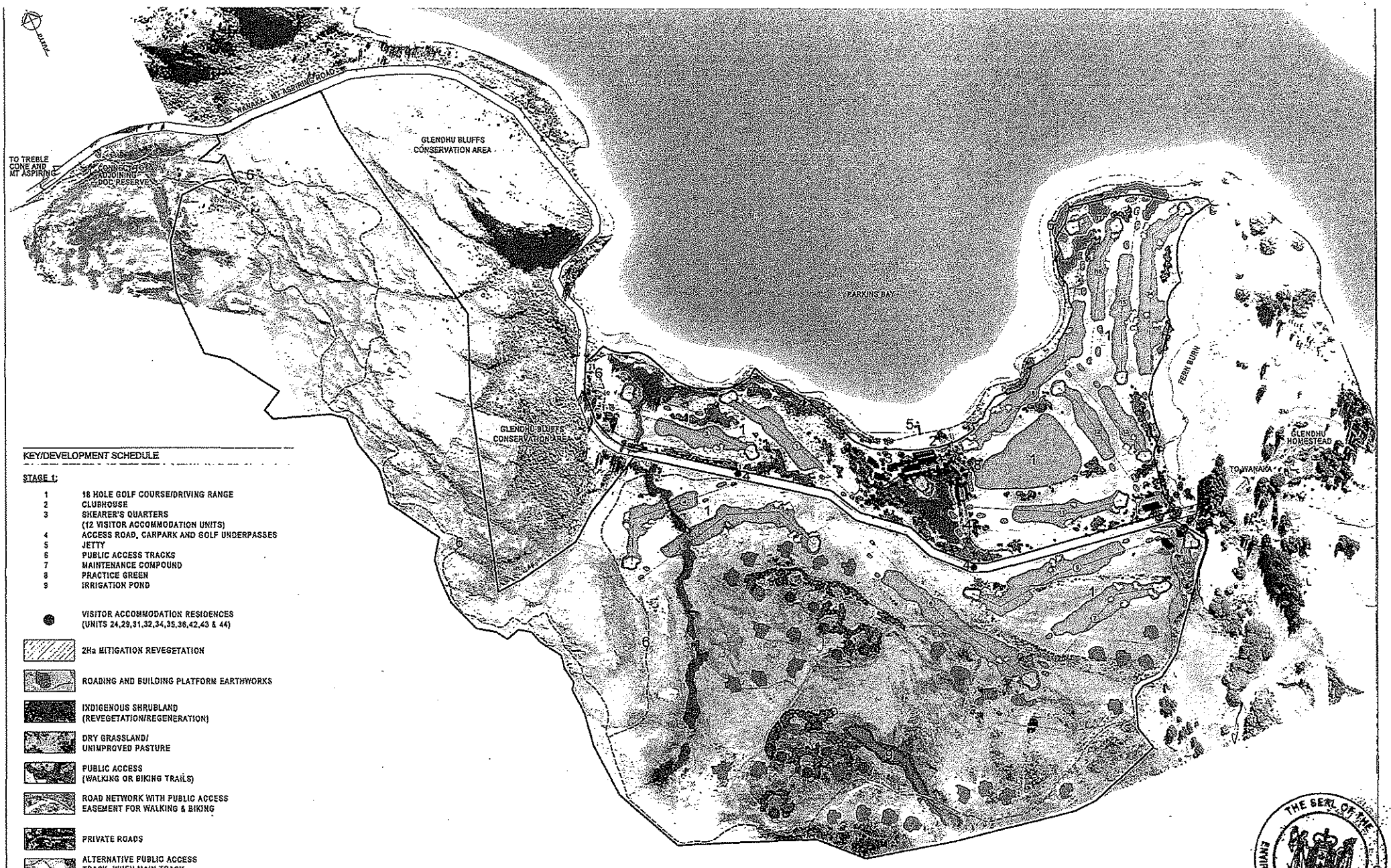


KEY/DEVELOPMENT SCHEDULE

STAGE 1:

1 18 HOLE GOLF COURSE/DRIVING RANGE
2 CLUBHOUSE
3 SHEARER'S QUARTERS (12 VISITOR ACCOMMODATION UNITS)
4 ACCESS ROAD, CARPARK AND GOLF UNDERPASSES
5 JETTY
6 PUBLIC ACCESS TRACKS
7 MAINTENANCE COMPOUND
8 PRACTICE GREEN
9 IRRIGATION POND

VISITOR ACCOMMODATION RESIDENCES (UNITS 24,29,31,32,34,35,36,42,43 & 44)

2Ha MITIGATION REVEGETATION

ROADING AND BUILDING PLATFORM EARTHWORKS

INDIGENOUS SHRUBLAND (REVEGETATION/REGENERATION)

DRY GRASSLAND/ UNIMPROVED PASTURE

PUBLIC ACCESS (WALKING OR BIKING TRAILS)

ROAD NETWORK WITH PUBLIC ACCESS EASEMENT FOR WALKING & BIKING

PRIVATE ROADS

ALTERNATIVE PUBLIC ACCESS TRACK, WHEN MAIN TRACK CLOSED DUE TO FARM ACTIVITY

DARBY PARTNERS LIMITED

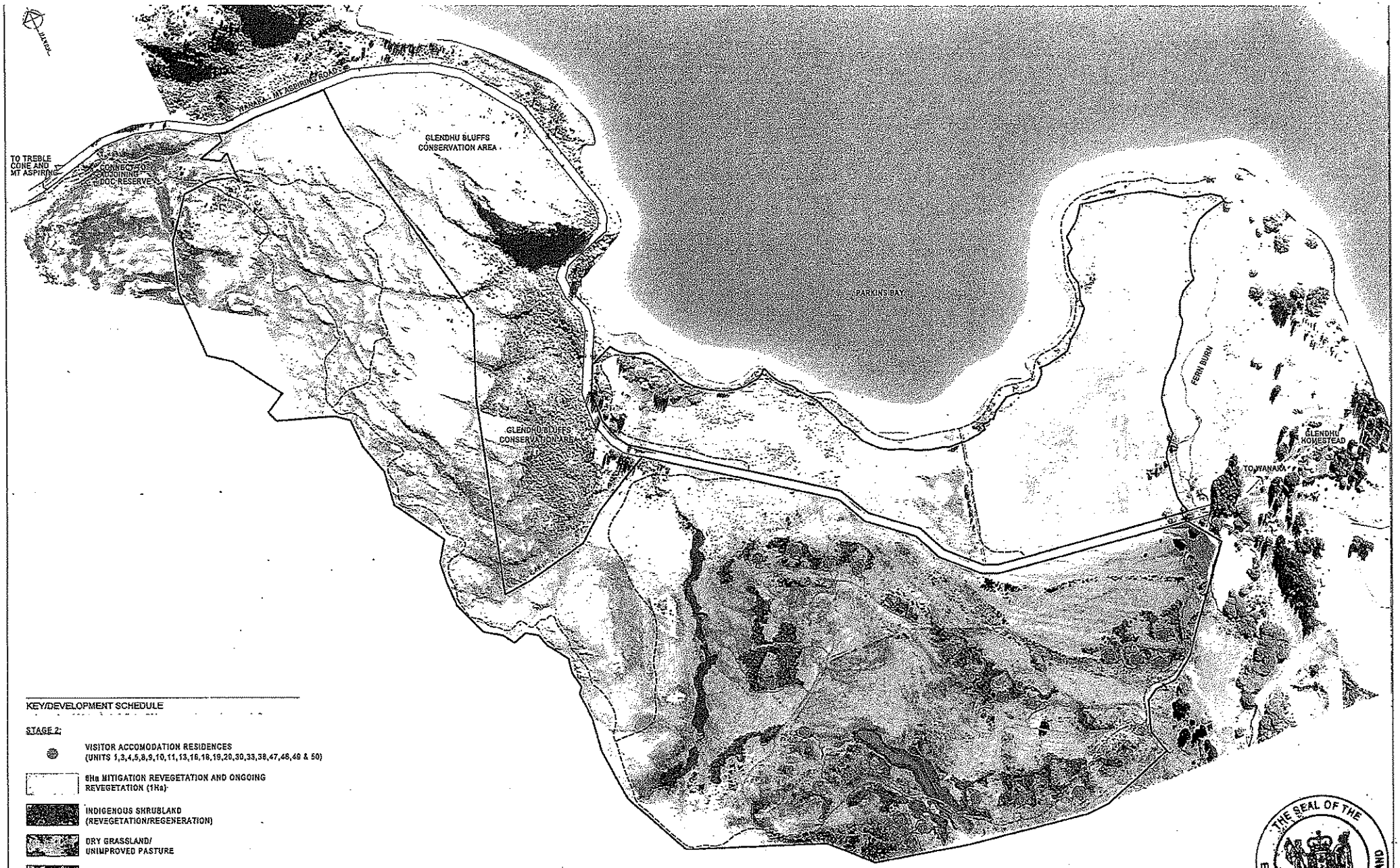
0 500m

Scale: 1:2000 (2xA0); 1:8000(A3)

MDP-Rev EC-Stage 1, SEP 2009

REVISION: S1_EC

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND



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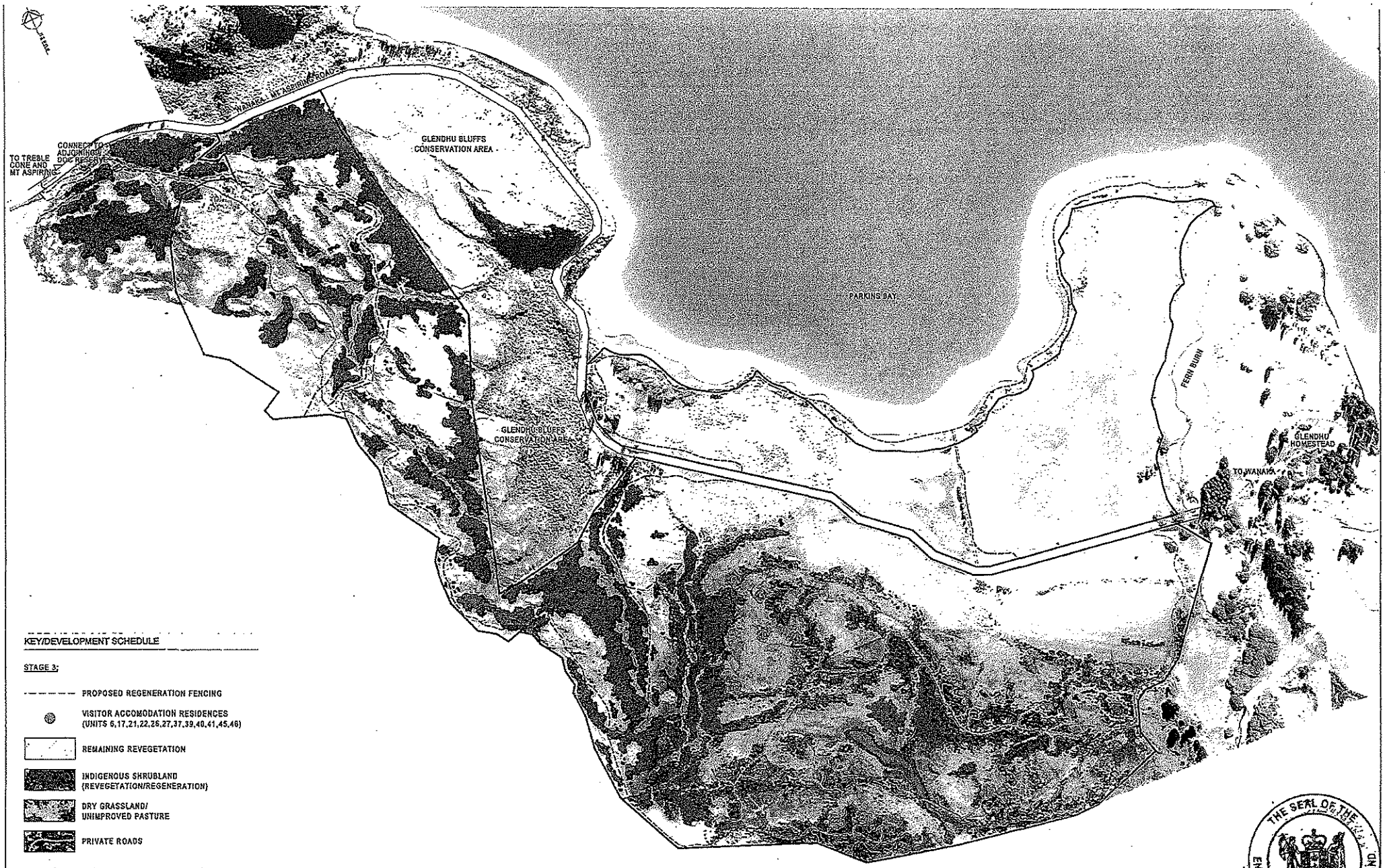
REVISION: S2_EC

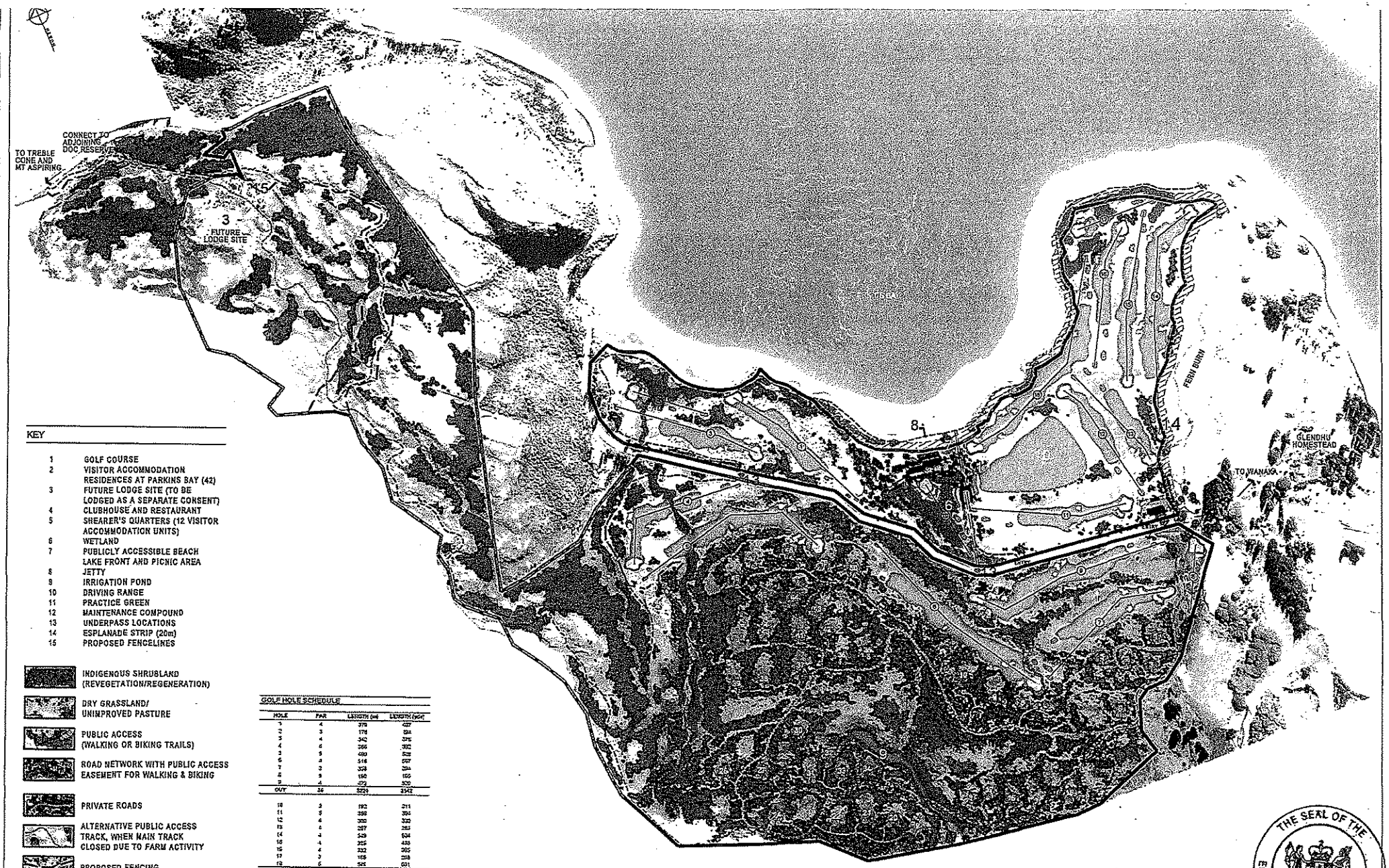
MDP-Rev EC-Stage 2, SEP 2009



Scale: 1:2000 (2xA0); 1:6000(A3)

MDP-Rev EC-Stage 3, SEP 2009

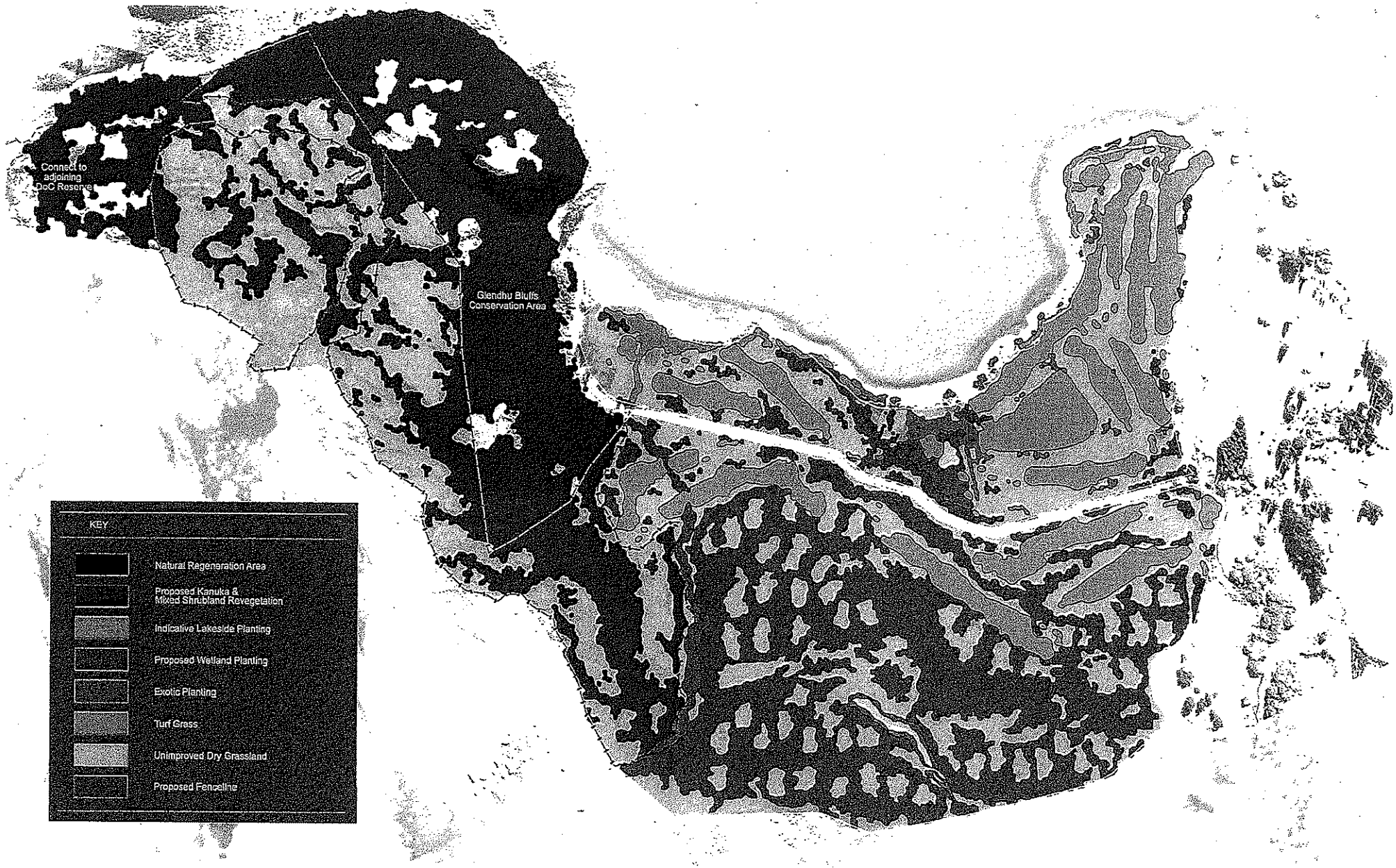
REVISION: S3_EC



Scale: 1:2000 (2xA0); 1:4000(A3)

MDP-Rev EC-revs, APRIL 2012

REVISION: EC

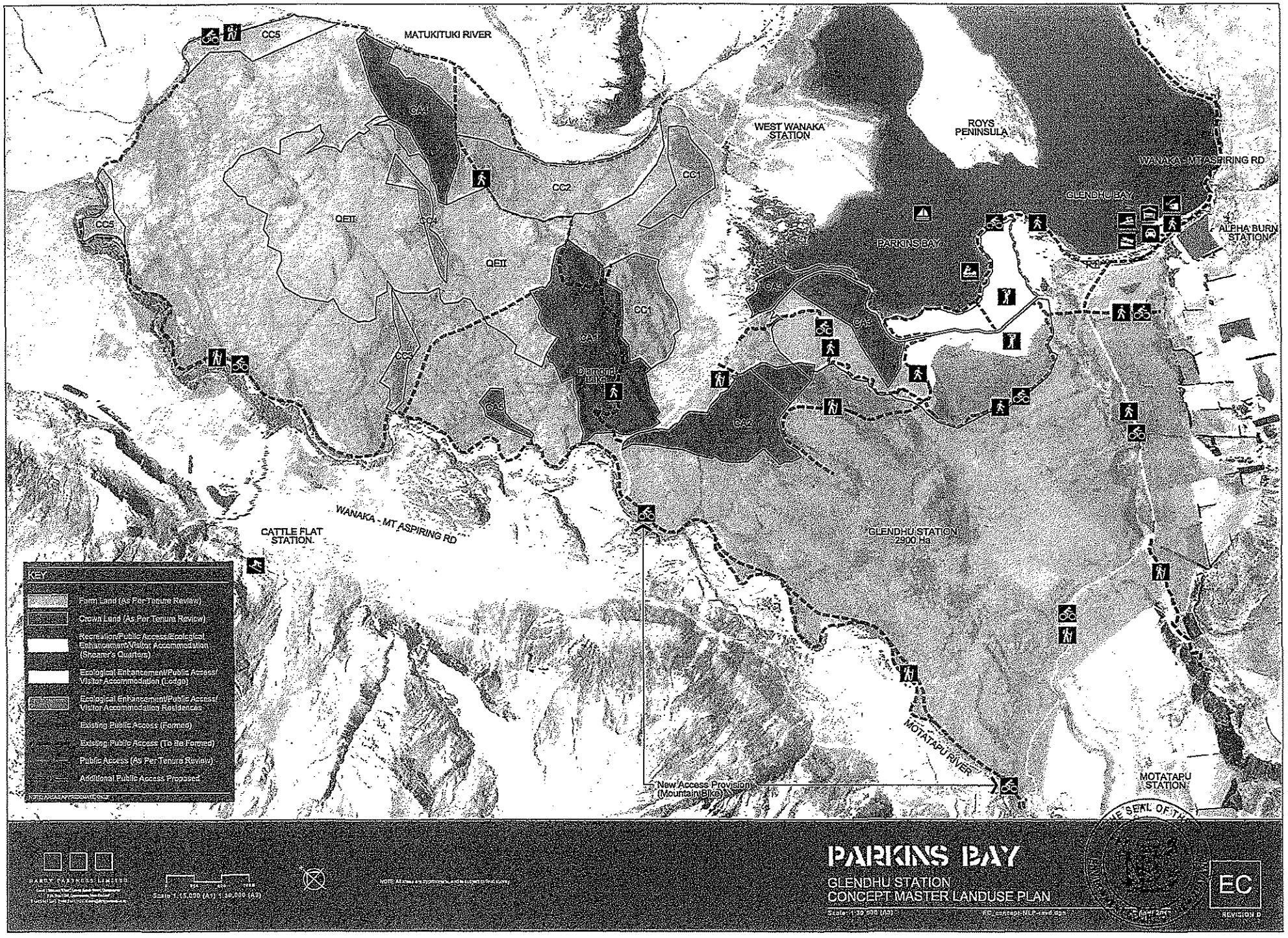


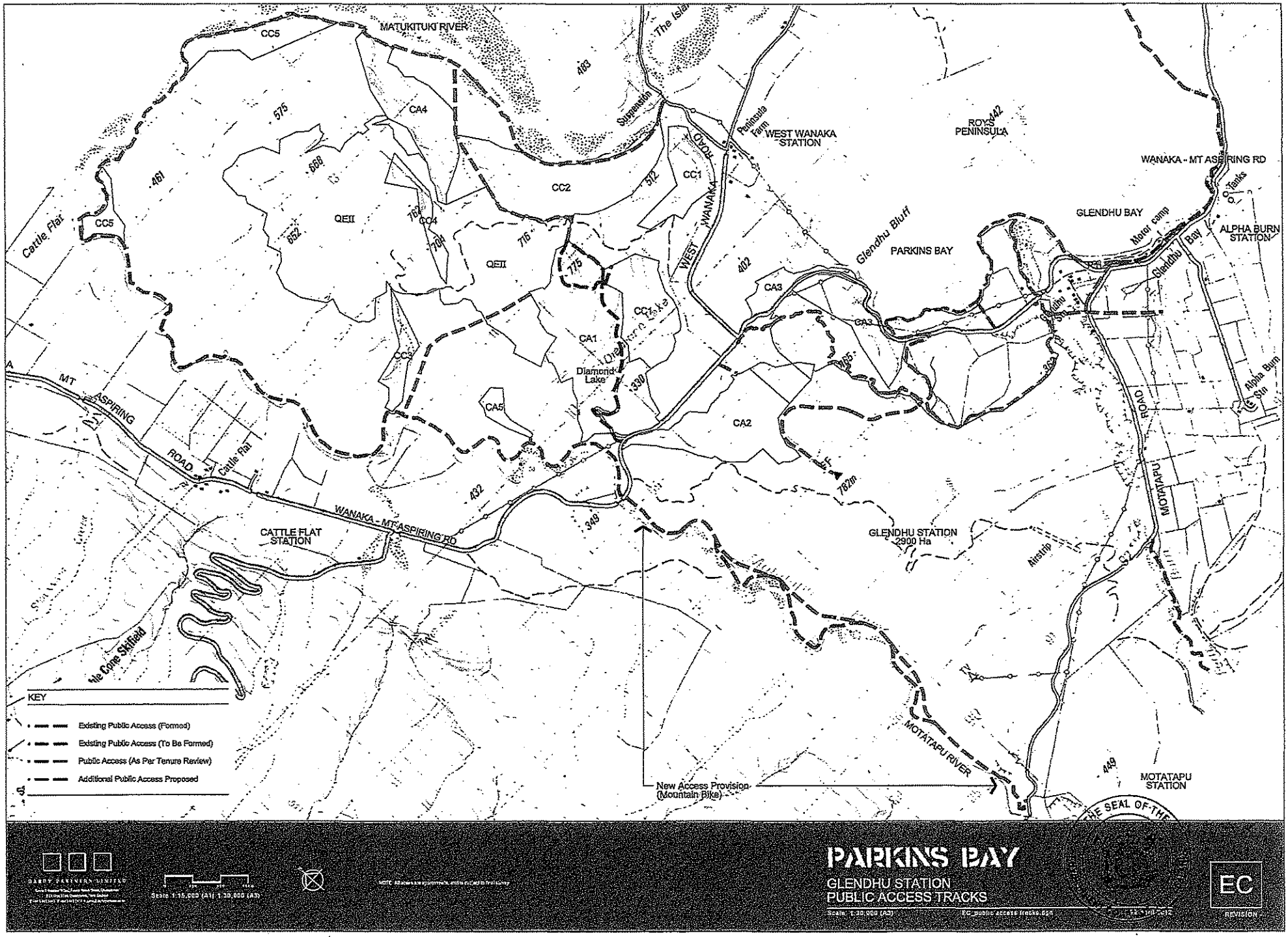
PARKINS BAY

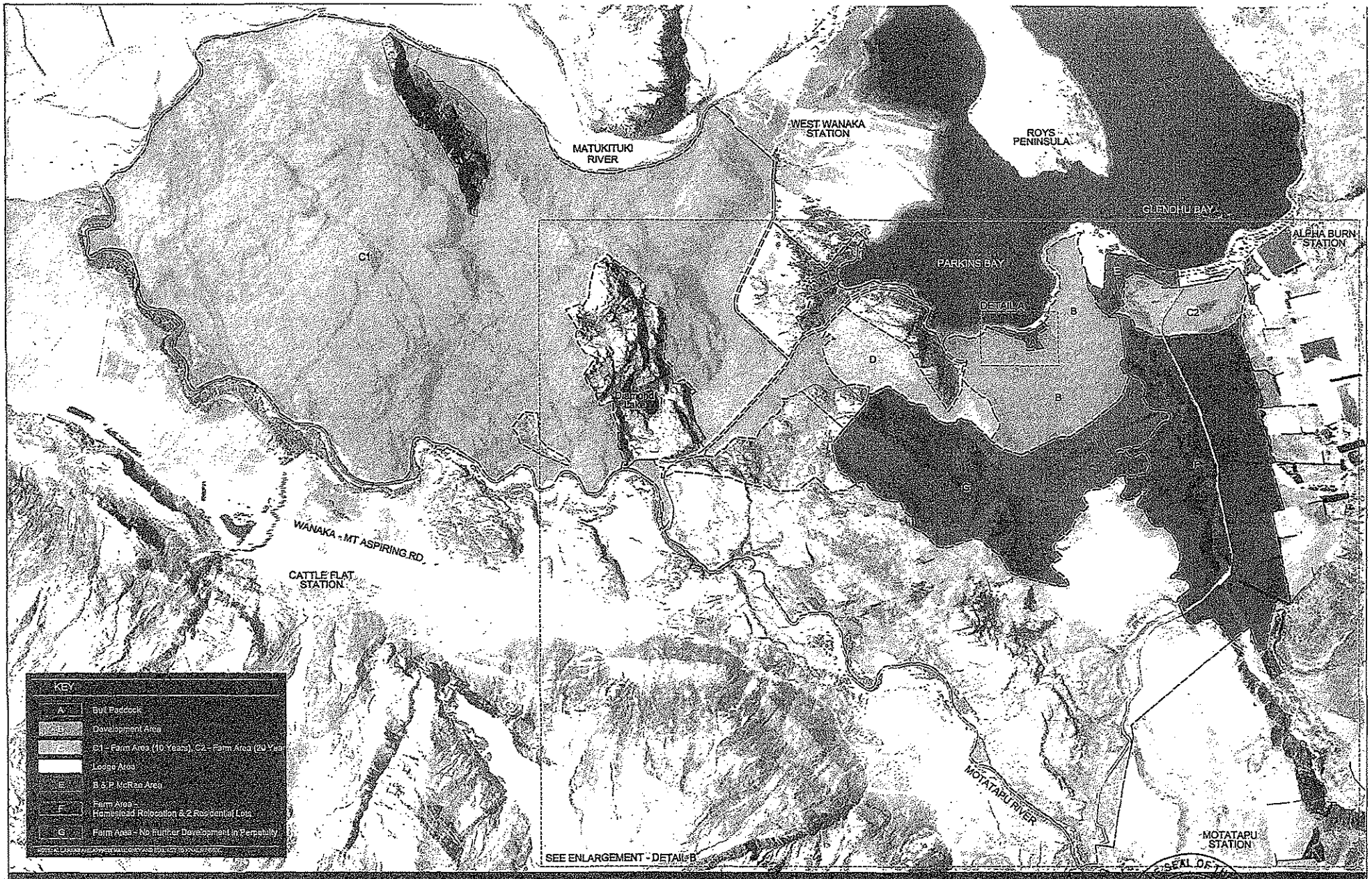
INDICATIVE VEGETATION CATEGORIES PLAN

Scale 1:2000 (A3) | vegetation-plan-rev2.dgn | September 2009

THE SEAL OF


MATUKITUKI RIVER
CC5
CA1
CC2
CC1
QEII
CC4
WEST WANAKA STATION
ROYS PENINSULA
WANAKA - MT ASPIRING RD
GLENDHU BAY
PARKINS BAY
ALPHA BURN STATION
CA2
CA3
CA4
Diamond Lake
WANAKA - MT ASPIRING RD
CATTLE FLAT STATION
GLENDHU STATION 2900 Ha
MOTATAPU RIVER
New Access Provision (Mountain Bike)
MOTATAPU STATION
Key
Farm Land (As Per Tenure Review)
Crown Land (As Per Tenure Review)
Recreation/Public Access/Ecological Enhancement/Visitor Accommodation (Shearer's Quarters)
Ecological Enhancement/Public Access/ Visitor Accommodation (Lodge)
Ecological Enhancement/Public Access/ Visitor Accommodation Residences
Existing Public Access (Formed)
Existing Public Access (To Be Formed)
Public Access (As Per Tenure Review)
Additional Public Access Proposed
PARKINS BAY
GLENDHU STATION
CONCEPT MASTER LANDUSE PLAN
EC


MATUKITUKI RIVER
CC5
CA4
CC2
CC1
QEII
CC4
CA3
CA1
CC3
CA5
CA2
WEST WANAKA STATION
ROYS PENINSULA
Peninsula Farm
Suspension
WEST WANAKA
Glendhu Bluff
PARKINS BAY
GLENDHU BAY
Motor camp
Glendhu Bay
ALPHA BURN STATION
WANAKA - MT ASPIRING RD
Tanks
Cattle Flat
MT ASPIRING ROAD
Cattle Flat
Diamond Lake
Alpha Burn Stn
MOTATAPU ROAD
CATTLE FLAT STATION
WANAKA - MT ASPIRING RD
GLENDHU STATION 2900 Ha
Airstrip
MOTATAPU RIVER
MOTATAPU STATION
New Access Provision (Mountain Bike)
KEY
Existing Public Access (Formed)
Existing Public Access (To Be Formed)
Public Access (As Per Tenure Review)
Additional Public Access Proposed
PARKINS BAY
GLENDHU STATION
PUBLIC ACCESS TRACKS
EC
REVISION

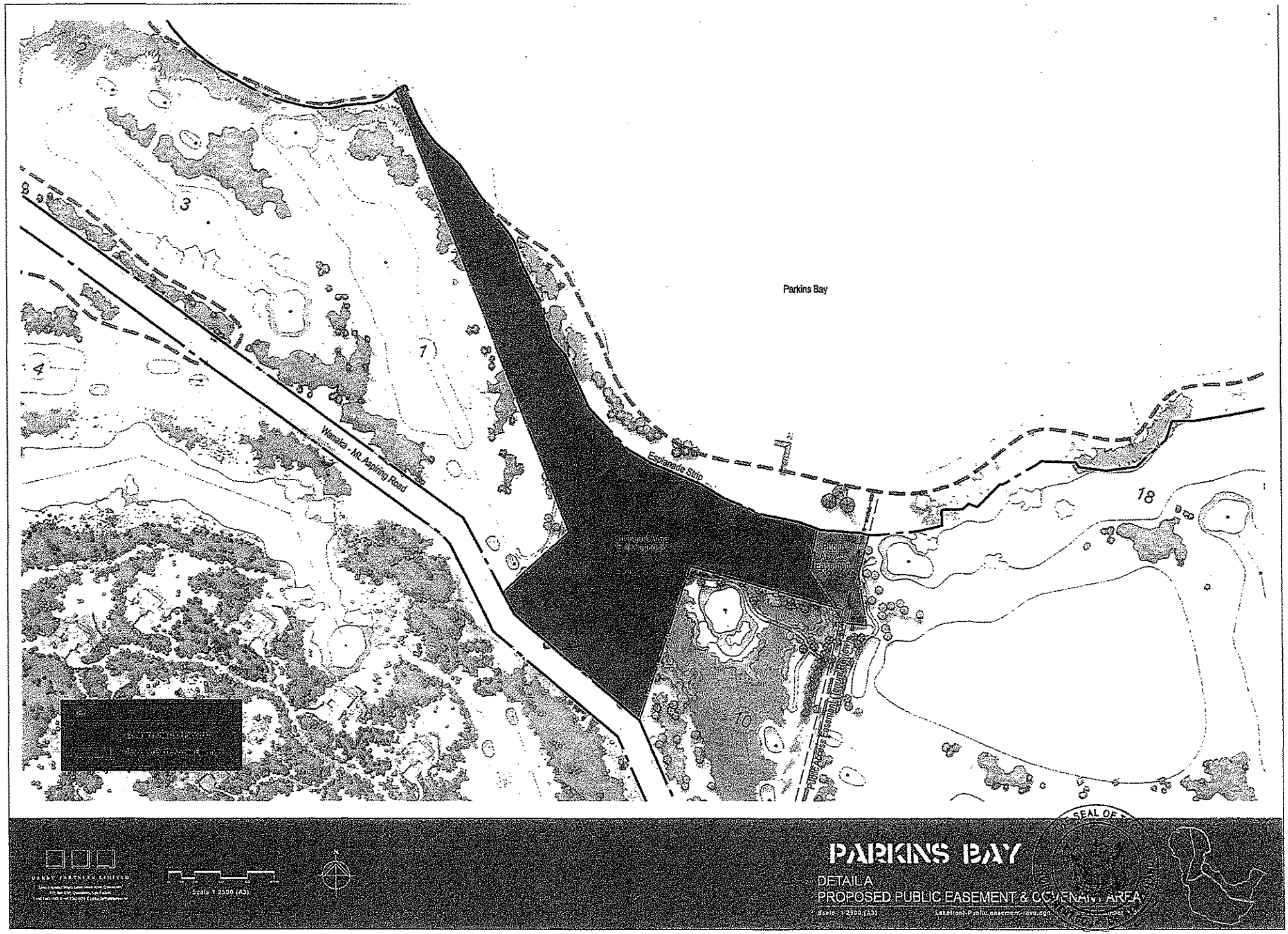


PARKINS BAY

GLENDHU STATION
COVENANT AREAS PLAN

EC

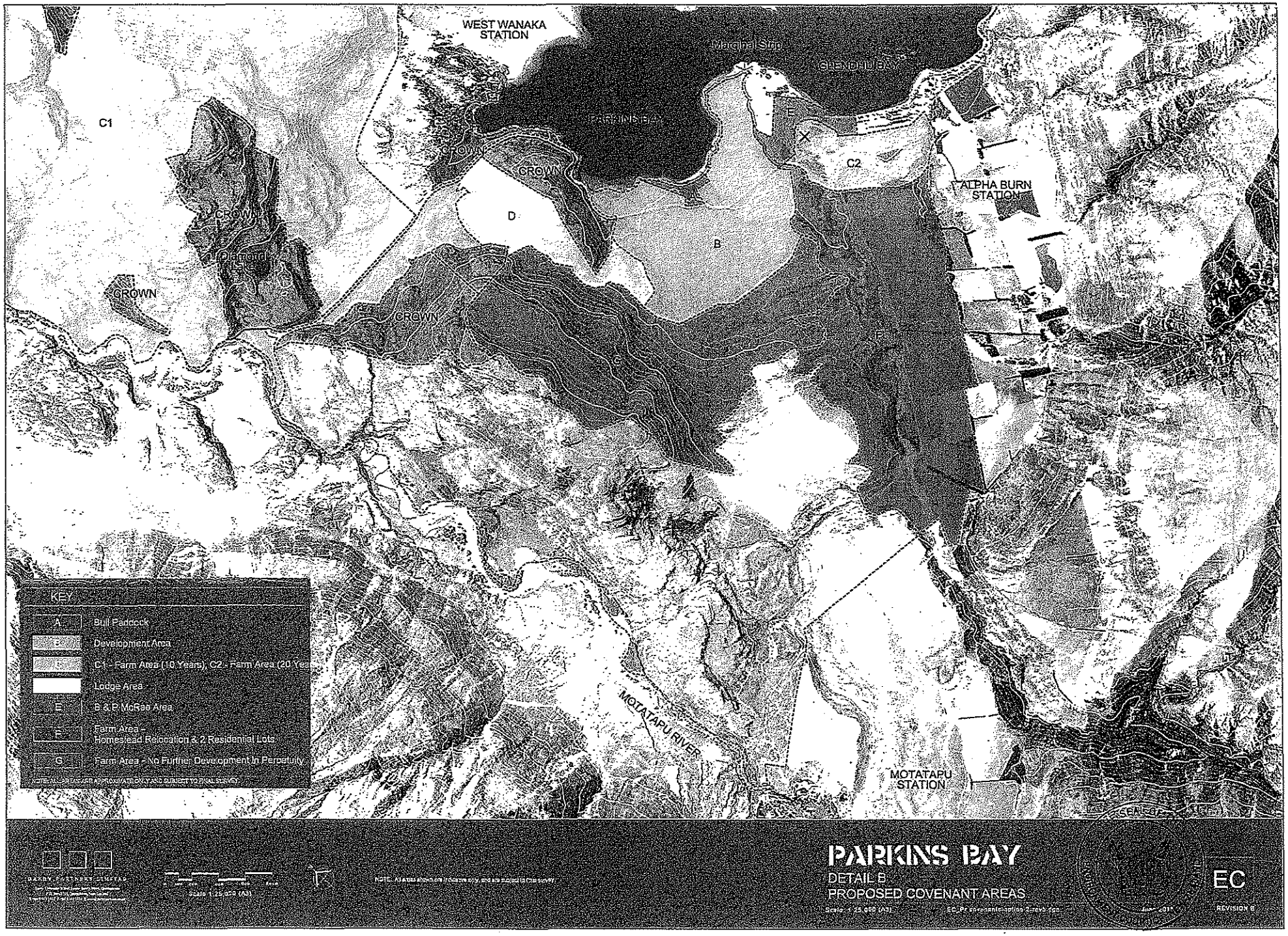
REVISION C



PARKINS BAY

DETAIL A

PROPOSED PUBLIC EASEMENT & COVENANT AREA


WEST WANAKA STATION
Marginal Strip
GLENDHU BAY
PARKINS BAY
C1
C2
CROWN
CROWN
CROWN
CROWN
CROWN
D
B
E
F
ALPHA BURN STATION
MOTATAPU RIVER
MOTATAPU STATION
KEY
A Bull Paddock
Development Areas
C1 - Farm Area (10 Years), C2 - Farm Area (20 Years)
Lodge Area
E B & R McRae Area
F Farm Area - Homestead Relocation & 2 Residential Lots
G Farm Area - No Further Development In Perpetuity
PARKINS BAY
DETAIL B
PROPOSED COVENANT AREAS
EC
REVISION E

