideration of the various provisions in the Act in which the word "environment" is used, or in which there is reference to the elements that are set out in the four paragraphs of its definition. The starting point should be s 5, which states and explains the fundamental purpose of the Act in the following terms:

5. Purpose -

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which

enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[44] "Natural and physical resources" are, of course, part of the environment as defined in s 2. The purpose of the Act is to promote their sustainable management. The idea of management plainly connotes action that is on-going, and will continue into the future. Further, such management is to be sustainable, that is to say, natural and physical resources are to be managed in the way explained in s 5(2). Again, it seems plain that provision by communities for their social, economic and cultural well-being, and for their health and safety, is an idea that embraces an on-going state of affairs.

[45] Section 5(2)(a) then makes an express reference to the "reasonably foreseeable needs of future generations". What to this point has been implicit, becomes explicit in the use of this language. There is a plain direction to consider the needs of future generations. Paragraph (b)'s reference to safeguarding the life-supporting capacity of air, water, soil, and ecosystems also points not only to the present, but also the future. The idea of safeguarding capacity necessarily involves consideration of what might happen at a later time.

[46] The same approach is requisite under paragraph (c). "Avoiding" naturally connotes an on-going process, as do "remedying" and "mitigating". The latter two words, in addition, imply alteration to an existing state of affairs, something that can only occur in the future.

[47] Each of the components of s 5(2) is, therefore, directed both to the present and the future state of affairs. An analysis of the concepts contained in ss 6 and 7 leads inevitably to the same conclusion. That is partly because the particular directions in each section are all said to exist for the purpose of achieving the purpose of the Act. But in part also, the future is embraced by the words "protection", "maintenance" and "enhancement" that appear frequently in each section. We do not agree with Mr Wylie's argument based on s 7(f). "Maintenance" and "enhancement" are words that inevitably extend beyond the date upon which a particular application for resource consent is being considered.

[48] The requirements of ss 5, 6 and 7 must be complied with by all who exercise functions and powers under the Act. Regional authorities must do so, when carrying out their functions in relation to regional policy statements (s 61) and the purposes of the preparation, implementation and administration of regional plans is to assist regional councils to carry out their functions "in order to achieve the purpose of this Act". Further, the functions of regional councils are all conferred for the purpose of giving effect to the Act (s 30(1)). Consistently with this, s 66

obliges regional councils to prepare and change regional plans in accordance with Part II.

[49] The same obligations must be met by territorial authorities, in relation to district plans. The purpose of the preparation, implementation and administration of district plans is, again, to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act. Similarly, the functions of territorial authorities are conferred only for the purpose of giving effect to the Act (s 31) and district plans are to be prepared and changed in accordance with the provisions of Part II. There is then a direct linkage of the powers and duties of regional and territorial authorities to the provisions of Part II with the necessary consequence that those bodies are in fact planning for the future. The same forward looking stance is required of central government and its delegates when exercising powers in relation to national policy statements (s 45) and New Zealand coastal policy statements (s 56). The drafting shows a consistent pattern.

[50] In the case of an application for resource consent, Part II of the Act is, again, central to the process. This follows directly from the statement of purpose in s 5 and the way in which the drafting of each of ss 6 to 8 requires their observance by all functionaries in the exercise of powers under the Act. Self-evidently, that includes the power to decide an application for resource consent under s 105 of the Act. Moreover, s 104 which sets out the matters to be considered in the case of resource consent applications, began, at the time relevant to this appeal:

(1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to ....

[51] The pervasiveness of Part II is once again apparent. In the case of resource consent applications, reference must also be made to the list of relevant considerations spelled out in paragraphs (a) to (i) of s 104(1). These include: “any actual and potential effects on the environment of allowing the activity” (paragraph (a)), the objectives, policies, rules and other provisions of the various planning instruments made under the Act (paragraphs (c) to (f)) and “any other matters that a consent authority considers relevant and reasonably necessary to determine the application” (paragraph (i)).

[52] Each of these provisions is likely to require a consent authority, in appropriate cases, to have regard to the future environment. Insofar as ss 104(1)(c) to (f) are concerned, that will be necessary where the instruments considered require that approach. If the precedent effects of granting an application are to be considered as envisaged by *Dye v Auckland Regional Council* [2002] 1 NZLR 337 then the future will need to be considered, whether under s 104(1)(d) or s 104(1)(i). As to s 104(1)(a), its reference to potential effects is sufficiently broad to include effects that may or may not occur depending on the occurrence of some future event. It must certainly embrace future events.

[53] Future potential effects cannot be considered unless there is a genuine attempt, at the same time, to envisage the environment in which such future effects, or effects arising over time, will be operating. The environment inevitably changes,

and in many cases future effects will not be effects on the environment as it exists on the day that the Council or the Environment Court on appeal makes its decision on the resource consent application.

[54] That must be the case when district plans permit activities to establish without resource consents, where resource consents are granted and put into effect and where existing uses continue as authorised by the Act. It is not just the erection of buildings that alters the environment: other activities by human beings, the effects of agriculture and pastoral land uses, and natural forces all have roles as agents of environmental change. It would be surprising if the Act, and in particular s 104(1)(a) were to be construed as requiring such ongoing change to be left out of account. Indeed, we think such an approach would militate against achievement of the Act's purpose.

[55] A further consideration based in particular on the provisions concerning applications leads to the same conclusion. When an application for resource consent is granted, the Act envisages that a period of time may elapse within which the resource consent may be implemented. At the time relevant to this appeal, the statutory period was two years or such shorter or longer period as might be provided for in the resource consent (s 125). Consequently, the effects of a resource consent might not be operative for an appreciable period after the consent had been granted. Mr Wylie's argument would prevent the consent authority considering the environment in which those effects would be felt for the first time. Rather, the consent authority would have to consider the effects on an environment which, at the time the effects are actually occurring, may well be different to the environment at the time that the application for consent was considered. That would not be sensible.

[56] Similarly, it is relevant that many resource consents are granted for an unlimited time. That is certainly the case for most land use and subdivision consents (see s 123(b)). Yet it could not be assumed that the effects of implementing the consent would be the same one year after it had been granted, as they would be in twenty years' time.

[57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[58] We have not been persuaded to a different view by any of Mr Wylie's arguments based on practical considerations and conflict with other lines of authority. It was his submission that the practical difficulties arising from Fogarty J's judgment would be significant. He contended that to require those administering district plans, and applicants for resource consents, to take account of the potential or notional future environment would be unduly burdensome, and would require them to speculate about what might or might not occur in any particular receiving environment, about what future economic conditions might be, and, possibly about how such future economic conditions might affect future

people and communities. He submitted that this would require a degree of prescience on the part of consent authorities that was inappropriate.
[59] In support of those propositions he referred to *O'Connell v Christchurch City Council* [2003] NZRMA 216, and in particular to what was said by Panckhurst J at [73]:

I also agree with the submission of Mr Chapman for AMI/AMP that an extension of the rule to include potential activities on sites other than the application site would place an intolerable burden on the consent authority when assessing resource consent applications.

[60] The concerns expressed by Mr Wylie about practical difficulties were overstated. It will not be every case where it is necessary to consider the future environment, or where doing so will be at all complicated. Suppose, for example, an application for resource consent to establish a new activity in a built up area of a city. There will be rules which provide for permitted activities and in the vast majority of cases it would be likely that the foreseeable future development of surrounding sites would be similar to that which existed at the time the application was being considered. In such a case, it might be a safe assumption that the environment would, in its principal attributes, be very much like it presently is, but perhaps more intensively developed if there are district plan objectives and policies designed to secure that end. At the other end of the spectrum, if one supposed an application to carry out some new activity involving development in an area which was rural in nature and which was intended to remain so in accordance with the policy framework established by the district plan, then once again it ought not be difficult to postulate the future state of that environment.
[61] Difficulties might be encountered in areas that were undergoing significant change, or where such change was planned to occur. However, even those areas would have an applicable policy framework in the district plan that, together with the rules, would give considerable guidance as to the nature and intensity of future activities likely to be established on surrounding land. In cases such as the present, where there are a significant number of outstanding resource consents yet to be implemented, and uncontested evidence of pressure for development, the task of predicting the likely future state of the environment is not difficult.
[62] The observations made by Panckhurst J in *O'Connell v Christchurch City Council* must be read in context. He was dealing with an appeal from an Environment Court decision overturning a decision by the City Council to grant consent to establish a tyre retail outlet. AMI and AMP occupied multi-storey office premises adjoining the subject site and had appealed to the Environment Court against the Council's decision. When the Environment Court set aside the Council's decision, the applicant for resource consent appealed to the High Court. One of the issues raised on the appeal was a contention that the Environment Court had misapplied the "permitted baseline test" in as much as it had considered the effects of permitted activities on only the subject site and had not considered the effects of permitted activities on adjacent sites as well. At [70] Panckhurst J said:

[70] I accept that the Court did apply the baseline test with reference only to the subject site. That is it compared the proposed activity against other hypothetical activities that could be established on this site as of right in terms of the transitional and proposed plans. Regard was not had to the impact of the establishment of hypothetical activities on a closely adjacent site. Was such an approach in error?

[71] I am not persuaded that it was. This conclusion I think follows from a reading of various decisions where the permitted baseline assessment has been considered in a number of contexts.

[63] The Judge referred to *Bayley v Manukau City Council, Smith Chilcott Ltd v Auckland City Council and Arrigato Investments Ltd v Auckland Regional Council*, and concluded that the required comparison for purposes of permitted baseline analysis is one that is restricted to the site in question. There was nothing in those cases which was consistent with the extension of the test for which the appellant had contended. We have earlier expressed our view that the "permitted baseline" has in the previous decisions of this Court been limited to a comparison of the effects of the activity which is the subject of the application for resource consent with the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the grant of a resource consent. In the latter case, it is only the effects of activities which have been the subject of resource consents already granted that may be considered, and the consent authority must decide whether or not to do so: *Arrigato Investments Ltd v Auckland Regional Council*, at [30] and [34]-[35].
[64] We agree with Panckhurst J's observations about the limits of the "permitted baseline" concept, and we also agree with him that the decisions of this Court have not suggested that it can be applied other than in relation to the site that is the subject of the resource consent application. However, it is a far step from there to contend that *Bayley v Manukau City* and the decisions that followed it, dictate the answer on the principal issues to be determined in this appeal. The question whether the "environment" could embrace the future state of the environment was not directly addressed in those cases, nor was an argument in those terms apparently put to Panckhurst J.
[65] It is as well to remember what the "permitted baseline" concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:

Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The

consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[66] Where it applies, therefore, the permitted baseline analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.
[67] We do not overlook what was said in *Bayley v Manukau City Council* at p 577, where the Court referred to what Salmon J had said in *Aley v North Shore City Council* [1998] NZRMA 361 at 377:

On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists.

The Court said that it would add to that sentence the words:

...or as it would exist if the land were used in a manner permitted as of right by the plan.

[68] However, it must be remembered first, that *Bayley* was the case in which the permitted baseline concept was formally recognised, and as we have explained did not deal with the issue which has to be decided in this case. Secondly, it was a case about notification of resource consent applications. The issue that arose concerned the proper application of s 94 of the Act, and the provisions it contained allowing non-notification in cases where the adverse effect on the environment of the activity for which consent was sought would be minor. In that context there could be no need to consider the future environment, because if the effects on the existing environment were not able to be described as minor, there would be no need to look any further.
[69] Mr Wylie referred to other practical difficulties which he illustrated by reference to Fogarty J's decision in *Wilson v Selwyn District Council*. In that case, as in this, Fogarty J held that the term "environment" could include the future environment where the word is used in s 104(1)(a) of the Act. He held further that, to ascertain the future state of the environment it was appropriate to ask, amongst other things, whether it was "not fanciful" that surrounding land should be developed, and to have regard in that connection to what was permitted in a proposed district plan. Because the district plan contemplated the subdivision of neighbouring land as a controlled activity, His Honour held that it was plain that the District Council did not regard it as fanciful that the land in the locality might be subdivided down into smaller sites with increased dwellings. Mr Wylie pointed out that although subdivision was a controlled activity under the proposed plan relevant in that case, and there were no submissions challenging that, there were,

however, submissions challenging the right to erect dwellings, as Fogarty J himself had recorded in [38] of the judgment. Mr Wylie criticised the decision on the basis that it had effectively "pre-empted" the submission process in relation to the district plan. It would also, in his submission, lead to considerable uncertainty.
[70] Mr Wylie further argued that in the present case, some of the remarks made by Fogarty J suggested that the possibility of development pursuant to resource consents for discretionary or even non-complying activities should be taken into account to ascertain the future state of the environment, in advance of such consents being granted.
[71] That is an inference which can arise from what the Judge said at [79]:

In my view Mr Wylie's argument has to depend on the point he has reserved, namely that a consent authority applying s 104 in these circumstances must consider the receiving environment as it exists, and ignore any potential development: whether it be imminent pursuant to existing building consents; or allowed as permitted uses; or potentially allowable as discretionary activity, controlled activity, or non-complying activity. If that is the law, then the judgment by the Environment Court on Other Rural Landscape may be infected with an error of law, in a material way.

[72] Fogarty J noted that the decision of the Environment Court in the present case had rejected an argument that it should take into account the likelihood of future successful applications for discretionary activity consent. At [74] he said:

As noted, the Court did go on to reject taking into account the further subdivision and thus even more houses resulting from successful applications for discretionary activities. It may be noted that that is a more cautious approach than I took in *Wilson and Rickerby*, see [62] and [81].

