DOUBLE SIDED ORIGINAL

Decision No. W 38/98

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **AQUA KING LIMITED**

(RMA 167/97)

Appellant

AND **MARLBOROUGH DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge S E Kenderdine sitting alone pursuant to section 279(1) of the Act

HEARING at BLENHEIM on the 25th day of May 1998

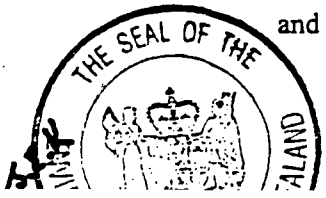
APPEARANCES

Mr M Gilbert for the appellant
Mr B Dwyer for the respondent
Mr W J Heal for Dr J M Foley, a submitter in opposition

DECISION ON PRELIMINARY POINT OF LAW

Background

[1] This is a preliminary point of law arising out of an application by the appellant to change the use made of two prior resource consents allowing the appellant to marine farm in a 6 hectare area between Red Clay Point and Matarau Point in Squally Cove, Croisilles Harbour'. The existing consents (being U940995 and U920266) permit the appellant to use seabed anchored racks to farm various aquatic species including blue and green mussels, cockles, Pacific and dredge oysters, scallops, and certain seaweeds.



[2] The appellant applied for a coastal permit to use standard surface longline methods to farm the same species within the same 6 hectare area. It was noted in the application report, prepared for the appellant by Mr Matthew Bloxham, that the application was for consent to vary the structural arrangement of the existing subsurface marine farm. To this end, standard surface longlines would replace the existing subsurface structures.

[3] The council treated the application as a "new marine farm application" and it was considered as a controlled activity. The decision was "to restrict the consent to a subsurface marine farm only", and the conditions included:

> "...
> 2. **That the only surface structures shall be those provided for by condition 3 below.**
> 3. **That surface buoys be displayed on each corner of the marine farm.**
> ..."

The clauses in condition 3 set out the details of the buoys and attachments such as navigation lights and warning signage. There is no provision for any surface structures beyond these buoys and attachments.

[4] Two reasons were given for the imposition of these conditions:

> **"1. The Committee accepted that the site was a main navigational route, used particularly by recreational boaters, and did not accept that adequate and appropriate lighting could mitigate navigational concerns. Thus the Committee considered it appropriate to restrict the farm to subsurface structures only.**
>
> **2. The Committee was also concerned that the visual impact of surface structures would adversely impact on people's appreciation of a nationally significant landform adjacent to the site."**

[5] The appellant now seeks to appeal the imposition of the conditions restricting the consent to subsurface structures and, as a preliminary legal point, questions the council's ability to impose conditions which effectively decline the application for a controlled activity.

[6] In response, council view the decision as having approved the application for a marine farm, and the specification of the type of structures to be used is simply a condition imposed on the consent. This view was supported by Dr Foley, a submitter in opposition to the application.

Status of the Activity

[7] It was accepted that the relevant planning instrument for this application is the Proposed Marlborough Sounds Resource Management Plan ("the PMSRMP") which is at the stage where decisions on submissions have been notified and references have been lodged with the Court. The application was made before the decisions on submissions were notified, and changes have been made to relevant parts of the plan. It was submitted by counsel for the appellant that the plan should be interpreted as it currently stands.

[8] A marine farm is defined in the PMSRMP as:

> **"any form of aqua culture characterised by the use of surface and/ or subsurface structures located in the coastal marine area."**

[9] Counsel for the appellant submitted that this definition clearly encompasses both surface and subsurface structures, but in the application the appellant specified the use of surface structures, being the standard long-lines.

[10] Under the PMSRMP controlled activities include:

> **"marine farms beyond 50 metres from MLWM and within specifically identified areas listed in Appendix D."**

The current marine farm, being permit U920266, is included in one of the specifically identified areas listed in Appendix D. The farm is beyond 50 metres from MLWM.

[11] Dr Foley and the Okiwi Bay Ratepayers Association have lodged a reference in respect of the provisions relating to the Coastal Marine Zone Rule 2.1. This reference seeks, among other things, to have the words **"marine farms beyond 50 metres from MLWM and within specifically identified areas listed in Appendix D"** deleted from the list of controlled activities. The referrers seek to have marine farming made a discretionary activity in the area including Squally Cove.

[12] However, it was counsel for the appellant's submission that the reference is general, relating to all marine farms in the proposed controlled activity areas, and does not specifically identify the appellant's farm. The Court must consider the PMSRMP as written, and cannot take into account decisions which may or may not be made by the

Court when the references are heard. The final provisions of this part of the PMSRMP therefore remain undetermined.

[13] On the basis that the activity is considered to be controlled (in this location) it was submitted by counsel for the appellant that a consent authority cannot refuse consent for a controlled activity if the proposal meets the standards set out in the plan. But, it was acknowledged, subject to the criteria specified in the plan, the authority may impose conditions under s.108 of the Act in respect of matters over which it has reserved control.

[14] Clause 2.5.1 (Volume 2 of the PMSRMP) sets the standards for permitting marine farms in areas known as controlled activity areas. These are:

> **2.5.1 Standards**
>
> - **The location of all marine farms must be registered with the Marlborough District Council; and**
> - **Public access through the identified area must be maintained at all times; and**
> - **For the purposes of this rule the definition of marine farming shall not permit a change of species which could increase the extent or severity of adverse environmental effects.**

[15] Counsel for the appellant submitted that the first standard had been complied with, and the second standard would be complied with through the proposed layout, included with the application for change to the resource consents. The third was not relevant as there was no attempt to change the species. On this basis it was counsel for the appellant's contention that the application was for a controlled activity, and the council had to grant consent to the activity, subject to conditions under s.108 in respect of those matters over which it has reserved control.

Scope of Conditions

[16] Clause 2.5.3 (Volume 2 of the PMSRMP) sets out the following matters over which the council has sought to retain control:

> **2.5.3 Matters over which control is retained**
>
> - **the duration of the consent;**
> - **information and monitoring requirements;**
> - **matters of navigational safety;**
> - **the extent and nature of disturbance to the foreshore and seabed;**
> - **administrative charges payable;**
> - **adverse effects on recreational access;**
> - **the species to be farmed;**

- **the effects of any marine farming related structures; and**
- **the adverse ecological effects of the activity.**

[17] It was submitted, with respect to these matters, that the council has not retained control over the type of structure that may be placed on a marine farm as it is not included in the criteria. Therefore the council cannot impose a condition on the proposal as to the type of structures used.

[18] With respect to setting conditions as to the structures to be used, the particular elements from clause 2.5.3 relied on by the council to set such conditions were matters of navigational safety, and the effects of any marine farming related structures. It was submitted by counsel for the appellant that these matters cannot be interpreted as giving the council the right to control whether there are surface or subsurface structures. To do so would stretch the interpretation of the words beyond their normal everyday dictionary meaning. The application was for surface longlines, and the council had no jurisdiction to go beyond this.

[19] Counsel for the council submitted the proposition that because marine farms are a controlled activity on a particular site then the council must grant consent to the type of structures proposed is flawed. It was Mr Dwyer's interpretation that because of the alternatives offered within the definition of marine farms, set out above, a marine farm using either surface or subsurface structures could be approved. If that definition were limited to surface structures then the council would be obliged to grant consent to a surface structure proposal. However, because of the broader definition, the council is left with more discretion.

[20] It was counsel for the council's submission that the matters of navigational safety, and the effects of any marine farming related structures, when read in conjunction with the definition of a marine farm, do give the council the ability to control the type of structures used. The example was given of a salmon farm which requires virtually total occupation of the licensed area, and would have a greater potential adverse impact on the environment due to the method of operation. Such a proposal could be contrary to the policies and objectives of the PMSRMP if not properly controlled. It was submitted that this example illustrated that the council must have retained an ability to determine the type of structures which may be used in areas where marine farming was

a controlled activity because if the appellant's proposition was correct then the council could not decline an application for a salmon farm on the appellant's site.

[21] Reference was made to the decision in Shotover Hamlet Investments Ltd v Queenstown Lakes District Council Decision No. W 148/95, where His Honour Judge Treadwell held that the expression "essential adjunct" was ambiguous and **"it would be absolutely impossible to formulate a condition which would objectively quantify the circumstances which must pertain before the dwellinghouse becomes essential."** He held that the council may not retain to itself a discretion as to whether or not an activity fitted the requirements of a rule, as the requirement under s.105(1)(a) does not allow for this discretion.

[22] It was submitted by counsel for Dr Foley that there was an element of discretion retained, as to how an activity may be carried out, within the control parameters specified in the plan. While a consent shall be granted, it is not required that it be granted on the terms sought. The activity proposed may be modified by way of conditions provided those conditions are reasonable and appropriate, won't effectively prevent the activity taking place, and are of a kind or nature consistent with the controls reserved to the council in the plan. This submission was based on the premise that the activity applied for was marine farming (as defined in the plan to include both surface and subsurface structures). On this basis it was appropriate to preclude surface floats in order to protect navigational safety in the area. This condition fits within the matters clearly reserved within the council's control.

[23] It was submitted by counsel for the appellant that the limits of the application limit the jurisdiction of the council in making its decision. I was referred to Clevedon Protection Society Inc v Warren Fowler Ltd Decision No. C 43/97, where His Honour Judge Jackson stated, at page 18:

> **"The starting point is the principle that every resource consent is limited by the terms of the relevant application. If the resource consent goes beyond what is sought in the application it is *ultra vires*: (Sutton v Moule [1992] 2 NZRMA 41, at 46)."**

Later, at page 20, he stated:

> **"A resource consent has to look back at the application documents because the consent cannot go beyond those documents which set the initial framework and the limits beyond which the notification and consent cannot go."**

[24] The appellant's application was specifically for "standard longline methods". The supporting documentation, including the report and structure diagrams, clearly referred to surface structures. It was submitted that the council could not consider anything more than had been applied for, so it had no jurisdiction to limit the consent to subsurface structures. While the definition of marine farms includes both surface and/or subsurface structures, the appellant did not apply merely for a marine farm consent, but for consent to operate a marine farm using surface longlines. And as this is a controlled activity, the council is required to grant the application pursuant to s.105(1)(a) of the Act.

[25] The case of McLaren v Marlborough District Council Decision No. W 22/97 was also referred to, which states that a resource consent cannot go beyond the scope of the application (in that example, the location of the farm could not be altered from that notified in the application). However, the proposal may be limited or reduced. In this case, the issue remains whether altering the structures used is merely a limitation on the consent or a fundamental change to what was originally proposed.

Determination

[26] The question of whether the type of structure used (being surface or subsurface) is a matter for a condition, or a fundamental part of the application for marine farming was considered briefly in Marchant v Marlborough District Council Decision No. W 22/97. The relevant facts of that case (being an application for declarations) are as follows. The various marine farmers had applied for resource consents to operate five marine farms using seabed anchors and subsurface longlines. These consents had been granted and were being used. The farmers then applied for variations to the consents, on the same terms except they now wished to use surface longline methods. The applications were generally described as being variations to existing coastal permits, but were treated as applications for new resource consents, and new resource consents for surface structures were granted.

[27] One of the declarations sought was that the grant of the applications to vary the conditions of the original consents was *ultra vires*, or alternatively that the treatment of the applications for variations as applications for resource consents was *ultra vires*.

The council's case was that the applications were not for variations in respect of conditions, and its position was recorded at page 9 as follows:

> **"Counsel further submitted the requirement that the farming was to be carried out by subsurface lines whilst not imposed by way of condition, was in fact the basis of an integral part of the actual application itself. Accordingly, the council had no power to vary the method of marine farming carried out on the various sites pursuant to s.127 procedures, but could only do so by way of fresh resource consent applications."**

[28] Counsel for the council in that case went on to submit that even if the applications had been made pursuant to s.127 of the Act, the council could have treated them as fresh applications pursuant to s.105(4) of the Act. Further, with reference to Sutton v Moule (1992) 2 NZRMA 41, it was submitted the council may determine which section of the Act is applicable, and where the subject matter is essentially a fresh proposal, it may be dealt with as such. It was stated that the council viewed the difference in the applications (being the different method used) as so significant that it was considered as a fresh application.

[29] From this it is clear that the type of structure used is not a suitable subject for conditions given its integral nature. That is not to say, of course, that structures themselves cannot be controlled by way of conditions. Clearly matters such as the number of lines and floats, coloration of equipment and lighting may be appropriately included in conditions in order to satisfy the criteria set out in clause 2.5.3.

[30] I must ask the question, if the matter of structure is so important as to warrant an application for variation being treated as a fresh resource consent application, how can the council now vary an application in precisely the same manner? Clearly the two methods have very different environmental effects, particularly visual effects, and also different economic and practical implications. The council is obviously well aware of these differences, and to treat the two methods as interchangeable, despite a specific application for surface longlines, is to go beyond the jurisdiction enjoyed by the council as consent authority.

[31] The definition of marine farm refers to the use of surface and/or subsurface structures. In essence the use is "described" by the use of either type of structure. The reason for retaining control over marine farms was, I was told by Mr Dwyer, to address the effects of the use. These effects flow in part from the type of structure used. Just as the kind

of aquatic species applied for goes to make up the substance of the consent sought so too does the specific type of structure required.

[32] Both types of structure are encompassed within the definition of "marine farm", and it is this term which is used to describe the use as a controlled activity in Coastal Marine Zone Rule 2.1 of the PMSRMP. Therefore, I must assume the council has considered both types of structure in terms of effects before setting the areas where the use will have controlled activity status.

[33] I find the use of the salmon farm example provided by Mr Dwyer unhelpful in that it appears the council wishes to interpret the definition of marine farms by using a test of whether the structures would be appropriate in the controlled areas, rather than setting areas as controlled where marine farms (as defined) would be appropriate. Given that the issue of the type of structure used is a fundamental aspect of a marine farm, and it plays a significant role in determining the impact on the environment that a farm would have, it cannot be belatedly controlled by indirect means such as navigational matters and the effects of structures.

[34] To interpret the definition of marine farm as giving the council a discretion over the type of structures to be used is to reserve a discretion which is so wide as to be incompatible with the requirement in s.105 that a controlled use consent must be granted, subject to conditions. Either both methods of marine farming are controlled activities in an area, or they are not, and those seeking to develop proposals under this plan have the right to a degree of certainty over which activities have controlled status.

[35] As noted by counsel for Dr Foley, conditions are required not to be of such a nature as to effectively prevent the activity taking place. In this case it was very clear that the appellant was not applying for resource consent to use subsurface methods for the marine farm, given that this is precisely what the two existing resource consents allowed for. To grant a consent only for subsurface structures is in essence to decline the consent applied for.

[36] Therefore, under the provisions of the PMSRMP as it is currently drafted, the use of either method is to be regarded as a controlled activity in specified areas of the

Marlborough Sounds. If an application is made for a surface based marine farm, and the application meets the criteria set out in the plan, then this must be regarded as a controlled activity.

[37] As a final matter, the prior resource consents held by the appellant are for 35 years and there was no application to vary this term. The PMSRMP, at clause 2.5.2, includes the limit that a coastal permit may be granted for a period up to but not exceeding 20 years, and the new consent is accordingly granted for 20 years.

[38] It is clear that the council has retained control, in clause 2.5.3, over the duration of the consent, and as this was treated as an application for a fresh consent (correctly in my view given the very different effects of surface versus subsurface structures) it is proper for the council to limit the term to 20 years given the current plan provisions to this effect.

[39] I acknowledge the result of this determination will have wide-ranging repercussions for the way in which the council intended to control marine farms in sensitive marine environments. But I must conclude that defining the use partly in terms of the structures allowed has meant that it is either of the structure types which attracts any conditions (such as the number and length of longlines, number of buoys, etc) and not that one structure may be substituted for another.

[40] The question of costs is reserved.

DATED at WELLINGTON this 23rd day of June 1998

S E Kenderdine
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2003-485-2228

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under s299 of the Act from the interim decision and interim report and recommendation by the Environment Court
BETWEEN	THE DIRECTOR-GENERAL OF CONSERVATION Appellant
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing: 16 and 17 February 2004

Appearances: BH Arthur and T Beverley for appellant
BP Dwyer for respondent
JK Guthrie with MRG Christensen and PD Horgan for Clifford Bay Marine Farms Ltd
QAM Davies for Dominion Salt Ltd

Judgment: 3 May 2004

JUDGMENT OF MACKENZIE J

Introduction

[1] This is an appeal under s 299 of the Resource Management Act 1991 ("the Act") against a decision of the Environment Court dated 22 September 2003 on an appeal by Clifford Bay Marine Farms Limited ("CBMFL"), the Director-General of Conservation ("the Director-General"), and Friends of Nelson Haven and Tasman Bay Inc as appellants, and Marlborough District Council ("MDC") as respondent. The decision is in the form of an interim decision, and an interim report and recommendations.

Background

[2] On 18 November 1999 CBMFL applied to MDC for consent to establish two marine farms on sites containing 1,362 hectares and located off the east coast of Marlborough at Clifford Bay. Consent was granted by MDC, under a decision dated 20 December 2000, for a single farm of approximately 460 hectares on what was termed the North Clifford site. The Council, in its decision, also recommended to the Minister of Conservation pursuant to s 105 and s 118 the grant of coastal permits for the site, subject to conditions.

[3] CBMFL, the Director-General and Friends of Nelson Haven and Tasman Bay Inc (an objector before the Council) appealed to the Environment Court against that decision. After a hearing at Blenheim on 24-28 March 2003, and after receiving final submissions on 14 April 2003, the Court issued its decision, which is the subject of this appeal, on 24 September 2003. The Court recommended under both the transitional and proposed district plans that the Minister of Conservation grant a coastal permit for the occupation of the site. It also confirmed what it understood to have been the intention of MDC's decision, and granted, under both the transitional and proposed district plans, coastal permits to CBMFL: (i) to place structures as shown in the application (s 12(1)(a)); (ii) to disturb the seabed by anchoring the structures (s 12(1)(c)); and (iii) to farm greenlipped and blue mussels (s 12(3)). It confirmed the conditions which MBC had imposed but with some changes. In particular, it required the inclusion of conditions of the type which it had discussed earlier in its reasons for judgment. Those conditions were set out in the following terms:

> If consent is to be granted then additional conditions should be added to achieve the following:
>
> Initial survey
>
> (1) These coastal permits are subject to the conditions precedent:
>
> (a) that an initial two year survey of the North Clifford site as amended by the Environment Court decision be carried out on the parameters identified in (2) below; and

(b) the results satisfy the consent authorities that it is very probable the site is not of special significance for the Cloudy/Clifford Bays population of Hector's dolphin in terms of breeding, nursing, feeding or sheltering.

(2) The two year survey of the site and surrounding bays shall be carried out to monitor and obtain useful figures on at least the following factors:

(a) Hector's dolphins' use of the site and surrounding areas, with particular emphasis on focal points for breeding, nursery, feeding and shelter purposes;

(b) Population statistics for Hector's dolphin including causes of death;

(c) Existing populations of Hector's dolphin principal prey.

Ongoing research

(3) The subsequent research programme should be subject to the conditions that it be peer-reviewed and approved by an agreed or approved independent expert;

(4) As part of any research, two properly independent control sites must be found, presumably south of Banks Peninsula or on the West Coast of the South Island or somewhere between;

(5) All required research shall be:

(a) carried out by or under the supervision of an independent cetacean expert (such as Dr Slooten) nominated by CBMFL and approved by the Council and the Director-General;

(b) at the expense of CBMFL in all matters including provision of boats and equipment, and payment of the researchers; and

(c) shared with the Director-General and other interested groups;

(6) If the Director-General considers it necessary: except for research purposes, no netting shall take place within or from a boat secured to any part of the marine farm.

We envisage that the survey in conditions (1) and (2) above could be commenced shortly after receipt of this decision; since it depends less on a detailed research programme being approved.

[4] The principal question of law raised in this appeal relates to the ability of the Court to impose conditions of that nature. The appeal also raises certain other questions.

Issues

[5] Initially, the Notice of Appeal raised six questions of law. At the hearing, counsel for the Director-General advised that two of those questions were no longer to be pursued, as a result of the decision of Ronald Young J in *Minister of Conservation v Tasman District Council* and related proceedings (CIV-2003-485-1072, 1073 and 1074, Nelson Registry, 9 December 2003).

[6] There are therefore now four questions which are to be dealt with on this appeal. These are set out in the submissions of counsel for the Director-General. In the order in which they were dealt with by counsel, they are as follows:

1. Whether it is legally possible under s 108 of the Resource Management Act to grant a resource consent subject to a condition that can have the effect of frustrating the consent.

2. Whether, having regard to s 319(2)(b) of the Resource Management Act, the Minister of Conservation can legally seek an enforcement order to cancel resource consents in the event monitoring of effects on Hector's dolphin discloses evidence of significant adverse effects.

3. Whether, having regard to s 30(1) of the Resource Management Act, it is possible to grant a resource consent subject to a condition requiring control sites for monitoring effects outside the region of the respondent Council.

4. Whether, having regard to s 30(2) of the Resource Management Act, it is legally possible to grant resource consents to occupy and use the coastal marine area having taken into account:

    4.1 the potential benefits to be obtained from the exclusion of fishing activities from the area;

    4.2 the opportunity for information to be obtained on fishing-related mortality of Hector's dolphin;

4.3 the comparative risks posed to Hector's dolphin by marine farms and fishing activities.

Question 1: Power to impose conditions under s 108

[7] This ground of appeal relates specifically to the condition as to the initial survey. That is contained in conditions (1) and (2), as set out in paragraph [3] above. It is convenient to set those out again here.

> Initial survey
>
> (1) These coastal permits are subject to the conditions precedent:
>
> (a) that an initial two year survey of the North Clifford site as amended by the Environment Court decision be carried out on the parameters identified in (2) below; and
>
> (b) the results satisfy the consent authorities that it is very probable the site is not of special significance for the Cloudy/Clifford Bays population of Hector's dolphin in terms of breeding, nursing, feeding or sheltering.
>
> (2) The two year survey of the site and surrounding bays shall be carried out to monitor and obtain useful figures on at least the following factors:
>
> (a) Hector's dolphins' use of the site and surrounding areas, with particular emphasis on focal points for breeding, nursery, feeding and shelter purposes;
>
> (b) Population statistics for Hector's dolphin including causes of death;
>
> (c) Existing populations of Hector's dolphin principal prey.

[8] It is important to emphasise at the outset that the wording of those conditions was not intended by the Court to be final. That is clear from the reference in its decision to the inclusion of conditions "of the type discussed". The Court also said:

> [164] There was some disagreement between the parties and their experts over the precise wording of some other conditions. We hope that, in the light of this decision, the parties can resolve their differences on all conditions. If they cannot agree on conditions then leave is reserved for any party to apply to the Court for a further hearing (in Court or on further papers) to resolve workable conditions.

Accordingly, in considering the power to impose those conditions, it is appropriate to approach the conditions broadly by having regard to their substance, and not to place undue weight on the actual wording used by the Court to describe the proposed conditions.

[9] There are a number of issues raised as to the validity of those conditions. The issues were formulated in slightly different ways by the parties in their submissions. I propose to deal with the issues by addressing the following questions:

(a) Does the Act allow the imposition of a condition precedent?

(b) Does the Act allow a condition which might have the effect of resulting in the consent not being able to be implemented, or being frustrated, and is this condition of that type?

(c) Does the Act allow a condition which requires studies prior to commencement of the activity to which the consent relates (as opposed to during the exercise of the consent)?

(d) Is the condition invalid as being unreasonable?

(e) Is the proposed condition ultra vires as purporting to reserve a further judgment to the consent authorities, by a process not authorised or recognised by the Act?

(a) Power to impose a condition precedent

[10] Counsel for the Director-General submitted that the condition is, as it is described, a "condition precedent", and that its effect will or may be to frustrate the exercise of the resource consent to which the condition is attached. Counsel submits that there is no authority under the Act to impose such a condition precedent. Counsel for MDC supports that submission, on slightly different grounds from those advanced by the Director-General.

[11] The starting point is s 108 of the Act. The relevant parts of that section, as it stood prior to the amendment effected by the Resource Management Amendment Act 2003, read as follows:

> **108 Conditions of resource consents**
>
> (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
>
> (2) A resource consent may include any one or more of the following conditions:
>
> [Here follows a list of specific matters.]
>
> (3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.
>
> (4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do one or more of the following:
>
> (a) To make and record measurements:
>
> (b) To take and supply samples:
>
> (c) To carry out analyses, surveys, investigations, inspections, or other specified tests:
>
> (d) To carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:
>
> (e) To provide information to the consent authority at a specified time or times:
>
> (f) To provide information to the consent authority in a specified manner:
>
> (g) To comply with the condition at the holder of the resource consent's expense.

[12] The term "condition precedent" has a well established meaning in certain areas of law. A condition precedent is one which must be fulfilled before: (a) an estate or interest will vest; or (b) a gift under a will will be created; or (c) a party becomes subject to a contractual obligation. A condition precedent is to be contrasted with a condition subsequent, under which the estate or interest will have vested, the gift will have been created, or the party will have become bound to the

contract, but the non-fulfilment of the condition will bring the estate or interest, or the gift, or the contractual obligation, to an end.

[13] The term "condition precedent" has no established meaning under resource management law. It seems that what the Court intended by the use of the term "condition precedent" was that the consents which it contemplated would be granted as a result of its decision would not become effective until the condition had been fulfilled. The question is therefore whether such a condition can lawfully be imposed under s 108.

[14] The powers of the relevant consent authorities to impose conditions under s108 are to be found in ss 105(1)(b) and 119(2)(a) and (b) of the Act (as they stood prior to the 2003 amendment), which provide relevantly as follows:

> **105 Decisions on applications**
>
> [(1) Subject to subsections (2) and (3), after considering an application for—
>
> ...
>
> (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:
>
> ....
>
> **119 Decision on application for restricted coastal activity**
>
> ...
>
> (2) When considering his or her decision on the application, the Minister of Conservation shall—
>
> (a) Take into account the recommendation of the hearing committee or report of the Environment Court, as the case may be; and
>
> (b) Have regard to the matters set out in section 104—
>
> and, subject to subsections (3) and (6), may grant or refuse to grant the coastal permit and, in granting the permit, may include any conditions in it in accordance with section 108.

[15] It is clear from both of those sections that the imposition of conditions is dependent upon the granting of consent, and would in normal circumstances be

contemporaneous with the granting of the consent. In my opinion, that precludes the imposition of a condition precedent, within the strict meaning of that term. There is an incongruity in imposing a condition precedent to the coming into effect of a consent. Since the grant of the consent is the foundation for the power to impose the condition, the condition cannot come into existence before the consent.

[16] Accordingly, while the power to impose conditions in s108 is very broad, in that resource consent may be granted "on any condition that the consent authority considers appropriate", I consider that it does not extend to imposing a condition which will have the effect that the consent will not legally be in existence until the condition is satisfied.

[17] That problem does not arise if the effect of the condition is that what is deferred until fulfilment of the condition is not the consent itself, but the ability of the applicant to carry out the activities permitted by the consent. As counsel for CBMFL points out, conditions which restrict the ability of the consent holder to action the consent until the condition is fulfilled are routinely applied.

[18] The conditions to be imposed in this case may well be capable of being worded in terms which do not have the effect, that the consent will not legally be in existence until the conditions are satisfied, so that I do not consider that the issue should be decided on this narrow ground. I consider it more appropriate for this Court to focus on the substance of the conditions, and what each seeks to achieve, than on the label which the Environment Court has applied to the conditions. I do so in dealing with the issues which follow.

(b) Frustration

[19] The second question, as I have formulated it, is: does the Act allow a condition which might have the effect of resulting in the consent not being able to be implemented, or being frustrated, and is this condition of that type?

[20] It was common ground that any conditions imposed under s 108 must meet the test of reasonableness. In the resource management context, the relevant test was enunciated by the House of Lords in *Newbury District Council v Secretary of State*

for the Environment [1980] 1 All ER 731. That decision was confirmed as being applicable in New Zealand by the Court of Appeal in *Housing New Zealand Ltd v Waitakere City Council* (CA 158/00, 14 December 2000). The requirements of the *Newbury* test are essentially threefold:

1. Conditions imposed must be for a planning purpose and not for any ulterior one.

2. They must fairly and reasonably relate to the development permitted.

3. They must not be so unreasonable that no reasonable planning authority could have imposed them, that is, *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223).

[21] Questions (b), (c) and (d) as I have framed them in paragraph [9] each relate to separate aspects of compliance with the *Newbury* requirements.

[22] The relevant issue on question (b) is whether, if the condition as to initial survey were framed so that the activities authorised by the consent would not be able to take place if the requirements of the condition were never satisfied, the condition would be invalid for that reason. In *Lyttelton Port Company Ltd v Canterbury Regional Council* (C008/01, 26 January 2001) the Environment Court said:

> A Court cannot impose a condition that would nullify the grant of consent and this point was conceded by all parties.

[23] I do not consider that the condition proposed by the Environment Court in this case is invalid for that reason. As counsel for CBMFL notes the imposition of a condition which, if it is not satisfied, will mean that the activities authorised by a consent cannot commence is not uncommon. In this case, the objective of the condition is to have a survey conducted into whether the site is of special significance for Hector's dolphin. The results of that survey are intended to be assessed by the consent authorities. Depending on the outcome, the marine farm authorised by the proposed consents may or may not be able to proceed. I do not consider that a condition which has two possible outcomes, one of which will enable

the activities authorised by the consent to proceed, and one of which will not, is for that reason a condition which would frustrate the consent, or which is otherwise unreasonable under the *Newbury* test.

(c) Studies prior to commencement

[24] The third question as I have formulated it is: does the Act allow a condition which requires studies prior to commencement of the activity to which the consent relates (as opposed to during the exercise of the consent)? In submitting that the answer to that question is "no", counsel for the Director-General draws attention to s 108(3) and (4) and submits that the information sought by the survey is not information "relating to the exercise of the resource consent"; rather it is information which is required preparatory to a final determination whether the resource consent can be exercised or not. I do not consider that it is necessary that the information which is required to be supplied to the consent authorities as a result of the initial survey must be information relating to the exercise of the consent. As I have already noted, the terms of s 108(1) are wide, and the matters about which conditions can be imposed are not limited to those in s 108(2), (3) and (4). Accordingly, I do not consider that the proposed condition is invalid by reason of the fact that it will require information to be obtained and supplied before the activities authorised by the consent are commenced.

(d) Unreasonableness

[25] The fourth question which I have identified, in paragraph [9], relating to question 1, is whether the condition is invalid as being unreasonable. That involves the third requirement of the Newbury test, as I have set it out in paragraph [20] above. There are no additional issues which need to be addressed under this heading.

(e) Delegation

[26] The final question on the first issue as I have framed it is: is the proposed condition ultra vires as purporting to reserve a further judgment to the consent authorities, by a process not authorised or recognised by the Act? The issue

underlying this question is whether the requirement in the proposed condition, that "the results satisfy the consent authorities that it is very probable that the site is not of special significance for ... Hector's dolphin ...", requires the consent authorities to exercise a judgment which ought to have been exercised by the Court itself

[27] It is clear that a court or tribunal entrusted with judicial duties cannot delegate the performance of such duties, unless authorised by the statute. *Turner v Allison* [1971] NZLR 833, *Olsen v Auckland City Council* [1998] NZRMA 66 and *Pine Tree Park Ltd v North Shore City* [1996] NZRMA 401, are examples of that principle in the resource management field. In *Turner v Allison*, the issue was stated in terms of whether the relevant condition involved the person whose decision was required under that condition to be acting in the capacity of a certifier or an arbitrator. That distinction has been drawn in other cases. While the question of whether the condition requires the decision-maker to act as certifier or arbitrator will provide a useful test, it does not necessarily provide the only test. The issue is whether there has been an unauthorised delegation of a judicial function. Where the judicial function has been delegated in terms which require an adjudication to be made by the delegate, then it will normally be readily apparent that it is a judicial function which has been delegated. But that is not necessarily the only basis upon which a judicial function may have been improperly delegated. It is of the essence of a judicial function that the adjudicator will be required to make findings of fact. If the function of making a finding on facts which are essential to the decision is delegated, then there is a delegation of the judicial function. That may occur in circumstances where the delegate is not explicitly deciding a dispute between the parties. The role of the delegate as certifier may conceal the fact that what is being delegated is the power to certify a matter which is an essential element of the decision which should be made by the tribunal. It is necessary to examine the real nature of the decision which the delegate is required to make, rather than the form in which the power to make that decision is conferred.

[28] In this case the condition requires that the consent authorities be satisfied, from the results of the initial survey, that it is very probable the site is not of special significance for the Cloudy/Clifford Bays population of Hector's dolphin in terms of breeding, nursing, feeding or sheltering. From the wording of the condition, it is

clear that if the consent authorities are not so satisfied (to use a double negative) then the consent will not be able to be actioned. The condition is framed in terms which are consistent with the consent authorities acting as a certifier in relation to this condition. To that extent, the conditions are similar to those in *Turner v Allison* which Richmond J would have found acceptable. However, in my opinion the condition in this case is substantially different from those in *Turner v Allison*. The conditions in that case related to matters of appearance of the buildings and landscaping and planting. Those were matters which necessarily followed the making of the decision to allow the development. The judicial function in that case was the making of that decision. In making that decision, the consent authority wished to impose standards as to certain matters, and required a means of ensuring that those standards were met. Conferring a decision-making power on a third party, as was done in that case, did not involve a delegation of the judicial function of deciding whether the development should be allowed, but rather a delegation of the administrative function of ensuring that appropriate standards were met in relation to the development after it had been allowed. The matter which is required to be certified in this case is quite different. Whether the site is of special significance for Hector's dolphin goes to the issue of whether or not the consent should be granted. It is a question which, if it is sufficiently important to have a bearing on whether the consent should be granted or not, should be decided by the Court itself. It is not a question which can properly be delegated.

[29] There are important practical considerations which support that conclusion. The condition is silent as to the processes which the consent authorities are to adopt in considering the results of the initial survey. There is no reference to a procedure under the Act for considering the results of the survey. It is not clear whether or not the Court envisaged that the parties would have any input into that process. It is not clear what power the consent authorities would have to conduct any further hearing, or hear any submissions, on the question. Either way, that presents difficulties. If the Court did intend that the parties have an input, then that would clearly make the role of the consent authorities on that question akin to that of arbitrator rather than certifier. If, on the other hand, the Court envisaged that the role of the consent authorities would be simply to consider, for themselves, the results of the survey and make a decision without hearing the parties, then that would deprive the parties of an

opportunity to test, and to make submissions on, evidence relevant to a factual question which goes to the issue whether the consent should be granted.

[30] For those reasons, I hold that the issue identified in condition (1)(b) in paragraph 136 of the Environment Court's decision is not one which could properly be delegated to the consent authorities.

[31] In so holding, I should not be taken as indicating that the Environment Court could not properly have granted the application without further evidence to enable it to make a decision on whether the site was of special significance to Hector's dolphin. The Court in its decision dealt with the effect of the proposed activity on Hector's dolphin at some length. It concluded that there was a paucity of research, and said at paragraph [82]: "There is no evidence that the site is a breeding/nursery area. And none that it is not." It posed, and considered, the question "Is the risk to the local Hector's dolphin sufficiently large that no marine farming should take place until adequate funding, qualified personnel and a research programme all coincide?" [paragraph 134]. The conditions as to initial survey were a response to its conclusion that "an opportunity exists to research all the risks to Hector's dolphin by way of conditions to a resource consent". [paragraph 134(2)]. What the outcome of the application would have been if the Court had not considered that that opportunity exists, so that the appeal had to be decided solely on the basis of the evidence which had been adduced, and without the additional information which the initial survey might produce, I cannot say. It is a matter which must be determined by the Environment Court.

[32] I should also add that if, on the information present available, the Court considers that the application should be granted, it may be possible for the objectives sought to be achieved by the initial survey to be addressed by a condition requiring the necessary research and monitoring to take place, in a way which does not involve a delegation of the judicial function. Counsel for CBMFL suggested in paragraph 56 of their submissions, a possible way in which this might be able to be done. That is a question for the Environment Court, and I express no view on it. That can only be determined by that Court.

[33] For those reasons, I consider that the appropriate course, on this issue, is to refer the matter back for further consideration by the Environment Court, for that Court to decide whether, in the light of this judgment, the objectives which it sought to achieve can be achieved by the imposition of conditions which

a) are not formulated as conditions precedent to the coming into force of the resource consent; and

b) do not involve a delegation to the consent authorities of a question which, in the performance of its judicial function, is required to be determined by the Environment Court.

Question 2: Power to cancel resource consents under section 319(2)(b)

[34] This aspect of the appeal relates to paragraph [129] of the Environment Court decision, where the Court said:

> There is a further point which the parties appear to have overlooked – that a marine farm could be closed down and removed by enforcement action under section 17 of the Act. That section now states (relevantly)
>
> (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, a designation ...
>
> Certainly the onus would then be on the applicant for an enforcement order under section 314 of the RMA to prove there was an adverse effect. However if the information gathering imposed on the consent-holder was sufficiently rigorous that itself might supply the information that the Director-General or some other person needed to take action.

[35] The starting point in this argument is s17. The current version of that section (that is, as amended by the 2003 Amendment Act) is relevant. That provides:

> 17 Duty to avoid, remedy, or mitigate adverse effects
>
> (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, [a designation,] [section 10, section 10A, or section [20A]].

(2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.

(3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part 12 to:

(a) Require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the [Environment Court] or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or

(b) Require a person to do something that, in the opinion of the [Environment Court] or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.

[(4) Subsection (3) is subject to section 319(2) (which specifies when an Environment Court shall not make an enforcement order).]

[36] The means of enforcement of the duty created by s17(1) is a enforcement order or abatement notice under part XII. An order that the marine farm be closed down and removed would need to be made under ss314 and 319. These sections provide (again, as amended by the 2003 Amendment Act) as follows:

314 Scope of enforcement order

(1) An enforcement order is an order made under section 319 by the [Environment Court] that may do any one or more of the following:

(a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the [Court],—

(i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, [a rule in a proposed plan,] a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section [20A] (certain existing lawful activities allowed); or

(ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:

(b) Require a person to do something that, in the opinion of the [Court], is necessary in order to—

(i) Ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, [a rule in a proposed plan,] a requirement for a designation or for a heritage order, or a resource consent; or

(ii) Avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:

(c) Require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person:

(d) Require a person to pay money to or reimburse any other person for any [actual and] reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect [on the environment, where the person against whom the order is sought] fails to comply with—

(i) An order under any other paragraph of this subsection; or

(ii) An abatement notice; or

(iii) A rule in a plan [or a proposed plan] or a resource consent; or

(iv) Any of that person's other obligations under this Act:

[(da) Require a person to do something that, in the opinion of the [Court], is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier:]

(e) Change or cancel a resource consent if, in the opinion of the [Court], the information made available to the consent authority by the applicant contained inaccuracies relevant to the enforcement order sought which materially influenced the decision to grant the consent:

(f) Where the [Court] determines that any one or more of the requirements of the Schedule 1 have not been observed in respect of a policy statement or a plan, do any one or more of the following:

(i) Grant a dispensation from the need to comply with those requirements:

(ii) Direct compliance with any of those requirements:

(iii) Suspend the whole or any part of the policy statement or plan from a particular date (which may be on or after the date of the order, but no such suspension shall affect any Court order made before the date of the suspension order).

(2) For the purposes of subsection (1)(d), "actual and reasonable costs" include the costs of investigation, supervision, and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, remedy, or mitigate the adverse effect.]

(3) Except as provided in section 319(2), an enforcement order may be made on such terms and conditions as the [Environment Court] thinks fit

(including the payment of any administrative charge under section 36, the provision of security, or the entry into a bond for performance).

(4) Without limiting the provisions of subsections (1) to (3), an order may require the restoration of any natural and physical resource to the state it was in before the adverse effect occurred (including the planting or replanting of any tree or other vegetation).

(5) An enforcement order shall, if the [Court] so states, apply to the personal representatives, successors, and assigns of a person to the same extent as it applies to that person.

319 Decision on application

(1) After considering an application for an enforcement order, the [Environment Court] may:

(a) Except as provided in subsection (2), make any appropriate order under section 314; or

(b) Refuse the application.

(2) Except as provided in subsection (3), the Environment Court must not make an enforcement order under section 314(1)(a)(ii), (b)(ii), (c), (d)(iv), or (da) against a person if:

(a) that person is acting in accordance with—

(i) a rule in a plan; or

(ii) a resource consent; or

(iii) a designation; and

(b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.

(3) The Environment Court may make an enforcement order if:

(a) the Court considers it appropriate after having regard to the time that has elapsed and any change in circumstances since the approval or granting, as the case may be; or

(b) the person was acting in accordance with a resource consent that has been changed or cancelled under section 314(1)(e).]

[37] Counsel for the Director-General posed a hypothetical situation, in which the possible application of these provisions could be examined. That hypothetical was:

a) that the mussel farm was established and operated in accordance with the consent;

b) that information gathered did show that the mussel farm was having a significant adverse effect on the health of Hectors dolphin (and so, an adverse effect on the environment).