KEY

- Existing Poplars / Willows
- Existing Kanuka Shrubland
- Proposed Exotic Trees
- Proposed Kanuka & Grey Shrubland
- Proposed Wetland Planting
- Trees to be removed

1. Clubhouse
2. Shearer's Quarters (12 units)
3. Timber Lean-to for Covered Parking (12 cars)
4. Timber Lean-to for Cart Storage (20 carts)
5. Gravel Carpark (50 Parks)
6. Overflow Parking (150 Parks)
6a. Glob All Weather Surface (16 Parks)
7. Entry Road: 2-coat Chipseal 5m wide
8. Driving Range
9. Cart Path: Chipseal 2.2m wide
10. Timber Boardwalk
11. Entry Courtyard
12. Practice Green
13. Timber Jetty (28x4m) With Return Section (9x4m) Floating Pontoon (5x4m)
14. Picnic Area
15. Bus Parking Area / Turning Bay
16. Public Access Track (Formed)
17. Signage for Public Access
18. Signage for Biking / Walking Track

PARKINS BAY

PROPOSED CLUBHOUSE PLAN

FIGURE 10A

Scale 1:1000 (A3)

EC_Clubhouse_Concept.dgn

KEY

- Existing Poplars / Willows
- Proposed Kanuka & Grey Shrubland
- Stone Retaining Wall
- Proposed Mounding

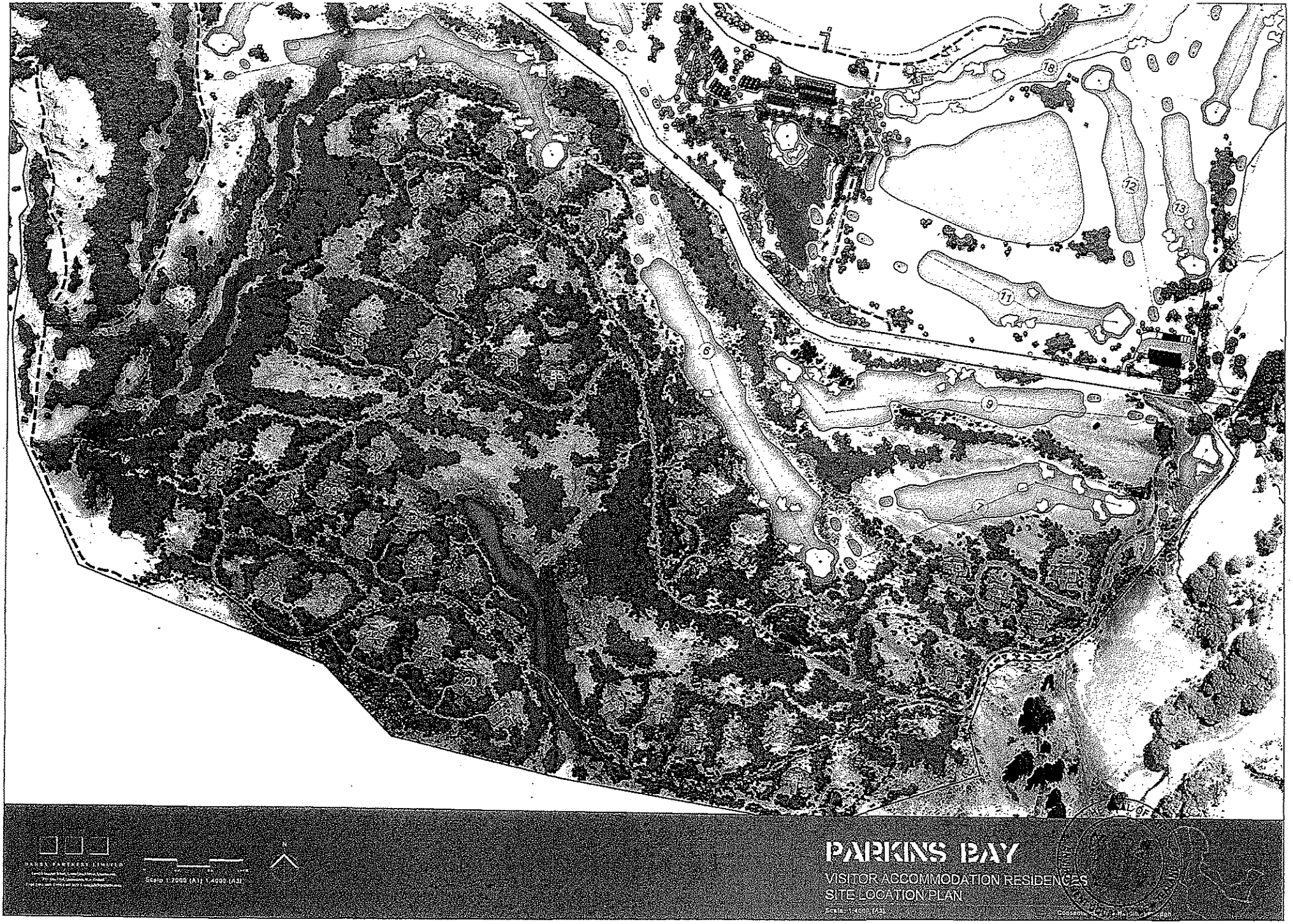
1. Maintenance Building
2. Carparking (Chipseal 10 Parks)
3. Access Road (4.5m Chipseal)
4. Washdown Area (8m in Depth, 147m2)
5. Fuel Storage (Diesel & Petrol)
6. 3 Storage Bins (Sand and Soil) 4x8 Each 96m2 in Total
7. Chemical Storage Shed (6x8m 48m2)
8. Lean-To Storage Building (192m2)
9. Forecourt (Asphalt)
10. Petrol Interceptor
11. Proposed Mounds

Scale 1:1000 (A3)

PARKINS BAY

DETAIL 2
MAINTENANCE COMPOUND SITE PLAN

Scale: 1:1000 (A3)


PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
SITE LOCATION PLAN


KEY
STAGE 1 - 2Ha MITIGATION REVEGETATION
STAGE 2 - 6Ha MITIGATION REVEGETATION AND ONGOING REVEGETATION (1Ha)
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
BUILDING MITIGATION PLAN

GOLF COURSE EARTHWORKS SCHEDULE

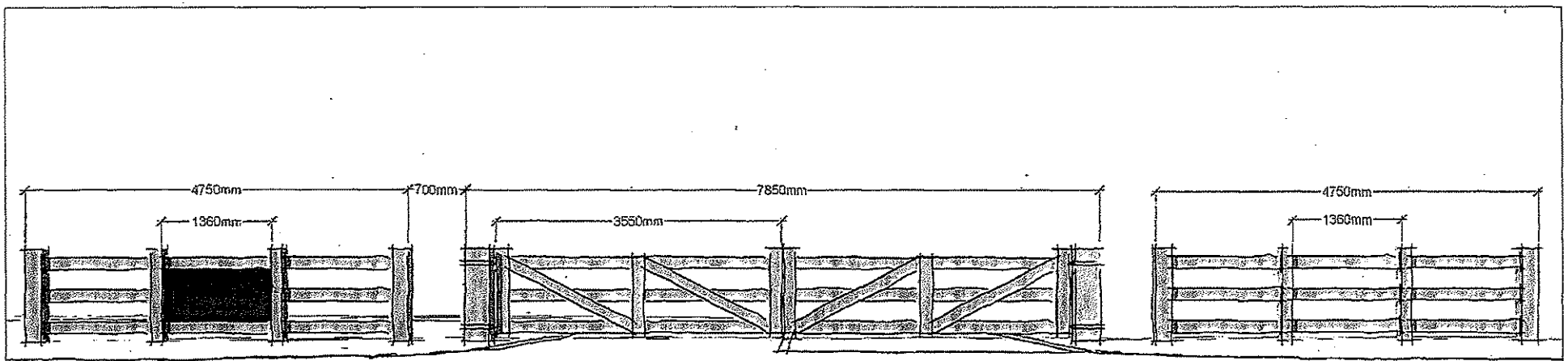
Hole	Par	Cut (m3)	Fill (m3)
1	4	3,000	1,000
2	3	250	2,000
3	4	2,100	2,000
4	4	2,500	2,500
5	5	2,000	4,000
6	4	1,000	1,500
7	3	1,000	1,500
8	5	7,500	1,000
9	4	5,500	2,500
Front 9	36	24,850	18,000
10	3		2,000
11	5	2,500	3,000
12	4	2,500	2,500
13	4	2,000	2,000
14	4	2,500	2,500
15	4	2,500	2,500
16	4	2,500	2,500
17	3	1,000	2,000
18	5	4,000	4,000
Back 9	36	19,500	23,000
Driving Range		2,000	3,000
2 x Practice Holes			2,500
Sub Total	72	46,350	46,500
Plus 15%		6,953	6,975
TOTAL		53,303	53,475

Topsoil Strip & relaying : 37,800 m3
NB: All measures are solid measure

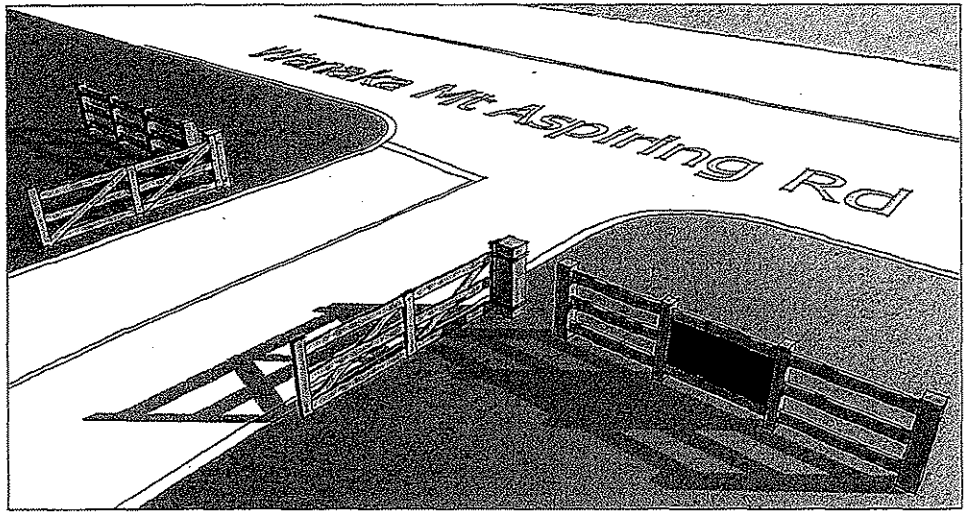
PARKINS BAY

PROPOSED GOLF COURSE
EARTHWORKS PLAN

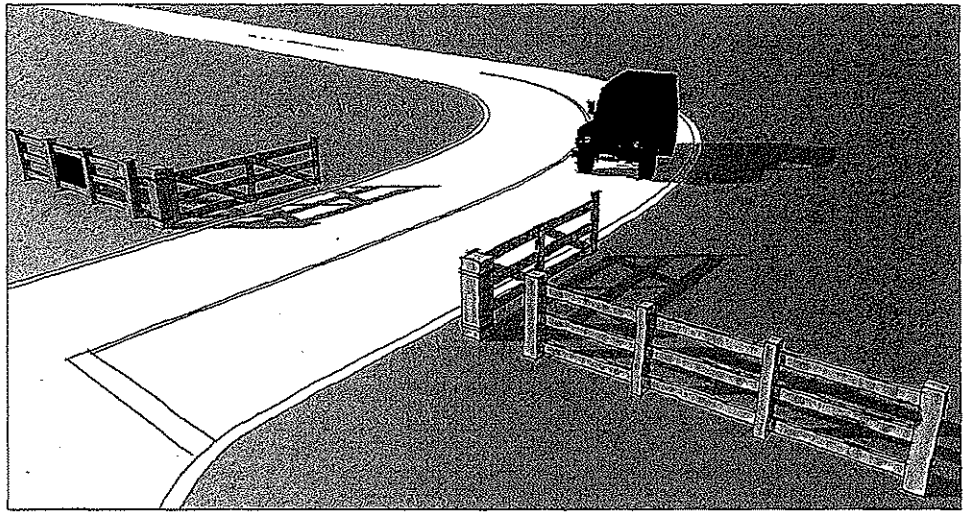
Scale: 1:4000 (A1)



Entry Gate Elevation
Scale 1:50



Perspective Looking South

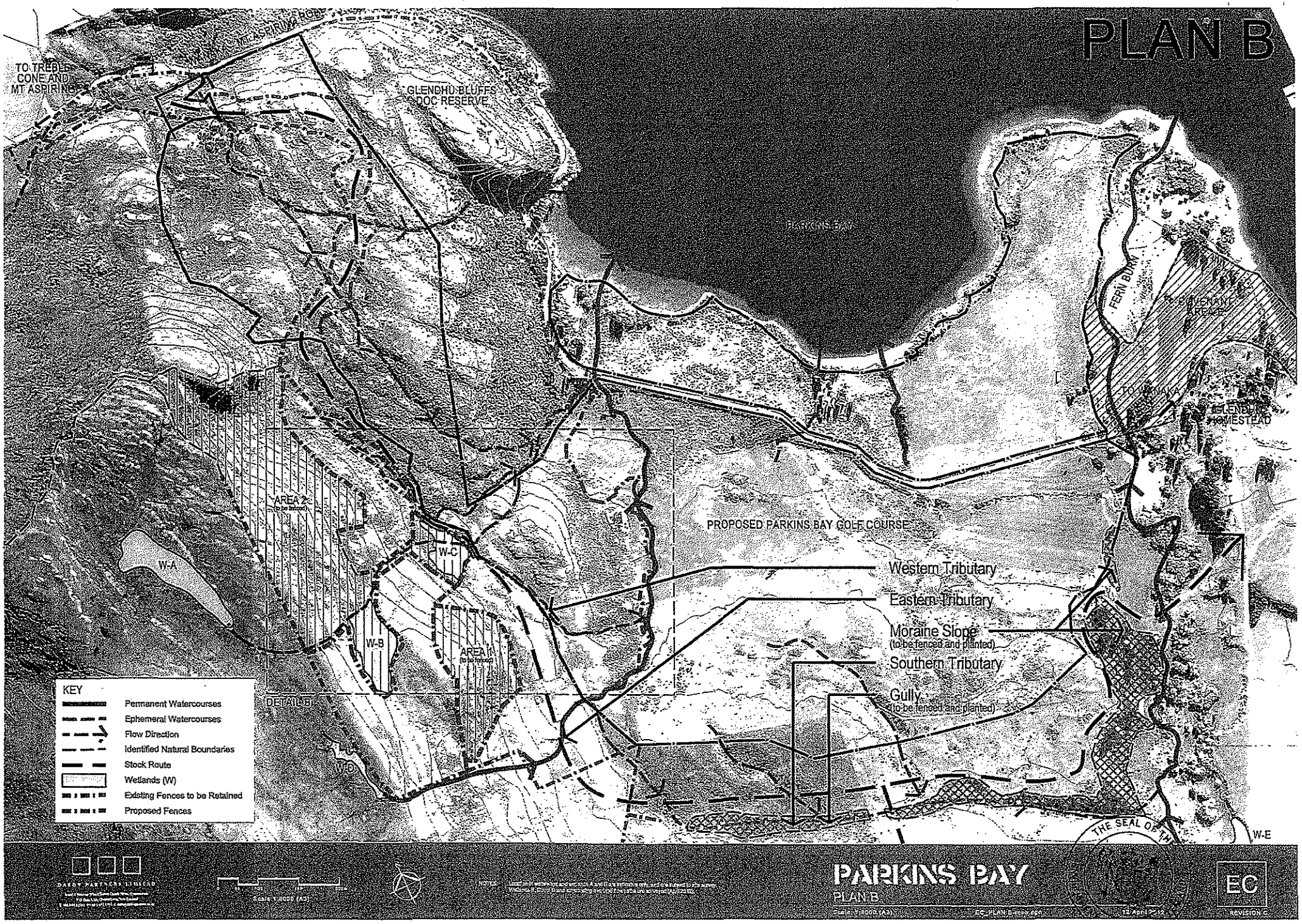


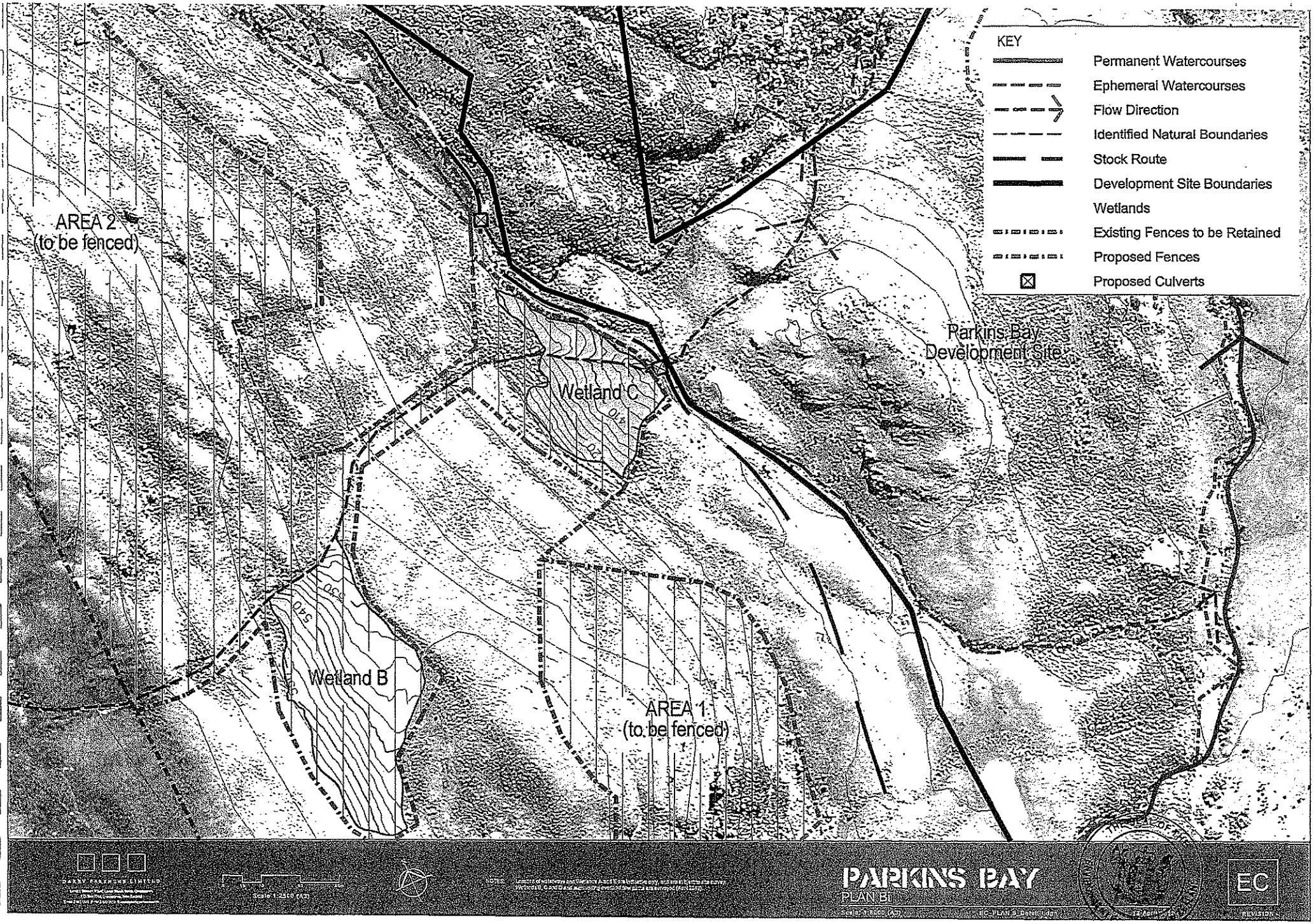
Perspective Looking North

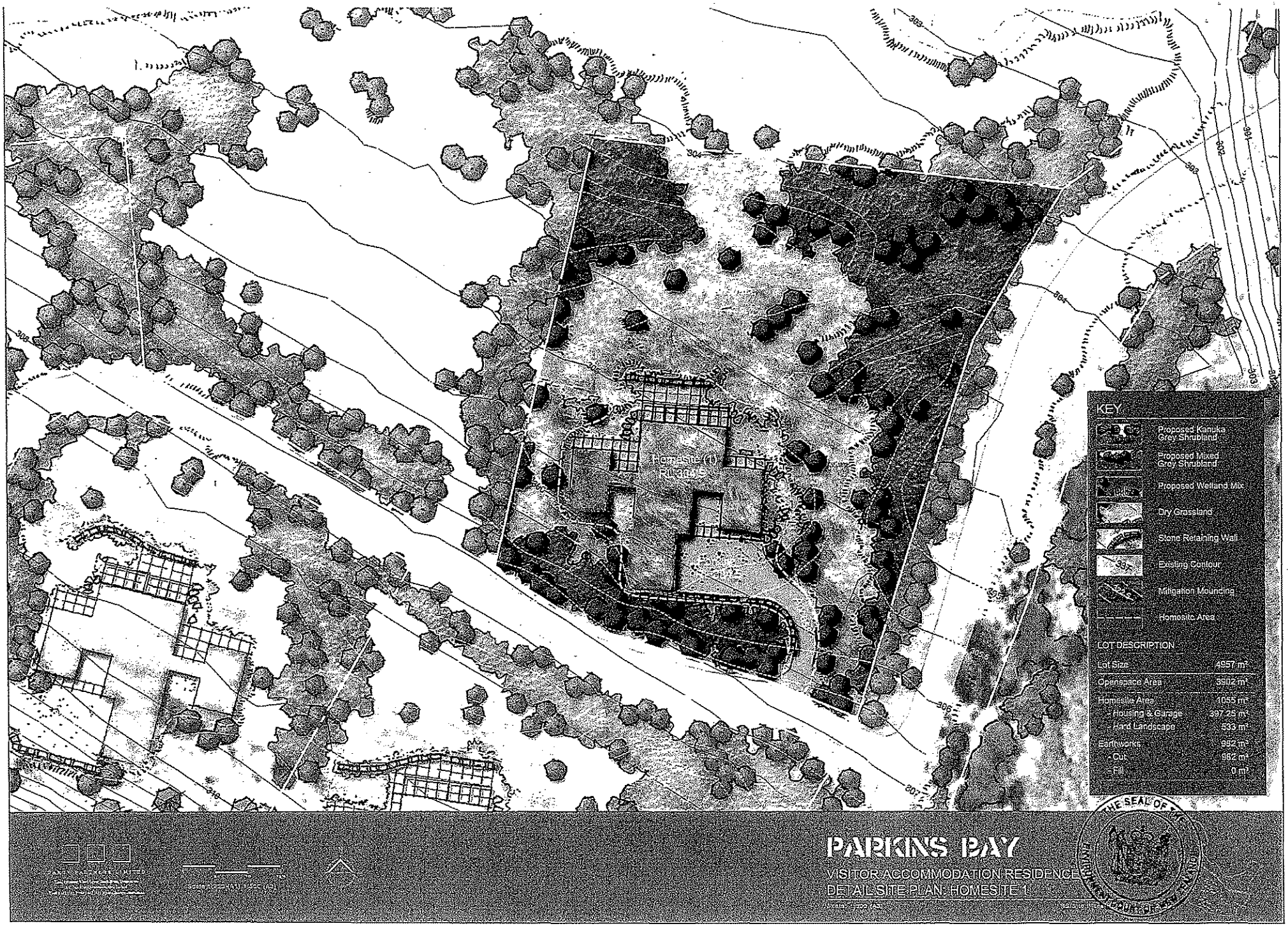
PARKINS BAY

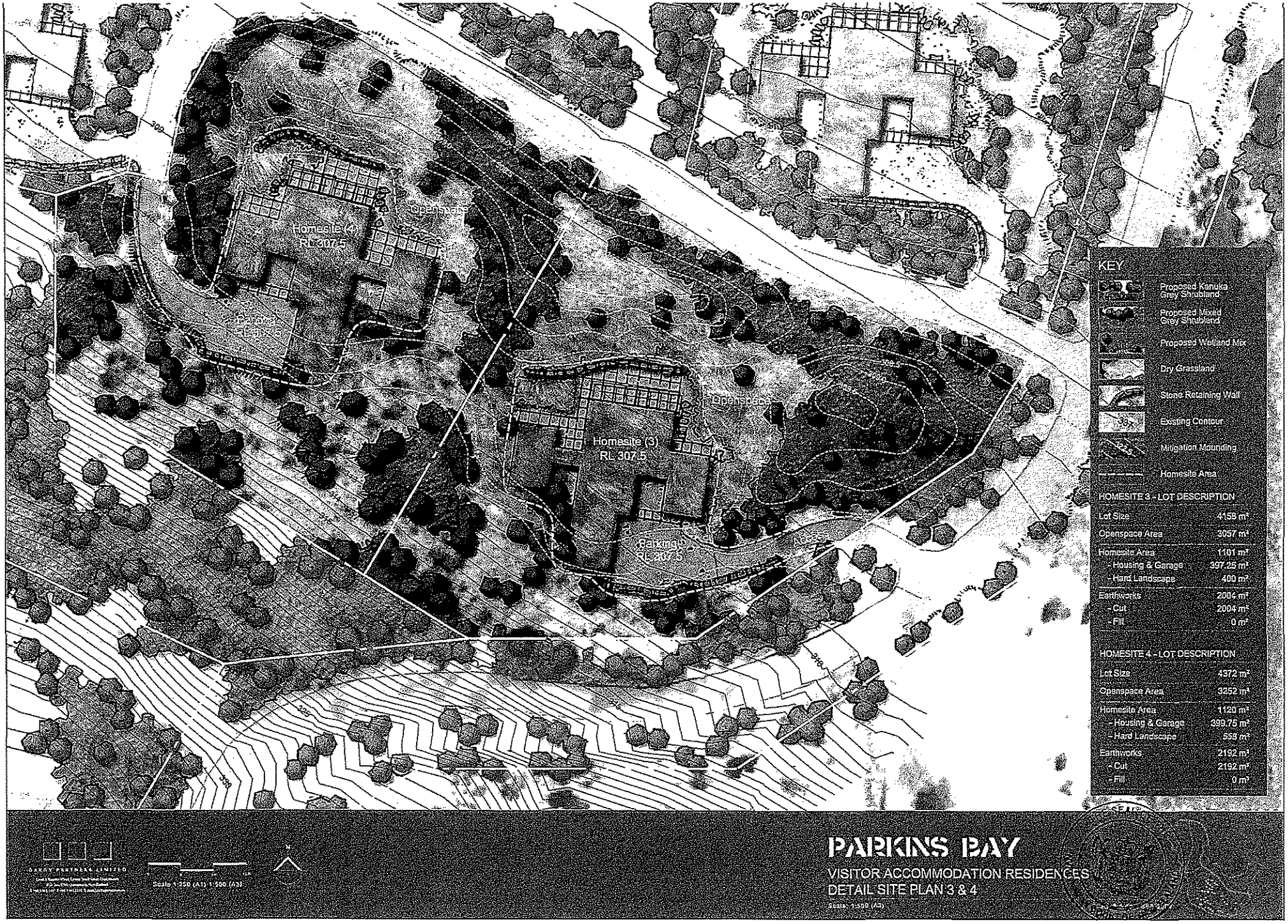
ENTRY GATE ELEVATION

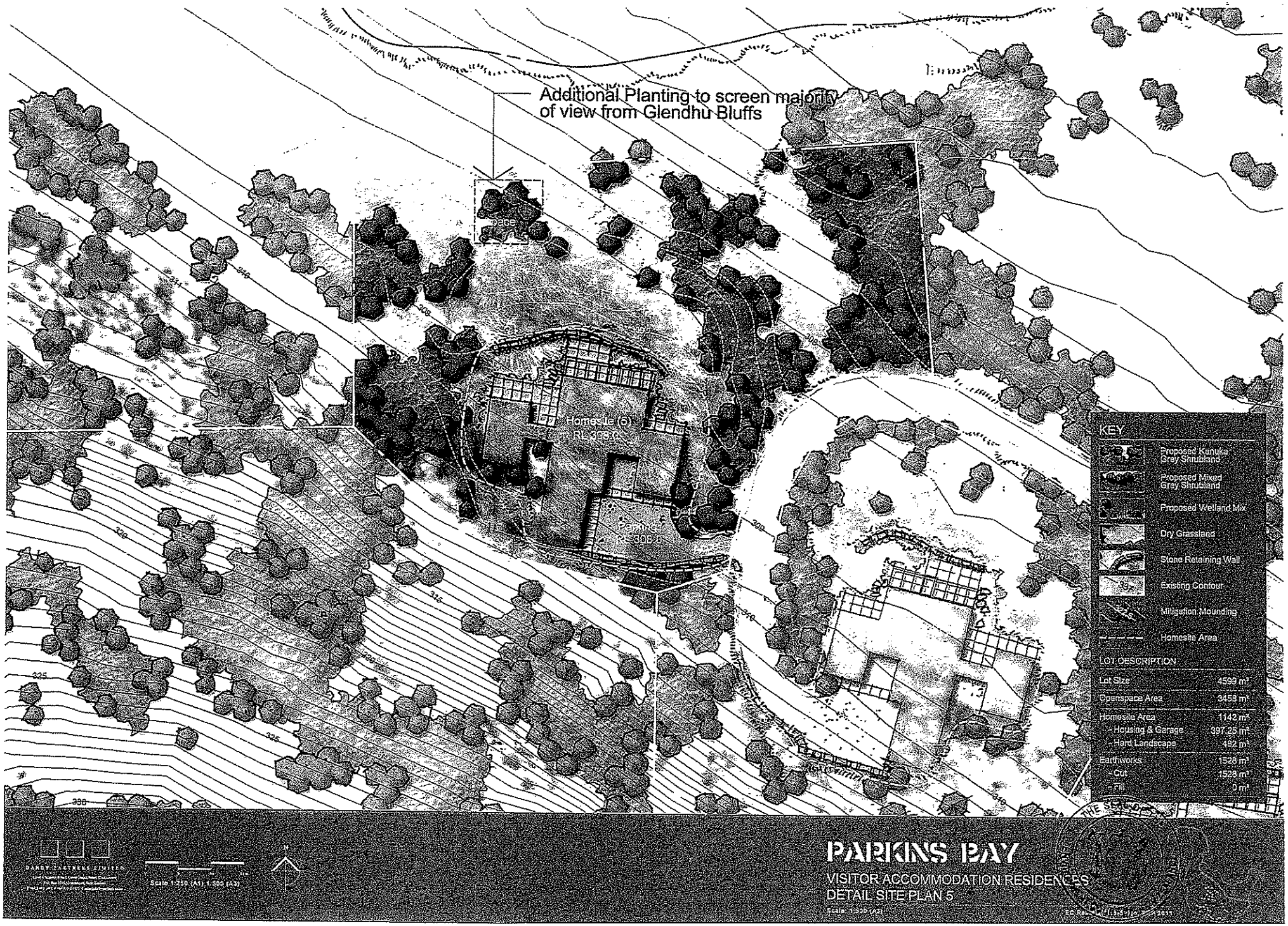
Scale: 1:50 (A3)

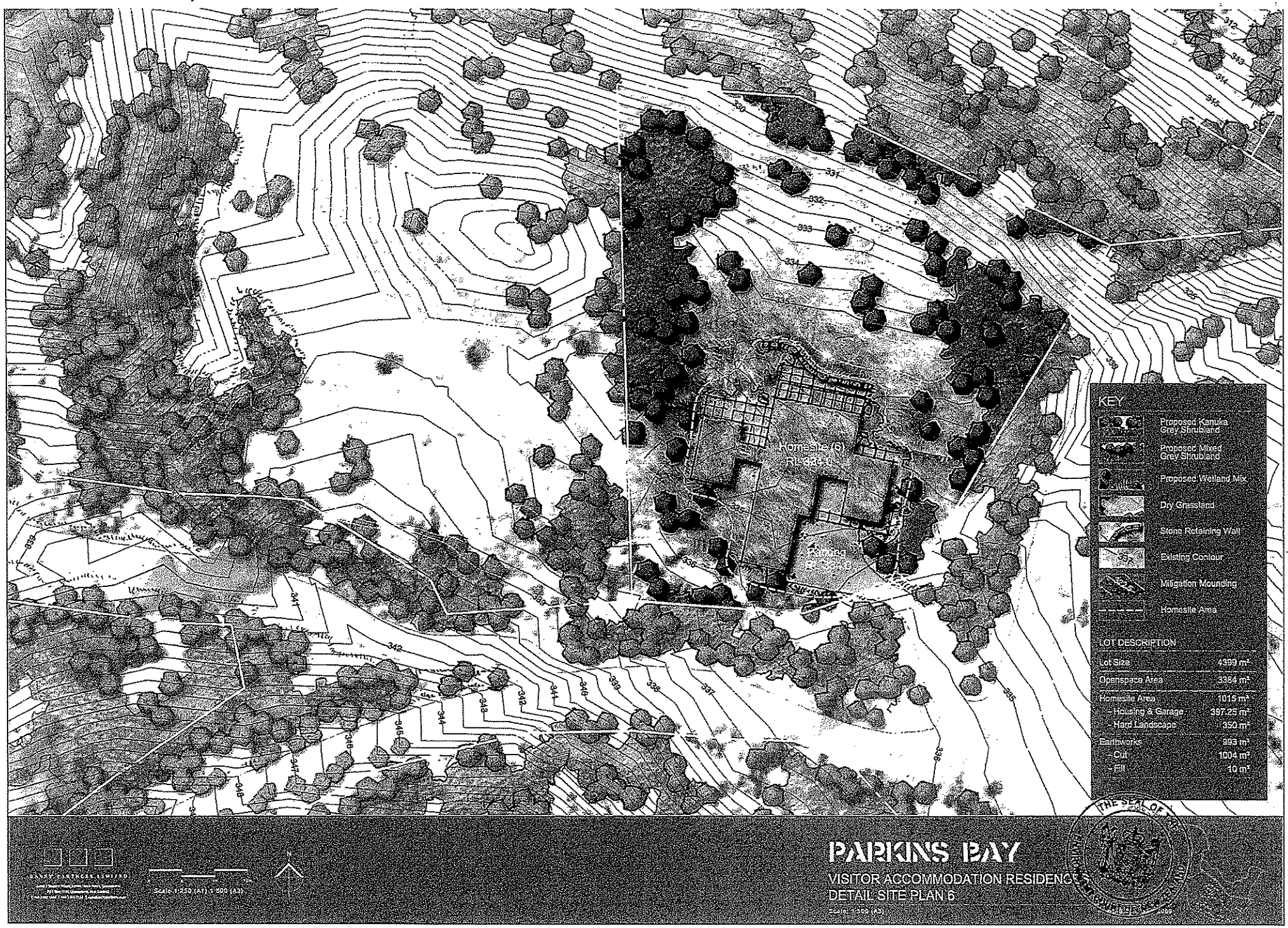

PLAN B
TO TREBLE CONE AND MT ASPIRING
MT ASPIRING ROAD
GLENDHU BLUFFS DOC RESERVE
PARKINS BAY
FERN BURN
COVENANT AREA
TO WANAKA
GLENDHU HOMESTEAD
AREA 2
(to be fenced)
AREA 1
(to be fenced)
PROPOSED PARKINS BAY GOLF COURSE
W-A
W-B
W-C
W-D
W-E
DETAIL B
Western Tributary
Eastern Tributary
Moraine Slope
(to be fenced and planted)
Southern Tributary
Gully
(to be fenced and planted)
KEY
Permanent Watercourses
Ephemeral Watercourses
Flow Direction
Identified Natural Boundaries
Stock Route
Wetlands (W)
Existing Fences to be Retained
Proposed Fences
THE SEAL OF THE
PARKINS BAY
PLAN B
EC
REVISION C

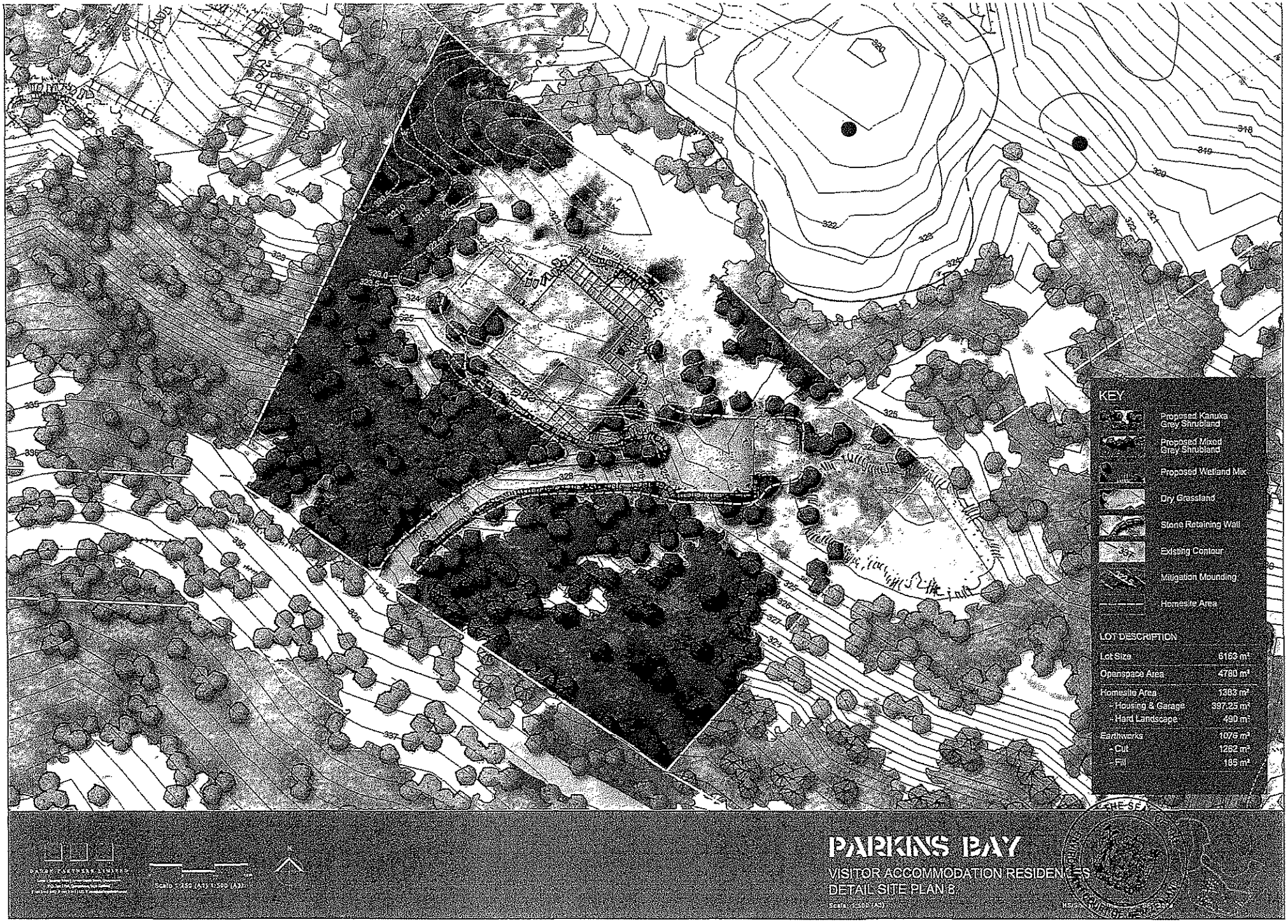

KEY
Permanent Watercourses
Ephemeral Watercourses
Flow Direction
Identified Natural Boundaries
Stock Route
Development Site Boundaries
Wetlands
Existing Fences to be Retained
Proposed Fences
Proposed Culverts
AREA 2
(to be fenced)
Parkins Bay
Development Site
Wetland C
Wetland B
AREA 1
(to be fenced)
PARKINS BAY
PLAN B1
EC