[73] The reference here to *Wilson and Rickerby* was a reference to the case now reported as *Wilson v Selwyn District Council*.
[74] These observations by the Judge express too broadly the ambit of a consent authority's ability to consider future events. There is no justification for borrowing the "fanciful" criterion from the permitted baseline cases and applying it in this different context. The word "fanciful" first appeared in *Smith Chilcott Ltd v Auckland City Council* at [26], where it was used to rule out of consideration, for the purposes of the permitted baseline test, activities that the plan would permit on a subject site because although permitted it would be "fanciful" to suppose that they might in fact take place. In that context, when the "fanciful" criterion is applied, it will be in the setting of known or ascertainable information about the development site (its area, topography, orientation and so on). Such an approach would be a much less certain guide when consideration is being given to whether or not future resource consent applications might be made, and if so granted, in a particular area. It would be too speculative to consider whether or not such consents might be granted and to then proceed to make decisions about the future

environment as if those resource consents had already been implemented.
[75] It was not necessary to cast the net so widely in the present case. The Environment Court took into account the fact that there were numerous resource consents that had been granted in and near the triangle. It accepted Mr Goldsmith's evidence that those consents were likely to be implemented. There was ample justification for the Court to conclude that the future environment would be altered by the implementation of those consents and the erection of dwellings in the surrounding area.
[76] Limited in this way, the approach taken to ascertain the future state of the environment is not so uncertain as to be unworkable or unduly speculative, as Mr Wylie contended.
[77] Another concern that was raised by Mr Wylie was the possibility of "environmental creep". This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(a). Mr Wylie submitted that if s 104(1)(a) requires that consideration be given to potential use and development, there would be nothing to stop developers from making a number of applications for resource consent, starting with the most benign, and heading towards the most damaging. On each successive application, they would be able to argue that the receiving environment had already been notionally degraded by its potential development under the unimplemented consents.
[78] This fear can be given the same answer as was given in *Arrigato* where the Court had to determine whether unimplemented resource consents should be included within the "permitted baseline". At [35] the Court said:

[35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.

[79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent

is going to implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[80] Three other issues, raised by Mr Wylie in support of his argument that "environment" should be confined to what exists at the time the resource consent application is considered by the consent authority, can be briefly mentioned. First, he suggested that the contrary approach would have the effect of negating the result of cases that have decided that priority as between applicants should be established in accordance with the time when applications are made to a consent authority (*Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1). That argument would only be legitimate if we were to endorse Fogarty J's decision that resource consent applications not yet made but which conceivably might be made, could be taken into account. That is not our view.

[81] Secondly, Mr Wylie contended that to hold that the word "environment" included potential use or development would undermine the decision of this Court in *Dye v Auckland Regional Council* where it had been decided that the grant of a resource consent had no precedent effect in the "strict sense". It is apparent from [32] of that decision, that what was meant by use of the expression "the strict sense" was that one consent authority is not bound by its own decisions or those of any other consent authority. We do not agree that a decision that the "environment" can include the future state of the environment has any implications for what was decided in *Dye*.

[82] Finally, Mr Wylie contended that if unimplemented resource consents are taken into account, then consent applications will fall to be decided on the basis of the environment as potentially affected by other consents. He submitted that this was to all intents and purposes "precedent by another route". We do not agree. To grant consent to an application for the reason that some other application has been granted consent is one thing. To decide to grant a resource consent application on the basis that resource consents already granted will alter the existing environment when implemented, and that those consents are likely to be implemented is quite a different matter.

[83] There is nothing in the High Court's decision in *Rodney District Council v Gould* [2006] NZRMA 217 on the question of cumulative effects which has any implications for the current issue. That decision simply explained what was already apparent from what this Court had decided in relation to cumulative effects in *Dye v Auckland Regional Council* that is, that the cumulative effects of a particular application are effects which arise from that application, and not from others.

[84] In summary, we have not found, in any of the difficulties Mr Wylie has referred to, any reason to depart from the conclusion which we have reached by considering the meaning of the words used in s 104(1)(a) in their context. In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. We think Fogarty J erred when he suggested that the effects of resource consents that might in future be made should be brought to account in considering the likely future state of the environment. We think the legitimate considerations should be limited to those that we have just expressed. In short, we endorse the Environment Court's approach. Subject to that reservation, we would answer question 1(a) in the negative.

Question 1(b) - Speculation

[85] The foregoing discussion means this and the subsequent questions can be answered more briefly. The issue raised by this question is whether taking into account the approved building platforms in and near the triangle, was speculative. The process adopted by the Environment Court cannot properly be characterised as having involved speculation. The Court accepted Mr Goldsmith's evidence that it was "practically certain" that the approved building sites in and near the triangle would be built on. Mr Wylie confirmed that there was no issue with the Environment Court's finding of fact on the likelihood of future houses being erected.

[86] However, Mr Wylie argued that the environment against which the application fell to be assessed comprised only the existing environment. If that assertion were correct, he submitted that it followed that the potential effects of unimplemented resource consents were irrelevant.

[87] We have already rejected his contention that the relevant environment was confined to the existing environment. It follows that there is no basis upon which we could find error of law in relation to Question 1(b).

Question 1(c) – Consideration of the permitted baseline

[88] The issue raised by this question is whether the Environment Court had given adequate and appropriate consideration to the application of the permitted baseline. Mr Wylie's argument on this issue proceeded as if the Environment Court had been making a decision about the permitted baseline when it allowed itself to be influenced by its conclusion that the building sites in and around the triangle would be developed. For reasons that we have already given, we do not consider that the receiving environment was properly to be approached on the basis of a "permitted baseline" analysis, as that term has normally been used.

[89] Whatever label is put upon the exercise, Mr Wylie's main contention in this

part of his argument was that there was nothing in the Environment Court's decision to show that it had a discretion of the kind that had been explained by this Court in the decision in *Arrigato Investments Ltd v Auckland Regional Council*, in particular the passage at [35] that we have earlier set out. Mr Wylie submitted that properly understood, the decision in *Arrigato* meant that there was a discretion when it came to the consideration of unimplemented resource consents. Mr Wylie also contended that it was not obvious from the Environment Court's judgment that it was aware that it had that discretion, let alone that it had exercised it.

[90] We do not consider that it is appropriate to describe what is simply an evaluative factual assessment as the exercise of a discretion. Further, we agree with Mr Castiglione that the Council's argument wrongly conflates the "permitted baseline" and the essentially factual exercise of ascertaining the likely state of the future environment. We have previously stated our reasons for limiting the permitted baseline to the effects of developments on the site that is the subject of a resource consent application. On the relevant issue of fact, the Environment Court relied on the evidence of Mr Goldsmith about the virtual certainty of development occurring on the approved building platforms in and around the triangle. There was no error in that approach.

[91] In reality the present question simply raises, in a different guise, the central complaint that the Council makes about the acceptance by both the Environment Court and the High Court that the receiving environment can include the future environment. That issue is not to be approached by invoking the permitted baseline, so the question posed does not strictly arise. We simply answer the question by saying that the issues raised by the Council in this part of the appeal do not establish any error of law by the Environment Court, nor by Fogarty J.

Question 2 – Landscape Category

[92] The Council argued that the Environment Court had wrongly concluded that the landscape category it was required to consider was an "Other Rural Landscape" under the district plan. It was contended that Fogarty J had erred by approving the Environment Court's approach.

[93] The district plan defines and classifies landscapes into three broad categories, "Outstanding Natural Landscapes and Features", "Visual Amenity Landscapes" and "Other Rural". The classification of a particular landscape can be important to the consideration of resource consent applications, because different policies, objectives and assessment criteria apply to land within the different categories.

[94] Landscapes in the "outstanding" category are described in the district plan as "romantic landscapes – the mountains and the lakes – landscapes to which s 6 of the Act applies". The important resource management issues are identified as being the protection of these landscapes from inappropriate subdivision, use and development, particularly where activity might threaten the openness and naturalness of the landscape. With respect to "Visual Amenity Landscapes", the district plan describes them in the following way:

They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces.

The district plan seeks to enhance their natural character and enable alternative forms of development where there are direct environmental benefits of doing so. This leaves a residual category of "other rural landscapes", to which the district plan assigns "lesser landscape values (but not necessarily insignificant ones)".

[95] There was a contest in the Environment Court as to whether the landscape to be considered in the present case was properly categorised as "Visual Amenity" or "Other Rural". In making its assessment as to which classification should apply, the Environment Court plainly had regard to what the landscape would be like when resource consents already granted were utilised. At [32], it said:

We consider that the landscape architects called by the Council and the section 271A parties have been too concerned with the Court's discussion of the scale of landscapes and have not sufficiently addressed the central question in landscape classification, namely whether the landscape, when developed to the extent permitted by existing consents, will retain the essential qualities of a VAL, which are pastoral or Arcadian characteristics. We noted (in paragraph 3) that development of "lifestyle" or "estate" lots for rural-residential living is not confined to the triangle itself.

[96] It then made reference to existing developments in the area finding some to be highly visible and detracting significantly from any "arcadian" qualities of the wider setting. It concluded that the landscape category was Other Rural.
[97] We accept, as Mr Wylie submitted, that in large part that conclusion of the Environment Court was apparently based on the view that it had formed about what the landscape would be like when modified by the implementation of as yet unimplemented resource consents.
[98] In the High Court, Fogarty J recorded the submission that had been made to him by Mr Wylie that, although there was evidence before that Court on which it could have concluded that the landscape was "Other Rural", nevertheless it had reached that conclusion after taking into account, irrelevantly, that the landscape would be developed to the extent permitted by existing consents. Fogarty J held first that this was in effect a repetition of the arguments previously made about faulty baseline analysis. As he did not consider that the Environment Court had made any error in that respect, Mr Wylie's argument could not be sustained. A little later in the judgment, Fogarty J confirmed his view that a landscape categorisation decision could only be criticised if the Court was obliged to ignore future potential developments in the area ([79] of his decision, set out in [29] above).
[99] Mr Wylie repeated in this context his argument that the Court had been

obliged to consider the environment as it existed at the time that it made its decision. That argument must fail for the reasons that we have already given. However, in this Court Mr Wylie developed another argument based not on the relevant statutory provisions, but on provisions of the district plan itself. Mr Wylie's argument was based on Rule 5.4.2.1 of the district plan.

[100] Rule 5.4.2 contains "assessment matters" which are to be considered when the Council decides whether or not to grant consent to, or impose conditions on, resource consent applications made in respect of land in the rural zones. As we have previously noted those assessment criteria vary according to the categorisation of the landscape. Before the actual assessment matters are stated, however, Rule 5.4.2.1 sets out a three-step process to be followed in applying the assessment criteria. It provides as follows:

- **5.4.2.1 Landscape Assessment Criteria – Process**

There are three steps in applying these assessment criteria. First, the analysis of the site and surrounding landscape; secondly determination of the appropriate landscape category; thirdly the application of the assessment matters. For the purpose of these assessment criteria, the term "proposed development" includes any subdivision, identification of building platforms, any building and associated activities such as roading, earthworks, landscaping, planting and boundaries.

Step 1 – Analysis of the Site and Surrounding Landscape

An analysis of the site and surrounding landscape is necessary for two reasons. Firstly it will provide the necessary information for determining a sites ability to absorb development including the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape. Secondly it is an important step in the determination of a landscape category – i.e. whether the proposed site falls within an outstanding natural, visual amenity or other rural landscape.

An analysis of the site must include a description of those existing qualities and characteristics (both negative and positive), such as vegetation, topography, aspect, visibility, natural features, relevant ecological systems and land use.

An analysis of the surrounding landscape must include natural science factors (the geological, topographical, ecological and dynamic components in [sic] of the

landscape), aesthetic values (including memorability and naturalness), expressiveness and legibility (how obviously the landscape demonstrates the formative processes leading to it), transient values (such as the occasional presence of wildlife; or its values at certain times of the day or of the year), value of the landscape to Tangata Whenua and its historical associations.

Step 2 – Determination of Landscape Category

This step is important as it determines which district wide objectives, policies, definitions and assessment matters are given weight in making a decision on a resource consent application.

The Council shall consider the matters referred to in Step 1 above, and any other relevant matter, in the context of the broad description of the three landscape categories in Part 4.2.4. of this Plan, and shall determine what category of landscape applies to the site subject to the application.

In making this determination the Council, shall consider:

(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and

(b) the landscape maps in Appendix 8.

Step 3 – Application of the Assessment Matters

Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:

First, with respect to the prescribed assessment criteria set out in Rule 5.4.2.2 of this section;

Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

[101] Mr Wylie argued, that even if his argument confining "environment" to the current environment failed, nevertheless in accordance with these district plan provisions it could not be relevant to consider the future environment other than at Step 3. He submitted that for the purposes of Step 1 and Step 2, attention should be focused solely on the current state of the environment.
[102] Mr Castiglione argued to the contrary, suggesting that the words used in Step 1, "...the basis for determining the compatibility of the proposed development with both the site and the surrounding landscape" were apt to refer to proposed development generally within the landscape. We reject that submission. In context, the reference to "the proposed development" must be the development which is the subject of a particular application for resource consent.
[103] But the wording of Steps 1 and 2 does not exclude a consideration of the environment as it would be after the implementation of existing resource consents. Although the second paragraph in Step 1 refers to "existing qualities and characteristics", the words used are inclusive, and there is nothing to suggest that they are exhaustive. The same applies in respect to the last paragraph in Step 1. We do not read the words in either paragraph as ruling out consideration of the future environment. Even if that conclusion were wrong it would be legitimate for the Council to consider the future environment as part of "any other relevant matter", the words used in the second paragraph within Step 2. Further, the second part of Step 2 authorises a broadly based inquiry when it requires the Council to "consider...the wider landscape" within which a development site is situated. There is no reason to read into these words, or any of the other language in Step 2, a limitation of the consideration to the present state of the landscape.
[104] It follows that the future state of the environment can properly be considered at Steps 1 and 2, before the landscape classification decision is made. Neither the Environment Court nor Fogarty J erred and Question 2 should be answered no.