[38] Counsel for the Director General submitted that, in that hypothetical

(i) the burden of proving that there was a significant adverse effect on Hector's dolphin would be on the enforcement authorities, and that, if such were proved, the only provisions in s 314 which are applicable are ss 314(1)(a)(ii) and 314(1)(b)(ii).

(ii) that an impact on the dolphin's health may not be considered "noxious, dangerous, offensive or objectionable" under (a)(ii);

(iii) that the only effective order that the Court could make under (b)(ii), in requiring the consent holder to surrender the consent. Counsel submitted that the Environment Court does not have jurisdiction to order someone to give up a resource consent because of the adverse effects on the environment. The only power to cancel a resource consent is under s314(1)(e), and it would not be possible to rely on s17 to obtain an order which requires the resource consent to be surrendered unless the information on which the consent was granted contained material inaccuracies;

(iv) the ability to make enforcement orders under s 314(1)(a)(ii) or (b)(ii) is subject to s 319(2). In the hypothetical, consideration was given to the effect on Hector's dolphin when the consent was granted. Therefore, any adverse effect on Hector's

dolphin was an adverse effect which was expressly recognised, in terms of s 319(2)(b);

(v) for these reasons, although not conclusive, the application of the enforcement provisions so as to require cancellation of the consent is significantly more difficult than was indicated by the Environment Court, and that to place any reliance on the ability to close down the mussel farm because of adverse effects on Hector's dolphin is misplaced. The appropriate remedy is to refuse to grant a resource consent;

(vi) similar considerations apply to abatement notices under s 322.

[39] Counsel for MDC, where submissions were largely supported by counsel for CBMFL, submitted that the comments in paragraph [129] of the decision were not central to the Court's decision making, and were obiter. Counsel submitted that the obiter comments were nonetheless correct, in that:

(i) MDC has a duty under s 35(2) to monitor the exercise of resource consents and take appropriate actions having regard to the methods available to it;

(ii) one of the methods available is that contained in s 17(3);

(iii) the breach of duty in s17(1) gives rise to the powers in s 17(3), even if the activity is being conducted in accordance with a resource consent;

(iv) any impact on dolphin's health would be 'noxious dangerous offensive or objectionable' for the purposes of s 314(i) and (ii);

(v) the remedies under s314 are very wide, and provide an effective remedy without cancelling the resource consent;

(vi) a finding by the consent authority that an adverse effect is unlikely or unknown does not constitute an adverse effect being 'expressly recognised'.

[40] This issue was expressly raised in the notice of appeal. However, I do not consider that I should make any formal ruling on it. I accept the submission of MDC and CBMFL that the comments upon it were obiter. The issue was not central to the Court's decision. It did not strictly arise on the facts. That was implicitly acknowledged by counsel for the Director General in that it was necessary to construct a hypothetical situation in which to argue the question.

[41] Without giving any formal ruling, I do make some observations, as the point was extensively argued. Generally, I prefer the submissions of MDC and CBMFL on the issue. Specifically, I consider that any impact on dolphin's health would fall within s314(1)(a)(ii). I also consider that any adverse effect which was considered by the consent authorities and held to be unlikely or unknown would not be one which was 'expressly recognised'. Further, counsel for the Director General's submission as to the breadth of the enforcement powers seems to me to be more narrow than is required by a purposive interpretation of the legislation. However, resolution of that issue must await a case in which it is directly in issue. I accordingly do not rule on question 2.

Question 3: Condition requiring control sites outside the region

[42] The third question as I have formulated it is whether, having regard to s30(1) of the Act, it is possible to grant a resource consent subject to effects outside the region of MDC. This question arises as a result of the requirement of condition 4, as set out in paragraph [3] above, namely that two properly independent control sites be found. These sites would necessarily be outside MDC's area.

[43] Counsel for the Director General submits that the Environment Court has erred in three ways under this ground of appeal:

(a) in imposing a condition which relates to an area outside the jurisdiction of MDC;

(b) the condition may be reliant upon the uncertain outcome of independent statutory processes, in that consents under, and compliance with, the Act and other legislation will be needed;

(c) preservation of the integrity of the control sites will require the actions of a third party. That has been discussed by the Court in paragraph 165 of its decision, as follows:

> 165. There is one other cross-regional boundary issue which the Department of Conservation and the Minister of Conversation will need to bear in mind. The control sites needed to comply with this marine farm's conditions will probably need to be in waters of the coastal marine area administered by one or two regional councils other than the unitary Marlborough District/Regional Council. It seems to us that it would be appropriate for the Director-General to draw to the attention of such a local authority (or on appeal, other divisions of this Court) the possibility of any further marine farms in Hector's dolphin habitat interfering with vital research on the species. Of course it is not for us in these proceedings to dictate where the most appropriate site for an experimental marine farm is. That appears to be a matter for the Minister of Conservation, when deciding whether or not to grant a coastal permit.

[44] Counsel for MDC, again supported by counsel for CBMFL, submits:

(a) that the condition is not intended to exercise control outside the region, but to ensure that the research programme contains comparisons with dolphin populations in other parts of New Zealand. The reporting condition enables MDC to ascertain whether the necessary research has been undertaken;

(b) the possibility that other consents may be required to give effect to a particular condition does not invalidate the condition. It is common for an applicant for a resource consent to have to obtain a range of statutory approvals.

(c) Paragraph [165] of the Court's decision constitutes an observation, rather than a condition.

[45] In my view, the submissions of counsel for MDC are to be preferred. As to the first point, the condition does not purport to confer upon MDC some "extraterritorial" authority. In monitoring the control sites, the researchers must meet all relevant requirements of the local authorities concerned with those sites. The role of MDC is to monitor compliance with the condition as to research, not to exercise control over the research sites.

[46] As to the second point, if difficulties over consents at the control sites are encountered, it will be for the researchers to meet those difficulties. If they are unable to do so, the condition may not be able to be satisfied. The resource consent may then need to be reviewed. Those possibilities are not a basis for holding that the condition is invalid.

[47] Similar considerations apply to the third point. If the integrity of the control sites cannot be secured, that may mean that the conditions as to research cannot be met. That possibility will need to be addressed if it arises. It is not a basis for holding that the condition is invalid. Accordingly, I answer question 3 in the affirmative.

Question 4: Are resource consents possible, having regard to s30(2) of the Act?

[48] The point which the Director General raises under this heading is that he alleges that the Environment Court wrongly relied upon matters relating to adverse effects of fishing activities on Hector's dolphin as part of its justification for granting the consents. The Director General submits that the "fishing effects" are both irrelevant and ultra vires. The submission is that in this case the Environment Court had held that there are two significant indirect ways in which a marine farm in Clifford Bay might safeguard the ability of the ecosystem to maintain the population of Hector's dolphin. First, the presence of the marine farms may prevent some set net deaths if set netting or trawling is diminished in the area and secondly observers could provide more accurate details in relation to the deaths of Hector's dolphins. The Director General submits that the Court has erred in considering whether there are positive effects on Hector's dolphin from the use of the area by one fishing sector (marine farming) as opposed to another sector (set netting and/or trawling). It is

submitted that by comparing the adverse effects of one form of harvesting of an aquatic organism against another, the Environment Court has sought to control the use of this part of Clifford Bay by set net and other fishers in order to prevent fisheries by-catch and that the Court has attempted to control the use of set nets in the area to be occupied by the marine farm.

[49] That submission raises two questions:

(a) whether the Environment Court is entitled to take into account any benefit which the de facto exclusion of set netting or trawling might entail and,

(b) whether, in so doing, the Environment Court was attempting to allocate the fisheries resource in Clifford Bay, a matter which is in the jurisdiction of the Minister of Fisheries under the fisheries legislation.

[50] As to the first of those questions, counsel for MDC submits that in finding that there were two significant indirect ways in which the proposal might safeguard the ability of the ecosystem to maintain the population of Hector's dolphin, the Environment Court was simply making findings of fact which, on the evidence were open to it. Counsel for MDC submits that what the Environment Court has found as a matter of fact is that a beneficial effect (albeit indirect) arising out of the establishment of the proposed marine farm will be a possible diminution of netting or trawling in the area of the marine farm and that this might prevent some dolphin deaths.

[51] I consider that the Environment Court was entitled to take into account the fact that one consequence of the establishment of the proposed marine farm would be that set netting would not be possible in the area occupied by the marine farm. That is a finding of fact which was entirely open to it, and indeed it is no more than a statement of the obvious. I further consider that the Court was entitled to conclude, on the basis of its extensive examination of the evidence as to possible causes of dolphin deaths, that set netting and/or trawling was a potential cause of dolphin

deaths. I further consider that the Court was entitled to weigh the potential risks to dolphin from set netting and/or trawling on the one hand, and marine farming on the other, in the area proposed to be occupied by the marine farm.

[52] As to the second question, I do not consider that it follows that, in weighing up the possible threats to dolphin from the alternative potential methods of fishing, the Court was thereby improperly seeking to allocate any fisheries resource in Clifford Bay. The establishment of a marine farm would inevitably exclude set netters or trawlers from the area occupied by the marine farm, but from that area alone. That consequence does not mean that the Court is thereby seeking to control the allocation of a fisheries resource. To acknowledge that Hector's dolphin may benefit from the exclusion of set netting, and to take that into account in relation to the granting of the consent for a marine farm, is not to attempt to impose a control on set netting, or in any other way to control the fisheries resource for the Clifford Bay.

[53] Accordingly, I answer question 4 by saying that the Environment Court has not improperly taken into account the effects of other forms of fishing in Clifford Bay, nor has it improperly purported to regulate other forms of fishing.

Decision

[54] For the reasons set out above, and in the light of the answers which I have given to the questions set out in paragraph 6, I consider that the appropriate course is to refer the matter back to the Environment Court as I have proposed in paragraph [33] above. Accordingly, I direct that the Environment Court should reconsider its report and recommendations, to decide whether, in the light of this judgment, the objectives which it sought to achieve can be achieved by the imposition of conditions which

a) are not formulated as conditions precedent to the coming into force of the resource consent; and

b) do not involve a delegation to the consent authorities of a question which, in the performance of its judicial function, is required to be determined by the Environment Court.

Costs

[55] I invite memoranda as to costs. I should indicate that my inclination is that, as none of the parties have been completely successful, and all have had a measure of success, no order for costs should be made. Counsel for the appellant should file a memorandum within 21 days, and all other parties should file memoranda within a further 14 days.

A D MacKenzie J

Signed at 9.45 a.m./~~p.m.~~ this 3rd day of May 2004

Solicitors:
Crown Law Office for appellant
Radich Dwyer for respondent
Anderson Lloyd Caudwell for Clifford Bay Marine Farms Ltd
Gascoigne Wicks for Dominion Salt Ltd

ORIGINAL

Decision No. A 022 /2007

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to s120 of the Act
BETWEEN	**J R & C H DUDIN**
	(ENV-2006-AKL-000218)
	Appellants
AND	**WHANGAREI DISTRICT COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

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

HEARING at **Whangarei** on 12 and 13 September, and 16 October 2006; submissions and other materials filed up until 11 January 2007

COUNSEL

R M Bell for appellants
G J Mathias for respondent

INTERIM DECISION

Introduction

[1] This appeal concerns an application for subdivision consent which had followed a number of unfortunate twists and turns, largely caused by the appellants, since consent had originally been sought in July 2001. The appeal was filed in January 2004, and continued to suffer from such problems. Indeed it was only set down for hearing by the Court out of some exasperation, as a rather generous alternative to being struck out. (It is fair to record that appellants' counsel was not appointed until late 2006, and he cannot be

held responsible in any way for the difficulties that arose earlier while the application and the appeal were being conducted by others).

[2] The respondent had refused consent to the subdivision into 3 lots, of the Dudins' 21.6 ha block on Whangarei Heads Road at McLeods Bay. That refusal was on the basis, as the respondent saw it, that the proposal was of non-complying character.

[3] The land is legally described as Part Lot 4, Deeds Plan W.34, Part Allotment 15 Parish of Manaia, Certificate of Title 93D/86 (North Auckland Registry). The proposal on the (slightly modified) plan placed before us, was for 2 lots of just over 4ha, and one of just over 13ha.

[4] The land is the subject of split zonings in both the Transitional District Plan and the Proposed District Plan. It was agreed between the parties that the relevant rules under the Transitional Plan, which we understand might have constituted the status of the proposal non-complying, had been replaced by the time of our hearing by the operation of s19 RMA. By that means, rules in the Proposed Plan had been settled through the submission and appeal processes and attained operative effect[1].

[5] Accordingly, the focus fell on the Proposed Plan ("PDP") which had undergone some refinement since promulgation, and as at the present date is close to being made operative. No appeals remain on foot that could change any relevant provisions of it.

[6] There are three zones applying to the land. The 2 zones of most importance are Living 3 on a western part of the property (the nearest part to the harbour, and with the least sloping area), and Coastal Countryside on the higher, eastern portion, which is steep and partly bush covered and found below the flanks of Mt Manaia. Running between these zones, but relatively inconsequential for the purposes of the application, is a narrow strip of Countryside zoned land on a stopped former road.

[7] On part of the upper area is a patch of bush extending down from the bush clad mountain slopes above. Those mountain slopes, and the patch on the subject site, are mapped in the PDP as an outstanding landscape area.

[1] See for instance decision of the Environment Court in *Campbell v Napier City Council* Decision No. W67/2005.

Issues in the appeal

[8] A measure of debate centred around the status of the proposed subdivision in the PDP. The principal areas of debate between the applicant and the council for over 5 years, centred on archaeological matters and engineering issues to do with access and effluent disposal. By the time the hearing commenced, the council's focus was confined principally to the archaeological aspects, in particular the lack of any consent yet granted by the New Zealand Historic Places Trust under s11 or s12 of the Historic Places Act 1993 for excavation of an accessway through a Maori shell midden. However, it is fair to say that the interest of the respondent was roused during the course of the hearing, concerning issues of effluent disposal and proposals put forward by the appellants for conditions of consent. In the latter area, a considerable debate arose that was almost identical to that on which 2 members of this division recently ruled in a case heard at around the same time, ***Morgan v Whangarei District Council***[2]. The latter issues achieved slightly less prominence in this case, and are relevant in a slightly different way, but we will come to that in a later section of this decision.

Status of the activity under the PDP

[9] We reiterate that the application was filed in mid 2001. Of relevance to status, it was brought prior to the 2003 and 2005 Amendments to the Act.

[10] The council's resource consents manager Mr A Hartstone, a qualified planner, gave evidence that he considered that the application would be a non-complying activity under PDP because the controlled and discretionary standards specified in Rule 50.4 would not be compiled with.

[11] Mr Hartstone said that he had assessed the application for the purposes of s88A under the Rules that existed at the time of lodgment of the application, and he considered that it was at all times one for non-complying activity consent. Unfortunately however, he was no more specific than that. The respondent's counsel Mr Mathias did not address the issue. Mr Bell, on behalf of the appellants, submitted that because the application was lodged in 2001, s88A in its form prior to 2003 Amendment, governed the position. That would appear to be the correct position in law having regard to the recent decision

[2] Decision No. A21/2007.

of the High Court (issued since our hearing concluded) ***Matukituki Trust v Queenstown Lakes District Council***[3].

[12] Section 88A, in its then form, provided :

> (1) Where—
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> (a) An application for a resource consent has been made under s88; and
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> (b) The type of activity (being controlled, discretionary, or non-complying) for which the application was made is altered after the application as a result of—
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> (i) a proposed plan being notified; or
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> (ii) a decision being made under clause 10(3) of the First Schedule; or
>
> (iii) otherwise—
>
> the application continues to be processed and completed as an application for the type of activities specified in the Plan or Proposed Plan existing at the time the application was made.
>
> 2 Notwithstanding subs (1), any Plan or Proposed Plan which exists when an application is considered must be had regard to in accordance with s104.

[13] The section must be interpreted in the absence of the legislative clarification that arrived in 2003 with the insertion of subs(1A). Some inconsistency of view on the part of the Environment Court cannot entirely be put aside concerning the former provision. Without entering on the debate, we prefer the view first put forward by Judge Jackson in ***Pigeon Bay Aquaculture Limited v Canterbury Regional Council***[4] and Judge Smith in ***Tarawera Lakes Protection Society Inc v Rotorua District Council***[5], over a decision issued between times, ***Canterbury Regional Council v Christchurch City Council***[6].

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[3] CIV-2000-412-0007333, High Court Christchurch (Fogarty J) at para [78], largely accepting the decision of the Environment Court in New Zealand ***Nut Producers and others v Otago Regional Council*** (Decision No. C 99/2004), and disagreeing with a number of other Environment Court decisions such as ***Omokoroa Ratepayers Association Incorporated v Western Bay of Plenty Regional Council*** (Decision No. A17/2004) and ***Environmental Defence Society Inc v Far North District Council*** (Decision No. A112/2004)

[4] [1999] NZRMA 209 at 215-7.

[5] Decision No. C6/2002 at paragraphs 19-22.

[6] Decision No. C25/2001.

[14] Hence, we consider that an activity retains its original status as at the date the application was brought, right through, including at the time the application for consent is considered substantively[7].

[15] The practical consequence is that the present application must be considered as being one for a controlled activity, because in our view it met the controlled activity parameters in the 2001 version of Rule 50.4 of the PDP (noting that in the 2006 version the proposal would have become a discretionary activity[8]).

[16] We remain mindful that pursuant to s88A(2), we must *have regard* to provisions of the PDP brought into existence by the directions in the Court's 2006 plan appeal decision.

The relevant provisions of the PDP

[17] Regrettably, we received inadequate assistance about plan provisions from either of the parties. The appellants' surveyor gave extremely brief evidence on planning matters, and in this regard did little more than touch briefly on some of the rules in the PDP in existence at 1 July 2001. The respondent's planner Mr Hartstone quoted from objectives and policies of the PDP, but omitted entirely to mention critical provisions concerning landscape found in Section 15 of the Plan. We have been left to take those meagre pieces of evidence, together with some submissions by Mr Bell, and then conduct our own comprehensive analysis of relevant objectives, policies, and rules. Because this is an application for a controlled activity, the issue is not whether consent should be granted, but rather the **conditions** upon which it should be granted. That has particular importance concerning the location of a proposed building platform within one of the lots, amongst other things.

The environment of the site and the locality

[18] Whangarei Heads Road skirts the eastern side of Whangarei Harbour, linking Whangarei City with the strikingly beautiful Bream Head, Ocean Beach, and Mt Manaia Range. There is a single strip of houses for most of the length of McLeod Bay (zoned

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[7] That position is also consistent with the law stated by the new subs (1A) from August 2003 introduced as a result of the decision of this Court in ***Director-General of Conservation and Ors v Whangarei District Council*** (Decision No. A101/2006), by which, amongst other things, the minimum lot size for controlled activity consent was raised from 4 ha to 20 ha.

[8] Maddin (interim decision) (sp)

Living 1), behind which to the east is a deeper strip of Living 3 zone on flat to undulating land that is largely in pasture. Behind that again is a deeper strip of Coastal Countryside zone on steepening ground, leading up to the bush clothing the Mt Manaia Range. The last feature is zoned Open Space. As previously mentioned, an Outstanding Landscape is mapped on the Open Space zone and on tongues of bush extending down into the Coastal Countryside zone, including over parts of proposed Lots 1 and 2.

[19] In addition, the whole of the locality from the foreshore to the highest ridge of the Mt Manaia Range undoubtedly qualifies as "Coastal Environment" as described as long ago as 1977 in ***Northland Regional Planning Authority v Whangarei County***[9]:

> What constitutes the Coastal Environment will vary from place to place and according to the position from which a place is viewed. Where there are hills behind the coast, it will generally extend up the dominant ridge behind the coast.

That definition has been applied in many cases since the RMA came into force.[10]

[20] Regrettably, these important features came in for no more than passing mention from the planning witnesses.

[21] A very unusual feature of this case was that while the council's opposition at the commencement of the hearing was confined almost to one factor, want of NZ Historic Places Trust authority to destroy or modify a shell midden (in fact granted after conclusion of the hearing), further concerns manifested themselves as the case unfolded. Some of these resulted in escalation of the debate in extensive written submissions filed by both parties over a number of weeks after the hearing.

[22] This was ironic in circumstances where there had been the prospect that if the NZHPT decision had been available before the hearing, the council might well have offered to settle. As it was, the unsatisfactory nature of the planning evidence for both parties, and the engineering evidence on behalf of the appellant, led us to question the witnesses. That led to the filing of supplementary statements before the second (October) leg of the hearing, and also to a second site visit. Both visits occurred after extensive consultation of the parties in open court, and on the second we were accompanied by

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[9] (1977) A4828 (TCPAB).

[10] See for instance *Wilkinson v Hurunui District Council* Decision No. C50/2000 and *Countache v Rodney District Council* Decision No. W94/1993.

representatives of the parties (the planning, engineering, and archaeological witnesses, who helped us locate mapped features scattered around the topographically complex property).

[23] Our initial misgivings about the evidence were somewhat confirmed by our first site visit in September. The supplementary evidence later filed was in answer to those concerns. The misgivings centred primarily around the placement of the building platform for Lot 2, high on a spur to the rear of the property, and the likely considerable steepness of access to it up a gully and out onto the spur.

[24] The council's representatives continued largely to acquiesce about these matters, but it is proper to record that if the NZHPT authority had arrived in a more timely fashion and led to a council offer to settle the case, we would not have been prepared to rubber stamp it. Our ultimate task having heard evidence and inspected a site, is to serve the purpose and principles of the Act as stated in Part II.

[25] The Lot 2 building platform on the spur would undoubtedly produce magnificent views of the Whangarei Harbour to the west, and of the striking form and bush covering of the Mt Manaia Range behind it.

[26] A corollary is (and this we amply shared with the parties during both stages of the hearing), that a house on the spur might intrude unacceptably on the bush backdrop (the mapped Outstanding Landscape), when viewed from Whangarei Heads Road, the adjoining beach, and the harbour beyond.

[27] Our other concern, also aired in the hearing, was the sheer steepness of the accessway, possible associated engineering difficulties with constructing it, and potential associated environmental effects. During the hearing we gave thought to a possible need to refuse consent under s106 RMA, but ultimately that did not prove necessary.

[28] As to the first concern, we were hindered by a dearth of landscape evidence. Such evidence as was offered came in the form of assertions and assumptions stated extremely briefly by the appellants' surveying witness and the council's planner. The latter had acknowledged in passing the presence of the mapped Outstanding Landscape, but no witness bothered to analyse the consequences of siting a building platform on Lot 2 in the position proposed.

[29] As to the second concern, the appellants' engineering witness Mr P J Cook, acknowledged the steepness of the accessway only in answer to questions from the Court. He acknowledged that it might have a gradient approaching 1:3.5 in places, which we consider steep for a vehicular accessway. He acknowledged that at the least it would need concreting on its steeper sections. He made light of the Court's questions about the presence along it of known unstable rock materials variously called Allocthon, or Onerahi Chaos.

[30] In the absence of any engineering assistance from the council, we were left with no basis other than to hear Mr Cook's assurances that (not too unkindly, we think) had a flavour of "engineers can cope with this if enough money is spent on it". (Our words, not his).

[31] The landscape issue cannot so easily be put aside. Mr Bell conceded in answer to questions from the Court that we were not expected to "proceed as three blind persons" and that our impressions gained from site visits, put to the parties in open court, could be brought to account in our decision making.

Relevant provisions of the proposed district plan

[32] Section 104(1)(d), in force in 2001, requires us, subject to Part II, to have regard to:

> Any relevant objectives, policies, rules or other provisions of a Plan or Proposed Plan.

Rules as at 2001

[33] Subdivision into lots having the areas proposed, is a **controlled activity** under Rule 50.4 of the PDP, as then in force concerning the Countryside and Coastal Countryside zones. Control was reserved over:

> (i) The likely location of future rural and urban development;
>
> (ii) The potential effects on rural amenity, landscape, and ecological values, and the natural character of the coastal environment;
>
> (iii) The location of versatile soils in relation to new allotments and potential building sites;
>
> (iv) The location of building areas;

(v) The proximity of the proposed allotments to land use activities that may have an adverse effect on residential amenity (such as a Mineral Extraction Area);

(vi) The additional matters listed in section 48.3.

[34] Items (ii) and (iv) have a particular bearing on matters as we see them in this appeal. In addition, we note one of the items in Rule 48.3 above referred to, Item (c):

> Works or services to ensure the protection, restoration or enhancement of any natural or physical resource, including (but not limited to) the creation, extension or upgrading of services and systems, planting or replanting, (the protection of Significant Ecological Areas) or any other works or services necessary to ensure the avoidance, remediation, or mitigation of adverse environmental effects.

[35] As will shortly be seen, items over which control is reserved in Rule 50.4, have changed slightly from the 2001 version to the present.

[36] Rule 50.5, "Building Area" specified in 2001 that subdivision would be a **controlled activity** *if every allotment...where the land is identified as an Outstanding or Notable Landscape Area, contains a building area of at least 100m^2 where a residential unit can be built so that there is compliance as a permitted activity with the relevant rules in the Plan*. Control was reserved over the need for earthworks; provision for parking, loading, manoeuvring and access; effects of natural hazards; bulk, height, location, foundations, and floor level of any structures on allotments; protection of land from natural hazards; the additional matters in Rule 48.3.

[37] To test for the permitted activity aspect, one cross-references to Rule 28.23 ("Residential Units"), where there is an indication that a house in the proposed position on Lot 2 would (in the 2001version) qualify as a permitted activity, thus meeting the qualification expressed in that regard in Rule 50.5. (It will be seen that that position changes, in the latest version of the Rules).

[38] We have also considered Rule 50.17 "Earthworks", in the 2001 version, by which it would be a **discretionary activity** for the proposed accessway to pass through an archaeological site, earthworks otherwise being a controlled activity. In this regard we have taken note of the fact that the earthworks proposed as part of the subdivision (as distinct from later earthworks that might be required to form house sites and individual accessways) is limited to the combined accessway that crosses Lot 3 to enable vehicular

access to Lots 1 and 2. The midden is found along the alignment of that combined acessway.

[39] We have given consideration to the issue of whether all necessary consents should be treated holistically, and therefore as to whether the discretionary activity status of the earthworks dictates that the proposal as a whole be treated as requiring discretionary activity consent. We have decided that that is not called for, based on the principles stated by the High Court in ***Body Corporate 970101 v Auckland City Council and Anor***[11]. That is because there is no real overlap between the earthworks consent (excavation of a midden in one relatively small part of the site) and the subdivision consent, because consideration of the former cannot be said to affect the outcome of the latter. The application for subdivision consent should therefore be processed as requiring controlled activity consent.

The rules in 2006

[40] Pursuant to s88A as previously discussed, we now proceed to *have regard* to the Rules as altered and having effect at the time of hearing this case.

[41] The key change has been a significant increase (in Rule 50.4) in the minimum net site area of lots in both the Coastal Countryside and the Countryside Environment, to 20 ha, for a subdivision to qualify as a controlled activity. Some change has also occurred in connection with matters over which control is reserved, and the list now reads:

> (i) The location of vehicle crossings, access or right-of-ways and proposed allotment boundaries so as to avoid urban development;
>
> (ii) The location of proposed allotment boundaries and building areas so as to avoid potential conflicts between incompatible land use activities, including the avoidance of reverse sensitivity effects;
>
> (iii) The location of proposed allotment boundaries, building areas and accessways or right-of-ways so as to avoid sites of historic and cultural heritage including Sites of Significance to Maori;
>
> (iv) The additional matters listed in section 48.3.

[42] The item of relevance in Rule 48.3, that is Item (c), has not been subject to wording change.

[43] Rule 50.5 "Building Area" has changed little in any relevant way, but the qualification stated in it about any potential residential unit being able to be built so that there was compliance with permitted activity rules in the Plan, leads us to note relevant changes in Rule 28.23 "Residential Units", such that construction of a residential unit on these lots in the Coastal Countryside zone would now be a **restricted discretionary activity**, which would, if the new version of Rule 50.5 were to have full force and effect, make the subdivision a discretionary activity. As matters stand however we are only to *have regard* to the new regime. As to that, we note that in Rule 28.23 discretion would extend to, amongst other things, effects on landscape values, alternative building locations, effects on the character of the coastal environment, visibility from roads and public places, and the effect on the appearance of skylines and ridgelines.

[44] There has been no change of relevance to the Rule concerning earthworks.

Findings concerning district plan rules

[45] The status of the proposed subdivision is as a **controlled activity** (except as to the discrete issue of excavation through a midden).

[46] Importantly, in the 2001 version of Rule 50.4, control is reserved over potential effects on landscape and the natural character of the coastal environment, and as to the location of building areas. Under Rule 48.3, control is reserved over works or services to ensure protection, restoration or enhancement of any natural resource including avoidance, remediation or mitigation of adverse environmental effects.

[47] Subdivision is a controlled activity in relation to Rule 50.5 "Building Area", because the qualification about establishment of the residential unit where land is identified as an outstanding landscape area, was, 2001, in the permitted activity class. We can however *have regard* to the fact that Rule 28.23 as amended in 2006 would place construction of the house on Lot 2 in the restricted discretionary category, discretion being restricted to effects on landscape values, alternative building locations, effects on the character of the coastal environment, visibility from roads and public places, and the effect on the appearance of skylines and ridgelines.

Objectives and policies of the proposed district plan

[48] The council's planner Mr Hartstone quoted a number of objectives and policies from Section 5 of the PDP (Amenity Values) and Section 7 (Subdivision and Development). Mr Webster, the appellants' surveyor, gave us no assistance in this area at all.

[49] Objectives in Section 5 address the maintenance of amenity values in each zone, and stress the maintenance and enhancement of amenity values of coastal areas and open space. In Section 7, objectives have a similar flavour, and focus on protection, and where appropriate, enhancement, of coastal landscapes and historic cultural and amenity values. Policies stress the outcome of form and density of subdivision and development appropriate to zones, and the importance of avoiding, remedying or mitigating adverse effects on natural character of the coastal environment, landscape values, and amenity values.

[50] Mr Hartstone recorded as his opinion that the proposal is generally complementary to the existing amenity and character of the locality. He thought that the density of the potential built development would not result in any land use conflicts, nor unduly affect the area of Outstanding Landscape on the site. We gained the distinct impression that that view arose because the proposed building platform on Lot 2 was not strictly **within** the mapped area of Outstanding Landscape. For ourselves, we do not consider that the district plan calls for a simple mapping exercise. In this case, although no landscape evidence was called, it was absolutely plain to us that a building on that platform on the spur, would place it in direct view against the mature bush (the Outstanding Landscape), and raise question marks about visual effects on that landscape.

[51] Mr Hartstone quoted objectives and policies from Section 9 – "The Coast", which generally flow from the provisions of the New Zealand Coastal Policy Statement, focusing particularly on the natural character of the coastal environment, landscapes, seascapes and landforms, and amenity values. As to natural character, Policy 9.4.2 provides:

> To recognise, in assessing the actual and potential effects of an activity, that most parts of the Whangarei District's coastal environment have some degree of character which requires protection from inappropriate subdivision, use and development.

Policy 9.4.3 provides, under the heading "Location of Activities":

> To ensure that, as far as practicable, subdivision, use and development is located in areas where the natural character has already been substantially modified.

[52] Again Mr Hartstone found no problem with the proposal. On the contrary, to our way of thinking, they raise the question of whether the proposed building platform on Lot 2 is sited too distant from, and too high above, the existing residential strip along the road near the harbour edge.

[53] Mr Hartstone quoted an objective and a policy from Section 12 – "Heritage Buildings, Sites and Objects". He considered that the issue of a small excavation through a shell midden (and what NZHPT might decide about that) to be the principal issue in the case. We do not agree.

[54] Remarkably, Mr Hartstone managed to avoid quoting any of the objectives and policies in Section 15 – "Landscape". We will now set out those that we consider to be relevant:

> Objective 15.3.1
>
> The preservation of the natural character of the coastal environment.
>
> Objective 15.3.2
>
> The protection of outstanding landscapes and natural features from inappropriate subdivision, use and development.
>
> Objective 15.3.3
>
> The amenity values of the District's natural features and landscapes are maintained and enhanced.
>
> Policy 15.4.1 – Outstanding Landscapes
>
> Landscapes having a sensitivity rating of 7, using the criteria in Schedule 15A, are regarded as "outstanding" and should be protected against inappropriate subdivision, use and development.
>
> Policy 15.4.4 – Natural Character
>
> To ensure that subdivision, use and development does not adversely affect the natural character of the coastal environment (particularly coastal headlines and promontories), and lakes and rivers and their margins.

Policy 15.4.5 – Subdivision

To ensure that subdivision of land in Outstanding Landscape Areas, or land containing Outstanding Natural Features for Geological Sites is of a scale, design and location that maintains and protects the landscape values and natural character of the environment. *Explanation and Reasons:*

Outstanding Natural Features and Landscapes and Geological Sites have been identified in both inland and coastal areas of the District.

Proposed subdivision and development in these areas will be required to have regard to the key elements, patterns and character that contribute to their significance. Subdivision activities, while not a direct use of land, will involve the identification of access, building platforms and other land development works, which make a significant impact on identified landscape areas. The design and density of subdivision in these areas will therefore be controlled.

Policy 15.4.6 – Buildings and Structures

To ensure that buildings and structures are of a scale, design and location that where possible, avoids adverse visual effects on landscape character and values, and otherwise mitigates such adverse effects to the maximum extent practicable.

Policy 15.4.7 – Ridgelines

To ensure that buildings and structures within Outstanding and Notable Landscapes avoid locating upon, or intruding above, ridgelines, where this results in adverse visual effects which cannot be mitigated or remedied, or unless there is a functional need for location on the ridgeline.

[55] These objectives and policies are the versions applying since early 2006, and while they have been amended from the 2001 versions in matters of detail, the thrust of them has been little altered.

[56] Taking account of Policy 15.4.7, photographs placed in evidence by Mr Webster, (and as confirmed by our site inspection), indicate that the spur on which the Lot 2 building platform is proposed to be located, would not constitute a "ridgeline" in the sense of being on a "skyline". But the term "ridgeline" in our view is employed in the Plan in a wider sense than just ridges constituting skyline. The term "ridgeline" is not defined in the PDP, but the relevant definition of "ridge" in the Oxford English Dictionary is *"the top, upper part, or crest of anything, especially when long and narrow...of rising ground, hills, etc"*.

[57] We consider that the relevant objectives and policies in the landscape section of the PDP, are of importance to the outcome in this case. As we have said previously, the

correct approach involves more than a mere mapping exercise. We have formed the view that the placement of the Lot 2 building platform would be contrary to these objectives and policies. This has the effect of reinforcing the views that we had come to concerning relevant matters over which control is reserved in relation to controlled activities.

Effects on the Environment

[58] As often occurs, assessment of effects on the environment has in fact proceeded alongside, and as part of, consideration of the proposal against objectives, policies and rules in the District Plan. There is no call for a detailed section on environmental effects, as that would inevitably be repetitive. There is one aspect of the amenity in McLeod Bay that has not however already been mentioned. Mr Hartstone referred to a decision of the Court, ***Scott v Whangarei District Council*** [12], involving a subdivision into smaller lots than those now before us, at the northern end of the Bay. He endeavoured to draw parallels, but we largely reject them. In particular, the Scott property had a closer visual link with the existing urban development along the bay; it was visible from very few public places; and it did not take in an area of Outstanding Landscape. It was a very much more contained proposition that the Dudins' proposed Lot 2 building platform which we are concerned could not be adequately avoided, remedied or mitigated by conditions other than ones requiring its relocation.

Outcome

[59] It follows also from our earlier findings, that various aspects of the purpose and principles of the Act in Part II, would militate against approval of the proposal in its current form. In particular we refer to s5(2)(c) *(avoiding, remedying, or mitigating any adverse effects of activities on the environment)*; s6(a)...a matter of national importance *(the preservation of the natural character of the coastal environment...and the protection of [it] from inappropriate subdivision, use, and development;* s6(b)...a matter of national importance *(the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development);* s7(c) *(the maintenance and enhancement of amenity values),* and s7(f) *(maintenance and enhancement of the quality of the environment).*

[12] Decision N. A 179/02, in which 2 of the present 3 members of the Court sat.

[60] This being an application for a controlled activity, we are not able to refuse it. We can however impose conditions, and we consider that that is the appropriate approach in connection with the subdivision design and layout. We would not want to sanction a condition that the subdivision design and layout follow that exhibited in evidence. Instead, we consider that there should be a condition approving the subdivision on the basis of an altered layout.

[61] We have given consideration to whether a condition requiring an altered layout would run counter to a proposition of law stated by the Environment Court in ***Aqua King Ltd v Marlborough District Council***.[13] That is, as to whether requiring a change of layout would tantamount to a refusal of consent for that which had been applied for (remembering that controlled activity consents cannot generally be refused). We do not find a problem in the present circumstances. ***Aqua King*** involved consideration of plan provisions that made either one of two forms of marine farm structure a controlled activity. The rules were drawn in such a way as to exclude any discretion about whether either one could be preferred over the other. The situation is very different here. Control has at all relevant times been expressly reserved over location of building areas, effects on landscape values, and effects on the character of the coastal environment.

[62] In general terms, the necessary change will involve extending Lot 2 westwards into part of the area currently shown as Lot 3, and the placing of a building platform and accessway on lower ground significantly below the crest of the spur. In questioning by the Court, the appellants' archaeological witness Dr R E Clough indicated that there might be some shell middens in the general area of the lower slopes, and some work might be necessary to design any building platform and accessway so as to cause no or minimal impact to those features. This aspect is probably little different from the fact of there being some shell middens in the vicinity of the originally proposed Lot 2 platform, and the upper reaches of the accessway to it.

[63] There was some expression of caution from Dr Clough (rather than from the appellants' engineer Mr Cook) that there might be some stability issues for a building platform on the lower slopes, but that is something that will need to be studied. We would be very surprised, from the totality of the engineering evidence including mapping of geological features, if there were to prove to be no place available for a building

[13] 4 ELRNZ 385 at paragraphs [26] to [36]

platform and accessway between the mid slopes of the spur and the rear boundary of the residential properties fronting Whangarei Heads Road.

[64] As we have already recorded, an authority from NZ Historic Places Trust eventually came to light, authorising excavation through the shell midden south of the important Maori pa site on the rocky knoll near the north west corner of the property. On the basis of Dr Clough's evidence, we are prepared to grant discretionary activity consent for that same excavation, noting that the accessway will still be needed approaching the boundary of Lot 1.

[65] We are also prepared to authorise the position of the indicative accessways and building platforms on Lots 1 and 3.

[66] The appellants have volunteered (pursuant to the ***Augier*** principle) a covenant under s77 of the Reserves Act 1977 for protection of the pa site. That will generally be appropriate, but it will be necessary to define the pa site with considerably greater accuracy than has been done until now. That will need to be done employing accurate surveying methodology, and with archaeological input, to the satisfaction of the appropriate delegated council officer.

[67] Late in the hearing, and somewhat reluctantly in light of his submissions about covenants and related matters, Mr Bell volunteered a condition about fencing the proposed sewage effluent disposal areas to keep out stock. That in our view will also be necessary.

[68] Mr Bell resisted the imposition of conditions for fencing of small wetland areas, stream margins and bush, submitting that those would not be valid requirements.

[69] This led to considerable debate between Mr Bell and Mr Mathias that significantly paralleled that which they undertook in the ***Morgan*** case we have referred to[14].

[70] We do not wish to record the arguments, our reasoning, and the outcomes again. They are set out at considerable length in the ***Morgan*** decision, and reference should be made to that.

[14] See footnote 2.

[71] One aspect that we should touch on briefly however, arises from the fact that the present application was made in 2001, whereas the ***Morgan*** application was made after 2005 Amendment to the RMA. So we need to consider the ramifications of the decision of the Court of Appeal in ***Kapiti Enviro Action Inc. v Frandi***[15]. In that case, the Court of Appeal found that the Act took an expressly different approach in the area of the changing of conditions of consent, as between s127 (land uses) and s221(3) (subdivisions).

[72] In paragraph [62] of ***Morgan*** we expressed doubt as to whether the Court of Appeal decision in ***Frandi*** could be interpreted as finding a methodological gulf between all land use consent provisions of Part VI and the subdivision consenting provisions of Part X, prior to the 2005 Amendment to the RMA. Examining that point a little more closely for the purposes of the present case, we are of the view that the Court of Appeal's findings about changes to subdivision consent conditions in s221(3), should not be seen as limiting the application of other parts of s221. It follows that our views expressed in ***Morgan***, about the availability of consent notices under s221, can be extended to the pre 2005 situation, and that consent notices do not constitute covenants of a kind that would trigger the limitation found in s108(2)(d).

[73] The mature and regenerating bush on the upper portions of the property, much of it mapped as part of an Outstanding Landscape, is in our view worthy of protection by way of fencing and consent notice. To require such would, to use the words of the Supreme Court in the recent decision ***Waitakere City Council v Estate Homes Limited Limited***[16], "be not unrelated to the subdivision". Again, a more detailed discussion of that aspect can be found in the ***Morgan*** decision. Equally, fencing and protection by way of consent notice, of wetland and stream margins should be carried out (to an extent that the parties should endeavour to agree based on ecological advice). The conditions should require as well, weed and animal pest eradication and subsequent maintenance, across all 3 lots. (The weed species *Eleagnus* is presently a particular problem).