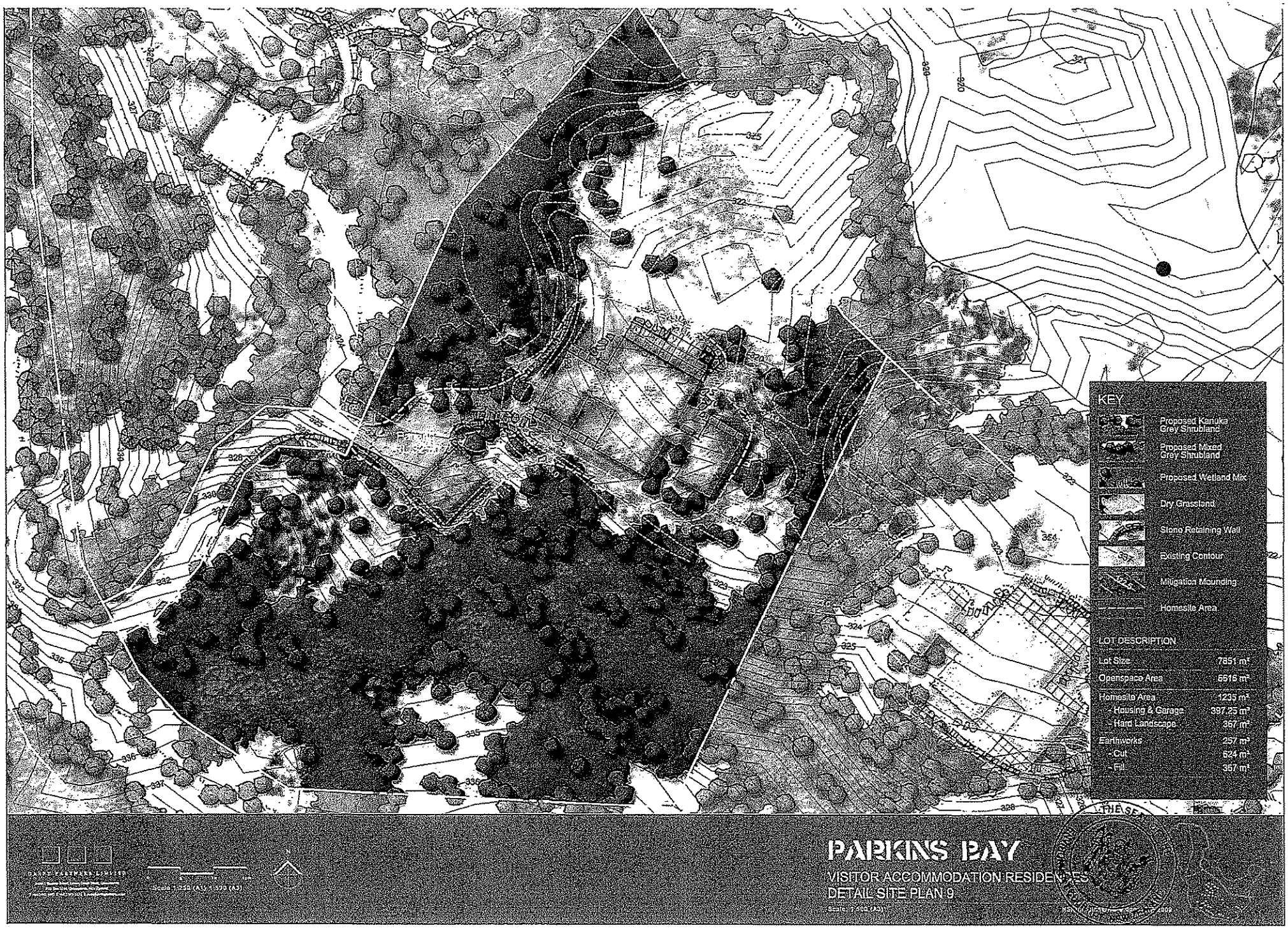

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 4957 m²
Openspace Area 3812 m²
Homesite Area 1055 m²
Housing & Garage 397.25 m²
Hard Landscape 533 m²
Earthworks 982 m³
Cut 982 m³
Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAILSITE PLAN: HOMESITE 1

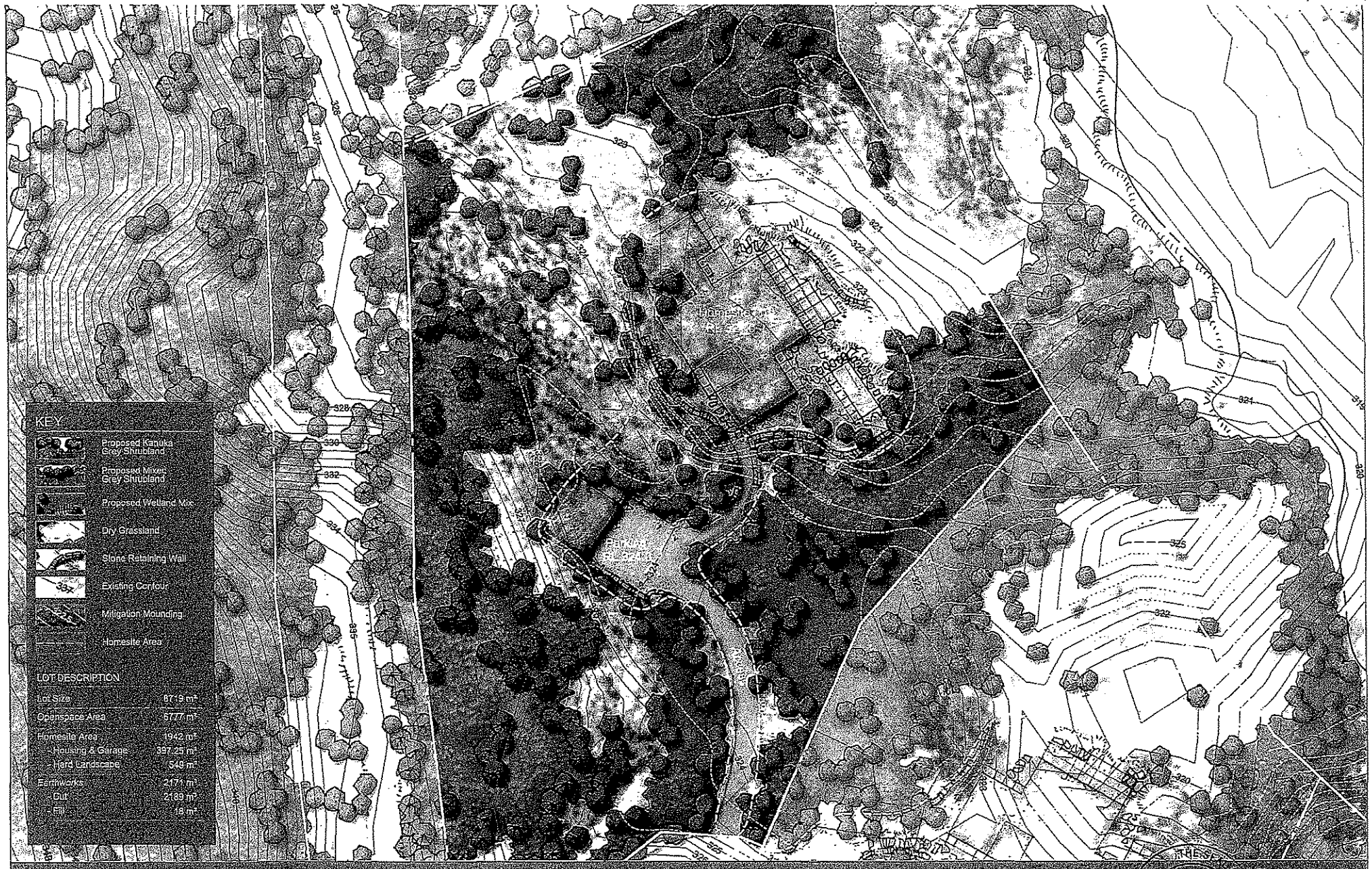

Homesite (4)
RL 307.5
Openspace
Parking
RL 307.5
Homesite (3)
RL 307.5
Openspace
Parking
RL 307.5
Access
KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
HOMESITE 3 - LOT DESCRIPTION
Lot Size 4158 m²
Openspace Area 3057 m²
Homesite Area 1101 m²
- Housing & Garage 307.25 m²
- Hard Landscape 400 m²
Earthworks 2004 m²
- Cut 2004 m²
- Fill 0 m²
HOMESITE 4 - LOT DESCRIPTION
Lot Size 4372 m²
Openspace Area 3252 m²
Homesite Area 1120 m²
- Housing & Garage 399.75 m²
- Hard Landscape 595 m²
Earthworks 2192 m²
- Cut 2192 m²
- Fill 0 m²
Scale 1:250 (A1) 1:500 (A3)
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 3 & 4
SCALE 1:250 (A1)

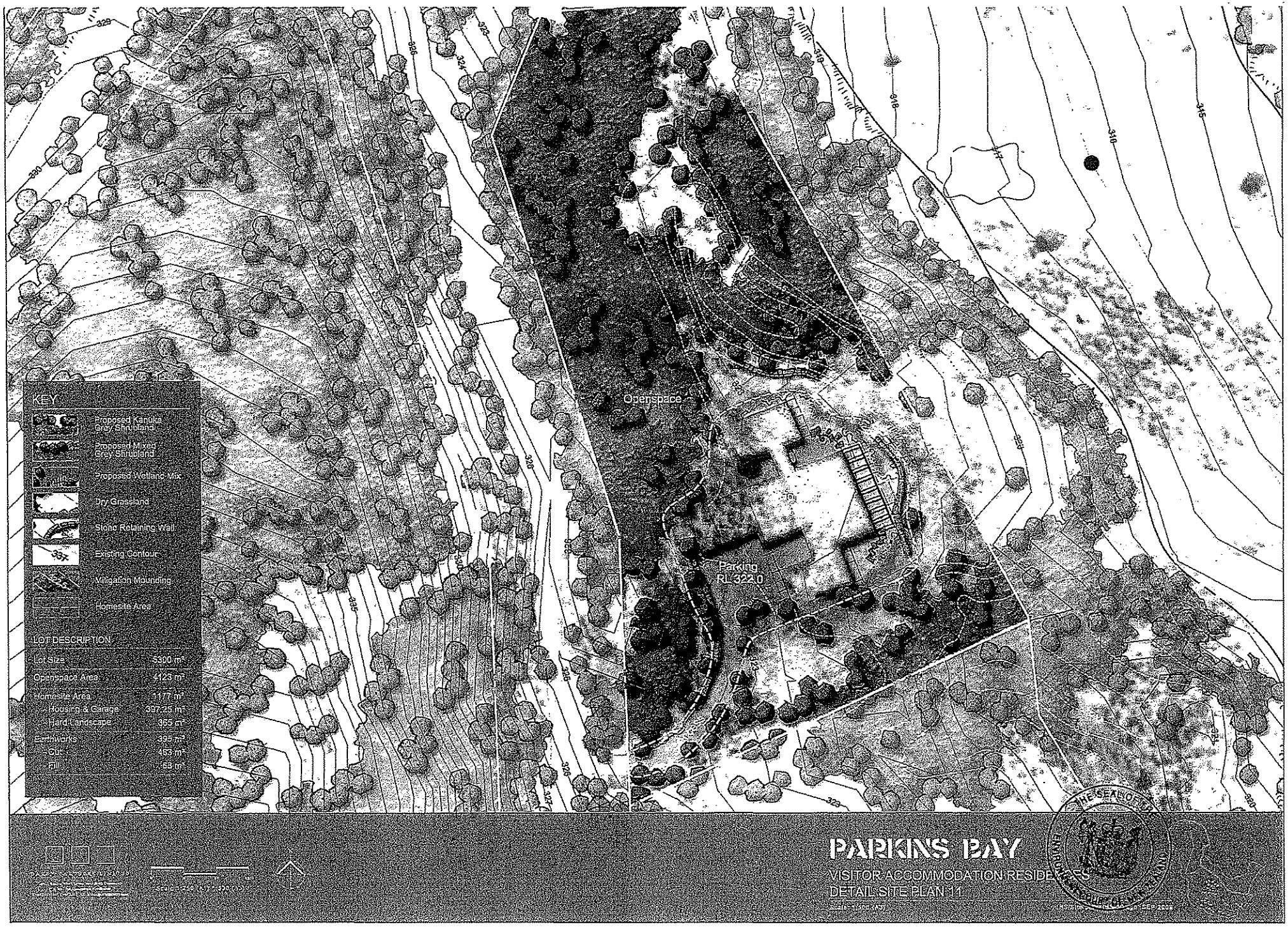

Additional Planting to screen majority of view from Glendhu Bluffs
Homesite (6)
RL 309.0
Parking
RL 309.0
KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 4599 m²
Openspace Area 3456 m²
Homesite Area 1143 m²
Housing & Garage 397.25 m²
Hard Landscape 492 m²
Earthworks 1528 m³
Cut 1528 m³
Fill 0 m³
THE SCHOOL
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 5

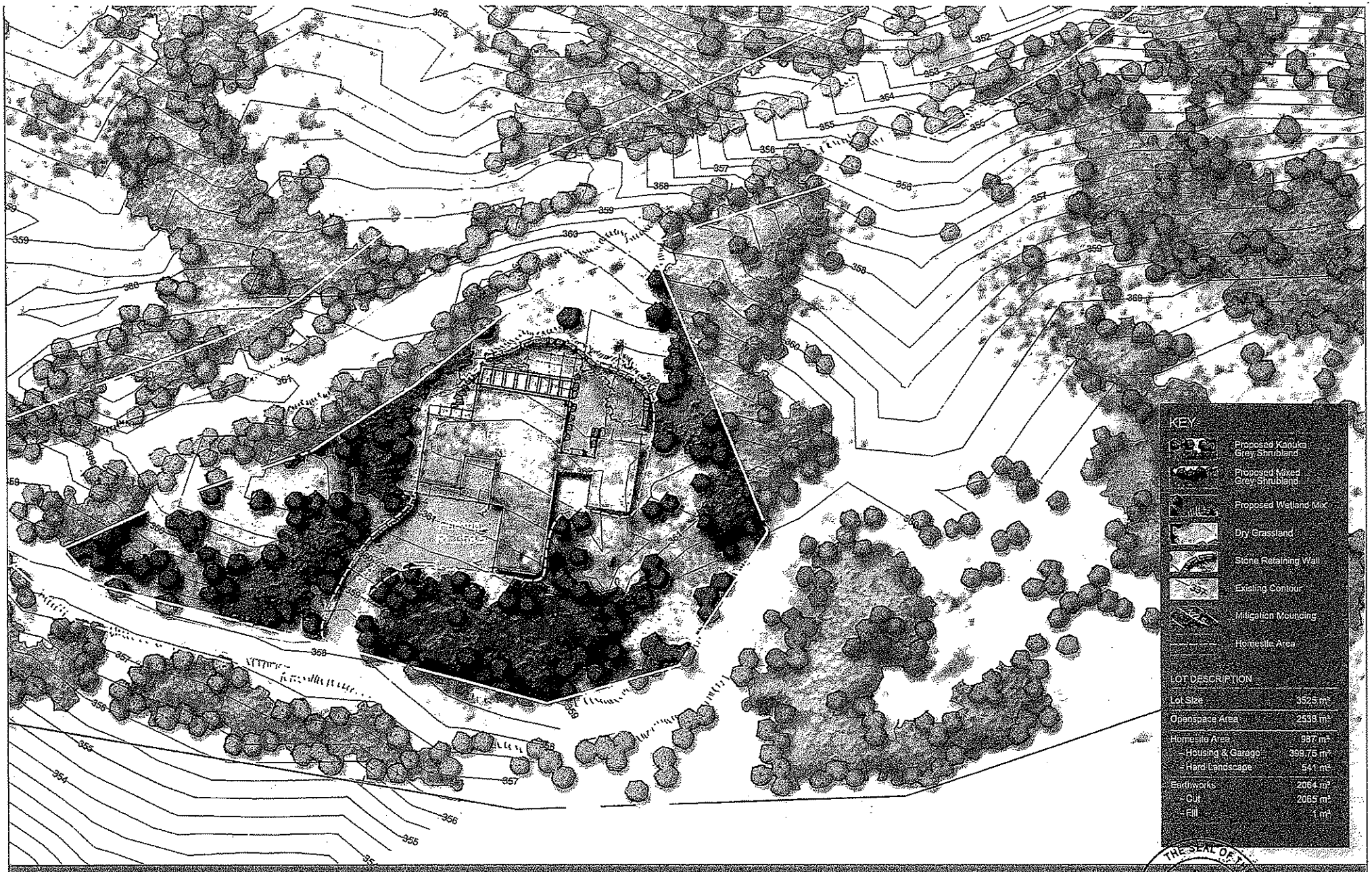

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 4399 m²
Openspace Area 3384 m²
Homesite Area 1015 m²
Housing & Garage 397.25 m²
Hard Landscape 390 m²
Earthworks 393 m³
Cut 100 m³
Fill 10 m³
Homesite (G)
RL 334.4
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 6
Scale 1:250 (A1) 1:500 (A3)


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 6163 m²
Openspace Area 4780 m²
Homesite Area 1383 m²
- Housing & Garage 397.25 m²
- Hard Landscape 490 m²
Earthworks 1076 m³
- Cut 1282 m³
- Fill 186 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN B


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 7851 m²
Openspace Area 6518 m²
Homesite Area 1235 m²
- Housing & Garage 397.25 m²
- Hard Landscape 367 m²
Earthworks 257 m²
- Cut 624 m²
- Fill 367 m²
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 9


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
328
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 87.19 m²
Open space Area 5777 m²
Homesite Area 1942 m²
Housing & Garage 397.25 m²
Hard Landscape 540 m²
Earthworks 2174 m²
Cut 2189 m²
Fill 18 m²
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 10


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 5300 m²
Openspace Area 4123 m²
Homesite Area 1177 m²
Housing & Garage 397.25 m²
Hard Landscape 365 m²
Earthworks 395 m³
Cut 153 m³
Fill 69 m³
Openspace
Parking
RL 322.0
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 11

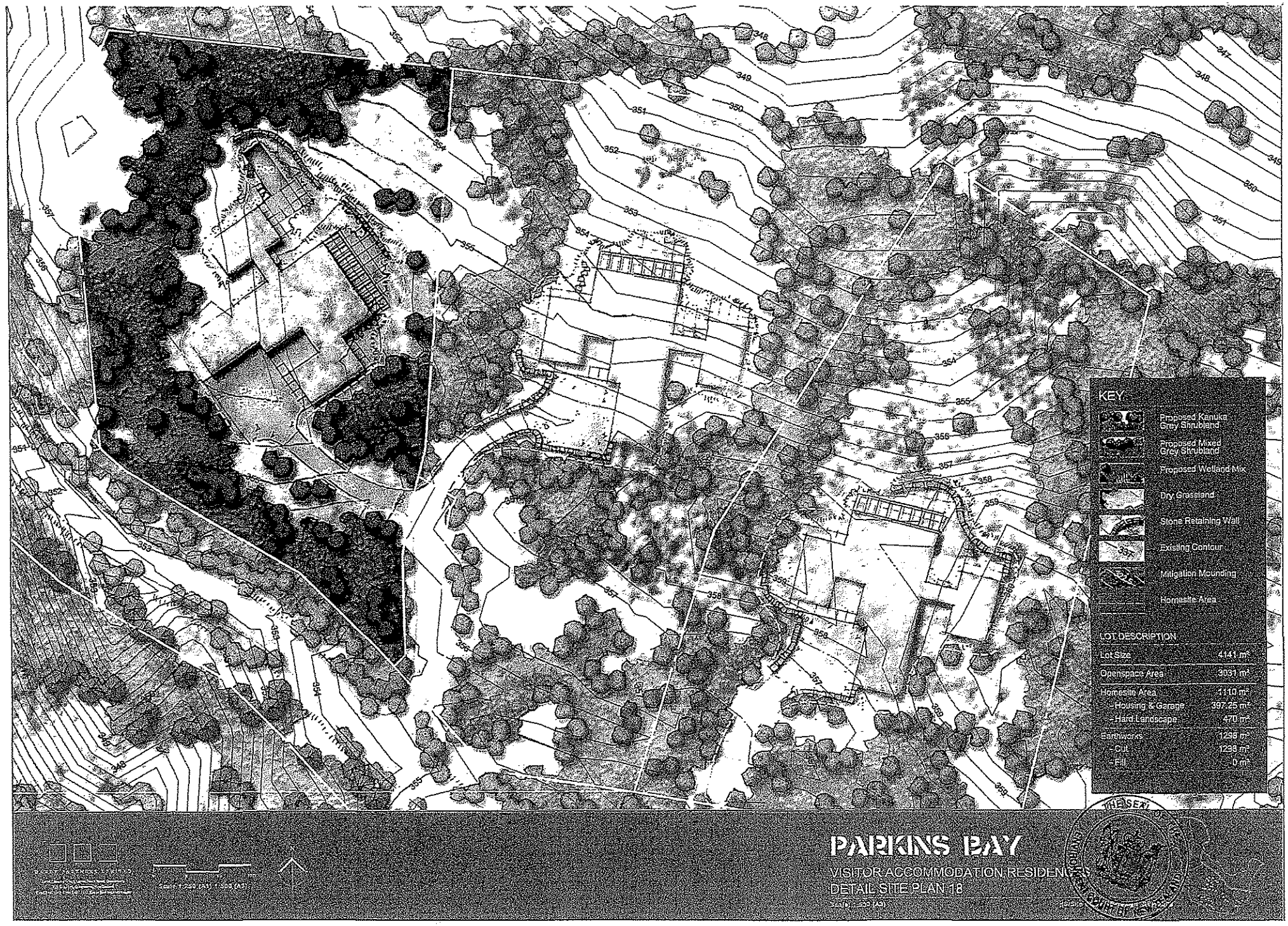


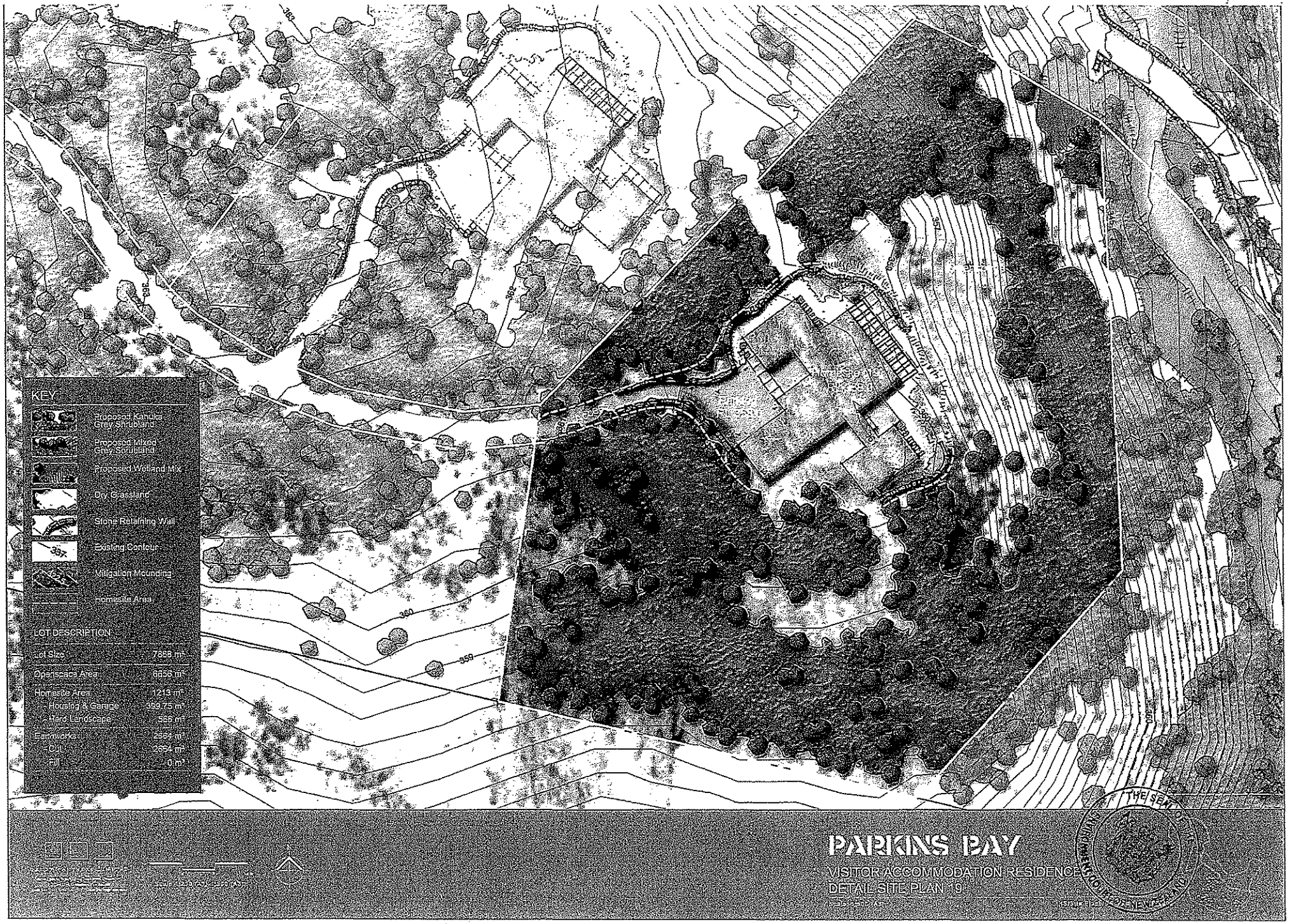
PAPKNS BAY

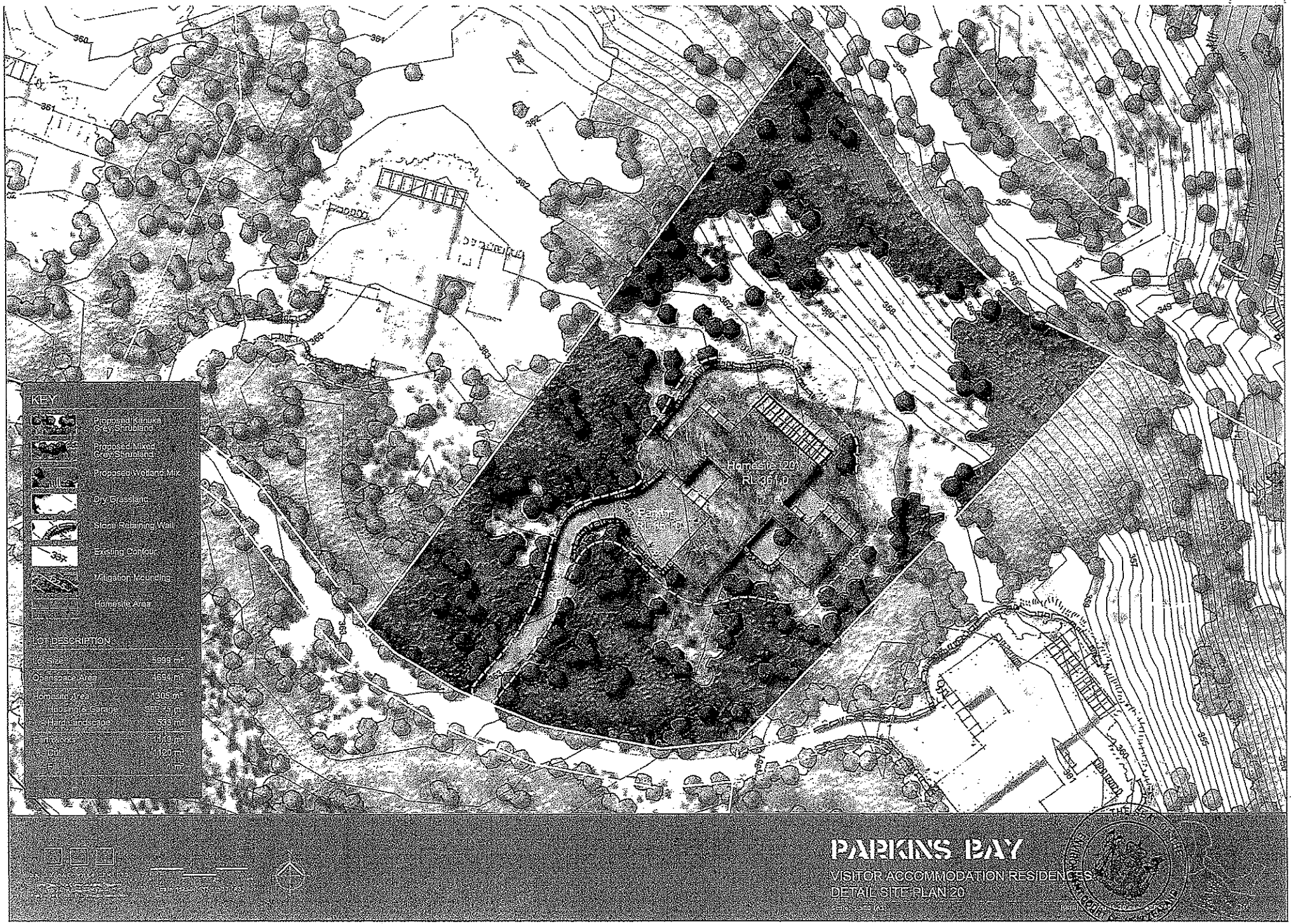
VISITOR ACCOMMODATION RESIDENCES

DETAIL SITE PLAN 13


Additional Planting to screen majority of view from Glendhu Bluffs
Openspace
Homesite 17
Parking
KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
HOMESITE 16 - LOT DESCRIPTION
Lot Size 4989 m²
Openspace Area 3855 m²
Homesite Area 1134 m²
- Housing & Garage 399.75 m²
- Hard Landscape 351 m²
Earthworks 3370 m³
- Cut 3371 m³
- Fill 4 m³
HOMESITE 17 - LOT DESCRIPTION
Lot Size 5558 m²
Openspace Area 4505 m²
Homesite Area 1052 m²
- Housing & Garage 399.75 m²
- Hard Landscape 404 m²
Earthworks 1679 m³
- Cut 1712 m³
- Fill 33 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 16 & 17


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 4141 m²
Openspace Area 3031 m²
Homesite Area 1110 m²
Housing & Garage 397.25 m²
Hard Landscape 470 m²
Earthworks 1298 m³
Cut 1298 m³
Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 18

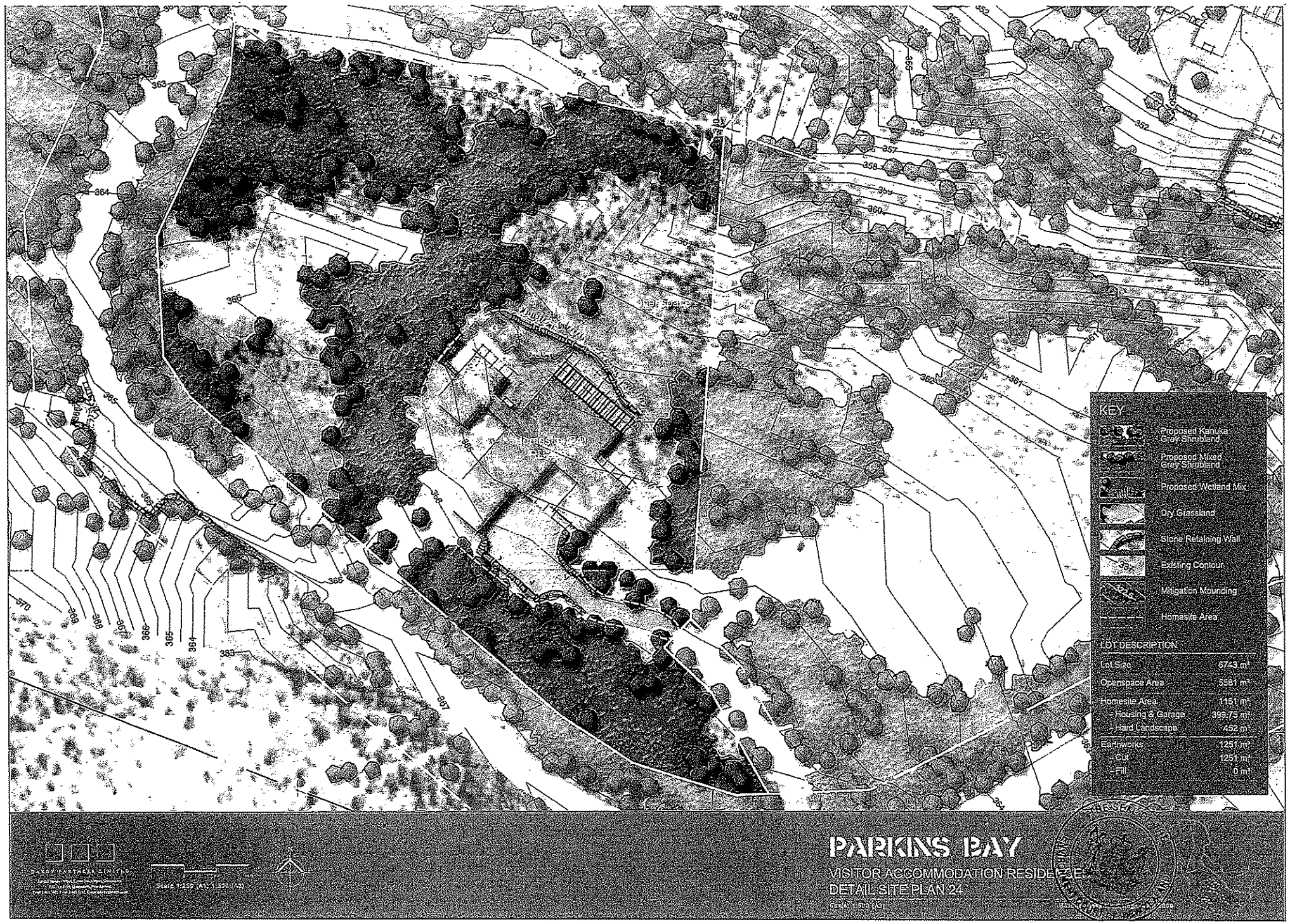

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 7868 m²
Proposed Area 0655 m²
Homesite Area 1215 m²
Housing & Garage 399.75 m²
Hard Landscape 589 m²
Earthworks
Cut 2654 m³
Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 19

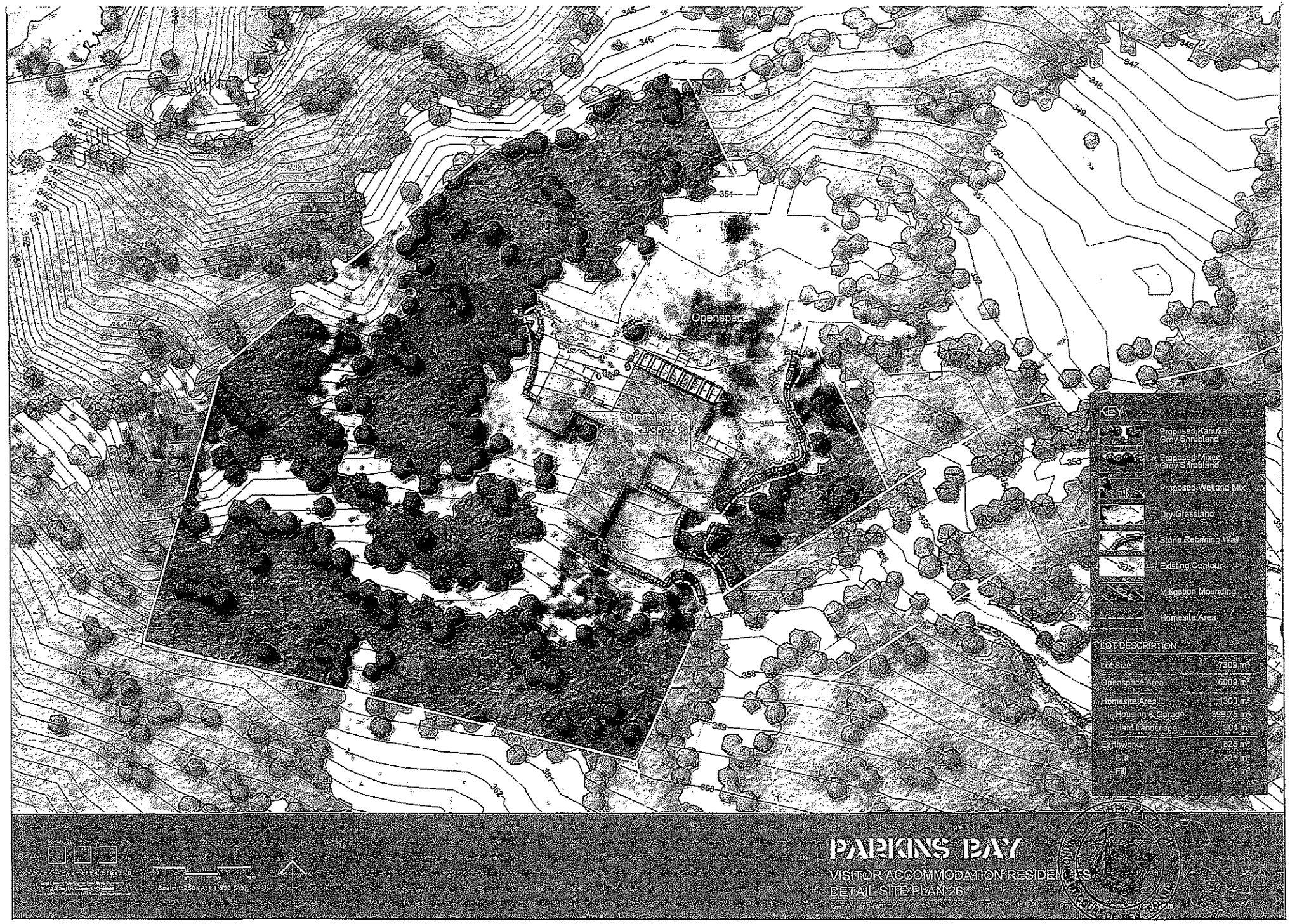

KEY
Proposed Native Bay Shrubland
Proposed Mixed Post Shrubland
Proposed Wetland Mix
Dry Creek Line
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size
Developed Area
Non Developed Area
Dwelling & Garage
Hard Landscape
Soft Landscape
Coverage
FAR
Homesite 20
RL 361.0
Parking
RL 360.0
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 20