Question 3 – Reliance on Minimum Subdivision Standards in the Rural-Residential zone

[105] In the High Court, the Council had argued that the Environment Court had misconstrued the relevant district plan provisions, and taken into account an irrelevant consideration by referring to the subdivision standards contained in the district plan for the rural-residential zone. The subject site is zoned rural general.
[106] Mr Wylie pointed to three separate paragraphs in the Environment Court's decision where there had been references to the rural-residential provisions of the plan. In [74] of its decision the Environment Court had discussed evidence that had been given about the desire of the developer to create a "park-like" environment. A landscape architect whose evidence had been called by the Council expressed the

opinion that although the proposal would not introduce urban densities, it was not rural in nature. The Court referred to the fact that in the rural-residential zone a minimum lot size of 4,000 square metres and an associated building platform was permitted. It will be remembered that the subject development would comprise allotments varying in size between 0.6 and 1.3 hectares. No doubt with that comparison in mind, the Environment Court expressed the view that the development would provide more than the level of "ruralness" of rural-residential amenity.

[107] The next reference to the rural-residential rules was in [78]. The Environment Court was there dealing with the issue of whether the development would result in the "over-domestication" of the landscape. The Court expressed its view that the proposal could co-exist with policies seeking to retain rural amenity and that while it would add to the level of domestication of the environment, the result would not reach the point of over-domestication. That was so, because the site was in an "other rural landscape", and the district plan considered that rural-residential allotments down to 4,000 square metres retained an appropriate amenity for rural living.

[108] Finally, Mr Wylie referred to the fact that at [92], where the Environment Court was dealing with a proposition that the proposal would be contrary to the district plan's overall settlement strategy, the Court made a reference to the reluctance that it had expressed in a previous decision to set minimum allotment sizes in the rural-residential zone. Mr Castiglione suggested that the Environment Court had made a mistake, and that it had meant to refer to the rural general zone in that paragraph, not the rural-residential zone. We do not need to decide whether or not that was the case.

[109] Having reviewed the various references to the rural-residential in context, Fogarty J held that the Environment Court had not considered an irrelevant matter or committed any error of law in its references to the rural-residential zones. We cannot see any basis to disturb that conclusion. In this Court Mr Wylie contended that Fogarty J's reasoning had been based on the fact that the Environment Court had considered that any "arcadian" character of the landscape had gone. He then repeated the point that that conclusion had turned on the fact that the Court had considered the likely future environment as opposed to confining its consideration to the existing environment. He submitted that the decision was wrong for that reason. We have already rejected that argument.

[110] We do not consider that there was any error of law in the approach of either the Environment Court or the High Court on this issue. Question 3 should also be answered no.

Result

[111] For the reasons that we have given, each of the questions raised on the appeal is answered in the negative. That answer in respect of Question 1(c) must be read in the context that the Environment Court's analysis of the relevant environment was not a "permitted baseline" analysis.

[112] The respondent is entitled to costs in this Court of $6,000 plus disbursements, including the reasonable travel and accommodation expenses of both counsel to be fixed, if necessary by the Registrar.

Solicitors:
Ross Dowling Marquet Griffin, Dunedin for Appellant
Anderson Lloyd Caudwell, Queenstown for First Respondent

SCHEDULE OF EXISTING EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	GRANTEE	REFERENCE
Right to Convey Water	AV	Lots 1-2 DP 20531 -Herein	Arrowtown Irrigation Company Limited	T.885724
Right to Convey Water	AW	Lots 1-2 DP 20531 -Herein	Arrowtown Irrigation Company Limited	T.885724

SCHEDULE OF PROPOSED EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
	CA	Lots 1 DP 20531	Lot 2, 3, 4
	CB	Lot 4	Lot 2, 3
Right to Convey Water	CC	Lot 1 DP 20531	Lot 2, 3
	CD	Lot 2	Lot 3
Right of way	DA	Lot 3	Lot 2
Consent notice area		Area BA, BB and BC are to be building platforms Area AA are to be a Wilding conifer control area	

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LOTS 1-4 BEING A PROPOSED SUBDIVISION OF LOTS 1 & 2 DP 20531, SEC 1 SO 20437, SEC 1 SO 302586 & SEC 3 SO 20437 AND PROPOSED ROAD STOPPING

Client: ROBERTSON	Surveyed	Signed	Date	Job No. 14231	Drawing No. 2 SHEET 001
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	Designed -	Signed	Date -	Datum & Level MSL	Rev. -

patch

Landscape - Reference : PA20412 IS13
Scale 1:2000 @ A1 - 1:4000 @ A3

0 20 40 70 100m
SCALE = 1:2000 AT A1

Speargrass Farm
Masterplan - 7 April 2022

Key:

- Proposed native shrubs and trees
- Proposed native grasses
- Proposed mitigation and rural character trees
- Proposed hedge
- Proposed Building Platform (1,000m²)
- .5m contours

Lot 3

1m schist stone wall

RL 372.5masl

Constructed mound +2.5m

Constructed mound +1.5m

Lot 2

RL 369.5masl

Constructed mound +2.5m

15m Setback

Speargrass Flat Road

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 2 & 3 Landscape Plan - 7 April 2022

Key:

ID	Botanical Name	Common Name	Quantity
Ac	Alnus cordata	Alder	20
Ca	Cedrus atlantica	Atlas cedar	4
Fc	Fuscospora fusca	Red beech	26

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 2 & 3 Tree Plan - 7 April 2022

Key:

	Botanical Name	Common Name	Size	Spacing	%
A	**Native Shrubs**				
	Austroderia richardii	Toe toe	PB3	2m	20%
	Griselinia littoralis	Broadleaf	PB5	2m	20%
	Brachyglottis monroi	Daisy bush	PB5	1.5m	10%
	Phormium cookianum	Mountain Flax	PB3	2m	20%
	Sophora prostrata	Dwarf kowhai	PB5	2m	10%
	Veronica salicifolia	Korokio	PB5	2m	20%
B	**Native Grasses**				
	Carex testacea	Hair sedge	PB3	.7m	30%
	Chionochloa rigida	Snow tussock	PB3	1m	20%
	Chionochloa rubra	Red tussock	PB3	1m	50%
C	**Hedge**				
	Olearia paniculata	Olearia	PB5	1.5m	100%

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 2 & 3 Shrub Plan - 7 April 2022

Key:

- Existing tree to be retained
- Proposed native shrubs and trees
- Proposed native grasses
- Proposed mitigation and rural character trees
- Proposed hedge
- Proposed Building Platform (1,000m²)
- .5m contours

Lot 4

Constructed mound +2.5m

15m Setback

Constructed mound +2.5m

Speargrass Flat Road

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 4 Landscape Plan - 7 April 2022

Key:

ID	Botanical Name	Common Name	Quantity
Ac	Alnus cordata	Alder	2
Ca	Fagus sylvatica 'purpurea'	Copper beech	5
Qp	Quercus palustris	Pin Oak	9

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 4 Tree Plan - 7 April 2022

Key:

	Botanical Name	Common Name	Size	Spacing	%
A	**Native Shrubs**				
	Austroderia richardii	Toe toe	PB3	2m	20%
	Griselinia littoralis	Broadleaf	PB5	2m	20%
	Brachyglottis monroi	Daisy bush	PB5	1.5m	10%
	Phormium cookianum	Mountain Flax	PB3	2m	20%
	Sophora prostrata	Dwarf kowhai	PB5	2m	10%
	Veronica salicifolia	Korokio	PB5	2m	20%
B	**Native Grasses**				
	Carex testacea	Hair sedge	PB3	.7m	30%
	Chionochloa rigida	Snow tussock	PB3	1m	20%
	Chionochloa rubra	Red tussock	PB3	1m	50%

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 4 Shrub Plan - 7 April 2022

LEGEND

EARTHWORKS

Fill Material

- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m

Cut Material

- -0m to -0.5m
- -0.5m to -1m
- -1m to -1.5m
- -1.5m to -2m
- -2m to -2.5m
- -2.5m to -3m

EARTHWORKS VOLUMES:

3m³ FILL (SOLID)

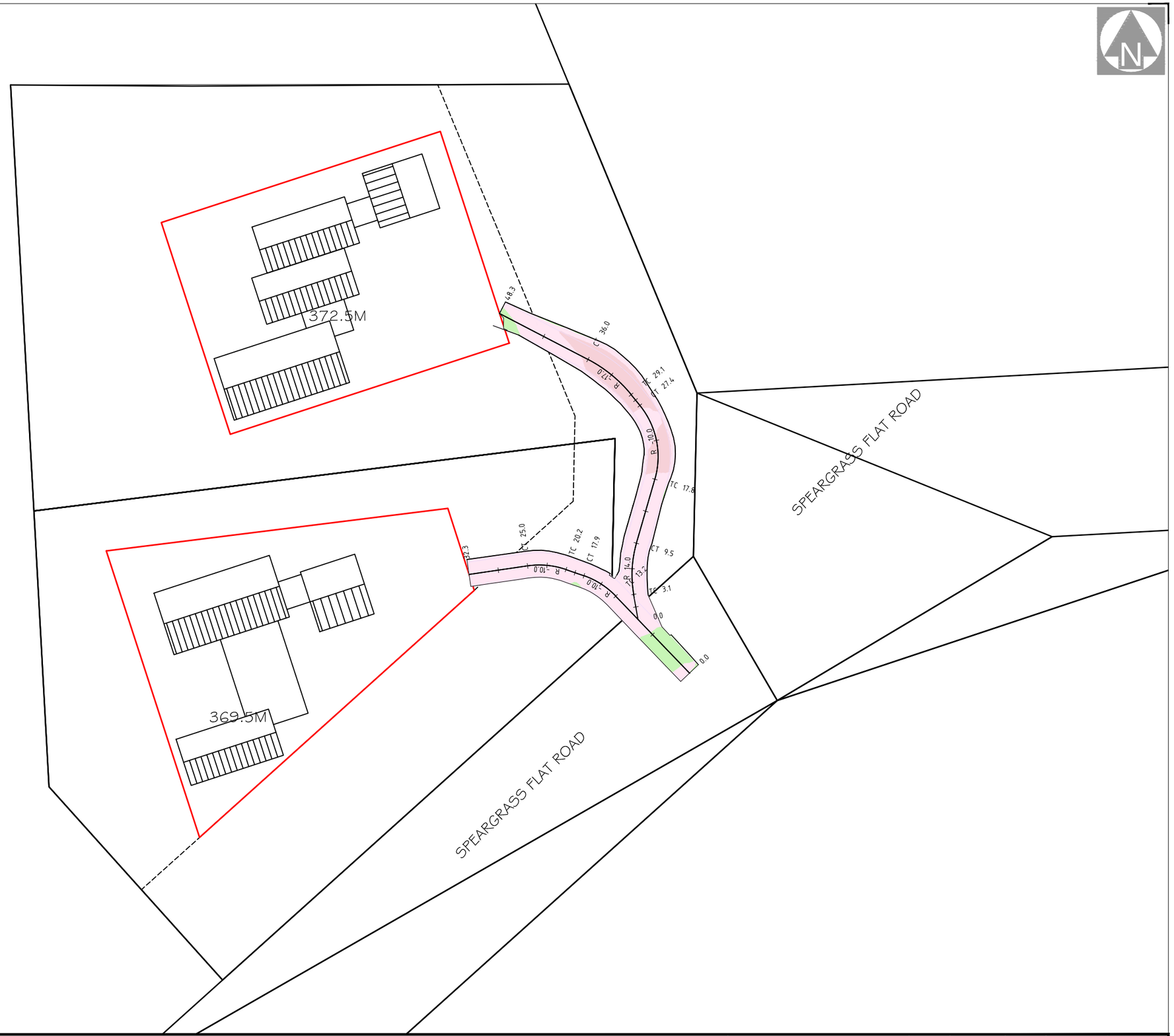
78m³ CUT (SOLID)

EARTHWORKS AREA:

273.47m²

LOT 3
3848m²

LOT 2
3068m2



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DRIVEWAY EARTHWORKS FOR PROPOSED LOT 2 - 4

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LEGEND

EARTHWORKS

- 4.5m or more
- 4m to 4.5m
- 3.5m to 4m
- 3m to 3.5m
- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m
- -0m to -0.5m
- -0.5m to -1m
- -1m to -1.5m
- -1.5m to -2m
- -2m to -2.5m
- -2.5m to -3m

EARTHWORKS VOLUMES:

3390m³ FILL (SOLID)
206m³ CUT (SOLID)

LOT 3
3848m²

LOT 2
3068m2

372.5M

369.5M

SPEARGRASS FLAT ROAD

SPEARGRASS FLAT ROAD

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DRIVEWAY EARTHWORKS FOR PROPOSED LOT 2-4