[74] Much of the appellants' case was built around suggestions by Mr Bell that the property was in the main a rather ordinary pastoral one, and the consent authorities should simply trust his clients to "do the right thing". We do not agree with either of those sentiments. The property is partly mapped as an Outstanding Landscape, it is

[15] [2008] NZRMA 337, in particular paragraphs [26]-[37].
[16] [2006] NZSC 112.

located between that outstanding bush-clad mountain landscape and the attractive outer reaches of the Whangarei Harbour, and is part of an important coastal landscape. We were provided with no detailed evidence of the ecology of the property, but located as it is between those two features, it will certainly be of some ecological value.

[75] We have indicated that we are prepared to grant consent upon appropriate conditions. The parties should work to prepare and endeavour to agree those conditions, and place them before us within 30 working days. It occurs to us however, that if there were to be any debate about stability or other engineering issues, or archaeological limitations, concerning the relocated building platform and accessway, that it may be necessary to hear further evidence. If that is the case, the parties should signal that to the Court as soon as possible.

[76] Costs are reserved. At the end of the hearing the council announced an intention to apply for costs on the basis of the difficulties occasioned the hearing by lack of timely input from the appellants about consent from the NZ Historic Places Trust. To regard that aspect of the case as being of real significance overall, would in our view be misguided. The approach of each party was, as we have found, unsatisfactory in many ways. We therefore express the present view that costs should lie where they fall. If however there is to be any application for costs, it should be brought, and answered, by the time that we conclude hearing any further evidence or have received materials from the parties on the substantive issues.

DATED at Auckland this 30th day of March 2007.

For the Court:

L J Newhook
Environment Judge

DOUBLE SIDED

Decision No. C 100 /2001

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of references under the First Schedule of the Act
BETWEEN	**LAKES DISTRICT RURAL LANDOWNERS SOCIETY INCORPORATED**
	(RMA 1402/98)
AND	**WAKATIPU ENVIRONMENTAL SOCIETY INC**
	(RMA 1043/98; 1394/98; 1165/98)
AND	**ANNE PINCKNEY**
	(RMA 132/98)
AND	**CLARK FORTUNE McDONALD**
	(RMA 1405/98)
	Referrers
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (sitting alone under section 279(1)(e) of the Act)

HEARING at **QUEENSTOWN** on 5 June 2001

Final submissions received 18 June 2001

APPEARANCES

Mr W Goldsmith for the Lakes District Rural Landowners Society Incorporated
Mr B Lawrence for the Wakatipu Environmental Society Inc
Mr N T McDonald for Clark, Fortune McDonald
Mr N S Marquet for the Queenstown Lakes District Council
Mr M Parker for various section 271A parties
Mr G Goldsmith and Mr D Gunn for various section 271A parties

DECISION No. 3 ON CHAPTERS 5 AND 15 QUEENSTOWN RULES

Table of Contents *Paragraphs*

[A] Introduction

[1] This decision is primarily about the power of a consent authority to impose conditions relating to land use when granting a subdivision consent under the Resource Management Act 1991 ("the RMA" or "the Act"). The subdivision consent issue arose out of the Environment Court's second decision[1] ("the rules decision") on references about Parts 5 and 15 of the revised proposed district plan ("the revised plan") of the Queenstown Lakes District Council ("the QLDC"). The Court also takes the opportunity to deal with two other procedural issues:

- Part [B] considers some ***sub judice*** comments made by the Mayor of Queenstown;
- Part [C] attempts to assist the parties with a suggestion on another aspect of the rules decision on which leave was reserved to make further submissions: the density of development; and
- Part [D] deals with the subdivision consent condition issue.

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[1] Decision C75/2001 dated 22 May 2001.

[2] The Court raised the land use condition issue in Part [G] of the rules decision but in the narrower framework of a discussion of residential building platforms ("RBPs"). The Court stated:[2]

> *... there is an anomaly in the residential building platform (RBP) concept. If someone applies under the rules in Part 15 to have one or more RBPs in any rural area then that is considered without reference to matters of house appearance or design. That is because those are irrelevant matters for subdivision consents:* **Brookes v Queenstown Lakes District Council;**[3] **Darrington v Waitakerere City Council.**[4] *The consent authority's jurisdiction is confined to such matters as location of the building platform and the height of any structure on it.*[5]
>
> ...
>
> *When the owner of land containing an approved residential building platform (presumably shown on a subdivision plan) applies to the Council for a land use consent under Part 5 of the revised plan to construct a dwelling on the RBP then that is treated as a* ***controlled*** *activity ...*
>
> *... However, if a person applies for land use consent to erect a dwelling on land which does not contain a RBP then the question of external appearance is a broad discretionary issue to which the assessment matters apply and on which other persons may make submissions. It seems to us that that scrutiny can be avoided if the RBP route is followed because then no public notification is required.*
>
> ...
>
> *In our view the issue should be addressed by making building on a RBP a discretionary activity but it appears we have no jurisdiction to do so under any submission and reference. However, since at first sight a case is made out for change we consider this is a case where we* ***might*** *consider amending the problem under section 293 of the RMA. We will give directions on that issue.* [my emphasis]

[3] The building density issue was discussed in the rules decision and a draft rule proposed[6] as follows:

> *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*

---

2 Decision C75/2001 paras [76] to [79].
3 C81/94.
4 W68/96.
5 Section 220(1)(c) of the RMA.
6 Decision C75/2001 para [52].

nearest point of the residential building platform) then on any application for resource consent and subject to all the other criteria, the suitability of all possible sites:

(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 possible future development on that alternative site(s) to be taken into account as a significant improvement on the proposal being considered by the Council

- *must be taken into account.*

[4] To ascertain the provenance of that rule one needs to look at our first decision[7]; the discussion of the evidence there and the proposed rules. The density rule in the rules decision differs in that the Council now has to consider all possible sites within a 500 metre radius of any proposed development in the rural general zone, but within a 1,100 metre radius only if an adjoining owner raises the issue.

[5] In the rules decision the Court then gave two sets of directions on the issues – the first set being expressly subject to the second. First the Court made orders[8] as follows:

*... (**subject to** paragraphs [86] to [88]):*

... Part 5 of the revised plan
Part 5 of the plan is deleted and Part 5 as in the attached Schedule A ... is substituted.

Part 15 of the revised plan
We direct that the [QLDC]:

...

(2) Draft a programme and wording for section 293 and circulate them to the parties and the Registrar for notification under paragraph [79] of this decision. [My emphasis].

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7 Decision C186/2000 paras (6 November 2000) paras [31] to [40].
8 Para [85] of Decision C75/2001.

Part 5 of the revised plan as set out in Schedule A to the rules decision contains the building density rule in terms of paragraph [52] of the rules decision. Paragraph [79] of the rules decision relates to residential building platform approvals upon grant of subdivision consent.

Secondly the Court stated:[9]

> *(1) While this decision is final as to the matters in parts [A] to [G] – except where it is expressly stated not to be, or where section 293 issues arise – ... we reserve leave for any party to make written submissions on the wording of Parts 1, 5 (included in Schedule A) and 15 so as:*
> ...
> *(b) to achieve the spirit and intent of this decision particularly with respect to:*
> *(i)paragraph [52] of this decision ... ;*
> *(c) to address the issue of building on a residential building platform as a controlled or discretionary activity.*

Thus the rules decision is final on neither the RBP issue (in any way) nor on building densities so far as the wording of the rule is concerned. The Court also set a timetable for any further submissions.

[6] In fact, the Council regarded the RBP issue as urgent, and so on Wednesday 23 May 2001 Mr Marquet, counsel for the QLDC applied orally and ex parte for an urgent hearing. I then issued directions[10] for an urgent hearing on 5 June 2001 of the legal issue involved in this case. However, before I turn to that issue, there are two other procedural matters relating to the conduct of this case.

[B] Sub judice comments

[7] On May 23 or 24 2001 the Mayor of Queenstown, His Worship Mr Cooper, issued a press release. This contained some remarks about the rules decision. It focused on the two issues discussed above – residential building platforms and density controls – even though the Court's consideration was, as I have just shown, expressly stated to be not final on the first issue, and was implicitly not final on the second since leave was reserved for the parties to make further submissions. The Court subsequently issued a

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9 Para [86] of Decision C75/2001.

10 See the Court's Minute (undated) but forwarded on 28 May 2001.

memorandum asking whether the Mayor had been accurately reported, and if so for submissions on why the remarks were not in contempt of Court as being made ***sub judice***, that is, in the course of proceedings.

[8] At a reconvened hearing before me on Thursday 5 June 2001 – sitting alone to resolve the jurisdictional issue in Part [D] below – I received a written statement ("the apology") by Mr Cooper from counsel for the QLDC which counsel said was an apology, although in fact it was somewhat conditional in that it did not concede the Mayor's press release was made sub judice. The apology gives various explanations of how the press release came to be issued. It also recognises the importance of the Environment Court being free of political influence.

[9] That last is an important point because it is not the offence to the Court which is at issue here. The law as to contempt has been authoritatively described by the Court of Appeal in ***Solicitor-General v Radio Avon Ltd***[11] as follows:

> *It will be as well, before proceeding further, to say something of the expression "contempt of court" and of the purpose of the law of contempt in our society. The use of the term "contempt of court" has been criticised, with some justification, as inaccurate and misleading. As was pointed out by the Report of the Committee on Contempt of Court (Cmnd 5794) presented to the United Kingdom Parliament in 1974, and generally referred to as the Phillimore Report, the term may suggest, in some contexts, that the law of contempt exists to protect the dignity of the judges whereas in fact it exists to protect the administration of justice. This point was made by Lord President Clyde in* ***Johnson v Grant*** *1923 SC 789. The Lord President said:*
>
> > *"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned ... The offence consists in interfering with the administration of the Law; in impeding and perverting the course of justice .... It is not the dignity of the Court which is offended – a petty and misleading view of the issues involved*

[11] [1978] 1 NZLR 225 at 229 (per Richmond P.)

> – *it is the fundamental supremacy of the law which is challenged" (ibid, 790).*
>
> *The same point was made, more briefly, by Lord Morris when delivering the judgment of the Privy Council in* ***McLeod v St Aubyn*** *[1899] AC 549:*
>
> > *"The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person" (ibid, 561).*
>
> *No one can question the extreme public importance of preserving an efficient and impartial system of justice in today's society which appears to be subject to growing dangers of direct action in its various forms. It is to that end, and to that end alone, that the law of contempt exists.*

[10] The principal concern in contempt issues is to ensure that justice can continue to be done **and** to be seen to be done. I am confident that this Court can, despite the intemperate and incorrect conclusions in the Mayor's press release, continue to resolve this and other Queenstown references in an objective and even-handed way which achieves, to the best of our ability, the purpose of the RMA. The difficulty I perceive is to avoid the Court being seen as not objective and independent because it looks as if we are bowing to political pressure. For example if the Court, after hearing further submissions (pursuant to the leave reserved in the rules decision) decides something in the Council's favour, it may appear we have been influenced in some way by the Mayor's remarks – see Part [C] below. The apology has, to a large extent, removed that danger.

[11] In view of the apology I consider that the Court is likely to take this matter no further except in due course to consider whether an order against the Council to pay costs to the Crown should be made under section 285(1)(b) of the RMA. Naturally the Court would seek submissions on that issue first. Since it is a novel point, and even our jurisdiction to make such an order is in doubt - since costs orders under section 285(1)(a) are not given as a punishment - it is unlikely that any order would be substantial.

[C] Building density

[12] It was clear from Mr Marquet's submissions in Wanaka (and even more so from Mr Cooper's press release) that the Council, at least, is not reading the proposed density rule in Para [52] of the rules decision in the same way I do. Mr Marquet appears to consider that the only way the second part of the rule can be complied with is for the Council to consider all land within a 1.1 km radius. Since leave has expressly been reserved for further submissions on that rule I do not think it is improper for me to write that the purpose, as I understand it, of the second part of the rule is quite different. The intention is to overcome certain "practical difficulties"[12] identified by the Council. One of those difficulties was the work imposed on the Council as consent authority to make inquiries as to better alternative sites. The idea of the second part of the new rule is to put the onus on landowners outside the inner 500m radius to make a submission as to the issue. If they do not then their concerns do not have to be considered. Perhaps the parties might consider a rewording of the second point in the rules quoted in paragraph [3] of this decision to read along these lines:

> *(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 possible future development on that alternative site to be taken into account ... by the Council and makes a submission to that effect*
> - *must be taken into account.*
> -

The underlined words are the possible addition.

[D] The subdivision consent condition issue

[13] The question whether there is an anomaly in the treatment of residential building platforms in the proposed plan depends on whether a consent authority has the power to impose what are in effect land use conditions on a subdivision consent. The latter question is what I agreed to hear as a matter of law, urgently, in Queenstown on Tuesday 5 June 2001.

---

12 C75/2001 para [52].

[14] In a memorandum to the parties before the hearing, I asked them to consider whether it might be more appropriate for the Environment Court to state a case on the legal issue to the High Court.[13] My reasons for that suggestion included: that there was a serious question to be resolved which might affect the operations of the revised plan; that there were apparently conflicting decisions of the Environment Court on the issue; and further that I had presided over the cases which (it was asserted) were in conflict with other decisions of the Environment Court.

[15] However, at the hearing all parties urged this Court to deal with the question on the grounds of urgency. Counsel submitted that there are persons with approved residential building platforms (approved as conditions of subdivision consents) who are uncertain as to whether they should apply for land use consents immediately or not; and that if this issue goes to the High Court that superior Court would benefit from this Court having considered the matter. I agreed that it would be fairer to the parties if some resolution is given as soon as possible and so I continued to hear the case.

[16] Mr Marquet for the QLDC submitted that 'land use' conditions, for example as to external appearance and colours, may lawfully be imposed on a subdivision consent, and that the cases referred to in the rules decision have been superceded by developing law. Mr Goldsmith supported Mr Marquet's position and analysed the cases further. Mr Parker's clients abided the decision of the Court. The Council's position was opposed by Mr McDonald who although not a lawyer, has, as a surveyor, a real understanding of the practical difficulties that can arise on this issue. The Wakatipu Environmental Society Inc made no submissions on the illegality issue but is concerned about the consequences if all aspects of buildings cannot be considered at the subdivision stage when a RBP has been applied for as part of the subdivision process.

The classes of resource consent

[17] The RMA categorises[14] resource consents into five classes – land use consents, subdivision consents, coastal permits, water permits and discharge permits according to which section in Part III of the Act they relate to. This case is concerned (mainly) with

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13 Under section 287 RMA.
14 Section 87 RMA.

the first two classes and the conditions which can be attached to each. I note that 'resource consent' is defined[15] as having:

> *... the meaning set out in section 87; and includes all conditions to which the consent is subject.*

[18] The powers to impose conditions on resource consents generally are contained in section 108 of the Act. This states (relevantly):

> ***108. Conditions of resource consents –***
>
> *(1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).*
> *(2) A resource consent may include any one or more of the following conditions:*
> *(a) Subject to subsection (10), a condition requiring that a financial contribution be made:*
> *(b) A condition requiring that a bond be given in respect of the performance of any one or more conditions of the consent, including any condition relating to the alteration or the removal of structures on the expiry of the consent:*
> *(c) A condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:*
> *(d) In respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates):*
> *(e) Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source:*
> *(f) In respect of a subdivision consent, any condition described in section 220 (notwithstanding any limitation on the imposition of conditions provided for by section 105(1)(a) or (b)):*
> *(g) In respect of any resource consent for reclamation granted by the relevant consent authority, a condition requiring an esplanade*

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15 Section 2 RMA.

reserve or esplanade strip of any specified width to be set aside or created under Part X:

(h) In respect of any coastal permit to occupy any part of the coastal marine area (relating to land of the Crown in the coastal marine area or land in the coastal marine area vested in the regional council), a condition –

(i) Detailing the extent of the exclusion of other persons:

(ii)Specifying any coastal occupation charge.

...

(6) Any condition under subsection (2)(b) may, among other things, -

(f) ... provide that the bond may be varied or cancelled or renewed at any time by agreement between the consent holder and the consent authority.

...

(10) A consent authority must not include a condition in a resource consent requiring a financial contribution unless ... [two conditions are met].

[19] Section 220 of the Act provides express power for the imposition of conditions on granting a subdivision consent. This states (relevantly)[16]:

(1) Without limiting section 108 or any provision in this Part, the conditions on which a subdivision consent may be granted may include any one or more of the following:

(a)Where an esplanade strip is required under section 230, a condition specifying the provisions to be included in the instrument creating the esplanade strip under section 232:

(aa) A condition requiring an esplanade reserve to be set aside in accordance with section 236:

(ab) A condition requiring the vesting of ownership of land in the coastal marine area or the bed of a lake or river in accordance with section 237A:

(ac) A condition waiving the requirement for, or reducing the width of, an esplanade reserve or esplanade strip in accordance with section 230 or section 405A:

(b) Subject to subsection (2), a condition that any specified part or parts of the land being subdivided or any other adjoining land of the subdividing owner be –

(i) Transferred to the owner of any other adjoining land and amalgamated with that land or any part thereof; or

(ii) Amalgamated, where the specified parts are adjoining; or

(iii)Amalgamated, whether the specified parts are adjoining or not, for any purpose specified in a district plan or necessary to comply with any requirement of the district plan; or

(iv) Held in the same ownership, or by tenancy-in-common in the same ownership, for the purpose of providing legal access or part

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16 Section 220 RMA.

of the legal access to any proposed allotment or allotments in the subdivision:

(c) A condition that any allotment be subject to a requirement as to the bulk, height, location, foundations, or height of floor levels of any structure on the allotments:

(d) A condition that provision be made to the satisfaction of the territorial authority for the protection of the land or any part thereof, or of any land not forming part of the subdivision, against erosion, subsidence, slippage, or inundation from any source (being, in the case of land not forming part of the subdivision, subsidence, slippage, erosion, or inundation arising or likely to arise as a result of the subdividing of the land the subject of the subdivision consent):

(e) A condition that filling and compaction of the land and earthworks be carried out to the satisfaction of the territorial authority:

(f) A condition requiring that any easements be duly granted or reserved:

(g) A condition requiring that any existing easements in respect of which the land is the dominant tenement and which the territorial authority considers to be redundant, be extinguished, or be extinguished in relation to any specified allotment or allotments.

...

It is important to note that section 220 expressly does not limit the power to impose conditions on subdivision consents conferred by section 108 of the Act.

Relevant authorities

[20] I consider the relevant Planning Tribunal and Environment Court cases on the question in chronological order. First, in ***Brookes v Queenstown Lakes District Council***[17] the Planning Tribunal had to decide an appeal under section 120 of the RMA concerning an applicant/appellant's proposal to subdivide land in a rural zone in the Wakatipu Basin. The respondent (the QLDC) was concerned about the effects of dwellings in the landscape if subdivision was allowed. The Court held that a further application for land use consent for a dwelling would be needed (under the transitional plan) and continued[18]:

Therefore there is no need, ... to impose conditions on the subdivision consent relating to dwellings. Indeed, not only is there no need to do that, but in our view conditions such as those are unlawful. A consent to subdivide is a separate and distinct consent from a consent to erect a dwelling. The Act makes this perfectly clear – see section 87. Hence ... [land use conditions] ... should not be imposed on a consent to subdivide.

17 Decision C81/94 (2 September 1994).
18 Decision C81/94 at p.16.

There was no further analysis by the Tribunal, for example of sections 108 and 220 of the RMA and their purpose and place in the Act. This case was followed, again without analysis, in ***Upper Clutha Environment Society Incorporated v Queensland Lakes District Council***[19].

[21] In ***Robinson v Ashburton District Council***[20] the Planning Tribunal had to decide an appeal under section 120 of the RMA concerning a proposal to subdivide rural land for a calla lily farm. The respondent apparently[21] declined land use consents (except for a separate consent relating to a packhouse) and subdivision consent. However at the Planning Tribunal hearing the only issue was as to whether a 90 hectare property could be divided into 19 smaller lots of 2 hectares each[22] (plus a balance allotment presumably). The issue arose as to whether "land use" conditions could be imposed on a subdivision consent. The conditions proposed were[23]:

> *(i) that each lot shall be used in conjunction with a joint venture flower-growing horticultural development and/or some other permitted intensive farming activity or one consented to by the council*
>
> *(ii) No certificate of title shall issue (except on lot 15) until the applicant has established the first-year planting of 20,000 tubers of calla lily and perimeter shelter belt plantings on each or a suitable bond entered into between any purchaser and the council to this effect.*
>
> (called "the Robinson conditions")

[22] Because I respectfully have to differ from the views expressed in ***Robinson*** I shall quote extensively from the relevant passages concerning those conditions. The Tribunal commenced its consideration of the argument by considering section 406 of the RMA. In my view that transitional provision is irrelevant. The section does not, and does not need to deal with conditions that might be imposed if subdivision consent is to

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19 Decision C112/98.
20 Decision W92/94 (23 September 1994).
21 Decision W92/94 at p.2.
22 Decision W92/94 at p.3.
23 Decision W92/94 at p.3.

be granted. Nothing in section 406 over-rules the general powers[24] to impose conditions on a resource consent, or the specific powers on a subdivision consent.[25]

[23] The Tribunal in ***Robinson*** then turned to the real issue and continued:[26]

> *In support of his argument counsel also refers to section 108 which prescribes the conditions which may be imposed on resource consents and draws attention to the fact that section 108(1)(c) expressly exempts subdivisions. It provides:*
>
> *A resource consent may include any one or more of the following conditions.*
> ...
> (a) *In respect of any resource consent (other than subdivision consent) a condition requiring that a covenant be entered into in favour of the consent authority in respect of the performance of any condition of the resource consent (being a condition which relates to the use of land to which the consent relates). (Our emphasis).*
>
> *Section 108(1)(f) provides that a condition may be imposed:*
>
> *"In respect of a subdivision consent notwithstanding section 114(1) any condition described in section 220."*
>
> *Mr Milligan further draws attention to the fact that although section 108(2) allows the imposition of:*
>
> *"any other condition that the consent authority considers appropriate"*
>
> *in granting a resource consent, it is subject to the exception:*
>
> *"Except as expressly provided in subsection (1)."*
>
> *Subsection (1)(c)*[now(2)(d)] *as we have noted exempts from its scope a subdivision consent.*
>
> *Finally, counsel refers to section 220 which allows for the imposition of conditions on subdivision consents and draws attention to the fact that nowhere in that section is there any power to impose the sort of conditions proposed by the applicants in this case. Mr Milligan submits, that all of the conditions referred to in section 220 generally relate to the physical nature of the subdivision itself rather than the use to which the subdivided land will be put.*

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24 Section 108 RMA.
25 Section 220 RMA.
26 W92/94 at p.25.

...

In our view Mr Milligan is correct and for the reasons given by him. Although the relevant sections are unhappily scattered throughout the legislation, when collected together, a pattern emerges of a legislative intent to deal with subdivision of land according to criteria different from those which are applicable to other resource consents. That is not surprising having regard to the historical antecedents of legislation relating to land subdivision in New Zealand. It was formerly to be found in the Land subdivision in Counties Act 1946, (in particular s4), The Municipal Corporations Act 1954 (in particular s 351(2)(a)), and the Counties Amendment Act 1961 (Part II). Traditionally, in considering questions of land subdivision, the territorial local authorities were empowered to impose such conditions as may be necessary to ensure that what might be described as the physical attributes of a subdivision accorded with the public interest. Thus, for example, there has long been power to consider matters such as section size, extent of boundaries, access to legal roads, provision of services such as water, power, electricity and the like. (Although s 23(1)(d) did allow councils to consider whether closer subdivision was in the public interest).

Parliament chose different mechanisms for controlling what activities were permitted upon subdivided land and traditionally has empowered and, indeed, required territorial local authorities to bring into existence planning documents governing the use of land within its boundaries. The impact of those provisions on the subdivision of land was to be found in s s 75 of the Town and Country Planning Act 1977 which prohibited the carrying out of any work which included a subdivision of land which was contrary to the provisions of the provisions of any district scheme. When the various statutory provisions relating to land subdivision were consolidated and brought into the Resource Management Act there was in our view a clear intention on the part of the legislature not to confuse land subdivision matters with land use matters. Unhappily, the intention is somewhat confused by the way in which the subdivision provisions of the Act are scattered throughout the text, but we, nevertheless, think that when construed together they lead to the conclusion that the conditions which may be imposed upon subdivisions are not coincidental with those which may be imposed upon other resource consents. That, in our view, can be the only explanation for the provisions of section 108(1)(c) which expressly exempt subdivision consents from the power to require covenants supporting the performance of conditions lawfully made in relation to the resource consents pursuant to that section. Further support for the view is to be found in the provisions of section 106 referred to above. Those are all matters relating to the physical aspects of the subdivision and also the transitional provisions of section 406. They too relate to the physical aspects of the subdivision including matters such as suitability of the land and availability of stormwater drainage, sewage disposal, water and electricity. A similar general approach is to be found in section 407 – the transitional provision relating to land in respect of which there is no district plan.

We are therefore of the view that even had we thought it desirable to grant the application and allow the appeal on the terms and conditions suggested by the applicant, the Tribunal lacks the power to do so. Given that finding the

application must fail because no one has suggested that it can properly be granted in the absence of such conditions.

[24] The initial approach of the Planning Tribunal in ***Robinson*** to subdivision under the RMA is contained in the sentence:[27]

> *When the various statutory provisions relating to land subdivision were consolidated and brought into the Resource Management Act ...*

Before me, Mr Goldsmith submitted that the RMA is not a consolidating statute. I agree. The long title expressly states that it is:

> *An Act to restate and reform the law relating to the use of land, air and water.* (My emphasis).

Subdivision is not expressly mentioned, but that is, in my view, because subdivision is only a technical matter. There is nothing in the RMA which suggests it consolidates subdivision law but reforms all other rights and duties relating to sustainable management of natural and physical resources.

[25] Further I have real doubts as to whether any clear intention not to confuse subdivision with land use can be discerned from sections 108 or 220 or their place in the scheme of the Act. Indeed for the Tribunal to write (twice) that the subdivision provisions "are unhappily scattered throughout" the legislation[28] rather suggests it has failed to realise the RMA does have "form and organisation"[29] and overlooked that those are a guide to meaning.

[26] As Mr Goldsmith submitted, a distinction between conditions that are able to be imposed on subdivision consent and other conditions is not *"the only explanation for the provisions of section 108(1)(c) which expressly exempt subdivision consents from the power to require covenants supporting the performance of conditions ... ."*[30] At first sight that paragraph does suggest a land use covenant cannot be imposed – and the reason might have been that it was inappropriate to do so. However Mr Goldsmith

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27 W92/94 at p.26.

28 W92/94 at p.26.

29 Section 5(2) Interpretation Act 1999: of course ***Robinson*** predates this decision but the common law and the Acts Interpretation Act 1924 also required the scheme of an enactment to be considered when interpreting it.

30 W92/94 at p.??.

pointed out that the real reason is that, on subdivision consents, the power to impose covenants is found elsewhere - in the consent notice provisions of section 221. A registered consent notice is deemed[31] to be a covenant running with the land. Thus there was no need to have the power in section 108 – duplication may cause confusion.

[27] The distinction that the Tribunal relied on between the ***Robinson*** conditions and those contemplated by sections 106, 108 and 220 of the Act is that the latter all relate "to the physical aspects of the subdivision". I am not quite sure what that means: if the Tribunal had said "to the physical aspects of the land" that might have had more meaning, but then the ***Robinson*** conditions could fall into that category too. The distinction is simply not a useful one, especially for the purposes of making a jurisdictional decision. I note that the Tribunal continued to consider the merits anyway. In case I am wrong about any of the above, I note that ***Robinson*** was of course decided well before the Resource Management Amendment Act 1997[32] which repealed and substituted section 108(1) and (2).

[28] In ***Darrington v Waitakere City Council***[33] the Planning Tribunal raised a more fundamental problem with the imposition of land use controls as conditions of a subdivision consent. It stated that it agreed with the reasoning in ***Robinson*** but continued:

> *We do not intend to repeat the reasoning in that decision with which we agree. To us section 108 clearly differentiates between resource consent and subdivisional consent situations. The additional powers contained in section 220(1)(c) can relate to bulk, height, location, foundations, or height of floor levels of any structure but such a condition of subdivision consent could not be imposed if it had the effect of negating the policies, objectives and rules of the district plan, the latter having the force and effect of a regulation, unless registered as a restrictive covenant upon the title or achieved by conservation covenant. If registered on title covenants can still be extinguished with the consent of the covenantee. Therefore the regulatory effect of plan provisions relating to building size and rights of clearance would extinguish the condition. The Tribunal under the provisions of the Town and Country Planning Act 1977 and under the RMA have [sic] consistently refused to impose conditions which purport to restrict permitted activities.*

---

31 Section 221(4).
32 1997/104.
33 W68/96 at p.7.

The Tribunal then held that section 220(1)(c):[34]

> *does not provide for the imposition of conditions governing:*
>
> - *The colour of structures*
> - *The building materials to be used*
> - *Details of external design ...*
>
> *[T]he ultimate use of the building.*

The point about permitted activities is a significant one and it was raised, in effect, by Mr McDonald in his submissions to me. However it seems to me that that is an issue that is better dealt with under the tests for the validity of conditions rather than as a type of provision implicitly barred by the Act itself and therefore automatically ***ultra vires***.

[29] In ***Wallace v Waitakere City Council***[35] the Environment Court was concerned with a subdivision condition that was proposed to limit future development. This was opposed for the two reasons:

- that it was imposing a land use condition on a subdivision consent; and
- that it was imposing restrictions on permitted activities.

As to the first point, the Court held, rather ingeniously, that:[36]

> *The proposed condition as amended by us in this case seeks to limit the bulk of structures on Lots 1 and 2 to no more than the existing buildings. It is in our view a condition that can be imposed by the Court under 220(1)(c)*[37] *of the Act.*

It continued:

> *Even if we are wrong in that regard we accept Ms Embling's submission that the condition in this case relates directly to the effects that could arise as a result of the subdivision. The limit on the bulk of the building is imposed to avoid, remedy or mitigate the adverse effects of the subdivision on the natural and physical environment. This case can be distinguished from those cases where it is sought to restrict the use to which the land can be put following subdivision as in the series of cases including* ***Robinson v Ashburton District Council*** *... .*

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34 W68/96 at p.7.
35 A39/98.
36 A39/98 at p.5.
37 The Court wrote section 221(c) but that is an obvious typographical error.

I respectfully agree with that passage (although I think ***Robinson*** may be wrong on other grounds). Further, I consider the Environment Court in ***Wallace*** was applying the correct test when it stated that the argument about imposing a land use condition on a subdivision consent:[38]

> *... is a reference to the general principle that conditions must fairly and reasonably relate to the subject matter of the consent.*

This is a reference to the validity tests which I consider shortly.

[30] On the second issue – whether the proposed condition was imposing restrictions on permitted activities - the Court stated:[39]

> *Mr Enright submitted that it was not appropriate for the Court to allow the use of the consent notice in circumstances where the condition prohibits what is a permitted activity. In support of that submission he referred to obiter statements of the Planning Tribunal (as it then was) in* ***Darrington v Waitakere City Council*** (Decision No. W68/96). *In this regard we refer to* ***Smeaton and others v Queenstown Borough Council and others*** *4 NZTPA at 410. This was a decision of Beattie J in the Supreme Court (Administrative Division) concerning inter alia whether a condition imposed by the Tribunal in allowing consent to a conditional use, relating to standards as to bulk, location and height could be different from the standards contained in the zone ordinances. Beattie J said at p.421:-*
>
> > *... the Board was plainly right in finding the standards in the Ordinance were not determinative because the very concept of conditional use zoning is that there is no development as of right and the matter ultimately becomes discretionary under section 28(c)(3). The standards in the particular Ordinance are a general guide to be taken into account when that discretion comes to be exercised under an application for conditional use consent. At that time, certainly more stringent standards could be laid down or less stringent standards also.*
>
> *While that was a decision relating to the Town and Country Planning Act 1953 the principle is applicable to the exercise of a discretion arising out of an application for a consent for a non-complying activity.*
>
> *For the above reasons we are of the view that the condition as amended by us is a condition that we can validly impose and that the best way to give notice to subsequent owners of the condition is to impose a consent notice under section 221 of the Act.*

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38 A39/98 at p.4.
39 A39/98 at pp.5 and 6.

I have some difficulty in understanding that aspect of the decision.

The text and purposes of sections 108 and 220 RMA

[31] The power to impose conditions under section 108 of the RMA upon granting a resource consent is very wide – it permits any condition that the consent authority considers appropriate. There are two statutory exceptions and some common law restrictions on the power. The first statutory exception consists (potentially) of all the other provisions of section 108. Upon examination they provide only limited exceptions.

(1) Although subsection (2) expressly identifies a number of specific powers, they do not limit the width of the general power in subsection (1). That is because the final words of that subsection, after the identification of the general power add the power to:

> .... *includ[e] any condition of a kind referred to in subsection(2).*[40]
>
> In my view those words preclude the application of the interpretative concept that latter specific words control an earlier more general power[41].

(2) Section 108(2)(d) provides a restriction on conditions that may be imposed on a subdivision consent which I consider later.

(3) There is a limitation[42] on the power to impose financial contributions.

[32] The second statutory restriction on the general power to impose conditions is the restriction contained in any relevant regulations[43]. There are none.

[33] There are also some common law restrictions on the exercise of powers like this, to impose conditions. They are often called the ***Newbury*** tests because they were first clearly articulated in a decision of the House of Lords in ***Newbury District Council v***

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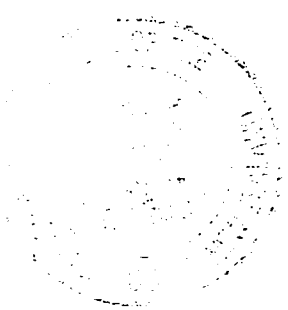
40 Section 108(1) RMA as amended by s.58(1) RMAA 1993.
41 See Burrows, JF Statute Law in NZ (1992, Wellington, Butterworths).
42 Section 108(10) RMA.
43 Section 108(1) RMA.

Secretary of State for the Environment.[44] The tests were recently reconfirmed by the New Zealand Court of Appeal as being applicable to the RMA – ***Housing Corporation of New Zealand Limited v Waitakere City Council.***[45] The tests state that a condition is invalid if it:

(a) is for an ulterior purpose, i.e. is not for a resource management purpose;
(b) does not fairly and reasonably relate to the development or subdivision authorised by the consent on which the condition is imposed;
(c) is so unreasonable that no reasonable consent authority could have imposed it

- on the particular facts of the case.

[34] In my view, it is the application of these tests which provides the answer to the previous cases' concerns about land use conditions on subdivision consents. Recourse to the validity tests seems more appropriate: if a condition proposed for a subdivision consent in effect controls a land use that is a permitted activity then that might offend at least two of the ***Newbury*** tests (but not if section 106 RMA applied). If, as in the current QLDC revised plan, the erection of dwellinghouses is a discretionary (land use) activity then different considerations might apply. In particular granting a subdivision consent subject to a land use condition as to, for example, the external appearance of a building might be the difference between obtaining a subdivision consent and not. Further, and even WESI encouraged this in Mr Lawrence's submissions, the RBP approval process (with 'land use' conditions if appropriate) enables an applicant to gain the relevant notified resource consents in one step. When the later step of obtaining a land use consent for a dwellinghouse is taken, that can be applied for as a controlled, rather than as a discretionary activity, because the important issues have already been dealt with on a notified basis at the subdivision stage.



44 [1981] AC 578, [1980] 1 All ER 731.
45 [2001] NZRMA 202 at para [18].

[35] Turning to the text of section 220, it is very significant in my view that a majority of the extra suite of conditions that can be imposed on a subdivision consent clearly relate to land uses. I consider each paragraph of section 220(1) in turn:

(a) the provisions to be considered for inclusion in the instrument creating the esplanade strip[46] include:[47]

> *The purpose(s) ... of the strip, including the needs of potential users of the strip; and*
> *... the use of the strip and adjoining land by the owner and occupier; and*
> *... the use of the river, lake, or coastal marine area within or adjacent to the strip* ... [My emphasis].

These are expressly matters of land use.

(aa) a subdivision condition may require an esplanade reserve[48] to be set aside:[49] that is, the condition does not merely define the area of the esplanade reserve but also requires it to be created.

(ab) a subdivision condition may also require the vesting of land in the coastal marine area or the bed of a lake or river;

(ac) is an exception: this is a power to waive or reduce esplanade strips or reserves. Even here the considerations relate more to land use matters – if in a negative way – than to the technicalities of subdivision;

(b) conditions may be imposed as to amalgamation of allotments and the transfer of land. While this is in itself a matter of subdivision technique, it appears to me that the reasons underlying it are most likely to relate to land use;

(c) conditions as to bulk, height, location, foundations and floor levels of any structure are the simplest examples of land use conditions. Indeed they provide the legal justification for the residential building platform approvals in the QLDC revised plan;

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46 Required under s.230 RMA and imposed under s.232 RMA.
47 Section 232(6), (c), (d) and (e) of the Act.
48 Under section 236 RMA.
49 Defined in section 2 RMA and under the Reserves Act 1977.

(d) a condition for the protection of land (including land outside a subdivision) against erosion, subsidence, slippage or flooding must of necessity be something much more than lines on a piece of paper – it must almost always be the requirement for some kind of physical work e.g. planting of trees or grass, construction of a retaining wall, or placement of a stop bank or water-channelling;

(e) a condition as to filling and compaction of land may be imposed – again matters of land use.

(f) a condition as to easements always, by definition, relate to land use (or the use of water and air – which are other natural resources managed under the Act);

(g) this is the converse of (f): it recognizes that some easements may need to be cancelled.

[36] From the discussion above of the various paragraphs in section 220(1) it appears that the purpose of the section as to conditions that may be imposed on subdivision consents is to ensure that when a subdivision of land takes place all the land use matters which:

(a) need definition to create enforceable rights in land under the Land Transfer Act 1952; and/or

(b) need to be imposed on public interest grounds

– are properly attended to. Although section 220 defines various circumstances in which particular (land use) conditions may be imposed that does not mean others cannot be. The introductory words are quite clear about that:[50]

> *Without limiting section 108 or any provision in this Part, the conditions on which a subdivision consent may be granted may include ...*

[50] Section 220(1) RMA.

Subdivision in the scheme of the Act

[37] There is no reference to subdivision in the titles to the RMA, nor in the Act's statement of its purpose.[51] The term 'subdivision' is defined in sections 2 and 218 of the RMA as *"the division of an allotment".*[52] However the relationship between the technical act of subdivision and the sustainable management of resources is recognised in the matters of natural importance defined in Part II of the Act.[53] Two matters which must be recognised and provided for as matters of national importance are:

> *(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them* ***from inappropriate subdivision****, use, and development:*
> *(b) The protection of outstanding natural features and landscapes* ***from inappropriate subdivision****, use, and development:* (My emphasis).

[38] If subdivision was to be recognised by the RMA as a purely technical matter of translating survey points on the land onto paper then in my view the subject would have been dealt with in a self-contained part – such as Part X of the RMA, but with no reference to land use matters; and without reference to subdivision in section 6 of the Act. The reference in section 6 to "inappropriate" subdivision suggests that the RMA recognises that subdivision of land does have effects on the management of resources.

[39] In my view that is the reason why section 11 of the RMA provides restrictions on land. It directs that:[54]

> *No person may subdivide land ... unless the subdivision is –*
> *(a) Expressly allowed by a rule in a district plan and in any relevant proposed district plan or a resource consent, and a survey plan ... has ...*
> *(i) [b]een deposited ... ; or ... .*

51 Section 5 RMA.
52 "Allotment" is defined in section 218(2) as (loosely) any parcel of land defined on a survey plan (or equivalent).
53 Section 6 RMA.
54 Section 11(1) – note the effect of s.11(2) that this does not apply to Maori land.

The place of subdivision under section 11 of the RMA was discussed by the Environment Court in ***Yates v Selwyn District Council***[55] where the Court stated:

> *Section 11 of the [RMA] recognises that allotments which are usually (but certainly not always) contained in one certificate of title are fundamental units in terms of the creation of property rights which of course include (from an economic point of view) rights in resource consents or certificates of compliance under the Act ... The smaller an allotment the greater the chances there are of causing external effects (or not being able to internalize effects) and of course this case is a classic example of that. Subdivision down to 2 hectares might mean that externalities in the form of sewage, pollution plumes or reverse sensitivity effects (such as complaint from what are, in effect, lifestyle units on the two hectare blocks about noise or spray or the other incidents of rural use) increase. In summary: subdivision of land tends to cause multiplication of complaints about effects.*

In the later case ***Wakatipu Environmental Society Inc v Queenstown Lakes District Council*** we agreed with the earlier case as follows:[56]

> ***Yates*** *was not particularly concerned with landscape issues. However we consider the principle it states is correct and does apply when landscapes are in contention. Subdivisions draw lines across the landscape, and in fact those lines tend to be marked by fences or trees or other changes in vegetation patterns. All those demarcations have effects on the visual quality of the landscape and thus need to be taken into account.*

[40] The functions, powers and duties under the Act of central and local government are set out in Part IV. The only reference to subdivision is a function given to territorial authorities in section 31:[57]

> *The control of subdivision of land.*

In his submissions Mr Goldsmith (rhetorically) asked the question why the function is not expressed as *"to control the effects of subdivision"*. His answer as I understand it is that subdivision as a technical (surveying) process needs to be controlled in itself – hence the need for section 31(c) - but that the effects of subdivision are effects which can be managed in an integrated way under section 31(a) and (b) of the Act.