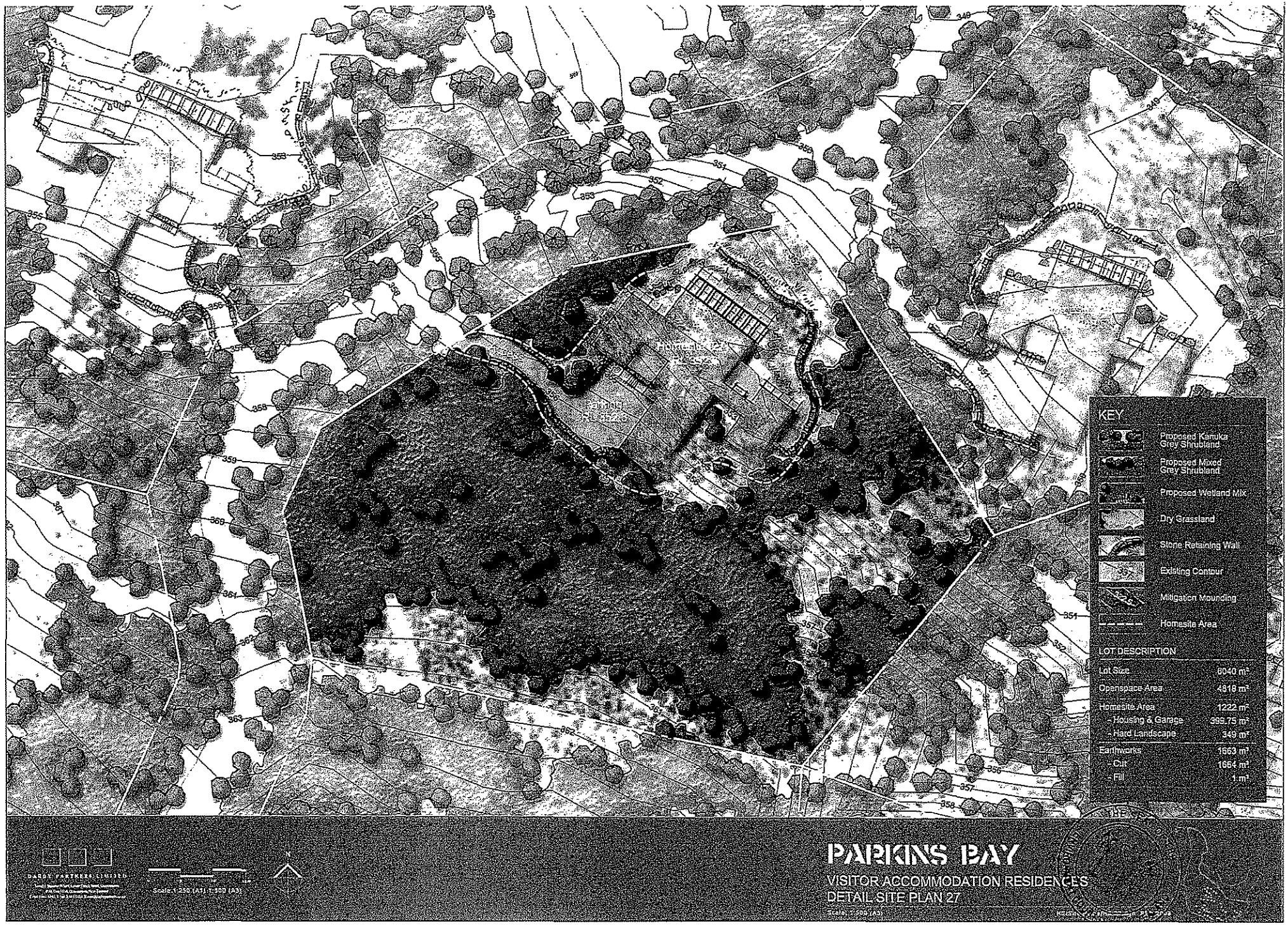
PARKINS BAY

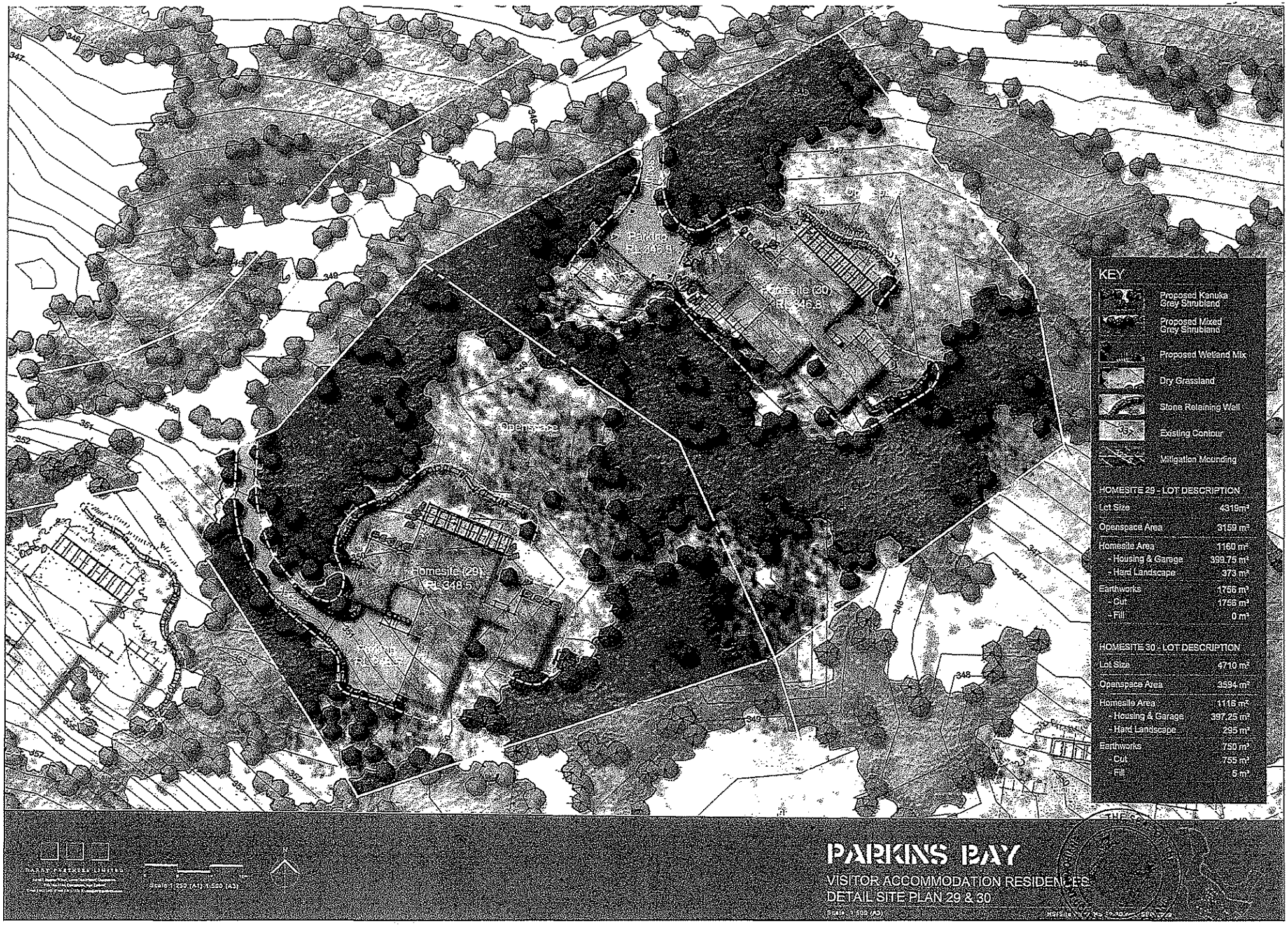
VISITOR ACCOMMODATION RESIDENCES

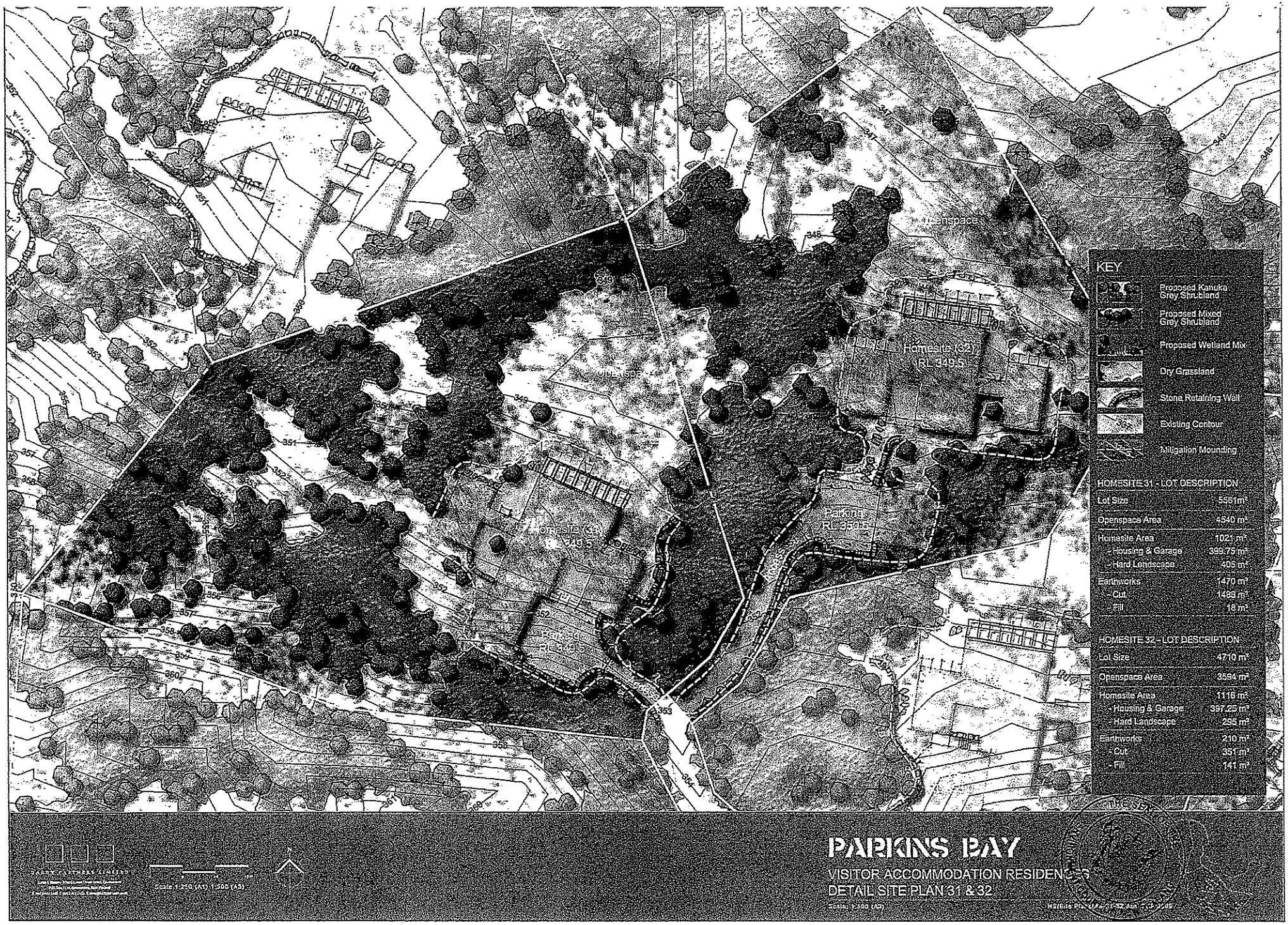
DETAIL SITE PLAN 21 & 22

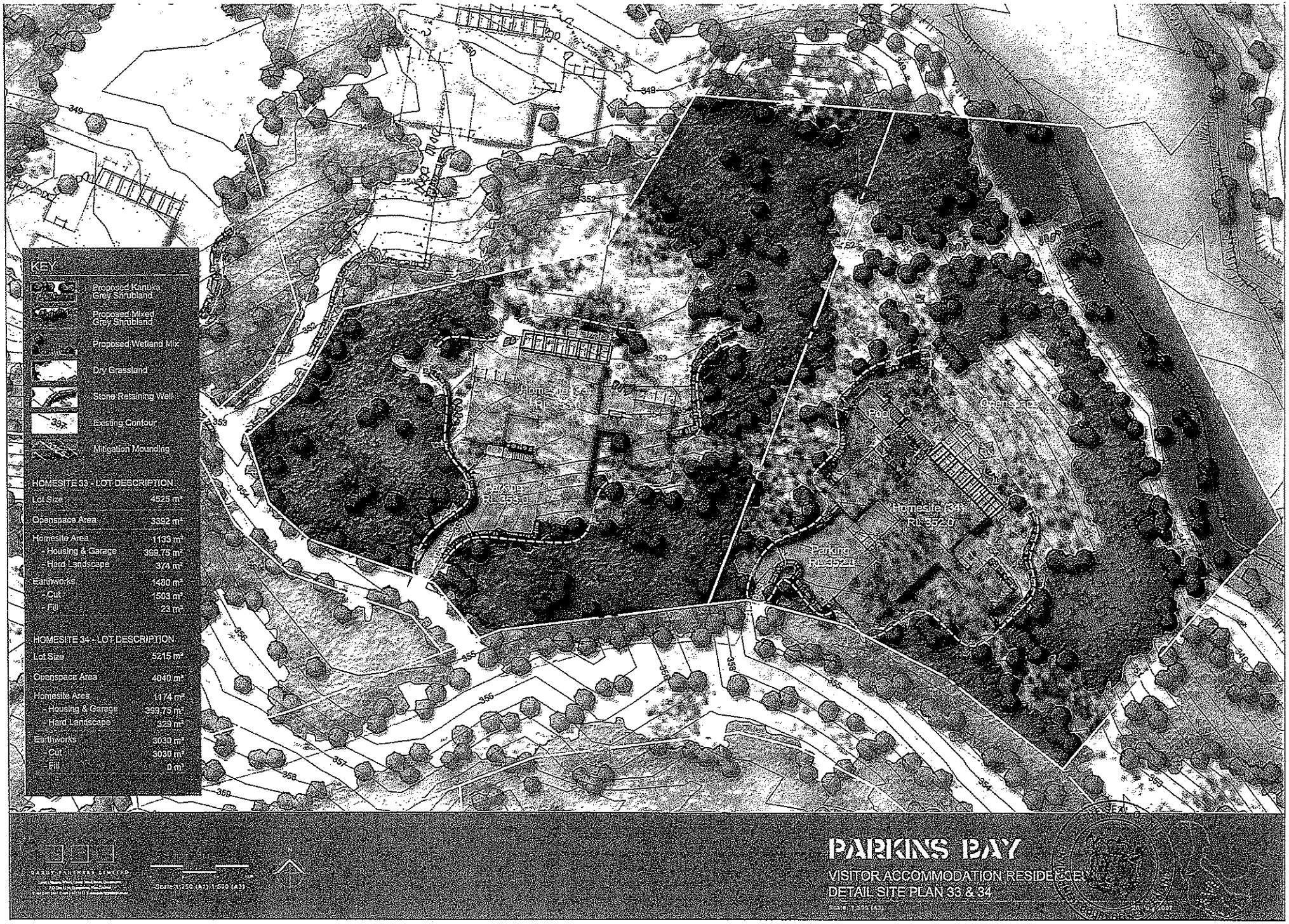

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 6743 m²
Openspace Area 5591 m²
Homesite Area 1151 m²
- Housing & Garage 399.75 m²
- Hard Landscape 492 m²
Earthworks 1251 m³
- Cut 1251 m³
- Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 24

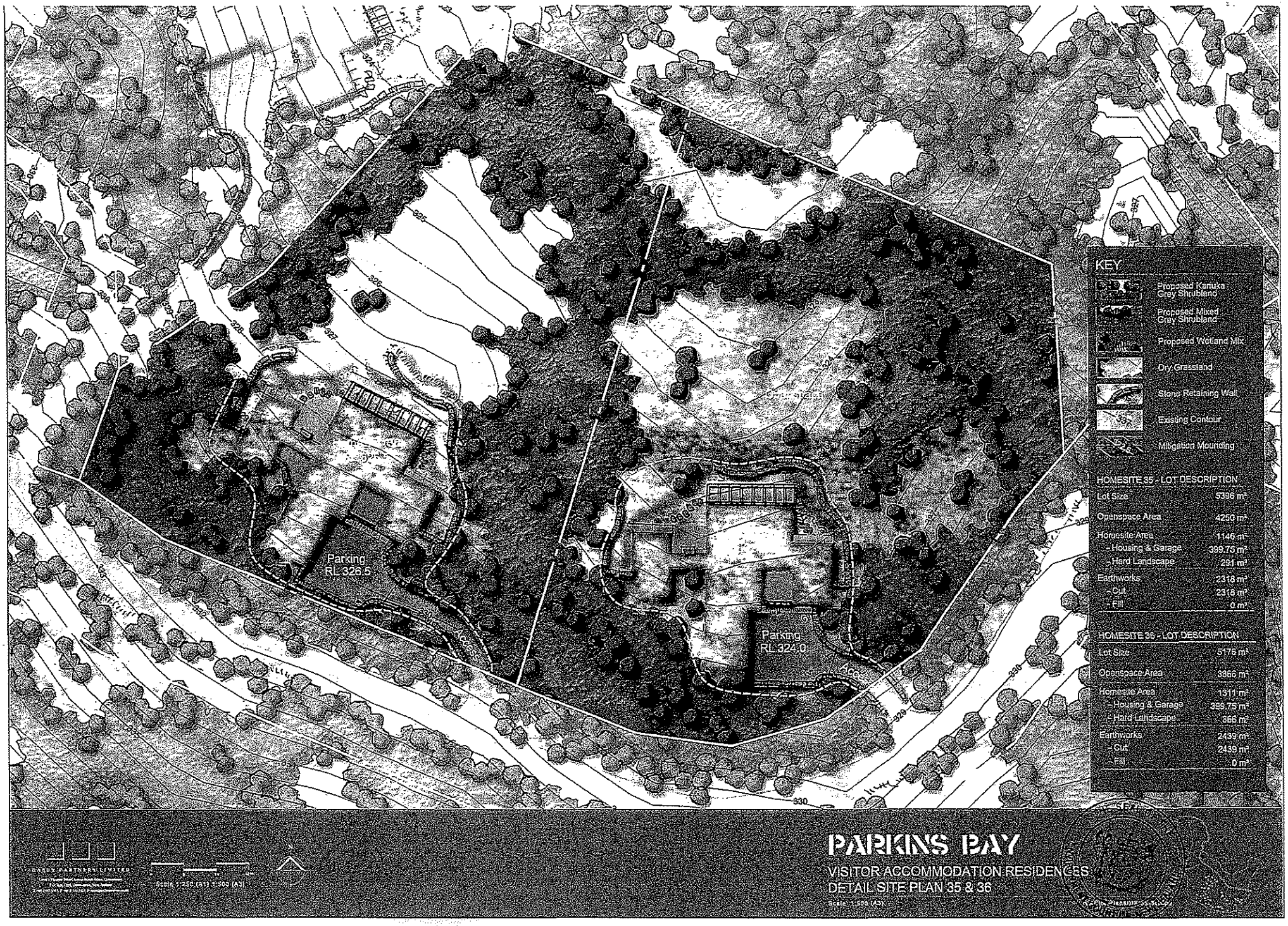

Openspace
Homesite 1
Homesite 2
KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 7303 m²
Openspace Area 6009 m²
Homesite Area 1300 m²
Housing & Garage 289.76 m²
Hard Landscape 304 m²
Earthworks 1825 m³
Cut 1825 m³
Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 26

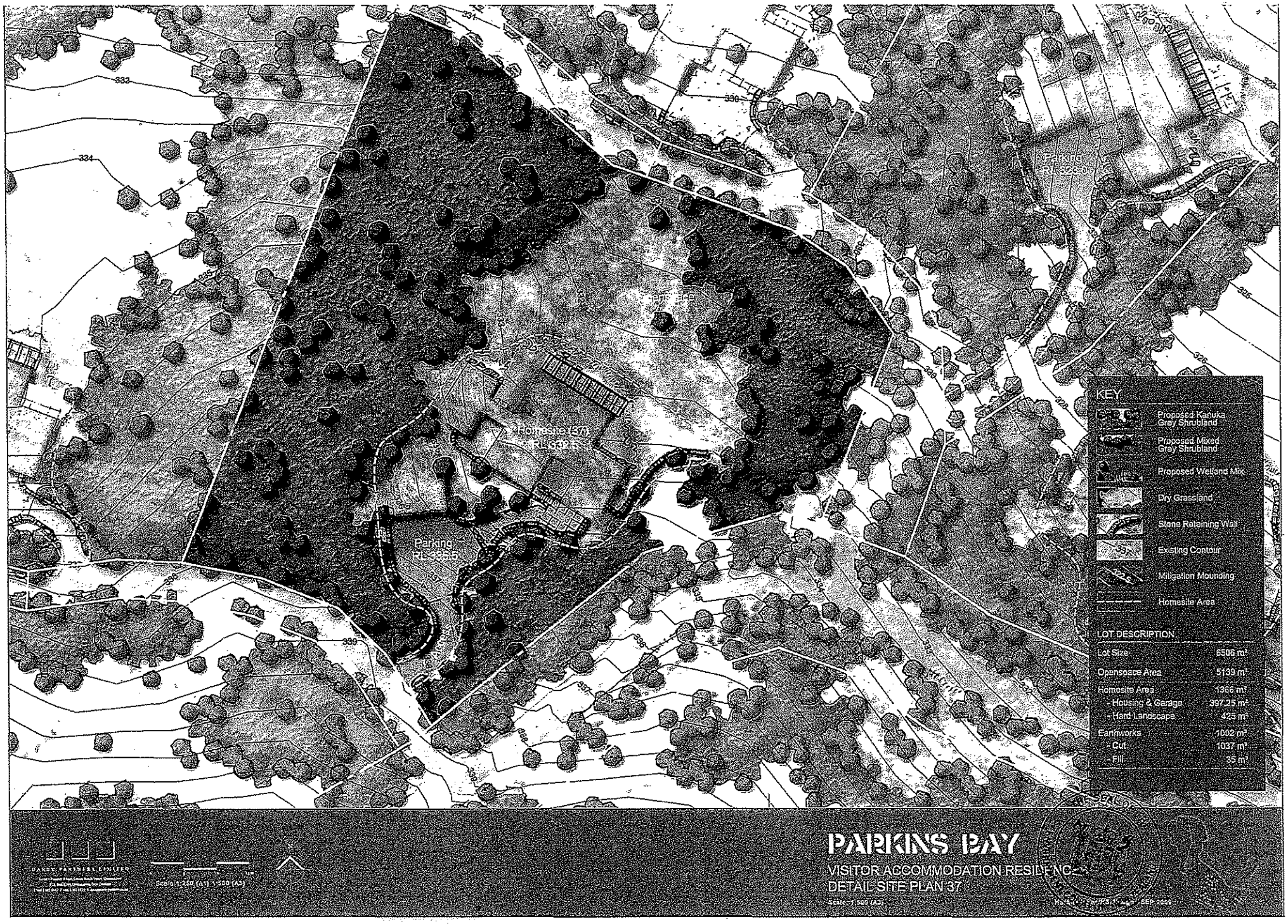

KEY
Proposed Kamuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 8040 m²
Openspace Area 4818 m²
Homesite Area 1222 m²
- Housing & Garage 395.75 m²
- Hard Landscape 449 m²
Earthworks 1663 m³
- Cut 1664 m³
- Fill 1 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 27

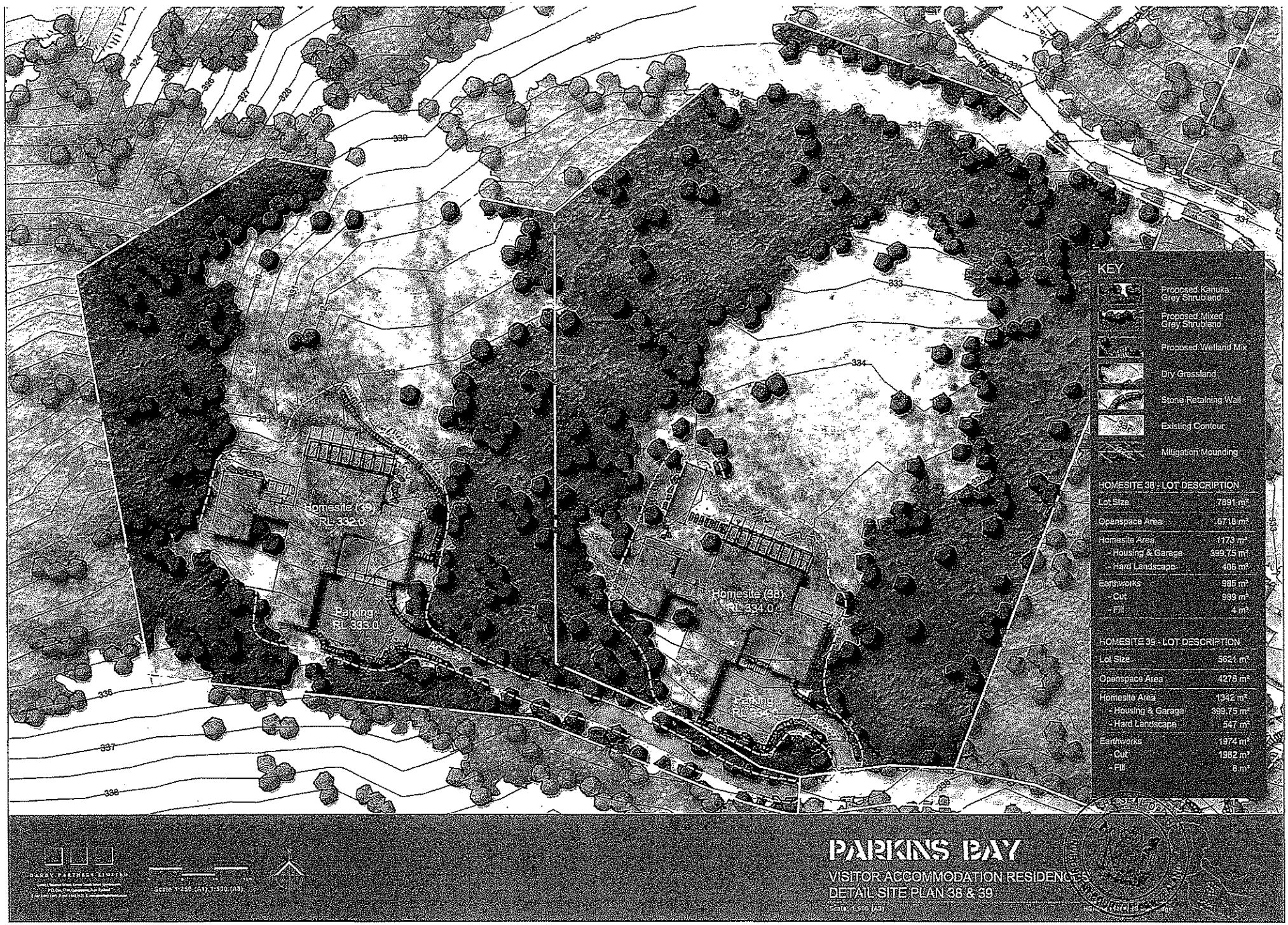

Openspace 2
Homesite (29)
RL 348.5
Homesite (30)
RL 346.8
KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 29 - LOT DESCRIPTION
Lot Size 4315m²
Openspace Area 3169 m²
Homesite Area 1160 m²
- Housing & Garage 399.75 m²
- Hard Landscape 373 m²
Earthworks 1766 m³
- Cut 1766 m³
- Fill 0 m³
HOMESITE 30 - LOT DESCRIPTION
Lot Size 4710 m²
Openspace Area 3594 m²
Homesite Area 1116 m²
- Housing & Garage 397.25 m²
- Hard Landscape 295 m²
Earthworks 750 m³
Cut 755 m³
Fill 5 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 29 & 30

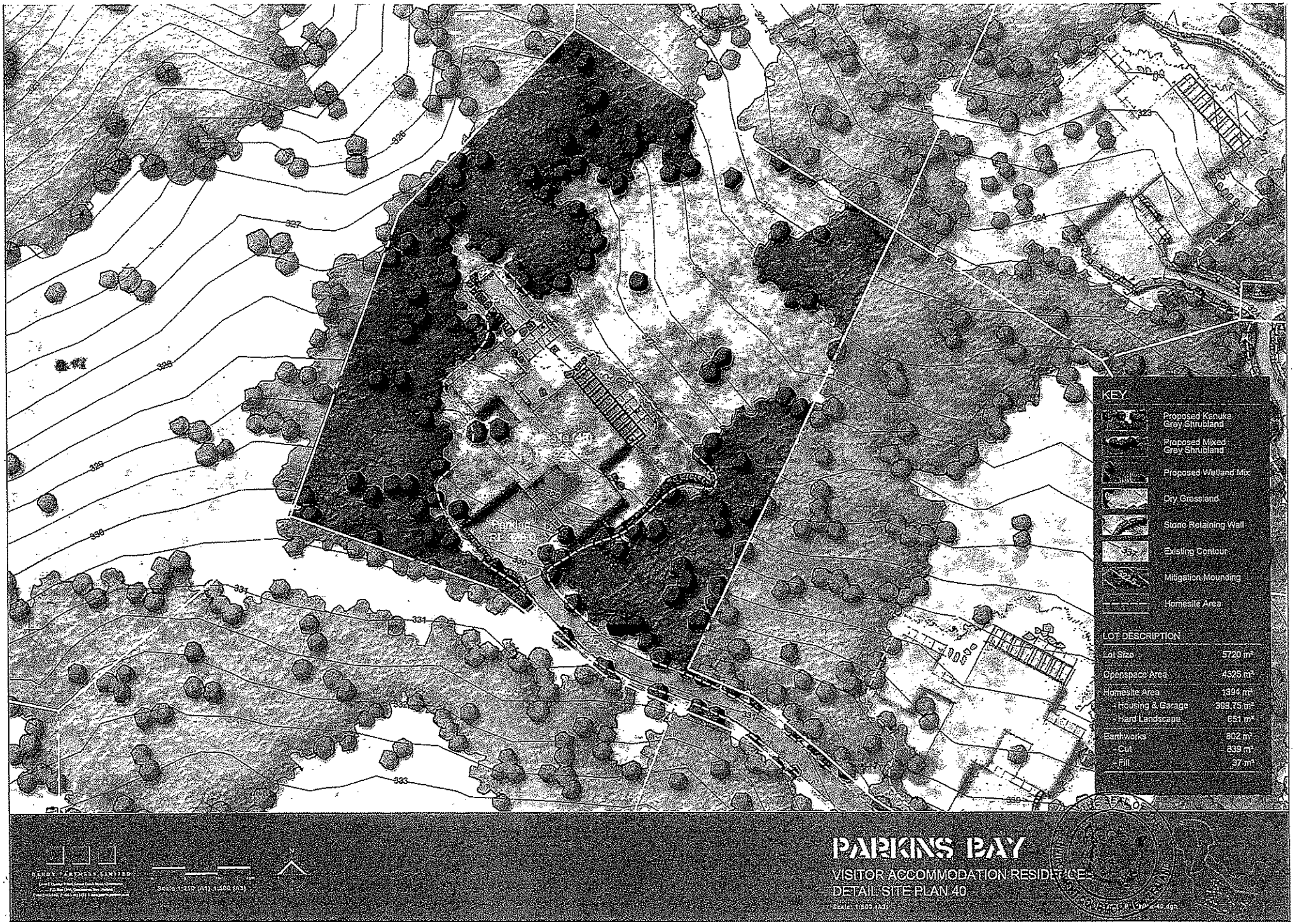

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 31 - LOT DESCRIPTION
Lot Size 5961m²
Openspace Area 4540 m²
Homesite Area 1021 m²
- Housing & Garage 399.75 m²
- Hard Landscape 405 m²
Earthworks 1470 m³
- Cut 1488 m³
- Fill 18 m³
HOMESITE 32 - LOT DESCRIPTION
Lot Size 4710 m²
Openspace Area 3594 m²
Homesite Area 1116 m²
- Housing & Garage 397.25 m²
- Hard Landscape 295 m²
Earthworks 210 m³
- Cut 351 m³
- Fill 141 m³
Homesite (32) RL 349.5
Parking RL 350.5
Parking RL 349.5
Openspace
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 31 & 32


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 33 - LOT DESCRIPTION
Lot Size 4525 m²
Openspace Area 3392 m²
Homesite Area 1133 m²
- Housing & Garage 359.75 m²
- Hard Landscape 374 m²
Earthworks 1480 m²
- Cut 1503 m²
- Fill 23 m²
HOMESITE 34 - LOT DESCRIPTION
Lot Size 5215 m²
Openspace Area 4040 m²
Homesite Area 1174 m²
- Housing & Garage 339.79 m²
- Hard Landscape 329 m²
Earthworks 3030 m²
- Cut 3030 m²
- Fill 0 m²
Homesite (33)
RL 352.0
Parking
RL 352.0
Pool
Owners Lo
Homesite (34)
RL 352.0
Parking
RL 352.0
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 33 & 34

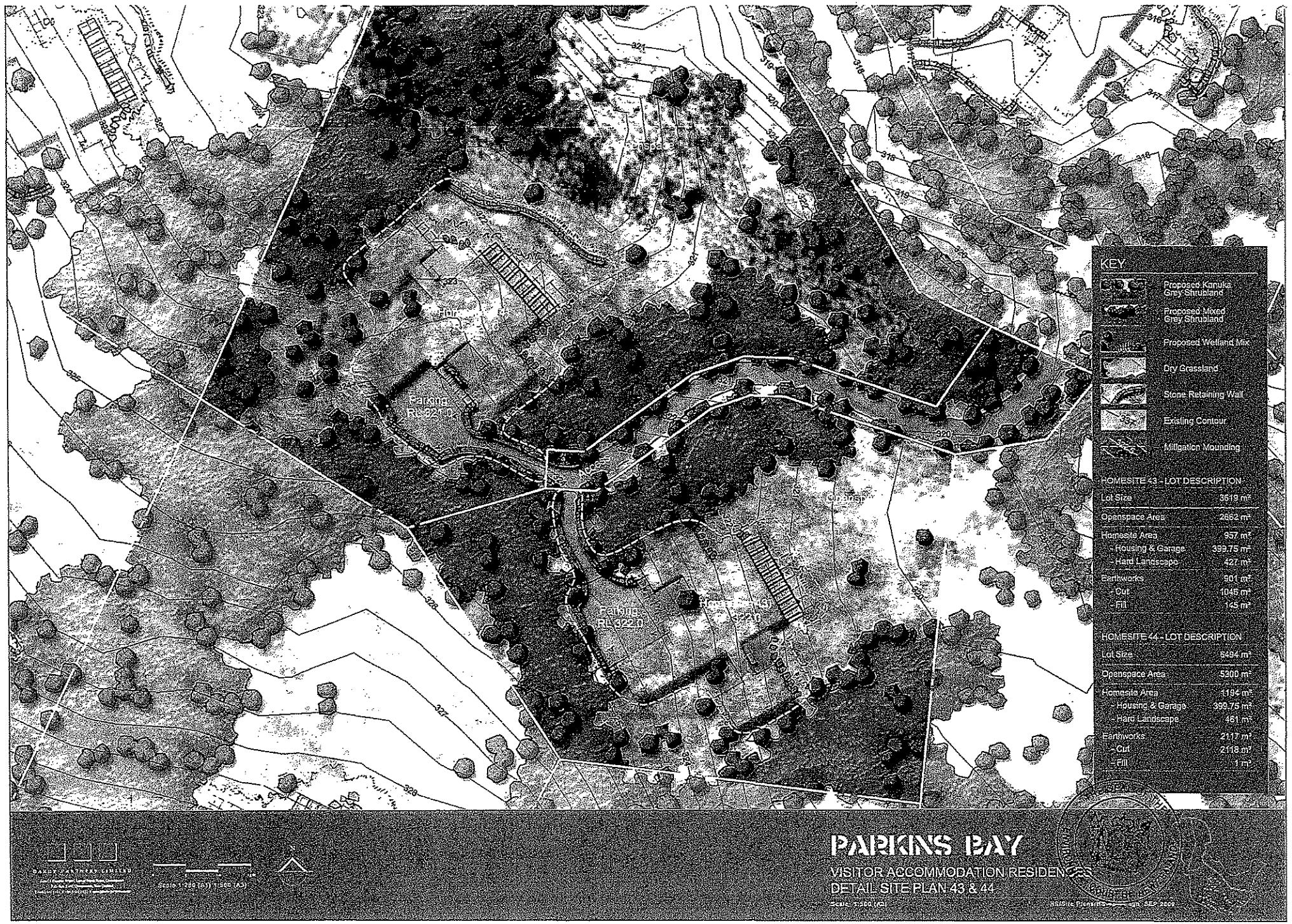

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 35 - LOT DESCRIPTION
Lot Size 5396 m²
Openspace Area 4250 m²
Homesite Area 1146 m²
- Housing & Garage 399.75 m²
- Hard Landscape 291 m²
Earthworks 2318 m³
- Cut 2318 m³
- Fill 0 m³
HOMESITE 36 - LOT DESCRIPTION
Lot Size 5178 m²
Openspace Area 3866 m²
Homesite Area 1311 m²
- Housing & Garage 399.75 m²
- Hard Landscape 366 m²
Earthworks 2439 m³
- Cut 2439 m³
- Fill 0 m³
Parking RL 326.5
Parking RL 324.0
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 35 & 36

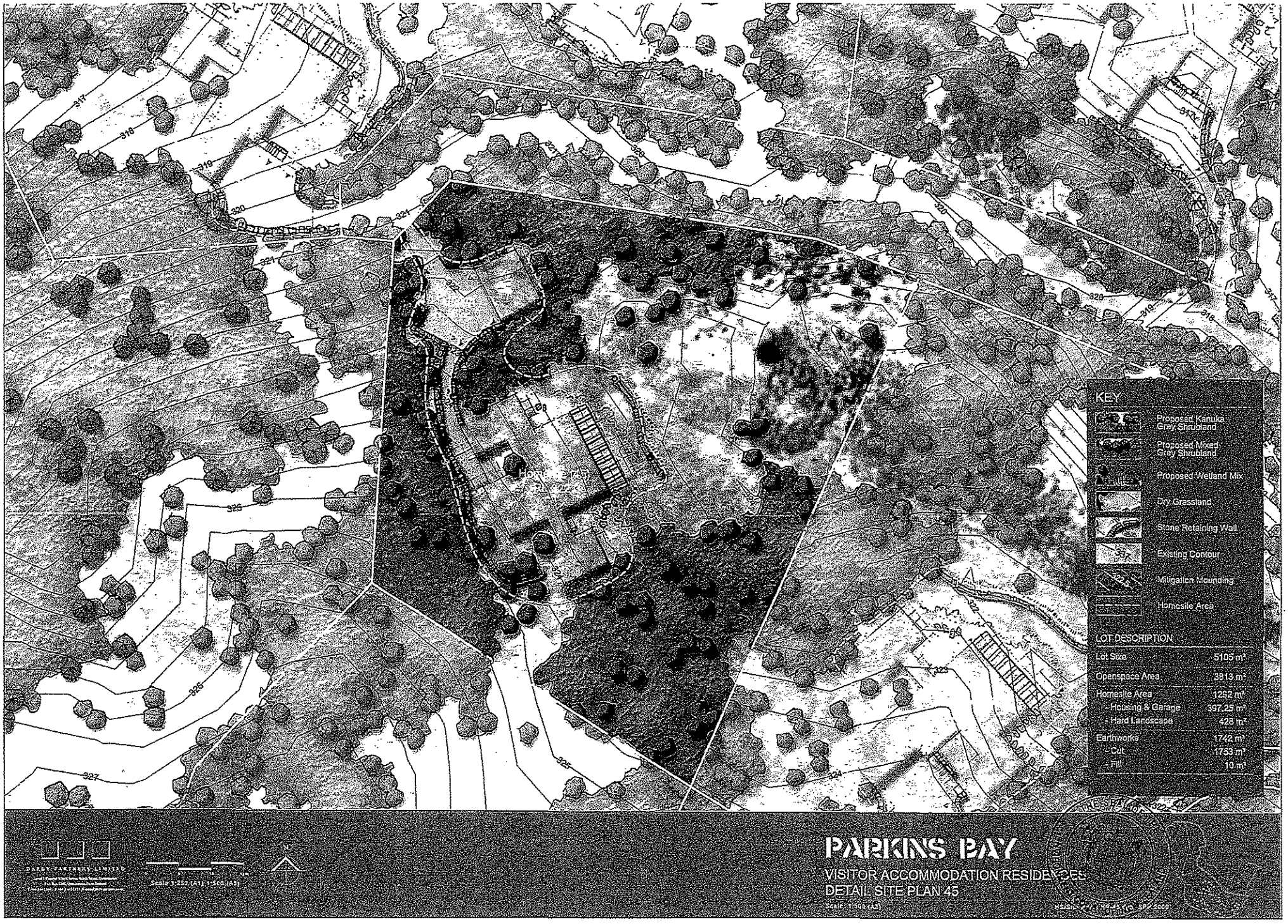

Homesite 1
RL 339.5
Parking
RL 339.5
Parking
RL 338.5
KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 6506 m²
Openspace Area 5139 m²
Homesite Area 1366 m²
- Housing & Garage 397.25 m²
- Hard Landscape 425 m²
Earthworks 1002 m³
- Cut 1037 m³
- Fill 35 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 37


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 38 - LOT DESCRIPTION
Lot Size 7091 m²
Openspace Area 5716 m²
Homesite Area 1179 m²
- Housing & Garage 399.75 m²
- Hard Landscape 486 m²
Earthworks 995 m³
- Cut 989 m³
- Fill 4 m³
HOMESITE 39 - LOT DESCRIPTION
Lot Size 5521 m²
Openspace Area 4278 m²
Homesite Area 1342 m²
- Housing & Garage 399.75 m²
- Hard Landscape 547 m²
Earthworks 1974 m³
- Cut 1962 m³
- Fill 8 m³
Homesite (39) RL 332.0
Parking RL 333.0
Homesite (38) RL 334.0
Parking RL 335.0
Access
Private Road
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 38 & 39

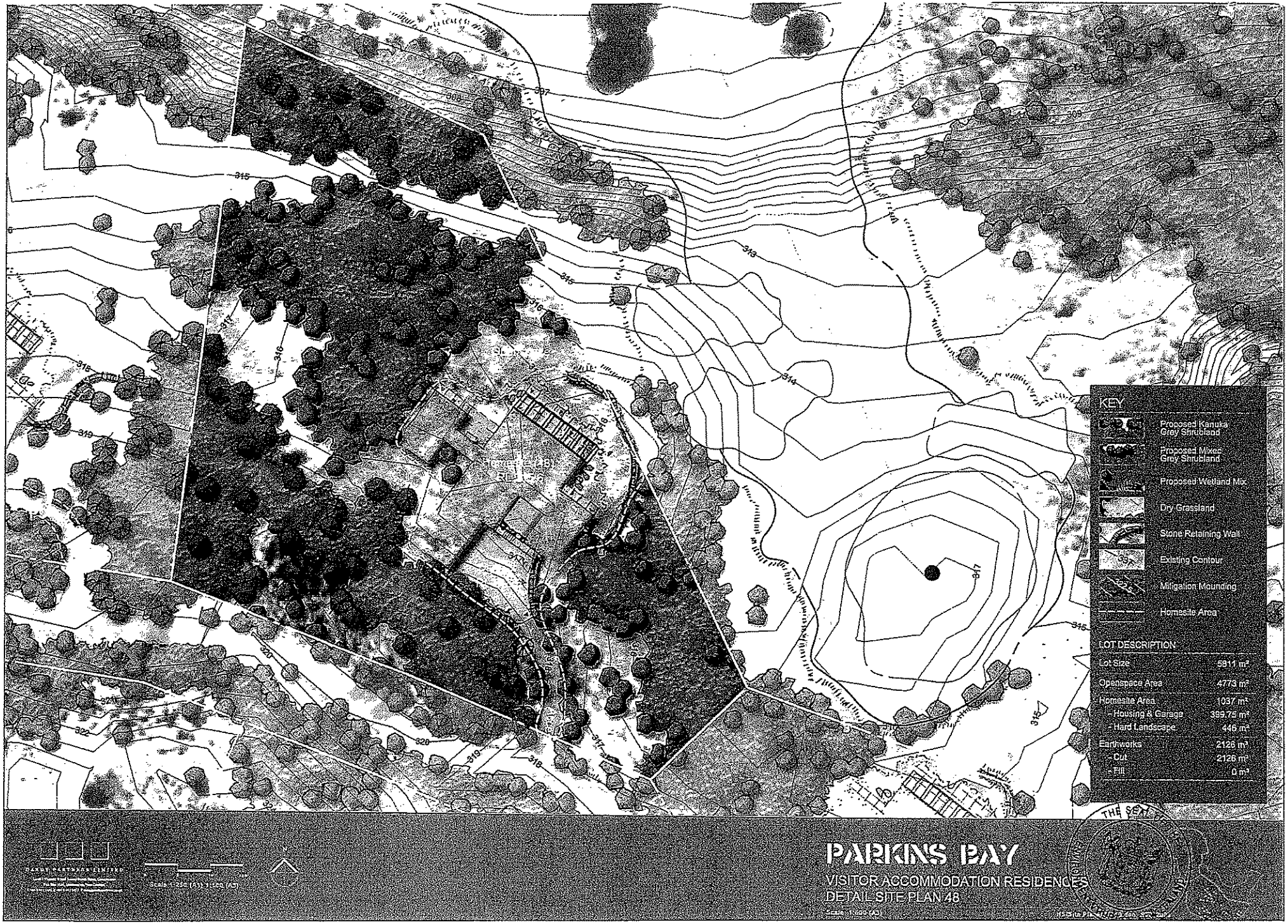

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 5720 m²
Openspace Area 4326 m²
Homesite Area 1394 m²
- Housing & Garage 393.75 m²
- Hard Landscape 651 m²
Earthworks 802 m³
- Cut 839 m³
- Fill 37 m³
PARKING
PARKING
PARKS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 40