Client: **ROBERTSON**

Surveyed | Signed | Date

Job No. **14231**

Drawing No. **2** SHEET 002

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JJ		–	1:250 @ A1 1:500 @ A3

Designed	Signed	Date	Datum & Level	Rev.
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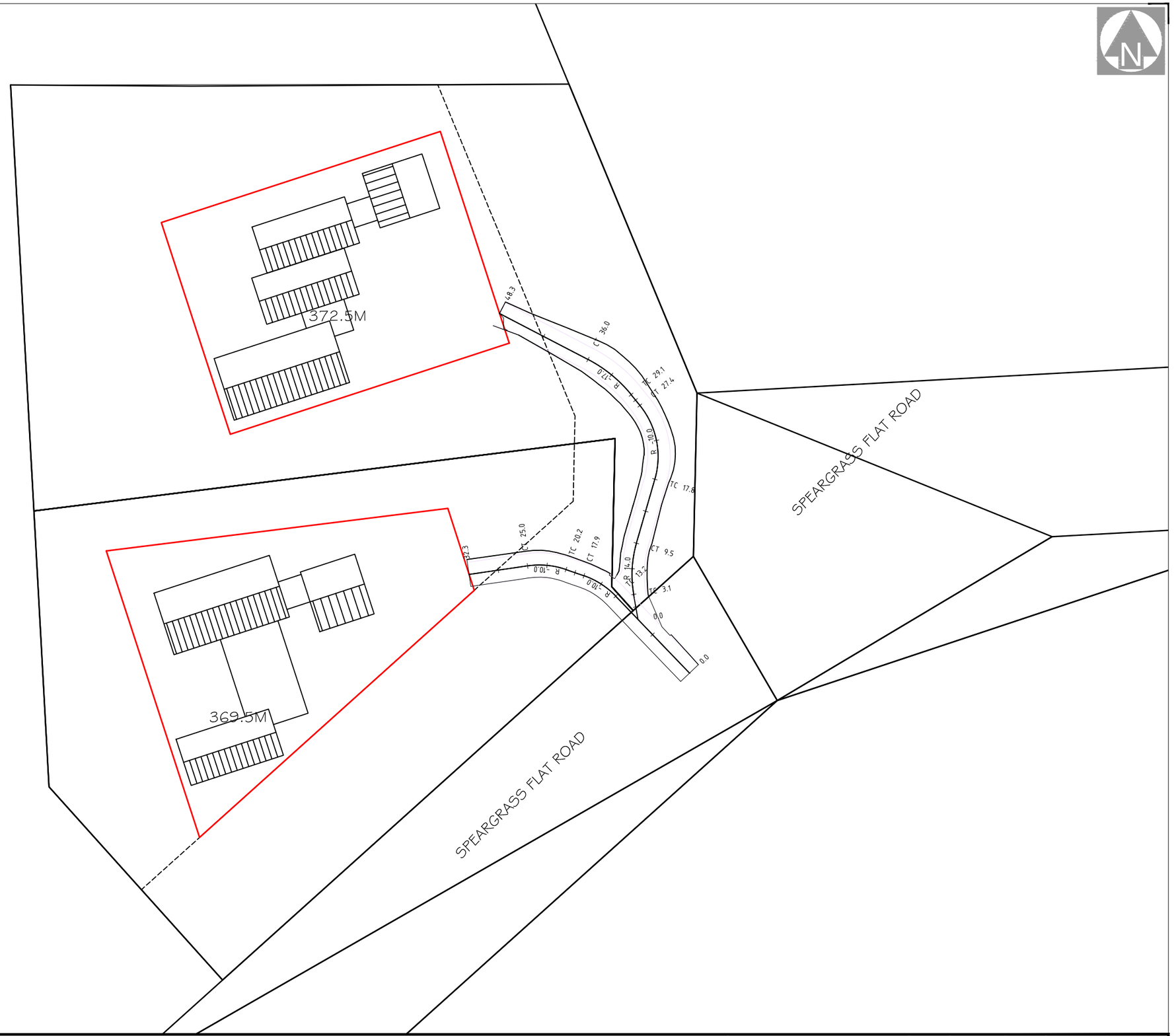
LOT 3
3848m²

LOT 2
3068m2



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DRIVEWAY EARTHWORKS FOR PROPOSED LOT 2-4

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LEGEND

EARTHWORKS

Fill Material

- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m

Cut Material

- -0m to -0.5m
- -0.5m to -1m
- -1m to -1.5m
- -1.5m to -2m
- -2m to -2.5m
- -2.5m to -3m

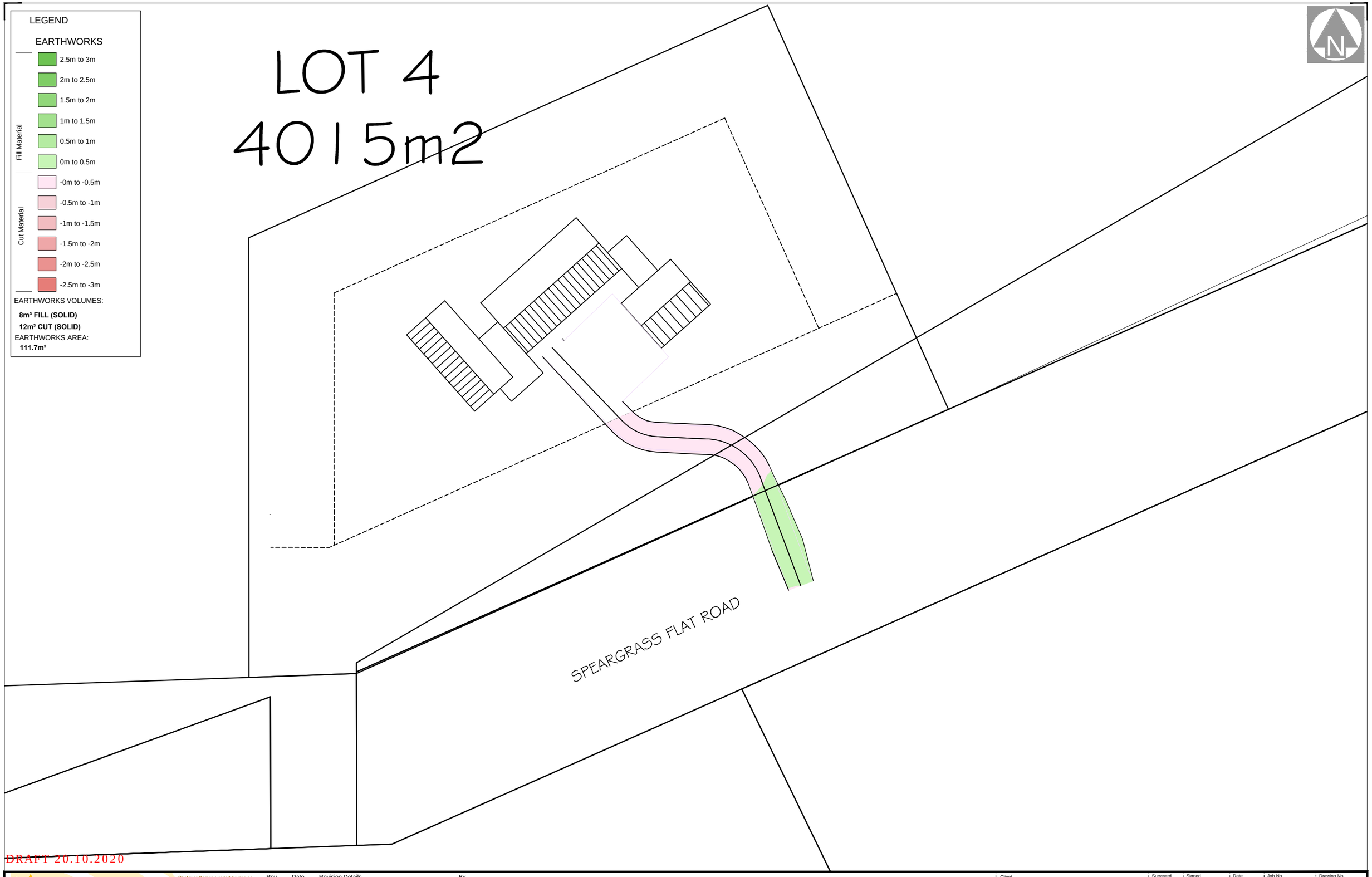
EARTHWORKS VOLUMES:

8m³ FILL (SOLID)

12m³ CUT (SOLID)

EARTHWORKS AREA:

111.7m²



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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2-4

Client: **ROBERTSON**

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Designed –	Signed	Date –	Datum & Level **MSL**	Rev. –	

LEGEND

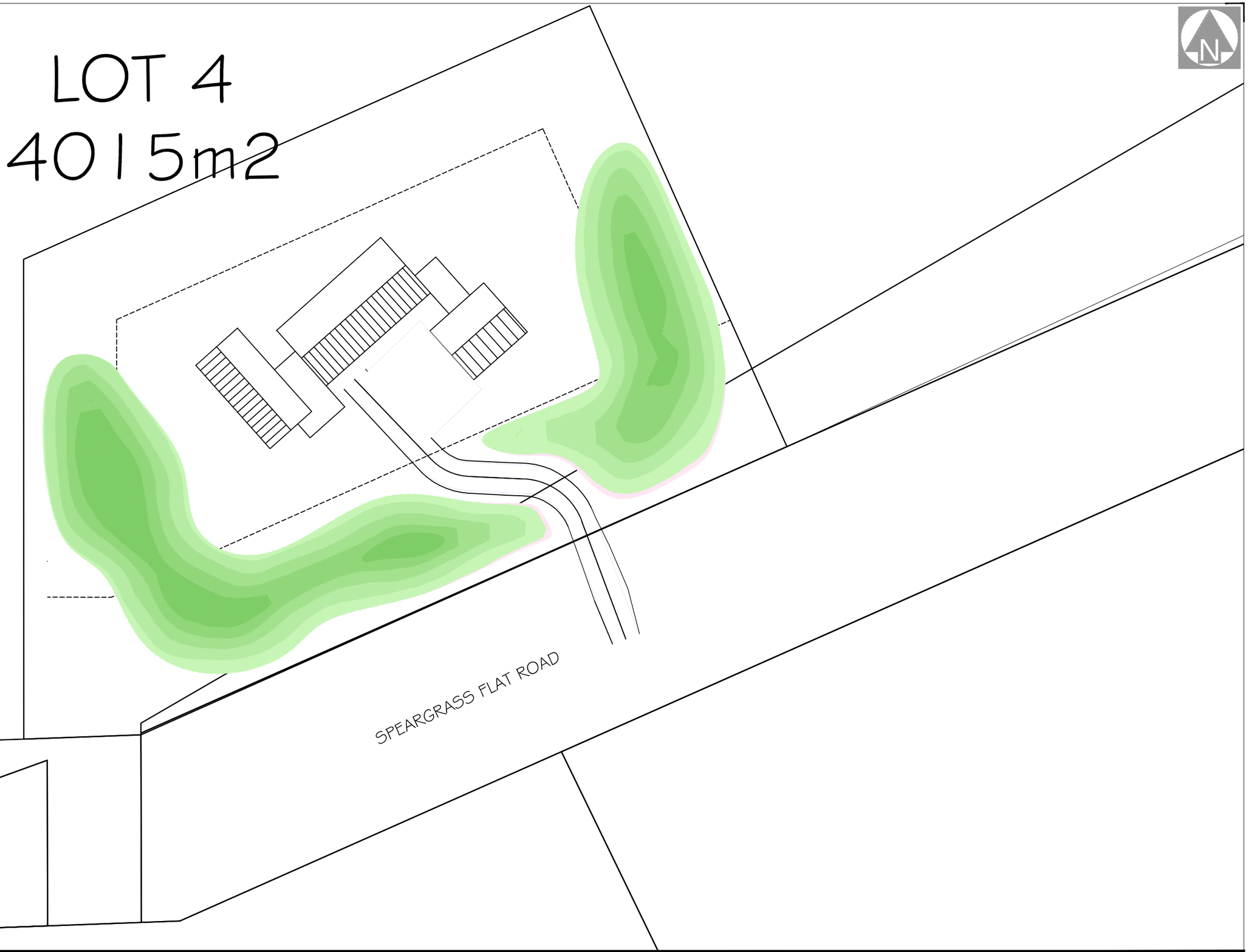
EARTHWORKS

- 4.5m or more
- 4m to 4.5m
- 3.5m to 4m
- 3m to 3.5m
- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m
- -0m to -0.5m

EARTHWORKS VOLUMES:

1435m³ FILL (SOLID)

0m³ CUT (SOLID)



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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2 - 4

Client: ROBERTSON	Surveyed	Signed	Date	Job No. 14231	Drawing No. 2 SHEET 005
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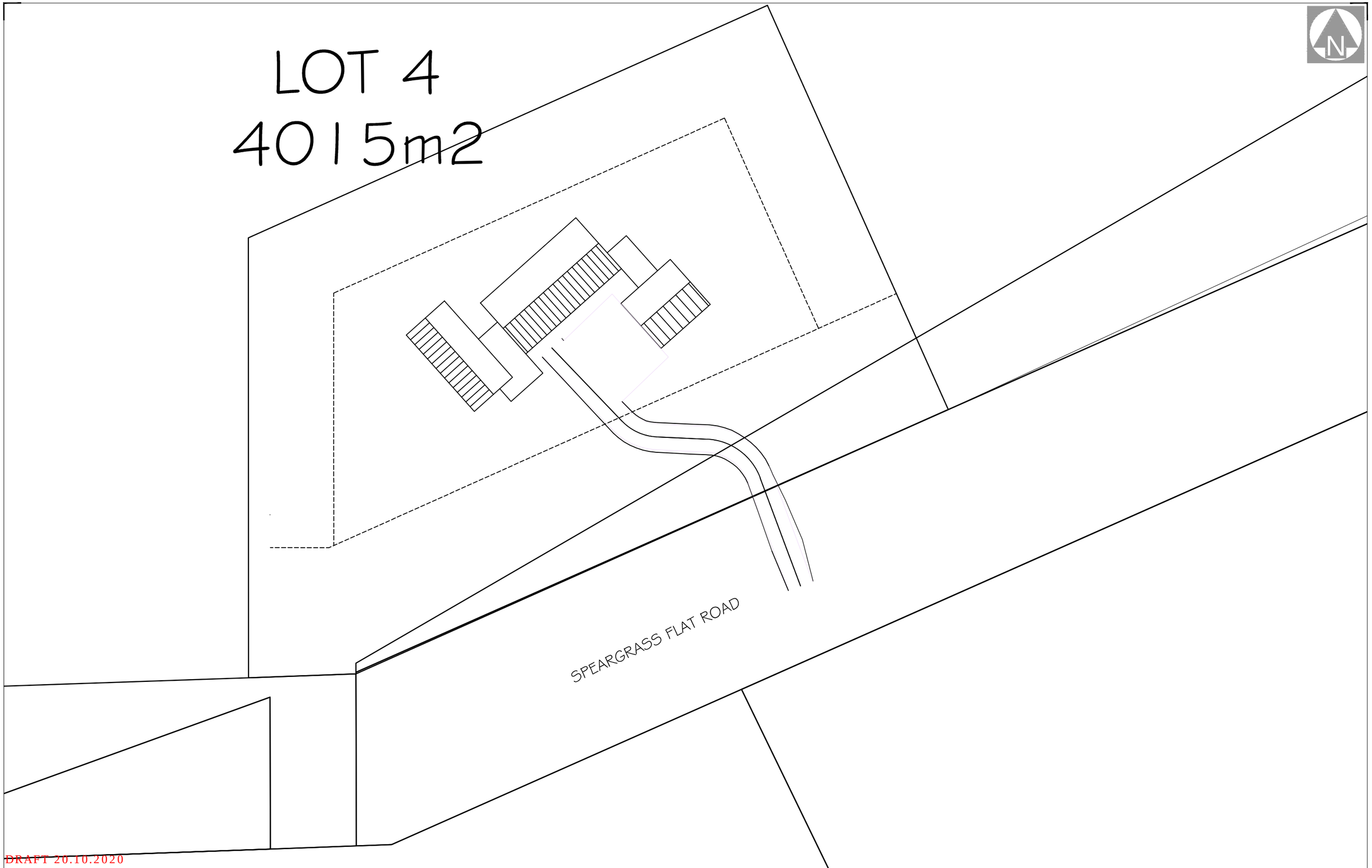