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55 C44/99 [31 March 1999] at p.21.
56 [2000] NZRMA 59 at para (129).
57 Section 31(c).

[41] Part VI of the Act deals with the process for considering applications for resource consents. Earlier I pointed out that a *"subdivision consent"* is defined in this Part as:[58]

> *A consent to do something that otherwise would contravene section 11 ...*

Thus all the provisions of Part VI apply to applications for subdivision consents as much as to any other category of resource consent. The matters to be had regard to on any application for resource consent include:[59]

> *Any actual and potential effects on the environment of allowing the activity;*

In this context it needs to be remembered that "effect" is defined[60] very widely as including:

> ...
> *(a) Any cumulative effect which arises over time or in combination with other effects –*
> *Regardless of the scale, intensity, duration or frequency of the effect ...*

So while the planting of a hedgerow after subdivision is most obviously the effect of the workers digging the holes, it can also be seen as an effect, under the RMA, of the grant of a subdivision consent. The idea that a cause can only have one effect or that all effects are of the same kind has been regarded as simplistic since Aristotle.

[42] If a consent authority grants a resource consent then it may always[61] impose conditions under section 108 of the Act. Indeed for controlled activities the only power the consent authority has, is to impose conditions since it has no power to refuse consent.[62]

[43] Taking all the above interpretative factors into account, I am persuaded that the legality of land use conditions on a subdivision consent is more a question of reasonableness in the circumstances than of a sharp definition of powers. I accept that questions of reasonableness merge at their outer edges with vires issues. However, from a practical point of view I consider that the ***Newbury*** tests are the answer to the complaint that conditions imposed on a subdivision consent can never relate to land use.

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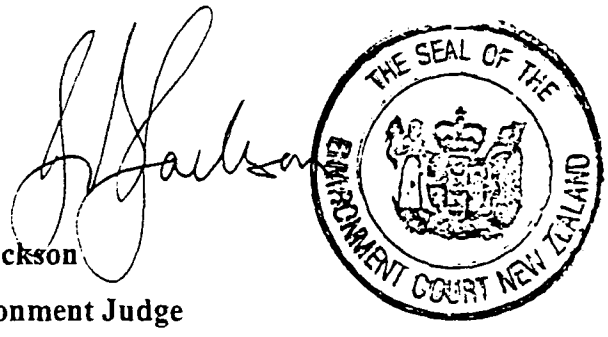
58 Section 87(b) RMA.
59 Section 104(1)(a) RMA.
60 Section 3 RMA.
61 Section 105(1) of the RMA.
62 Section 105(1) (a) and 105(3) of the RMA.

There is jurisdiction to impose such conditions but that they may (sometimes) fail the ***Newbury*** tests. Just when conditions may fail is a question that would have to be decided by the consent authority on the specific facts of any case. Given that sections 220 and 106 of the RMA expressly deal with land use matters, the boundaries for imposing conditions on subdivision consents with respect to other land use issues may be quite wide. The outcome in any given case may depend more on the provisions of the relevant plan, than on the powers conferred by the RMA.

[44] I conclude that, in these circumstances, where there are land use controls on the exterior appearance of buildings, it is lawful for the revised plan to contain subdivision rules which allow the QLDC to consider and, if necessary, impose similar conditions as conditions of a subdivision consent. If any party wants a declaration to that, or more precise, effect it should apply in writing by 14 July 2001. I also reserve leave for any party to apply for any other consequential relief. In the meantime, the programme for submissions stated in the rules decision should be adhered to if possible.

DATED at **CHRISTCHURCH** this 21st day of **June** 2001.



J R Jackson
Environment Judge

DOUBLE SIDED ORIGINAL

Decision No. C 8 /2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 and section 121 of the Act

BETWEEN **LYTTELTON PORT COMPANY LIMITED**

(RMA 146/99)

Appellant

AND **THE CANTERBURY REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith
Mrs N J Johnson

HEARING at **CHRISTCHURCH** on 9-13 and 16 days of October 2000

APPEARANCES

Mr S R Maling and Ms A C Dewar for the appellant
Ms M Perpick for the Canterbury Regional Council
Mr T Young for the Lyttelton Residents and Ratepayers Guild
Mr I Graham and Mr S Shrigley for the Inner Harbour Moorings Association
Mr Illingworth and Mr V McClimont for Lyttelton Harbour Residents Association Incorporated
Mr S Hemsley in person

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION

Introduction

[1] These appeals are from the decisions of an independent Commissioner for the Canterbury Regional Council ("**The Regional Council**") relating to an area in the Port of Lyttelton known as the Inner Harbour Moorings area ("the **Moorings area**"). The applicant, the Lyttelton Port Company Limited, ("the **Port Company**"), sought to:

(a) remove all of the existing piles in the Moorings area. This application was granted subject to conditions including condition 2 which is the subject of appeal. That reads:

> 2. *No moorings which are occupied as at the date of this decision, shall be removed until application CRC 990039, and any appeals have been determined or withdrawn.*

(b) occupy the Moorings area to the exclusion of all other persons not expressly allowed to occupy the area. This application was declined by the Commissioner.

The application CRC 990039 is an application by Inner Harbour Moorings Association ("the **Moorings Association**") which has not yet been processed by the Regional Council, apparently at the request of the Moorings Association.

Background

[2] The Port of Lyttelton has been established for some 150 years and has been in continuous use for both recreational and commercial vessels during that time. Over that period it has undergone significant improvements by way of reclamations to provide flat land around the harbour areas together with breakwaters, jetties, wharves and other facilities to provide a well protected environment for shipping. This area is known as the **inner harbour** and shall be referred to as such throughout the

decision. In more recent years development has also occurred on the outside of the inner harbour (which shall be referred to as the **outer harbour**) to provide further extensive areas for containers and other cargo, together with coal. This area includes wharves, known as Cashin Quay, and is protected by a further breakwater protruding into the Lyttelton harbour. West of the inner harbour entrance is a large area of reclamation known as Naval Point Reclamation. There are jetties on the inner harbour side of this reclamation but not on the outer harbour side. Further to the west again is an area known as Magazine Bay which has a berthage area for small vessels. That area was originally protected by a floating tyre breakwater which was removed in more recent years.

[3] Recently there have been attempts to construct a larger marina at Magazine Bay ("the **Marina**") involving construction of floating jetties and floating breakwaters. This relied on floating concrete structures anchored by wires and substantial weights to the seabed. The High Court decision ***Canterbury Regional Council –v- Lyttelton Marina Ltd et al,*** and ***Lyttelton Marina Ltd and Magazine Bay Berth Holders Association Incorporated and Others***[1], contains a detailed description relating to the marina and notes that construction began between 1981 and 1985.

[4] At the commencement of the hearing the Marina development was well underway with approximately 75% of the marina completed. On Thursday 12 October 2000 during the course of this hearing the area was hit by a particularly severe storm and the Marina was substantially destroyed, with significant loss of vessels moored at the jetties.

[5] When the hearing commenced there were no recreational vessels in the Moorings area by virtue of a decision by the Port Company to exclude all such vessels. There was one vessel which was anchored within the Moorings area, belonging to one of the submitters Mr V McClimont, and several vessels belonging

[1] [1999] NZRMA 330.

to the Port Company which were still moored to the piles. At the commencement of this hearing no piles had been removed but wire rope encircled most piles restricting vessels from entering the area.

[6] It is against a background of ongoing concern by recreational vessel owners as to the safety of the Marina and the exclusion of recreational vessels from the Moorings area that this appeal was heard.

The history of the appeal

[7] In 1998 the appellant sought consents to remove the piles from the Moorings area and to obtain occupation of this area to the exclusion of other parties. As already noted, the application for removal of the piles was granted subject to one condition preventing the removal of the piles until an application by the Moorings Association to occupy and place piles in the Moorings area had been finally disposed of. The Court is told that that application has still not been considered by The Regional Council at the request of the Moorings Association.

[8] The Port Company's application to occupy, which was declined by the Commissioner, has been the subject of further requests for information by some of the submitters. A copy of a confidential supplementary paper circulated to the Board of the Port Company in December 1998 was the subject of orders for confidentiality by the Court dated 30 June 2000.

[9] The matter had previously been listed for call but could not be reached as part of the list. At the commencement of this hearing all [submitter parties] made application for adjournment of the matter. After considering the various submissions of the parties the Court by oral decision declined the application for adjournment.

[10] As already noted, part-way through the hearing of this matter the Christchurch and Banks Peninsula areas were struck by a particularly severe southerly storm. With the consent of all parties the Court took the opportunity of viewing Magazine Bay and the Port during these extreme weather conditions. It was subsequently

conceded by the Port Company that there had been a failure of the Marina. A significant number of vessels were sunk or damaged with failure of the floating jetties in the Marina and the floating concrete breakwaters. In light of the concession by the Port Company it was unnecessary to recall any of the witnesses. Evidence given by a witness for the submitters, Mr McClimont, was not rebutted relating to the Marina. In light of the concession by counsel it is also unnecessary for the Court to consider in any detail, evidence produced by the Port Company supporting the ongoing safety or availability of the Marina for recreational vessels.

Issues on appeal

(a) Scope of conditions on pile removal

[11] Having regard to the significant developments at the Marina it is important that we focus on the issues before the Environment Court in this appeal. Consent has been granted for the removal of the Moorings area piles ("the **piles**") and the only issue relating to that consent before this Court on appeal is the condition limiting the timing of the removal until after the application by the Moorings Association has been determined or dealt with. In such circumstances the Court cannot impose a condition that would nullify the grant of consent and this point was conceded by all parties. It was also accepted by all parties that we have jurisdiction to consider as part of the conditions, limitation on the number of piles to be removed. That is, to the maximum number that were unoccupied at the time of the Commissioner's decision. The Court could also impose another form of limitation upon removal, either as to time or number of piles that might be removed.

[12] In deciding the appropriateness of the conditions it will be necessary to consider the status of the piles under the transitional provisions of the Resource Management Act 1991 (**the Act or RMA**).

(b) Occupation of the Moorings area

[13] The more substantial issue before the Court was the aspect of the appeal relating to the occupation of the Moorings area for the future. The Port Company

argued that because it owned the pile moorings what it sought was only an extension of its already existing rights of occupation. This requires some determination as to the extent of the occupation rights already enjoyed in the Moorings area and those enjoyed throughout the balance of the Port Company area. We are also required to examine in detail the concept of occupation as set out in section 12 of the RMA and its inter-relationship with other sections in the Act, particularly section 122(5). This involves:

(a) the issue of "exclusion" as this term is used in section 12;

(b) the question of whether occupation is reasonably necessary for another activity;

(c) consideration of the manoeuvring and mooring of commercial vessels and guaranteed access to the adjacent No. 7 wharf and nearby land as compared with other identified reasons for occupation including transactional costs, defending its position from alternative claims and economic efficiency;

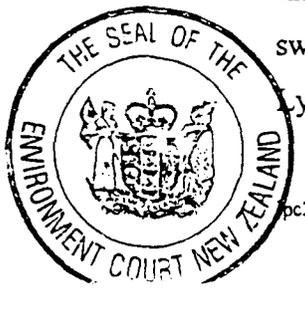
(d) the scope of occupation as intended under section 12 in relation to areas of the coastal marine area that are on or over harbour bed vested in the Crown;

(e) the scope of potential development options in relation to a necessity for occupation at the present time.

[14] It is the Court's intention to deal with the pile issue first and consider issues relating to the exclusive occupation sought in the balance of the decision.

Removal of the piles

[15] The piles themselves have been in consistent use for a considerable period of time dating from around the 1920's. Prior to that time the area was used for either swing moorings or anchoring. The piles themselves devolved to the control of the Lyttelton Harbour Board and both the harbour bed in the Moorings area and the piles



themselves were owned by the Harbour Board at the time of the Local Government re-organisation in 1989. Although the Moorings area was originally transferred to the Banks Peninsula District Council, this was purchased by the Port Company for some $462,000 in 1995. In the meantime however, the harbour bed in the Moorings area was transferred to the Crown. Accordingly, to determine the scope of any consent that was transferred to the Port Company the Court must determine the consents that were in force at the time of transfer.

Deemed consent for the Moorings area

[16] Section 384 provides that any existing permissions are to become coastal permits. Section 384(1) provides relevantly:

> *(1) Every ...*
>
> > *(b) Licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950, Order in Council made under section 175 of that Act, and every approval granted under section 178(1)(b) or (2) of that Act (or the corresponding provisions of any former enactment); and*
> >
> > *(c) ...*
> >
> > *in respect of any area in the coastal marine area, being a permission, licence, permit, or authority in force immediately before the date of commencement of this Act, shall be deemed to be a coastal permit granted under this Act on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act) by the appropriate consent authority; and the provisions of this Act shall apply accordingly.*

The relevant date set out in section 384A(1) to determine the right to occupy the coastal marine area adjacent to a port is September 30, 1991. In respect of other

permissions not covered by section 384A these appear to become coastal permits on the date of commencement of the Act namely 1 October 1991 by virtue of section 384(1).

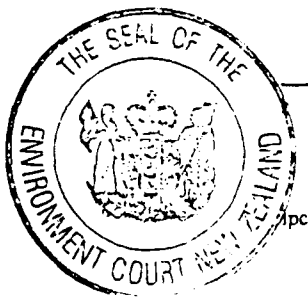
Section 425 of the Act also provides:

> *(3) Except as provided in section 384(1) –*
>
> *(a) Every licence or permit granted under section 146A or section 156 or section 162 or section 165 of the Harbours Act 1950; and*
>
> *(b) Every Order in Council made under section 175 of that Act; and*
>
> *(c) Every approval granted under section 178(1)(b) or (2) of that Act-*
>
> *shall, notwithstanding the amendment of that Act by this Act, continue in force after the date of commencement of this Act on the same conditions and with the same effect as if that Act had not been so amended.*

Scope of deemed consent

[17] The Moorings area was not included in the occupation area under section 384A as the plan produced to the Court clearly shows.

[18] In respect of the Moorings area, the issue then arises as to whether or not the deemed resource consent in this case arises by virtue of the Harbours Act section 156 provision or section 178. In ***Canterbury Regional Council –v- Lyttelton Marina Ltd***[2] the Court concluded that the Marina was established under section 178. The Court drew a distinction between a licence or permit under section 156 which was subject, under section 158, to a 14 year time limit and one authorised under section 173 and requiring Ministerial approval under section 178(1)(b).



[2] [1999] NZRMA 330 at page 337.

[19] We can see no proper distinction between the Marina established by the Harbour Board and the piles except the date of establishment. We adopt the reasoning of the Court in ***Canterbury Regional Council v Lyttelton Marina Ltd*** and hold that the continuing existence of the piles was authorised pursuant to sections 173 and 178 of the Act. Section 178 of the Harbours Act 1950 as amended and inserted by section 41 of the 1977 Harbours Amendment Act reads:

> *178. RESTRICTION ON WORKS AFFECTING HARBOURS OR NAVIGATION UNDER STATUTORY POWERS -*
>
> *(1) Except where this Act or any other Act otherwise specially provides, the following provisions shall have effect with respect to harbour works, [pipelines, cables,] or any other structure of any kind undertaken or constructed by any Board or any local authority or other body or person (hereinafter called the constructing authority) on, in, over, through, or across tidal lands or a tidal water, [or the bed of the sea, or the bed or bottom of any harbour, navigable lake, or navigable river], by virtue of this or any other Act, namely:*
>
> *(a) ...*
>
> *[(b) If it appears to the Minister that the proposed work will not unduly interfere with or adversely affect the interest of the public (whether by being or tending to be to the injury of navigation or otherwise), he may approve the deposited plan, with or without such modification, addition, or condition as he may reasonably require, and subject or not to any restriction or condition necessary for the preservation of any public right:]*
>
> *(c) The work shall not be made, constructed, altered, or extended without the like approval but any such approval shall not confer on the constructing authority any right to construct, alter, or extend any work which independently thereof it would not have had:*

[(d) ...

(e) ...

...

[(2) The Minister of Conservation shall not give an approval under paragraph (b) of subsection (1) of this section except with the approval of the Minister of Transport; the Minister of Transport shall not give an approval under that paragraph or this subsection unless satisfied that the proposed work concerned will not unduly interfere with or restrict any public right of navigation; and the Minister of Conservation shall not give an approval under that paragraph unless satisfied that the work will not unduly interfere with or adversely affect the interest of the public].

Section 384(1)(b) of the (Resource Management) Act has already been quoted at para 16 of this decision.

Sub-section (2) of section 384 also states relevantly:

Notwithstanding section 12, a person who is the holder of -

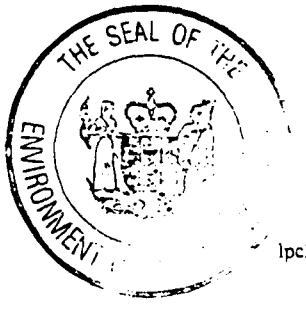
(a) ...

(b) A licence, permit, or approval referred to in subsection 1(b); or

(c) ...

(d) ...

shall not thereby be authorised to carry out any activity referred to in section 12, except where that person also holds every other permission, licence, permit, or approval referred to in subsection (1)(a) or subsection (1)(b) that,



immediately before the date of commencement of this Act, he or she was legally required to hold in order to carry out the activity.

Subsection (3) reads:

Notwithstanding subsection (2), every coastal permit deemed to be granted by subsection (1) shall be deemed to include a condition enabling the holder of the permit, at any time until the proposed regional coastal plan is notified, to apply to the relevant regional council under section 127(1) to change the permit for the purpose of including, as conditions of that permit, matters that could have been included in a permission referred to in subsection (1)(a) or a licence, permit or approval referred to in subsection (1)(b) or a licence, permit, or authority referred to in subsection (1)(c), and of enabling the permit to authorise the activity.

[20] Applying the provisions of the statutes, the continued existence of the piles is permitted. Section 178(c) of the Harbours Act is incorporated as a condition of the deemed coastal permit by virtue of section 384(1) of the RMA which uses the words

...on the same conditions (including those set out in any enactment, whether or not repealed or revoked by this Act, except to the extent that they are inconsistent with the provisions of this Act)...

[21] The removal of the piles is not included within the powers under section 178(c) and accordingly by virtue of section 384(2) of the RMA the Port Company is obliged to have regard to the restrictions of section 12 of the RMA which states relevantly:

(1) No person may, in the coastal marine area, -

(a) ...

(b) Erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or

(c) - (f) ...

> *unless expressly allowed by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or a resource consent.*

We conclude that maintenance is permitted in terms of the deemed resource consent and also the replacement of a broken or faulty pile as these are not precluded by the wording of section 12(1)(b) of the RMA. We find that the deemed resource consent under section 384 included the continued existence of the piles and the ability to maintain those piles.

[22] Section 178(2) of the Harbours Act is of some importance. Under that provision, approval is required by the Minister of Transport and the Minister of Conservation. The rights of public navigation and the interests of the public are required to be considered. The deemed resource consent must be deemed to be subject to these implied restrictions.

[23] In summary, section 178(c) of the Harbours Act would include conditions of the deemed consent allowing the existence and maintenance but not alteration or extension of the piles. The restriction imposed under section 12(1)(b) of the RMA would therefore be subject to the deemed consent to place, erect (and maintain) those piles. However, the deemed consent could not include rights to reconstruct, alter, extend, remove or demolish those piles as those rights are not provided for under section 178 of the Harbours Act.

Does the deemed resource consent include a right to occupy the area around the piles?

[24] A deemed consent for the use of the area around the piles for mooring can only exist if resource consent for the use of the piles for mooring a vessel is required. In ***Canterbury Regional Council –v- Lyttelton Marina Ltd***[3] the Court noted:

[3] [1999] NZRMA 330 at 349.

We think that the clear sense of section 384 is that a licence or permit granted under section 156 becomes a deemed coastal [sic] only if, and to the extent that, a coastal permit is required in respect of the activities licensed or permitted.

And later, at page 350:

... The right which the berth holders have is to tie up to the marina and use its facilities. We do not see this as involving (or as ever having involved) any occupation of the "coastal space" which requires any separate permit or licence.

[25] In light of that decision we must conclude that although there is a deemed consent for the existence and maintenance of the piles by virtue of section 178 there is no corresponding deemed coastal permit in respect of the **use** of those piles. As a matter of contract the Port Company is able to licence the use of the piles as the piles are the property of the Port Company. But it has no right of occupation which exists outside that in terms of the RMA. In practical terms therefore the effect of the High Court decision ***Canterbury Regional Council v Lyttelton Marina Ltd*** on this case is that the deemed coastal permit relates only to the existence of the piles themselves and the use of those piles is a matter controlled by licence from the owner of the piles. This approach is consistent with that adopted by the Environment Court in the ***Auckland Regional Council***[4] declaration case where Judge Treadwell states at page 7 of that decision:

I am of the opinion that a permit authorising the jetty structure and without other express provisions only allows exclusive occupancy of the space occupied by the physical form of the structure and does not confer other rights concerning the air space above, over or below the structure or the area of water below the structure. Thus in the absence of prohibition by a permit consent condition members of the public whether on foot, swimming or diving may continue use [sic] the air space, the land and water unless prohibited by a condition in terms of section 122(5).

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[4] Decision A109/2000.

[26] Whether the occupation of the area around that pile is reasonably necessary for the use of the pile itself is a question that will be considered later in the context of this decision as it relates to occupation. We conclude that the deemed coastal permit relating to the piles cannot include wider powers of occupation than are necessary for the existence and maintenance of the piles.

The condition as to timing of pile removal

[27] On this analysis of the existing position we have reached the inescapable conclusion that it is not possible to impose conditions reserving rights of occupation until others have their application heard before the Court. The Commissioner having granted approval for the removal of the piles can not properly impose conditions restricting the timing of that.

[28] Because of our conclusion, that the permit does not give a power to reconstruct the piles, the deemed permit would be at an end when all piles were removed. It can not be assumed by the Court that having obtained consent for the removal of the piles the Port Company will necessarily exercise that consent or remove all the piles. Deemed consents would only continue for any piles not removed.

[29] Accordingly existing condition 2 of the consent should be deleted.

Deemed permit under section 384

[30] As already determined only the piles themselves have a resource consent to occupy the area (that is the seabed, the water column and the air space). Vessels in the area do not require resource consents to moor to the piles. Applying the ***Canterbury Regional Council*** decision vessels in the area do not require a resource

consent to moor to the piles. The ***Canterbury Regional Council*** decision related to a Marina where some vessels were berthed permanently.[5] Furthermore, in the ***Auckland Regional Council*** application for declaration the Environment Court considered the impact of section 122(5) (as it related to the occupancy of jetties). The Court considered that section 122(5) provides that no coastal permit shall be regarded as conferring occupancy to the exclusion of all or any class of persons unless the permit expressly provides otherwise[6].

[31] In our view section 122(5) is directly applicable in the current situation. There is no express restriction on the consent and the issue turns upon whether such a restriction is reasonably necessary to achieve the purpose of the coastal permit. The Port Company having applied to remove the piles is unable to argue that occupation of the area around them is reasonably necessary *"for the purposes of the coastal permit"*. Accordingly we conclude that the deemed coastal permit does not confer other rights in the circumstances where the piles are to be removed.

The Section 384A permit as a basis for exclusive occupation of Moorings area

[32] In our view the application for exclusive occupation is not an extension of existing rights but a new application. The essence of the Port Company's case here was that it sought occupation of the Moorings area on the same basis as it occupied the balance of the port area. Mr D G K Viles, the managing director of the Port Company, gave evidence on its behalf. He said at para 61 of his evidence:

> *This application to occupy under the same terms and conditions as the surrounding section 384(A) [sic] permit is to protect the commercial investment and all surrounding areas, and to exclude the very real possibility of conflicting rights being granted to some other parties whilst at the same time improving access to existing infrastructures such as the dry dock and No. 7 wharf.*

5 There is a line of cases including ***Hauraki District Council v Moulton*** 2 NZED 375 where degree of annexation determined occupancy.

6 Decision A109/2000 Judge Treadwell.

[33] On this basis it seems fundamental to the position of the Port Company that the occupancy they hold under section 384A gives exclusive occupation of the area. In ***Ports of Auckland –v- Auckland Regional Council***[7] Judge Sheppard considered the background to section 384A and its application. He noted:

> *On the question whether the Ports Company's rights are to occupy space in the coastal marine area to the exclusion of others, both parties submitted that the Ports Company's rights to occupy are exclusive only to the extent required to enable Ports Company to manage and operate its port-related commercial undertaking. It seems to me that the true difference between them on this point is not the extent to which the Ports Company's rights of occupation are exclusive, but rather, which of them has the authority to decide whether occupation by another is compatible or not. I consider that that is an independent question, the answer to which does not assist to resolve the principal issue.*

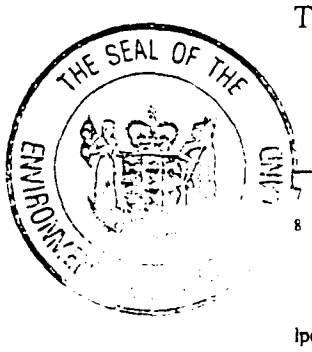
And at page 15 the Court concluded:

> *... I do not need to attempt the questions about whether the Ports Company's rights in the areas defined by the coastal permit are exclusive, and if not, whether the Ports Company or the Regional Council has authority to permit occupation of parts of the defined areas by others.*

[34] Some guidance in respect of the extent of the rights under section 384A can be obtained from ***Port Otago Ltd –v- Hall***[8]. In the Court of Appeal decision Blanchard J noted:

> *It follows that we do not read section 384A as an indirect method of creating or preserving existing use rights for an extended period.*

The Court then noted:



[7] Decision A23/95 at 11.
[8] [1998] 2 NZLR 152 at 159 (CA).

The coastal permit does not authorise any activity or activities at all, other than to the extent that occupation is itself an activity. The permit, as the Full Court elsewhere accepts, is a permit for [Port Otago Ltd] to occupy the area specified in it. That right of occupation is conferred for the purpose of allowing the port company to manage and operate the port-related commercial undertaking it acquired under the Port Companies Act 1988, and it is limited to that purpose. The company does not have a right to occupy the area for any other purpose. But the port-related commercial undertaking is not authorised by the coastal permit as such; that undertaking is the purpose of the grant of the right of occupation and not itself part of the grant[9].

[35] We have concluded that the section 384A permit does not in itself give rights of exclusive occupation to the Port Company. Nor does it prevent any other application for occupation except to the extent that there is a conflict.

We are supported in that conclusion by reference to section 122(5). Section 122 on its face applies to all coastal permits including those under section 384A. Section 122(5) states relevantly:

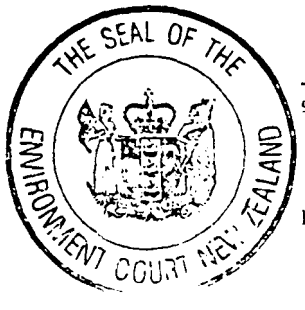
(5) Except to the extent –

(a) That the coastal permit expressly provides otherwise; and

(b) That is reasonably necessary to achieve the purpose of the coastal permit, -

no coastal permit shall be regarded as-

(c) An authority for the holder to occupy a coastal marine area which is land of the Crown or land vested in a regional council to the exclusion of all or any class of persons; or



[9] Ibid at 159.

(d) *Conferring on the holder the same rights in relation to the use and occupation of the area against those persons as if he or she were a tenant or licensee of the land.*

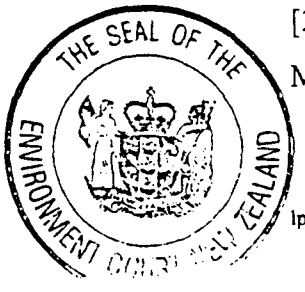
[36] The requirements of section 122(5)(a) and (b) are cumulative. The section 384A coastal permit granted to the Port Company does not exclude any classes of persons. Section 384A(10) expressly recognises potential for competing claims for occupation. Although this clause appears to apply only to the transitional phase, it is consistent with section 122(5) and the potential limit to rights of occupation.

[37] In light of section 122(5) and quotations from the Court of Appeal decision in ***Port Otago Ltd –v- Hall*** it cannot be said that the occupation granted under section 384A to the Port Company is for all purposes and to the exclusion of all other persons. The occupation itself is limited to that required for the purpose associated with the operation and management of the port's undertaking. There is a lack of any express words limiting the persons who may enter into the area. We conclude that there is no general power to exclude classes of persons under the section 384A permit except for limited times and for limited reasons relating to the operational requirements of the port itself. The limits of those powers would of course vary within the port area and may very well be significantly greater on the jetties, wharves and piers than they might be in other portions of the harbour which are only required for navigational purposes from time to time. The Port Company itself did not propose that it restrict the right of persons to pass and re-pass through the areas of the port. We heard that vessels could stop for example to refuel at the fuelling jetty and anchor in certain areas temporarily.

[38] Accordingly we must conclude that the rights under s384A are not exclusive rights of occupation but give power to exclude identified classes of persons for limited periods and for reasons related to the operational requirements of the port.

The current status of the Moorings area

[39] We have concluded that neither the deemed coastal permit applying to the Moorings area, or the section 384A rights the Port Company have, give a right to



exclusive occupation for all purposes. Therefore, we must consider whether the use and occupation of those areas by the Port Company precludes competing applications for occupation within the area. This is one of the issues that the Court in ***Ports of Auckland***[10] determined it was not required to decide on that occasion. In this case, however, the Port Company's application for occupation seems to be predicated on an understanding that if it obtains an occupation consent this will preclude other parties from seeking occupation in the Moorings area. Mr Viles said in his evidence, paragraphs 94 and 95:

> *94. This application is to occupy the coastal marine area under the same terms and conditions as the surrounding 384A coastal permit. If the application is granted this will give us security of tenure for the current operations of the port and for the planning of the development of this part of the port whilst excluding conflicting rights being granted to another party.*
>
> *95. An occupation consent will also provide significant assurance that further more detailed investigation work for the necessary resource consents would not be wasted. Occupation would protect a strategic position for development when circumstances are right and avoid legal costs in defending that position.*

[40] Mr P T Donnelly, consultant economist to the applicant, went even further in para 12.4 of his evidence when he said:

> *I am convinced that s.7(b) and the enabling provisions of s.5(2) will be promoted by their exclusive occupation of the* [moorings] *area. My analysis leads me to the conclusion that occupation of the* [moorings] *area is necessary for the efficient operation to the port, and that granting consent will forthwith avoid unnecessary transaction and other opportunity costs being inflicted on society.*

[10] Decision A23/95 at 15.

[41] Notwithstanding this evidence counsel for the applicant accepted in closing that it was not possible to preclude further applications for occupation of the area. Section 122(5) specifically indicates that no coastal permit shall be regarded as conferring on the holder the same rights in relation to the use and occupation of the Moorings area against other persons as if they were a tenant or licensee of the land. It was not even contended that the current section 384A permit goes that far. It being conceded that the seabed in this area is vested in the Crown, it must be said that there is always potential for conflicting applications for occupation. This potential for competing applications is supported by reference to section 122(5) which requires any occupation to:

(a) expressly state the persons excluded; and

(b) be reasonably necessary.

[42] In respect of the current situation therefore, the Moorings area is subject to a deemed resource consent for the existence and maintenance of the piles. The limits of that occupation are subject to a reading of section 122(5)(a) and (b). We repeat the conjunctive word between the two provisions is *"and"*. This is a cumulative requirement that there not only be an express provision in the coastal permit but also that the provision is reasonably necessary to achieve the purpose of the coastal permit. This means that the current deemed coastal permit cannot exclude other persons from the area as there is no express provision within it.

The application for occupation

[43] Against the background of the status of the general port area and the Moorings area we must now consider the current application for occupation. The application must be considered under section 12 of the Act, particularly subsection (2) which states relevantly:

No person may, in relation to land of the Crown in the Coastal Marine area ...

(a) Occupy any part of the coastal marine area; or

(b) ...

unless expressly allowed to do so by ... a resource consent.

The word *"occupy"* takes its definition from section 12(4) and is defined as follows:

(a) 'Occupy' means the activity of occupying any part of the coastal marine area –

(i) Where that occupation is reasonably necessary for another activity; and

(ii) Where it is to the exclusion of all or any class of persons who are not expressly allowed to occupy that part of the coastal marine area by a rule in a regional coastal plan and in any relevant proposed regional coastal plan or by a resource consent; and

(iii) For a period of time and in a way that, but for a rule in the regional coastal plan and in any relevant proposed regional coastal plan or the holding of a resource consent under this Act, a lease or licence to occupy that part of the coastal marine area would be necessary to give effect to the exclusion of other persons, whether in a physical or legal sense; -

and 'occupation' has a corresponding meaning:

[44] By virtue of the definition of occupation the following elements can be derived from section 12(4)(a):

(1) That the occupation is reasonably necessary for another activity; and

(2) That it excludes all or any class of persons not expressly allowed to occupy that area; and

(3) It is for a period of time or in a way that would require a lease or licence to occupy unless there is a rule or resource consent.

These requirements are cumulative and are derived rather than direct. They comprise the definition of the activity for which resource consent is sought under section 12(2)(a).

The Proposed Regional Coastal Plan

[45] Under the Proposed Regional Coastal Environment Plan (**Proposed Coastal Plan**) this application is a non-complying activity. The Proposed Coastal Plan is currently at a somewhat complicated stage in its development. Although originally notified in 1994 changes known as Variations 1 to 9, have been introduced to Chapters 7 and 8. No hearings have been held in respect of the variations to date. In respect of the base plan itself, Council have considered and notified decisions on submissions. References have yet to be determined. The relevant variations are not yet as advanced as the proposed plan and therefore have not yet merged under Clause 16B to the First Schedule. Clause 16B however states relevantly:

> *From the date of public notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.*

The meaning of these provisions is unclear but must involve a modification of any provisions in the proposed plan affected by the variation. In this case the variation does not change the status of the application as non-complying but other criteria of the proposed coastal plan which have been altered by the variation must be regarded with some circumspection.

[46] Mr A M Purves, consultant planner for the Port Company, gave evidence relating to the proposed coastal plan (with variations) including:

(a) That the port is recognised as having both regional and local strategic significance. It is noted as requiring relatively exclusive use of the coastal marine area at and adjacent to the port facilities and is in

accordance with policy 8.8(e) recognising that port infrastructure including hard standing areas, wharves, cranes, buildings and other structures may be further developed in response to commercial opportunities.

(b) Recognising that the port needs to have its own controls over access to the port operational area and that provision for public access to or use of such areas is not necessarily appropriate.

(c) Policy 8.5(a) also recognises the following:

(i) To give priority to maintaining safe anchorage of vessels; and

(ii) The need to avoid impeding navigational channels and access to wharves, slipways and jetties;

(iii) Avoid displacing existing public recreational use of the area where there are no safe adjacent alternative areas available;

(iv) Having regard to existing commercial use of the area and any adverse effects on that activity.

The case for exclusive occupation

[47] We now consider the evidence given and submissions relating to the application. Evidence for the Port Company given by Mr Viles and Mr Donnelly made it clear that they primarily saw the advantage of obtaining occupation as excluding other parties from seeking to occupy the same area. However, both Mr Viles and Captain W T Oliver for the Port Company also made it clear that there were operational advantages in having exclusive occupation of the area. These turned largely upon the ability for greater manoeuvring, particularly with tugs and vessels off No. 7 wharf and into the dry dock area. Captain Oliver in particular made mention of several occasions when tugs had been compromised to some extent by the piles in the Moorings area, and particularly their fear of damaging or swamping moored vessels if mid or full thrust was used. Captain F R Keer-Keer for the

Regional Council on the other hand believed that the ports' pilots were well used to operating within confined spaces and that the manoeuvrability of vessels off both No. 7 wharf and the dry dock was not compromised by the existing piles. However, his view was that if the piles were removed then this would be more convenient for navigation.

[48] We conclude from the evidence that larger vessels would not be able to utilise the Moorings area in any event because of the water depth of 4-5 metres. Tugs are operable on the edges of the Moorings area but would be in marginal operating conditions once half-way into the Moorings area itself. The only immediate use of the Moorings area itself suggested by witnesses for the Port Company was transitory in the sense of potential utilisation by tugs manoeuvring vessels through the area.

[49] For the applicant the prospect of the Moorings Association obtaining occupation and constructing further moorings was of particular concern. They also cited difficulties with uncontrolled occupation of the area creating potential difficulties for operation of the access to No. 7 wharf and the dry dock.

[50] Counsel for the Regional Council quoted from the decision of ***Hauraki District Council v Moulton***[11] and the High Court decision in ***Canterbury Regional Council v Lyttelton Marina Ltd***[12] as authority for the proposition that people exercising their public right of navigation are not *"occupying"* the coastal marina area even when they leave a vessel in one place temporarily. The Regional Council position was that exclusive occupation would not prevent the navigational rights that seemed to be the concern of the Port Company.

[51] Evidence for the submitters related in part to the public amenity value of the area and that it constituted part of the coastal marine area. They pointed to the fact that it had traditionally been used by recreational vessels. They pointed to the lack of alternative places for the mooring of vessels in Lyttelton Harbour. They also pointed to the significant noise and impacts on the residential properties nearby of the use of the area for commercial vessels or land based activities. The submitters,

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[11] 2 NZED 375.
[12] [1999] NZRMA 330 Supra.

particularly Mr McClimont and Mr T Young, raised concerns relating to the installation by the Port Company of wiring between piles to prevent vessels entering the Moorings area. They pointed to this de facto attempt at exclusive occupation as providing a risk to vessels which had resulted in a hazard warning being issued by the Harbourmaster.

[52] The Port Company provided a significant amount of evidence about potential development of the area. All this potential development was at this stage speculative, including estimates of costs. There were no potential impact assessments. We have concluded that we can put little, if any, weight on potential uses of the area which do not constitute part of the application for occupation before this Court.

[53] Most, but not all, of the potential uses of the site would require resource consents. It was accepted by the applicant that the proposals were not sufficiently advanced to give the type of detail necessary to perform the scrutiny required in terms of the RMA. We do not believe we can put the potential developments any higher than that the Port Company believed there are uses to which the Moorings area could be put at some time in the future.

[54] From the time of the Commissioner's decision in early 1999 these proposals have not advanced. At the Court hearing no firm proposal or commitment was made by the Port Company as to any development in the Moorings area. One particular possible use, that of unloading and storing imported vehicles, appears to be a use that would not require significant modification in the area. It could be undertaken without utilising the Moorings area and may use No. 7 wharf for unloading and nearby open land areas for storage. Other uses, including potential construction of new breastwork for mooring commercial vessels and reclamation in the area would involve significant works by the Port Company at significant cost. Use by larger vessels in the area would require a significant increase in depth involving the removal of the underwater rock shelf in the Moorings area.

[55] At the time when some formal proposal is made in respect of the Moorings area, the evidence may then support the Port Company's contention that occupation

should be granted and the extent to which that should exclude any class or classes of person. At the present time however the proposals are **hypothetical possibilities**[13] and cannot provide a basis for assessment of effects or evidence to support the application.

In our view these hypothetical potential future uses of the site cannot form a basis for obtaining exclusive occupation at the current time.

Reasonably necessary

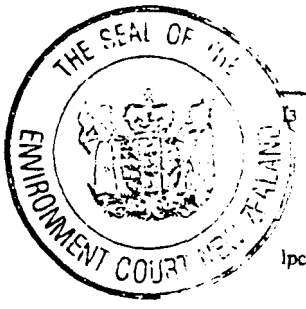
[56] The evidence for the applicant, in respect of whether or not the occupation of the area is reasonably necessary, related to:

(a) retaining options for future development;

(b) maintaining efficiency and avoidance of transactional costs in defending the occupation sought by other parties;

(c) operational use of the port particularly of No. 7 wharf and the dry dock.

[57] It was argued that as the ports' infrastructure is of strategic importance the occupation has a status as reasonably necessary. The Regional Council disagreed and submitted that there was no evidence before the Court that established that the occupation of the Moorings area (as opposed to the removal of the piles) was reasonably necessary for the operation of the port. The submitters' evidence, particularly that of Mr Young and Mr McClimont, made it clear that the area was not suitable for larger vessels. They also pointed to the risk to smaller vessels of not being able to have a portion of Lyttelton Harbour for safe mooring in serious storm events. Mr McClimont in particular pointed to the sinking of several vessels at the Marina on 12 and 13 October 2000. Some of these vessels were previously in the Moorings area until required to vacate by the Port Company.



[13] ***Barrett v Wellington City Council*** [2000] NZRMA 481, 5 NZED 602(HC). In the context of baselines.