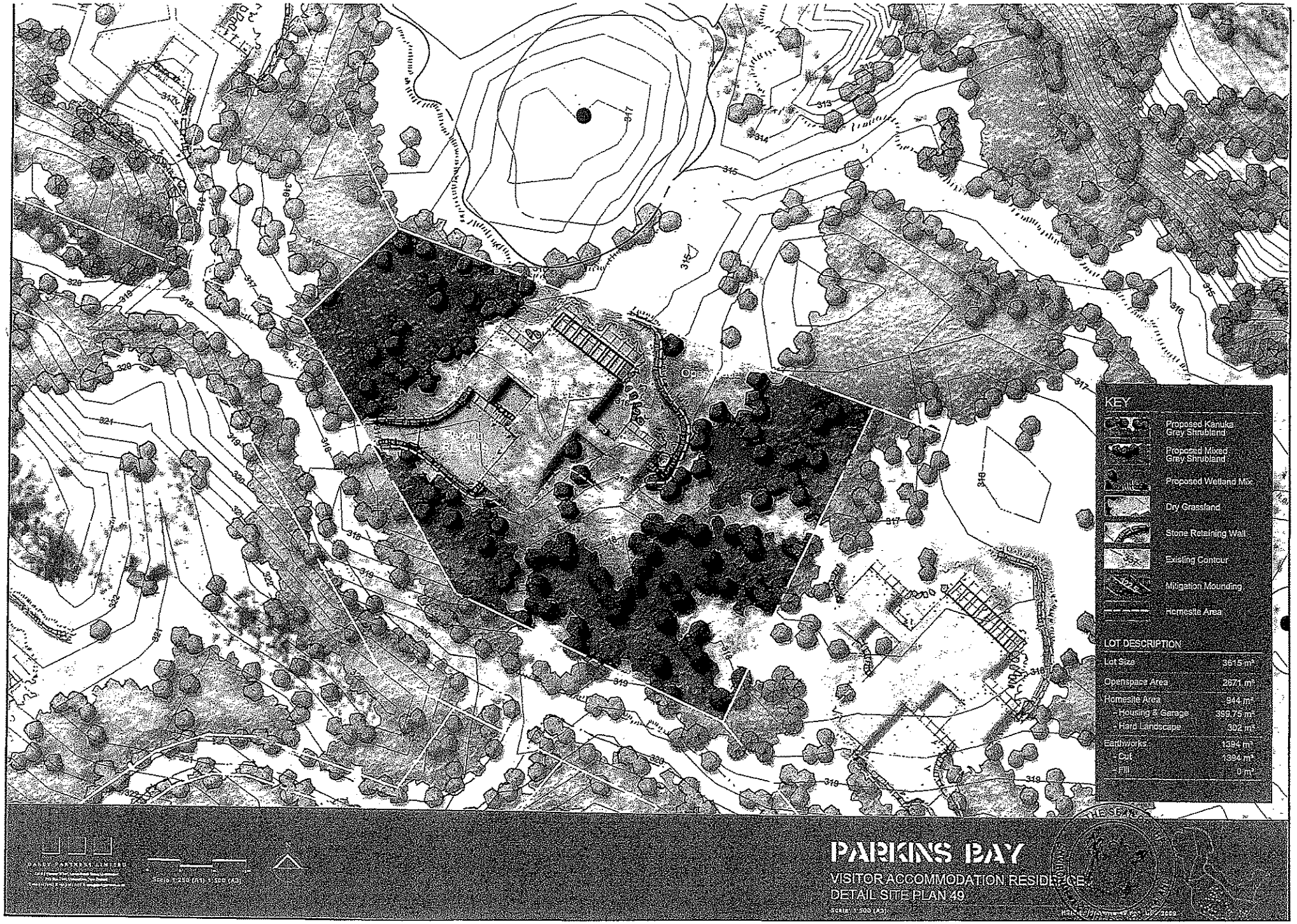

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 41 - LOT DESCRIPTION
Lot Size 5352 m²
Openspace Area 4027 m²
Homesite Area 1036 m²
- Housing & Garage 399.75 m²
- Hard Landscape 348 m²
Earthworks 885 m³
- Cut 599 m³
- Fill 14 m³
HOMESITE 42 - LOT DESCRIPTION
Lot Size 3975 m²
Openspace Area 2804 m²
Homesite Area 1172 m²
- Housing & Garage 399.75 m²
- Hard Landscape 459 m²
Earthworks 1951 m³
- Cut 1553 m³
- Fill 2 m³
Parking RL 328.5
Parking RL 323.0
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 41 & 42

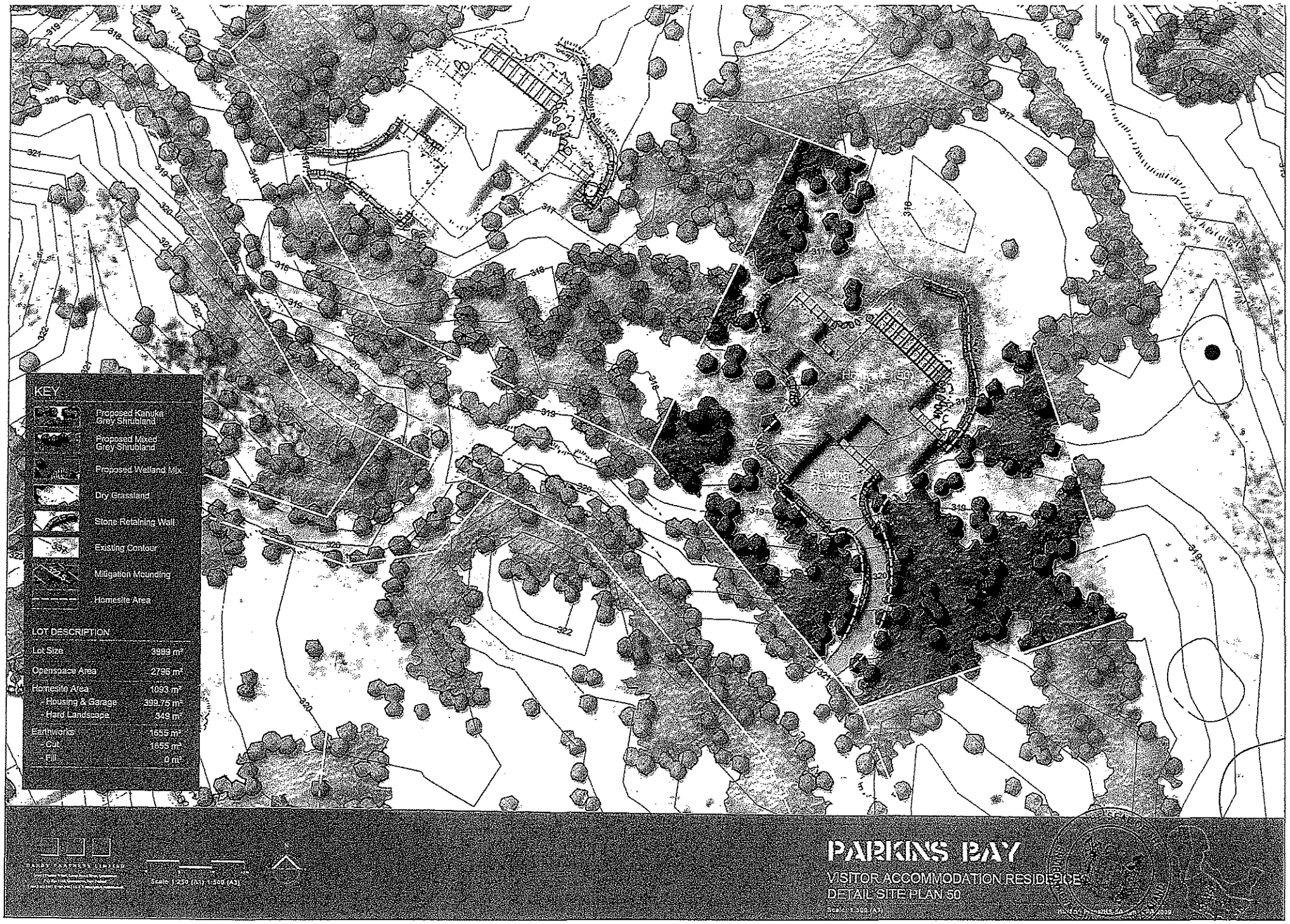

KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 43 - LOT DESCRIPTION
Lot Size 3619 m²
Openspace Area 2662 m²
Homesite Area 957 m²
- Housing & Garage 399.75 m²
- Hard Landscape 427 m²
Earthworks 901 m²
- Cut 1048 m³
- Fill 148 m³
HOMESITE 44 - LOT DESCRIPTION
Lot Size 6494 m²
Openspace Area 5300 m²
Homesite Area 1194 m²
- Housing & Garage 399.75 m²
- Hard Landscape 461 m²
Earthworks 2117 m²
- Cut 2118 m³
- Fill 1 m³
Parkins RL 321.0
Fairlie RL 322.0
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 43 & 44


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 5105 m²
Openspace Area 3819 m²
Homesite Area 1232 m²
- Housing & Garage 397.25 m²
- Hard Landscape 428 m²
Earthworks 1742 m³
- Cut 1733 m³
- Fill 10 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 45


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
HOMESITE 46 - LOT DESCRIPTION
Lot Size 5780 m²
Openspace Area 4683 m²
Homesite Area 1097 m²
- Housing & Garage 399.75 m²
- Hard Landscape 403 m²
Earthworks 2256 m³
- Cut 2256 m³
- Fill 0 m³
HOMESITE 47 - LOT DESCRIPTION
Lot Size 6464 m²
Openspace Area 5324 m²
Homesite Area 1140 m²
- Housing & Garage 399.75 m²
- Hard Landscape 470 m²
Earthworks 1252 m³
- Cut 1254 m³
- Fill 2 m³
Homesite (46)
Homesite (47)
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 46 & 47


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 5811 m²
Openspace Area 4773 m²
Homesite Area 1037 m²
- Housing & Garage 389.75 m²
- Hard Landscape 446 m²
Earthworks 2126 m³
- Cut 2126 m³
- Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCES
DETAIL SITE PLAN 48


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 3615 m²
Openspace Area 2671 m²
Homesite Area 944 m²
- Housing & Garage 639.75 m²
- Hard Landscape 304 m²
Earthworks 1394 m³
- Cut 1394 m³
- Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 49


KEY
Proposed Kanuka Grey Shrubland
Proposed Mixed Grey Shrubland
Proposed Wetland Mix
Dry Grassland
Stone Retaining Wall
Existing Contour
Mitigation Mounding
Homesite Area
LOT DESCRIPTION
Lot Size 3999 m²
Openspace Area 2796 m²
Homesite Area 1093 m²
- Housing & Garage 393.75 m²
- Hard Landscape 349 m²
Earthworks 1655 m³
- Cut 1655 m³
- Fill 0 m³
PARKINS BAY
VISITOR ACCOMMODATION RESIDENCE
DETAIL SITE PLAN 50

TAB 15

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2003-485-1764

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under s 299 of that Act
BETWEEN	WAIKANAE CHRISTIAN HOLIDAY PARK
	Appellant
AND	KAPITI COAST DISTRICT COUNCIL
	Respondent

CIV-2003-485-1774

BETWEEN	NEW ZEALAND HISTORIC PLACES TRUST (POUHERE TAONGA)
	Appellant
AND	KAPITI COAST DISTRICT COUNCIL
	Respondent

CIV-2003-485-1805

BETWEEN	TAKAMORE TRUSTEES
	Appellant
AND	KAPITI COAST DISTRICT COUNCIL
	Respondent
AND	TRANSIT NEW ZEALAND
	Section 301 Party
AND	THE ENVIRONMENT COURT
	Section 301 Party

Hearing:	27 - 29 September 2004
Counsel:	M F McClelland for Waikanae Christian Holiday Park A G Hazelton with C Jorgensen for New Zealand Historic Places Trust L H Watson for Takamore Trustees D J S Laing with J G A Winchester for Kapiti Coast District Council C J Sinnott for Transit New Zealand
Judgment:	27 October 2004

JUDGMENT OF MACKENZIE J

Introduction

[1] There are three appeals under s 299 of the Resource Management Act 1993 ("RMA") against a decision of the Environment Court. The appellants are the Takamore Trustees, New Zealand Historic Places Trust (Pouhere Taonga)("NZHPT") and Waikanae Christian Holiday Park ("WCHP"). As well as lodging its own appeal, NZHPT supports the appeal by the Takamore Trustees, on a number of grounds, under s 301. Transit New Zealand supports the respondent ("KCDC"), under s 301. The Environment Court entered appearances in all three appeals but did not appear at the hearing. Its counsel submitted a short memorandum.

[2] The decision of the Environment Court relates to the proposed Kapiti western link road, which is intended to provide a link road from Raumati to Pekapeka. A notice of requirement ("NOR") was issued pursuant to s 168 and 168A of the RMA. The NOR was considered by the respondent, the matter having been heard by hearings commissioners. The recommendation, to allow the NOR, was accepted by the requiring authority under s 172. Two appeals under s 174 of the RMA were heard by the Environment Court in lengthy hearings extending from 3 December 2001 to 19 February 2002, and a decision was issued on 4 July 2002. By a majority (Judge Treadwell and Commissioner Howie), the Court dismissed the appeals and confirmed the requirements. Commissioner Menzies would have withdrawn the

NOR for a section of the NOR, but upheld it on the remaining sections. An appeal under s 299 of the RMA, by Takamore Trustees and Waikanae Christian Holiday Park ("WCHP"), was lodged, and was heard before Ronald Young J. It is not entirely clear from the various judgments whether there was one joint appeal, or two separate appeals, but that is immaterial. In his judgment delivered on 4 April 2003, *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433, he held in favour of the appellants on some grounds, and rejected others. He allowed the appeal, and referred the matter back to the Environment Court for reconsideration on those points on which the appellants were successful. The Environment Court heard further submissions on 30 June 2003, and issued its second decision on 30 July 2003. In that decision, the majority (Judge Treadwell and Commissioner Howie) confirmed its original decision. Commissioner Menzies again dissented.

[3] From that decision, the three appeals which are before me were brought.

[4] The factual background is fully set out in the first decision of the Environment Court, and in the judgment of Ronald Young J. I will not lengthen what will necessarily be a lengthy judgment by repeating that background here. I will cover relevant matters as necessary in the course of this judgment.

The approach on these appeals

[5] The scope of an appeal under s 299 is well established. As held by the full Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145, at 153, this Court will interfere with decisions of the Environment Court only if it considers that that Court:

(a) applied a wrong legal test; or

(b) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or

(c) took into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.

The Court should be given some latitude in reaching findings of fact within its areas of expertise. Any error of law must materially affect the result of the Court's decision before this Court should grant relief.

[6] One matter which does arise, in relation to this appeal, is the approach which this Court should adopt where the appeal is, as this is, against the decision of the Environment Court on a reconsideration arising from an earlier appeal.

[7] Several of the grounds of appeal, in all three appeals, are expressed in terms that the alleged error of law is a failure to follow correctly the directions of Ronald Young J. That too raises issues as to the proper approach for this Court to adopt in dealing with these appeals.

[8] In my view, the broad approach is the same as that on a first appeal. I must approach the decision of the Court, having regard both to its original decision and to its subsequent decision on the matters referred back to it, and consider the total decision in the light of *Countdown* principles. My task is not limited to examining the second decision and considering whether the directions have been followed.

[9] The appellants question what actually is the decision of the Environment Court. In his judgment, Ronald Young J quashed the first decision, and referred the appeal back to the Environment Court for reconsideration. He said at para [117]:

> The Court will need to reconsider its decision to "confirm the requirement in regard to the NOR". The reconsideration need involve only those aspects where this Court has concluded the Environment Court was in error.

In its second decision, the Environment Court adopted the following approach:

> [2] The decision of the Environment Court was quashed but the wording of the High Court decision indicated that it was four specific points of law which were referred back to the Court for reconsideration. The referral back procedures of s 303(1)(b) and (c) were not used. Although the whole decision was quashed Ronald Young J indicated in the penultimate paragraph of the decision:

> *"The reconsideration need only involve those aspects where this Court has concluded the Environment Court was in error."*
>
> [3] We therefore make clear in this decision that the original decision still stands except in relation to those matters on which the High Court determined that the Environment Court had erred in law. This Court therefore makes the following preliminary determination:
>
> > The original decision number W 23/2002 of the Environment Court is included in and forms part of this decision except in so far as the High Court has expressly referred the matter back to the Environment Court for reconsideration as set forth in the decision of that Court numbered AP 191/02.

[10] NZHPT squarely raises this in ground 1 of its notice of appeal. It submits that "the decision of the majority is erroneous in law in ... purporting to adopt parts of [its first decision] into its judgment when such judgment had been quashed by the High Court". As that ground of appeal is relevant to all appeals, I will deal with it first.

[11] Mr Hazelton submits that the failure to identify properly which parts of the first decision were incorporated in the second decision, and which parts were replaced by it, led to the result that it was not possible to determine with any certainty what paragraphs of the first decision are incorporated and what have been abandoned. He submits that the proper approach should have been for the Court to have issued a completely new decision in line with the direction that the first decision had been quashed. Mr Hazelton submits that this led to a breach of natural justice, in that there was a breach of the duty to give reasons, and of the principle that the reason disclosed in a decision should not be logically self-contradictory.

[12] I consider that the Environment Court has not erred in law in adopting the approach which it did. While it quashed the whole decision, the decision of this Court was quite specific that reconsideration need involve only those aspects where the Court had concluded the Court was in error. The approach of re-affirming its earlier decision, except for the matters required to be determined, was one which was open to it as a matter of law. I will need to deal in detail with the reasoning of the Environment Court in dealing with the specific grounds of appeal, and in doing so will have to give consideration to both the first decision and the second decision, and

to glean from that exercise what the Court has decided. I consider that it is feasible to conduct the exercise in that way. I do not consider that the ends of justice would be served, in the circumstances of this case, by requiring the Environment Court to conduct the exercise which Mr Hazelton submits should have been conducted. There are very strong reasons why that course should not be adopted. The first is that the exercise is not possible. To require it would require the Environment Court to rewrite its decisions in their entirety. That cannot now be done. Judge Treadwell has since died. There would therefore be no alternative to a complete rehearing before a new court. The second is that this is an important matter, now before this Court for the second time. A reconsideration should not lightly be required, if the issue is essentially one of form, rather than substance. If the substantive grounds of appeal are upheld, so that a reconsideration by the Court is a necessary consequence, then that consequence must follow. But, since it is, in my view, possible to deal with the substantive grounds of appeal by looking at both decisions, and determining the essence of the reasoning from them, that is the course which should be preferred.

[13] The next issue which it is desirable to address at the outset is the status of the directions given by Ronald Young J. Mr Hazelton submits that, on the basis of the doctrine of res judicata, or issue estoppel, in the absence of any appeal against his decision, the findings of law contained in his judgment, and incorporated in the direction as to reconsideration, are binding on the parties, and cannot now be challenged.

[14] I do not accept that submission. The purpose of the doctrine of res judicata, and issue estoppel, is to prevent a litigant re-litigating issues which have already been decided between the parties. Those doctrines, when they apply, act as a bar to subsequent litigation. That is not the situation here. This Court was not in a position to make a final determination of the rights of the parties to the earlier appeals, in the sense required for the operation of those doctrines. This Court referred the matter back for reconsideration and that reconsideration took place. There was a right of appeal against that reconsideration. This litigation is not barred by the earlier decision. The approach which the Court is to adopt on the second appeals, under s 299, is that set out in *Countdown*. This Court must consider, on the basis of the law as this Court finds it, whether the decision of the Environment Court, on the

reconsideration, is erroneous in law. Obviously, in that exercise, the views expressed by this Court in the earlier decision are highly persuasive. But the principles of law set out in that decision cannot, on this appeal, have a status higher than other statement of this Court in other cases, when considering whether the final decision is erroneous in law or not. The doctrine of res judicata and issue estoppel can have no application to the hearing of this appeal. That that must be so can most clearly be demonstrated by considering the situation which would arise if an appeal to the Court of Appeal were brought against my decision on these appeals. If the doctrine of res judicata or issue estoppel apply to the decision of this Court on the first appeal, then the Court of Appeal would be bound by statements of law made by this Court on the earlier appeal. That cannot be right.

[15] For those reasons, I consider that the proper approach to those grounds of appeal which assert that the Environment Court has erred in failing to follow the directions of this Court is to consider whether the final decision of the Environment Court is in accordance with the law, having regard to previous decisions on relevant issues, in the ordinary way, under the doctrine of precedent, and treating the views expressed by this Court on the first appeal as of high persuasive authority, because of their direct relevance to the facts of this case, but not according to those statements of law the effect which would follow from the application of the doctrine of res judicata or issue estoppel.

Appeal by Takamore Trustees

Point on appeal one – the Environment Court reached conclusions without evidence or to which on the evidence the Court could not reasonably have come

[16] Before turning to the substance of this ground of appeal, it is necessary to describe, in a little more detail than I have done in setting out the background, the course which the case has taken with regard to this aspect. In the appeal against the first Environment Court decision (*Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433), Ronald Young J set out the essence of what was involved in the relevant ground of appeal, ground 3, in paragraphs 40 to 52 of his judgment. As he noted, that ground was variously described at different stages. He

discussed the various formulations and what was involved in that ground of appeal. He noted that the trustees faced the difficulty that there had been no application under s 303 to make available to the High Court evidence heard before the Environment Court on this point. He set out the way in which he proposed to approach this ground of appeal in paragraph 52, where he said:

> These and other points in combination, in my view, would have left the respondents with the clear view that the appellants claimed the Court had not given proper or any reasons to reject the evidence as to koiwi in the wetlands. I therefore propose to approach the appellant's point on appeal here as if it alleged no reasons were given for the rejection of the evidence of the presence of koiwi in the wetlands. In those circumstances, therefore, there is no need for any order for evidence to be brought from the Environment Court.

[17] In paragraphs 53 to 68, he went on to consider the Environment Court decision, and the references by that Court to the relevant evidence. In paragraph 69 he said:

> Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the kaumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

In paragraphs 70 to 74, he discussed the law concerning the duty to give reasons. In paragraph 75, he reached the conclusion that

> Considering these authorities, I reach the conclusion in this case, in my view, there was a clear need to explain why (if it was to be done) the evidence of the kaumatua as to the presence of koiwi in the swamp area at Takamore was being rejected.

In paragraphs 76 to 78, he discussed the evidence, as he understood it. He then expressed his conclusion on that ground of appeal in paragraph 79 in these terms:

> I am therefore satisfied that the Environment Court:
>
> (1) Failed to give reasons for rejecting the evidence as to the presence of kaumatua in the swamp areas;
>
> (2) Given the pivotal nature of the evidence was required to give reasons for rejecting it;
>
> (3) Made an error of law in failing to give such reasons; and

(4) Wrongly concluded there was no evidence of the presence of koiwi in the Takamore swamp area.

[18] The matter was reconsidered by the Environment Court, and in the second Environment Court decision it again discussed the evidence which it had heard on the point. The trustees have again appealed, and on this appeal the relevant ground of appeal is formulated as I have set out above, namely:

> The Environment Court reached conclusions without evidence or to which on the evidence the Court could not reasonably have come.

[19] On this appeal, an application under s 303 of the Act was made by the trustees, and a direction was given that the Environment Court lodge with the Registrar of this Court the following:

> (a) All written statements of evidence filed by the witnesses for the Takamore Trustees, Historic Places Trust and the respondent witnesses, Dr Keesing, B Mikaere and P Coop.
>
> (b) A record of the transcript of the questioning and cross-examination of the above listed witnesses.
>
> (c) Exhibit 35A.
>
> (d) All exhibits mentioned in the transcript and the written statements noted in orders (a) and (b) above, except where the parties to this proceeding agree they need not be so produced.

[20] The items listed in paragraph (a), (b) and (c) of that direction have been made available. The evidence of 14 witnesses (out of some 40 witnesses who gave evidence) was produced. None of the other exhibits referred to in paragraph (d) were referred to by any counsel during the hearing before me.

[21] In the light of that background, I consider that the appropriate course for me to adopt, on this ground of appeal, is to consider whether, in the light of all of the relevant evidence, which is before me, the Court has reached conclusions without evidence or to which on the evidence the Court could not reasonably have come. In doing so, I approach the matter afresh. I do not use as a starting point the

conclusions which Ronald Young J reached, and consider whether the reconsideration dealt with each of the points raised by him. I do not consider that that is the proper approach. There are essentially two reasons for that. The first is that the ground of appeal with which I am concerned is significantly different from that with which Ronald Young J was concerned, on his formulation and description of it. The second is that the evidence before the Environment Court is available to me, whereas it was not available to Ronald Young J. I consider that it is wrong to treat the statements of Ronald Young J as to what the evidence disclosed as if they were findings of fact. They were not. He was not required to make findings of fact. Nor was he in any position to do so. He did not see the evidence. In the way in which he approached the matter, as described in paragraph 52 of his judgment, he saw no need for evidence to be brought from the Environment Court.

[22] On this appeal, when the issue is whether the Environment Court reached conclusions without evidence, or to which on the evidence the Court could not reasonably come, I must look at the evidence. The evidence which I must examine is the evidence which was before the Environment Court, not the description of that evidence in the judgment of this Court on the first appeal.

[23] In considering this ground of appeal, I confine myself solely to the issue of whether the Environment Court reached conclusions without evidence or to which on the evidence the Court could not reasonably have come. I am not concerned with the weight which is to be attached to any of the evidence. That is entirely a matter for the Environment Court. This Court, on appeal, cannot trespass into the field of considering whether or not it agrees with the weight which has been given to the evidence, or whether it agrees with the conclusion which the Environment Court has reached, in its assessment of the evidence. The sole task is to consider whether that is a conclusion on which there was no evidence, or which could not reasonably have been reached on an assessment of the evidence.

[24] With those general observations as to the approach, I turn to consider each of the specific points on which this ground of appeal is based.

1.1 The conclusion at paragraph 12 of the second Environment Court decision, that Mr Parai did not positively identify koiwi within the carriageway route

[25] This point on appeal relates to paragraph 12 of the second Environment Court decision, where it said:

> We are, however, bound by the directions of His Honour which is a direction that this Court must accept oral testimony from kaumatua as to koiwi presence despite the fact that there was no background evidence supporting the fact that the Takamore Swamp would be a burial ground. We record that Mr Parai did not positively identify koiwi within the carriageway route and this seems to be a misinterpretation of his evidence.

[26] This issue had been the subject of discussion by Ronald Young J in his decision. He said, at para [78]:

> The bold statement by the tribunal at para [77]:
>
> > We have evidential difficulty insofar as koiwi (human remains) are concerned within the swamp area, because none of the evidence we heard (with the exception of some hearsay evidence concerning the activities of a seer) directly related to swamp burial, even in the times of Muaupoko occupation in the general area.
>
> is simply not true. Mr Te Taku Parai gave evidence in relation to the particular area in the carriageway that the swamp lands had long been the resting home for his ancestors. This the Court described as an assertion rather than evidence. Here, as I have observed, suitably chosen kaumatua have given their evidence as part of their oral tradition. If oral history is to be reduced to assertion rather than evidence, then much of the evidence by Maori in support of ss 6(e), 7(a) and 8 matters will be rejected as assertion and not evidence. This is not at all the proper approach to oral history such as this.

[27] I must consider, with the advantage, which Ronald Young J did not have, of having read Mr Parai's evidence, whether the statement in the final sentence of paragraph 12 of the second Environment Court decision is one which the Court could not reasonably have reached in the light of Mr Parai's evidence. It is desirable that I should discuss his evidence at some length.

[28] In his statement of evidence, he sets out his background and qualifications. He says:

> My tribal affiliations are Te Atiawa, Ngati Toa Rangatira and Raukawa. My ancestors lived in the Waikanae area and many are buried at Takamore.

[29] He goes on to describe his academic qualifications, his current work and his curriculum vitae. He describes the scope of his evidence in these terms:

> 1.5 I am authorised by the Takamore Trustees to present this evidence on their behalf. My evidence will cover key concepts of Maori knowledge and cultural practice that we the uri (descendants) of Takamore believe explain our relationship with this land and this place.
>
> 1.6 I have been asked to provide expert commentary on the following phrases contained in Part II of the Act:
>
> [various phrases are set out]

[30] Paragraph 2 of his evidence contains a brief description of "the beginnings" to explain those phrases using a Maori understanding of resource management. Paragraph 3 of his evidence discusses the concept of kaitiakitanga (guardianship). In paragraph 4, he describes urupa/cemeteries. He notes that the confinement of an area designated as a cemetery was a Western practice and expresses the view that it is "quite inappropriate for us to view a fenced urupa as being the limit of the area in which bodies are buried". He then discusses the evidence of two other witnesses as to where burials were likely to have been made. He refers to Ms Forbes' evidence that bodies were pushed into the western toe of the dunes at Takamore, and to Mr Mikaere's suggestion that that seems unlikely, and that "it would be more sensible to place bodies on the eastern side of the dunes ...". He says:

> I disagree with [Mr Mikaere's] evidence. Traditional practice supports Ms Forbes' statement. Our people named this area and an ancestral family home (Whakarongotai). Our tupuna would have been placed on the western side of the dunes mostly because we want our loved ones to be able to listen to the tides as they flow in and out, watch as the fishermen return with their catch and also to welcome home the war canoes and warriors from journeys and war.

[31] Paragraph 5 deals with taonga/tribal values. He says in paragraph 5.1:

> In addition to our mate (deceased) the swamp itself contains tribal taonga – treasures.

He discusses the concept of taonga and the relationship Maori have with their taonga and says in paragraph 5.4:

> In this case the land of Takamore is itself a taonga, but of particular relevance are the taonga that lie buried with the dead.

He also says in paragraph 5.7:

> Takamore has been and still is known amongst our people as a treasure trove of taonga. Its outlying area and swamp lands have long been the resting home for our ancestors. Along with them are whare taonga (treasure houses). Oral tradition of our elders of Te Atiawa talk about the abundance of taonga that lie at the bottom of the swamp at Takamore. The most well known are the remains of old Wharenui (meeting houses) and the remnants of waka (canoes). In addition, there is little doubt that many other prized pieces that [sic] were buried in the lake for reasons of preservation and safety away from marauding tribes. Quite aside from the presence in the sand dunes and swamps of Takamore, the area is of immense importance to us culturally. As present day kaitiaki by virtue of our whakapapa to that area, it is our responsibility to protect, maintain and uphold the integrity of these taonga for they are physical affidavit of what we have endured and a testimony of mana for our people.

[32] In section 6 of his evidence he comments on the importance of Korero Tawhito/oral tradition.

[33] In the light of paragraph [78] of the judgment of Ronald Young J, set out above, it is important to note that Mr Parai was not called to give evidence of the oral traditions relating to the use of Takamore as a burial ground. That is clear from the description in his brief of the matters which his evidence was to cover, which do not include oral traditions on that issue. His only specific reference to the oral traditions relating to this area is that which I have set out from paragraph 5.7. Evidence was called from kaumatua of the oral traditions concerning this area. Mr Robert Ngaia and Mr Porotene gave evidence as to the oral traditions. I will come to their evidence later.

[34] Paragraph 5.1 of Mr Parai's evidence, as I have noted, reads:

> In addition to our mate (deceased) the swamp itself contains tribal taonga – treasures.

[35] The first Environment Court decision described that statement as "a cryptic comment". It seems to me that it must be read in the context of his evidence as a whole. It comes at the start of paragraph 5. Paragraph 4 had discussed urupa and paragraph 5 discussed taonga. In paragraph 4, Mr Parai had discussed competing contentions as to whether bodies would have been buried on the eastern side or the western side of the dunes. In his section on urupa, he makes no reference to the swamp. It appears to me that paragraph 5.1 is intended as no more than a link between the two topics of urupa and taonga, and the reference to mate is a reference to the matters discussed in paragraph 4, as a preliminary to the discussion on a new topic, that of taonga. The statement in paragraph 5.1 that the swamp itself contains tribal taonga is later, in paragraph 5.7, supported by reference to the oral tradition of Te Ati Awa, as I have noted. There is no similar support for the proposition that mate (or koiwi) are buried in the swamp. The only discussion of the burial of mate is in paragraph 4, where no mention is made of the swamp, and no reference is made to oral tradition. I am quite unable to reach the conclusion that the Environment Court was bound to accept the statement in paragraph 5.1 as a positive statement that there are koiwi in the swamp. I am therefore quite unable to conclude that the Environment Court was wrong in not treating that sentence as a positive statement that there are koiwi in the swamp.

[36] The next statement in Mr Parai's evidence which is relevant to the presence or otherwise of koiwi in the swamp is the statement in paragraph 5.7 that "Its outlying area and swamp lands have long been the resting home for our ancestors". That appears in the section of his evidence dealing with taonga, and paragraph 5.7 discusses taonga, not koiwi. The statement refers to both the outlying area and the swamp lands. Further, as I have earlier noted, it is supported by a reference to oral tradition which is specific as to swamp burial of taonga, but there is no reference to oral tradition concerning swamp burial of koiwi. There was other evidence concerning burial of koiwi in the dunes. The dunes are included in the term "its outlying area" I do not consider that the Environment Court was bound in law to regard that statement as evidence that there are koiwi in the swamp.

[37] Having read the evidence of Mr Parai as a whole, I am quite unable to hold that the Environment Court was bound, as a matter of law, to conclude that Mr Parai gave evidence that there were koiwi in the swamp land. I am further quite unable to hold that it was bound to conclude that he gave evidence that there were koiwi within the proposed carriageway.

[38] The passage in para 12, where it said:

> We record that Mr Parai did not positively identify koiwi within the carriageway route and this seems to be a misinterpretation of his evidence.

was much criticised by counsel in argument before me, and it forms the kernel of this point of appeal. I consider that it was a conclusion to which the Environment Court could properly come, on the basis of Mr Parai's evidence, when that evidence is read as a whole, and all statements in it are read in context. It could properly come to that conclusion without rejecting any part of his evidence.

Point on appeal 1.5 – the conclusion at paragraph 42 that while koiwi may be present in the swamp lands it "is unlikely that there would be large numbers"

[39] Evidence of kaumatua as to the oral tradition of both Te Atiawa and Muaupoko was given. It is necessary to consider that evidence in some detail also. Mr Robert Ngaia gives evidence of the oral tradition. He makes his qualifications to do so quite clear in his statement of evidence. In particular, he describes the source of his knowledge of those oral traditions and his right to present that evidence in paragraph 3.3 of his statement. His knowledge is based on links from both Te Atiawa and Muaupoko.

[40] In paragraph 2.1 he says that the scope of his evidence is to include "the urupa and its history". In paragraph 4 he describes the urupa in some detail. He says:

> Many of our graves inside the fenced urupa are unmarked. The headstones at the moment do not reflect just how many are buried there. In addition, we know for a fact that our urupa is bigger than the fenced area. We have always been told that by our kaumatua and kuia.

[41] He also describes in his evidence the Historic Places registration of the wahi tapu, and the reasons for it. He says:

> The old people who have passed the wahi tapu information to me had always said that the whole wahi tapu was an area of about 25 acres. I was shown the exact extent of the area. This was the place we submitted for registration. The area was known by us to contain many burials. We have been told by Rameka and the other old kaumatua that the area was sacred and koiwi were buried there. We also know of houses and a waka that are buried within the area. There are also other treasures.

[42] That is clear evidence of an oral tradition of the burial of koiwi in the area of the wahi tapu, of about 25 acres. The area of the wahi tapu is marked on Plan 35A. There are various demarcations of its area on that plan. However the area is defined, it clearly includes areas of sand dunes on both the east and west sides of the swamp area, as well as the swamp area itself. Mr Watson in his submissions refers to that passage in submitting that "Mr Ngaia refers to the swamp lands containing 'many burials'". The passage, properly read, does not support that submission.

[43] The Environment Court said, in paragraph 77 of its first decision that "Such evidence as there was referred to burials within the registered wahi tapu area which covers dunes and swamps". It also referred to the concept of swamp burials, and the evidence as to the likelihood of those. Because this evidence of Mr Ngaia related to an area which included both dunes and swamps, I am quite unable to hold that the Environment Court was bound, as a matter of law, to regard that evidence as positively establishing the presence of koiwi in the swamp.

[44] Mr Ngaia also discusses in his evidence a visit from "one of our Taranaki kaumatua and matakite (or visionary) called Tom Ngatai" who visited Takamore in about 1996. He says:

> He walked part of the sand dunes in the wahi tapu area and carried out karakia. His view was that there could be many more bodies in the wahi tapu area than we have in the fenced urupa.

It is to be noted that that evidence refers only to walking part of the sand dunes, and makes no reference to the swamp.

He also says:

> Earlier this year the Kapiti Coast District Council paid for a respected matakite (John Hovell) to come from Ngati Porou to identify the location of burials. John walked into the wahi tapu area from Puriri Road. He indicated the presence of about 22 burials in the swamp area to the west of the maketu tree in the path of the proposed road in the holiday park land), said that the west boundary of the designation was full of bodies, and that about 160 people as well as houses and a canoe are buried in the swamp below and to the west of the urupa.

Mr Ngaia does not, in his evidence, state the significance which is to be attached, in the culture and customs of those for whom he speaks, to the views of a matakite. Neither Mr Tom Ngatai nor Mr John Hovell was called as a witness. The Environment Court referred to that evidence in para 77 of its first decision, where it said:

> ... none of the evidence we heard (with the exception of some hearsay evidence concerning the activities of a seer) directly related to swamp burial.

I consider that the Environment Court was not bound, as a matter of law, to accept the evidence as to the views of Mr Ngatai or Mr Hovell. That evidence was not required, in my view, to be treated in the same way as the oral traditions. Indeed, no party submitted that it should. There is a clear need not to apply the strict rules of evidence, and in particular the hearsay rule, to evidence of oral tradition. However, the views of Mr Ngatai and Mr Hovell are not subject to that same need. There was, on the face of the evidence, no reason why they could not have been called to give evidence of their views, and be cross-examined on those views. The Environment Court expressly raised the point, during the cross-examination of Mr Robert Ngaia. I do not consider that there is any error in the way in which the Court has treated the evidence as to their views.

[45] Mr Benjamin Ngaia also gave evidence. In his statement, he covers "an explanation of who we are as a people, Te Ati Awa ki Whakarongotai, and how we came to be kaitiaki over this area" and "an outline of places of cultural and spiritual significance to us between the Waikanae River and Pekapeka, sourced from the oral traditions which have been handed down to me". On the second of those matters, he describes the Takamore urupa, and explains its significance. He does not give any

evidence of burials outside that urupa. I record that the transcript which was produced to this Court did not include a transcript of his cross-examination, except for six pages wrongly attached to the transcript for Mr Robert Ngaia.

[46] Mr James Porotene gave evidence of the significance of the area for Muaupoko. His evidence covers Muaupoko ancestral occupation, Muaupoko participation in the roading proposal, and the relationship between Muaupoko and Te Ati Awa. His evidence does not specifically deal with the location of burials in this area. The only specific reference in his evidence came in cross-examination, where he said:

> In your view. ... If you accidentally, well, if you bulldozed it up we'd have to do that. We couldn't ignore that. But I mean, our people would be there as a human chain. See we can't encourage you to go through there.
>
> No, I understand that, and that's, I'm not asking you to have to do that. ... You know, there might be a lot of burials there. There's a lot of burials there. And you could be talking about 100 – we don't know. We had a matakite in there, and he said there was a lot of burials there. I think he came from Taranaki. That's the fella that locates those things.

That answer was given in the context of a series of questions about what would be the situation if the road proceeded and human remains were discovered.

[47] The Environment Court was entitled to give that evidence such weight as it thought fit. Mr Porotene had not included any statement in his evidence in chief, based on oral tradition, as to burials in the swamp, and, a fortiori, none which was specific as to numbers. To the extent that his answer in cross-examination was based on the views of the matakite, the Court was not bound to accept those views, for the reasons I have given. I am quite unable to hold that the Court was bound to accept that evidence as establishing facts which would have made its finding that "it is unlikely that there would be large numbers" of koiwi present in the swamp land one which it could not lawfully reach on the evidence.

[48] Based on all of that evidence, I am quite unable to say that the Environment Court was bound to conclude that there were large numbers of burials within the

swamp area as a whole, or within that part of the swamp area included within the proposed carriageway in particular.

Points on appeal 1.2, 1.3 and 1.4 – conclusion at paragraph 16 relating to a false distinction drawn by the Environment Court between the presence of taonga in the swamp, but not the presence of koiwi

[49] Mr Watson submits that

> The conclusions of the Court at para 16 are in error, given that the evidence of Kaumatua drew no such distinction between the presence of taonga in the swamps and the presence of koiwi. In fact, the reasons of the Environment Court for drawing such a distinction relied upon a base which the High Court had already found to be irrational – that there was a lack of geographical precision and a lack of background history or tradition as to koiwi burial.

[50] It is of the utmost importance that proper recognition be given to evidence by kaumatua of the oral traditions. That was clearly recognised by Ronald Young J. I agree. However, it is also important to ensure that, in giving proper recognition to that evidence, conclusions which do not follow from it are not drawn from it. As I have already indicated, the evidence of kaumatua, accepting it as establishing exactly the facts as those kaumatua stated them to be, did not establish that there were koiwi within the swamp area. To hold that it did not establish that there were koiwi in the swamp does not require the rejection of any of the evidence of the kaumatua, nor does it involve giving limited weight to any of that evidence. I am quite unable to say, as I have indicated, that the evidence of kaumatua was such that the Environment Court, accepting that evidence in its entirety and giving full weight to it, was bound to conclude that there were koiwi within the swamp area or the area of the proposed carriageway.

[51] On the other hand, there was specific evidence of the burial of taonga in the swamp. I have already referred to Mr Parai's evidence, in particular. The premise which underlies Mr Watson's submission (that the evidence of kaumatua drew no such distinction) is not, in my view, made out. The evidence of kaumatua did deal differently with the presence of taonga and the presence of koiwi in the swamp. A finding that the presence of taonga in the swamp was established on the evidence, but that the presence of koiwi in the swamp was not positively established on the

evidence, was one which was fully open to the Environment Court on the evidence. I am quite unable to hold that any of the conclusions in paragraph 16 were made without evidence, or were conclusions which could not reasonably have been reached on an assessment of the evidence.

[52] For the foregoing reasons, I hold that point 1 of the appeal of Takamore Trustees must fail.

Point on appeal 2 – the Environment Court erred in failing to follow its own reasoning that the adverse effects of the designation on the existence of burials in the "fenced urupa" and in the sand dunes beyond the urupa must be avoided, and yet the adverse effects on the existence of burials in the swamp urupa could be mitigated.

[53] This ground of appeal is supported by New Zealand Historic Places Trust (Pouhere Taonga). In its points on appeal in support, Mr Hazelton submits:

> (a) The Environment Court did not find that the evidence given by kaumatua was "incredible or unreliable". On that basis their evidence that the swamp contained koiwi should have been accepted. It is clear from the judgment of the Environment Court that the evidence was still treated as "mere assertion" and was not afforded the appropriate weight.
>
> (b) If the evidence had been afforded the appropriate weight, the reasoning of the Environment Court relating to the defined urupa would and should have applied to the koiwi contained in the swamp.