DRAFT 20.10.2020

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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2-4

Client: **ROBERTSON**

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Drawn JJ	Signed	Date -	Scale 1:200 @ A1 1:400 @ A3		
Designed -	Signed	Date -	Datum & Level MSL	Rev. -	

SCHEDULE OF EXISTING EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	GRANTEE	REFERENCE
Right to Convey Water	AV	Lots 1-2 DP 20531 -Herein	Arrowtown Irrigation Company Limited	T.885724
Right to Convey Water	AW	Lots 1-2 DP 20531 -Herein	Arrowtown Irrigation Company Limited	T.885724

SCHEDULE OF PROPOSED EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
	CA	Lot 1 DP 20531	Lot 2, 3, 4
	CB	Lot 4	Lot 2, 3
Right to Convey Water	CC	Lot 1 DP 20531	Lot 2
Consent notice area		Area BA, BB are to be building platforms Area AA and AB are to be a Wilding conifer control area	
Amalgamation condition		Lot 100 hereon is to be held in the same certificate of title as Lot 1 DP ******	

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LOTS 1-4 BEING A PROPOSED SUBDIVISION OF LOTS 1 & 2 DP 20531, SEC 1 SO 20437, SEC 1 SO 302586 & SEC 3 SO 20437 AND PROPOSED ROAD STOPPING

Client: **ROBERTSON**

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				14231	2 SHEET 001
	Drawn: JJ	Signed	Date: -	Scale: 1:2000 @ A1, 1:4000 @ A3	
	Designed: -	Signed	Date: -	Datum & Level: MSL	Rev.: -

patch

Landscape - Reference : PA20412 IS13
Scale 1:2000 @ A1 - 1:4000 @ A3

0 20 40 70 100m
SCALE = 1:2000 AT A1

Speargrass Farm
Masterplan - 7 April 2022

Key:

- Proposed native shrubs and trees
- Proposed native grasses
- Proposed mitigation and rural character trees
- .5m contours

10m Setback

Lot 2

Building Platform 1,000m²

Constructed mound +2.5m

Constructed mound +3.0m

15m Setback

Speargrass Flat Road

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 2 Landscape Plan - 7 April 2022

Key:

ID	Botanical Name	Common Name	Quantity
Ac	Alnus cordata	Alder	9
Ca	Cedrus atlantica	Atlas cedar	4
Fc	Fuscospora fusca	Red beech	23

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 2 Tree Plan - 7 April 2022

Key:

	Botanical Name	Common Name	Size	Spacing	%
A	**Native Shrubs**				
	Austroderia richardii	Toe toe	PB3	2m	20%
	Griselinia littoralis	Broadleaf	PB5	2m	20%
	Brachyglottis monroi	Daisy bush	PB5	1.5m	10%
	Phormium cookianum	Mountain Flax	PB3	2m	20%
	Sophora prostrata	Dwarf kowhai	PB5	2m	10%
	Veronica salicifolia	Korokio	PB5	2m	20%
B	**Native Grasses**				
	Carex testacea	Hair sedge	PB3	.7m	30%
	Chionochloa rigida	Snow tussock	PB3	1m	20%
	Chionochloa rubra	Red tussock	PB3	1m	50%

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 2 Shrub Plan - 7 April 2022

Key:

- Existing tree to be retained
- Proposed native shrubs and trees
- Proposed native grasses
- Proposed mitigation and rural character trees
- Proposed hedge
- Proposed Building Platform (1,000m²)
- .5m contours

Lot 4

Constructed mound +2.5m

Constructed mound +2.5m

15m Setback

Speargrass Flat Road

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 4 Landscape Plan - 7 April 2022

Key:

ID	Botanical Name	Common Name	Quantity
Ac	Alnus cordata	Alder	2
Ca	Fagus sylvatica 'purpurea'	Copper beech	5
Qp	Quercus palustris	Pin Oak	9

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 4 Tree Plan - 7 April 2022

Key:

	Botanical Name	Common Name	Size	Spacing	%
A	**Native Shrubs**				
	Austroderia richardii	Toe toe	PB3	2m	20%
	Griselinia littoralis	Broadleaf	PB5	2m	20%
	Brachyglottis monroi	Daisy bush	PB5	1.5m	10%
	Phormium cookianum	Mountain Flax	PB3	2m	20%
	Sophora prostrata	Dwarf kowhai	PB5	2m	10%
	Veronica salicifolia	Korokio	PB5	2m	20%
B	**Native Grasses**				
	Carex testacea	Hair sedge	PB3	.7m	30%
	Chionochloa rigida	Snow tussock	PB3	1m	20%
	Chionochloa rubra	Red tussock	PB3	1m	50%

patch

Landscape - Reference : PA20412 IS13
Scale 1:250 @ A1 - 1:500 @ A3

0 2.5 5.0 12.5m
SCALE = 1:250 AT A1

Speargrass Farm
Lot 4 Shrub Plan - 7 April 2022

LEGEND

EARTHWORKS

Fill Material

- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m

Cut Material

- -0m to -0.5m
- -0.5m to -1m
- -1m to -1.5m
- -1.5m to -2m
- -2m to -2.5m
- -2.5m to -3m

EARTHWORKS VOLUMES:

20m³ FILL (SOLID)
78m³ CUT (SOLID)

EARTHWORKS AREA:
107.5m²

LOT 2
3993m2

SPEARGRASS FLAT ROAD

SPEARGRASS FLAT ROAD

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DRIVEWAY EARTHWORKS FOR PROPOSED LOT 2 & 4

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LEGEND

EARTHWORKS

- 4.5m or more
- 4m to 4.5m
- 3.5m to 4m
- 3m to 3.5m
- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m
- -0m to -0.5m
- -0.5m to -1m
- -1m to -1.5m
- -1.5m to -2m
- -2m to -2.5m
- -2.5m to -3m

EARTHWORKS VOLUMES:

1730m³ FILL (SOLID)
34m³ CUT (SOLID)

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DRIVEWAY EARTHWORKS FOR PROPOSED LOT 2 & 4

Client: **ROBERTSON**

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Drawn JJ	Signed	Date –	Scale 1:250 @ A1, 1:500 @ A3		
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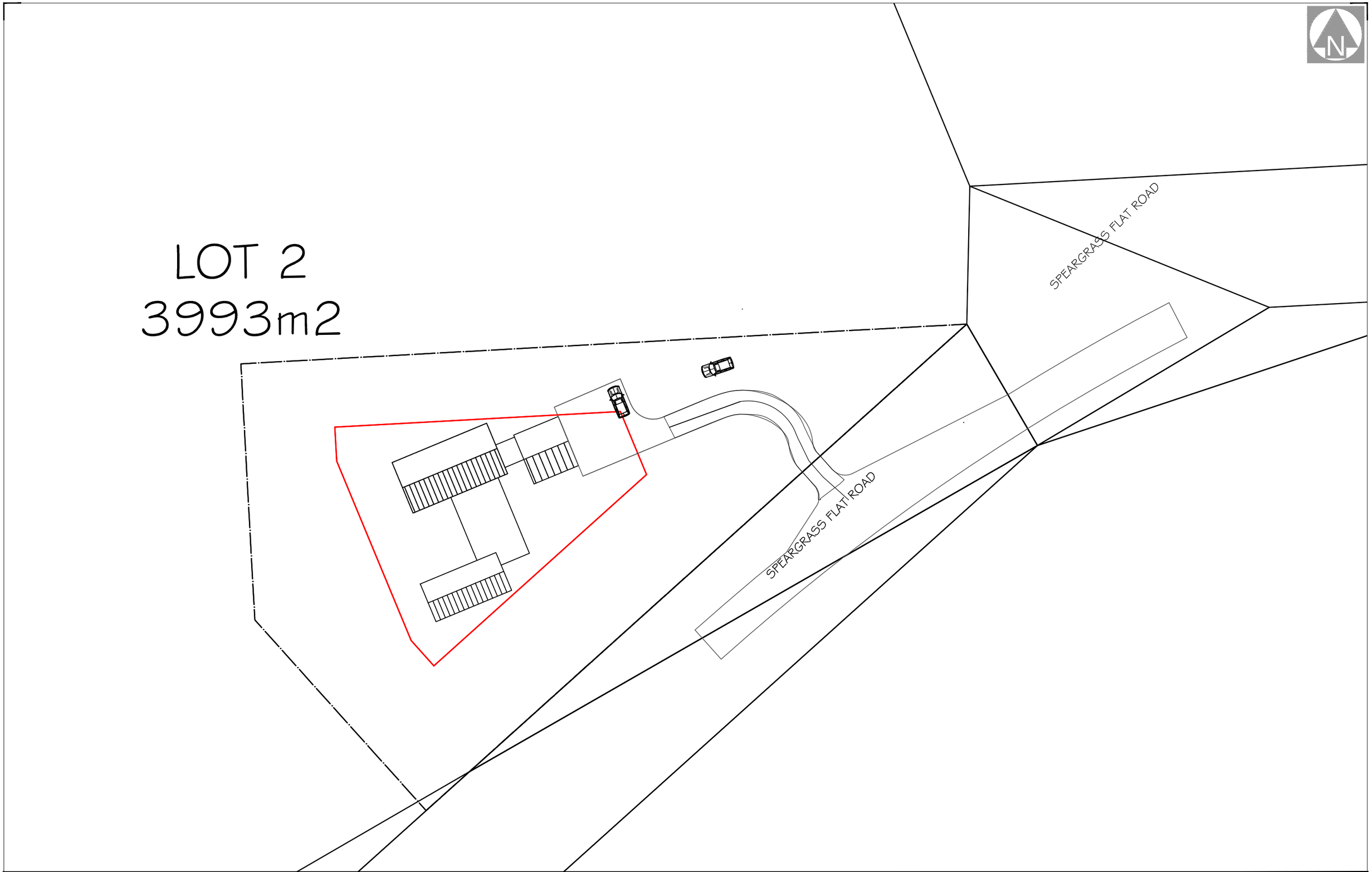

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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2 & 4

Client: **ROBERTSON**

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			14231	2 SHEET 003
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Designed –	Signed	Date –	Datum & Level MSL	Rev. –

LEGEND

EARTHWORKS

Fill Material
- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m

Cut Material
- -0m to -0.5m
- -0.5m to -1m
- -1m to -1.5m
- -1.5m to -2m
- -2m to -2.5m
- -2.5m to -3m

EARTHWORKS VOLUMES:

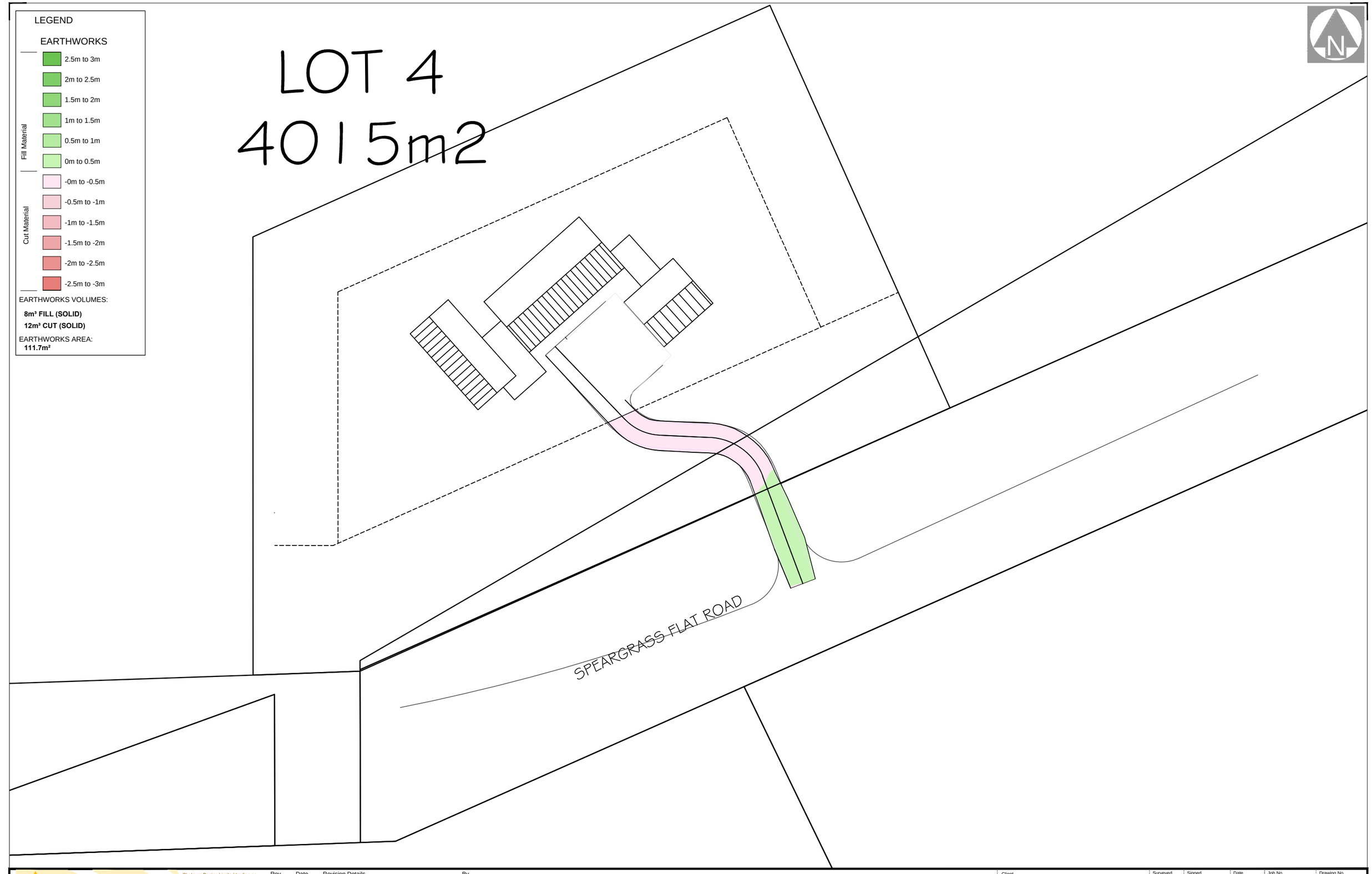
8m³ FILL (SOLID)

12m³ CUT (SOLID)

EARTHWORKS AREA:

111.7m²

LOT 4
4015m2



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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2 & 4

Client: **ROBERTSON**

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LEGEND

EARTHWORKS

- 4.5m or more
- 4m to 4.5m
- 3.5m to 4m
- 3m to 3.5m
- 2.5m to 3m
- 2m to 2.5m
- 1.5m to 2m
- 1m to 1.5m
- 0.5m to 1m
- 0m to 0.5m
- -0m to -0.5m

EARTHWORKS VOLUMES:

1435m³ FILL (SOLID)

0m³ CUT (SOLID)

LOT 4
4015m2

SPEARGRASS FLAT ROAD

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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2 & 4

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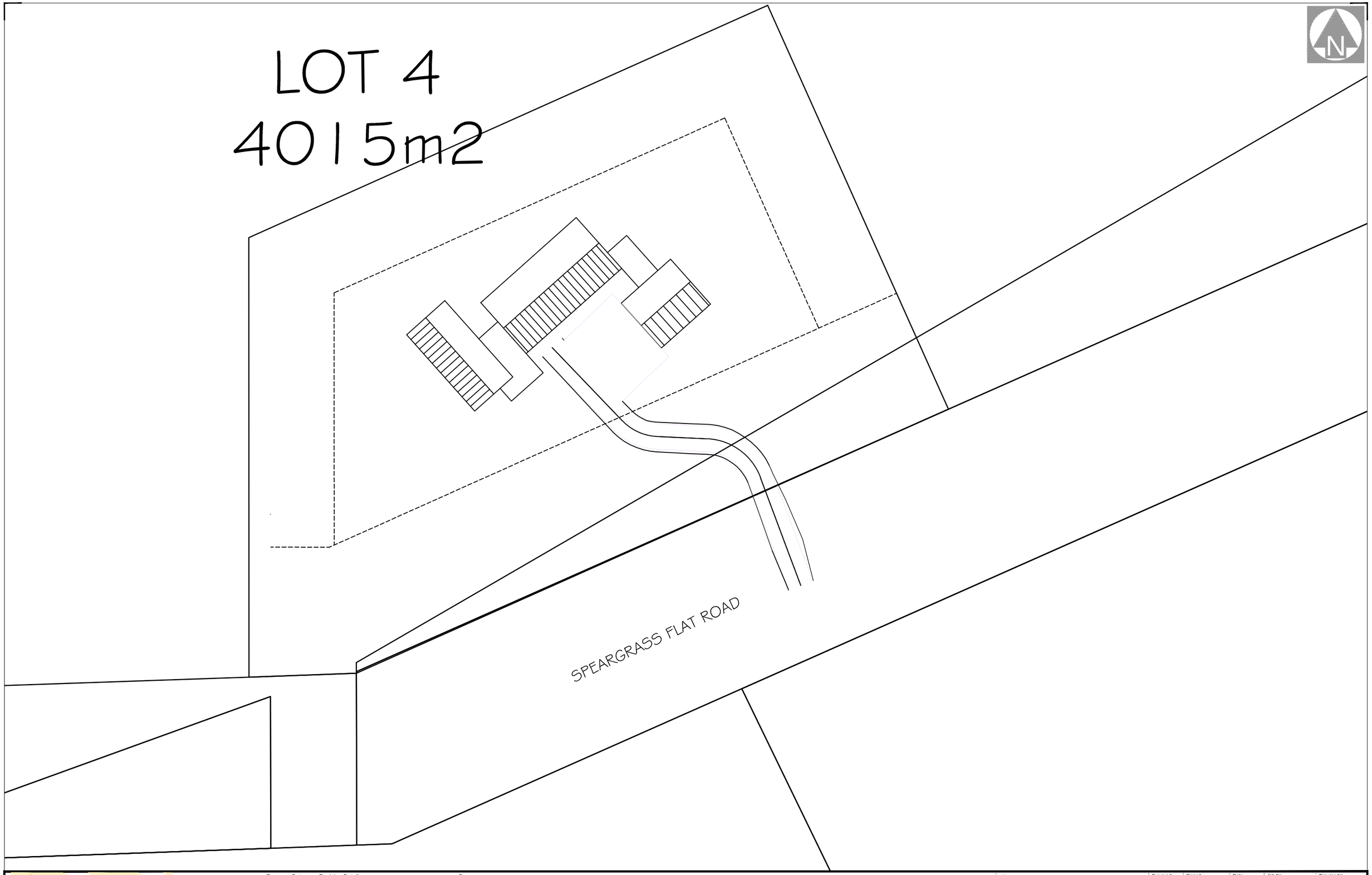

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DRIVEWAY EARTHWORKS FOR PROPOSED LOTS 2 & 4

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LANDSCAPE ASSESSMENT REPORT

Speargrass Farm - Robertson

125 Hunter Road

5 August 2021

Document prepared by	Stephen Skelton
Document reviewed by	Felipe Braga
Client	Robertson – Speargrass Farm
Status	Resource Consent
Issued	5 August 2021

1. INTRODUCTION

1.1. This report provides an assessment of the landscape character and visual amenity effects of a proposed four lots subdivision, the establishment of three new building platforms and associated landscaping and access. The following report includes:

a) Assessment methodology,
b) A description of the proposal,
c) A description of the site and surrounding landscape,
d) A landscape assessment,
e) Conclusion,
f) Attachments.

2. ASSESSMENT METHODOLOGY

2.1. Patch Limited has been asked by the applicant to assess the landscape character and visual amenity effects of a proposed subdivision and establishment of three Building Platform (BP), access and landscaping on a rural site in the Wakatipu Basin. Patch visited the site on several occasions and viewed the site from surrounding public places and where available, from private places. Building poles were erected on each proposed BP to represent the location and building height of future buildings. Photographs were taken and these photographs are attached to this report (**Attachment A, and Images**).

2.2. Patch also prepared the landscape plans which form part of this proposal.

2.3. An assessment of the proposal's actual and potential effects on landscape character and visual amenity is undertaken in the frame of the relevant statutory considerations directed by the District Plan(s). This report uses the following definitions:

- Landscape character and value effects – Character (the expression of landscape's collective attributes) and value (the reasons a landscape is valued embodied in its attributes) effects are the consequences of changes in the physical attributes (character), on a landscape's values.
- Visual effects – Visual effects are the consequences of change on landscape's values experienced in views.

- Landscape – "Landscape embodies the relationship between people and place: it is the character of an area, how the area is experienced and perceived, and the meanings associated with it." [1]

Extent of Effect

2.4. In assessing the extent of effects, this report uses the following seven-point scale:

very high, high, moderate-high, moderate, moderate-low, low, very low.

2.5. An effects rating of moderate–low corresponds to a 'minor' adverse effects rating. An adverse effects rating of "low' or 'very low' corresponds to a 'less than minor' adverse effects rating.

Landscape Category

2.6. The site is shown in the Operative District Plan (**ODP**), Appendix 8A – Map 2 as being part of a Visual Amenity Landscape (**VAL**). The Proposed District Plan (**PDP**), Stage 1 and 2 maps show the site as being part of the Wakatipu Basin Rural Amenity Zone which is not subject to Landscape Category. The site is not part of an Outstanding Natural Landscape (**ONL**) where RMA91 Section 6 matters may apply and is instead, part of a visual amenity landscape where RMA91 Section 7c matters apply.

Statutory Considerations

2.7. The QLDC District Plan is currently under review. Much of the relevant landscape matters in the ODP are contained within Chapter 5 – Rural General. In terms of the PDP (Decisions Version), the landscape relevant matters are contained within Part 5 - *Tangata Whenua*, Part 6 - *Landscape and Rural Character and* Part 24 - *Wakatipu Basin*. Schedule 24.8 in the PDP recognizes the site as being part of the Speargrass Flat Landscape Character Unit (**LCU 8**).

2.8. This assessment is undertaken in the frame of the relevant assessment matters with particular regard to:

ODP 5.4.2.2 (3) – Rural General, VAL;

[1] NZILA. Te Tangi a Te Manu Aotearora New Zealand Landscape Assessment Guidelines. April 2021.

PDP 24.7.5 – Wakatipu Basin and LCU 8.

3. DESCRIPTION OF THE PROPOSAL

3.1. The complete details of the proposal are contained within the Assessment of Environmental Effects which forms part of this proposal.

3.2. In summary, the proposal seeks to create three new rural living lots, each with a 1000m2 BP, access and landscaping. The balance is held in proposed Lot 1 to facilitate the continued use of this land for productive rural uses and controlling wilding conifer spread.

3.3. Proposed Lot 1 will 66.6ha in area and will contain the existing dwelling near the upper northwestern corner of the site and an approved farm building near the site's southern boundary (RM200892). This lot covers most of the site. 25.3 ha of the northern, rolling, south facing slopes of the site will be controlled for wilding conifers. The balance of the site will be retained in its existing pastoral character. Legal roads which cross the site will be closed to form a subject site of 67.18ha.

3.4. Proposed Lots 2 and 3 will be set at the southeastern extents of the site. They will share an access off Speargrass Flat Road. Each lot will contain a 1000m2 BP and will be surrounded by a residential curtilage area. Future building heights will be 5.5m from a set RL. Lot 2 will be 3,090m2 in area and Lot 3 will be 3,855m2 in area. Extensive areas of planting and mounding are proposed on each site.

3.5. Proposed Lot 4 will be 4000m2 in area and will contain a 1000m2 BP surrounded by a residential curtilage area. Any future building will be 5.5m from existing ground level. Lot 4 will be accessed of a new driveway from Speargrass Flat Road. Extensive mounding and planting are proposed around the BP.

3.6. A set of design controls are proposed which will set the tone and character of future buildings and landscape treatments (**Appendix A**). The objectives of these design controls is to ensure built development is visually recessive and of a scale and character which will appears subservient to the landscape's rural and natural values.

3.7. The proposed wilding conifer control area will be cleared of these wilding trees and maintained to ensure wilding conifers do not spread across the site.

4. DESCRIPTION OF THE SITE AND SURROUNDING LANDSCAPE

4.1. The site is part of the Wakatipu Basin in the Queenstown Lakes District, Central Otago. It is near the centre of the Wakatipu Basin in an area described in the PDP as the Speargrass Flat - Landscape Character Unit 8 (LCU8). LCU8 is a relatively open pastoral unit framed by the south facing slopes of the Wharehuanui Hill to the north and the steep margins of the Slope Hill Foothills to the south. It is a long and narrow LCU bound by these landforms, however opening to a broader, flatland character near the site at Hunter Road and at it's more eastern extents near Lake Hayes.

4.2. LCU8 is covered mainly in pasture grass. Shelterbelt trees extend across parts of the pastoral landscape while mixed scrubland and rural character trees are spread intermittently in the gullies. Some parts of the LCU are clad in woodland. The steeper slopes of the unit are often clad in wilding exotics including hawthorn, conifers and broom. The Speargrass Flats are framed by two landforms to the north and south. The northern landform is at a moderate grade and appears as mostly pastoral rolling hills while the southern landform is an escarpment, with steep, often craggy sides.

4.3. Speargrass Flat is a mix of rural and rural living characters, with several dwellings set on the flats near Speargrass Flat Road and large areas of open space. Other dwellings are set within landform patterns and vegetation near or within natural character elements. Large areas of open pastureland, including much of the subject site, provides for an impression of a working rural landscape.