[58] All counsel adopted the definition as set out in ***Environment Defence Society Inc v Mangonui County Council***[14] where Cooke P said "necessary" is:

> *... a fairly strong word falling between expedient or desirable on the one hand and essential on the other.*

[59] The issue of difference between the parties appears to turn on whether matters such as efficiency and strategic importance equate to reasonably necessary. For The Regional Council and for the submitters it was said that questions of strategic importance or efficiency equate to something in the order of desirable or expedient.

[60] In our view there is no evidence before this Court that would establish that the occupation of the Moorings area is essential for the operation of the port. If the Port Company had finalised an option for development of the Moorings area and associated land, then there may be compelling evidence to support such a proposition. We are of the view that once the piles are removed any inconvenience with manoeuvring vessels from No. 7 wharf and the dry dock will be avoided, and therefore we are unable to see any real advantage to the Port Company in obtaining occupation of the Moorings area from an operational point of view. It may be **desirable** for the Port Company to have full control over this area. However, the general powers of the Harbourmaster to control navigation and mooring would be sufficient. Accordingly we cannot find that there is anything **necessary** about occupation of the area from an operational perspective. We see occupation as no more than desirable. Nor do we accept that such occupation is currently of strategic importance or that strategic importance equates to reasonably necessary.

[61] We must assess where this application fits between desirable and essential. We have concluded that the evidence before the Court falls short of establishing that the occupation of the area is reasonably necessary. We base that decision on the following factors:

(1) The port has operated for in excess of 100 years without significant conflict between the Moorings area and the balance of the port;

[14] [1989] 3 NZLR 257 at 260.

(2) Although we accept that there have been changes in the size of vessels operating at the port, there is no immediate proposal before this Court for the use of the Moorings area for berthing ships;

(3) The Moorings area is still subject to navigation and use by other vessels, including recreational vessels and fishing vessels;

(4) There may be other areas of the port available for development or redevelopment.

Exclusion of parties under section 12

[62] In the alternative we consider that there is no basis for establishing the exclusion of any class or classes of persons under section 12. We consider that a resource consent for occupation must expressly state whether a class or classes of persons are to be excluded. Although it is unclear from the definition we are of the view that it must be established that it is reasonably necessary that parties be excluded from the coastal marine area. A reasoning for this view is based upon section 122(5) that provides that:

(a) the permit must expressly provide exclusion of persons from the area otherwise no exclusion occurs; and

(b) such exclusion must be reasonably necessary to achieve the purpose of the coastal permit; and

(c) the permit shall not be regarded as authority to occupy the coastal marine area which is land of the Crown as if the holder were a tenant or licensee unless the permit expressly says so and it is reasonably necessary.

Not only must any resource consent specifically state the class or classes of persons to be excluded, but it must be reasonably necessary for the purpose of the coastal permit. On those grounds we are unable to find any proper basis upon which persons could be excluded from the area.

[63] It was suggested that giving the Port Company occupation would avoid competing claims for occupation. This was close to a submission that the Court should be involved in allocating or licensing the resource. Any competing application for occupation would need to be considered on a case by case basis. We indicate that the clear direction of section 122(5) is to ensure that the coastal marine area vested in the Crown remains open to the widest range of persons possible.

Non-Complying Activity

[64] In addition to the other conclusions we have reached we also have concerns about the application meeting the tests under section 105(2A). We have insufficient evidence before us to form a view as to the extent of effects from the activity. Until there is a particular proposal before us we must assume that one of the major effects will be the lack of a harbour mooring for recreational vessels. In light of the loss of vessels at the Marina we cannot say that effect is minor.

[65] We also note the objectives and policies of the Proposed Coastal Plan, particularly 8.5(a)(i) and (iii) relating to priority for safe anchorage for vessels and avoiding displacing recreational use of an area. We are not convinced that exclusive occupation of the Moorings area (by itself) meets the objectives and policies of the plan. We acknowledge the many references to the port as regionally and strategically important. However, to date there is no proposal before us to demonstrate that the occupation of the Moorings area furthers those objectives. The application does not seek occupation for a port activity but rather for potential future use. Accordingly we conclude that the application as currently framed is contrary to the objectives and policies of the plan, particularly those cited above.

[66] On the evidence before us we have concluded the appellant has not satisfied the provisions of section 105(2A).

Conclusion

[67] For the reasons given we are of the view that no compelling reasons have been advanced by the Port Company to restrict the range of persons having access to

the Moorings area or that there is any particular use which the Port Company has for the area which would found the basis for such an application. The Port Company still holds a deemed resource consent for the existence and maintenance of the piles and it may wish to continue licensing those for mooring purposes.

[68] In the alternative there appears to be opportunities for all the parties to attempt to reach a consensus as to the most appropriate use for the Moorings area in the future. Having regard to the onus to establish any exclusive occupation as reasonably necessary, some element of public utility would seem to be contemplated in terms of the Statute. There is a potential adverse effect on the local community of excluding all recreational vessels from the harbour. There is merit in the various stakeholders including The Regional Council considering and developing a consultative/consensus approach to resolution of this matter. Alternatively The Regional Council may wish to consider promulgating particular rules for the Moorings area as is contemplated in the Act.

[69] For the reasons given we uphold the decision of the Commissioner for The Regional Council in declining the application for consent as it relates to the occupation of the Moorings area. The appeal on this aspect of the Commissioner's decision is disallowed.

[70] In respect of the application for the removal of the piles we confirm the decision of the Commissioner subject to the deletion of the existing condition 2.

[71] Costs are reserved. Any party wishing to seek costs must file applications within 15 working days (as defined in the Act). Any reply is to be filed 10 working days thereafter. Final reply (if any) to be filed 5 working days thereafter.

DATED at **CHRISTCHURCH** this 26th day of **January** 2001.

J A Smith

Environment Judge

ORIGINAL

BEFORE THE ENVIRONMENT COURT

[2010] NZEnvC 034

IN THE MATTER	of an appeal pursuant to Section 120 of the Resource Management Act 1991
BETWEEN	C S & M E MYGIND AND R G LIMBRICK & OTHERS (ENV-2008-WLG-000195) M J AND S A EDENS (ENV-2008-WLG-000196) *Appellants*
AND	THAMES-COROMANDEL DISTRICT COUNCIL *Respondent*

Hearing at: Auckland on 24th – 26th November 2009, and site visit

Court: Environment Judge J A Smith (presiding)
Environment Commissioner K Prime
Environment Commissioner P A Catchpole

Appearances: Mr R E Bartlett for M J & S A Edens **(the Edens)**
Mr J A Burns and V Holm for C S and M E Mygind and others, Blackjack Protection Society Inc, B and P King Family Trust, Environmental Defence Society Inc, Mr R J MacCormick and Mr J M Potter, and others **(Mygind & Others)**
Mr J D Young for the Thames-Coromandel District Council **(the Council)**
Mr P F Majurey for the Ngati Whanaunga

DECISION OF THE ENVIRONMENT COURT

THE SEAL OF THE NEW ZEALAND ENVIRONMENT COURT

A. **The applicant is to re-draft its proposed conditions of consent D with amended plans and circulate to the other parties within 20 working days.**

B. **The other parties are to respond to the applicant within a further 10 working days.**

C. **If matters cannot be agreed the applicants are to file their proposed conditions within a further 10 working days (40 days from this decision) and other parties may file their responses within a further 10 working days thereafter.**

D. **If the applicants seek leave to commence part of the consent, i.e. relating to the earthworks, pending the finalisation of conditions, then an application can be filed under Section 116 of the Act.**

E. **Any application for costs to be filed within 40 working days. Responses to be filed 10 working days thereafter.**

REASONS FOR DECISION

Introduction

[1] The Edens own some 390ha of coastal land at Opito Bay, North Coromandel. The subject Lot 4 DP331209 comprises some 106.9ha, of which around 9.5ha is zoned Coastal Residential Policy Area (CRPA) and 1.2ha on the coastal edge is zoned Coastal Zone (Outside Policy Areas) but subject to a Structure Plan showing the land as proposed recreation area.

[2] In December 2006 the Edens lodged a controlled activity resource consent application with the Council for a 79-lot subdivision of the land zoned CRPA. The application was subject to limited notification and heard by an Independent Commissioner. At the time of the hearing of the land use consent the Edens had obtained an earthworks consent from Environment Waikato to cut and fill the site to the extent of

some 82,200m^3 and authorisation from the Historic Places Trust to modify or destroy an archaeological site.

Issues

[3] The Commissioner determined that:

[a] the activity was a controlled activity;

[b] the associated wastewater plant could be considered and conditions imposed as part of the land use application;

[c] consultation was not mandatory under Section 36A of the Act;

and then moved on to consider the appropriate conditions to be imposed as a consequence of the activity being a controlled activity.

[4] In this regard the Commissioner was faced with the parties having largely agreed the conditions of consent with little dispute remaining. On appeal similar arguments were raised as to status and consultation, but there was also significant concern about some of the conditions. In particular:

[a] the extent of the earthworks;

[b] the status of the area of 1.2ha marked proposed reserve;

[c] access issues including public access;

[d] the retaining walls intended to be utilised to the rear of sites, particularly on proposed Lots 59 - 66 inclusive;

[e] whether issues as to cultural interests of tangata whenua had been properly recognised, particularly in the cultural protocols.

Background

[5] It was common ground that the land had been zoned CRPA for some considerable time. There was some doubt as to whether or not the 1.2ha of land was properly identified in the Plan as recreational area and this was the subject of a decision by the Environment Court (W34/2009).

[6] By the end of the hearing before this Court it was acknowledged by the parties that the current application and land to be developed in accordance with CRPA is within the area shown on the Structure Plan. An impression of some plans suggested that the land covered by this application may have gone beyond that shown in the Structure Plan. Further investigation satisfied the parties that it was within the area shown on the Structure Planning Maps.

[7] There was also no issue that the wastewater treatment plant, although partially outside the Structure Plan area, is a permitted activity within the Rural Zone. Accordingly, it can be appropriately controlled by conditions on the land use consent, either for the subdivision of the parent lot and/or as a condition of the residential land use consent.

The Application

[8] Annexed hereto and marked **A** is a plan of the proposed development. It shows 79 residential lots with several other access lots to the beach. It also provides for infrastructural services such as the wastewater pumping station and the wastewater station itself. As can be seen from the diagram the subdivision effectively represents an extension of the existing Skippers Road. There are houses on both sides of a central spine road, meandering parallel to the beachfront. At the northern end of the development there is a stormwater and water treatment system. Water, after significant treatment, drains towards the beach.

[9] The subdivision is intended to occupy most of the flatter land at the foot of a range of hills on the eastern side of the parent title. Those hills intrude significantly into the dune area around the middle of the site. To overcome this it is intended that the hill would be excavated with the fill used on the lower-lying areas of the development site. It is intended that there would be two large retaining walls, up to a maximum height of 3m

each, which would retain the hill excavations and allow development of houses on the landward side of the Skippers Road extension.

[10] There are several areas, for example, between Lots 45 & 46 and between Lots 66 & 67, which are clearly slip prone and it is not intended that homes are built on these lots. These together with the hills to the landward side of the site are intended to be extensively replanted in accordance with a landscape plan provided to the court. We understand that the total planting involved is in excess of 6ha and will form, over a period of time, a full canopy backdrop to the residential area below.

[11] The area between the beach and the foothills constitutes an undulating dune terrace area. It is intended to use a cut and fill process to obtain a relatively even grade through this area between 4m above sea level (RL) at the southern Skippers Road entrance grading to around 9m RL at the northern end. At the northern end of the subdivision the land will lift going inland with a finished level of around 14m RL at the end of the north-western cul-de-sac. Retaining walls are intended over Lots 59 - 66, at around 22m and 28m RL. However, we note that there is to be a building covenant over Lots 59 - 61 which would ensure house foundations are below 16m above sea level.

[12] The foredunes in the area vary in height but are shown largely between the 5m and 9m above sea level (RL) with some lower-lying areas where there has been flood erosion. The level of the dunes does drop off at the far northern end of the site as it approaches the intended output for the wastewater.

[13] The land seaward of the proposed subdivision is all vested in the Crown and is recognised as having considerable conservation values. The Department of Conservation ("**DOC**") has sought to protect the area by limiting access across the dunes to the beach. It also seeks to preserve areas of land in their current state which are currently incorporated within the DOC land by fences, although they are part of the subdivision site.

[14] A key element of the proposal seeks to protect the existing DOC land not only in respect of fencing and limiting accesses across it, but also by volunteering conditions relating to limitation on pets.

[15] By re-contouring the site the intent of the applicant is to direct both wastewater and stormwater to a single area where it can be collected and treated, and then discharged to the north of the property.

Recreation and Other Land

[16] The Planning Maps do not show the 1.2ha area within the Structure Plan as attributed to recreation. In addition the land between Lots 66 & 67 and Lots 45 & 47 are not shown on Plan A as having any particular status. This was an area of concern to the Court and other parties. However, by the end of the hearing the applicant's position in this regard was significantly clarified. On the last day of hearing we were advised that the Council have now accepted that the entire 1.2ha area marked on the map should properly be vested in the Council as recreation reserve and that we could proceed on the basis that this will be incorporated as a condition of consent.

[17] In addition, we were advised that the areas between Lots 66 & 67 and Lots 46 & 47 that were within the Structure Plan would be included within the subdivision and covered as areas in which there were covenants for planting and no rights for building. Although the position is not finalised, it appeared that the applicant was prepared to consider any reasonable conditions by which those protections could be encompassed. The Council did not offer to take these areas as recreational reserves. We understand that the applicant was proposing that they be incorporated by enlarging the adjacent sections.

[18] In respect of the area between Lots 46 & 47, that may be able to be included as part of the land managed by the wastewater treatment system. We also recognise that even the land between Lots 66 & 67 could be included as part of the land owned by the body corporate operating the wastewater treatment system, given that the body corporate would constitute owners of the individual lots. Given that no party expressed any strong preferences as to the outcome, we do not consider it critical whether those lots are subject to extensive covenants but incorporated with neighbouring sections, or included, subject to covenant, as part of the land managed by the property owning company for the residents. Either way, the intended outcome is that the land will not be utilised for housing and will be planted in accordance with Mr Brown's (the landscape architect) proposals as shown in the maps attached as **B**.

[19] In respect of the recreational area, the vesting of that land in the Council enabled the applicant then to make significantly more concrete proposals in respect of access to and through that area. We understand that the final proposal is that Lot 2 and Lot 16 will be modified so as to provide access at least 15m wide to the recreation area.

[20] In respect of the northern end of the recreation area this will mean that Lots 89 and 81 will not be required. Instead it is intended that the applicant will show a redesign of this area showing broad access in the vicinity of Lot 16 of at least 15m wide with planted pedestrian access over the northern side of the recreation area and a boardwalk from that position to the beach and at a position agreed with the DOC.

[21] In respect of the southern end, there appears to be two possibilities. Firstly, Lot 2 could be at least 15m wide throughout, and then access Lot 79A is not required. If access can be provided along the western side of Lot 1 to the approximate position of Lot 88, then Lot 88 itself would not be required. It would be necessary for the pedestrian beach boardwalk, if it was to go from the recreation area in this position, to reach the beach either by connecting to the boardwalk adjacent to Lot 88, or by taking a direct line to the beach from the recreation area. In either event, we understand that it is intended there be a boardwalk at the southern end so that people walking along the beach or foredunes from Skippers Road area can also enter the recreation area.

[22] Given that it is not intended by the applicant that there necessarily has to be a reduction in the number of sections, reconfiguration may yield an approach which enables the connection to the south across Lot 1 and deletes Lot 88, while still yielding a similar number of lots. The applicant still intends that this will result in the yield meeting the average lot size requirements and minimum lot size requirements for the zone.

[23] By the end of the hearing we also understood the applicant to be proposing that mountable kerbs and bollard lighting could be incorporated in the design so as to recognise the remote and nautical features of the area. The applicant also proffered that it would extend the accessways currently identified as Lots 90 and 80 to minimum widths of 4m with a planting plan. If Lot 88 was to be retained, then it too would be extended to 4m width.

[24] We understand that the applicant seeks that the Court consent to the configuration as modified. It acknowledges that certain changes to the subdivisional plans and the

conditions will be necessary to incorporate the matters that we have discussed but otherwise the applicant says it is appropriate that the Court should grant consent. Nevertheless, it acknowledges that if the Court considers that there should be further amendments to the conditions of consent and that these are properly within the area reserved to the Council in its Plan provisions 704.1 – 704.9, then consent might be granted, subject to such conditions.

Boundaries and Jurisdiction

[25] Given the late settlement of the reserve issue it was unclear to the Court, even at the end of the hearing, whether the appellants were still maintaining their argument that the activity was a non-complying activity because:

[a] it involved undefined boundaries as that term is used in the District Plan; and

[b] the status of the 1.2ha land as recreation reserve was not resolved.

[26] We have concluded as a matter of law that the second argument is no longer open to the appellant given that the Council has now accepted that the land can be vested. We deal briefly with the jurisdictional issue in relation to undefined boundaries.

[27] After questioning the relevant witnesses the Court is of the view that the issue of undefined boundaries is one which can properly be addressed in terms of conditions rather than as affecting the status of the activity itself. Nevertheless in the event that this position is not conceded by the appellants our conclusion is clearly that the question of undefined boundaries is not a matter that goes to the status of the application.

[28] Our reasoning follows.

Controlled Activity Conditions

[29] If the activity is a controlled activity then although a resource consent is required for the activity it must be granted unless insufficient information is provided to determine whether or not the activity is a controlled activity. That argument was not raised in this case. The issue raised is that the consent authority must specify in the Plan or Proposed

Plan any matters over which it has reserved control. This restricts the consent authority's power to impose conditions to those matters. Of course the activity must also comply with the standard terms or conditions, if any, as specified in the Plan or Proposed Plan.

[30] In this regard it was common ground that the general standards for the zone were contained both within the Structure Plan and within the standards applicable in Rule 743, page 17 of Section 7. These standards relate to minimum lot areas, private ways and access gradients. It is acknowledged that all of those are complied with.

[31] It is also acknowledged that under Rule 742.1 the status of the residential activity within the Coastal Residential Policy Area (CRPA) is a controlled activity. The parties were also agreed that the general requirements under Rules 701-709 were also applicable although there were some differences as to the method by which they were applicable. For our part, we conclude that these standards are intended to have various applications depending on whether the activity status is controlled, restricted, discretionary or controlled.

[32] In that regard, we acknowledge and adopt Mr Young's proposition that Sections 701-709 must be viewed through the lens of the activity status which applies to the application. Accordingly, in respect of a controlled activity, the provisions can be used, where applicable, to impose a condition but cannot be read as providing a discretion to refuse consent. Although there was some suggestion that there was a lack of clarity in these provisions, we have concluded in the end that, when they are viewed as being applicable in varying ways to the various standards, they are clear.

[33] It is possible that some of the provisions set additional standards to those in Rule 743. For example, Rule 702.1 requires that the building site should be free of inundation, erosion, subsidence, slippage or other potential hazard. Equally, almost all of these provisions can be read as allowing a consent authority to impose consent conditions for a controlled activity to properly control the particular effect identified. For example, in respect of the hazard issue, although the activity is controlled, there may be certain sites proposed by an applicant which could not be included because they represented significant hazard. In this regard, the two areas of subsidence, for example, between Lots 66 & 67 are in that category and have properly been excluded from development as a result.

[34] The particular concern that relates to jurisdiction is whether or not Rule 706.2 takes effect as a standard with the effect that the application is a non-complying activity. For a number of reasons we have concluded that this is not the case.

1. Rule 706.2 relates to undefined boundaries where the minimum lot area requirements shall not apply. Given that the minimum lot requirements do apply, in this case, there is no need to rely upon this exception at all. Accordingly, the provision as a whole does not apply to this application.

2. Issues of topographic or natural features and the purpose of the zone are overcome in this case by a Structure Plan which clearly identifies the limits of the zone. Although it is possible to argue that there may be areas within that which are not entirely suitable, this has been recognised in the application put to the Court. If for whatever reason the Court concluded that other areas were not suitable, then these could easily be excluded from development also, subject to the same type of restrictions being considered for the land between Lot 66 & Lot 67.

3. The wording of this provision does not take effect to change status. It is clearly one that can be addressed through the application of suitable conditions. Given that those conditions may mean that certain areas of the land cannot be built upon, that in our view fully and properly addresses how the concerns in Rule 706.2 would be addressed in a suitable case.

Others Matters of Control

[35] We conclude that any undefined boundaries do not act to change the status of the activity, and in this case does not affect any areas that require further control.

[36] We now move to consider the other matters identified throughout Rules 701 – 709 which are in dispute. Although it was generally accepted that Rules 701 – 709 were applicable, the parties were largely agreed that the provisions in relation to housing, other land use activities (702), servicing (703), water supply and reticulation (703.2), stormwater and wastewater (703.3.), roading and access (703.4), private ways (703.6), network utilities (703.7), and corner splays (703.8), had all been appropriately addressed in the application.

[37] Esplanade reserves were not directly relevant given the setback from the beach. Aspects of reserves etc have now been addressed by the proposed vesting in the Council, and other matters which will be discussed in due course in relation to design under Rule 704. We have already discussed the question of boundary adjustments under Rule 706 and that there are no existing buildings under Rule 707. Again, there did not appear to be any intention for cross-lease subdivisions under Rule 708.

[38] The issues of earthworks and land disturbance were raised by a number of parties. There was a concern that the height of the land behind the dunes was to be raised enabling buildings to be clearly seen from other parts of the Bay. Although the earthworks and disturbance categories are subject to Rules 710 – 760 there was little in these provisions to assist the Court in assessing these issues.

[39] In the end we have concluded that the issues about the retaining walls and about the heights of the building platforms and potential heights of buildings, are all matters which can be appropriately addressed in Rule 704 Subdivision Design, particularly under Rule 704.4 and Rule 704.5. We recognise that the Regional consents authorise the earthmoving itself.

Subdivision Design Rule 704

[40] This was the main focus of the evidence of the parties and many of the arguments that were originally constructed as arguments as to the status of the activity were reduced to issues about imposing appropriate conditions to ensure proper outcomes under Rule 704. In that regard, it is worth setting out Rule 704 in full:

> **704 Subdivision Design**
>
> The layout and design of a subdivision shall be such as to:
>
> .1 promote safe and efficient traffic movements to and from lots within the subdivision,
>
> .2 provide appropriate linkages to the existing roading network,
>
> .3 provide pedestrian access to the roading and reserves network including coastal and esplanade areas,
>
> .4 avoid the unnecessary destruction, damage or modification of archaeological or other cultural heritage sites,
>
> .5 ensure the amenity values and landscape character of the area are not compromised (see 860 for guidelines),

.6 provide public reserves and public open space sufficient to meet the active and passive recreation needs of the population to be accommodated within the subdivision,

.7 ensure biodiversity values are maintained or enhanced and consideration is given to appropriate conditions as outlined in Method 211.5.8 in accordance with 211.4 Policies.

Traffic Movements and Linkages Rule 704.1 and Rule 704.2

[41] No particular arguments were raised in respect of the roading network within the development area with the exception of a general argument that the roading should be at the seaward side of the houses along its length. We conclude that the safe and efficient movement of traffic within and beyond the subdivision is maintained by the roading design envisaged in this case. We consider the applicant is correct to separate the public road from the DOC reserve foredune area. The creation of the recreation area and sections on the seaward side enables better control over public access.

[42] Of more immediate concern was the evidence before us that the unsealed portion of Skippers Road and Blackjack Road should properly be sealed to cater with the extra traffic generated from this development. We agree entirely, and it is therefore disappointing to hear that the Council seek only financial contributions rather than improvement to this portion of road.

[43] Given that the matter has been appealed to this Court, it is our view that the Court is now in the same position as the Council concerning whether it should accept a financial contribution or the actual physical improvement of the roads. Our clear preference to address the effects on the road network is that the roading be upgraded and sealed at the cost of the developer rather than pay the council contributions in lieu. We consider that an appropriate condition of consent satisfactory to both the Council and the developer could be included within the terms of the conditions of consent to address this issue. In our view the payment of financial contribution in lieu is too indirect to adequately mitigate for the clear adverse effects of the extra traffic upon Skippers Road as a result of this development.

Pedestrian Access Rule 704.3

[44] We have concluded that pedestrian access is a matter of particular importance in coastal developments. This is an area remote from civilisation but in a position where

those who do come to Opito Bay are clearly wishing to access the beach and wide views that are obtained towards the Mercury Islands and the northern and southern headlands. Pedestrian access is also important for residents within the subdivision and also for other residents who wish to enjoy the scenery and ambience of the area.

[45] In this regard we conclude that it is important that there be pedestrian connections along the roads, from the roads to the foredune area, and where these are not restricted for conservation reasons, to the beaches. In this regard we are particularly pleased that the Council has now seen fit to take the proposed reserve given that this is situated on a remnant foredune. The majority of foredune (throughout the rest of Opito Bay) has been either developed or modified. We have concluded that visitors will utilise this recreation area (because of its proximity to vehicular access and to the beach), even though it does not have direct views to the beach.

[46] As we will discuss shortly, we consider that the development of the recreation area is best left to a Council Reserves Management Plan to be created in due course. However, we can confidently expect that it will be utilised by members of the public at least for passive recreation and as a thoroughfare to the beach. Depending on the nature of its further development it may also provide for other activities such as rest or picnic areas, shade and perhaps some recreation areas i.e. frisbee, ball games etc.

[47] However, its primary function is to provide a physical connection and setting between the beachfront and the roading area. Given its proximity to the Skippers Road Extension we consider it will also serve this function for residents and visitors to all of Skippers Road. In that regard, we consider that pedestrian access should be provided for by the provision of at least a footpath on one side of the road along the main spine and by clear and broad accessways to the recreation area, boardwalk and the beach beyond.

[48] In this regard we consider that the most northern of the pedestrian accessways needs to be extended to 4m width to provide a more inviting entry way it should also have minor splays or setback to provide for a planted entrance that can invite the walker towards the pedestrian accessway. Users of Skippers Road would then be able to utilise the footpath within the development and accessway at this mid northern end. Although we do not consider that a formal pedestrian way needs to be provided at the very end of the development, we suspect there may be some informal access down the stormwater

easement towards the beach. In our view that does not derogate from the balance of the development and does not need to be formally provided.

[49] The main beach access points should function around the recreation area. In this regard we consider that a broader entry at both northern and southern ends of the recreation area would enhance access to and use of the recreation area. The mid position access Lot 80 should remain and be widened to 4m. In this regard we consider that reasonably broad entrances at the north and south could also provide for some carparking off-road. A width at each end, of say 15m, would provide a suitable visual and physical entrance to the recreation area beyond. We have concluded that there is no need to separately provide for pedestrian accessways over the recreation area, provided:

[a] a path was planted and formed on the reserve entries to provide an access towards the boardwalks; and

[b] the boardwalk was able to be connected to the beach from the recreation area.

[50] This is relatively straightforward at the northern end but may require some more comprehensive redesign at the southern end. Again, at Lot 79A/Lot 2 we consider that a minimum width into the recreation area of 15m is required. This may also involve a slightly wider splay at the road entry but that is a matter of design. Again, we have a significant preference to provide a pedestrian accessway at the southern end of the recreation area connecting to a boardwalk which gave access to both the beach and also to the southern foredune area which is not controlled as a conservation area. If this could be done Lot 88 may be unnecessary.

[51] The intention is therefore that people coming from the south of Opito Bay would be able to access the recreation area and subsequently the Skippers Road by utilising the boardwalk and recreation area. Those who are using the foredune area in front of the balance of Skippers Road could access the park or the beach or the road by the boardwalk at the southern end of the subdivision. It may be possible that such a connection could be provided for within the Crown land given its proximity to the southern end of the conservation area. We consider that both the conservation and pedestrian purpose would be best served by providing clear and open accessways in this area and thus guiding them away from the conservation area and towards other areas of public land and amenity.

[52] We still consider that the Lot 80 accessway shown on the Plan needs to be provided particularly for residents and pedestrians who are familiar with the area. Again, we would anticipate that this pedestrian accessway even though part of the recreation area would be subject to planting and landscape architecture design accordingly.

[53] We consider a redesign of this part of the subdivision should be able to address these issues in a way satisfactory to the Court and the parties. The applicant also proposes that individual site holders on the frontage with the DOC reserve would have the ability to have an interconnecting series of paths which would then connect to the public boardwalks. That is a matter for the developer given that it is not intended to provide public access over these paths. We recognise the desirability of avoiding individual landowners crossing the Crown reserve and the fact that it is intended that the owners at the northern end of the subdivision will be preserving some of their land in an undeveloped state. We therefore agree that such pathways connecting private land to the public boardwalk are an appropriate response. Nevertheless particular conditions in that regard are not required as it involves matters for easement between individual owners which can be incorporated by the developer as part of the development.

[54] Nevertheless, it is clear that the conditions relating to those properties must include a covenant that there is no direct access from the frontage of their property over the Crown land to the beach, and that the connection would need to be via the public boardwalks provided. For the sake of clarity, the developer may wish to note in the consent that easement pathways for individual owners, particularly from Lot 30 – Lot 17, may connect to public boardwalks and accessways.

Archaeological and Cultural Heritage Sites

[55] We note that the Edens have already obtained consent from the Historic Places Trust in respect of disturbing archaeological sites. In the end we understand the concern of Ngati Whanaunga is that they wish to be included in any consultation relating to cultural matters and they seek some improvement over the protocols. To this end the Court suggested that the protocols adopted in respect of the consents in a recent Matata case might be appropriate. Annexed hereto and marked **C** is a copy of the relevant conditions for consideration by the parties. Some amendment of these to recognise the cultural interests of the various groups may be appropriate. Nevertheless, it appears to be

agreed that the parties are prepared to look at improving the cultural conditions to recognise the various cultural interests in this case.

[56] Although we recognise that there may be archaeological sites and/or koiwi over the site, nearly half the site is likely to be subject to fill only and therefore such items are not likely to be disturbed. In those areas of cut, notably on the coastal hills, it is less likely that would be artefacts in these positions given that they are on the lower shoulders of the hills. Nevertheless, we agree that the appropriate approach, given that consent must be granted, is that there are conditions to ensure that if any artefacts are discovered appropriate action is taken. The relevant consent under the Historic Places Act has already been obtained. This will include conditions relating to items of interest and this could be incorporated by reference in this consent.

[57] Whilst we recognise the concern of Ngati Whanaunga about individual landowners excavating their sites and thus disturbing artefacts or koiwi we consider that the extent of works conducted by the applicant in this case is such as to minimise the likelihood of that event. Thus, we consider that conditions of consent similar to **C** and the Historic Places consent would cover these issues.

Amenity Values and Landscape Character

[58] There was a broad concern of the witnesses, particularly Ms M Absolum, landscape architect called for the appellants, that the site is entirely located within what has been identified as either an amenity landscape or an outstanding landscape. Mr B Brown, a landscape architect called for the appellants, was of the view that although the landscape values were notable they were not outstanding.

[59] Although a great deal of evidence was given on the matter we must say that it seemed at best discursive given the zoning of this land as CRPA. Ms Absolum herself notes that the description and purpose of this CRPA in Rule 332.4.1 and Rule 332.4.2 make it clear that protection of the natural character of the coastal environment and the dominance of the land form are important purposes of the CRPA.

[60] We have concluded that there are four elements in this area that constitute the elements making up the natural character of the coastal environment in respect of its immediate surrounds. They consist of:

[a] the beach;

[b] the foredune area;

[c] the terrace including and behind the foredunes; and

[d] the steep coastal hills.

[61] We have also concluded from all the evidence that the Structure Plan's lines indicate that it was Council's intention that:

[a] the foredunes were only to be partly developed;

[b] the recreation area would preserve some of the foredunes;

[c] the terrace area was to be developed; and

[d] that any development on the coastal hills was to be limited to a height similar (but not identical) to those on Skippers Road.

[62] In this regard it is important to understand that there is a coastal ridge commencing at the corner of Blackjack and Skippers Road on which a number of houses are built. Given that these hills are less than 20m in height, homes are built on the top of this ridge to maximise views over Opito Bay. The reference to the Planning Maps demonstrates that it is intended that the landward boundary align with the properties on Skippers Road and then in broad terms follow a similar contour around the coastal hills to the north.

[63] In fact the applicant has gone further by proposing extensive revegetation of the adjacent coastal hills to form a context for the residential development area on the terrace and part of the foredune. It appears that various landowners (possibly with the consent of the neighbouring farmers) have undertaken similar works in Opito Bay and this is having a significant beneficial effect by improving the context in which the residences are viewed. Accordingly, we have concluded that the coastal hills planting with intrusions over the land between Lots 66 & 67 and Lots 45 & 47 would create a strong natural context to the development area viewed below.

[64] Concerns were raised about buildings moving up the foothills and also the increase in height of the terrace area making the homes more prominent. We do not accept this contention. Provided a building line constraint is placed to avoid buildings being constructed too far up the coastal hill slope we have concluded that the intention for cut and fill in this site is to provide suitable sites. These sites will not be subject to ponding or inundation and provide for a proper and appropriate gradient for infrastructure such as stormwater and roading and building platforms which will require minimal further earthworks.

[65] In terms of overall landscape we do not consider that the earthworks as presented are likely to constitute any more than a minimal impact upon the amenity and landscape of the area with the possible exception of the two retaining walls. These retaining walls essentially retain two coastal hill areas at a contour from between around 14m – 16m above sea level and 34m (in the order of 20m). The intention is that there would still be slopes both vegetated and unvegetated included between the two retaining walls.

[66] We accept the expert evidence of the witnesses, including Mr Kelly, that the retaining walls can be constructed below a maximum height each of 3m, and the evidence of Mr Brown, that if constructed in that manner they will not constitute a significant adverse effect. We do, however, conclude that:

[a] the height of the retaining walls should be controlled by condition to a maximum height of 3m;

[b] the slopes both uphill and downhill must be certified by a geotechnical engineer as stable; and

[c] an appropriate planting plan approved by both the geotechnical engineer and the landscape architect, must be incorporated to minimise the impact of the structures.

[67] Combined with the fact that residences will be constructed on the sites in front of these walls, we agree that the outcomes would be acceptable with conditions controlling the construction of the walls. However, we wish to make it clear that in the event that the walls are higher than 3m we consider that the effects would be unacceptable. It may then be that further sections would need to be removed from the development to enable

satisfactory slopes to be obtained. The applicant has accepted this constraint and assures us that the development is technically feasible subject to this constraint.

[68] In the end we have concluded that the comparison for purposes of assessing the amenity values and landscape characters is the area or context in which this development will be viewed. That includes of course views from the southern end of the bay, northern end of the bay, the beach and roads. Overall we have concluded that:

[a] the inclusion of the recreational area on the foredune,

[b] the maintenance of the conservation standards of the Crown land on the foredune, and

[c] the extensive replanting of the coastal hills,

all give a setting or context to this development which is likely in the long term to be at least neutral and probably beneficial. We have reached this conclusion because the coastal hills both immediately behind the site and to the north have both been extensively modified for pasture and farming use. The replanting of at least the adjacent coastal hills may lead to more extensive replanting to the north of the site, and the potential integration of this area with the broader remnant forestry further inland. Accordingly, we are satisfied that with the conditions which are proposed or inserted by the Court, the amenity values and landscape character will not be compromised.

[69] One area of concern is that the height of individual buildings could achieve an outcome not contemplated currently. Annexed hereto and marked **D** is a set of draft conditions prepared by the Council. These have already been subject to amendment during the course of the hearing and accordingly the comments in this decision would take priority in terms of the document i.e. the recreation reserve, accessways, street lighting, footpaths etc. Nevertheless, there is no particular control that we are able to ascertain within the proposed conditions currently relating to building height. We consider there should be some reference to a rule or height.

[70] Rule 510, Table 7, seems to show that housing for coastal residential is controlled to 8m, restricted discretionary to 10m. Although the evidence did not address this issue specifically if that is the type of range this means there is the potential for three-storey dwellings in the area. Theoretically, this may mean that with a restricted discretionary

consent, someone building at the maximum platform contour of around 22m may build to a height of 32m. Overall our conclusion is that this range of height limits are generally appropriate and are consistent with those applying throughout the rest of Opito Bay and the Coromandel Peninsula generally. We may need to consider a condition in the event that parties are not able to assure us that these are the heights that are applying to this development.

Public Reserves and Private Open Space Sufficient to Meet the Active and Passive Recreation Needs of the Population

[71] The Council has clearly taken the approach within their Plan that open spaces are essentially supplied by the beaches in these coastal areas. Nevertheless their agreement to acquire the 1.2ha proposed recreation area makes an adequate provision for recreation within the development. There are other aspects of open space within the design including the pedestrian ways, the area around the wastewater treatment ponds, and potentially around the site where areas are set aside for planting. In the context of the retirement of 6ha of nearby farmland for the purposes of replanting this gives a spaciousness and amenity which in our view will significantly improve the development and experience of those living and visiting it. It is very important that there be pedestrian accessways of sufficient width (minimum now 4m) to enable members of the public and residents to access the beaches. It is important that the boardwalks are the only access over the Crown coastal reserve so that they do not interfere with the operation of the conservation areas themselves. In short, we consider that the proposal meets the Plan requirements with the proposed conditions and the vesting of the recreation area in the Council.

Biodiversity Values

[72] In this regard the proposal seeks to minimise any impact upon the adjacent Crown conservation reserve. Parties have essentially agreed to limit the number of crossings to the beach and to have these designed and built in such a way that they discourage deviation from the boardwalks created. Furthermore, the developer is proposing that there be covenants over individual properties where part of the property is within the existing DOC fence-line to remain in its current state and that there be no building or general occupation of that area (beyond a pathway to the boardwalk). This is to be contained within certain conditions of consent in consent notices. This limits the use of

that portion of land by the owner, but nevertheless constitutes a very valuable supplement to the Crown conservation estate. This will impact upon the properties, Lots 22 – 30 in particular.

[73] In addition, the developer has proffered a condition controlling pets, particularly cats, dogs, mustelids. Given the proximity of the sites to the vegetated protection area and the known presence of dotterels and other seabirds, this can only be seen as helping to preserve the natural biodiversity values. Additionally, the developer has offered a condition to pay $1,000 from the sale of each lot to a dotterel enhancement programme, but a particular programme has not been identified at this point. From the Court's point of view our only concern is that the condition should be easily checked and enforced by the Council. It may be preferable if there was some provision that payments were made in advance, say for the first ten sales; second payment be made on the sale of the tenth section, for the next ten, etc, or alternatively making payment to stages of development (if there are any).

[74] This appears to be a matter that the parties could review so that the Council is satisfied that the condition was easily checked and enforced by it. Overall however, we are satisfied that these proposals ensure biodiversity is maintained.

[75] In this regard one matter which relates both to amenity, public reserves and biodiversity is the question of boat access to the northern end of Opito Bay. Several witnesses suggested that there should be an accessway from the extension of Skippers Road to enable people to enter the northern end of the beach without having to drive up and down the beach itself.

[76] We acknowledge that there is likely to be a significant further use of boats once this development is fully developed. At the current time the boats would travel to the south to the various points already identified as boat ramps. We also understand that as a matter of practice given the onshore conditions, it is frequent for boat owners to pull their boats to the northern end of the Bay and launch them behind the relative shelter of the headland and rocks. We note a concern by some witnesses as to effects on shellfish beds.

[77] We have concluded that no provision should be made for a boat accessway to the beach through the vegetation protection area of Crown land and that the walkways provided are sufficient access points. This would mean that any future boat access point

would need to be to the north of this development. In that regard it would be over land remaining for rural use and not subject to this application for land use.

[78] Overall we consider it would not be appropriate to require a boat access point for the following reasons:

[a] there are alternative methods to limit boat movement to the northern end of the Bay if this is considered inappropriate; and

[b] there are adequate launching places for boats in and around Opito Bay, including near this subdivision.

Broader Considerations

[79] Much of the evidence of witnesses discussed provisions of the Act, particularly Part 2, various statutory documents, Regional Plans and the broader provisions of the District Plan. It has been clear from our consideration that the Court's powers to impose conditions is limited only to those areas specifically reserved in the District Plan. Although reference to Part 2 or the broader terms of Regional and District Plans might help inform the wording of those reserved areas of control, it has not been necessary in this case. In fact nothing we have seen in relation to the Regional or other District documents gives any concern as to the interpretation we have adopted in this case.

[80] The District Plan is operative and we must assume that it meets the purpose of the Act as expressed in Part 2 and that it complies with all superior documents. Nothing in the evidence has given us any cause to doubt those conclusions. Overall this District Plan takes a liberal approach to subdivision within the areas identified as CRPA.

[81] Although there was some criticism of this being an urban-like development, that is not a concern to this Court. We prefer the installation of proper roading, lighting, footpaths, wastewater and stormwater. The Plan enables these matters to be properly controlled and, accordingly, limits the ongoing impact to the wider environment.