[54] It will be apparent that again this ground of appeal rests on the premise that there was evidence that the swamp contains koiwi. I have already held that the Environment Court's conclusions on that point cannot be shown to have been reached with no evidence, or that those conclusions could not be reasonably drawn from the evidence. On the basis of its findings, which it was entitled to make, I consider that the distinction between the known urupa (including both the fenced urupa and the additional area around it which was identified in evidence) which was known to contain koiwi, and the swamp land, where the presence of koiwi could not be excluded, was a perfectly rational distinction to be drawn.

[55] Mr Watson, in his submissions on this point on appeal, refers to the first paragraph numbered 54 of the second Environment Court decision:

> This Court has at all times recognised that to be the situation but may not have been explicit. On the other hand the Court has always been mindful that in an endeavour to steer an arterial through an area which is liberally endowed with koiwi sites (many of which are unknown as to location) and areas of prime taonga importance it is preferable to avoid known human remains having regard to the extremely strong views of Maori concerning desecration and the fact that ancestors should be left in peace. In the application of that concept we consider taonga when compared to koiwi as being on a lower, but not much lower, scale of importance.

He draws attention to the reference to it being preferable to avoid known human remains, and submits that it was irrational and illogical not to apply that principle of avoidance to the swamp burials. Again, that is premised on the proposition that swamp burials of koiwi were positively established. For the reasons given in respect of point 1 of this appeal, that premise is not established.

[56] For these reasons, I hold that the second point on appeal of the Takamore Trustees must fail.

Point on appeal 3 – the Environment Court failed to treat oral kaumatua evidence in accordance with the direction of Ronald Young J in the High Court decision

[57] Mr Watson submits that the directions as to the correct treatment of kaumatua evidence were twofold:

> (a) The direction at paragraph 69 (inter alia) that the reasons relied on by the Environment Court for rejecting kaumatua evidence were irrational; and
>
> (b) The direction at paragraph 78 (inter alia) that oral kaumatua evidence was to be treated as evidence and not assertion.

He submits that the Environment Court simply did not follow these directions.

[58] In paragraph 69 of his judgment, Ronald Young J said:

> Having therefore considered the conclusion and the "reasons" given, I cannot see that the Court has in fact given a rational reason for rejecting the clear evidence of the kaumatua of the presence of koiwi in the swamps of Takamore and thus potentially in the area of the proposed road.

[59] It is clear that Ronald Young J assumed, from the description of the evidence in the first Environment Court judgment, that there was in fact clear evidence from kaumatua of the presence of koiwi in the swamp at Takamore. For the reasons which I have given in dealing with the first point on appeal, I consider, having had the advantage, which Ronald Young J did not have, of being able to review the evidence itself, that that assumption on his part was not justified by the evidence. It appears clear that Ronald Young J considered that the Environment Court must have rejected evidence which had been given by kaumatua in reaching the conclusion which it did. I have held that the conclusions which it reached, on its reconsideration of the matter, were not conclusions for which there was no evidence, or which could not reasonably have been drawn on the evidence. My finding is in no way dependent upon the proposition that the Court was entitled to reject, or did reject, any evidence given by kaumatua. It applies if all of the evidence of kaumatua were accepted.

[60] The criticisms which are made in point of appeal 2 must be seen in that light. It would not be reasonable to expect the Environment Court to give reasons for rejecting evidence which did not exist. In effect, that is what this ground of appeal would require. Because, in my view, the factual premise underlying Ronald Young J's decision, namely that there was clear evidence from kaumatua of the presence of koiwi in the swamp, is shown, by an examination of the relevant evidence, not to be the case, the requirement that rational reasons be given for rejecting it cannot apply. Ronald Young J held at paragraph 78:

> Mr Te Taku Parai gave evidence in relation to the particular area in the carriageway that the swamp lands had long been the resting home for his ancestors. This the Court described as an assertion rather than evidence. Here, as I have observed, suitably chosen kaumatua have given their evidence as part of their oral tradition. If oral history is to be reduced to assertion rather than evidence, then much of the evidence by Maori in support of ss 6(e), 7(a) and 8 matters will be rejected as assertion and not evidence. This is not at all the proper approach to oral history such as this.

I have already discussed that evidence. For the reasons I have given, I do not consider that his evidence, when read as a whole, was that the swamp lands, as distinct from the outlying areas and the swamp lands, had long been the resting home of his ancestors. I have also pointed out that Mr Parai (with one very limited exception) did not claim to give evidence based on the oral traditions. That limited exception, in para 5.7 of his evidence, dealt specifically with taonga, not koiwi. The other evidence, from kaumatua, which was specifically directed to oral traditions, did not state that there had been swamp burial of koiwi.

[61] Another matter referred to by Ronald Young J in his criticism of the way in which the Environment Court had treated the evidence of kaumatua in his first decision appears in paragraph 67. There he said:

> Mr Parai gives a rationale for swamp burials (preservation and safety from marauding tribes). There is no evidence identified which the Court accepts to contradict this.

[62] That rationale appears in paragraph 5.7 of his brief, which I have earlier set out. That is in the section of his evidence dealing with taonga, and his statement "In addition, there is little doubt that many other prized pieces that (sic) were buried in the lake for reasons of preservation and safety away from marauding tribes" related specifically to the burial of taonga and did not refer to the burial of koiwi. Reading the whole of his statement, it is clear that his rationale for swamp burials dealt only with the burial of taonga. There was no need to identify evidence to contradict the rationale relating to the swamp burial of koiwi.

[63] I have already noted that Ronald Young J was not making findings of fact, and that he was in no position to do so. His directions cannot be read as requiring the Environment Court to reach any particular finding of fact. That Court, in giving proper effect to his directions, could not be bound to give rational reasons for rejecting evidence which was not given. Nor could that Court be required to treat as evidence and not assertion evidence which was not given.

[64] Mr Watson lists a large number of what he submits are examples of both of the failures relied upon in this ground to apply the High Court directions. I do not

propose to analyse those in detail. I have dealt with them sufficiently in those general comments. In essence, if the matter were to be approached in the way in which Mr Watson submits that it should be approached under this head of appeal, the Environment Court would be required to accept as true evidence which was never given. Compliance with the directions of this Court could not have that effect.

[65] Mr Watson described the Environment Court's acceptance that it must treat kaumatua's testimony as "begrudging". I do not consider that that description of it is warranted, in the circumstances as I have just described them. The Court could not be expected to accept evidence as establishing facts which that evidence did not cover. The Court did give effect to kaumatua evidence. It described the approach which it took in paragraphs 20 to 22 of its second decision:

> [20] The approach taken by the Environment Court from the outset was based on the law as we saw it at the time of our decision. We consider we should place this on record as supportive of our reasons. We set this forth not to debate the conclusions of the High Court on questions of law but to show the law as we then perceived it to be. We considered our approach to be logical.
>
> [21] The starting point was the general law of evidence as supported by the Evidence Amendment Act 1980. Without entering into a legal debate, it is fairly clear to the Court that evidence based on oral tradition of this type is not protected by the provisions of the common law or the statute. We raised this issue at the reconvened hearing of this case and that proposition was not disputed by any counsel.
>
> [22] The question as to whether this evidence should or should not have been admitted however, was never in issue, there being no question but that the Court would accept statements based on traditional Maori custom by way of oral testimony. The Court, therefore, had no hesitation in exercising its powers under s.276(1)(a), (2) and (3). In so doing, questions of weight became an issue and it was for this reason that the Court was anxious to find supportive evidence of the assertions made by kaumatua. We accept that our use of the words "no evidence" was unfortunate. What we were addressing was the probative value of that evidence.

I consider that statement of the legal position is accurate. I find nothing in that which suggests that the Court has adopted an incorrect approach.

[66] For these reasons, I hold that the third point on appeal of the Takamore Trustees fails.

[67] Before departing from the issue of whether there was evidence of koiwi in the swamp, a general comment seems appropriate. In this appeal, much importance has been attached by the appellants to the proposition that the presence of koiwi in the swamp was established. I have held that the conclusions which the Environment Court drew on the question of the presence or otherwise of koiwi in the swamp were conclusions which it was entitled to reach. However, the emphasis which has been placed on the presence or otherwise of koiwi should not be allowed to obscure the more fundamental point which was made in the evidence of the kaumatua, namely the very high significance of the whole of the wahi tapu area. Mr Robert Ngaia in his evidence at para 5.3 said:

> The relationship that we the Takamore Trustees have with this wahi tapu land is what defines us as a hapu and as kaitiaki. We cannot imagine how this place could have a road put through it. Caring for this land and those who lie in it as well as passing on the information about this place is a sacred duty. It is a responsibility passed on to us and one we will in turn pass on. Everything about this place and our role as kaitiaki goes to the heart of our values as Maori.

[68] I remind myself of this evidence, in turning to deal with the other grounds of appeal. It is important that I should do so, as it would be wrong to approach the other grounds of appeal with any thought that the concerns of the people of Takamore were wholly dependent upon the proposition that the swamp is known to contain koiwi which might be disturbed by construction, and that those concerns would be resolved if that proposition was not established. As that evidence, and other evidence to similar effect, clearly shows, the concern in relation to the wahi tapu land was more widely based and more deep-rooted than being simply a concern that koiwi might be found in the proposed route of the carriageway.

[69] The Environment Court noted this in its second decision, where it said:

> [46] Although questions of relationship of Maori to their waahi tapu and ancestral lands has been to the forefront of all hearings, a re-reading of all Judgments pertaining to this case lead [sic] to the conclusion that all decision-making authorities have to a degree been

> side tracked by the koiwi issue and have to a degree concluded that the absence or presence of koiwi, possibly the most powerful waahi tapu element to Maori, was the determinative element.

[70] It is important that the full extent of the wahi tapu concerns be borne in mind. I shall endeavour to avoid being side-tracked by the koiwi issue when considering the further grounds of the Takamore Trustees' appeal.

Point on appeal 4 – the Environment Court failed to interpret s 6(e) in accordance with the directions of Ronald Young J in the High Court decision

[71] Counsel for Takamore Trustees dealt with this point in conjunction with point 3. Similarly, ground 3 of the appeal before Ronald Young J, which I have already discussed, raised, as a ground, a misapplication of s 6(e) of the Act, with regard to the evidence concerning koiwi. I consider that it is desirable to deal with point 4 separately. As I have just noted, the concerns of the Trustees in relation to wahi tapu are not dependent on the presence of koiwi in the swamp lands; so I consider that point on appeal 4 cannot be resolved purely by reference to that evidence. It requires a wider consideration of the significance of the matters identified in s 6(e), particularly in relation to wahi tapu.

[72] However, although the application of s 6(e) in this case involves wider issues than that of the presence of koiwi in the swamp, it is also important to note that it was the analysis of the evidence on that issue which led Ronald Young J to the conclusion that s 6(e) had not been properly applied. He said at paragraph 117:

> My conclusion is that s 6(e) factors may not have had the consideration demanded because of the erroneous evidential evaluation by the Court.

No other error in relation to s 6(e) was identified. Thus, my discussion of point 3 does substantially deal with this ground of appeal.

[73] Section 6 requires that all persons exercising functions under the Act must recognise and provide for the matters of national importance listed. The requirement to "provide for" the matters referred to in paragraph (e) does not mean that the strong views of the Takamore Trustees, and those they represent, must be given effect by

refusing to confirm the designation. That would amount to treating s 6(e) as creating a right of veto where matters of wahi tapu arise. That is clearly not the effect of s 6(e). That is clear from such decisions as *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, at 307, and *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360, at 370. The Takamore Trustees do not contend for a right of veto. The obligation to "provide for" the s 6 matters is to be read in the light of the Part II hierarchy: that is, in the context of achieving the purpose in s 5.

[74] In this case, the Environment Court clearly articulated the views of the Takamore Trustees as to the incompatibility, in their view, of the proposed road with the wahi tapu area. It considered ss 6(e) and 7 as a joint exercise, as it noted in para 66 of its second decision. Commenting specifically upon s 6(e) under this point of appeal, I consider that the Takamore Trustees have not demonstrated that the Court has applied a wrong legal test, or taken into account matters which it should not have taken into account, or failed to take into account matters which it should have taken into account, in determining how, and to what extent, in the balancing exercise which it was required to undertake, s 6(e) matters should be provided for.

[75] For these reasons, I conclude that point on appeal 4 must fail.

Point 5 – the Environment Court failed to interpret s 7(a) in accordance with the directions of Ronald Young J in the High Court decision

[76] In support of this point on appeal, Mr Watson referred to the following passages from the decision of Ronald Young J:

> [85] .... s 7(a) creates not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision making. Thus, in terms of s 7 the territorial authority, and in turn the Environment Court, had to understand (presumably through consultation) and then have particular regard to, in achieving the purpose of sustainable management of the natural and physical resources of the area, the view of the trustees that this development compromised the exercise of guardianship of this land. ....
>
> [86] .... This does not mean that in terms of s 7(a) Maori exercising guardianship have a right of veto. Section 7 does not say this. But their view (those exercising guardianship) must be paid

particular regard to in the balance of factors in deciding whether the NOR should be confirmed. This is what s 7(a) explicitly requires.

....

[93] .... The Environment Court's approach has been to accept the primacy of the road development and consider ways in which it can avoid, remedy but mostly mitigate adverse effects. Thus, the Environment Court considered that any taonga found as part of the construction of the road could be removed and reburied with proper ceremony. While this is a proper and valid way of mitigating adverse effects it cannot be a substitute for the balancing process required when considering whether to confirm the NOR itself.

[77] One point needs to be made immediately about those passages, and their citation by Mr Watson in relation to this point on appeal. Paragraphs 85 and 86 appear in that part of the judgment of this Court dealing with ground 4 of that appeal, which contended that the Environment Court misconstrued s 7(a) of the Act. However, paragraph 93 appears in the judgment in relation to ground 5, which deals with the application of s 8. Ronald Young J's finding in relation to ground 4 is contained in paragraph 87:

> There is no evidence the Environment Court assessed the territorial authority's obligation in this regard at all. It should have. There is nothing to conclude the Environment Court had particular regard to kaitiakitanga. It should have. To illustrate the point s 7(e) requires the decision-maker to have particular regard to the protection of the habitat of trout and salmon. It would be absurd to suggest that a decision maker's obligation is no more than to hear the effect of a project on trout or salmon habitat. Obviously the purpose of hearing the effect is to take it into account in the decision making, and so with Kaitiakitanga. This was an error of law to limit the interpretation of s 7(a) by the Court in this way. I will consider its materiality at the end of this judgment.

[78] Some discussion of the concept of kaitiakitanga is desirable. The definition of that term in s 2 of the Resource Management Act is brief. A very helpful description of the concept is contained in the Report and Recommendations of the Board of Inquiry into the New Zealand Coastal Policy Statement (Department of Conservation, February 1994). At p 16, a full explanation of the term is given. The Report goes on, at p 17, to say:

> An interpretation of kaitiakitanga based on this explanation must of necessity incorporate the spiritual as well as physical responsibilities of tangata whenua, and relate to the mana not only of the tangata whenua, but also of the gods, the land and the sea.
>
> Local authorities and consent authorities need to be aware that tangata whenua read far more into the interpretation of kaitiakitanga expressed in Section 2 than just the surface meaning of the words written in English.
>
> It must always be borne in mind that the value system associated with mana, kaitiakitanga, taonga, mauri, whanau and hapu is a system deeply embedded in the Maori culture. As such, these terms can best be understood within that cultural context. Local authorities and consent authorities should be aware of and able to accommodate what, to the uninformed, may seem to be stubborn refusal to compromise the principles of kaitiakitanga. For in reality, compromise most often simply is not an option for tangata whenua.
>
> The example above perhaps also illustrates why translations into English of any of the Maori terms used in the NZCPS can never adequately explain the terms. The English translation of kaitiaki is "guardian, caretaker, trustee". The translation of kaitiakitanga is "guardianship, trusteeship". None of these words comes even close to matching the explanation given above.

[79] Counsel for Takamore Trustees identifies two alleged errors in relation to the consideration of s 7. First, counsel submits that the Environment Court has maintained in its second decision the erroneous approach identified by this Court in paragraph 93, which I have set out. I have pointed out that that paragraph relates to the ground of appeal concerning s 8 rather than s 7, but I nevertheless deal with the submission on the basis that what is alleged as an error in relation to s 7 is that the Environment Court has erred in "accepting the primacy of the road development" and then considering mitigation of adverse effects.

[80] The second error alleged in the Environment Court's interpretation of s 7 is what Mr Watson describes as "its continued conclusion that ownership of the land is relevant to the exercise of kaitiakitanga".

[81] Mr Laing for the respondent succinctly summarised the appellant's submissions on this point as being:

(a) Failing to bring the views of the Takamore Trustees into the balance of factors as opposed to listing aspects of mitigation; and

(b) Wrongly concluding that ownership of land is relevant to the exercise of kaitiakitanga.

I deal with the matter under those two heads.

[82] The first is failing to bring the views of the Takamore Trustees into the balance. The approach of the Court, in its second decision, to the views of the Takamore Trustees is contained in paragraphs 46 to 58. I do not consider that a reading of those paragraphs, in the context of the decision as a whole, justifies the conclusion that the Court has failed to bring the views of the Takamore Trustees into the balance of factors considered by it. In paragraph 46, which I have already set out, the importance of the relationship of Maori to their wahi tapu and ancestral lands was recognised as being to the forefront of all hearings. In paragraph 49 the majority accepted the submission that the consensus of opinion from iwi totally supports the concept of wahi tapu in the area identified by the Takamore Trustees which led to the wahi tapu designation. In paragraph 50 the majority noted that the Court has at all times accepted without question that this is ancestral land and that the wahi tapu status of the land indicates, in terms of the Historic Places Act, that this wahi tapu area may contain individual sites of wahi tapu. It noted that "that statutory definition has tended to cloud the evidence which is that this place (at least 25 acres) is of huge importance to Maori and that the whole area is a wahi tapu place". It also noted "kaumatua who gave evidence used the word 'desecration' to describe the future road, which was indeed a very strong word". In paragraph 51 the majority accepted without question that the urupa itself is a very ancient one. Paragraph 54, which I have already set out, is an explicit recognition of the need to examine ways of providing for the issues identified, namely the wahi tapu of the area through which the carriageway will pass. That paragraph explicitly notes that the Court has at all times recognised the situation which it has just described. It also raises the need for the views of the Takamore Trustees to be brought into the balance of factors to be applied. It was common ground, both in the Environment Court and this Court, that there could be no claim, in terms of the Act, to exercise a veto.

[83] The Takamore Trustees maintained what the majority of the Court described in paragraph 59 as "implacable opposition to the carriageway anywhere within the designated area where it passes through the swamp lands and to the west of the urupa". For my part, I wish to emphasise that, in using the Environment Court's description of "implacable opposition", I attach no pejorative connotations to that description. The explanation which I have given of the concept of kaitiakitanga makes clear the reasons for that stance. The Trustees were entitled to maintain that stance. There was express recognition of that stance by the Court. However, the Court was not required, as a matter of law, to give effect to that stance by refusing to uphold the designation. The submission of the Trustees on this appeal comes close to being that, if the Trustees maintained implacable opposition, and refused to acknowledge that any mitigation measures could in any way alleviate their concerns, then the Environment Court could not properly consider whether mitigating measures, such as those adverted to in paragraph 54 and in paragraph 57, might be an appropriate way of balancing the competing interests. I do not consider that such a position is sustainable. The majority of the Court took the view, having weighed all relevant factors, that the designation should be confirmed notwithstanding that implacable opposition. Having made that choice, a responsible approach to adopt was to consider whether conditions might be imposed which might address to some extent, but not answer, the grounds for the implacable opposition which had been taken into account in making that choice. The Trustees are entitled to maintain a refusal to compromise. The concept of kaitiakitanga may require that. They are entitled to have their opposition weighed in the balance when the fundamental decision whether the designation should be approved or not is made. The Trustees are not entitled, as a matter of law, to have that opposition prevail over all other competing interests. Their views are to be balanced in the scales. I consider that a fair reading of the Environment Court's second decision shows that this was done.

[84] I do not consider that, on a reading of the second decision as a whole, and particularly those parts to which I have referred, it can be fairly said that the Court has failed to take cognisance of the concerns of the Takamore Trustees and those whom they represent, and to weigh them in the balance. This was clearly a difficult decision. The very strongly held views of the Trustees that constructing a road through this area would be a desecration had to be, and were, taken into account. So

too had the needs of the wider community for the road. Whether those competing interests could be accommodated or not was an issue which the Act clearly casts responsibility on the Environment Court to decide. It is not for this Court to substitute its views as to the appropriate outcome. The function of this Court is to ensure that proper legal principles are applied to the balancing exercise. I consider that the Trustees have not demonstrated that the Court applied a wrong legal test, or failed to take proper account of the relevant s 7 considerations when balancing the factors to be addressed.

[85] Mr Watson submits that "the views of the kaitiaki are interpreted (in error) as an effective veto and the primacy of the road project is assumed". I do not accept either of the two propositions in that submission. The Court expressly recognised, in paragraph 63, that there was no claim by kaitiaki in terms of the Act to exercise a veto. The Court did, however, note in paragraph 59 that

> Maori have simply evinced implacable opposition to the carriageway anywhere within the designated area where it passes through the swamplands and to the west of the urupa.

That is not to interpret the views of kaitiaki as an effective veto. It is to recognise the strength of the opposition and of the views which had been expressed. The Court was clearly in no doubt that the only solution acceptable to kaitiaki was to avoid the area entirely. That was a stance which, as I have noted, the Takamore Trustees were fully entitled to adopt. The Court was bound to, and did, have regard to that view, and weigh it in the balance.

[86] As to the second proposition, the Court was also bound to weigh in the balance the benefits which the road would bring. I do not consider that, in doing so, it can properly be said that the primacy of the road project has been assumed by the Court. The Court devoted much more of its judgments to a consideration of the arguments raised by the appellants than it did to setting out the benefits which would flow from the road. In the second decision, that is unsurprising, since the focus of that decision was on the matters referred back for reconsideration. In the first decision, there was specific discussion on traffic issues, and the balancing exercise was specifically addressed, in particular in paragraphs 134 and 137 of that decision. Reading both decisions together, I consider that the submission that the primacy of

the road has been assumed is not made out. This was a difficult decision, as the fact that this was a majority decision attests. The starkness of the choice was expressly recognised, for example in para 79 of the second decision. The decision that the views of kaitiaki cannot, when weighed in the balance, prevail to the extent that the roadway cannot proceed through that area is a decision which was clearly open to the Environment Court.

[87] Mr Watson also submits:

> The Court's only consideration is mitigation of adverse effects, thereby failing to take into the mix of decision-making the views of the kaitiaki.

[88] Again, I do not accept that submission. The Court has taken into the mix the views of kaitiaki. The Court has expressly acknowledged (for example, in paragraphs 59 and 77 of its second decision) that mitigation will not meet the concerns of kaitiaki. However, it has concluded that on balance those concerns cannot prevail. It has gone on to consider whether, in the view of the Court, some mitigation of adverse effects is possible. That is a responsible approach. I find no justification, in the lengthy consideration of the views of the kaitiaki, for the submission that the Court has failed to take those views into account on the grounds that they can be met by mitigation of adverse effects.

[89] The second aspect of this ground of appeal is the submission that the Environment Court wrongly concluded that ownership of land is relevant to the exercise of kaitiakitanga.

[90] Mr Watson relies on paragraphs 62, 77 and 78 of the Court's decision in support of that submission. Mr Watson submits, in relation to those paragraphs, that:

> The law is clear (and the Court accepts) that the Takamore wahi tapu is Maori ancestral land. The views of the kaitiaki that the wahi tapu must be avoided is [sic] not dependent on ownership of the land.

[91] In paragraph 62, the Court said:

> In the course of cross-examination, Mr Ngatai [Ngaia], when asked about the exercise of kaitiakitanga on the area covered by the

> designation, indicated that the exercise of guardianship by the tangata whenua of the area in relation to natural and physical resources, including the ethic of stewardship, had not really been exercised, which is not surprising in view of the lack of any legal control.

[92] Mr Ngaia (not Ngatai) was cross-examined on the relationship between kaitiakitanga and land ownership in this case. When questioned as to how the kaitiaki role was exercised in relation to the subdivision, he responded that "... it's in pakeha title, European title, and the laws of the land pertain to those" (Transcript, p 20). I consider that paragraph 62 is properly to be read as discussing an issue of fact, namely the extent to which kaitiakitanga had been exercised in this case. I do not interpret that discussion as expressing a view on the legal nature of kaitiakitanga, or on the relevance, as a matter of law, of ownership of land to kaitiakitanga.

[93] In paragraph 77 the Court said:

> We accept that the Maori appellants totally reject any interference with the ancestral land presently affected by the corridor. It must, however, be remembered that they do not own this land and that the exercise of kaitiakitanga is restricted.

The two propositions contained in the second sentence are both propositions of fact which were supported by the evidence. There was clear evidence that title to the land has been alienated. As I have just noted, there was evidence from Mr Ngaia that the exercise of kaitiakitanga is in fact restricted in respect of this area.

[94] In paragraph 78, the Court said:

> Therefore in relation to kaitiakitanga the fact that land ownership was abandoned by Maori in the 19th century is relevant to the ability to exercise stewardship.

Again, that statement is, on the evidence to which I have just referred, a conclusion which could properly be drawn from the evidence.

[95] Nothing in any of the three paragraphs upon which Mr Watson relies suggests that the Court has not accepted that the Takamore wahi tapu is Maori ancestral land. Nor is there anything in the decision that suggests that acceptance of the views of the kaitiaki that the wahi tapu must be avoided were in any way

dependent on ownership of the land. Kaitiakitanga was taken into account by the Court, notwithstanding that the kaitiaki were no longer the owners of the land. I consider that it is clear that the Environment Court has recognised the strongly held views of kaitiaki that any interference with the ancestral land is totally rejected. The Court says so explicitly in paragraph 77. Accordingly, I do not consider that, as a matter of law, it can be said that the Court has failed to give proper recognition to the views of kaitiaki or to kaitiakitanga.

[96] The fact that the land was no longer owned by Maori, if not a relevant factor in considering the concept of kaitiakitanga for the purposes of s 7(a), was clearly a relevant factor in the overall balancing exercise which the Court was required to undertake. Ownership of the land over which the NOR was given was clearly a relevant consideration in determining whether the NOR should be confirmed. The owner of land over which a requirement under s 168 is made has specific rights, for example to be served with notice of the requirement. The reasons for that are obvious. The specific effect of the proposed work on the owner of land affected by it is clearly a relevant consideration. I consider that, as a matter of law, the Court was entitled to take into account, as a relevant factor in the overall balancing exercise, the fact that the land was no longer owned by Maori. That is quite separate from any considerations of kaitiakitanga. The references to ownership in the three paragraphs referred to must be viewed with that in mind.

[97] In his judgment, Ronald Young J considered that the error in respect of s 7(a) was "in equating kaitiakitanga with consultation alone" (para 94). For the reasons I have given, I do not consider that the Environment Court has merely consulted kaitiaki and not taken their views properly into account in making its decision, even although those views have not prevailed. This ground of appeal does not raise the question of the steps taken by KCDC. However, for completeness, I note that, so far as the Environment Court was required to examine the processes adopted by KCDC, I consider that the Court was fully entitled, on the evidence, to reach the conclusion that KCDC, too, had gone further than mere consultation with kaitiaki, and had properly taken the views of kaitiaki into account.

[98] For these reasons, point on appeal 5 must fail.

Point on appeal 6 – the Environment Court failed to interpret s 8 in accordance with the directions of Ronald Young J in the High Court decision

[99] Some preliminary comment on the interrelationship between ss 6(e), 7(a) and 8 is desirable. As has been recognised in a number of cases, ss 5, 6, 7 and 8 create a hierarchy. At the top is s 5, which sets out the purpose of the Act, to the achievement of which all provisions in the Act are directed. Next comes s 6, which sets out matters of national importance which all persons exercising functions under the Act must, in achieving the s 5 purpose, recognise and provide for. Third is s 7, which contains matters to which all such persons must have particular regard. Standing alongside ss 6 and 7, and also directed to achieving the s 5 purpose, is s 8, which requires all such persons to take account of the Treaty of Waitangi.

[100] The interrelationship of ss 6(e), 7(a) and 8 in particular arises in this case. Ronald Young J discusses this in para [89] and following of his judgment. He notes, in para [91], that

> It has been suggested that if the decision maker properly takes into account s 6(e) and s 7(a) matters it may well have fulfilled its s 8 obligations in any event. This will depend very much on the facts of each case. Section 6(e) matters, the relationship between Maori and their culture and traditions, are considered in some detail by the Environment Court in this case.

His conclusion, in para [94], was:

> Because of the errors made in assessing whether koiwi were present in the area of proposed road, because of the error in equating kaitiakitanga (s 7(a)) with consultation alone and because of the express failure to identify potentially relevant Treaty of Waitangi principles and take them "into account" in the decision making, I find the Environment Court failed to consider s 8 matters.

Because I have held that, on its reconsideration, the Environment Court has not erred in its assessment of ss 6(e) and 7(a) matters, I am accordingly of the view that that error of law in the application of s 8 is no longer apparent. That is sufficient to deal with this point of appeal. However, for completeness, I deal with the specific submissions on s 8 which were made on this appeal.

[101] Mr Watson submits that the Environment Court was explicitly directed to

(a) identify potentially relevant principles of the Treaty of Waitangi; and

(b) take them into account in the decision-making process in assessing sustainable management.

He submits that there are three relevant principles:

1. The principle of partnership;

2. The principle of active protection;

3. The principle of redress.

[102] As to the first, the principle of partnership, Mr Watson identified a number of aspects. First, he submits that partnership requires good faith, and that, in acting in good faith towards Maori, the Crown must make informed decisions in some circumstances requiring consultation. He further submits that consultation by itself is not an end in itself and must influence decision-making. He submits:

> 4.10 What does the duty of acting reasonably and in good faith require of both the Kapiti Coast District Council and the Takamore Trustees? The Council have been consistently told since 1997 that the Takamore area is to be avoided altogether. The Takamore Trustees did all they could to propose alternatives, including routes which might well impact on "waahi tapu" but of a lesser category than the Takamore waahi tapu. This is not a case where Maori raise concerns at the last minute, or any other indicators of a lack of good faith. Their "lack of input" into mitigation proposals is not unreasonable, but a legitimate expression of their kaitiakitanga. On the other hand, it is submitted that a Council working in good faith, and taking into account the clearly expressed abhorrence of any desecration of that small area, would do all it could to find alternative routes which did not impinge on the waahi tapu. Put another way, it would be reasonable to expect that a route through the waahi tapu should be the "last resort". This is in effect what the Privy Council in *McGuire* has held to be the correct interpretation of section 8.

[103] The view of the Takamore Trustees that the Takamore area is to be avoided altogether was clearly taken into account by the Environment Court, as I have discussed in relation to the earlier grounds of appeal. As to the submission that "a Council working in good faith, and taking into account the clearly expressed abhorrence of any desecration of that small area, would do all it could to find alternative routes which did not impinge on the waahi tapu". I have already, in

dealing with the concept of kaitiakitanga, held that the Court was entitled to reach the conclusion that KCDC has gone further than consultation. I consider, in relation to the WCHP appeal, the issue of the consideration of alternatives. I do not consider that the application of s 8 imposes on KCDC, or the Environment Court, some additional obligation to the consideration of alternatives than that which it is necessary for its consideration of the relevant matters under ss 6(e) and 7(a), or s 171.

[104] Mr Watson places reliance on *McGuire v Hastings District Council* [2001] NZRMA 557. Lord Cooke said, at p 566:

> By s 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process. The Treaty of Waitangi guaranteed Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they desired to retain. While, as already mentioned, this cannot exclude compulsory acquisition (with proper compensation) for necessary public purposes, it and the other statutory provisions quoted do mean that special regard to Maori interests and values is required in such policy decisions as determining the routes of roads. Thus, for instance, their Lordships think that if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route. So, too, if there were no pressing need for a new route to link with the motorway because other access was reasonably available.

That statement must be read in its context. In that case, the focus was on the task of the territorial authority at the commencement of the planning process. Here, the focus is on the role of the Environment Court, at the end of the process. What might be a reasonable approach to s 8 at the start of the process, when all alternatives are open for consideration, may be different from what is reasonable at the end of the process, when the function of the Environment Court is to approve, or reject, an alternative already adopted, and its consideration of alternatives is essentially governed by s 171, and its application of s 8 must be undertaken in that context.

[105] Mr Watson also refers to two matters which he submits are "sub-principles" of the principle of partnership, namely reciprocity and mutual benefit. He submits that "both parties must mutually benefit from a proposal and the interests of one be

not subsumed by the other". In this case, the Environment Court was faced with the options of either confirming the designation, or of removing the designation. As I discuss later, there was no middle way open to the Environment Court. The Act clearly limits the power of the Court to one or other of those alternatives. Mr Watson's submission involves the proposition that the interests of the respondent (and the public interest which it represents), are to be subsumed to those of the appellant. I do not consider that the Court has erred, in its application of s 8, in this respect.

[106] As to the principle of active protection, the essence of Mr Watson's submission is set out in the following paragraph:

> 4.20 *Active* protection requires positive action, according to the Environment Court in the *Mason-Riseborough* case. There is no doubt that a route through the waahi tapu will not actively protect the taonga and koiwi buried there. The Council has tried to avoid such a conclusion by reference to mitigation and other activities such as consultation. However, no blush can be given to the stark reality that the taonga and koiwi at Takamore will not be actively protected. That fact must be taken into account in the overall decision-making required of the Court. However, there was no mention of active protection in the second Environment Court decision.

[107] That submission seems to involve the proposition that the Court is required, under s 8, to afford greater protection to wahi tapu than that afforded by a consideration of s 6(e). Given the hierarchy of ss 5, 6, 7 and 8 in the Act, I do not consider that that proposition is correct.

[108] As to the principle of redress, Mr Watson submits that it is a principle of the Treaty that there is an obligation on the Crown to remedy past breaches. He acknowledges that, strictly speaking, this obligation falls outside the scope of local government responsibilities. That is for the reason that the Crown, and not the local authority, is the Treaty partner. However, he submits that it is within the spirit of the Treaty to take into account past wrongs in the Takamore area, and to be open to ways to restore the imbalance. I do not accept that the Environment Court has erred in law in this respect. Section 8 does not require persons exercising powers under the RMA to investigate allegations that there have been "past wrongs" or breaches of the Treaty. There is no power under the RMA to conduct any such investigation.

The proposition that there may have been "past wrongs in the Takamore area" is not one which could be accepted without proper investigation. Further, the obligation in respect of past breaches rests on the Crown, not on local authorities, or the members of the communities whose interests they represent. For these reasons, I am unable to accept the submission that s 8 carries with it a responsibility to take into account past wrongs, and redress the balance, when the burden of doing so would fall on other members of the community, not on the Crown.

[109] Mr Watson summarises what he submits are the relevant Treaty principles in para 4.25 of his submissions in these terms:

> 1 A duty on both the Council and Takamore Trustees to act responsibly and in good faith;
>
> 2 A duty to make informed decisions, including a need for proper consultation, allowing that information to influence decision-making;
>
> 3 Provision for the management of resources according to Maori cultural preferences (tino Rangatiratanga);
>
> 4 An acknowledgement that both parties will mutually benefit from a proposal and the interests of one be not subsumed by the other;
>
> 5 Positive action to ensure an active protection of taonga and Maori interests especially where vulnerability of the taonga is due to previous legislative actions.

[110] I do not propose to address each of those. As Cooke P made clear in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, at 662:

> The principles of the Treaty are to be applied, not the literal words.

Section 8 of the RMA must be approached in that broad way. It is not the case that a detailed articulation of the principles must be made, and each case considered against that detailed articulation. To do so would be to rely not on the spirit of the Treaty, nor indeed its literal words, but the literal words of an articulation such as that given by Mr Watson. That approach is not, in my view, correct. Approaching the matter in that light, I consider that I have dealt with the essence of all of the

matters raised, though not in precisely the way Mr Watson has formulated his submissions.

[111] For these reasons, point 6 of the appeal must fail.

Appeal by New Zealand Historic Places Trust (Pouhere Taonga)

[112] The grounds of appeal of the NZHPT are set out in the notice of appeal in the following terms:

> ... that the majority is erroneous in law in the following respects:
>
> 1. Purporting to adopt parts of decision W23/2002 into its judgment when such judgment had been quashed by the High Court.
>
> 2. It failed to follow its own reasoning in that:
>
> (a) It required that certain tapu areas, in particular the area it identified as the Urupa, the Maketu Burial Tree, the Punawai and the swamp area "should it contain koiwi", must be avoided, but that the wahi tapu represented by the swamp burials/taonga in the wetlands could be mitigated.
>
> (b) It wrongly distinguishes between the urupa and other koiwi in the area -the Takamore Area, including the swamp and the dunes is one urupa. In making that incorrect distinction the Court erred in affording protection to one half of the urupa, but failed to follow its reasoning in respect of the second half of the urupa.
>
> (c) In respect of the Historic Places Act in the second decision the majority stated that it should not *refuse the confirmation of a designation to assist in the interpretation of another Act.* [para55] However in the first decision the majority used an interpretation of the Historic Places Act (namely that it provided ample powers for the protection of koiwi) to avoid addressing the existence of such koiwi under the Resource Management Act [para 228].
>
> 3. That the majority was wrong under s5 in failing to afford sufficient weight to the fact that the road proposal was capable of re-alignment/relocation but that the wahi tapu cannot be relocated but will be destroyed by this proposal.

[113] I have already dealt with ground 1 in my preliminary discussion of the approach to be adopted on this appeal.

[114] Ground 2 was put on slightly different terms in the point on appeal, and in submission. Mr Hazelton described the reasoning of the Environment Court as "not intelligible" and "illogical and self-contradictory". I propose to follow the formulation in the notice of appeal, and in doing so to address the other points made in submissions. Grounds 2(a) and (b) have already been discussed in substance in relation to the appeal by the Takamore Trustees, and there is little that needs to be added. All that need be said is that, for the reasons I have given, I consider that the Environment Court has not erred in law in its treatment of the evidence concerning the possibility of burials in the wetlands. The distinction which it drew between the area acknowledged as urupa, which included the fenced urupa and an area outside the fence which was defined with reasonable particularity in the evidence, on the one hand, and the rest of the area, in particular the swamp on the other hand, was an appropriate one, based on its findings on the evidence. Accordingly, I consider that the ground of appeal that the Court has "failed to follow its own reasoning in wrongly distinguish[ing] between the urupa and other koiwi in the area" is not made out.

Ground 2(c)

[115] I should indicate at the outset that I do not accept the submission that the Environment Court has "avoid[ed] addressing the existence of such koiwi under the Resource Management Act". The Court explicitly addressed the issue of the possibility of koiwi in the swamp area, and I have already discussed that at some length.

[116] In his submissions in support of this ground of appeal, Mr Hazelton submits that, in its first decision, the Environment Court had relied upon an interpretation of another Act, the Historic Places Act 1993 ("HPA"), in part to justify its decision in allowing the NOR to proceed. He refers to paragraphs 100 and 101 of the first decision:

100 We find that the areas in and about the urupa are waahi tapu in a general sense and that the road will pass through such areas. The wetland areas are also within the definition of wetland in terms of the RMA. Therefore both waahi tapu and wetlands come within the statutory national importance status by virtue of s.6. Should there be taonga in the swamp, conditions can be imposed which will ensure protection and preservation under the control of the tangata whenua. Should koiwi be uncovered that is a different matter. The question of further conditions to deal with this contingency is not however a matter for this Court. It is covered by the provisions of the HPA. None of the existing conditions imposed by the Commissioners are under challenge as a result of appeals except as we specifically record in this decision. A protocol acceptable to HPT would nevertheless be a useful guide.

101 The District Council must realise that any significant discovery of human remains could result in the road being literally stopped in its tracks whilst a realigned carriageway route is adopted. Both in relation to taonga and koiwi, we make it clear that any observations on the part of this Court in the course of this decision are neither binding nor persuasive on the HPT which has its own role to play in terms of its own Act in relation to discoveries of that nature made in the course of any development works. We also record that general authorisation in terms of the HPA cover an unrealistically short timeframe of two years in relation to a public work of this magnitude.

[117] Mr Hazelton also referred to the second paragraph 54 and paragraph 55 of the second decision:

54 It is accepted that a consultative process is but part of the recognition process and once recognition has been achieved, then ways must be examined for providing for the issues so identified, which in this case is the waahi tapu of the area through which the carriageway will pass. As we have previously discussed, that may or may not involve the discovery of koiwi in the swamp, sand hills or other areas near the urupa and should such discovery take place, as the Court has already recognised in its original decision, the council may face difficulties in terms of the HPT. During the course of the hearing of these proceedings, the HPT submitted that if koiwi are in fact present as part of the waahi tapu area, then the designation should not be confirmed because if that were done, the fact that the activity would then become lawful would in effect cause it to become an essentially predominant activity which could not be prevented by the powers contained in the Historic Places Act 1993. We observe that if that were to occur other activities such as farming would then become lawful in its place.

55 We do not consider that we should refuse a confirmation of a designation to assist in the interpretation of another Act. It must be

> remembered that cancellation of the requirement does not prevent activities within the waahi tapu area and indeed the Weggery subdivision is an example of lawful activities proceeding and Maori kaitiakitanga being recognised. All the cancellation of the designation would achieve would be the prevention of a particular type of activity then its replacement with other activities presently permitted in terms of the district plan. That particular result is relevant when considering the ability of Maori to exercise kaitiakitanga in an area no longer within its ownership.

[118] Mr Hazelton accepts that the first sentence in paragraph 55 is a correct statement of the law, but submits that that is precisely what the Court sought to do. He submits that the Court overstated the extent of the powers available to the NZHPT under the HPA, but his principal point is that the Court wrongly sought to pass the issue to the NZHPT by stating that matters of koiwi discovery should be left to NZHPT under the HPA.