4.4. The site is the amalgamation of two sites, legally described as Lot 2 DP 20531 and Lot 1 DP 20531. These sites are split by a legal road and their total combined area (excluding the legal road) is approximately 62.7ha. The site exists east of Hunter Road and north of Speargrass Flat Road. It covers the rolling, northern sides of LCU8 and parts of the flats before

intersecting with the Speargrass Flat Road. A large dwelling exists near the site's north-western corner and is accessed off Hunter Road. The Arrow Irrigation Scheme crosses the upper parts of the site, below a large hummock until the water race is piped down the hill slopes, across the flats, under Speargrass Flat Road and then up to the Slope Hill Foothills. The site's south facing slopes are clad mostly in wilding conifers and exotic weeds with some patches of native shrubs. These slopes meet the more pastoral lands, which appear as a moderately graded pastoral unit. There is an existing shed near the southern central part of the site near Speargrass Flat Road and another small shed adjacent to Hunter Road.

4.5. A new farm building has recently been approved on the site's southern boundary (RM200892).

5. LANDSCAPE ASSESSMENT

Extent of Visibility

5.1. Proposed lots 2 and 3 are clustered together near the south-eastern edge of the property while Lot 4 is in a different location, near the site's southern boundary. The visibility of proposed lots 2 and 3 is different to that of lot 4. However, the surrounding landform restrict views of the site from the wider surrounding landscape. The only public places where it is possible to see the proposed development is from Speargrass Flat Road and Hunter Road. The proposal seeks extensive landscaping around each proposed BP. This landscaping will provide a high degree of visual screening once mature.

5.2. The following description of the extent of visibility describes the potential visibility. Refer to **Attachment A** and **Images** for each view location.

Speargrass Flat Road

5.3. When approaching the site in an east to west direction along Speargrass Flat Road, intervening landform to the east of the subject site will screen all proposed built development

until the receptor is approximately 520m from the site (**Image 1**). Proposed vegetation to the south and east of the proposed BP's will provide a very high level of screening. Only the entrance to Lots 2 and 3 will be visible between **Images 1 & 3** and from these views all built development will be well screened behind the proposed landscaping.

5.4. A receptor in the immediate vicinity of the site (**Images 4 & 5**) may be able to see the upper parts of a future roof of a building in proposed Lot 2, but those views will be well buffered by proposed landscaping. This potential view of a future budling's roof may remain until the receptor moves farther west, at which point parts of built development will become visible in both Lots 2 and 3 (**Images 6 - 9**) from a distance of between 450m (**Image 6**) to 1.1km (**Image 9**).

5.5. Built development in proposed Lot 4 will be well screened from all Speargrass Flat Road views, but the access and landscaping will be visible.

5.6. No part of the proposed development will be visible from the Speargrass Road corridor west of the Hunter Road intersection.

5.7. Overall, there will be some limited potential visibility of a future roof in the Lot 2 BP for an approximately 500m long portion of Speargrass Flat Road between **Images 4 – 6**. Visibility of built development in Lots 2 and 3 will become more apparent from receptors farther west along Speargrass Flat Road (**Images 8 and 9**) but built development within Lot 4 will be well screened by proposed landscaping.

Hunter Road

5.8. Hunter Road crosses the Speargrass Flats in a north – south direction. South of Speargrass Flat, the road is called Lower Shotover Road and the proposed development will not be visible south of this intersection.

5.9. There may be some limited visibility of built development in proposed Lots 2 and 3 from near the southern extents of Hunter Road intersection (**Image 11**) from approximately 1.2 km. This level of visibility will continue as the receptor moves to the north, where future built development on lots 2, 3 and 4 will be visible for a short portion of the road (**Images 12 – 13**). As the receptor moves farther north proposed lots 2 and 3 will be screening by landform until Proposed Lot 4 is screened by landform, north of (**Image 14**).

5.10. Overall, there will be some limited, distant views of the proposed development for an approximately 500m long portion of Hunter Road between **Images 11 and 14**.

Private Places

5.11. In terms of private places there is potential for the proposed development to be visible from the neighbouring property's south of Speargrass Flat Road. However, views of built development will largely be screened from view by proposed landscaping.

5.12. East of the subject site is a large rural site and views from this site will be similar to and at a lesser extent to those experienced from Hunter Road. West of the subject site, views will be well screened as those described above for **Images 1- 3**. Most of the dwellings adjacent to the site's north boundary are set back sufficiently from the edge of the landform to not see the proposed development. Buildings and approved building platforms south of the proposed development area will not see built development as intervening landform and proposed landscaping will screen the building areas.

Operative District Plan - Visual Amenity Landscapes

Assessment Matters 5.4.2.2 (3)

(a) Effects on natural and pastoral character

In considering whether the adverse effects (including potential effects of the eventual construction and use of buildings and associated spaces) on the natural and pastoral character are avoided, remedied or mitigated, the following matters shall be taken into account:

(i) where the site is adjacent to an Outstanding Natural Landscape or Feature, whether and the extent to which the visual effects of the development proposed will compromise any open character of the adjacent Outstanding Natural Landscape or Feature;

5.13. The site is not adjacent to any ONL or ONF.

(ii) whether and the extent to which the scale and nature of the development will compromise the natural or arcadian pastoral character of the surrounding Visual Amenity Landscape;

(iii) whether the development will degrade any natural or arcadian pastoral character of the landscape by causing over-domestication of the landscape;

(iv) whether any adverse effects identified in (i) - (iii) above are or can be avoided or mitigated by appropriate subdivision design and landscaping, and/or appropriate conditions of consent (including covenants, consent notices and other restrictive instruments) having regard to the matters contained in (b) to (e) below;

5.14. The site is part of a mix of pastoral and rural living landscape characters. The proposed BP's will be well contained within vegetation and will be of a scale similar to that within the immediate receiving environment, representing small rural living pockets set within wider areas of open space. The balance of the site (proposed Lot 1) will continue to act as open space and this much wider open area will maintain the arcadian pastoral character of the landscape. Subdivision design, landscape design and design controls will ensure the character of development will appear recessive within the wider rural landscape and in character with

the receiving landscape. The arcadian pastoral character of the landscape will be affected to a low degree and the proposal will not lead to over-domestication of the landscape.

(b) Visibility of Development

Whether the development will result in a loss of the natural or arcadian pastoral character of the landscape, having regard to whether and the extent to which:

(i) *the proposed development is highly visible when viewed from any public places, or is visible from any public road and in the case of proposed development in the vicinity of unformed legal roads, the Council shall also consider present use and the practicalities and likelihood of potential use of unformed legal roads for vehicular and/or pedestrian, equestrian and other means of access;*

(ii) *the proposed development is likely to be visually prominent such that it detracts from public or private views otherwise characterised by natural or arcadian pastoral landscapes;*

(iii) *there is opportunity for screening or other mitigation by any proposed method such as earthworks and/or new planting which does not detract from or obstruct views of the existing natural topography or cultural plantings such as hedge rows and avenues;*

(iv) *the subject site and the wider Visual Amenity Landscape of which it forms part is enclosed by any confining elements of topography and/or vegetation;*

5.15. As discussed above under the 'Extent of Visibility' heading, the proposal will be well screened and buffered with proposed landscaping. The only location where any proposed built development will be 'highly visible' will be from Hunter Road, but from these westerly places' development will be visible from a significant distance and viewed in the context of the more dominant pastoral landscape. The proposed development will be well absorbed within the wider views of open space such that it will not be visually prominent or detract from public or private views otherwise characterised by natural or arcadian pastoral landscapes.

5.16. Proposed landscaping will not detract from views of existing natural topography or cultural plantings and will appear as appropriate pocket planting within in a wider pastroal landscape.

(v) any building platforms proposed pursuant to rule 15.2.3.3 will give rise to any structures being located where they will break the line and form of any skylines, ridges, hills or prominent slopes;

5.17. The proposal will not give rise to any structures being located where they will break the line and form of any skylines, ridges, hills or prominent slopes.

(vi) any proposed roads, earthworks and landscaping will change the line of the landscape or affect the naturalness of the landscape particularly with respect to elements which are inconsistent with the existing natural topography;

5.18. The proposed access, earthworks and landscaping will slightly alter the existing natural topography around proposed Lot 3. However, the earthworks associated with Lots 2 and 4 will appear as small mounds and hummocks and will be consistent with the existing natural topography. Planting will aid in integrating the earthworks, access and buildings into the naturalness of the landscape.

(vii) any proposed new boundaries and the potential for planting and fencing will give rise to any arbitrary lines and patterns on the landscape with respect to the existing character;

(viii) boundaries follow, wherever reasonably possible and practicable, the natural lines of the landscape and/or landscape units;

5.19. The proposed boundaries will closely follow the proposed development areas and planting and earthworks will exist entirely within these small lots. The south and east boundaries of Lots 2 and 3 will follow existing fence lines while the south and west boundaries of proposed Lot 4 will follow existing fence lines. While the proposed new boundaries have very little in terms of natural lines in the landscape to follow, they will wrap around the proposed planting

and developed areas. It is considered the effects of the development, including the new boundaries on the landscape's natural character, with particular regard to landform, will be no more than low.

(ix) the development constitutes sprawl of built development along the roads of the District;

5.20. The proposed residential development will be set within large areas of open space. While there is existing rural living type development adjacent to Speargrass Flat and Hunter Road, the proposal will not read as 'sprawl' along the roads of the District.

(c) Form and Density of Development

In considering the appropriateness of the form and density of development the following matters the Council shall take into account whether and to what extent:

(i) *there is the opportunity to utilise existing natural topography to ensure that development is located where it is not highly visible when viewed from public places;*

5.21. The proposal will be well contained to the immediate area due to the effects of the surrounding natural topography to the north, south and east. There will be some limited public visibility from within the vicinity of the site and from Hunter Road as discussed above.

(ii) *opportunity has been taken to aggregate built development to utilise common access ways including pedestrian linkages, services and open space (ie. open space held in one title whether jointly or otherwise);*

5.22. The proposed access to Lots 2 and 3 will be aggregated. The 'parent lot' Lot 1 will be held in one large 66.6 ha lot and retained in its open character. This large lot will maintain a significant open space buffer between Hunter Road and the proposed BPs will be set within this large area of open space.

(iii) *development is concentrated in areas with a higher potential to absorb development while retaining areas which are more sensitive in their natural or arcadian pastoral state;*

5.23. The proposal will maintain a large area of open space, including the balance of the open, visible pastoral flatlands between Hunter Road and Speargrass Flat Road and the south facing slopes. These parts of the site are more sensitive to development. The proposal utilises the 'edge effect', embracing the complexity of the site's edges as a place to located development in areas which have a higher ability to absorb change.

(iv) *(iv) the proposed development, if it is visible, does not introduce densities which reflect those characteristic of urban areas.*

5.24. The proposal will not reflect a density characteristic of urban areas.

(v) *(v) If a proposed residential building platform is not located inside existing development (being two or more houses each not more than 50 metres from the nearest point of the residential building platform) then on any application for resource consent and subject to all the other criteria, the existence of alternative locations or methods:*

(a) within a 500 metre radius of the centre of the building platform, whether or not:

(i) subdivision and/or development is contemplated on those sites;

(ii) the relevant land is within the applicant's ownership; and

(b) within a 1,100 metre radius of the centre of the building platform if any owner or occupier of land within that area wishes alternative locations or methods to be taken into account as a significant improvement on the proposal being considered by the Council - must be taken into account.

5.25. The proposed location for the BPs is considered the most appropriate location on the site as the proposed vegetation and landform allows built development to be visually screened and absorbed. Similarly, its distant location from public views will ensure the open charecter of

the balance of the site and the public's experience of the landscapes pastoral character is retained.

(vi) *recognition that if high densities are achieved on any allotment that may in fact preclude residential development and/or subdivision on neighbouring land because the adverse cumulative effects would be unacceptably large.*

5.26. The site is distinct in its ability to absorb change and any future proposed developments on neighbouring land will be unaffected by the proposal.

(d) Cumulative effects of development on the landscape

In considering whether and the extent to which the granting of the consent may give rise to adverse cumulative effects on the natural or arcadian pastoral character of the landscape with particular regard to the inappropriate domestication of the landscape, the following matters shall be taken into account:

(i) *the assessment matters detailed in (a) to (d) above;*

(ii) *the nature and extent of existing development within the vicinity or locality;*

(iii) *whether the proposed development is likely to lead to further degradation or domestication of the landscape such that the existing development and/or land use represents a threshold with respect to the vicinity's ability to absorb further change;*

(iv) *whether further development as proposed will visually compromise the existing natural and arcadian pastoral character of the landscape by exacerbating existing and potential adverse effects;*

(v) *the ability to contain development within discrete landscape units as defined by topographical features such as ridges, terraces or basins, or other visually significant natural elements, so as to check the spread of development that might*

otherwise occur either adjacent to or within the vicinity as a consequence of granting consent;

5.27. As discussed above the site is part of a mixed rural living and pastoral landscape. The proposed BPs will be well contained by vegetation and landform such that they will not visually compromise the existing natural and arcadian pastoral character of the landscape by exacerbating existing and potential adverse effects. The proposal will not cross a threshold with respect to the landscape's ability to absorb change. Any adverse cumulative effects will be low in extent.

(vi) *whether the proposed development is likely to result in the need for infrastructure consistent with urban landscapes in order to accommodate increased population and traffic volumes;*

5.28. The proposed development will not result in the need for any infrastructure consistent with urban landscapes.

(vii) *whether the potential for the development to cause cumulative adverse effects may be avoided, remedied or mitigated by way of covenant, consent notice or other legal instrument (including covenants controlling or preventing future buildings and/or landscaping, and covenants controlling or preventing future subdivision which may be volunteered by the applicant).*

5.29. There is no covenant, consent notices or other legal instruments volunteered with this application which would prevent future development of the site.