[82] With the various controls we have outlined and those proffered as part of the hearing, we are satisfied that the impacts of this development will be localised and for the most part short term. In the longer term we believe the benefits of the adjacent planting on the coastal hills and the provision of recreation and access areas to the beach will

improve the environmental amenity of this part of Opito Bay. Greater public access will be provided to the northern part of the bay. Accordingly, we are satisfied that the conditions we have outlined and which need to be finalised for this controlled activity will meet the purposes of the Plan and in particular Sections 701 – 709 being reserved areas for control.

Final Directions

[83] The court directs:

[a] **The applicant is to re-draft its proposed conditions of consent D with amended plans and circulate to the other parties within 20 working days;**

[b] **The other parties are to respond to the applicant within a further 10 working days.**

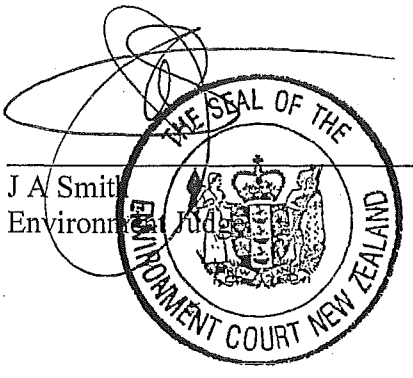
[c] **If matters cannot be agreed the applicants are to file their proposed conditions within a further 10 working days (40 days from this decision) and other parties may file their responses within a further 10 working days thereafter.**

[d] **If the applicants seek leave to commence part of the consent, i.e. relating to the earthworks, pending the finalisation of conditions, then an application can be filed under Section 116 of the Act.**

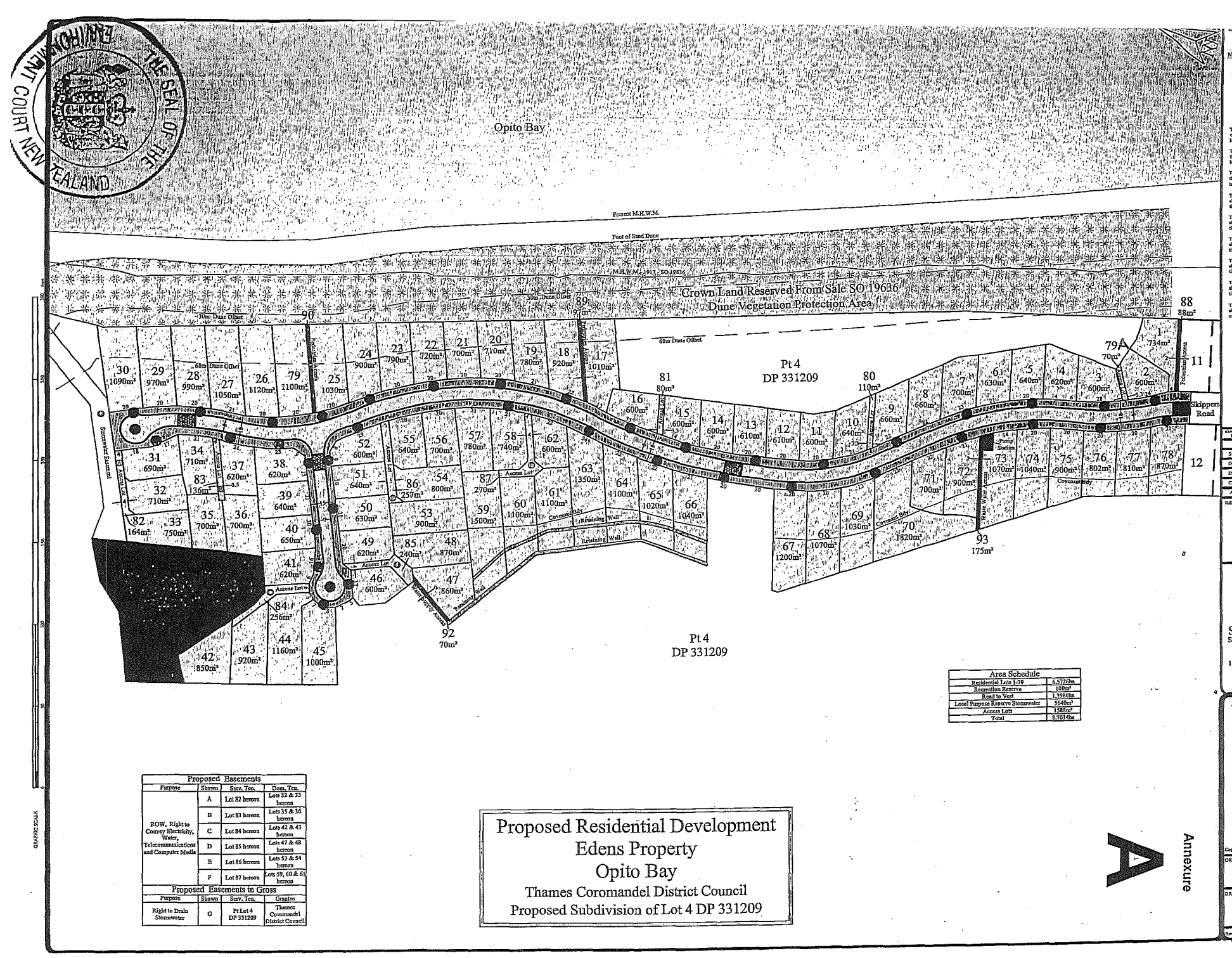
[e] **Any application for costs to be filed within 40 working days. Responses to be filed 10 working days thereafter.**

DATED at Auckland this 10th day of February 2010

For the Court:



J A Smith
Environment Judge



Notes

1) All lots can contain a 20m shape circle
2) Lots 88, 89 & 90 are to Vest in Council as Accessways under the Local Government Act

Amalgamation Conditions

That Lot 79 hereon (Legal access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith

That Lot 80 hereon (Legal access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith

That Lot 81 hereon (Legal access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith

That Lot 82 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 32 and 33 hereon and one certificate of title be issued in accordance therewith

That Lot 83 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 35 and 36 hereon and one certificate of title be issued in accordance therewith

That Lot 84 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 42 and 43 hereon and one certificate of title be issued in accordance therewith

That Lot 85 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 47 and 48 hereon and one certificate of title be issued in accordance therewith

That Lot 86 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 53 and 54 hereon and one certificate of title be issued in accordance therewith

That Lot 87 hereon (Legal access) be held as to 3 undivided one third shares by the owners of Lots 59, 60 and 61 hereon and one certificate of title be issued in accordance therewith.

Area Schedule	
Residential Lots 1-79	6.5726ha
Recreation Reserve	100m²
Road to Vest	1.3980ha
Local Purpose Reserve Stormwater	5640m²
Access Lots	1588m²
Total	8.7034ha

Proposed Easements			
Purpose	Shown	Serv. Ten.	Dom. Ten.
ROW, Right to Convey Electricity, Water, Telecommunications and Computer Media	A	Lot 82 hereon	Lots 32 & 33 hereon
	B	Lot 83 hereon	Lots 35 & 36 hereon
	C	Lot 84 hereon	Lots 42 & 43 hereon
	D	Lot 85 hereon	Lots 47 & 48 hereon
	E	Lot 86 hereon	Lots 53 & 54 hereon
	F	Lot 87 hereon	Lots 59, 60 & 61 hereon
Proposed Easements in Gross			
Purpose	Shown	Serv. Ten.	Grantee
Right to Drain Stormwater	G	Pt Lot 4 DP 331209	Thames Coromandel District Council

Proposed Residential Development
Edens Property
Opito Bay
Thames Coromandel District Council
Proposed Subdivision of Lot 4 DP 331209

Annexure A

Checked by	Rev. No.	Description	DATE
		NAME	DATE	SIGNED
Surveyed				
Designed				
Drawn		NP	4/10/06	
Checked				
Approved				

REFERENCES

S & L CONSULTANTS LTD
SURVEYORS - ENGINEERS - PLANNERS

111 Cameron Road, Tauranga, New Zealand
P.O. Box 231 Ph.(07)577-6069
Fax(07)577-6065
Email: slconsultants@slnz.co.nz

TITLE

Proposed Residential Development Opito Bay

ORIGINAL SCALES 1:1000 @ A1

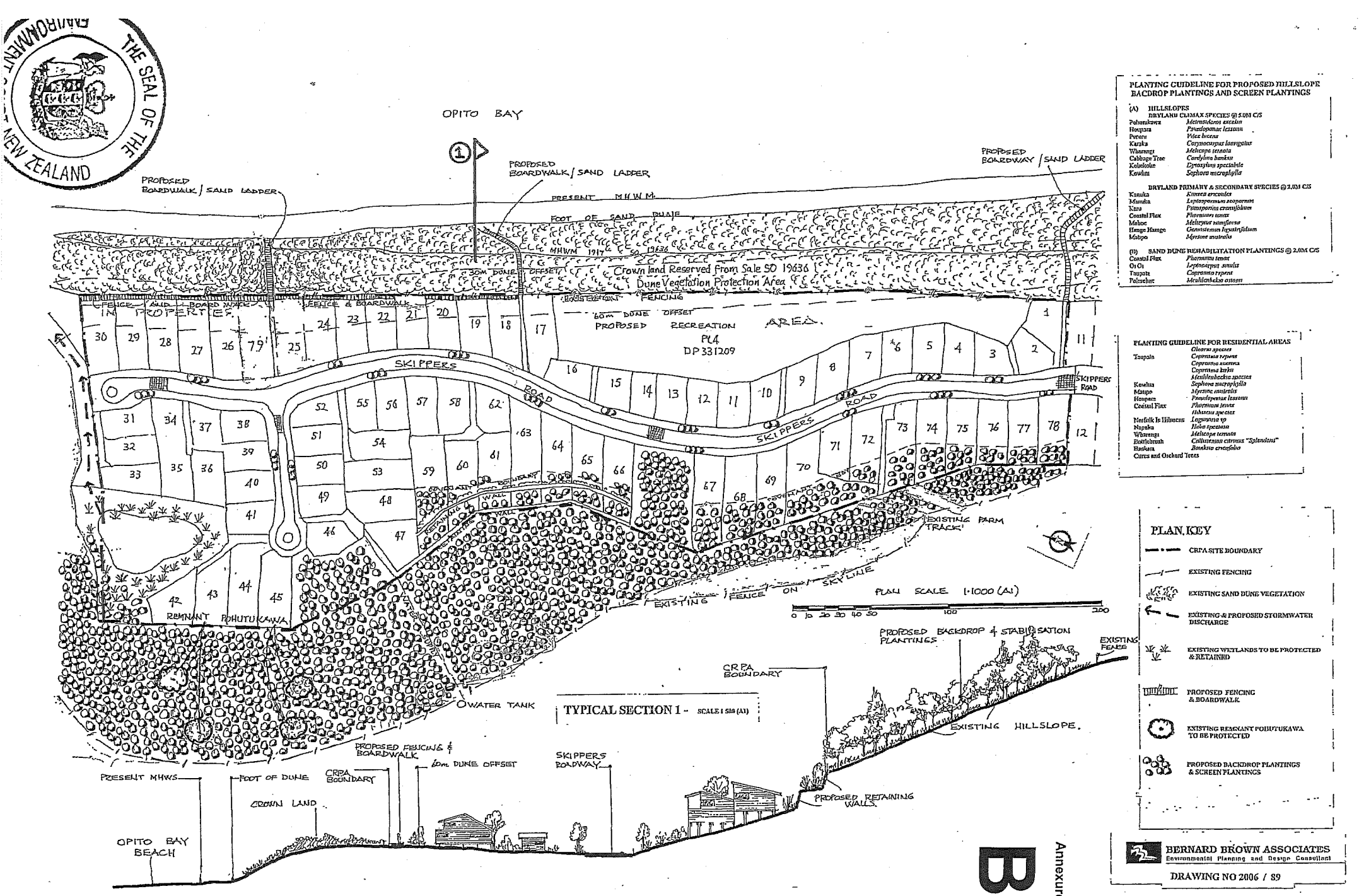
DATE 20/3/07

DRAWING No 18089 - RC1

Revision:

ARTERIC DESIGN

GRAPHIC SCALE



PLANTING GUIDELINE FOR PROPOSED HILLSLOPE BACKDROP PLANTINGS AND SCREEN PLANTINGS

(A) HILLSLOPES

DRYLAND CLIMAX SPECIES @ 5.0M C/S

Pohutukawa	*Metrosideros excelsa*
Houpara	*Pseudopanax lessonii*
Puriri	*Vitex lucens*
Karaka	*Corynocarpus laevigatus*
Wharangi	*Melicope ternata*
Cabbage Tree	*Cordyline banksii*
Kohekohe	*Dysoxylum spectabile*
Kowhia	*Sophora microphylla*

DRYLAND PRIMARY & SECONDARY SPECIES @ 2.0M C/S

Kanuka	*Kunzea ericoides*
Manuka	*Leptospermum scoparium*
Karo	*Pittosporum crassifolium*
Coastal Flax	*Phormium tenax*
Mahoe	*Melicytus ramiflorus*
Hange Hange	*Geniostemon ligustrifolium*
Mahoe	*Myrsine australis*

(B) SAND DUNE REHABILITATION PLANTINGS @ 2.0M C/S

Coastal Flax	*Phormium tenax*
Oi Oi	*Leptocarpus simplex*
Taupata	*Coprosma repens*
Pohuehue	*Muehlenbeckia axillaris*

PLANTING GUIDELINE FOR RESIDENTIAL AREAS

	Olearia species
Taupata	*Coprosma repens*
	Coprosma acerosa
	Coprosma kirkii
	Muehlenbeckia species
Kowhia	*Sophora microphylla*
Maipo	*Myrsine australis*
Houpara	*Pseudopanax lessonii*
Coastal Flax	*Phormium tenax*
	Hebesia species
Norfolk Is Hibiscus	*Lagunaria sp*
Nepuka	*Hoheria specioasa*
Wharangi	*Melicope ternata*
Bottlebrush	*Callistemon citrinus "Splendens"*
Hankara	*Banksia ericaefolia*
Citrus and Orchard Trees	

PLAN KEY

- CRPA SITE BOUNDARY
- EXISTING FENCING
- EXISTING SAND DUNE VEGETATION
- EXISTING & PROPOSED STORMWATER DISCHARGE
- EXISTING WETLANDS TO BE PROTECTED & RETAINED
- PROPOSED FENCING & BOARDWALK
- EXISTING REMNANT POHUTUKAWA TO BE PROTECTED
- PROPOSED BACKDROP PLANTINGS & SCREEN PLANTINGS

BERNARD BROWN ASSOCIATES
Environmental Planning and Design Consultant

DRAWING NO 2006 / 89

B Annexure

APPENDIX 4

M J & S A EDENS – PROPOSED SUBDIVISION OF LOT 4 DP 331209 – OPITO BAY
PROPOSED LANDSCAPE MANAGEMENT CONCEPT –

Annexure

C

13.1 The consent holder shall implement the following procedures to initiate the protocols set out in [.....]:

- A suitably qualified and experienced archaeologist familiar with the [.....] area and proposed activity locations shall be on site during all earthworks operations authorised under this consent.
- The consent holder shall provide for a training session on the protocols with the archaeologist, iwi representatives and earthwork contractors to ensure all parties know what will happen on site, who must be contacted and who is responsible for works to cease and to re-start.
- In the event of any archaeological site or koiwi being uncovered during the exercise of this consent, activities in the vicinity of the discovery shall immediately cease, and the site supervisor and archaeologist shall be notified immediately.
- The archaeologist shall notify the Tangata Whenua representatives including [.....] and [.....]

13.2 The consent holder shall notify the Regional Council as soon as possible following discovery of an archaeological site or koiwi.

13.3 The consent holder shall not recommence works in the area of the discovery until the relevant Historic Places Trust approvals or other approvals to damage, destroy or modify such sites have been obtained, where necessary.

13.4 Prior to commencement of works authorised by this consent, the consent holder shall give an opportunity to the governing body of [.....] to carry out a ceremony at the site as deemed appropriate by [.....]. For the purposes of this condition, the governing body of [.....] shall be deemed to be the [.....] unless otherwise advised to the Regional Council. The opportunity shall also be given to [.....] and [.....] to take part in the ceremony or conduct their own ceremony or ceremonies as deemed appropriate by them. In particular the consent holder shall give [.....] the opportunity to carry out their own ceremony before the works are carried out to unearth and identify the rock referred to as [.....] and the opportunity to conduct their own ceremony before any works are carried out on the [.....] Stream banks and channel between [.....] Street and the [.....] Lagoon. The consent holder shall confirm by notice in writing to the Regional Council that the opportunity to conduct a ceremony or ceremonies has been given and that a ceremony or ceremonies have been undertaken where desired by the iwi.

13.5 The consent holder shall provide reasonable opportunity for tangata whenua to be involved in future reporting and decision making in respect of on-going monitoring, management and maintenance of the works. For the purpose of implementing this condition [.....] shall be considered as one of the groups to be consulted. This shall include but not be limited to a person nominated by tangata whenua to be on site during all earthworks to ensure the protocols for the discovery of koiwi, artefacts or archaeological features is complied with.

13.5 The consent holder shall provide reasonable opportunity for tangata whenua to be involved in future reporting and decision making in respect of on-going monitoring, management and maintenance of the works. For the purpose of implementing this condition [.....] shall be considered as one of the groups to be consulted. This shall include but not be limited to a kaitiaki person nominated by [.....] to be employed by the consent holder to be on site during all earthworks to ensure the protocols for the discovery of koiwi, artefacts or archaeological features is complied with.

Annexure

D

Please note the amended and new conditions are included underlined and in blue font. The portion of Condition 30 to be deleted is shown with strikethrough through the text to be removed.

Schedule of Conditions

The Thames-Coromandel District Council **RESOLVES** pursuant to Sections 104, 104A, 106 and 108 of the Resource Management Act 1991, **TO APPROVE THE SUBDIVISION AND LAND USE CONSENT** to Subdivide 79 residential lots within the Coastal Zone (Residential Policy Area) and consent for earthworks and retaining walls and infrastructural services. The application involves 82200m^3 of cut and fill across the site, construction of two 3m high retaining walls, construction of a stormwater pond and stormwater and wastewater reticulation through the site and revegetation of approximately 5.0 hectares of hillside on Lot 4 DP 381209, being land located at the end of Skippers Road identified as 844 Black Jack Road OPITO BAY, subject to the following conditions of consent:

CONDITIONS PURSUANT TO THE RESOURCE MANAGEMENT ACT 1991

1. That the development proceeds in accordance with the plans and information provided with the application, namely:

   - The application and plans submitted by S & L Consultants Ltd dated 20/12/06;
   - The additional information and plans submitted by S & L Consultants Ltd dated 31/05/2007 as part of a Section 92 response;
   - Proposed Subdivision Plan and referenced Drawing No 18089-RC1 dated 20/3/07;

2. Should any archaeological site, remains, artifacts, taonga or koiwi be unearthed, dislodged, uncovered or otherwise found or discovered on the site, work shall cease immediately, the area shall be secured and any uncovered material shall remain untouched. The consent holder shall advise representatives of the Local Iwi (including Ngati Hei and Ngati Whanaunga), Historic Places Trust and the Thames-Coromandel District Council within 48 hours. Any artifacts will be removed in accordance with

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appropriate iwi protocols and any legal requirements of the Historic Places Act 1993, which shall be implemented prior to work recommencing on site.

3. The consent holder shall prepare a Pest Management Plan to be submitted to Council's Development Planning Manager for approval which sets out the animal pest control programme along the beach front in accordance with the recommendations of the Kessels & Associates Ltd report "Assessment of Ecological Effects" 280507.

4. The consent holder shall pay the Council a consent compliance monitoring charge of $1000 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs that have been incurred to ensure compliance with the conditions attached to this consent. (This charge is to cover the cost of inspecting the site, carrying out tests, reviewing conditions, updating files, etc, all being work to ensure compliance with the resource consent).

5. The $1000 (inclusive of GST) charge shall be paid as part of the resource consent fee and the consent holder will be advised of the further monitoring charge or charges as they fall due. Such further charges are to be paid within one month of the date of invoice.

6. A copy of this consent is to be held on site at all times that the works which the consent relates to are being carried out. The consent holder is to notify Council, in writing, of their intention to begin works a minimum of three days prior to the commencement of the proposed works (Please refer to the attached sheet.) Such notification shall be sent to the Council (Monitoring Officer) (facsimile: 07 868 9027) and include the following details:

    - Name and telephone number of the project manager and site owner
    - Site address to which the consent relates
    - Activity to which the consent relates
    - Expected duration of works.

    By notifying Council of the intended start date this will enable cost effective monitoring to take place. The consent holder is advised that additional visits and administration required by Council officers to determine compliance with consent conditions will be charged to the consent holder on an actual and reasonable basis.

A: Prior to the survey plan being signed pursuant to Section 223 of the Resource Management Act 1991, the following conditions are to be complied with:

1. Pursuant to Sections 239 and 243 of the Resource Management Act 1991, any necessary easements as required shall be included in a memorandum of easements endorsed on the survey plan. This shall include all the easements relating to access over the boardwalks on private land to permit pedestrian access. The applicants shall meet all costs relating to the creation of easements.

2. All public services, where they cross private property boundaries, shall be shown as an "Easement in Gross" in favour of the Thames-Coromandel District Council.

3. Any private service leads or drainage lines, where they cross property boundaries including the wastewater pipeline shall be protected by an easement and shall be shown on the submitted survey plan within a Memorandum of Easements.

4. That Lot 79 hereon (Legal Access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith.

5. That Lot 80 hereon (Legal Access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith.

6. That Lot 81 hereon (Legal Access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith.

7. That Lot 82 hereon (Legal Access) be held as to 2 undivided one half by the owners of Lots 32 and 33 hereon and one certificate of title be issued in accordance therewith.

8. That Lot 83 hereon (Legal Access) be held as to 2 undivided one half share by the owners of Lots 35 and 36 hereon and one certificate of title be issued in accordance therewith.

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9. That Lot 84 hereon (Legal Access) be held as to 2 undivided half share by the owners of Lots 42 and 43 hereon and one certificate of title be issued in accordance therewith.

10. That Lot 85 hereon (Legal Access) be held as to 2 undivided half shares owner of Lots 47 and 48 hereon and one certificate of title be issued in accordance therewith.

11. That Lot 86 hereon (Legal Access) be held as to 2 undivided one half by the owners of Lots 53 and 54 hereon and one certificate of title be issued in accordance therewith.

12. That Lot 87 hereon (Legal Access) be held as to 3 undivided one third shares by the owners of Lots 59, 60 and 61 hereon and one certificate of title be issued in accordance therewith.

13. That Lots 88, 89 and 90 are to Vest in Council as Accessways under the Local Government Act.

14. The proposed road which is an extension to Skippers Road and the cul-de-sac are to vest in Council as road under the Local Government Act.

15. That ROW "C" hereon (Legal Access) shall include the TCDC as a Dominant Tennant to allow for access to Lot 91. This access shall be utilised as well as Stormwater Easement "G".

16. That Lot 91 is to vest in the Thames-Coromandel District Council as Local Purpose Reserve (Stormwater).

B: **Prior to the completion certificate being signed pursuant to Section 224(c) of the Resource Management Act 1991, the following conditions of consent are to be complied with:**

1. The consent holder shall submit As-built plans for approval (to the satisfaction of the Group Manager, Service Delivery) prior to s224(c) certification. All fees for approval and inspections are to be paid prior to the release of this certificate.

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2. The consent holder shall (if applicable) submit data of assets to be vested in Thames-Coromandel District Council (if applicable) prior to s224(c) certification. These assets shall be presented in Council's Acquisition/Disposal of Operational Asset – Schedule format.

3. The consent holder shall submit an Operations and Maintenance (O & Manual) for incorporation into the Council's Maintenance Contract with United Water or approved contractor.

GENERAL

4. The consent holder shall appoint an official representative in respect of engineering works, with whom all correspondence relating to engineering matters will be undertaken by Council.

5. The consent holder shall submit engineering plans and specifications for the approval of the Group Manager, Service Delivery. No work is to be undertaken on the site prior to the plans and specifications being approved.

6. The construction and completion of all physical works shall be certified by a Chartered Professional Engineer, or other suitably qualified person for whom Council's approval has been obtained, or their delegated agent, as in accordance with the approved plans and specifications and Thames-Coromandel District Council's current "Code of Practice for Subdivision and Development" as per schedule 1B & 1C NZS 4404:2004. All materials used therein are to be certified to be in accordance with the relevant New Zealand standards.

7. The consent holder shall submit a Quality Management Plan for the approval of the Group Manager, Service Delivery, and also to Ngati Whanaunga and Ngati Hei for approval, prior to the commencement of works. This plan shall be compiled to a level of sophistication appropriate to the nature and scale of the proposed works, and in the case of minor works this may simply entail documentation of an inspection by a suitably qualified person.

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8. The consent holder shall seek written approval from Council for any variation to the approved quality management plan or non-compliance. Records shall be made available to Council's engineering representative on demand for auditing purposes.

9. The onus shall rest with the consent holder to demonstrate that the completed works meet Council requirements and accepted engineering standards. To this end, developers are advised to employ suitably qualified and experienced contractors, and maintain records of the quality control process.

10. All works that are to be vested in the Thames-Coromandel District Council are subject to an 18 month maintenance period (except the Wetland Pond system that shall be 5 years maintenance period) that does not commence until issue of 224c, or once any bonded works are completed, which ever is the latest. A bond of 150% of the agreed sum will be required for this work as per the TCDC Code of Practice.

ASSETS

11. The consent holder shall submit RAMM as-builts for the approval of the Group Manager, Service Delivery, and all fees for approval and inspections are to be paid prior to the release of the 224(c) Certificate. The consent holder shall engage a suitably qualified RAMM technician to produce as-builts of the all roading assets vested, which may include, but not be limited to, pavement surfacing, pavement layers, surface water channels, footpaths, signs, road marking, streetlights. The consent holder shall, prior to undertaking data gathering, confirm the data tables required with Council's Roading Manager.

12. The consent holder shall provide a concrete path 2.0m in width (boundary to boundary) within Lot 88, 89 and 90, from Skippers Road to the Dune vegetation protection area as shown on S&L Plan of Proposed Boardwalk and Sand Ladders Referenced 18089 – BW1 Each of lots 88, 89 and 90 are to have a 1.2m high close wooden board fence installed on the boundaries of the neighbouring lots.

LANDSCAPING

13. Any landscaping considered or required as part of this subdivision needs acceptance from Council. A planting plan must be forwarded to Councils Senior Development

Engineer for consideration and approval before any planting occurs. Landscaping design and construction shall comply with NZS 4404: 2004, Land Development and Subdivision Engineering – Part 7 Landscape Design and Practice, Part 8 Reserves, Clause 3.4.16 berms and landscaping.

13a. The consent holder shall ensure that the final landscaping plan including the final design of beach access, fencing along the eastern boundary of the lots adjoining the foredune, backdrop planting and coastal planting and street planting has been developed in consultation and with the approval of Ngati Whanaunga and Ngati Hei prior to be submitted to Council for approval.

14. The consent holder shall complete the mass backdrop plantings across the hillside areas (comprising approximately 1 hectare within the Coastal Zone (Residential Policy Area) and 5 hectares in the Coastal Zone (Outside All Policy Area). A planting plan, timetable of planting and plant sizes and an ongoing maintenance schedule and process for continued maintenance shall be submitted to Council's Development Planning Manager for approval prior to implementation. This planting shall be generally in accordance with Bernard Brown Drawing No. 2006/89 with the deletion from the drawing (including the key to the drawing) the reference to the "proposed sand dune rehabilitation plantings". If application for 224 (c) Certification is made prior to the completion of this planting and maintenance period the consent holder may apply to Council for a bond to cover this work. All costs associated with the bond including any legal costs shall be met by the consent holder.

15. The consent holder shall also complete additional planting of Pohutukawa at 20m centres across the eastern boundary of the Structure Plan Area within the Site.

15a. The consent holder shall submit a street planting plan to Council's Development Planning Manager for approval prior to the undertaking of any street planting and shall ensure that the trees planted within in the street berm areas are Pohutukawa.

16. The consent holder shall prepare a detailed design of the retaining walls to be constructed which shall include the materials and design of the walls as well as the visual screening proposed within or adjacent to the retaining walls. This detailed design and planting programme shall be approved by Council's Development Planning Manager prior to any construction of the retaining walls. The retaining walls shall be located as shown on the S&L Consultants Ltd Plan 18089-RC1.

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17. The consent holder shall provide the boardwalk and sand ladder structures for pedestrian access as approved by the Department of Conservation and shown on Drawing No 18089 –BW1 and BW2. The boardwalks on public property are to have railings as detailed on both sides. Those on private property for use of the property owners are to have as a minimum a railing on the seaward side of the boardwalk. The boardwalk is to be constructed entirely within the footprint of the boardwalk and is to be constructed progressively from the landward ends so as to provide for the carrying of materials along the completed sections. Piles are to be placed no more than two bays ahead of the completed decking.

18. The consent holder shall landscape the Treated Effluent Landscape Application Area in accordance with the Drawing No 18089 – W02 and the concept plan prepared by Bernard Brown. Final details of the planting, plant sizes and the maintenance programme shall be submitted to Council's Development Planning Manager for approval prior to any planting work commencing on site.

19. The Council will require a bond in relation to the landscaping conditions set out in Conditions 14 – 17. The bond will be for a period of 3 years and will cover the replacement cost of plants and materials and maintenance of the works and plantings. The bond will be 150% of an agreed sum required to cover this work.

SERVICES

20. The consent holder shall install separate electricity and telephone services to lots, to a standard satisfactory to the Development Planning Manager, and in accordance with the specifications and criteria set out by the respective utility network provider. Evidence that the requirements of each network provider have been met shall be provided to Council at the time of s224(c) certification. All electric wiring and telephone cables within the subdivision shall be underground.

21. The consent holder shall install stormwater reticulation to the subdivision, designed for the 10yr 10min rainfall event plus 20% minimum global warming factor. Lots 1 to 79 shall be provided with separate connections to the reticulation.

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22. The consent holder shall construct stormwater wetland pond system and associated outlet structures for the subdivision in accordance with the conditions of the Environment Waikato consents # 116593 and 117249. Both Environment Waikato consents shall be transferred to TCDC at the completion of works and a 12 month maintenance period.

23. The consent holder shall construct a 1.8m high fence on the boundaries of the neighbouring residential lots surrounding the Wetland Pond (Lot 91). An approved lockable gate shall be installed gaining access from ROW "C" to the Wetland Pond and access from Skippers Road to the Wetland Pond via the stormwater easement (G). The purpose of the fencing is to ensure that children cannot climb into the stormwater and wetland area. The fence is to be constructed of a type of fencing material such as closely boarded wooden fencing pails or iron railing to ensure that it cannot be easily climbed. The consent holder shall construct a stock proof fence where the wetland area adjoins farmland.

24. The consent holder shall install wastewater reticulation to the subdivision. Lots 1 to 79 shall be provided with separate connections to the reticulation.

25. The consent holder shall construct a wastewater treatment and disposal facility to serve the subdivision in accordance with the Environment Waikato resource consent # 116594.

26. The consent holder shall install wastewater re-use reticulation to the subdivision. Lots 1 to 79 shall be provided with separate connections to the wastewater re-use reticulation. These connections are to be labelled for identification as wastewater re-use only.

27. The wastewater reticulation, treatment and disposal facility, and wastewater re-use reticulation will be owned and operated by the development, therefore the applicants is to demonstrate how the operations and maintenance of the system will take place and under what authority.

28. The applicants shall provide to Council a copy of the Operations and Maintenance manual of the wastewater reticulation plus the treatment and disposal facility prior to 224c.

29. Any culverts constructed as part of this resource consent, shall have erosion protection placed at their inlets and outlets by way of rip-rap, reno mattress, concrete headwall structures, or approved alternative to the satisfaction of the Group Manager Service Delivery.

ROADING

30. The consent holder shall construct the proposed new public road (Skippers Road extension) and turning head, plus the cul-de-sac and turning head in compliance with Council's Roading standards specified in Council's District Plan and "Code of Practice for Subdivision and Development". The following criteria are to be adhered to:

Skippers Road extension:

- Carriageway – 8.0 m.
- Flush Kerb both sides of carriageway.
- Swales.
- Footpath constructed on beach side of road.

Cul de Sac:

- Carriageway – 7.0 m.
- Flush Kerb both sides of carriageway.
- Swales.
- Footpath constructed on one side of road.
- Street Name – To reflect area history.

The consent holder shall upgrade existing Skippers Road in compliance with Council's Roading standards specified in Council's District Plan and "Code of Practice for Subdivision and Development". The following criteria are to be adhered to:

Skippers Road existing:

The consent holder shall upgrade existing Skippers Road and meet the cost of the same. The work shall be in compliance with Council's Roading Standards specified in Council's District Plan and "Code of Practice for Subdivision and Development". The following criteria are to be adhered to:

- Carriageway – 8.0 m.

- Flush Kerb both sides of carriageway.
- Swales.
- Footpath constructed on beach side of road.

~~Streetlights~~

- ~~Within the subdivision three streetlights are to be provided at the walkways (i.e. adjacent to Lots 88, 89 and 90). Specific detailed design of the streetlights shall be provided to Council at engineering design stage to ensure that the streetlights provide down light only and minimise light spill.~~

31. Overland flow paths for events greater than the capacity of the proposed primary stormwater system shall be designed and shown on a plan at the engineering drawing stage (also the overland flow paths shall be identified on an as built plan to be submitted before the release of the section 224 certificate). Overland flow paths shall be directed along a route to a controlled discharge point so as to not worsen any flooding downstream of the site or enter buildings sites in the 1% AEP event. This may require physical works and/or the imposition of minimum habitable floor levels for each new residential lot. In the case of the latter a consent notice shall be placed on the title of each residential lot.

32. The consent holder shall construct the Right of Ways "A - F" in compliance with Council's standards of the District Plan. The geometric design of the Right Of Way shall meet with the Right of Way requirements of Council's "Code of Practice for Subdivision and Development" (2.7m concrete carriageway width). Stormwater runoff from the ROW is to be disposed of in a controlled manner.

33. The consent holder shall install streetlights in compliance with Council's "Code of Practice for Subdivision and Development". A street lighting plan shall be submitted as part of the engineering plan approval.

34. The consent holder shall install a complying vehicle crossing to ROW "A, B, C, D, E, F" to the standards specified in Council's "Code of Practice for Subdivision and Development".

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35. The consent holder shall install a complying vehicle crossing to Lot 1 to the standards specified in Council's "Code of Practice for Subdivision and Development".

36. The consent holder shall install a complying vehicle crossing to Lot 44 to the standards specified in Council's "Code of Practice for Subdivision and Development".

37. The consent holder is required to contact Council's roading management consultants, Opus Consultants Ltd, on (07)867 9321, to formally apply for a vehicle crossing permit which shall be inspected and approved in writing by Opus prior to s224 certification.

38. The consent holder is required should any work be planned within the Council's road corridor, to contact Council's roading management consultants, Opus Consultants Ltd, on (07)867 9321, to formally arrange for a Road Opening Notice for the work to occur.

EARTHWORKS

39. The consent holder shall carry out all 'Cut and fill' earthworks in accordance with the relevant provisions of NZS4431:1989, entitled "Code of Practice for Earth Fill for Residential Development". Upon completion all earthworks shall be certified by a suitable qualified Chartered Professional Engineer or suitably qualified professional, to the satisfaction of the Group Manager, Service Delivery.

39a. The consent holder shall ensure that within Lots 17-30 and Lot 79 that there is no cut and fill earthworks undertaken forward of the 60m covenanted coastal foredune offset line.

40. That a Geotechnical Investigation and report be undertaken for all lots upon the completion of all earthworks within the development, by a suitably qualified and experienced Geotechnical Chartered Professional Engineer. The report is to consider the classification of all lots and the recommendation of the wording of consent notices to be placed on the respective lots.

41. The consent holder shall, within 3 months of the completion of earthworks, regrass or hydroseed all exposed earthworks to achieve an 80-90% grass strike.

42. The consent holder shall obtain written sign off from Environment Waikato that all EW consent conditions have been satisfied with regard to EW Resource Consent # 116592 – Land Disturbance, prior to issue of 224c.

SILT AND DUST CONTROL

43. The consent holder shall take all practicable steps to ensure that run-off from the site is treated so that sediment is retained on site and the discharge does not cause adverse effects on the environment by entering either the kerb and channel, the stormwater system, or a natural watercourse.

44. Silt control measures shall be to the satisfaction of the Group Manager, Service Delivery prior to the commencement of earthworks, and shall generally conform to the Waikato Regional Council (Environment Waikato). Erosion and Sediment Control Guidelines for Soil Distributing Activities, May 2003, Technical Publication No TR2002/01.

45. The consent holder shall regularly wet land disturbed by earthworks during dry periods, to ensure that dust nuisance is maintained within the site. Dust control measures shall ensure that there are no adverse effects on the neighbouring properties.

H: CONSENT NOTICES

46. A Consent notice, pursuant to section 221 Resource Management Act 1991, shall be registered against the relevant certificates of title. These notices shall specify the following conditions as relevant to each lot:

    1. An application for a vehicle crossing to serve Lots 2 to 31, 34, 37 to 41, 45, 46, 49 to 52, 55 to 58, and 62 to 79 shall be made at the time of building consent application for a garage or dwelling. The vehicle crossing shall be constructed within six (6) months of Council granting the building consent. The vehicle crossing shall be installed to the standards specified in Council's "Code of Practice and Development".

2. The consent holder is required to contact Council's roading management consultants, to formally apply for a vehicle crossing permit which shall be inspected and approved in writing.

3. Foundation design for all lots shall be undertaken in accordance with the recommendations contained in the Geotechnical Completion Report for this development. **(This consent notice wording to be finalised once Condition 40 above has been completed).**

4. Effluent disposal for lots 1 to 79 shall be by way of primary treatment of effluent on each residential site with an interceptor tank, pumped into a sealed reticulation connection provided as part of the development. The interceptor tank is to be installed at the time of building consent. The interceptor tank shall be owned and operated by the individual lot owner.

5. Primary stormwater disposal for lots 1 to 79 shall be by way of Engineer designed retention tank, designed for the 10 yr 10min rainfall intensity event plus 20% global warming factor, with overflow to the public stormwater reticulation, at the time of building consent. The retention tank and associated pipe work to the stormwater connection at the property boundary shall be owned and operated by the individual lot owner.

6. Water supply for lots 1 to 79 shall be by way of roof water to on site storage tank, installed at the time of building consent. The water tank shall be owned and operated by the individual lot owner. Note: The water tank and stormwater retention tank (Consent notice 4 above) may be designed as one tank for both requirements.

7. That the land owners of those lots adjoining the Crown Reserve (Lots 1, 17 to 30, 79 and Pt4 DP 331209) maintain the existing or a replacement, fence in the current position, and, in the respective areas within their lots on the seaward side of the fence, not to remove or allow to be removed any of the existing native dune vegetation nor plant or allow to be planted any non-native plants and shall remove any weeds likely to be detrimental to the existing vegetation, including any "Pest Plants" identified in the Waikato Regional Council publication "Plant Me Instead".

8. That the owners of Lots 1 to 79 inclusive and Pt 4 DP 331209 adjoining the Crown Reserve shall not access the beach other than via the approved public accessways vested in the Thames-Coromandel District Council and the board walks on Lots 1, 17 to 19, 22 to 29 and 79.

9. That the owners of Lots 1 to 79 inclusive shall not keep or harbour any cats, dogs, mustelids or livestock on their properties.

10. That the owners of Lots 1 to 79 inclusive shall not plant on their lots any of the "Pest Plants" identified in the Waikato Regional Council publication "Plant Me Instead".

11. That the owners of Lots 1, 17 to 30 and 79 shall not construct nor allow to be constructed on their land any buildings on the eastward side of the sixty metre setback line.

12. That the owners of Lots 1 and 28 to 30 where the existing fence is landward of the sixty metre setback line, shall not construct nor allow to be constructed any building foundations on that part of their land seaward of the existing fence.

13. The owners of Lots 1 to 79 inclusive shall ensure that all buildings on the sites are in compliance with the requirements recommended in the Bernard Brown Landscape Assessment "Summary of Recommended Visual Mitigation Measures" dated December 2006.

14. The owners of Lots 1 to 79 inclusive shall ensure that prior to any earthworks being undertaken in relation to the construction of any buildings on the site, silt control measures are in place in line with the requirements of the Waikato Regional Council (Environment Waikato). Erosion and Sediment Control Guidelines for Soil Distributing Activities, May 2003, Technical Publication No TR2002/01.

15. The owners of the balance lot shall ensure that the mass backdrop planting required in Condition 14 of RMA2006/439 is planted in general accordance with the Bernard Brown Assessments - Drawing No 2006/89 and shall be retained and maintained in a healthy state to the satisfaction of the Development Planning Manager.

16. The owners of the balance lot shall ensure that the planted area shown on S&L Consultants Drawing No 18089 –W02 and the concept plan prepared by Bernard Brown Associates be retained and maintained in a healthy state to the satisfaction of the Development Planning Manager.

Advice Note: Local Government Act Development Contributions

The following development contributions shall be paid pursuant to Sections 102, 198 and 208 of the Local Government Act 2002.