[119] I do not consider that, on a fair reading of the decision as a whole, it can be said that the Environment Court has placed improper reliance upon the provisions for protection in the HPA as a justification for its decision. As the Court noted in para 100 of its first decision, it was not concerned with the detail of the conditions which might be imposed to ensure that, if taonga and koiwi were encountered in the area of the work to be carried out in building the road, then proper means could be taken to ensure their preservation or removal. None of the specific conditions proposed by the Commissioners were challenged. It seems clear that the Court was simply drawing the attention of KCDC to the possibility that, if koiwi were encountered, then the powers in the HPA might become exercisable. I consider that the comment in relation to the powers of the NZHPT is to be seen as a comment as to what future consequences of discovery of koiwi during the course of construction might be, rather than a reliance upon those consequences as addressing issues which the Court itself was required to address.

[120] Mr Hazelton submits that the NZHPT would not in fact have powers under the HPA in the event that the NOR was confirmed, and koiwi were discovered in the course of construction. He submits that, in terms of s 20(6)(c) of the HPA, the confirmation of the NOR would mean that the building of the road would fall within the terms of "reasonable future use of the site for any lawful purpose", which would

be a matter to be taken into account by the Environment Court in considering any appeal against a decision of the NZHPT to exercise any of its powers under the HPA.

[121] I need not examine that submission in detail. It suffices to say that, since I have reached the conclusion that improper reliance was not placed by the Environment Court on the powers under the HPA, the precise extent of powers under that Act does not require to be resolved in this appeal.

[122] As the Court noted in para 100 of its first decision, none of the conditions imposed by the Commissioners was under challenge. If the powers under the HPA are seen as insufficient, then conditions could be imposed under the RMA. The opportunity to do that will still be available, before any work is carried out. The possibility of further measures to address specific aspects was explicitly recognised by the Environment Court. The issue of measures to be taken if koiwi are in fact encountered in the course of construction is a matter which properly falls to be addressed by conditions if it arises. This ground of appeal should not be elevated to the level of causing this Court to set aside, or require reconsideration of, the Environment Court decision to confirm the NOR, when the Court had expressly (and, as I have held, correctly in law) decided that the NOR should be confirmed notwithstanding the possibility that koiwi might be encountered during construction.

Ground 3

[123] This ground of appeal was not specifically addressed by Mr Hazelton in his submission, but I deal with it for completeness. It relates entirely to the weight which was given to the proposition stated. The weight to be given to relevant considerations is a matter for the Environment Court, and not for this Court. That is sufficient to deal with this ground of appeal. Additionally, the proposition that "the road proposal was capable of realignment/relocation" does not adequately recognise the limited powers of the Environment Court, which I deal with in relation to the WCHP appeal.

[124] For these reasons, the appeal by NZHPT must be dismissed.

Appeal by Waikanae Christian Holiday Park

[125] This appeal is upon the grounds

> that the decision of the majority is erroneous in law in the following respects
>
> 1. It failed to apply s 171(c) of the RMA in accordance with the direction as to its interpretation by Ronald Young J
>
> 2. It incorrectly interpreted the meaning of "nature" as it appears in s 171(c) of the RMA.

[126] Section 171 was amended, as from 1 August 2003, by substituting a new section. It is convenient to set out s 171(1) in its previous form, which is the form to be considered on this appeal:

> **171 Recommendation by territorial authority**
>
> (1) Subject to Part 2, when considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to—
>
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
>
> (d) All relevant provisions of any national policy statement, New Zealand coastal policy statement, regional policy statement, proposed regional policy statement, regional plan, proposed regional plan, district plan, or proposed district plan.
>
> (e) *Repealed*

[127] Mr McClelland relies upon this statement in paragraph [101] of the earlier decision of this Court:

> .... The paragraph is concerned with the nature of the work causing unreasonableness in requiring an alternative route. The unreasonableness relates not to the process that may have to be gone through to gain approval for an alternative route, but to the expectation of an alternative route because of the nature of the public work. I therefore reject the Environment Court's conclusion that there must be a viable alternative route before para (c) can effectively be considered. This, as I have observed, seems to put the emphasis and obligations in the section around the wrong way. ...

He submits that, in its second decision, the Environment Court in para 94 set out the reasons why an alternative route proposed by WCHP would not be viable, then dealt in para 95 with the nature of the work, which he submits "again appears to put the emphasis and the obligation of s 171(1)(c) 'around the wrong way'".

[128] Some comment on the relationship between s 171(c) and the other paragraphs in that section is called for. The relationship between paragraphs (b) and (c) in particular is not easy to ascertain. Section 171(1) requires a territorial authority considering a requirement of a requiring authority made under s 168 to have particular regard to the matters listed in paragraphs (a) to (d). Likewise, the Environment Court, considering an appeal under s 174, is required by s 174(4) to have regard to those same matters. Alternative sites, routes or methods are relevant under both (b) and (c). Those paragraphs are not alternatives, because the conjunction is "and" not "or". Thus, the territorial authority, and the Court, must consider both whether the requiring authority has given adequate consideration to alternative sites, routes or methods and to whether the nature of the work means that it would be unreasonable to expect the requiring authority to use an alternative route or method.

[129] As I see it, the effect of that is that the task of the territorial authority, and of the Court on appeal, is essentially two-fold:

> 1. Under (b), to examine what consideration has been given by the requiring authority to alternative sites, routes or methods. That is essentially an examination of the processes and consideration adopted by the requiring authority, and the exercise of a judgment by the territorial authority or the Court as to whether that consideration has been, in its view, adequate.

2. Under (c), to consider whether the nature of the work is such that it would, in the judgment of the territorial authority or the Court, be unreasonable to expect the requiring authority to use an alternative.

The two exercises are separate, but they are closely intertwined. The way in which the task is approached may differ, according to the circumstances. It may, for instance, be appropriate in some cases to consider paragraph (c), before paragraph (b). If the nature of the work is such that there are unlikely to be viable alternatives, it may be appropriate to examine that issue first, because if the conclusion in relation to (c) is that the nature of the public work is such that it would be unreasonable to expect the requiring authority to use an alternative site, route or method, then little attention to para (b) may be required. Conversely, a decision that it would not be unreasonable to expect the requiring authority to use an alternative is likely to mean that a greater consideration of alternatives will be required of the requiring authority, to be deemed adequate. In other cases, it may be more appropriate to consider first, under para (b), the alternatives which have been investigated, because some detail of the possible alternatives may be needed to decide whether it is unreasonable to expect the requiring authority to use an alternative. In other cases, it may be convenient to address both paragraphs together. Much will depend on the individual case, and the views of the relevant authority as to the best way to approach the task. In my view, the ordering of the paragraphs does not dictate the approach.

[130] Another important point to note is that a negative answer to the question posed in paragraph (c) will not necessarily lead to a rejection of the requirement. That will be in large measure dependent upon the answer to (b). If an affirmative answer is given to (b), and a negative answer to (c), then that means that the nature of the work is such that it would not be unreasonable to expect the requiring authority to use an alternative site, but adequate consideration has been given to alternative sites, and the requiring authority has preferred the site which it has selected. A negative answer to (c) does not invalidate the site selection.

[131] It cannot be the case that a negative answer under (c) must necessarily require the use of an alternative site, route or method. To demonstrate why that must be so, consider the hypothetical that there are two potential sites for a public work, site A

and site B, both of which are suitable, having regard to the nature of the work. The requiring authority selects site A. When the territorial authority considers the matter under s 171(1)(c), it must give a negative answer. The nature of the work does not mean that it would be unreasonable to expect the requiring authority to use site B, because that is a potential site. Equally, if the requiring authority had selected site B, the territorial authority must reach the conclusion that it would not be unreasonable to use site A. A negative answer to (c) would, if it were conclusive, necessarily always eliminate the site actually selected.

[132] So, a negative answer under paragraph (c) cannot be conclusive. It will simply point to the need for a closer scrutiny of whether adequate consideration has been given to the alternatives, in terms of (b), rather than the considerations under (c) being decisive of the issue. A decision, in relation to s 171(1)(c), that the nature of the work did not make it unreasonable to consider the use of alternatives would be simply one of the factors to be weighed in the balance in the overall decision-making process, not a decisive factor.

[133] I turn to consider the nature of the proposed work in this case. Mr McClelland submits, on the basis of Environment Court decisions in the *Estate of P A Moran v Transit New Zealand* (WO55/99, 30 April 1999), and *Olsen v Minister of Social Welfare* [1995] NZRMA 385, that the phrase "nature of the public work" refers to the activity to be undertaken in the area once the proposed works are completed, for example driving motor vehicles, rather than being directed to the physical elements of the proposed work. Mr Laing submits that there is no hard and fast rule or uniform approach to the meaning of "nature" in paragraph (c).

[134] I accept Mr Laing's submission. In my view, the word "nature" in this context is a broad one. It seems to me that a broad term has been deliberately chosen, to enable a wide range of potential matters to be taken into account in considering whether it would be unreasonable to expect the requiring authority to use an alternative. Much will depend on the circumstances. In some cases, a focus on the nature of the activity may be appropriate. In others, it may be the form of the structures which constitute the public work. Any attempt to closely define the term "nature" would be to detract from the flexibility and ability to have regard to the

circumstances of particular cases which are, in my view, inherent in the choice of that term.

[135] The Environment Court in its second decision identified the following matters in its discussion of the nature of the work:

1. That it is an urban arterial, where routing through residential streets should be avoided if possible (paragraph 95);

2. That it is to be a fairly free-flowing arterial with 70 kilometre per hour restrictions, a limited number of intersections, and ready and attractive access for residents both west and east of the proposed corridor (paragraph 96).

The Court also noted, in paragraph 97, that it had taken some time in looking at the alternatives itself and concluded that the Council's views on the alternatives were supportable. This led it to the conclusion in paragraph 98 as follows:

> The nature of the work therefore in connection with the objectives sought to be achieved would render it unreasonable to effectively force the council into an alternative that is demonstrably inferior with new widespread and serious environmental effects.

[136] In my view, the matters identified in paragraphs 95 and 96 do fall within the scope of the term "the nature" of the work, and there is no error in law in having regard to those matters as being aspects of the nature of the work. In respect of para 97, because of the interrelationship to which I have referred between s 171(1)(b) and 171(1)(c), I consider that the Court was, as a matter of law, entitled to have regard to the alternatives which had been considered, in examining whether the nature of the work made the consideration of those alternatives unreasonable.

[137] In relation to the nature of the work, the Court also said, at paragraph 102:

> 102 Lastly the nature of the work includes the acquisition of continuous properties, the design requirements of an arterial road long planned for, the importance of the work, its part within the network serving the immediate community and its part in meeting the wider transport demands in a safe and efficient way. Any deviation to avoid the swamp would necessitate the re-routing of extensive lengths of the road on either side of the swamp as an arterial road and on the operation of the roading network. The proposal has to be considered

> as a whole, not in parts, and under these circumstances it is unreasonable to expect an alternative to be adopted.

[138] In my view, all of those were considerations which the Court was entitled to take into account as aspects of the nature of the work which were relevant in assessing whether or not the use of alternatives would be unreasonable.

[139] Because the ability of the road to use the protected corridor falls within the scope of the term "nature of the work", I consider that the matters referred to by the Environment Court in para 87 of its second decision (which Mr McClelland submits were in error) were matters to which the Environment Court was entitled to have regard in considering whether use of another site would be an unreasonable expectation. Whether the nature of the work is considered in the way I have discussed, or whether it is considered, as Mr McClelland submits, by reference to the activity to be undertaken once the work is completed, the answer in this case is the same: the nature of the work requires a long continuous corridor. The availability of a protected corridor, when contrasted with the lack of another protected corridor, and the consequences which would flow from attempts to obtain protection for another corridor, were, in my view, all relevant matters for the purposes of s 171(1)(c).

[140] Mr McClelland submits, in para 5.8 of his submissions, that the "nature of the work" does not relate to the preparatory work already completed, and so the fact that this roading corridor has had protection since 1956 is irrelevant for the purposes of s 171(1)(c). I do not agree. In my view, the fact that the proposed public work is an urban arterial road which requires a long continuous corridor, which could be accommodated within the protected corridor, does fall within the scope of the term "the nature of the public work".

[141] It is also necessary to bear in mind, in considering this ground of appeal, the limited powers which the Environment Court has on an appeal under s 174. Ronald Young J dealt with that question in his judgment, in relation to one of the grounds of appeal which he rejected. He said:

> 36. The Environment Court's power to approve the NOR in such a limited way is also in doubt. Section 174(4) Act states:

174. Appeals –

....

(4) In determining an appeal, the Environment Court shall have regard to the matters set out in section 171 and may –

(a) Confirm or cancel a requirement; or

(b) Modify a requirement in such manner, or impose such conditions, as the Court thinks fit.

37. On the face of it the Court had no power to cancel part of the requirement. For good reasons it will be all or nothing. Nor could it be suggested that a cancellation of part of the NOR was simply a modification of the overall scheme. The cancellation of a significant piece of the NOR is well beyond modifying a proposal. The word used in s 174(4) is "cancel" not "cancel in whole or in part". I do not consider the Court had power to cancel part of the requirement in the way proposed.

38. Finally, a redirection of the Waikanae/Te Moana Road route could not be undertaken by the Court. If it was not satisfied that part of the route met the Act requirements, then its task was to refuse to confirm the NOR. The Court had no power to substitute its own alternative route. The Court said at para [152] of its judgment:

> We cannot direct choice of another alternative therefore, in the absence of exercise of a power of adjournment, we would be left without powers under ss 172 and 174 to do anything but cancel or confirm the requirement. Also this subsection is directed at alternatives – not the route covered by the requirement.

I agree. It is appropriate to note, at this point, that the decision proposed by the minority in the Environment Court would have been susceptible to challenge for that reason.

[142] Those limitations must be borne in mind when considering the task of the Court under s 171(1). The Court is required to determine, having regard to all relevant factors, including those under Part II, and those in s 171, whether to confirm the NOR, or to cancel the NOR, in its entirety. It is not able to confirm the major part of the requirement, but require a further investigation of alternatives in the area involved with these appeals. Nor can it modify the proposal by making changes which would themselves require further steps to comply with RMA procedures.

Accordingly, the examination of the relevant issues under s 171(1)(b) and (c) must have regard to the whole of the work covered by the NOR, not only to part of it.

[143] Mr McClelland submits that the Environment Court erred in having regard to what he described as "hypothetical observations" of this Court on the existence of a protected corridor. I do not accept that submission. The existence of a protected corridor was clearly a relevant consideration.

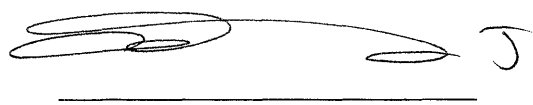
[144] For these reasons, I have reached the conclusion that the WCHP appeal must also be dismissed.

Conclusion

[145] For the reasons I have given, all of the appeals are dismissed.

Costs

[146] Counsel may submit memoranda as to costs.



A D MacKenzie J

Signed at 11.00 a.m./~~p.m.~~ this 27th day of October 2004

Solicitors:
Kensington Swan, Wellington, for Waikanae Christian Holiday Park
Simpson Grierson, Wellington, for Kapiti Coast District Council
Chapman Tripp, Wellington, for Transit New Zealand
Duncan Cotterill, Wellington, for Takamore Trustees
Hazelton Law, Wellington, for New Zealand Historic Places Trust
Crown Law Office, Wellington, for the Environment Court

TAB 16

DOUBLE SIDED

ORIGINAL

Decision No. C 73 /2002

IN THE MATTER of the Resource Management Act 199 1

AND

IN THE MATTER of references pursuant to Clause 14 of the First Schedule of the Act

BETWEEN WAKATIPU ENVIRONMENTAL SOCIETY

(RMA 1043/98, 1394/98, 1165/98)

LAKES -DISTRICT RURAL LANDOWNERS TNC

(RMA 1402/98)

Referrers

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson presiding
Environment Commissioner R S Tasker
Alternate Environment Commissioner R Grigg

HEARING at WANAKA on 2, 3, 4, 5, 6 and 11, 12, 13 July 2001; 29, 30 April 2002 and at **QUEENSTOWN** on 1 May 2002

Final submissions received 8 May 2002

APPEARANCES

Mr A Borick for Upper Clutha Environmental Society Inc. – under section 271A of -the Act
Mr G M Todd for the Lakes Landcare Group, P J McRae and for D W McRrae – under section 271A of the Act
Mr N S Marquet for the Queenstown Lakes District Council
Mr W J Goldsmith for Waterfall Creek Partnership Ltd - under section 271A of the Act

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Mr R T Chapman for the Sharpridge Trust - under section 271A of the Act
Mr M E Parker for Infinity Investments Ltd - under section 271A of the Act
Mr A More for Mr S and Mrs V Laming - under section 271A of the Act

TABLE OF CONTENTS

DECISION (RE GLENDHU BAY TO HILLEND)

[A] Introduction

[1] This decision identifies the outstanding natural landscapes and visual amenity landscapes between Glendhu Bay and Hillend at Wanaka in the Queenstown Lakes District. It is a further step[1] in the resolution of references under the Resource Management Act 1991 ("the Act" or "the RMA") of the proposed district plan as revised in 1998 ("the revised plan")[2] of the Queenstown Lakes District Council ("the Council").

[2] As we explained in decision C163/2001 ("the Roy's Peninsula decision") the position concerning parties to these cases is quite complex. Neither of the referrers appeared at the hearing, but at the pre-hearing conferences it was clear that the two referrers had each had their respective positions taken over, in the Wanaka area, by section 271A parties as follows:

- Lakes District Rural Landowners Incorporated by the Lakes Landcare Group which is an unincorporated body of farmers; and
- Wakatipu Environmental Society Incorporated by the Upper Clutha Environmental Society Inc ("UCESI").

Earlier decisions on Part 4 of the revised plan include C180/99, C74/2000, C129/2001 and C162/2001.

2 References to the revised plan in this decision are to the February 2002 reprint which includes changes as the results of various decisions on other references to this Court.

There has been no opposition to that course.

[3] At the hearing of these references, in addition to the named parties and the two section 271A parties just discussed, six other landowners appeared under section 2'71A of the Act and were represented by counsel:

(1) Mrs P J McRae who farms in partnership a property Glendhu Station – at Glendhu Bay including land on the Fern Burn River flats and on the western flanks of Roy's Peak;.

(2) Mr D W McRae who farms Alpha Burn Station on the northern flanks of Koy's Peak and land on the northern side of the Mt Aspiring Road including Damper Bay;

(3) Sharpridge Trust which owns land between Mt Aspiring Road and Lake Wanaka, close to Damper Bay;

(4) Mr S and Mrs V Laming who own the land to the east of the Sharpridge Trust land;

(5) The Waterfall Partnership which owns land between the road and the lake immediately north-west of Waterfall Creek near the Rippon Vineyard; and

(6) Infinity Investments Ltd which has an interest in Hillend Station underneath the east ridge of Mt Alpha, and with one boundary on the Cardrona Valley Road.

[4] It is common ground that much of the massif between Glendhu Bay and the Cardrona Road – including most of Roy's Peak and Mt Alpha – is at least an outstanding natural landscape. The issues in this area are, as usual, where the outstanding natural landscape(s) within the meaning of section 6(b) of the Act end, and other landscapes begin. In particular there are four specific questions we answer in this decision:

(1) What is the extent of the visual amenity landscape ("VAL") in the Fern Burn catchment at Glendhu Bay?

(2) Is the strip of land along the Mt Aspiring Road between Damper Bay and Waterfall Creek an outstanding natural landscape or not?

(3) Where are the bounds of the outstanding natural landscape on the area of land identified as the Mt Alpha fan close to Hillend?

(4) Whether there should be (as requested by the UCESI) an Inner Upper Clutha outstanding natural landscape (ONL (IUC)), by analogy with the outstanding natural landscape of the Wakatipu Basin?

[5] We should add that the hearing of these issues took place at two times – the first in 2001 and the second in 2002. The first hearing related mainly to the Glendhu area and resulted in the Roy's Peninsula decision. Issues as to the extent of the Visual Amenity Landscape[3] in the Fern Burn catchment were raised in the July 2001 hearing but not decided. We have decided to resolve that issue in this decision – as the answer to question (1) above – because consideration of the facts relevant to -that issue, as to what constitutes a landscape, helps us with the determination of -the other questions which were raised at the 2002 hearing. That second hearing related principally to the area to the south of Wanaka township between Hillend to the east and Damper Bay to the west.

[6] Before we decide the specific factual issues, there is a legal. question which we have to deal with: "What is a landscape?" Since, to the best of our abilities, we answered this in our first decision: ***Wakatipu Environmental Society Inc and Others v Queenstown Lakes District Council***[4] ("the first *Queenstown landscape decision")* it may be slightly surprising that the question has been asked again. However Mr Goldsmith, for the Waterfall Creek Partnership, submitted that the concept of a 'landscape' has changed in subsequent decisions, and that the 'simplicity' of the original distinction between an outstanding natural landscape and what the Court identified in the Queenstown Lakes District as a 'visual amenity landscape' has been lost. In particular he submitted that questions of scale have more recently been introduced which were not (allegedly) part of the original concept of 'landscape'. We now turn to consider this issue.

3 As defined in Part 4 of the revised plan.

4 [2000] NZRMA 59.

[B] ***The scale of landscapes***

[7] In the *first* Queenstown *landscape decision* the Court stated that[5]:

> ... *a precise definition of 'landscape' cannot be given* ...

and continued to mention three ways ofperceiving landscape:

> (1) ... *as a large subset of the 'environment"*
>
> (2) ... *as a link between individual . . . resources and the environment as a whole*[7]
>
> *(3) under the amended Pigeon Bay assessment criteria.'*

[8] After discussing the meaning of 'outstanding natural landscapes' we then looked at how the landscapes of the district could be usefully analysed[9] and stated:

> *In very broad terms we make a tripartite distinction . . . : outstanding natural landscapes andfeatures; what we shall call visual amenity landscapes, to which particular regard is to be had under s 7, and landscapes in respect of which there is no significant resource management issue. We must always bear in mind that such a categorisation is a vey crude way of dealing with the richness and variety of most of New Zealand's landscapes let alone those of the Queenstown-Lakes District.*
>
> *The outstanding natural landscapes of the district are Romantic landscapes – the mountains and lakes. Each landscape in the second category of visual amenity landscapes wears a cloak of human activity much more obviously – these are pastoral or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces. The extra quality they possess that brings them into the category of "visual amenity landscape" is their prominence because they are:*

5 [2000] NZRMA 59 at para (74).
6 [2000] NZRMA 59 at para (77).
7 [2000] NZRMA 59 at para (78).
8 [2000] NZRMA 59 at para (80).
9 [2000] NZRMA 59 at para (92) to (94).

- *adjacent to outstanding naturalfeatures or landscapes; or*
- *on ridges or hills; or*
- *because they are adjacent to important scenic roads; or*
- *a combination of the above.*

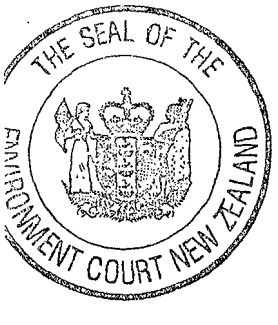
These aspects mean they require particular regard under s 7. The third category is all other landscapes. Of course such landscapes may have other qualities that make their protection a matter to which regard is to be had ***or*** *even a matter of national importance,*

It must always be borne in mind that all landscapes form a continuum physically and ecologically in the many ways they are perceived.' Consequently we cannot over-emphasize the crudeness of our three way division – derived from Mr Rackham's evidence – but it is the only way we can make findings of "fact" sufficient to identify the resource management issues. [Footnotes omitted].

Despite the warnings in this passage about the crudity of the division and the continuum of landscapes Mr Goldsmith relied on this passage as showing that the distinc-tion between outstanding natural landscapes and VAL was, to use his word, 'simple'.

[9] In the *first Queenstown landscape decision* the Court did not have to determine precisely **where the** edges of the district's outstanding natural landscapes are. In subsequent hearings **the** issue has arisen as to **where** the boundaries are in relation to specific areas of I.and. At those hearings some of the parties and their landscape witnesses have attempted to divide up the relevant landscapes into small parts or units and to classify those separately. Generally the Court has held that approach to be incorrect. In doing so, submits Mr Goldsmith, it has introduced complications as to scale which are inconsistent with the *first Queenstown landscape decision.*

[10] The Court stated in ***Lakes District Rural Landowners Society Inc v*** *Queenstown Lakes District Council*[10] *("the third Queenstown landscape decision "):*



[10] C75/2001 at para [27].

> *Perhaps the most important practical point we can make about other rural landscapes ("ORL") in this district is that an area has to be of sufficient size to include the qualities that enable it to be described as a "landscape". The obvious area most likely to qualify as an ORL ["other rural landscape "] is part of the extensive Hawea Flats. ... Returning to the Wakatipu Basin: the Domain Road triangle may or may not qualify as ORL – we have yet to determine that issue in a specific case. However any area that is smaller than that triangle would have difficulty in qualifying as an ORL or any type of landscape because it would be too small. As we have already stated it demonstrates an inadequate grasp of the amended* ***Pigeon Bay*** *criteria to find small pieces of ORL included in a VAL or ONL.* [Footnotes omitted].

[11] The Court applied the same approach ***in Wakatipu Environmental Society Inc v Queenstown Lakes District Council'"*** (the *"West Malaghan Road decision "*) when we stated:

> *... when appreciating or evaluating a landscape one does not look at one part – say the valley floor – in isolation. A valley floor is only a floor because there are walls. Referring to the container metaphors that have been used for the Wakatipu Basin, the smaller Arthur's Point bowl (roughly a circle centred on Big Beach) only has a bottom (the river flats, and the Paterson terraces) because it has the mountains and the escarpment as its sides. As Mr Kruger observed when under cross-examination by Mr Todd his water cup would not be a cup if it did not have a bottom: it would not hold water.*

[12] Mr Goldsmith submitted that the later decisions are not consistent with the *first Queenstown landscape decision*[12] which made its tripartite classification without regard to scale; that the definitions were simple and did not need. to be supplemented by a 'subjective' scale; and that shortly after the *first Queenstown landscape decision* the Court analysed small areas as VAL's. On that last point he referred to a sentence in a passage in *Waterston v Queenstown Lakes District Council*[13] where the Court stated:

11 C3/2002 at para [33].
12 [2000] NZRMA 59.
13 C169/2000 at para [20].

> ... *In our view this part of Ferry Hill has four landscape components. They start with a separation at the level of the row of poplars – with a more natural (outstanding) landscape above. The second component is a visual amenity landscape below the poplars down to fourth components are the bank and lower terrace* ***respectively.*** *The second component should be* ***treated as a*** *whole in order to avoid resource consent creep with unacceptable cumulative effects* . . . [Footnote excluded, and underlining added].

Mr Goldsmith submitted that the Court was there finding that a small area of one title could to be a separate (visual amenity) landscape.

[13] That passage in *Waterston* needs to be read in context. The Court had already[14] identified all of the second, third and fourth landscape components of the appellant's land as falling "into the visual amenity landscape". In other words the Court held that Mr Waterston's particular site is part of a visual amenity landscape. In our view Mr Goldsmith is reading too much into paragraph [20] of *Waterston* as identifying different landscape components as different landscapes – although we concede the relevant sentence is not accurately expressed and should perhaps have said that: "The *second component is [part off a visual amenity landscape".*

[14] Further Mr Goldsmith's suggestions that using 'scale' in the assessment of landscapes as new, unnecessary and subjective are all wrong. As to novelty: the *first Queenstown landscape decision* expressly referred to questions of scale. We stated[15]:

> ...
>
> *To individual landowners who look at their house, pasture, shelterbelts and sheds and cannot believe that their land is an outstanding natural landscape we point out* ***that*** *the land is part of an outstanding natural landscape and questions of the wider context and of scale need to be considered.*

14 C169/2000 atpara [10].
15 [2000] NZRMA 59 at para (105).

[15] As to its necessity: in almost every reference on the Council's revised plans' Rural General zones since the *first Queenstown landscape decision* a landowner has argued that a relatively small piece of land is a separate landscape: the West *Malaghan Road decision* is an illustration of that; as is ***Fordyce Farms Ltd v Queenstown Lakes District Council***[16]***;*** so too is this case. It is necessary to have some concept of scale in the definition of landscape. At an absurd extreme it would be possible, otherwise, for a rural landowner with a large garden to argue that it is a separate landscape.

[16] As for scale being 'subjective': that is a curious submission because, of all the elusive concepts involved in landscapes scale is nearly unique in that it can be objectively assessed by measuring the area being considered (as we shall see when discussing the next issue).

[17] We are satisfied that *we* can *follow* the *third Queenstown landscape decision* and the *West Malaghan Road decision* and that they are consistent with the *first decision.*

[C] ***The visual amenity landscape at Glendhu Bay***

[18] The relevance of scale is demonstrated by Mr Vivian's evidence on the Fern Burn area[17]:

> *The Motatapu [Road] Valley is approximately 2 kilometres in width and extends for approximately 3 kilometres in depth. It is one of the largest, wildest, valleys of the district (outside of the Upper Clutha or Wakatipu Basins – if they can be considered valleys). The area identified by Miss Kidson as being VAL is approximately 600 hectares in area. It is of a sufficient size to be considered a VAL, independent of the wider ONL, without compromising the integrated management of the effects of the use, development and protection of ONL's.*

16 Decision C39/2002.

17 Evidence of C Vivian, para 5.8: he rather misleadingly calls it the 'Motatapu Valley' but it is clear from the context and his references to the evidence of the Council's landscape witness Ms E J Kidson, that he is refer-ring to what the latter describes as "Glendhu Bay" and we have called "the Fern Bum". His misnomer is, we believe, caused by the fact that the road up the Fern Bum flats is the "Motatapu Road" leading to the station of that name.

[19] All of the expert landscape witnesses (Mr PJ Baxter, Ms D J Lucas, Ms E J Kidson) who gave evidence on the Fern Burn agreed that its floor was a VAL. There was no evidence to the contrary and we find accordingly.

[20] That evidence suggests that in most circumstances in the district a flat area that has the following characteristics may begin to be considered as a. separate landscape:

(a) it must contain at least one (preferably more) rectangle with al; least 1.5 x 2 kilometre sides;
(b) no part of the landscape may 'be more than 1 kilometre from such a rectangle;
(c) it must contain a minimum area of 600 hectares;
(d) internal **comers** should be rounded.

We do not decide that such a quantitative measure of scale is appropriate, but introduce it to the parties as an inference from the common stance of the landscape experts in these proceedings, in case it is useful in future. An area that meets the above areal and shape characteristics is not necessarily a separate landscape, but may meet the minimum objective features. We also caution that it appears to us:

- that the more open a landscape is, the greater the area it must contain to be seen as a landscape;
- that the area qualifications might not invariably apply, for **example** on hillsides; and
- they could not apply to a feature which is, by definition, part of a landscape.

[21] On the scale criteria the terrace above the Fern Burn flats identified by Mr Baxter as a VAL would not qualify as an individual landscape because i-t is too small. However, because the scale criteria have not been tested we do not use them to determine **the** issues in this case, but consider the remainder of the evidence.

[22] In fact there was no substantial evidence as to why the terrace should be classified as a VAL. We have also considered the lay evidence of Mrs P J McRae of Glendhu Station, Mr J H Aspinall on behalf of the Lakes Landcare Group and Federated Farmers of New Zealand, and Mr D W McRae of Alpha Bum Station. On this occasion the evidence of the expert witnesses, other than Mr Baxter, is more persuasive.

[D] The Waterfall **Creek to Damper Bay** *valley*

[23] The road from Wanaka. to the Matutuki Valley ("the Mt Aspiring Road") after running behind Larch Hill, runs northwest parallel with the edge of Lake Wanaka. The road does not follow the lake edge. Between Waterfall Creek and Damper Bay it leads through a shallow valley ("the Damper/Waterfall valley") between the steep sides of Roy's Peak (on the left) and a row of *roches moutonnee* (rock sheep) on the right. It was common ground that the slopes of Roy's Peak were included in an outstanding natural landscape as were the waters and shores of Lake Wakatipu up to (at least) the crest of the rocky ridge (of *roches moutonnee)* between the lakeshore and Mt Aspiring Road. The question for us to determine here is whether the flatter land either side of the Mt Aspiring Road is part of a western tongue of VAL protruding from the pastoral landscapes around Wanaka township to the south and east.

[24] The most complete summary of the amended ***Pigeon*** Bay factors affecting assessment of the setting of the Damper/Waterfall valley was given in Mr B Espie's landscape evidence for the Council. He discussed each factor in turn as follows:

(a) Natural Science Factors'*:

> *In simple terms the mountain slopes beginning shortly to the west of the Wanaka Mount Aspiring Road and the hummocky formations in the area of the Rippon Vineyard and around point 11581 are formed of glacially-sculpted schist, while the tongue of flatter land thatfollows the road and the land surrounding Wanaka are formed of tills, gravels and alluvium. There is a difference in the formative*

18 B Espie paragraphs 3.6 to 3.8.

processes that have acted on the hummocky areas and the mountain slopes. The hummocky areas have been overrun by glaciation, resulting in their rounded appearance while, above a certain altitude, the mountain slopes have not.

The topography of the subject area reflects the geological underlay. The mountain slopes form a steep wall to the southwest and *the road follows the shallow [Damper/Waterfall]* valley area *of tills and gravels. The topography again becomes steep in the hummocky areas, which appear as intermittent obstacles between the road and the lake, but in many areas the flatter low ground extends from the road to the lake surface. The mountain slopes are generally covered in low unkempt scrub-like vegetation while the flatter land contains pasture and intermittent shelter and amenity trees, particularly towards the southeast as the road approaches Wanaka. The hummocky topography is also grazed pasture but contains many schist faces and outcrops and ureas of scrub.*

A detailed ecological study of the site was not conducted but it is evident that the vegetation of *the tongue of flatter land [through which the Mt Aspiring Road runs] and the hummocky landforms is typical of a farmed, pastoral landscape. Grazed exotic pasture dominates, punctuated by shelter trees. Exotic amenity tree planting increases significantly in the eastern area adjacent to the Pleasant Lodge Holiday Park and the Rippon Vineyard where grapevines are also visible. The areas of hummocky topography are mainly pasture but contain areas of briar rose, matagouri and kanuka scrub. Areas of native wetland vegetation are evident, particularly in the northern end of the subject area. The ecology of the steep mountain slopes is of an unkempt scrub-like appearance consisting* of *briar rose, bracken fern and matagouri giving way to yellower areas* of *native grasses on the upper slopes.*

(b) Aesthetics[19]:

[19] B Espie, Evidence in chief, paragraphs 3.9 and 3.10.

...

The upper Clutha area demonstrates very high aesthetic value. It is dominated by ranges of high, natural mountain peaks and vast lakes and draws large numbers of domestic and international tourists. In the subject area historic use of the land has heavily influenced the. aesthetics that exist today. The mountain slopes (particularly the lower slopes) are covered in many exotic wilding species but overall have a wild and unkempt aesthetic pattern. When viewed in context these slopes are part of a romantic landscape, as is the vast lake surface and distant mountain backdrop. The aestheticpattern that exists on the tongue of flat land that follows the [Mt Aspiring] road is not wild and is chnracterised by verdant grazed paddocks and signs of a working use of the land. This could be termed a pastoral aesthetic pattern. However, when looking north and east from the road the view is still romantic and wild with the hummocky landforms forming a foreground to views of the lake surface and distant dramatic mountain peaks.

(c) Legibility':

. ..[I]t is obvious that the land of the subject area visible reflects it's formative processes. Areas of bedrock that have been weathered by glaciation are visible in the form of the mountain slopes and hummocks. The tongue of flat land is visible as an area of glacial and fluvial deposition.

(d) Transience[21]:

The wider landscape of the upper Clutha area demonstrates transient values to a significant extent. Dramatic aesthetic effects result [from] changing light conditions throughout the day and year, weather conditions (particularly seasonal snow), and seasonal changes in deciduous vegetation and agricultural land use. These effects are visible on a broad scale throughout the district but occur more dramatically in areas of high altitude or variable topography. In the

2.0
21 B Espie, Evidence in chief paragraph 3.14.
B Espie, Evidence in chief, paragraph 3.17.

subject area this is the case in the form of snow cover on the mountain slopes, the play of light conditions on the variable topography of the mountains and the areas of hummocky topography and the seasonal changes in vegetation and agricultural activity [in the Damper/Waterfall valley], particularly in the south eastern portion.

(e) Shared and Recognised Values[22]:

The impact of natural science factors are shared and recognised by observers to some extent. I consider that most observers would recognise that the mountain slopes and the hummocky landforms are weathered bedrock while the shallow valley is an area of deposition. I consider that the aesthetic and transient values of the subject area would be shared and recognised by most locals and visitors to the area, and that to the west of a certain point on the Wanaka Mount Aspiring Road the aesthetics of the landscape when read as a whole are consistent with a dramatic, romantic mountain and lake landscape.

Mr Espie has a touching faith in the geomorphological education of the majority of visitors to the area, but we consider that he is correct in his assessment of the general effect on visitors of driving through this valley.

(f) Takata whenua and (g) Historical values.

In fact neither Mr Espie nor any other witness identified any specific values attached to the Damper/Waterfall valley. Mr Espie was cross-examined in some detail on his evidence but his answers did not weaken his evidence overall.

[25] For the landowners Mr Baxter considered that the Damper/Waterfall valley[23]:

... being the landscape adjacent and on either side of the road [and] ... not visible from the lake or township . . . is of sufficient scale and place to be landscape on its own merits,

22 B Espie, Evidence in chief, paragraph 3.19.
23 P J Baxter, April 2002 evidence, paragraph 14.

He comes to that conclusion:

> *... on the basis that it is a distinct visual experience for people within that particular area. I then ask whether the experience of that landscape is predominantly of ONL type elements or predominantly of VAL type elements. I believe that the experience of the viewer within that landscape is more likely to be dominated by the pastoral surrounds and foreground, I form that view for the following reasons.*
>
> a. *The steep ONL slopes on the left-hand side (driving towards Glendhu Bay), while being fairly close to the road, are so steep and high they are largely above and outside the primary visual experience when driving along that road.*
> b. *The ONL of Lake Wanaka and the far shores are very distant.,*

[26] We have difficulties with accepting Mr Baxter's evidence on this issue because it seems:

- unduly reliant on a visual assessment;
- to be made from the road; and
- to be a restricted visual assessment.

We do not think it is unfair to suggest that Mr Baxter has taken a driver's assessment of the Damper/Waterfall valley. All his photographs[24] of the valley are taken looking along the road and do not show Roy's Peak on the left. A more objective photograph of the view north-west from the Waterfall creek turnoff was produced[25] by Mr Espie for the Council.

[27] We accept that a 'visual' assessment is very important in the overall landscape assessment, but it needs to be much fuller than a 'drive along the road' view. Even a

24 Photographs 6 and 7 to his primary April 2002 evidence; and photographs 1 to 4 to his rebuttal evidence.

25 B Espie, photograph 1.

passenger looking at right angles to the road would see a different landscape aspect than Mr Baxter's photographs suggest.

[28] Another omission from Mr Baxter's assessment of categories (he mentions it earlier in his discussion of the amended ***Pigeon Bay*** criteria) is the presence and character of the line of rock sheep along the other side of the Damper/Waterfall valley floor, between the road and the lake.

[29] The subjectivity of visual assessments is also shown by comparing two photographs taken from the entrance to the property called "Whare Kea" on the Mt Aspiring Road as it runs through the Damper Waterfall. valley. Mr Baxter's photograph[26] is taken from a few metres south of the entrance. It looks north-west along the road and then round to the north and east through an angle of about 90° to 100°. In the foreground is the gravelled entrance to Whare Mea property. The entrance is flanked by stone walls and then a very solid square post and rail fence. The drive to the right of the photograph is lined by an avenue of small willow trees, The roche moutonnee ridge in the middle ground is largely obscured by the low trees. The bright light and relief show a bland, light green, pastoral landscape. The unfocused mountains in the background look much like the many ranges in New Zealand seen from a distance. There is only one glimpse of Lake Wanaka in the photograph.

[30] By contrast, Ms Lucas' photograph 2 taken from a point on the Mt Aspiring Road only 30 metres west shows neither road nor willows. It looks north-east directly across the fields (now more brown than green) to the line of rock sheep covered in much darker scrub and trees (mainly pines). Beyond are two larger mirrors of lake surface and focused 'higher' closer mountains.

[31] Of course neither photograph is more valid than the other. Each suggests that the photographer is recording and showing what they want the viewer to see. Perhaps the photographer is (subconsciously?) manipulating the relevant technical factors (including location, direction, focus, film speed, print colour saturation) when taking the photograph to achieve their desired result.

[26] P J Baxter, Rebuttal evidence Photo 2.

[32] For UCESI Ms Lucas recognised that the Damper/Waterfall valley was less wild and more modified than the ridges on either side. She wrote[27]:

> *There are thus 2 options for addressing the landscape categorisation. Separate the [Damper Waterfall Valley] from the ridge lands, the former as VAL the latter as ONL and/or ONF, to recognise their differing values.*
>
> *This was the approach I took in the preliminary mapping in my overview evidence (June 2001, attachment G). However, refined mapping reveals that the resultant VAL map unit would be very spatially limited.*
>
> *The second option is to combine the rock ridge and [the Damper Waterfall valley] as an integrated whole – recognising the hard rock and softer rock areas that had been more thoroughly gouged out to form a trough.*
>
> *A combination of rock ridge and trough as a single mapping unit would be recognised as an outstanding natural landscape in total.*

[33] In cross-examination Mr Goldsmith asked Ms Lucas why she had changed her position between July 2001 and 2002. Her answer was that the Court in its Roy's Peninsula decision had emphasised the need to look at the big picture. That had "persuaded"[28] her that, for this area, the categorisation of the Damper/Waterfall valley as ONL was the correct option.

[34] Of the two witnesses discussed we prefer the evidence of Ms Lucas. Despite its subjectivity it is fuller, more open and coherent than that of Mr Baxter. As it happens, we heard more objective evidence from Mr Espie who was called by the Council. We were quite impressed by his written evidence on the Damper/Waterfall valley and by his careful, considered answers in cross-examination.

[35] In his evidence in chief Mr Espie wrote of the shallow valley[29]:

27 D J Lucas, April 2002 evidence, paragraphs 65-68.
28 Notes of evidence, p.35 line 35.
29 B Espie, Evidence in chief, paragraph 4.15.