(e) **Rural Amenities**

In considering the potential effect of the proposed development on rural amenities, the following matters the Council shall take into account whether and to what extent:

(i) the proposed development maintains adequate and appropriate visual access to open space and views across arcadian pastoral landscapes from public roads and

other public places; and from adjacent land where views are sought to be maintained;

5.30. The proposal will maintain appropriate visual access to open space and views across the arcadian pastoral landscape to a high degree. Visual access across open space from Hunter Road will be almost entirely retained. From Speargrass Flat Road there will be some reduction in visual access across open space due to the proposed screening mounds and vegetation. However, it is considered the proposal will not reduce visual access to open, arcadian pastoral landscape to a more than low degree.

(ii) the proposed development compromises the ability to undertake agricultural activities on surrounding land;

5.31. The proposal will not compromise the ability to undertake agricultural activities on surrounding land

(iii) the proposed development is likely to require infrastructure consistent with urban landscapes such as street lighting and curb and channelling, particularly in relation to public road frontages;

(iv) landscaping, including fencing and entrance ways, are consistent with traditional rural elements, particularly where they front public roads.

5.32. The proposal will not be urban in character and will not require any urban infrastructure and all landscaping will be rural in character.

(v) buildings and building platforms are set back from property boundaries to avoid remedy or mitigate the potential effects of new activities on the existing amenities of neighbouring properties.

5.33. The BPs will be setback suffeceintly from other nearby properties. The existing amenities of the more distant neighbours will not be affected by the proposal.

Proposed District Plan – Wakatipu Basin

Assessment Matters 24.7.5 – *New buildings (and alterations to existing buildings) including farm buildings and residential flats; and infringements of the standards for building coverage, building size, building material and colours, and building height:*

Landscape character and visual amenity

a. Whether the location, form, scale, design and finished materials including colours of the building(s) adequately responds to the identified landscape character and visual amenity qualities of the landscape character units set out in Schedule 24.8 – Landscape Character Units and the criteria set out below.

5.34. With respect to the landscape character values as set out in Schedule 24.8 of the PDP (PDP 24.7.3, a) for LCU 8, Speargrass Flat, the proposal responds to the landscape's characteristics in the following ways:

a) ***Landform patterns*** – The landform will be modified slightly to accommodate the mounds and set the Lot 3 BP into the landscape. However the overall landform patterns of LCU 8 will be unaffected by the proposal.

b) ***Vegetation patterns*** – Exotic pasture grasses and shelterbelts will remain dominant.

c) ***Hydrology*** – Watercourses will be unaffected.

d) ***Proximity to ONL/ONF*** – Open, long-range views to the ONLs and ONFs will be maintained.

e) ***Land use*** – The pastoral land use over the visually prominent parts of the site will not be affected by the proposal and the proposal will reflect the existing 'scattered rural residential lots' of the landscape.

f) ***Settlement patterns*** – The proposed BPs will be framed by plantings and Lots 2 and 3 will be set into landform. The proposed BP will be buffered from other rural areas, large areas of open space and vegetation.

g) ***Proximity to key route*** – The proposed BPs will be located away from key vehicular routes.

h) ***Heritage features*** – No heritage features will be affected by the proposal.

i) ***Recreation features*** – The proposal will not have any effect on existing recreation features.

j) ***Visibility/prominence –***The proposed BPs and activity will not be prominent from public places.

k) ***Views –*** The proposal will not adversely affect any key views.

l) ***Complexity –*** The proposal will not adversely affect the hillslopes and instead will embrace the complexity and 'edge effect' to locate built development where it can best be absorbed.

m) ***Coherence –*** The balance of the LCU will continue to display a coherent open pastoral character.

n) ***Naturalness –*** The LCU's hillslopes and riparian areas will not be affected by the proposal to a more than very low degree.

o) ***Sense of place –*** The site's open pastoral character will continue to read as a 'breathing space' between development to the north and south of the LCU. The wider LCU will be unaffected by the proposal.

p) ***Potential landscape issues and constraints associated with additional development –*** There are no potential landscape issues or constraints associated with the proposal. The wider open character of the LCU will not be adversely affected by the proposal.

q) ***Environmental characteristics and visual amenity values to be maintained and enhanced –*** The proposed development will be integrated into landform and vegetation and the surrounding sense of openness and spaciousness will remain.

r) ***Capability to absorb additional development –*** The BPs will be located in the least sensitive parts of the site where the edge effect, landform, proposed vegetation and the large area of open space which is part of the larger site, will allow the proposed development to be absorbed without adversely affecting landscape character or visual amenity.

b. The extent to which the location and design of buildings and ancillary elements and the landscape treatment complement the existing landscape character and visual amenity values, including consideration of:

i. *building height;*
ii. *building colours and materials;*
iii. *building coverage;*
iv. *design, size and location of accessory buildings;*
v. *the design and location of landform modification, retaining, fencing, gates, accessways (including paving materials), external lighting, domestic infrastructure (including water tanks), vegetation removal, and proposed planting;*
vi. *the retention of existing vegetation and landform patterns;*
vii. *earth mounding and framework planting to integrate buildings and accessways;*
viii. *planting of appropriate species that are suited to the general area having regard to the matters set out in Schedule 24.8 - Landscape Character Units;*
ix. *riparian restoration planting;*
x. *the retirement and restoration planting of steep slopes over 15˚ to promote slope stabilisation and indigenous vegetation enhancement; and the integration of existing and provision for new public walkways and cycleways/bridlepaths.*

5.35. The matters above have been considered and described above in this report under the ODP Assessment Matters, Description of the Proposal and Description of the Landscape. In summary, the proposed development well controlled by the building and landscape design controls which will limit the height, form and external appearance of a future building, lighting and landscaping. The BPs will be well contained within appropriate vegetation and mounding. It is considered the proposal will adversely effect the existing landscape character and visual amenity to a low degree.

a. *The extent to which existing covenants or consent notice conditions need to be retained or are otherwise integrated into the proposed development in a manner that maintains or enhances landscape character and visual amenity values.*

5.36. There are no existing covenants or consent notice conditions which need to be retained or integrated into the proposed development. A number of conditions are recommended and included in Attachment [F] of the application documents.

b. The extent to which the development maintains visual amenity in the landscape, particularly from public places.

5.37. The proposal will not affect the more publicly visible open spaces west of the BPs and the visual amenity as experienced from public places will be adversely effected to a very low degree.

c. Whether clustering of buildings or varied densities of the development areas would better maintain a sense of openness and spaciousness, or better integrate development with existing landform and vegetation or settlement patterns.

5.38. The proposal will cluster two building in the south-eastern part of the site which will better maintain a sense of openness and spaciousness, and better integrate development with existing landform and vegetation.

d. Where a residential flat is not located adjacent to the residential unit, the extent to which this could give rise to sprawl of buildings and cumulative effects.

5.39. This assessment matter is not applicable to the proposal.

e. *The extent to which the development avoids, remedies or mitigates adverse effects on the features, elements and patterns that contribute to the value of adjacent or nearby ONLs and ONFs. This includes consideration of the appropriate setback from such features as well as the maintenance of views from public roads and other public places to the surrounding ONL and ONF context.*

5.40. This assessment matter is not relevant as there are no adjacent ONLs or ONFs.

f. Whether mitigation elements such as a landscape management plan or proposed plantings should be subject to bonds or covenants.

5.41. No bonds or covenants are proposed but all landscaping will be undertaken and protected by consent conditions.

g. The merit of the removal of wilding exotic trees at the time of development.

5.42. The proposal seeks to impellent a wilding conifer control area over the site's south facing slopes. This will see the removal of all wilding trees and the ongoing control of wilding trees across this slope This is considered a significant part of the proposal as the removal of the existing wilding conifers will result in positive outcomes in terms of nature conservation values. Similarly, the removal of these wilding trees and control of the slope for woody weeds and other wilding trees will enhance the legibility and formative process of the landscape by better exposing the underling landform. While the proposed wilding conifer control area offers positive effects in terms of landscape enhancement, the proposal is not reliant on this component to ensure the development is appropriately remedied or mitigated.

a. Whether the proposed development provides an opportunity to maintain landscape character and visual amenity through the registration of covenants requiring open space to be maintained in perpetuity.

5.43. No covenants are proposed.

6. CONCLUSION

6.1. The proposal seeks to create three new lots, each with a 1000m2 building platform, access, and associated landscaping. Mounding and planting will contain the proposed development and provide a high degree of screening such that the visual effects of development will be no more than low. The large parent lot will be retained in its existing open, pastoral character and development will be set at the edge of this open space. Overall, it is considered the proposal will result in no more than low adverse effects on landscape character and visual amenity.

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Proposed Design Controls

August 2021

1. *Building Footprint*

- All residential buildings and accessory buildings shall be constructed within the approved building area.
- The maximum building coverage within the building area shall be 500m².

2. *Building Height*

- Building height is limited to no greater than 5.5m as measured from set RLs. This excludes chimneys which may extend 1.5m above the highest roof point.

3. *Exterior Cladding*

- All exterior cladding shall be limited to:
  - Cedar weatherboard (stained, oiled, weathered);
  - Cedar board and batten;
  - Shingles / shakes;
  - Locally sourced schist stone/plaster mix (up to 60% plaster cover);
  - In-situ concrete/rammed earth walls;
  - Pre-weathered (patina) copper sheet cladding or weathered metal finishes (to read as subservient and secondary building materials only);

- Any colours shall be of a recessive natural colour in tones of natural browns, greys or greens with a light reflectance value (LRV) of less than 30% (if a LRV is applicable for the material).

4. *Roofing Material*

- Roof claddings shall be in steel (corrugated or tray), slate (natural or imitation), shingles/shakes, membrane linings and/or vegetated.
- Any colours shall be of a recessive natural colour in tones of dark browns, black, greys or greens with a light reflectance value (LRV) of less than 20% (if a LRV is applicable for the material).
- Conservatory style glazed roofing is permitted up to a maximum 20% of covered roof area.

5. *Roof Details and Structures Attached*

- All roofing details including gutters, downpipes and flashings shall match the joinery/roof or wall materials and colours.

- All structures attached to the roof, including aerials, dishes or solar panels, shall be discretely located such that they are not visible from Speargrass Flat Road.
- All metal chimney flues shall be enclosed or in a recessive colour to match the surrounding roof colour.

6. *Windows/Glazing and Doors (Façade Articulation)*

- Windows and doors should be recessed from the façade by a minimum of 200mm or designed to avoid the flat elevation look of aluminium joinery.
- Exterior joinery shall be in timber, steel or aluminium. Joinery colours (excepting timbers) shall match roofing detail colours.

7. *Gates and Fencing*

- All boundary and curtilage fencing shall be constructed to a maximum height of 1.2 metres of standard un-painted timber post and wire (in the local traditional farming style), standard un-painted timber post and beam, or dry stacked locally sourced schist stone with vertical capping in the agricultural stone wall style only.
- Entry gates shall not exceed 1.2m in height and shall be constructed of timber (excluding fittings, fixings and hinges).

8. *Exterior Lighting*

- All exterior lighting (including that fixed to a building) shall be housed and directed downward. All exterior lighting fixed to a dwelling shall be fixed no higher than 1.5m above finished ground level.
- Low intensity, indirect light sources are to be used for all exterior lighting applications.
- External light sources are to be incandescent, halogen or other white light, not sodium vapour or other light.
- No exterior lighting is to be installed outside of the curtilage area and driveway.

9. *Curtilage Area and Services*

- All elements of domestic curtilage (such as car parking areas, lawns, domestic landscape planting, outdoor storage areas, water tanks, gas cylinders, rubbish bins and clotheslines) shall be contained within the identified curtilage area and building area and must be screened from view from Arrowtown-Lake Hayes Road.
- Screening structures must adhere to the relevant building design controls.
- Water tanks shall be in a recessive natural colour in tones of natural browns, black, greys or greens and may be located outside the building area provided part is within 5m of the curtilage area. Water tanks shall be screened from public views by landform or vegetation.
- All other services and utilities shall be located below ground.

patch
landscape ■ architecture ■ urban

Reference : PA20412 IS07

Scale: 1:3,000@A1 - 1:6,000@A3

0 30 60 150m
SCALE = 1:3,000 AT A1

Speargrass Farm
Visual Assessment Images
5 August 2021

50mm photo - 20 July 2021 at 1:07pm

50mm photo - 20 July 2021 at 1:09pm

50mm photo - 20 July 2021 at 1:10pm

Image 4 - **Lot 2 and Lot 3**

Panorama - 20 July 2021 at 1:13pm

Image 4 - **Lot 4**

50mm photo - 20 July 2021 at 1:15pm

Image 5 - **Lot 2 and Lot 3**

25mm photo - 20 July 2021 at 1:17pm

Image 5 - **Lot 4**

50mm photo - 20 July 2021 at 1:19pm

Image 6 - **Lot 2 and Lot 3**

50mm photo - 20 July 2021 at 1:21pm

50mm photo - 20 July 2021 at 1:23pm

Image 7 - **Lot 2 and Lot 3**

50mm photo - 20 July 2021 at 1:26pm

25mm photo - 20 July 2021 at 1:27pm

50mm photo - 20 July 2021 at 1:31pm

50mm photo - 20 July 2021 at 1:33pm

50mm photo - 20 July 2021 at 1:35pm

50mm photo - 20 July 2021 at 1:37pm

50mm photo - 20 July 2021 at 1:45pm

50mm photo - 20 July 2021 at 1:44pm

50mm photo - 20 July 2021 at 1:43pm