1. A reserves contribution is payable on this subdivision. The amount payable is the average market value of 15m2 of land per additional lot within the subdivision. The payment is to be accompanied by an assessment from a Registered Valuer approved by Council, of the estimated market value per lot. This assessment shall be subject to the approval of the Group Manager, Environmental Services, and shall be less than 90 days old on the date which payment is to be made.

2. A development contribution is payable on this subdivision. A letter stating the amount payable will be issued within 10 working days of the date of this decision.

   These contributions are required in accordance with Council's Development Contributions Policy. The Development Contributions Policy provides a review provision under Section 8.5. Any request shall be in writing and shall set out the reasons for the review. The notice of review must be received by the Council within 15 working days of receipt of the formal development contribution letter.

   The applicant is liable to pay a development contribution upon the granting of this subdivision consent and prior to the completion certificate being issued pursuant to Section 224(c) of the Resource Management Act 1991.

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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2007-463-000606

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Local Government Act 2002
BETWEEN	WHAKATANE DISTRICT COUNCIL Applicant
AND	THE BAY OF PLENTY REGIONAL COUNCIL Respondent

Hearing: 17-21 March and 4-6 June 2008

Appearances: D J Neutze and V T Bruton for the Applicant
J G Miles QC and K J Catran for the Respondent

Judgment: 9 April 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 9 April 2009 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: J G Miles QC P O Box 4338 Auckland for the Respondent

Solicitors: Brookfields P O Box 240 Auckland for the Applicant
Cooney Lees Morgan P O Box 143 Tauranga for the Respondent

[1] The applicant challenges, by way of judicial review, a decision of the respondent to relocate its headquarters and 100 staff positions from Whakatane to Tauranga. Both parties are territorial authorities whose status and authority are derived from the Local Government Act 2002. The applicant's challenge has the support of the Rotorua and Opotiki District Councils, as well as the Te Arawa Lakes Trust, which represents 60 Iwi and Hapu in the Te Arawa Lakes area.

[2] The respondent's decision-making powers are derived from and subject to the Local Government Act. It follows that the respondent's decision to relocate its headquarters from Whakatane to Tauranga (the relocation decision) must comply with the relevant provisions of the Act, as well as any requirements that the common law imposes on decisions of this type.

[3] As with most judicial review claims, there is an overlap between some of the grounds of review. There is a challenge to the lawfulness of the decision-making process, which the respondent followed. The allegations in this regard are that:

a) The respondent failed to follow the required statutory process and, therefore, exceeded its jurisdiction;

b) The unlawful process the respondent adopted meant that it failed to take into account relevant mandatory statutory considerations; and

c) In the course of reaching its decision, the respondent breached legitimate expectations contained in the Triennial Agreement between it and various territorial authorities of which the applicant is one.

[4] There are also allegations of a breach of the duty to consult, which is a duty imposed under s 83 of the Local Government Act. This breach is alleged to stem from distinct flaws within the decision-making process. The respondent is alleged to have failed to provide a reasonable opportunity to be heard to those persons who sought to make submissions in person, which is allegedly due to certain councillors having closed minds on the topic and others being absent during the public consultation hearings.

[5] Furthermore, it is alleged that the respondent's relocation decision was the result of bias and predetermination on the part of a number of the respondent's councillors. And finally, there is an allegation the relocation decision was unreasonable.

[6] In this case the hearing was spread over two separate periods of time. By the commencement of the second period, the key issues between the parties had become more refined. The applicant helpfully provided a summary of the key issues. The findings on these issues will determine the outcome of the proceeding. I propose, therefore, to list the issues now and later to deal with each in turn. The issues are:

a) Whether compliance with ss 76 to 79 of the Local Government Act requires the express and conscious exercise of the discretion under s 79, or whether this can be done by accident;

b) Whether stage one of the decision-making process – the identification of the problems and objectives – was always focused on relocating the respondent's headquarters or whether it was for the respondent to assess what options might be open to it to carry out the new functions it was proposing to undertake;

c) Whether the end point of stage two of the decision-making process – the seeking to identify all reasonably practicable options – was reached on 7 December 2006 when the respondent made an "in principle" decision to relocate its headquarters to Tauranga, or whether the end point was reached later on 15 March 2007 when the respondent resolved to adopt amendments to its 10 year plan to provide for the relocation. Within this issue is the sub-issue of whether or not the "in principle" decision of 7 December 2006 was in fact a decision at all in terms of the Act;

d) Whether the respondent gave any consideration at all during the stage one and stage two part of the decision-making process to community views on the location of its head office;

e) Whether the councillors who did not attend all or substantial parts of the hearings should have voted on the relocation decision and, if not, what effect did their voting have on the decision;

f) Whether some of the respondent's councillors came to the hearings and deliberations in May and June 2007 with closed minds;

g) The application of the Triennial Agreement to the decisions at issue and whether that agreement gave the applicant a justifiable legitimate expectation of early notification of, and input into, the relocation decision, as well as the review leading up to the decision.

Facts

[7] Since the establishment of the respondent in 1989 (under s 41 of the Local Government Amendment Act 1989 (No 2)), its headquarters have been located in Whakatane. The location was an historical accident resulting from the local government reforms of that time. Since then, from time to time the respondent has questioned the appropriateness of this location. On 21 June 2007 a decision was made to amend the Long Term Community Plan to provide for the relocation of the respondent's headquarters to Tauranga, together with the relocation of 100 of 160 staff positions.

[8] Over the years, the possibility of relocating the respondent's headquarters has come under consideration. There were accommodation reviews in 1993, 2000, 2002 and 2003. None of these resulted in any changes. Then in 2005 the respondent considered looking at the issue again but deferred doing so until its new Chief Executive, Mr Bayfield, commenced work in the New Year (2006).

[9] At the beginning of 2006 the respondent was faced with an issue regarding the use of land it had purchased at Sulphur Point, Tauranga, from the Tauranga District Council. The respondent had intended building on the site but the independent commissioner responsible for the consent decision refused consent. An appeal to the Environment Court was lodged. This was later abandoned and the land

was sold back to the Tauranga District Council. The inability to use the Sulphur Point site for the respondent's operations in Tauranga increased the accommodation pressures the respondent was experiencing. The respondent's statutory responsibilities had increased as a result of a change in legislation. The conflux of a new Chief Executive, new expanded statutory role, and the loss of the site for some expansion in Tauranga caused the respondent to re-evaluate its performance and how it might best deliver its responsibilities in the region. Its accommodation arrangements were critical to this evaluation as they had a significant practical effect on the respondent's performance.

[10] The relevant actions the respondent took are fully described in the affidavits of its Chairperson, John Cronin, and its Chief Executive, William Bayfield. The first step was on 30 March 2006 when the respondent's Finance and Corporate Services Committee agreed to undertake an accommodation and location review using external advisers. The report the Committee had received from Miles Conway, Group Manager of the respondent's Human Resources and Corporate Services, recorded that the brief to the external advisers was to be developed in consultation with the Chairman and was to investigate "all aspects of our present and future accommodation needs, including where we would be best located to deliver our services and the estimated tangible and intangible costs and benefits associated with any recommendations".

[11] In April 2006 potential external advisers were approached. As part of this process, on 13 April 2006 a briefing letter was sent to Deloitte New Zealand (Deloitte). The briefing letter makes it clear that the respondent was seeking "a comprehensive report analysing where [it] as a corporate organisation could best be located and what [were] the tangible and intangible costs, benefits, drawbacks and hurdles".

[12] In June 2006 Deloitte responded with a proposal. Whilst the proposal referred to the task as an accommodation needs and location review, the content of the proposal reveals that Deloitte understood the wider and more comprehensive scope of the exercise. The proposal noted that:

> Environment Bay of Plenty is currently facing capacity issues in relation to its current office space in all its present locations and wishes to take this opportunity to determine a long term plan for the location of the various functions that the organisation performs now and will perform in the future.

[13] The Deloitte proposal was subsequently accepted by the respondent. In short, the proposal recommended that the respondent relocate its headquarters to Tauranga. The key findings were that there had been a significant increase in population in Tauranga, with a corresponding increase in what Deloitte described as "leadership functions in various organisations located there". The report recognised that the respondent needed to have a "presence" in Whakatane, Rotorua and Tauranga. The current offices were near to full capacity and additional space was required in all locations. It was seen as inevitable that the respondent would have a bigger presence in the Western Bay of Plenty due to the population growth in that part of the region.

[14] The issues the briefing letter required Deloitte to cover seems to me to extend beyond simple accommodation concerns. The respondent was seeking to find information on how it could best be located in terms of the impact on its functions, present and future, its leadership functions and role in the region, the extent to which its functions were location biased when it came to service delivery, and how it could efficiently deliver its functions in terms of its location. Deloitte was also asked to consider the recommendations on these issues in terms of cost and impact on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations, and the implementation of the identified changes. Enclosed with the briefing letter were the draft 10 year plan, volumes one and two, the Regional Policy Statement, a guide to the Regional Council, Smart Growth Strategy, Bay Trends 2004, a map of the region showing the various locations of the respondent's offices, the human resources quarterly report and the respondent's corporate structure.

[15] A steering group was set up comprising the Chairman, Mr Cronin, Councillors Riesterer and Cleghorn, the Chief Executive, Mr Bayfield, and two senior staff members, Mr Conway and Bruce Fraser. The group met regularly, including with Deloitte. Mr Bayfield's evidence was that during this stage it became apparent from the discussions with Deloitte that there was no financial imperative to

relocate the respondent's headquarters, but that relocation continued to make sense for strategic reasons.

[16] In October 2006 Deloitte undertook interviews with the respondent's councillors and with the Mayors and Chief Executives of local territorial authorities within the respondent's region.

[17] From October 2006 onwards the steering group received drafts of Deloitte's report. These drafts were discussed with Deloitte. Although, the applicant has criticised the interaction between the steering group and Deloitte during this time, I see no reason to be critical of what occurred. It was important for the respondent to ensure that Deloitte was adhering to the project's terms of reference, and these discussions were a way of achieving that.

[18] Then, in November 2006, Deloitte's issued its report. It recommended shifting the respondent's headquarters to Tauranga. The report is a comprehensive and relatively in-depth response to the terms of reference set out in the briefing letter of 13 April 2006.

[19] In the report Deloitte had concluded that there was a significant increase in the population in the western area of the respondent's region, particularly in Tauranga, whereas the population in the eastern areas was either static or in decline. Tauranga was recognised as the natural centre of the region and Deloitte considered that the respondent should have its headquarters located in the region's leading urban centre. Deloitte also considered that the success of the respondent's future performance, including it assuming a leadership role in the region, necessitated the establishment of a more significant presence in the major population centres. The need for a more significant presence in the western area of the region was seen as inevitable. The result of these conclusions was that the continuation of headquarters located in Whakatane came to be seen as an impediment to the respondent's ability to perform its newly expanded role in the region.

[20] Whilst some increase in presence in Rotorua was recognised as necessary, the location choices seen as warranting serious consideration were to remain in

Whakatane or move to Tauranga. It is clear from the report that no other centre in the region was realistically in contention. If a move was to be made, the sensible and realistic option was to move to the largest and ever expanding urban centre in the region.

[21] In December 2006, Mr Bayfield reported to the respondent recommending it make an "in principle" decision to relocate (the Bayfield report). This report contained comprehensive comment on the Deloitte report and set out a proposed plan of action, including the "in principle" adoption of the Deloitte report.

[22] The Bayfield report makes it clear that the Deloitte report was not a "blueprint for any relocation or retention project and should not be construed as setting out what changes will occur".

[23] On 7 December 2006, the respondent resolved that it supported the key recommendations in the Deloitte report and agreed in principle that the head office should be relocated to Tauranga, subject to further detailed investigative work on costs and accommodation. The Deloitte report, as well as the report Mr Bayfield prepared for the 7 December 2006 meeting, were subsequently published on the respondent's website.

[24] On 31 January 2007, the respondent had a workshop with Whakatane District Council representatives at which a formal presentation of the relocation question was presented. The respondent requested its staff to provide information on the effect of relocating the headquarters or the respondent's ability to perform its function.

[25] In February 2007 a separate independent market economics report was obtained on the potential positive and negative economic impacts likely to result from the relocation of the headquarters. Then later that month Deloitte conducted socio-economic interviews with representatives from various interest groups in Whakatane. Also during February, councillors of the respondent met with members of the community and local authority members to discuss the issues raised in the

Deloitte report. These discussions included the respondent's councillors meeting with local Iwi.

[26] On 8 March 2007, Deloitte released a social impact report. Then on 15 March 2007, there was a public release of a statement of proposal and proposed amendments to the respondent's 10 year plan. The proposal recommended moving the headquarters to Tauranga, including 130 staff positions. This action was taken because by then the respondent had realised that a decision to move its headquarters away from Whakatane was a decision that needed to be potentially provided for in the respondent's 10 year plan.

[27] Between 15 March 2007 to 2 May 2007, persons having an interest in making submissions on the question of the location of the respondent's headquarters were given the opportunity to make submissions in writing. From 21 May to 24 May and on 31 May and 1 June 2007 there were meetings at which the respondent heard and deliberated on submissions in relation to the decision on whether or not to relocate its headquarters. The decision to relocate was effectively taken on 1 June 2007 when the respondent decided to amend its 10 year plan to provide for the relocation of its headquarters. Then on 14 June 2007, the actual decision to relocate was made.

[28] The conduct of the hearings between 21 May and 1 June 2007 has generated some controversy. Two councillors who voted in favour of relocation on 1 June 2007, Councillors Eru and Sherry, were absent for 3.5 days of the hearings. Another who also voted in favour of relocation, Councillor von Dadelszen, was absent from the hearings for periods of time.

[29] On 30 May 2007, the respondent received email legal advice that it would be preferable for councillors who had not been present at the consultation hearings (21 May to 24 May 2007) not to vote on the relocation decision. However, the advice was not followed. Chair Cronin has subsequently explained that he believed he had no authority to prevent those councillors who had not attended the public hearings and all the deliberation hearings from voting on the decision. On 30 May 2007, Chair Cronin circulated a memorandum to absentee councillors requiring them

to read submissions which they had been unable to hear presented and to read the minutes of the presentation hearing before voting.

[30] The resolution to relocate the headquarters ultimately arrived at was a modified version of the recommendation. The original recommendation had been to relocate its head office to Tauranga on the basis that 130 staff positions were transferred. The decision that was actually made involved relocation of the headquarters with approximately 100 staff positions to Tauranga by 30 June 2010.

Legislative scheme

[31] The respondent's decision to relocate its headquarters to Tauranga is a statutory power of decision that had to be exercised in accordance with the empowering legislation. An understanding of the legislative scheme is, therefore, the starting point for determining whether there are any judicially reviewable flaws in the decision process of the respondent.

[32] The preliminary provisions in Part 1 set out the Act's purposes. Whereas Part 6 of the Act deals specifically with planning, decision-making, and accountability.

[33] Section 3 of Part 1 states that the purpose of the Act is to provide for democratic and effective local government. Included within this stated purpose is a recognition of the need for accountability of local authorities to their communities and the importance of the role local authorities play in promoting the social, economic, environmental and cultural well-being of their communities. Section 4 expressly addresses the Treaty of Waitangi and recognises the need for local authorities to facilitate Mäori participation in local authority decision-making processes. I consider that the more specific provisions of Part 6 need to be understood in the context of the general purposes expressed in Part 1.

[34] Part 6 commences at s 75. This section outlines the purpose of Part 6 and is of a general explanatory nature. What follows afterwards is a series of provisions

that, because they do not operate in a stand-alone fashion, are best understood when viewed collectively.

[35] Section 76(1) sets out certain decision-making requirements that local authorities must meet. Their decisions must be made in accordance with such of the provisions of ss 77, 78, 80, 81, and 82 as are applicable. However, the decision on the applicability of those considerations is left to the local authority (s 76(2)). As will be seen later, this is a discretionary exercise that in the case of ss 77 and 78 has a process that is set out in s 79. In the case of ss 80, 81 and 82, there is no process and so here the decision on applicability is subject to the general administrative law requirement of reasonableness.

[36] Section 77 sets out certain specific requirements for decision-making. Section 78 imposes a requirement to consider community views and prescribes the process for doing so. Section 80 requires local authorities to identify inconsistent decisions. Section 81 covers contributions by Mäori to the decision-making. Section 82 sets out the principles of consultation to be applied to the decision-making process. Thus far, the statutory regime applying to decision-making by local authorities has the appearance of a comprehensive prescriptive regime.

[37] However, there are some unusual aspects to this regime that make it different from the usual prescriptive regime. The language in many of the parts of s 76, s 77 and s 78 has a prescriptive tone. However, this is contrasted by more discretionary language used in other parts. The obligation in s 76(1) to make decisions in accordance with ss 77, 78, 80, 81, and 82 rests on the local authority's decision on whether or not those sections are applicable to the decision to be made. In addition, s 76(2) makes the obligations derived from s 76(1) subject to s 79. The obligations to take into account the considerations in ss 77 and 78 are also dependent on a discretionary judgment made under s 79. Sections 77(2) and 78(4) expressly provide for this.

[38] Section 78(3) expressly provides that the consideration it requires to be given to community views does not require any process or procedure of consultation to be followed. Nor do any of the provisions in s 76 or s 77 expressly require consultation

processes to be followed. Furthermore, s 82(3) provides that subject to subss (4) and (5), the consultation principles in s 82(1) are to be applied at the discretion of the local authority. Section 82(4) sets out the criteria to which a local authority must have regard when making its discretionary judgment on the applicability of the s 82 consultation principles to the decision at hand. Section 82(5) provides that where other consultation requirements are imposed as well, they take precedence over the consultation principles in s 82. Hence, the applicability of the s 82 consultation principles to decisions that are subject to ss 76 to 79 turns on the discretionary choice of the decision-maker. Unless the particular decision is also subject to other separate statutory provisions expressly requiring consultation, there is no obligation to follow a consultation process when making decisions subject to ss 76 to 79.

[39] Section 79(1) gives a local authority the power to decide (in its discretion) whether the considerations in s 77 and s 78 are applicable to the decision at hand and extent to which this is so. A local authority must turn its mind to this question but it is then free to determine for itself the very nature of the s 77 and s 78 obligations. Though this freedom is not unfettered, s 79 sets out a process for how this is to be exercised.

[40] The practical result is as follows.

i) Under s 76(1) a local authority must first decide on the applicability of the provisions in ss 77, 78, 80, 81, and 82 to the particular decision to be made.

ii) Once it has identified which of those provisions are applicable, it must then determine under s 79 how it will achieve compliance with the requirements of the those provisions. Thus, if a local authority finds that s 77(1)(a) is applicable to making a particular decision, that section will require the local authority to seek to identify all reasonably practicable options for achievement of the decision's objective. But this will be so only once the local authority has reached a judgment under s 79(1) on how it will achieve compliance with s 77(1)(a),

including the extent to which it will identify and assess different options.

iii) How many reasonably practicable options are identified and how they are then assessed is for the local authority to decide. There are always going to be at least two options, since a decision not to act is also subject to Part 6 (s 76(4)). Consequently, there will always be a choice to be made between doing nothing and doing something. Provided the conclusion on the number of different options is reasonable and is exercised in accordance with the required process (s 79), it will stand.

iv) Any person wanting to challenge the substantive decision on the ground the local authority has failed to consider all reasonably practicable options will only be able to do so successfully if he or she can establish that the s 79(1) decision on the identification of the different options is flawed. Provided the s 79(1) decision is well founded, it will not be open to someone later on to contend that the substantive decision is flawed because there was no consideration of some other reasonably practicable option.

[41] Similarly, the extent to which the identified options must be assessed in terms of the requirements of s 77(1)(b)(i)-(iv) depends entirely on the judgment a local authority has reached under s 79(1)(b) as to the extent of this assessment. Once a local authority has in its discretion reached a conclusion under s 79(1)(b) on the extent of this assessment, no one can challenge the assessment that is undertaken on the ground it fails to meet the requirements of s 77(1)(b).

[42] The same goes for s 78. The obligation this section imposes, to consider the views and preferences of persons likely to be affected by, or to have an interest in the substantive decision, is subject to a balancing exercise under s 79(1)(a). This provision allows a local authority to balance compliance with s 78 against the

significance of the matters affected by the decision. Hence, the nature and extent of the consideration to be given to the community's views will depend on the judgment a local authority makes under s 79. There can be no complaint about a local authority's failure to comply with s 78 if what has been done accords with the local authority's s 79 judgment on how compliance with s 78 is to be achieved.

[43] Section 79(1)(b) prescribes relevant procedural considerations to take into account when making the necessary judgments under this section. To exercise the s 79 discretion properly, a local authority must identify matters it thinks will be affected by the substantive decision and their significance; then a local authority must identify the degree of compliance with ss 77 and 78 that is largely in proportion to those matters (s 79(1)(a)). The s 79 discretion must also be exercised in a way that has regard to the extent to which different options are to be identified and assessed (s 79(1)(b)(i)). A judgment also has to be made on the degree to which benefits and costs are to be quantified (s 79(1)(b)(ii)), the extent and detail of the information to be considered (s 79(1)(b)(iii)), and the extent and nature of any written record to be kept of the manner in which compliance with ss 77 and 78 is attained (s 79(1)(b)(iv)).

[44] When it comes to making a judgment under s 79(1), a local authority must have regard to the significance of all "relevant matters" (s 79(2)), as well as considering the principles set out in s 14 (s 79(2)(a)), the extent of the local authority's resources (s 79(2)(b)), and the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons (s 79(2)(c)). Section 14 sets out eight principles, some of which have sub-principles, which describe the role of local authorities and the expectations attendant on that role. Section 79(3) requires consideration to be given to other enactments, as well as the matters outlined in s 79(1) and (2).

[45] Section 76(3) identifies two classes of decisions. In the case of the first class, subject to the discretionary judgments made under s 79 on what form a particular decision-making process will take, the chosen process must promote compliance with s 76(1). That is, the chosen form must promote decision-making that accords

with such of the provisions of ss 77, 78, 80, 81, and 82 as the local authority has found to be applicable when exercising its discretion under s 79. The second class of decisions are those that are considered to be "significant" in terms of the Local Government Act. For those decisions, the chosen process (again subject to the discretionary choices in s 79 on compliance) must ensure that s 76(1) has been appropriately observed. That is, the chosen form must ensure there has been appropriate observation of those provisions of ss 77, 78, 80, 81, and 82 that the local authority has found to be applicable when exercising its discretion under s 79. This must be done before the decision is made.

Discussion

[46] In essence, the combined effect of ss 76, 77, 78 and 79 is to empower and require a local authority to create a procedural template for the substantive decision to be made. That the Act had this effect is alluded to in *Reid v Tararua District Council* HC WN CIV2003-454-615 8 November 2004, Ellen France J at [135]. The local authority is obliged to create the procedural template, but the form it takes is left to the local authority's discretion. The discretionary decision as to how the template is fashioned must be carried out in a way that ensures that the design of the procedural template is largely in proportion to the significance of the matters affected by the substantive decision. There is no express obligation to record the template separately in writing. Section 79(1)(a)(iv) authorises a local authority to decide the extent and nature of any written record it might choose to make. Whilst not obligatory, a written record of how a local authority discharged its s 79 obligations would be helpful for any subsequent assessment of that topic.

[47] This is a completely new approach to local authority decision-making. It departs from the usual ways in which statutory powers of decision are vested in decision-makers. In general, statutory powers of decision either prescribe the process to be followed or empower the decision-maker with discretion as to how the power is to be exercised. In the latter case, unless specific considerations are identified as relevant to the exercise of the discretionary power, its exercise is subject only to common law constraints of legality, reasonableness and procedural fairness. With this Act, the actual process for making a particular substantive decision is

partly prescribed. For the remainder, the Act obliges a local authority to determine its own process. But in doing so, the local authority must have regard to a series of prescriptive requirements.

[48] Once the appropriate procedural template is developed, a local authority can then turn to making its substantive decision. But in making its substantive decision, a local authority must adhere to the self-determined procedural template (s 76(1)).

[49] The statutory scheme I have outlined applies to local authority decisions in general. There is also a special category of decisions that trigger what is termed the "special consultative procedure". The requirements relating to this category of decisions are set out in ss 83 to 90. Sections 91 to 97 require the making of annual and long-term plans, which are a further specialised form of local authority decision-making. In addition to the specific requirements that apply to these special categories of decision, they must also meet the requirements ss 76, 77, 78, and 79 impose on general decision-making.

[50] The purpose of, and policy behind, this new legislative approach was to improve local authority decision-making and to ensure transparency in how local authority decision-making was carried out. The approach results in what becomes in effect performance standards for each decision, in that a local authority has to express its thoughts on how it will make its substantive decision before proceeding to do so.

[51] However, a consequence of the new approach is that the discretionary judgments a local authority makes on the procedural template to adopt for any substantive decision will themselves be statutory powers of decision that are susceptible to judicial review. As with the exercise of any other statutory discretion, those judgments will be subject to the usual requirements the common law imposes on such decisions. There is also the statutory requirement of proportionality that s 79(1)(a) introduces, as well as the relevant considerations expressed in s 79(1)(b), s 79(2) and s 79(3). It follows that any flaws at this level, either through having a poorly developed procedural template or through failing to develop one at all, will flow through to and affect the substantive decision.

[52] There are some things that the Act does not expressly provide for. First, the Act does not expressly set out how compliance with s 76 and its associated provisions is to be achieved. Secondly, the Act does not expressly provide for what will be the consequences of failure to comply with s 76 and its associated provisions. Consequently, it is left to the Court to decide whether or not what has been done in any given case is sufficient to constitute compliance, as well as the consequences of non-compliance.

[53] In terms of achieving compliance with s 76 and its associated provisions, the Act does not expressly require there to be a written record of the development of the procedural template (s 79(1)(iv)). Nonetheless, the applicant contended that the Act requires a local authority to specify in an express and transparent manner the judgments it has made under s 79 as to how it will comply with s 77 and s 78. I understand the submission to include the contention that the same applies for the judgments a local authority has made under s 76(1) on the applicability of the provisions in ss 77, 78, 80, 81, and 82 to the decision at hand. The respondent contended that those provisions require no expression of a procedural template for the substantive decision. It submitted that it is enough if compliance is manifest from the process followed in making the substantive decision.

[54] Section 79(1)(b)(iv) empowers a local authority to determine the extent and nature of any written record of its procedural template. This suggests to me that this provision gives a local authority the power to choose what it does in this regard. There are likely to be simple decisions for which the ss 76 and 79 judgments on the procedural template will be identifiable from the reasoning of the substantive decision. For example, a simple decision to sell or not to sell a block of land may not necessitate separate s 76 and s 79 judgments. An example of this type of decision is to be found in *Reid v Tararua District Council* (supra [46]). However, a more complex decision may benefit from the procedural template being separately articulated. There are so many considerations to take into account when reaching judgments under s 79 that, in the case of a complex substantive decision, the development of the procedural template and compliance with it may not be readily apparent from the reasons given for reaching the substantive decision.

[55] I do not accept the applicant's` submission that the Act requires a local authority to expressly record judgments it has made under s 79 on the application of ss 77 and 78. If Parliament had required this to be done, I consider it would have expressly so provided. The decisions a local authority is called on to make are so variable that there will be many occasions when it would be a nonsense to require a record of judgments made under s 79. A local authority's decision to sell some minor item of property is quite capable of manifesting the s 79 judgments on the application (if at all) of ss 77 and 78. But with some other decisions, their nature and complexity may obscure judgments that have been made under s 79 on the application of ss 77 and 78. For those decisions, it would be sensible to ensure a written record of the s 79 judgments, on the decision-making process to adopt, was kept. Without such a record, a local authority places its substantive decision-making at risk.

[56] Section 76(4) states that s 76(1) applies to every decision made by or on behalf of a local authority. Read literally, that would cover the embryonic thoughts that can lead to a decision affecting others. But I do not think that would be consistent with the scheme and purpose of the Act. It would be a nonsense if the Act was so far reaching. For a start it would inhibit exploratory discussions at the conceptual stage. It would be hard to imagine how any decision-making could be accomplished under such a regime. The new approach created in Part 6 was for the purpose of improving the quality and transparency of local authority decision-making. It was not to create a mire in which decision-making became bogged down with preliminary requirements that impeded good decision-making.

[57] The scheme and purpose of the Act suggests to me that the new approach introduced by Part 6 was intended to apply to decisions resulting in outcomes which may potentially affect the communities of a local authority. It would be consistent with this view if s 76 and its associated provisions were understood to engage at a time when the question to be answered by the substantive decision was being formalised. Since the nature and scope of a question can influence and even invite its answer, to exclude this stage from the Act's provisions would weaken its force. However, I cannot see why Parliament would intend that antecedent stages,

encompassing preliminary attempts at framing questions to be answered, should also be subject to the Act. To do so would not serve the Act's purpose.

[58] This view of when s 76 and its associated provisions take effect fits with the first stage consideration of s 78(2)(a): to consider the community's views at the time when the problems and objectives related to the matter are defined. This view also fits with the fact that all the other considerations in ss 77 and 78 relate to later stages in the decision-making process than those that are covered in s 78(2)(a). If Parliament had intended that the stages leading up to formalising the question to be answered by the substantive decision should also be subject to s 76 and its associated provisions, I would have expected to find some indication to that effect in the Act. However, there is none to be found. I conclude, therefore, that those provisions take effect from the time the question for decision is formalised.

[59] In the course of the hearing, the applicant narrowed the focus of its complaint about non-compliance with the required statutory process to what it referred to as the first two stages of the decision-making process. These correlated with the stages identified in s 78(2)(a) and (b); that is the stage at which the problems and objectives related to the matter are defined and the stage at which the options that may be reasonably practicable options of achieving an objective are identified. The applicant accepted that in terms of the first category of its grounds of review (failure to follow required statutory process and failure to take into account relevant mandatory considerations), the evidence showed there could be no complaint about the latter stages of the process, which included the use of the special consultative procedure in ss 83 to 89, as well as an amendment to the respondent's long term plan.

[60] As I understand the applicant's submission, the failure was twofold: first a failure to take the steps required of it for the first and second stage of the decision-making process; and secondly, a failure to record having done so. The failure to follow the proper process being evidenced from the absence of any record.

[61] The failures at the first and second stage of the substantive decision-making process were said to be incapable of cure through proper compliance with the latter

stages of this process. By then, the applicant contended, the dye was caste and the scope of the matter to be decided had become unduly narrowed by the earlier procedural failure.

[62] The respondent rejected the need for a written record and maintained that provided the evidence revealed, either expressly or by implication, there was appropriate compliance with the Act's requirements, (which need be no more than accidental), that was enough. In this regard, the respondent relied upon *Reid* for support. At [148] of *Reid*, Ellen France J accepted that accidental compliance with s 77, s 78 and s 79 would suffice. Furthermore, the respondent did not accept that the decision-making process necessarily followed sequential stages. It considered that process could operate as a matrix, which I take to mean that certain stages could occur at the same time or overlap each other.

[63] I have already found that the Act imposes no legal requirement to record in writing the manner in which compliance with ss 76, 77, 78, and 79 is achieved. I will, therefore, concentrate on the question of the type of compliance the Act requires and whether there was the necessary compliance in this case.

[64] The evidence shows that during March 2006 and April 2006, the respondent was investigating its present and future accommodation needs in the context of how best it could deliver its services to the region in the light of its newly expanded role. This entailed it embarking on an information gathering exercise for the purpose of seeing if there was a question to be answered. To do so adequately, it decided to engage private consultants. The respondent's actions from March 2006 through to April 2006, including the engagement of Deloitte to prepare a report, can be viewed as being actions taken to assist the respondent to determine if there was a question to be answered. I do not find, therefore, that this activity was subject to the Act's requirements. I also find that the respondent's actions between April 2006 and up to November 2006, when the Deloitte report was published, can be similarly characterised. During this period the respondent was doing no more than to gather information. Until it was fully informed, it was unable to be sure there was a question to be decided, yet alone know how best to frame it.

[65] On 7 December 2006, with receipt of the Deloitte report, as well as the Bayfield report, the respondent was equipped to frame the question for it to answer. Only then could it proceed with defining the problems and objectives it faced in relation to its accommodation. Once the question was framed, it was then for the respondent to decide the procedural template it would follow to answer the question and then to proceed to do so in accordance with the template it had developed.

[66] The question could have taken a variety of forms. It could have been an open question of where the headquarters were best located. Alternatively, it could have been confined to questioning whether the respondent should remain in its existing headquarters or move to another specified location. Provided it followed the required process and made appropriate judgments under s 79, as well as considered the other matters required by s 76 and its associated provisions, the shape the question took was a matter for the respondent to determine.

[67] The applicant contends that the respondent's 7 December 2006 decision to accept the Deloitte recommendation in principle was premature and not in accordance with the statutory process. The applicant argues that by 7 December 2006, the defendant's decision-making process was at the end of the stage at which the respondent was obliged to identify all reasonably practicable options. Furthermore, that instead of ensuring all reasonably practicable options were identified and giving consideration to community views, the respondent jumped ahead to a later stage of the statutory processes when it made its "in principle" decision to accept the Deloitte recommendation. The result, the applicant contends, is that flaws in what the applicant asserts to be the first two stages of the decision-making process have rendered the final outcome invalid.

[68] The respondent contends that what is described in its records as an "in principle" decision is not a decision in terms of s 78 at all. It says the adoption of an "in principle" view that relocation of the headquarters was the best thing to do signified no more than this being a "work in progress", which did not come to a conclusion until March 2007. Hence, according to the respondent, it was not until March 2007 that it was obliged to identify the reasonably practical options available to it.

[69] I consider that the respondent's receipt of the Deloitte report and the Bayfield report on 7 December 2006, with its suggestion that a move to Tauranga would best enable the respondent to carry out its statutory role, coincides with the time at which the respondent, in terms of s 78(2)(a), should have been defining the problems and objectives related to the ultimate decision to be made. However, the applicant argues that by 7 December 2006, the process had reached the end of s 78(2)(b). I do not accept that view. On 7 December 2006 the respondent's decision-making process had crystallised stage one (s 78(2)(a)) only, and from there on forward began to move into stage two (s 78(2)(b)) of the process. It was the receipt of the Deloitte report and the Bayfield report which left the respondent well equipped to reach a view on what were the problems and objectives surrounding the relocation of its headquarters. Until those reports were received, the respondent did not have sufficient information to be able to identify the problems and objectives related to the question of where its headquarters should be located to ensure best delivery of services to the region. It did not even know if the location of its headquarters had any bearing on its service delivery. It might have thought that was so but, until the Deloitte and Bayfield reports were received, it could not have known there was a proper foundation for thinking that. This is why I do not accept the applicant's argument that 7 December 2006 signifies the end of the stage at which the respondent should have been identifying the reasonably practicable options or considering the views of the community in relation to its choice of such options.

[70] Since I see 7 December 2006 as a point in time signifying the end of stage one in terms of s 78(2), this was also the time to give consideration to the community's views in accordance with s 78(2)(a).

[71] As at 7 December 2006, there is no evidence that the respondent expressly formed a decision-making template. However, provided the existence of some such template can be inferred from what occurred, I see no reason why that should not be sufficient to comply with the requirements of s 76 and its associated provisions. There is nothing in the legislation to suggest otherwise. Moreover, the express provision in s 79(1)(b)(iv) for any written record of the decision-making process to be at the discretion of a local authority suggests to me that Parliament recognised

there would be occasions when the decision-making template would be implicitly present in a decision, rather than separately expressed.

[72] The view I have taken of s 76 and its associated provisions accords with that applied in *Reid v Tararua District Council* (supra [46]).

[73] Section 79 empowered the respondent to determine that at stage one of the decision-making process, it was unnecessary to consider community views, or that the consideration of such views could be achieved through the information gathering process Deloitte and Mr Bayfield had carried out as part of the preparation of their reports. Part of the brief to Deloitte was to provide recommendations on cost and impact on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations, and the implementation of the identified changes. This information, coupled with the knowledge the respondent's councillors would have of the community they represented, could have provided them with sufficient information on the community's views. The type of consideration s 78(2)(a) requires is not to be equated with consultation. Section 78(3) expressly provides that the section does not require consultation. How consideration of community views was to be achieved, if at all, was a matter for the respondents to determine.

[74] It is implicit from the instructions given to Deloitte that the respondent had determined that the consideration it would give to the views and preferences of the community was to be achieved through the enquiries Deloitte would make for the purpose of making the abovementioned recommendations, coupled with the knowledge of the respondent's councillors.

[75] The very purpose of instructing Deloitte to gather information on the impact on cost on human resources, property acquisition and disposal, socio-economic costs on communities affected, ongoing benefits and pay back periods of recommendations seems to me to be in part to enable the respondent to give some consideration to the community's views. As part of the preparation of the report in mid-October 2006, Deloitte interviewed the Mayors and Chief Executives of the territorial authorities in the respondent's region. Those interviews would have

enabled Deloitte to obtain a view on the impact of the location of the respondent's headquarters on the community, as well as an opportunity to assess the view the community held on the topic.

[76] I see no reason why the respondent's consideration of community views at this early stage of the decision-making process could not be done as a matter of inference from the reports it received. The choice of performing the s 78(2)(a) consideration in this way was open to the respondent. There is nothing to suggest that this approach was out of proportion to the task at hand.

[77] The applicant drew my attention to a document of the respondent titled "Checklist For Decision-Making Under the Local Government Act 2002" dated 28 November 2006. The document was created at the time the Deloitte report was received and about to be presented to the respondent. The document notes at page 2, item 11 that the respondent does not hold information about the community's views on the matter. The applicant contends that this is an acknowledgement of the respondent that it did not have information of the community's views and, therefore, it could not discharge it obligations under s 78(2). The report has been prepared by an officer of the respondent and approved by the Chief Executive.

[78] The respondent contends that the section, in the form in which the statement is made, relates to assessing the significance of the decision in terms of the Act's requirements for "significant" decisions and that the import of the statement should not be taken to extend beyond any such assessment.

[79] The checklist is perplexing. The officer who completed the form has filled in the check boxes with the result the location decision is seen as having medium significance; not being controversial and having only a minor or no impact on residents and ratepayers. These are mistaken assessments. The decision was later recognised as a significant decision which entailed it being approached as a significant decision in terms of the Act's requirements for decisions of that type.

[80] The decision to move the respondent's headquarters would have a considerable impact on residents and ratepayers as it was driven by the respondent's

concern to ensure it was performing well. How well the respondent delivered its services to the region was a major concern for residents and ratepayers.

[81] When it comes to assessing what information the respondent had about the community's views as at 7 December 2006, there was information in the Deloitte report that would assist the respondent's councillors to form a view on this topic. This report would have included Deloitte's distillation of the information it received when it interviewed the Mayors and Chief Executives of the local territorial authorities. Furthermore, the Bayfield report of 1 December 2006 specifically drew attention to the need to engage with "stakeholders" in the region in regard to considering the proposed move. The recognition of the need to engage with stakeholders was a form of consideration of the community's views. It needs to be remembered that this was very early on in the decision-making process. Part of considering the community views must entail the recognition of the need for engagement with the community. Until the engagement takes place, community views can only be inferred. Furthermore, until the decision takes some shape and form, it is difficult to see how engagement with the stakeholders, to obtain their views, can occur. It seems, therefore, that some of the answers in the checklist are at odds with other evidence. I do not find the checklist a reliable indicator of what was known to the respondent at that time.

[82] It is for the applicant to show on the balance of probabilities that, at the stage when the problems and objectives of the matter in issue are defined (s 78(2)(a)), the respondent has failed to comply with ss 78 and 79. Certainly there is no evidence of the respondent expressly deciding (under s 79) on whether or not to comply with s 78(2)(a) and, if so, how that compliance would be achieved. But when the conduct of the respondent at this stage of the decision-making process is considered, there is nothing about it that is at odds with the requirements in ss 78 and 79.

[83] Once the Deloitte and Bayfield reports were received, the adoption in principle of the recommendation to move the headquarters fits with the commencement of the stage when the respondent could begin identifying the reasonably practicable options that would enable the identified problems and objectives to be achieved. This stage raises issues regarding s 78(2)(b) and s 77.

The view I have taken of the "in principle" decision to adopt the Deloitte recommendation means that I regard this conduct as signifying a work in progress, rather than a finite decision which represents a particular stage in the decision-making process.

[84] Section 78(2)(b) required the respondent to give consideration to the views of the community. This of course was subject to judgments made under s 79 on the extent to which, if at all, there would be compliance with s 78(2)(b) at this stage of the overall decision-making process. Section 77 required the respondent to seek to identify all reasonably practicable options for the achievement of the objective of the decision it was to make. This section was also subject to s 79 judgments on whether there should be compliance with s 77 and, if so, how that would be achieved.

[85] The respondent contends that the process of identifying the reasonably practicable options to achieve the identified objectives ran until 15 March 2007. This is because it took until 15 March 2007 to obtain all the necessary and relevant information for the respondent to be able to complete stage two of the process and to embark on stage three, stage three being the stage at which the reasonably practicable options are assessed and proposals developed. Until 15 March 2007, the respondent argues that there was insufficient information to enable a proper assessment of the merits of the "in principle" view that a move to Tauranga was best.

[86] I have already rejected the applicant's contention that 7 December 2006 heralded the end of the stage at which the reasonably practicable options were to be identified (s 78(2)(b)). The evidence suggests to me that until March 2007, the respondent was in the process of gathering information that would enable it to reach a decision on where its headquarters should be located. I consider that regard to the requirements of ss 77 and 78 would have been an implicit part of this decision-making process.

[87] The evidence shows that from 7 December 2006 to March 2007, the defendant took significant steps to equip itself with further information to enable it to determine if the "in principle" decision to move its headquarters to Tauranga should be carried out. This culminated with a decision on 15 March 2007 to amend the

respondent's long-term plan to include a proposal to move the headquarters to Tauranga. This step was taken as the respondent had belatedly realised that a decision of this magnitude required inclusion in the long-term annual plan.

[88] The degree of engagement with the community between January 2007 and March 2007 demonstrates consideration was being given to the community's views. The affidavit evidence of Chair Cronin, Councillor Bennett and Chief Executive Mr Bayfield recounts numerous meetings the respondent had with members of the community, members and officials of local authorities within its region and local Iwi. The purpose of these meetings was to inform the community on the matter under consideration and to receive comments from the community on this topic. Whilst there is no evidence of the respondent expressly determining a template for this stage of its decision-making process, there is ample evidence to suggest to me that, in terms of s 78(2)(b), consideration was being given to the community's views.

[89] I now turn to consider if the decision-making process being followed at this time reveals that implicit or accidental consideration was given to the reasonably practicable options available to the respondent for its choice of the location of its headquarters. The choice of the reasonably practicable options available was for the respondent to make. Provided its choice accorded with s 79, it is not for the applicant to point to what it considers to be additional reasonably practicable options and assert that the respondent has omitted to consider them.

[90] Following receipt of the Deloitte report and the Bayfield report, the respondent's focus was on two possible locations for its headquarters: the existing location in Whakatane or Tauranga. None of the specialist reports the respondent had received from December 2006 onwards suggested that any other location in the region was tenable. In such circumstances, I consider that the respondent has implicitly determined that the only reasonably practicable options available for it to consider for its headquarters location were Whakatane or Tauranga. The information the respondent was gathering between December 2006 and March 2007 was sufficient to inform it of the matters set out in s 77(1)(b). I also consider that the evidence is consistent with the respondent seeking to reach a decision in a manner that took account of the matters in s 77(1)(b). The entire purpose of considering the

move of the headquarters was to enable the respondent to perform its functions and responsibilities better. The achievement of that aim would encompass the matters set out in s 77(1)(b).

[91] It follows that I find the respondent's decision to move its headquarters to Tauranga is a decision that complies with s 76 and its associated provisions. The applicant's challenge on the ground there was no compliance with the required statutory processes has failed. As regards the issues for determination in this case, the finding I have reached means that:

a) As regards the first issue, I consider that it is enough if compliance with s 76 and its associated provisions is achieved by implication or accidentally.

b) As regards the second issue, I consider that at the point when the identification of problems and objectives was undertaken, the initial approach was to consider how the respondent was to carry out the new functions it was to undertake but that after 7 December 2006, the respondent moved to the second stage of identifying the reasonably practicable options to enable it to achieve its objectives, and these became focused on the location of the respondent's headquarters.

c) As regards the third issue, I consider the end point of what may be described as stage two of the decision-making process (s 78(2)(b)) was not reached until March 2007.

d) As regards the fourth issue, I consider the respondent gave proper consideration at stage one and stage two of the decision-making process to community views on the location of its head office.

[92] Before turning to the next ground of review, I propose, as an alternative to the conclusions I have reached, to consider the legal consequences of the respondent's decision not complying with s 76 and its associated provisions.

[93] In relation to the consequences of non-compliance with the statutory scheme, the concepts of mandatory and directory effect can provide some assistance on how to interpret this legislation. In *Petch v Gurney (Inspector of Taxes)* [1994] 3 All ER 731 at 736, Millet LJ said:

> The difficulty (in deciding whether a statutory requirement is mandatory or directory) arises from the common practice of the legislature of stating that something "shall" be done (which means it "must" be done) without stating what are to be the consequences if it is not done.

Bennion On Statutory Interpretation at 46 states that:

> [I]t would be draconian to hold that in every case failure to comply with the relevant requirement invalidates the thing to be done. So the courts' answer, where the consequences of breach are not spelt out in the statute, has been to devise a distinction between mandatory and directory duties.

[94] The unusual nature of s 76 and its associated provisions make it difficult to determine the consequences of non-compliance. The general principle is that non-compliance with mandatory considerations will invalidate a decision: see *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 183. But statutory considerations with that legal effect are truly mandatory in that Parliament prescribes them and intends that decision-makers have no choice but to take them into account. The considerations in s 76 and its associated provisions have the appearance of being mandatory but in many respects Parliament has given the decision-maker a choice as to their application in any particular case. The inclusion of a discretionary choice of this nature undermines the considerations' otherwise mandatory character.

[95] When the language of s 76, and its associated provisions, is contrasted with the latter parts of Part 6, which apply to the special category of decisions affected by ss 83 to 97, it is notable that those subsequent sections do not permit a decision-maker any choice over when they will apply and, if so, how they will be applied. The prescriptive language in ss 83 to 97 is not tempered by other expressions that resemble the discretionary authority which is also to be found in ss 76 or 79.

[96] Section 76(3)(a) enjoins a local authority to "ensure" its decision-making processes "promote compliance" with s 76(1). Being required to promote compliance is not the same as being compelled to achieve it. Section 79(1) makes it

the "responsibility" of local authorities to make discretionary judgments on how to achieve compliance with ss 77 and 78. Being made responsible for achieving compliance is also not the same as being compelled to achieve it. The use of such expressions is a departure from the usual expressions that are recognised to result in decisions being set aside for non-compliance. The language of s 76(1)(a) and s 79(1) suggests to me that the purpose of those sections is to set performance standards for achievement, rather than to impose mandatory requirements with invalidation being the consequence of non-compliance.

[97] In the case of "significant decisions", s 76(3)(b) states that a local authority must ensure that before the decision is made, s 76(1) has been "appropriately observed". The use of the words "must ensure", "before the decision is made" and "appropriately observed" is stronger language than in subs 3(a) of s 76. These words have the ring of mandatory requirements. That Parliament has chosen to use different language for "significant" and "non-significant" decisions suggests to me that Parliament was setting a stricter standard for non-compliance with s 76(3) in the case of significant decisions. Nonetheless, it is not clear to me that Parliament intended decisions that fall within the scope of s 76(3)(b) to be subject to mandatory requirements which will cause them to be invalidated if there is non compliance with the statutory scheme.

[98] The words "must ensure" suggest to me a directive to local authorities which requires them to make certain or to make sure their significant decisions comply with s 76(3). However, Parliament then uses the words "appropriately observed". The difference here is the use of the word "appropriate". This has the meaning of "right" or "suitable" [Collins Dictionary] or "fitting" [New Shorter Oxford Dictionary]. The New Shorter Oxford Dictionary defines "appropriately" as "fittingly". Whether something is appropriately observed requires a value judgment. Unlike a requirement for observation s*impliciter*, a requirement for appropriate observation is not an absolute. Its presence or absence cannot be measured in black and white terms. Any objective assessment of whether or not something has been appropriately observed will involve an element of reasonableness. Something may be appropriately observed in one context but not in another. Once this degree of relativity is introduced into s 76(3)(b), it becomes difficult to read the provision as

imposing the type of consequences that administrative law has traditionally attached to a failure to follow statutory provisions having a mandatory character. For the consequences of non-compliance to have the effect of invalidating a decision, I consider the statutory language must be expressed in clear terms. This is because such consequences carry serious repercussions. I am not able, therefore, to read s 76(3)(b) as having the effect of imposing mandatory compliance requirements on local authority decision-making under s 76 and its associated provisions. It follows that if I am wrong on finding that the respondent has implicitly complied with s 76 and its associated provisions, or that implicit compliance is sufficient to meet the provisions' requirements, nonetheless, I do not consider non-compliance will invalidate the decision.

[99] When the decision in this case is looked at overall, it is apparent that in terms of compliance with s 76 and its associated provisions (ss 77 to 82), the steps taken after 17 March 2007 can be treated as beyond criticism as there has been no challenge to those steps. This part of the decision-making process coincides with ss 78(2)(c) and (d). From 7 December 2006 to 17 March 2007 (being a period that fits with s 78(2)(b)), there is clear evidence to show there were a number of occasions on which the respondent, through its members and officials, engaged with the community for the purpose of obtaining community views on the appropriate location for its headquarters. All the expert advice and information the respondent received showed there to be only two viable choices for the location of its headquarters. This in my view demonstrates that it was reasonable for the respondent to approach the question on the basis there were only two reasonably practicable options available for it to choose from. Such an approach cannot be said to be unreasonable in the sense that term is understood in administrative law. On the information available, there is nothing to support the view that no reasonable decision-maker would have approached the location question as a choice between staying at the existing location or moving to the largest and growing urban centre in the region. Nor can taking such an approach be said to be out of proportion to the significance of the decision to be made. I do not consider, therefore, that what occurred over this period was inconsistent with the requirements of s 77.

[100] On 7 December 2006 when the respondent received the Deloitte and Bayfield reports and decided to accept the Deloitte report's recommendations in principle (being a time that fits with s 78(2)(a)), there was no reason why the respondent could not consider the community's views through inferences drawn from the information it received in the Deloitte and Bayfield reports and from the knowledge its members held, as elected representatives of the community. At this early stage of the decision-making process, that type of regard to the community's view can be viewed as being in proportion to the matter then under consideration. The discretion in s 79 contemplates that different types of consideration may be given to community views at different stages of the decision-making process. There is nothing in s 78 to suggest that the consideration to be given to community views must be of the same value throughout the decision-making process. Moreover, s 79 would permit a decision to be made that no such consideration was necessary at this stage of the decision-making process.

[101] It follows that, even if the failure to articulate the decision-making template for the first two stages of the decision does not mean there has been non-compliance with ss 77 and 78(2)(a) and (b), I consider that, in terms of s 76(3)(b), when looked at overall, the actions the respondent took in the lead up to the final decision in June 2007 were enough to ensure that s 76(1) had been appropriately observed.

[102] I will now deal separately with the allegation that there has been a failure under ss 4, 14(1)(d) and 81 to discharge properly the obligations those provisions impose in relation to Mäori. In this regard, it is alleged that Mäori were given no opportunity to contribute to stages one and two of the decision-making process. It is also alleged that at all stages of the decision-making process, the respondent failed to comply with its policy in its "LTCCP on Development of Mäori capacity to contribute to the decision-making process". The applicant contends that at stages one and two of the decision-making process, there were no discussions with Mäori. This view of events turns on the applicant's view of when these two stages in the decision-making process came to an end. I have found that stage one of the process (s 78(2)(a)) ended on 7 December 2006. At this time there had been no discussions with Mäori. However, there is nothing in ss 4, 14 or 81 of the Act that would require

discussions to have been carried out with Mäori at stage one of the decision-making process.

[103] By stage two of that process (from 7 December 2006 to 17 March 2007), there were discussions with Mäori taking place. The evidence of Councillor Bennett, Councillor Eru and Bruce Murray (the respondent's Group Manager, People and Partnerships) outlines the steps the respondent took to involve Mäori in the decision-making process. That evidence shows that during stage two (7 December 2006 to 17 March 2007), the respondent actively sought to engage with Mäori to obtain their views on the relocation decision.

[104] For completeness, I have considered s 77(1)(c) and whether that provision has any application to the respondent's decision. I do not consider that this provision impacts on a decision of the type that the respondent was making.

[105] Sections 4, 14 and 81 do not require separate consideration to be given to Mäori at a series of different stages in the decision-making process. When considering all the steps the respondent took to reach its decision on the re-location of its headquarters, I consider that it discharged those obligations to Mäori which the Act has imposed on the respondent.

Breach of legitimate expectations

[106] The next ground of review is the allegation that the respondent has breached legitimate expectations contained in the Bay of Plenty Local Government Triennial Agreement. The parties to this agreement are the applicant, the respondent, Kawerau District Council, Opotiki District Council, Rotorua District Council, Taupo District Council, Tauranga District Council and Western Bay of Plenty District Council. The agreement was entered into in fulfilment of the obligations s 15 of the Local Government Act imposes on local and territorial authorities. There are statements in the agreement to the effect that:

> The parties would, where practicable, communicate and consult openly, honestly and respectfully and proactively (no surprises).

Also, that the parties would ensure each had early notification of and participation in significant decisions that may affect them and their communities. The applicant contends that the respondent's actions have breached the legitimate expectations inherent in this agreement. The alleged failure lies in the respondent not placing the possible relocation of its head office to Tauranga on the agenda of a "Mayors and Chairs" meeting until 19 April 2007, which was after the respondent had released its statement of proposal of 15 March 2007.

[107] My reading of the agreement is that it sets out protocols the signatories will follow during its currency. Those protocols are designed to provide a means by which the signatories can work together for the betterment of the Bay of Plenty region. The agreement envisages some consultation before significant decisions are made by any one of the signatories. Its intent seems to me to be to encourage the signatories to work collaboratively where possible for the good of their region. The agreement contains statements of intent and of best practice. I consider it is akin to a policy statement providing no more than administrative reassurance to the signatories and the communities they serve. There is nothing that I can see in the agreement that could amount to an enforceable legitimate expectation that adds to the legislative requirements imposed on the respondent. In particular, I see nothing in the agreement that would require notice to be given at a Mayors and Chairs meeting prior to public notice of a proposed change as provided for in the 15 March 2007 statement of proposal. My understanding of the agreement's references to consultation is that they do no more than to recognise the statutory consultation requirements the Act imposes on the signatories.

[108] The law of legitimate expectations is derived from the duty to act fairly. It developed as a requirement that assurances given, or regular practices followed, would not be departed from without affording persons adversely affected an opportunity to be heard. In this form the law of legitimate expectation has created a common law foundation for a duty to consult. Failure to follow the assurances given, or changes of practice without providing those affected with an opportunity to be heard, could result in the decision reached being set aside. Generally, the persons claiming that they were adversely affected had to establish the decision affecting them had deprived them of a right, interest or expectation of a benefit. The law of

legitimate expectations recognised that such persons were entitled to be consulted before being deprived in that way.

[109] In this case the only benefit which the applicant claims deprivation of is the benefit of early consultation, early meaning some time before the statement of proposal was issued in March 2007. However, the respondent's consultation obligations are imposed by legislation. In order for the agreement to impose justifiable consultation obligations that were additional to those imposed under the Act, very clear language to that effect would be required. The terms of the agreement do not have that effect. I find, therefore, that in terms of issue (f) of the issues for determination, the Triennial Agreement did not give the applicant a justifiable legitimate expectation of consultation that extended beyond the statutory duties of consultation which the Act imposed. It follows that the applicant has not made out this ground of review.

"Closed minds"/failure to consult properly

[110] The grounds of review under this category are focused on what occurred in the later stages of the decision-making process (after 17 March 2007) when the respondent's members and Chair attended the public consultation meetings that were held and subsequently when the respondent came to make its final decision.

[111] The allegations in relation to a breach of the duty to consult are that the absence of certain members of the respondent from the public hearings for the purpose of consultation means that the respondent did not properly discharge its obligations to consult. The issue here being whether their absences have precluded proper consultation. Flowing from this is the secondary issue of whether those persons who were absent from the public consultation hearings should have voted on the final decision. The same absences are also relied upon as evidence to prove certain members of the respondent had already closed their minds to the outcome, with the result the respondent's final decision on where its headquarters should be located is tainted with predetermination and bias and is, therefore, invalid. There is also the wider issue of whether those members of the respondent who voted to move the headquarters to Tauranga did so as a result of predetermination and bias. Finally

there is the issue of whether those members of the respondent who were absent from part of the deliberation hearings should have voted on the final decision. The determination of these issues involves the application of similar legal principles and so there is a degree of overlap among them.

[112] I will deal first with the allegations of bias and predetermination. This type of challenge to the decisions of local authorities under the previous legislation required a plaintiff to show actual predetermination or bias, rather than apparent predetermination or bias. A helpful authority on this point is *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 at 47. Tipping J said:

> What in my judgment is required is no more and no less than this. The full council must come to the meeting at which the s 230 resolution is to be considered with an open mind as to whether the land in question should be sold. The councillors must be prepared to give a fair and open-minded hearing to anyone who appears at the meeting and submits for whatever reason that the land should not be sold. If it could be shown that the council had not approached the meeting on that basis, then the resolution to sell would prima facie be invalid and, subject to any relevant discretionary matters, liable to review. What I am saying is that in my judgment, in the particular statutory and factual setting with which this case is concerned, anyone challenging a s 230 resolution on the basis of predetermination or fettering of discretion is required to show actual predetermination or fettering rather than the appearance of the same.

Tipping J drew support for the conclusion he reached from a consideration of earlier cases on local government and the legal position with Ministers of the Crown and central government. In that regard Tipping J at p 47 adopted a test applied by Richardson J in *CREEDNZ Inc v Governor-General* (supra [95)] which equated predetermination with being "irretrievably committed" to a particular position. This approach sets a high threshold for proving predetermination or bias in relation to decisions of the executive or local authorities. There is nothing in the current legislation that would cause me to think that the legal test for predetermination and bias has been altered. Accordingly, I propose to approach this case on the same basis as was done in *Travis Holdings*.

[113] I propose to make some general comments on the evidence before dealing with specific allegations of bias and predetermination made against individual

members of the respondent. In June 2007 Chair Cronin and eight of the respondent's councillors voted for moving the headquarters to Tauranga. Five councillors voted against the move.

[114] In their affidavit evidence, Chair Cronin and the eight councillors who voted in favour of moving the headquarters to Tauranga denied they were biased or had predetermined their decision. Each of them contended that during the deliberations on 31 May and 1 June 2007, they had approached the relocation decision with an open mind, prepared to consider every sensible option, but, having done so, each of them concluded that moving the respondent's headquarters to Tauranga was the best decision.

[115] The report of the meeting on 31 May 2007 records Chair Cronin addressing the councillors and on the need to approach the decision they were about to undertake with an open mind and without bias. He directed them to be prepared to listen and to consider all the submissions that had been made to the respondent with an open mind. The deliberations ran over from 31 May 2007 to 1 June 2007. Because of the factual allegations of bias made against certain councillors, limited cross-examination was permitted. When under cross-examination, none of the persons who had voted in favour of the move retreated from the assertions in their evidence in chief of having had a fair and open-minded approach to the relocation decision. There was nothing in the evidence which I heard and read that would cause me to conclude that the persons who voted in favour of the relocation of the headquarters did so simply because they were "irretrievably committed" to the idea of relocating the headquarters.

[116] The evidence the applicant relied upon to prove predetermination or bias was provided by the councillors who had opposed the relocation decision or other persons in the community opposed to that decision. Their evidence, either referred to passing comments from the persons alleged to be predetermined, or offered what was in essence opinion evidence to prove the presence of predetermination or bias. Their evidence also reveals an assumption that Councillors Eru, Sherry and von Dadelszen, who were absent for part of the public consultation hearings (in the case of Councillors Eru and Sherry their absences were for 3.5 of the 4 days of

hearings), had already reached a predetermined view and should not, therefore, have participated in the deliberations. There were other comments, which in essence debated the wisdom of the decision to relocate and which suggested alternative ways in which the decision could have been approached.

[117] Proof of actual predetermination requires evidence capable of objective assessment. The opinions or value judgments of persons who have participated in the decision-making process but who have taken a different view from those alleged to have pre-determined their decision are not helpful. This type of evidence is not reliable. I have no doubt that the applicant's witnesses firmly believe their assessment of what occurred is correct. But the account they give does not go far enough to provide evidence that those who voted for relocation were irretrievably committed to that certain outcome. With decisions of this type, it is to be expected that members of regional councils will hold certain views and express those views from time to time. There is nothing objectionable about councillors holding preliminary or in principle views on decisions, provided when it comes to making the actual decision, they do so with a mind open to other alternatives. Indeed it is always likely to be the case that members of local authorities will hold particular views on certain issues. The effect of local body democracy is that persons are voted into office holding certain views. What is important is that when they come to make decisions, they follow a thought process that recognises a change of mind may eventuate. I have seen no evidence that would suggest to me that those who voted for relocation of the headquarters failed to have this recognition.

[118] In *Travis Holdings Ltd* there was evidence that, prior to reaching their final decision, councillors had adopted stances that could be taken to suggest they favoured a particular course of action. Nonetheless, the Court accepted that preliminary steps taken towards passing a particular resolution, whilst perhaps problematic under an appearance of bias test, would not be for an actual bias test. The Court recognised that constraint on a council conducting preliminary steps towards passing a resolution on the ground those steps could indicate bias would make life "extremely difficult for council staff and sub-committees". The Court was of the view that:

> There will have been some exploratory discussions as to potential purchasers, what they may wish to do with the land and so on, and I am very mindful of the fact that endless difficulties, both legal and administrative, could ensue if the threshold for intervention was set at the level of an appearance of predetermination. In my judgment when requiring a local body to pass a resolution under s 230, Parliament cannot have intended the sort of delicate footwork that would be necessary if the test were appearance of predetermination.

I think the same comments can be applied to what has occurred in this case.

[119] Having made these general comments on the evidence, I will deal with evidence of predetermination as it relates to individual members of the respondent.

[120] There was evidence from the applicant's witnesses of occasions where Chair Cronin is alleged to have made remarks which, the applicant contends, evidence of predetermination on the part of Chair Cronin. Before the 2004 elections, Chair Cronin is alleged to have said he had the numbers to move. Shortly after the election in 2004, Chair Cronin is alleged to have held a meeting at his home with the newly elected councillors and to have presented them with a number of actions he wanted to see achieved in the three year term, one of these being relocation of the headquarters. Chair Cronin rejected having any such discussion with Mr Oppatt about his intention to move headquarters. At a meeting with a regional focus group in January 2007, Chair Cronin is alleged to have said words to the effect that his driving to meetings in Whakatane would soon be history. After the first day of deliberations on 31 May 2007 when the members of the respondent went to a restaurant in Whakatane, as they left the restaurant and were walking past the regional council building in Whakatane, Chair Cronin is alleged to have said:

> If they had sold us the land, the headquarters would be staying in Whakatane.

[121] When under cross-examination, Chair Cronin was challenged about a conversation he was alleged to have had with John Forbes, who is the Mayor of the Opotiki District Council. It was put to Chair Cronin that at a Christmas social event in 2006, Chair Cronin had essentially given Mayor Forbes a:

> Heads up from yourself that the headquarters was moving and he took the heads up to be a fait accompli this was going to happen.

Chair Cronin rejected this suggestion. Chair Cronin was then challenged on his alleged failure as chair of the regional council to direct councillors who had not been present during the consultation hearings to desist from voting. His response was that he had no authority to stop councillors who were entitled to vote on the issue from voting. He said that he had been in local authorities for the best part of 20 years and that, to his knowledge, there has never been a councillor excluded from annual plan, deliberations and submissions in that time, with the exception where there was a conflict of interest. His view was that he had no authority to prevent the councillors who had not fully participated by attending all the submission hearings and deliberations from participating in the decision. It was suggested to Chair Cronin that his mind was not open to persuasion and that he was determined to see the relocation of head office to Tauranga. His response was that he rejected that suggestion entirely and that when it came to making the decision, he had addressed the councillors, stating to them:

> It is important that within the process that the issues be with an open mind and without bias. It is important that councillors be prepared to listen and consider all the submissions with an open mind, however, that does not mean councillors may not have a working plan or views but that they are prepared to listen and consider the submissions with an open mind.

Further on, he said he addressed the council to the effect:

> As we move in to the debate deliberations, I will ask you if there are any other issues for consideration so as to ensure that the deliberations are both robust and within correct procedures.

Chair Cronin said he also attempted to ask all the councillors individually did they approach the process in that position.

[122] I have no reason to doubt Chair Cronin's evidence. The overall impression I have of all the allegations of predetermination, said to be supported by evidence of comments made prior to the final decision being made, which could suggest a particular view, do not take the matter far enough to establish the presence of actual predetermination.

[123] Councillor Eru attended a public consultation meeting in Rotorua. He did not attend the meetings in Tauranga or Whakatane. He had suffered a serious car

accident at the beginning of April 2007. He also had a cataract operation at Rotorua Hospital. In addition, his wife was ill. For these reasons, he did not attend three and a half days of the four days of consultation hearings. However, Councillor Eru said that he had the opportunity to read the submissions presented at those hearings and that Councillor Bennett had come to Rotorua to go over the oral submissions with him. He did not, however, listen to the audio record of any of the oral submissions. Councillor Eru was adamant under cross-examination that he had gone through all the written submissions and, with the help of Councillor Bennett, had gone through the oral submissions and council summaries of the submissions. Councillor Eru was unable to say what exactly had been sent to him, but he said that he had read everything that had been sent to him. In this regard Chair Cronin has said that he directed that all the relevant material be sent to the respondent's councillors.

[124] Councillor Eru accepted, when cross-examined, that the volume of material and the personal difficulties he was experiencing at the time through the health problems of himself and his wife would have made his role in the deliberation process difficult. It was put to him in cross-examination that at the council meeting in June, his mind was not open to consider anything other than a shift of head office to Tauranga. He rejected that. The reasons for Councillor Eru not attending all the meetings are acceptable. Furthermore, as will be explained later in the judgment, I do not consider the Act requires councillors who participate in decisions to have personally attended all the public consultation meetings, nor, where deliberation hearings go over a number of days, do I consider they need to attend every sitting. I am satisfied, therefore, that the absences of Councillor Eru have neither affected the quality of the public consultation, nor do I think show his participation in the final decision to be affected by predetermination or bias.

[125] At a meeting with the regional focus group at the Rotorua Airport, Councillor Eru is alleged to have made it clear he supported the move and could not be persuaded otherwise. The applicant relies on an affidavit of Lorraine Brill. In her affidavit, Ms Brill said that when Mr Eru was questioned at this meeting, he made a comment to the effect he would not support doing anything that would help Ngati Awa as they had tried to take the Kaingaroa Forest away from them

(Te Arawa). Councillor Eru denied that he would have said anything to that effect. Councillor Eru's response to what Ms Brill said was, "she has got that totally wrong". Councillor Eru's view was that Ms Brill was mistaken because, in his words, "the issue with Te Arawa and Ngati Awa is totally out of kilter". His evidence was that on the basis of his knowledge of history, he would not have said something like that. When asked whether there was a view within Te Arawa that Ngati Awa tried to take the forest at Kaingaroa, he said, "no, there was not".

[126] Ms Brill's affidavit provided on 29 November 2007 records something which occurred at a meeting on 19 February 2007. Councillor Eru rejects the suggestion he would have made the statement concerned and, to support his rejection, he says that, in effect, there has never been an issue between Ngati Awa and Te Arawa regarding Ngati Awa trying to take Kaingaroa Forest with them, so that the comment is not only incorrect in terms of Councillor Eru not having made it, but it does not fit with the historic position. I note in her affidavit at paragraph 21 that Ms Brill says that Mr Eru made a comment to the effect that moving was the right decision and his mind was made up. She does not say what his words were. The statement seems simply Ms Brill's interpretation of what Councillor Eru said. Without having his actual words expressed, it is not possible to assess objectively whether or not the effect of those words could amount to a statement evidencing predetermination. An allegation of bias and predetermination is serious. To prove actual bias requires reliable evidence. I am not satisfied that the evidence from Ms Brill is sufficiently reliable to persuade me on the balance of probabilities that Councillor Eru had made what had amounted to an admission of having a predetermined view as at February 2007.

[127] Councillor Sherry only attended the public consultation meeting in Tauranga. He did not attend the meetings in Rotorua or Whakatane. He has sworn an affidavit in which he asserts that while he did not attend all the public consultation meetings, he did fully inform himself by reading all the written material from those meetings. He said he was open to persuasion and ready to be persuaded as to a different outcome from that for which he ultimately voted for. Under cross-examination he provided explanations for why he did not attend all the consultation meetings. The records of the deliberation meeting record that he addressed the meeting and gave an

assurance that he had read all the submissions and that he was approaching the decision with an open mind. I see no reason not to accept his evidence.

[128] At a Christmas function in December 2006, Councillor von Dadelszen is alleged to have said the move was "a done deal and we have the numbers". The applicant relied upon these remarks to prove predetermination on the part of Councillor von Dadelszen. Councillor von Dadelszen was cross-examined about the comments he was alleged to have made. Councillor von Dadelszen's recall was that he had started to say the respondent had voted in favour of an "in principle" decision, which would be to accept the Deloitte recommendation to move the headquarters, when Colin Hammond (a retired local body politician and member of the Regional Focus Group which opposed the relocation) aggressively attacked him about the statement. Councillor von Dadelszen refuted the suggestion that he had said the decision to move was a "done deal" and he said he would never use the words "you easties have got to live with it". His evidence was this was not the sort of language he would use. He conceded he was angered by Mr Hammond's comments and he may have said "we have the numbers", but he knew at that stage that a final decision was at least six months away.

[129] The applicant is inviting the Court to draw the inference from words said at a Christmas party in December 2006 that Councillor von Dadelszen had such a closed mind that his decision in June 2007 to vote in favour of the headquarters' move can be said to be predetermined. There was a significant time gap between the Christmas party in December 2006 and the June meeting. In view of Councillor von Dadelszen's denials of predetermination and his assertions of approaching the June 2007 decision with an open mind, which I have no reason to disbelieve, I am not prepared to rely on comments made six months earlier to find that Councillor von Dadelszen had a closed mind in June 2007.

[130] Councillor von Dadelszen was also cross-examined about him being absent on the last day of the consultation hearings in Whakatane on 24 May 2007. It was put to him that by that time he had made his mind up to vote in favour of relocation. He rejected any suggestion. He rejected the suggestion that by the time of the respondent's deliberations, he was not open to persuasion.

Councillor von Dadelszen said that although he had been absent for one day of the public consultation hearings, he had taken it upon himself to read all the submissions thoroughly to ensure that he was fully informed when it came to the time of making his decision. Again I see no reason to disbelieve him.

[131] Councillor Raewyn Bennett, in a meeting with Ngati Awa in February 2007, is alleged to have made it clear she supported the move and that it was time for Western Bay of Plenty Mäori to have the head office located in their district. In her affidavit evidence, Councillor Bennett rejected any suggestion her decision to support the headquarters move was affected by predetermination or bias. It was put to her in cross-examination that she had favoured the move because she thought it best for the Iwi which she represented (namely, Western Bay of Plenty Mäori) and that she thought they would be better served by having the regional council headquarters in Tauranga. She accepted that her concern about "the urbanisation of Iwi" was one of the factors that she took into account in her decision-making but rejected the suggestion this was entirely what had motivated her decision. She agreed that she had been at a meeting on 26 February 2007 of local Iwi that was attended by Jeremy Gardiner. Mr Gardiner's recall of the meeting was that Ms Bennett had represented to the meeting that the relocation was to go ahead and that she had told him she would be voting for it. Under cross-examination, Ms Bennett denied that she had a conversation to this effect with Mr Gardiner. She said that at the meeting she gave reasons for supporting the "in principle decision" of 7 December 2006.

[132] Ms Bennett's understanding of the communications she had at the meeting of 26 February 2007 was for her to outline why she had decided to support the Deloitte recommendation. She denied that the effect of what she said at the meeting was to promote the headquarters relocation. An email was put to her, which she had written to Bruce Fraser on 18 February 2007, in which she had said the words "at Fisheries forum tomorrow (promoting HQ)". It was put to her that the statement in the email reflected what she would actually have been doing at the meeting. She rejected that idea and said that all she was doing was to raise awareness among Iwi in the various areas. When it was suggested to her that as at February 2007 she was going out to

the community trying to sell the relocation decision, she rejected that on the basis that at that point in time no decision had been made.

[133] Mr Gardiner had sworn in his affidavit that Councillor Bennett had said it was "Ngati Rangi's turn to have the regional council located near them and that Ngati Awa had their turn". Councillor Bennett said she did not make the statement and never would make such a statement. I have no reason to reject Councillor Bennett's evidence on the points where there is a conflict with Mr Gardiner's evidence. Statements made in the context of meetings to discuss the issue of the headquarters relocation are now being lifted out of their context. In addition, it may be that certain glosses are being placed on those statements, which may not have been intended at the time the statements were made.

[134] With decisions of this type, it is to be expected that councillors will have discussions with members of the community. In the course of those discussions, councillors may make comments that may suggest they hold a particular view. It is difficult to see how councillors could engage effectively and explain why they have taken a certain stance without perhaps creating an impression of holding particular views. That is very different from having a predetermined view. It follows that I am not satisfied on the balance of probabilities that Councillor Bennett made the comments now alleged to demonstrate bias and, in any event, even if she did, I do not interpret those comments or words to such effect as amounting to actual bias.

[135] On 25 April 2007, Councillor Pringle wrote a letter to the editor of the *Whakatane Beacon* in which he stated:

> While I sympathise with the effects to what this change means to any people in Whakatane;

and

> This will happen but at the same time we do not intend to leave Whakatane in the lurch.

[136] Councillor Pringle was cross-examined about bias as revealed through the letter he had written to the editor of the *Whakatane Beacon* on 25 April 2007. It was put to him that the way in which he had expressed himself in the letter revealed he

was treating the relocation as a foregone conclusion, rather than as a possibility. He accepted that the letter could be read in that way, but said that was not his intent because the decision on the relocation was still to be made. He explained the letter on the basis that he was responding to letters that had been published earlier on and he was putting matters in context. He rejected the suggestion that at the time he wrote the letter, he had made his mind up about the relocation of headquarters. It was suggested to him that he had written the letter using references to relocation, rather than possible relocation, because, in his mind, the relocation was going to happen. He rejected this suggestion.

[137] I consider that when local body politicians write letters to local newspapers regarding issues that have become contentious within the community for the purpose of explaining the benefits of the move, the language used may be stronger and less precise than that which a lawyer would use. I am not prepared to infer from the words Mr Pringle wrote in a letter to the editor designed to answer earlier letters that this amounts to sound, reliable evidence of actual bias on his part. He has rejected that suggestion, and I have no reason to disbelieve him.

[138] The applicant has also alleged that the respondent's decisions were made with undue haste and did not allow for any or sufficient time for proper consultation and input and consideration of the community views, particularly at stage one and stage two of the decision-making process. This allegation depends on the view being taken that stage one and two of the decision-making process had reached an end by 7 December 2006. I have already rejected this view on the facts, which disposes of this allegation.

[139] Another allegation made against those who voted for relocation of the headquarters was that none of those who did so were willing to engage in any meaningful debate as to the pros and cons during the deliberation hearings on 31 May 2007 and 1 June 2007. To counter this allegation, the respondent pointed to the minutes made of the deliberation hearings. In my view, those minutes support the respondent’s view of what occurred. A perusal of the minutes reveals that a number of those who voted for the relocation actively participated in the deliberation process. It follows that I do not find the applicant has established this allegation.

[140] As regards the failure of Councillors Eru, Sherry and von Dadelszen to attend all of the submissions and deliberations hearings, I do not see their absence as undermining the quality of the consultation process. The applicant has not directed me to any authority which establishes that the members of a local authority who vote on a decision must have attended all the public consultation hearings. The applicant relied on s 83 of the Act to support its assertion that the requirement in that provision to give submitters an "opportunity to be heard" could not be met without the respondent's members attending all the consultation meetings.

[141] Like Tipping J in *Travis Holdings*, I think that parallels can be drawn between local authority decisions and those of the executive. When Ministers of the Crown come to make decisions that require consultation, there is generally no requirement that a Minister will individually attend and participate in any consultation process. That is left to the officials who then have the responsibility of preparing reports for the minister outlining the thrust of the matters consulted on and the submissions received. If the officials do a poor job of summarising the submissions produced during the consultation process, that can leave a Minister open to the accusation he or she has not properly consulted. Although decided on another ground of review, the judgment in *Air Nelson v Minister of Transport* CA279/06 5 May 2008 is relevant to understanding the consequences of decision-makers being poorly informed by their officials.

[142] I do not understand the applicant in this case to be critical of the materials that went to the respondent's members for the purpose of recording for them and informing them on the consultation submissions received. Provided the written material the respondent's officials produced provided a fair and accurate account of the submissions received during the consultation hearings and the respondent's members read this material, I can see no reason for finding the consultation process was flawed.

[143] Furthermore, when the votes of councillors whose absences from the submissions hearings are put to the side, of the remaining votes, those who voted for relocation are still in the majority. The outcome was not a closely balanced decision which hinged on the votes of those who did not attend all the submissions hearings.

Even if they had abstained, the numbers were still against those who voted against relocation. The applicant contended that as that would have resulted in a six to five split for relocation, it may well have been that some of the six may have changed their minds. I find this to be speculative. There is no foundation for it. In circumstances where the three councillors who were absent from the consultation meetings gave proper consideration to the consultation materials, and when those who voted for relocation outnumbered those against, with or without the abstention of the three councillors, I cannot see how their absences from some of the consultation meetings can have any impact on the respondent's performance of its obligations to consult under s 83.

[144] The applicant attempted to make something out of the fact the respondent's legal advisers had advised against those who had missed part of the submissions' hearings from voting on the decision. That advice may have been given out of an abundance of caution. Whilst adherence to it would have avoided one of the grounds of challenge to the decision to relocate, the departure from the advice was not wrong in law.

[145] The applicant also challenged the absences of Councillors von Dadelszen and Bennett from part of the deliberation hearings. However, at all times the necessary numbers to make up the required quorum were present. It is not as if these councillors absented themselves for most of the two days of deliberations and did no more than to arrive at the time when the vote was to be taken. It is in the nature of local body work that members of local authorities will need to absent themselves from deliberation hearings from time to time. Provided those persons ensure they are well informed and approach the decisions to be taken with an open mind, I can see no reason for being critical of them being absent for part of the deliberation process.

[146] It follows that the applicant has not made out the grounds of review of predetermination and bias, or of failure to consult. The failure to consult also came under the heading of unfairness and procedural impropriety in that the applicant contended that a breach of the duty to consult under ss 82 and 83 was also a procedural impropriety and unfair. The applicant's failure to establish there has been

a breach of the statutory duty to consult means it has failed on the ground of procedural impropriety and unfairness as well.

Unreasonableness

[147] The applicant contends that the decision to move the applicant's headquarters from Whakatane to Tauranga was unreasonable. *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537 is a leading case on challenges on the ground of unreasonableness in relation to local government decisions. That case involved the setting of rates and earlier legislation. The Court of Appeal concluded that the setting of rates was essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them. The Court was not prepared to interfere with what was essentially a policy decision. It recognised that the setting of rates required the exercise of political judgment by elected representatives of the community. In that regard, economic, social and political assessments involved were complex. The test for unreasonableness applied in *Wellington City Council* was that given by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, where it was said:

> It (unreasonableness) applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[148] When I apply that test to the present decision under review, it seems to me that the decision cannot be so described. The councillors of the respondent who voted in favour of a move of the headquarters had sufficient material before them in the form of the Deloitte report, the Bayfield report and other material gained following those reports which supported the headquarters move. It is for the applicant to establish that the decision to move the headquarters was one that no sensible person could have arrived at in terms of the test set out by Lord Diplock. On my reading of the reports on which the respondent relied, they outlined the long-term wisdom in moving the headquarters to the most populace centre in the region for which the respondent was responsible. The benefits of having the headquarters sited in the most populated and growing centre of the respondent's region are set out in the reports on which the respondent relied to inform itself. These reports make

sense. It was open to the councillors to decide that it was in the region's long-term benefit for the headquarters to be sited in Tauranga. The evidence revealed that most regional authorities have their headquarters sited in the most populated centre of the region they serve. While it seems that the respondent has managed to carry out its role to date, the idea that, with the increased responsibilities legislative change has placed upon it, it would better perform its role if sited in Tauranga is a tenable one. There is nothing about the decision which would suggest to me it was unreasonable in terms of the test applied by Lord Diplock and approved of in *Wellington City Council*. I do not find the decision to be an unreasonable one.

[149] The applicant elected not to pursue the ground of review based on the taking into account of irrelevant considerations and mistake of fact. The ground of review based on failure to take into account relevant considerations is largely covered by the findings made on s 76 and its associated provisions. In regard to those additional considerations the applicant has pleaded as being relevant considerations which were not taken into account, the applicant has not identified how they have the mandatory character necessary to support this ground of review. For this reason, the applicant fails on this ground of review.

[150] After this proceeding was heard, the judgment in *Council of Social Services in Christchurch/Outautahi Inc v Christchurch City Council* HC CHCH CIV 2008-409-1385 25 November 2008 was issued. The Court in this judgment has interpreted the effect of s 76 and its associated provisions differently from the interpretation contained herein. I have considered the judgment but must respectfully disagree with the interpretation it expresses.

Result

[151] The applicant has failed to establish the grounds of judicial review on which it relied to support its claim that the respondent's decision was unlawful and invalid.

[152] Leave is reserved to the parties to file memoranda on costs.

Duffy J