> ... *This tongue of land is not outstanding or particularly natural when looked at in isolation but it is part of a landscape that is outstanding and natural when assessed as a whole.*

One of the additional details that helps us to prefer Mr Espie's evidence is his identification of the interest and value of the line of small (roche moutonnee) hills copying the higher range beyond the lake to the north-east.

[36] Mr Goldsmith submitted that since there was disagreement between the experts as to whether the Damper/Waterfall valley was ONL or VAL it could not be an ONL because the issue was so difficult. He referred to the *first Queenstown landscape decision*[30] where we stated:

> ... *usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis.*

[37] The real issue here is similar to the problem identified in the *first Queenstown landscape decision*[31] where the Court pointed out that:

> ... *while the Remarkables Mountains were on the whole agreed to be an outstanding natural landscape none of the witnesses for the other parties was prepared to say where the outstanding natural landscape terminated.*

The need for expert analysis is not as to the existence of an outstanding natural landscape, but as to where it ends.

[38] As we have stated, it is common ground in this case that the mountains to the left of the Mt Aspiring Road (driving away from Wanaka) and the lake to the right, as well as the lake edge to the crest of the low ridgeline, are all part of -the outstanding natural landscape. The general argument is that the thin strip of land (the Damper/Waterfall valley) between the large outstanding natural landscape(s) on either side is not a part of

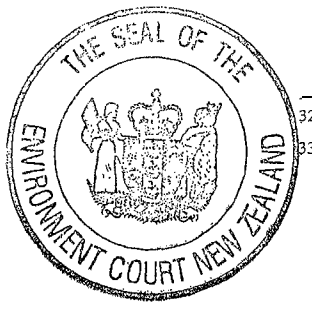
30 [2000] NZRMA 59 atpara (99).
31 [2000] NZRMA 59 at para (96).

that landscape but a separate "visual amenity" landscape. The specific argument is that it cannot be an outstanding natural landscape because there is disagreement about that issue.

[39] In our view the issue in respect of the shallow valley that is the Damper/Waterfall valley turns on its facts: it is so narrow that the suggestion it is a separate landscape does not make sense. While the Damper/Waterfall valley is a thin continuation of the same type of rural landscape that curls around Wanaka town it is the wrong shape to be seen as a separate landscape. Far from having a minimum width of 1.5 kilometres it is, on Mr Baxter's evidence, in at least one place (and, we think, two) less than 500 metres wide[32].

[40] For Mr and Mrs Laming, Mr More submitted that the Damper/Waterfall valley was not ONL but either VAL or some other rural landscape. We have already found that the valley is not a VAL. As for his alternative argument: he referred to ***Prospectus Nominees Ltd v Queenstown Lakes District Council***[33] where, the Court (differently constituted) held that an allotment containing 2.2 hectares and zoned Rural General on Beacon Point at Wanaka was in the third category of landscapes. In our opinion the Court was there faced with a different, and difficult, issue in that the land was sandwiched between Lake Wanaka's outstanding natural landscape and the urban landscape of Penrith Park which is an extension of Wanaka township. The issue before the Court was which category did the relevant lot fall into when the obvious 'urban' category was, on the face of it, precluded by the land's Rural-General zoning.

[41] In our respectful view the Court in ***Prospectus Nominees*** may have treated the tripartite division of rural landscapes a little too rigidly. In the *first Queenstown landscape decision* we did not have to consider in detail a landscape 'boundary' adjacent to a town. But certainly the earlier decision made it clear that the categories of landscape are not zonings. They are findings of fact and opinion of the kind required by section 6(b) and section 7 of the Act. So it appears to us that it was open to the Court in *Prospectus Nominees* to hold that the relevant land was part of the townscape because



[32] Comparing Mr Baxter's document 5.2 with his Attachment A.
[33] Decision C238/2001.

of its physical and other characteristics including its immediate proximity to Wanaka township.

[42] By contrast the Damper/Waterfall valley has ONL on both sides. So, while the valley is too narrow to be a separate landscape, we find that it fits comfortably into the outstanding natural landscapes on each side.

[E] The Mt Alpha Fan

[43] 'The mountain that dominates the views southwest of Wanaka town is Mt Alpha. It rises to 1.630 metres above sea level. From Wanaka it presents a huge triangular face ("the .Mt Alpha face"): one side is the northern ridge which runs across Roy's Peak (1578 metres) and down to Damper Bay. The second side runs east down to the appropriately named Hillend on the Casdrona Valley Road. The bottom or third side runs along the foot of the mountain (close to and parallel with the Mt Aspiring Road for several kilometres) between Damper Bay and Hillend.

[44] For the most part, the Mt Alpha face is steep and rough. However underneath the Mt Alpha-Hillend ridge there is a large smooth(ish) fan ("the Alpha fan") which looks rather different from the rest of the lower Alpha face. While the upper Mt Alpha face is steep tussock slopes, broken by rock outcrops and cliffs, the lower face is generally covered in bracken and scrub species. The exception is the Alpha fan which shows a greener pastoral character on a smoother surface at a gentler angle,

[45] Mr Espie described the fan as follows[34]:

- *Geology is almost exclusively deposited material in the form of tills and gravels. Topography and ecology are reflective of this but also include many aspects of human modification in the form of clutter of structures, roads and very extensive exotic ecology in the form of pasture grasses and introduced tree planting.*

[34] B Espie, Evidence in chief, para 4.4.

- *Aesthetic values are consistent with a farmed valley floor. The observers experience in this landscape is of being in a relatively open rurally populated landscape surrounded by distant mountain peaks. The immediate surroundings appear more modified and domesticated than the natural backdrop.*
- *Formative processes are legible in parts such as those adjacent to riverbeds but are generally less obvious and obscured by the trappings of human modification.*
- *Transient values are visible in the mountain backdrop to this landscape in the form of variable light and weather conditions, and in the seasonal change in agricultural activity and deciduous vegetation.*
- *I believe it is generally shared and recognised by observers that this is a relatively flat landscape, traditionally used for agriculture [and] surrounded by natural mountain peaks.*

[46] However on this area we find Mr Espie's evidence on the Mt Alpha face a little confusing because he conflates[35] two questions:

(1) Whether the Mt Alpha face is an ONL? and
(2) Whether it should be included in a special "Inner/Upper Clutha" category of ONL?

[47] Consequently Mr Espie draws the boundary of the ONL high on the Mt Alpha face, so as to exclude the Alpha fan.

[48] Mr Baxter's primary evidence on the Alpha fan was[36]:

To the southern end of the subject site, in the vicinity of Hillend Station, the distinction between VAL and ONL landscape is less apparent. I acknowledge

35 B Espie, Evidence in chief, paragraphs 5.6 to 5.8 and 6.4.
36 P J Baxter, April 2002, Evidence para 19.

that, while not the subject of this hearing, it is reasonable to expect that the rolling pastoral land that surrounds Wanaka to be substantially VAL. The challenge then is where does that landscape transition from VAL to ONL occur? I have... shown that transition to occur on a continuous contour along the upper edge of a terrace, than runs along that Hillend face. In my opinion this reflects a change in gradient that, whilst not reflecting land use changes, is contiguous with the geological underlay. . . .

[49] Ms Lucas considered the physiognomy of the Mt Alpha face a little more fully[37]:

I refer to this landscape unit as the . . . Alpha fan as it now displays a surface created by fan-building processes . . . This fan deposition material overlies moraine. (Mr Haworth has referred to this landform as a "terrace", perhaps due to its smoothness and river-truncated front edge formed by outwash during the last great glacial retreat).

The . . . Alpha fan is a strongly rolling surface below the steep mountain slope. I understand the landform unit derives from moraine smeared on this mountain slope by an earlier glaciation (some 30,000 years ago). The younger fans running off the mountain slopes above are now overwhelming it. No longer a rippled surface, the moraine has been buried and smoothed. The toe has been truncated by the later glaciation. ...

The stark line across the mountain slope above the landform unit is merely a management boundary – a bracken line . . . that comes and goes. I assess the Mt Alpha fan to be part of the mountain range landscape.

The . . . Alpha fan is very prominent from around the Wanaka basin, and its smooth sloping surface, uninterrupted except for a few tree clumps, "displays" any contrasts with the open grassland character.

37 D J Lucas, April 2002, Evidence paragraphs 47-51 and 53.

Due to the prominence and coherence of this displayed, sloping fan surface, I assess it to be part of the outstanding natural landscape of the Alpha Range.

...

The landscapes of the rock ridge and Mt. Alpha face are front stage. They are very highly visible, from the traditional town and from the much expanded town toward Beacon Point, and from the major recreational area around and in the waters of Roys Bay, Eely Point, Bremner Bay to Beacon Point. They are also overviewed from important recreational areas, such as from Mt. Iron Reserve, similar to the view from Mt. Barker.

[50] We have quoted that passage because it shows both strengths and weaknesses in Ms Lucas' evidence. Examples of the latter are that it does not seem entirely consistent to call the Mt Alpha fan both 'strongly rolling' and 'smooth'. Nor are we sure what is meant by the sentence in which the 'sloping surface' phrase occurs. As to strength, Ms Lucas gives map information both about the geomorphology and about -the context of the Mt Alpha fan.

[51] We observe first that the Mt Alpha fan could be joined with either the ONL that arcs around it, or the VAL underneath it. There are no artificially small or strained shapes involved in this situation. The complication, is that the geomorphological and pastoral characteristics rather contradict each other. The former make the fan 'read' with the mountainous side, while the latter suggest it is part of the pastoral, visual amenity landscape of the flats as Ms Lucas accepted in cross-examination by Mr Parker. However, those visual amenity landscape characteristics are relatively ephemeral, and they could, if a landowner managed their land differently, be reversed. By comparison, the geomorphological characteristics, whilst ultimately also in flux, are relatively solid as a basis for the categorisation we have to make.

[52] While we can understand Mr Baxter's assessment if the Mt Alpha fan is viewed from Studholme Road (east) and the Cardrona Valley Road, we consider Ms Lucas' assessment is more comprehensive. The obvious demarcation between the Alpha face (including the fan) and the flat land to the north is not obvious from those two roads or from Wanaka. It is very visible from Mt Iron and Mt Barker: the demarcation is the river-truncated end of the fan as identified on Ms Lucas' plan. We hold that lowest line

is the limit of the ONL because it is the most clearly definable line although we accept this is a finely balanced decision.

[F] An Inner Upper Clutha Outstanding Natural Landscape?

[53] Within the district-wide outstanding natural landscapes we also held that there was an exceptional category of landscapes in the Wakatipu Basin. The *first* Queenstown *landscape decision* stated[38]:

> *The Wakatipu Basin is more difficult to manage sustainably. The outstanding natural landscapes and features of the basin differ from most of the other outstanding natural landscapes of the district in that they are more visible from more viewpoints by more people. The scale of the basin is also important as Mr Kruger pointed out. People in the basin are never more than 2-3 kilometres from an outstanding natural feature or landscape. Consequently, we find that it is generally inappropriate to allow any developmentfor residential, industrial or commercial activities on the outstanding natural landscape or features. We accept Mr Kruger's evidence (and Mr Rough said something similar) that, for these reasons, the Wakatipu Basin needs to be treated as a special case and as a coherent whole. We find that there has been inappropriate urban sprawl in the basin – in particular on Centennial Road in the vicinity of Arrow Junction and again along parts of Malaghan Road on its south side . . .*
>
> *We consider the cumulative effects have already gone further than is desirable. In the outstanding natural landscape of the Wakatipu Basin, and on the outstanding natural features in it, any further structures are undesirable – they should be avoided* . . . (Footnotes excluded).

[54] The Upper Clutha Environmental Society suggests there should be a similar category of landscape in the Clutha catchment of the district. We gave our reasons why there should be no such general area – an "ONL Inner Upper Clutha" - in our Roy's

[38] [2000] NZRMA 59 at para (136).

Peninsula decision, but reserved the issue whether we should find a pocket of such category on the Alpha face and the land underneath it.

[55] Mr Borick submitted for UCESI that only one planner or resource manager - Mr Vivian for the Council, at the first Wanaka hearing in July 2001 – had given evidence on this issue, and his opinion was that there should be a pocket of "Inner Upper Clutha" ONL in the same way as there is an ONL (Wakatipu Basin). That is a misconception of Mr Vivian's evidence in chief. He proceeds on the assumption that there is such a category as ONL (IUC). He does not give reasons why there should be such a category.

[56] At the 2002 hearing Mr Haworth gave evidence (and in effect submissions) why the Mt Alpha face should be an outstanding natural landscape (Inner Upper Clutha). However we see no reason to depart from our conclusions in the Roy's Peninsula decision to the effect that the objectives and. policies of Part 4 of the revised plan as they relate to ONL (district wide) are adequate to cope with any applications for subdivision in the ONL.

[57] The conditions of overdomestication that already exist in the Wakatipu Basin do not apply on the Mt Alpha face or above Lake Wanaka on the western side of Roy's Bay. We concede there have been at least one or two inappropriate developments, but not on the scale that has happened in the Wakatipu Basin. We prefer the evidence of Mr Espie to that of Mr Haworth on this issue. We hold that there should be no special category of "Outstanding Natural Landscape (Inner Upper Clutha)" in this area.

[58] Of course having regard to those objectives and policies and the assessment matters in Part 5 of the revised plan it is more likely that applications for subdivision and residential development in this outstanding natural landscape will succeed if they do not draw straight survey lines and/or build fences over complex topography, and if they maintain and/or enhance naturalness by, for example:

(a) imposing covenants to remove exotic plants such as larches (perhaps even sweet briar); and

(b) imposing covenants to keep out cattle to enable endemic regeneration and to improve water and wetland quality.

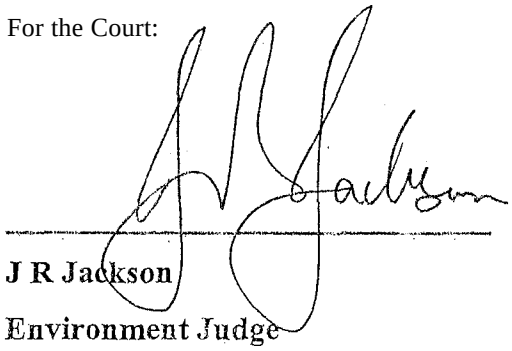
[G] Outcome

[59] It does not appear that any formal orders are necessary as the outcome of this decision but in case we are wrong about that we reserve leave for any party to apply.

[60] Costs are reserved, although we consider any order for costs in respect of the Wanaka part of the Part 4 references is unlikely.

DATED at CHRISTCHURCH 26th **June *2002.***

For the Court:



J R Jackson
Environment Judge

Issued: 27 JUN 2002

TAB 17

Watercare Services Ltd v Minhinnick

Court of Appeal Wellington
21 October; 17 November 1997
Keith, Tipping and Williams JJ

Maori and Maori land – Treaty of Waitangi – Veto – Principles of Treaty of Waitangi – Whether s 8 of the Resource Management Act 1991 gives right of veto to any proposal to carry out work pursuant to a designation under s 176 of the Resource Management Act 1991.

Resource management – Designation – Whether designation under s 176 of the Resource Management Act 1991 subject to the enforcement order regime – Resource Management Act 1991, ss 176 and 319.

Resource management – Adverse environmental effects – Whether opinion of Environment Court is to be opinion representative of New Zealand society as a whole or of individual members of society – Resource Management Act 1991, s 314(1)(a).

Statutes – Interpretation – Implication – Whether section in statute expressly subject to certain sections may be impliedly subject to other sections.

Watercare was the authority responsible for waste water collection and treatment in the Auckland region and is a requiring authority for the purposes of ss 166 to 168 of the Resource Management Act 1991.

The intended route of a major sewer pipeline in South Auckland had been the subject of a designation in the relevant district schemes or plans since 1978. All required resource consents and agreements with landowners were in place.

For about 400 m the route of the pipeline crossed the Matukuturua Stonefields in a corridor 30 m wide. The Stonefields was an archaeological site under the terms of the historic places legislation. The Historic Places Trust gave approval for construction of the pipeline subject to conditions in 1978. The consent was confirmed on 18 June 1997.

Over many years there had been four opportunities for public discussion and/or objections to the designation. No one had used any of these opportunities to object to the designation or to the fact or the route of the pipeline.

There had been consultation with Maori leading to a Maori cultural ceremony at which many iwi were represented and a blessing was given to the works over the protests of Mrs Minhinnick and another.

Watercare claimed that in terms of s 176(1)(a) of the Resource Management Act 1991 it was entitled to do anything that was in accordance with the designation. It argued that the completion of the pipeline through the Stonefields was in accordance with the designation and that Watercare had an

absolute entitlement to proceed to complete the pipeline and the work could not be subjected to an enforcement order prohibiting the work from being done.

The respondent, Mrs Minhinnick, sought an enforcement order under ss 314(1)(a)(ii) and 319 of the Resource Management Act 1991 on the ground that both the idea of conveying sewage over and across waahi tapu and the associated works were in the circumstances objectionable and offensive to such an extent that an adverse effect on the environment was likely to ensue.

The Environment Court declined to make an enforcement order. On appeal the High Court held that the Environment Court had misdirected itself and erred in law, but gave Watercare leave to appeal on three questions of law and also gave leave to Mrs Minhinnick to appeal against the decision of the High Court that under s 8 of the Resource Management Act 1991 Mrs Minhinnick did not have a right of veto.

Held: 1 A designation included in a district plan under s 176(1) of the Resource Management Act 1991 was clear authority to do anything that is in accordance with the designation. The proposed work was not subject to the enforcement order regime. Watercare was entitled to do what it proposed (see p 303 line 49).

2 If one section in a statute was expressly made subject to certain others, it would be an improper method of statutory interpretation to take the view that Parliament had impliedly subjected the first section to sections beyond those expressly mentioned (see p 303 line 25).

3 The principles of the Treaty of Waitangi do not, through the operation of s 8 of the Resource Management Act 1991 give any individual the right to veto any proposal. Such an argument served only to reduce the effectiveness of the principles of the treaty rather than to enhance them (see p 307 line 7, p 307 line 40).

Observations: (i) The Environment Court's opinion under s 314(1)(a) that it 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 is the opinion of the Court as the representative of New Zealand society as a whole. The views of individual members of society must always be sympathetically considered, but the Act does not require those views to prevail irrespective of the weight of other considerations. The High Court was not correct to direct itself by reference to a reasonable Maori person representative of the Maori community at large (see p 305 line 17, p 307 line 16, p 307 line 24).

Zdrahal v Wellington City Council [1995] 1 NZLR 700 referred to.

(ii) It is appropriate in assessing whether an activity is offensive or objectionable to take account of processes of consultation, of any Maori cultural blessing ceremony, the designation of the activity under the Resource Management Act 1991 and of the process of consideration of other alternatives to the activity (see p 306 line 3, p 307 line 29).

(iii) There is a clear distinction between a designation on the one hand and rules and resource consents on the other for the purposes of ss 176 and 319. A designation is not a rule in a district plan, although it is to be included "as if it were a rule" (see p 306 line 48).

Appeal allowed: cross-appeal dismissed.

Appeal

This was an appeal by leave of the High Court against a decision of the High Court reported at [1998] 1 NZLR 63 allowing an appeal against a decision of the Environment Court reported at [1997] NZRMA 289.

Richard Craddock QC and *Mark Christensen* for the appellant.

Simon Reeves for the respondent.

Cur adv vult

The judgment of the Court was delivered by

TIPPING J. This appeal and cross-appeal from the High Court, by leave of that Court, raise questions of law under the Resource Management Act 1991 (the Act). One of the principal issues concerns the power of the Environment Court to make an enforcement order under s 319 of the Act when the work or activity in question is being carried out in accordance with a designation as defined in s 166.

Background circumstances

The appellant, Watercare Services Ltd (Watercare), is responsible for waste water collection and treatment in the Auckland region. It is a requiring authority for the purposes of ss 166 to 168 of the Act. Watercare is currently completing the construction of a major sewer pipeline (the Southwestern Interceptor) to relieve pressure on the existing pipeline which takes sewage from South Auckland to the treatment plant at Mangere. The existing pipeline has for some time been required to operate above its designed capacity. There are regular overflows following heavy rainfall. They pollute the Manukau harbour and various residential properties in South Auckland.

The new pipeline relies on gravity. In parts it is below and in parts above ground level. For the most part it passes through vacant land close to the edge of the Manukau harbour. For about 400 m the route of the pipeline crosses an area of land known as Matukuturua Stonefields (Stonefields) in a corridor about 30 m wide. The Stonefields area, which comprises about 29 ha in all, represents one of the southern lava flows from McLaughlins Mountain. This area is formed of basalt and scoria with a thin covering of earth. The general area is owned or leased by quarrying companies. The Stonefields area itself has not been quarried and is currently used intermittently for grazing.

By the early 1980s about half of the Southwestern Interceptor had been constructed. At this point, for reasons that do not need to be discussed, the balance of the project was deferred. Population growth in the 1990s required its resumption. Various necessary consents were obtained in 1993 and 1994. By 1995 completion of the project had become urgent. In September 1996 a contract for that completion was let at a cost of approximately $28m and work has been progressing since that time.

That part of the Southwestern Interceptor intended to run through the Stonefields was due to be constructed in April 1997. Work was about to commence when the respondent (Mrs Minhinnick) and others made application to the Environment Court for an interim enforcement order. Following the dismissal of that application, and before a stay pending appeal to the High Court was granted, some work was done on the Stonefields site which involved stripping off the topsoil from the intended route. In the meantime work has continued elsewhere.

As indicated, the planning and construction of the Southwestern Interceptor has involved a number of consents and approvals. The intended

route has been the subject of a designation in the relevant district schemes or plans since 1978. All required resource consents have been obtained, including coastal permits, water permits and earthwork consents. All required agreements with landowners are in place. An important aspect of the case is the fact that the Stonefields are an archaeological site in terms of the historic places legislation. This arises from the association of the Stonefields site with human activity more than 100 years ago.

In 1978 Watercare's predecessor, the Auckland Regional Authority, sought the permission of the Historic Places Trust in terms of its legislation to "modify" the Stonefields by constructing the pipeline through them. The Historic Places Trust commissioned a report on the alignment of the pipeline. That report led to a slight realignment of the proposed route. The Historic Places Trust gave approval for the construction of the pipeline subject to various conditions in 1978. One of the conditions of approval was that a comprehensive archaeological study of the route be undertaken. That was done by archaeologists at the University of Auckland over a period of nearly three years. The study, which was paid for by the Auckland Regional Authority, concluded in 1991 at a cost of $40,000. After the Historic Places Trust recently cast doubt on the validity of the earlier consent, that matter was referred to the High Court. On 18 June 1997 Giles J confirmed that the original approval was still in force: *Watercare Services Ltd v Attorney-General* [1997] NZRMA 485.

We have earlier mentioned the existence from 1978 of a designation over the route across the Stonefields for the pipeline. The designation was for "proposed . . . sewer line". By a process which need not be traced, the designation is still in force and is a designation for the purposes of s 175 of the Act. The relevant planning instrument is the proposed Manukau district plan. Submissions have closed in relation to that plan and all hearings on the Southwestern Interceptor designation have been completed. Over the years there have been four opportunities for public submissions and/or objections to the designation. Neither Mrs Minhinnick nor anyone else has used any of those opportunities to object to the designation or to the fact or the route of the pipeline.

Designations

Part VIII of the Act deals with designations. Although the designation in question came into existence under earlier legislation and is carried forward by s 420, it is still of some moment to examine the nature and effect of designations under the Act. In terms of s 166 a designation means a provision made in a district plan to give effect to a requirement made by a requiring authority under the statutory provisions specified. A requiring authority means a Minister of the Crown, a local authority or a network utility operator approved as a requiring authority under s 167.

There is no need to set out the definition of a "network utility operator". It is sufficient to say that Watercare, as a body undertaking or proposing to undertake a drainage or sewerage system, clearly fulfils the definition in para (e) of s 166. There is no doubt that Watercare has been approved as a network utility operator pursuant to s 167.

Under s 168 a requiring authority may at any time give notice to a territorial authority of its requirement for a designation. Under s 168A the territorial authority, where it proposes to issue notice of a requirement for a designation, must publicly notify that requirement. Section 169 is concerned, inter alia, with submissions and hearings in relation to the publicly notified

requirement. After its consideration of the matter the territorial authority, in terms of s 171, may recommend to the requiring authority either to confirm the requirement or withdraw it.

The requiring authority then has to consider whether it will accept or reject the territorial authority's recommendation in whole or in part (s 172). The territorial authority has to notify the requiring authority's decision (s 173) and the persons listed in s 174 may appeal to the Environment Court against the whole or any part of that decision. The Court may confirm or cancel the requirement or modify it or impose such conditions on it as the Court thinks fit. Unless the requirement is cancelled, the territorial authority is required, in terms of s 175, to include the designation in its district plan "as if it were a rule".

The Act then provides in s 176, and this is of critical importance in the present case, for the effect of the designation once it is included in the district plan. Section 176(1)(a) says that where a designation is so included:

> . . . then, notwithstanding anything to the contrary in the district plan and regardless of any resource consent but subject to sections 9(3) and 11 to 15,
>
> (a) The requiring authority responsible for the designation may do anything that is in accordance with the designation.

Section 177 does not apply because it has been the same designation throughout. Sections 9(3) and 11 to 15 to which s 176(1)(a) is subject have no present relevance.

Watercare's first proposition is a very simple one. It says that in terms of s 176(1)(a) it, as the requiring authority responsible for the designation, is entitled to do anything that is in accordance with the designation. It says that completion of the pipeline through the Stonefields is in accordance with the designation and therefore, as s 176(1) is not subject to the sections dealing with enforcement orders (ss 314 to 321), nor to their counterpart s 17, it has an absolute entitlement to proceed to complete the pipeline through the Stonefields and the work involved cannot be made subject to an enforcement order prohibiting it from doing the work.

Whether Watercare's submission to that effect is correct is the first logical step in this case, but the issue arises only indirectly from the questions of law which were defined for the purpose of the appeal to this Court. Those issues were directed primarily to what logically are later issues arising only if Watercare's primary stance is rejected.

The Environment Court's decision

Judge Sheppard examined all aspects of the case with considerable care [see [1997] NZRMA 289]. He noted that the Stonefields is land which was occupied by Maori in times past. The land contains remains of that occupation which are of interest to descendants of the former Maori occupiers and to archaeologists. Some parts of the area, including the land in question, are regarded by some of the Maori descendants as waahi tapu. The Judge found that there is a likelihood that the land contains bones and other remains of Maori interred there many generations ago. The expression "waahi tapu", which is found in s 6(e) of the Act, is not defined in the Act but is defined in s 2 of the Historic Places Act 1993 as "a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense".

Judge Sheppard noted that Mrs Minhinnick sought an enforcement order under s 319 on the basis of s 314(1)(a)(ii). The latter provision empowers the Environment Court to make an enforcement order requiring a person to cease, or prohibiting a person from commencing, anything done or to be done by or on behalf of that person that in the opinion of the Court is or is likely to be noxious, dangerous, offensive or objectionable to such an extent that it is or is likely to have an adverse effect on the environment. Mrs Minhinnick's submission to the Environment Court was that both the idea of conveying sewage over and across waahi tapu and the associated works were in the circumstances objectionable and offensive to such an extent that an adverse effect on the environment was likely to ensue.

After setting out a number of definitions, including those of the word "effect", the word "environment" and the expressions "natural and physical resources" and "amenity values", Judge Sheppard noted that he had found assistance in understanding how subpara (ii) of s 314(1)(a) should be applied from the judgment of Greig J in *Zdrahal v Wellington City Council* [1995] 1 NZLR 700. Judge Sheppard referred to Greig J's observation that the test for whether something is or is likely to be offensive or objectionable is an objective one.

It is not enough that the person complaining finds the activity or matter to be offensive or objectionable. Greig J went so far as to say that it is not enough that the Environment Court itself might think the matter was objectionable. He held that if ordinary reasonable persons would be offended or find the subject-matter objectionable the activity affects the environment of those people and of any other such people living in the vicinity who are likely to be affected.

Later in his decision Judge Sheppard came back to what can conveniently be described as the ordinary reasonable person test and set out a number of matters which in his view the ordinary reasonable person would take into account in deciding whether the subject-matter of this case was offensive or objectionable. While accepting that Mrs Minhinnick and those who expressed similar views genuinely held their opinions, the Judge concluded that those opinions, while entitled to careful consideration, could not be regarded as determinative. The Judge held that ordinary reasonable persons would be informed about the background and about the way in which the work was to be done.

He then noted a number of matters of which ordinary reasonable persons should be taken to have knowledge. First that Watercare's proposal was part of a public sewerage system to provide hygienic collection, treatment and disposal of sewage and avoid out-flows that could pollute the Manukau harbour. Second that there could be no suggestion that the route had been chosen arbitrarily without consideration of alternative routes and of the relative advantages and disadvantages of each. Third that the route had been designated on planning instruments which had been exposed to the well-known process of objection, public hearing and appeals.

Fourth that in preparation for the work intended to be done in the Stonefields section there had been consultation with Maori over a period of at least many months leading to a Maori cultural ceremony at which many iwi were represented and blessing was given to the work, albeit over the protests of Mrs Minhinnick and a Mrs Black. Fifth the Judge noted that it could not be

thought that the work was to be done in a manner that was reckless or disrespectful of waahi tapu and the associated archaeological features.

Finally the Judge noted that an ordinary reasonable person would know that Watercare had committed itself to protocols agreed with tangata whenua to ensure that waahi tapu were treated with appropriate respect and that any archaeological remains encountered would be dealt with to a professional standard consistent with good archaeological practice in the Auckland region. Judge Sheppard considered that an ordinary reasonable person forming an opinion about whether or not the proposed work was offensive or objectionable to the extent in question would take all these various matters into account.

Importantly for present purposes, Judge Sheppard directed himself to consider the attitude of a person who was a representative of the community at large rather than a representative of a particular iwi or other section of the community. The ordinary reasonable person would be a person who did not put greater value on waahi tapu than informed members of the community at large do. The Judge then concluded at pp 310 – 311:

> "Such a person would regret that waahi tapu are to be disturbed. In my judgment she or he would consider that because of the public service to be provided, the reasoned route selection, the opportunities for public challenge to it, the consultation with Maori, the cultural blessing ceremony, and the agreed protocols to be followed if waahi tapu or archaeological remains are encountered, because of all of them what might otherwise have been offensive, or at least objectionable, is regrettable but not offensive or objectionable, let alone to such an extent as to have or be likely to have an adverse effect on the environment.
>
> Such a person would respect the exercise by Mesdames Black and Minhinnick of opportunities for peaceable protest, but that would not make offensive or objectionable what would not otherwise be so."

High Court judgment

Salmon J allowed Mrs Minhinnick's appeal [see [1998] 1 NZLR 63]. He held that the Environment Court had misdirected itself in law in relation to its identification of the reasonable person. In substance he held that the reasonable person should not be a reasonable member of the community at large but a reasonable Maori representative of the Maori community at large. In the light of his conclusion that there had been an error of law he referred the matter back to the Environment Court for reconsideration in accordance with his judgment. In the course of his judgment the Judge rejected Mrs Minhinnick's submission that she had a right of veto in respect of the works in question.

In a section of his judgment headed "Statutory protection of waahi tapu" at p 72 the Judge observed that there were numerous provisions in the Act which recognised the importance of a Maori dimension to the subject-matter of the Act. He referred in particular to what he regarded as provisions of this kind which are of general application, namely ss 5, 6(e), 7(e) and 8. Section 5 states in subs (1) that the purpose of the Act is "to promote the sustainable management of natural and physical resources". Subsection (2) amplifies the statutory purpose by stating what sustainable management means, namely:

> . . . managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 states that in achieving the purpose of the Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall recognise and provide for various matters of national importance. Paragraph (e) constitutes as a matter of national importance: "The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga." Section 7 states that in achieving the purpose of the Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall have particular regard to, inter alia:

(e) Recognition and protection of the heritage values of sites, buildings, places, or areas.

Section 8 states that in achieving the purpose of the Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

After having mentioned these matters, Salmon J indicated that s 6(e) "must bear heavily in this case [with] protection of waahi tapu [as] a matter of national importance." That is undoubtedly so: s 6(e) says as much. One of the issues in this case is whether Salmon J elevated this aspect beyond its undoubtedly important compass to one of almost decisive influence.

When he considered the Environment Court's approach to what should be regarded as offensive or objectionable under s 314 Salmon J noted that Mr Reeves, who represented Mrs Minhinnick in the High Court as in this Court, had acknowledged that Greig J's approach in *Zdrahal* was generally applicable but had submitted that the Environment Court had been wrong in looking at the matter through the eyes of an ordinary reasonable member of the community at large rather than through the eyes of an ordinary reasonable member of the Maori community.

His Honour noted that the subject-matter in *Zdrahal* was a series of swastikas painted on the side of the appellant's house. They were visible to two neighbours but not to passers-by generally. Salmon J noted that not only was it necessary for the subject-matter to be offensive or objectionable; that had to be so to an extent likely to have an adverse effect on the environment. Although the ultimate test is a composite one, for analytical purposes two steps are involved as we shall mention below.

After having referred again to ss 5, 6, 7 and 8 Salmon J said that they provided a strong indication that s 314 and its counterpart s 17 should be concerned with matters that are offensive or objectionable to Maori. In the Judge's view the Environment Court misdirected itself by its reference to members of the community at large. He said that while this approach might often be correct it did not in his view apply where there were important cultural issues at stake.

The Judge accepted that it was not enough that those complaining found the subject-matter offensive or objectionable. The test must involve an objective consideration of the importance of the cultural elements involved. Salmon J indicated that something which affects a waahi tapu area must be of greater concern to members of the Maori community than it would be to many non-Maori. He observed that it would usually be sufficient for the purposes of s 314 that a proposal was offensive or objectionable to a reasonable Maori person because that is an attitude which would be respected by the balance of the community. The Judge was also of the view that the Environment Court had erred in law in deciding that the ordinary reasonable member of the community at large or, as the Judge viewed it, an ordinary reasonable member of the Maori community would be informed of and would take into account the variety of matters set out in the extract from the Environment Court's judgment noted earlier.

The issues of law in this Court

Salmon J gave leave to Watercare to appeal to this Court on the following questions of law. He also gave leave to Mrs Minhinnick to appeal on the veto point which the Judge formulated as set out in point 4 below. In all there were therefore four questions of law submitted to this Court for determination:

"1. Whether the High Court was correct in law in holding that the Environment Court misdirected itself in its adoption of an objective test by reference to members of the community at large, for the purposes of ss 17(3) & 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act'); and

2. In particular, whether the High Court was correct in law in holding that, in relation to an activity on a site claimed to be waahi tapu:
   (a) The test as to whether that activity is offensive or objectionable, in terms of ss 17(3) & 314(1)(a)(ii), is whether, objectively, it is offensive or objectionable to a reasonable Maori person representative of the Maori community at large;
   (b) In determining whether that activity is offensive or objectionable, no account is to be taken of any process of consultation, nor of any Maori cultural blessing ceremony, nor of any designation of the activity under the Act or any previous legislation, nor of any process of consideration of alternatives to the activity; and further

3. Whether, contrary to the decision of the Environment Court, the granting of an enforcement order is precluded by s 319(2) of the Act; and

4. Whether for the purposes of s 17(3) and s 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act') or otherwise the High Court was correct in law in holding that s 8 of the Act did not provide the Appellant with a right of veto."

Reliance on designation – s 176

Although not directly addressed in the formulated questions of law, Mr Craddock QC, as earlier indicated, took his first stance on s 176. There was no objection from Mr Reeves to this course, he having had adequate notice through Mr Craddock's written submissions. Indirectly the point does arise via question 3 and for these reasons it is a proper one for us to consider. Clearly, however, Watercare's reliance on s 176 received much greater prominence in this Court than below.

The fundamental starting point of the submission is that Watercare, as the requiring authority in respect of the designation, is empowered by s 176(1)(a) to do "anything that is in accordance with the designation". Mr Reeves properly accepted, as he was bound to do, that what Watercare is proposing to do is in accordance with the designation. The activity (conveying sewage by pipeline across and through land) falls within the designation. The works proposed to establish that activity do not fall outside the reasonable intendment of the designation. At both the conceptual and the operational level what Watercare proposes to do is in accordance with the designation.

The position might be different if the way in which Watercare intended to do the works implicitly authorised by the designation was outside anything reasonably contemplated by the designation. This case does not raise that issue. For all purposes what is proposed is within the designation. The authority given to Watercare by s 176(1)(a) applies notwithstanding anything to the contrary in the district plan and regardless of any resource consent. Watercare's entitlement is not subject to the sections dealing with enforcement orders.

Nor is s 176(1) made subject to s 17 which requires every person 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 or certain specified sections. While that duty is not enforceable of itself as a statutory duty, enforcement orders or abatement notices may be made or issued in support of the duty. Not only is s 176 not made subject to s 17 but s 17 carries no reference to designations as opposed to rules in a plan or resource consents.

In these circumstances there can be no question of implying into s 176 that it is subject to any of ss 17, 314 and 319. We cannot accept Mr Reeves' submission to that effect. If one section is, as here, expressly made subject to certain others it would be an improper method of statutory interpretation to take the view that Parliament had impliedly subjected the first section to sections beyond those expressly mentioned.

Mr Reeves' principal submission in this area of the case was that Parliament could not have intended a designation to prevail against the combined force of ss 17, 314 and 319. In aid of that submission Mr Reeves argued that if the effect of s 176 was as Watercare contended those requiring designations would have carte blanche to create noxious, dangerous, offensive and objectionable situations without ordinary citizens being able to do anything about it.

The flaw in that submission lies in the designation process. As earlier indicated, that process does allow for public input. The territorial authority, after that input, must decide what recommendation it will make to the requiring authority. If a member of the public is dissatisfied, there is at that stage a right of appeal to the Environment Court which may cancel or modify the designation if it considers, after hearing evidence and argument, that the designation requires that treatment. At this stage the effect of the designation on the environment, both generally and as a result of such noxious, dangerous, offensive or objectionable aspects as may be involved, will come under the independent scrutiny of a Court specialising and skilled in environmental matters.

We are of the view that s 176(1)(a) should be held to mean exactly what it says. It gives Watercare clear authority to do what is proposed. It is not subject to the enforcement order regime and by this direct route the application to the

Environment Court for the enforcement order in question should have been dismissed. Equally Mrs Minhinnick's appeal to the High Court from that dismissal should itself have been dismissed. In fairness to Salmon J and Judge Sheppard it is appropriate to say again that the compass of the argument before them appears to have been significantly different and to have served, if anything, to draw attention away from this aspect of the matter.

It is not strictly necessary for the disposition of this case, in the light of our conclusion about s 176, to examine the rest of the formulated issues of law other than number 4 but as the matters involved were fully argued and are matters of general importance we will state our views on them.

Questions 1 and 2(a)

These questions can conveniently be taken together. The first point to make is that it is clear the assessment whether something is noxious, dangerous, offensive or objectionable is an objective one. The bona fide assertion of the person seeking an enforcement order that the matter in question is offensive or objectionable is not enough. There must be some external standard against which that assertion can be measured. Part of the difficulty arises from the conjunction of the four concepts involved. Whether something is noxious or dangerous will seldom logically depend on the identity of the person potentially suffering harm. Whether something is offensive usually involves consideration of the person or group against whom the question should be measured.

The more is this so when the question is whether something is objectionable. What is objectionable to one person may not be to another. Obviously the subject-matter said to be offensive or objectionable will be relevant to the inquiry. It is important to note that s 314(1)(a) directs that whether something is offensive or objectionable depends on "the opinion" of the Environment Court. That formation of opinion must of course be done judicially after considering all relevant evidence tendered and after a correct appraisal of all relevant matters of law, but ultimately the legislation requires the Court to form its opinion first whether the subject-matter is or is likely to be noxious, dangerous, offensive or objectionable and second whether any noxious, dangerous, offensive or objectionable aspect found to exist is of such an extent that it is or is likely to have an adverse effect on the environment. In essence the necessary inquiry involves four steps:

1. Whether the assertion of the applicant seeking the enforcement order that the subject-matter is noxious, dangerous, offensive or objectionable is an assertion honestly made.
2. If so, whether in the opinion of the Court the subject-matter is or is likely to be noxious, dangerous, offensive or objectionable.
3. If so, whether in the opinion of the Court any noxious, dangerous, offensive or objectionable aspect found to exist is of such an extent that it is likely to have an adverse effect on the environment.
4. If so, whether in all the circumstances the Court's discretion should be exercised in favour of making the enforcement order sought or otherwise.

At steps 2 and 3 the Court acts as the representative of the community at large. In that capacity the Court must decide whether the claim of the objector to find the subject-matter offensive or objectionable is a justified one. In coming to that assessment the Court must consider the relationship between the objector and the subject-matter and all other features of the case which are said

to justify the objector's contention on the one hand or not justify it on the other. For example, in this case Mrs Minhinnick's claim to find the proposed works objectionable on the various grounds she advanced must be considered against the circumstance that earlier opportunities to object were not taken up.

The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural well-being, while one of the aspects of s 5, is accompanied by social and economic well-being. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject-matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made.

Where the High Court differed from the Environment Court on this aspect of the case was in the High Court's more restricted approach. In terms of the formulated questions the Environment Court directed itself by reference to members of the community at large whereas the High Court directed itself by reference to a reasonable Maori person representative of the Maori community at large. That approach was, of course, adopted in relation to an activity on a site claimed to be waahi tapu. While that subject-matter was the focus of the inquiry it did not justify the narrower approach which the High Court took, for the reasons given above.

As earlier indicated, the Environment Court in forming its opinion under s 314(1)(a) is the representative of New Zealand society as a whole. That is the equivalent of the community at large. The views of individual members of society must always be sympathetically considered but the Resource Management Act does not require those views to prevail irrespective of the weight of other relevant considerations. For the reasons given the Environment Court in substance correctly directed itself in law when forming its opinion under s 314(1)(a).

Question 2(b)

It is inherent in the way this question was framed that the High Court considered no account whatever was to be taken of the listed matters in deciding whether the stated activity was offensive or objectionable to the necessary extent under s 314(1)(a). We are unable to accept the absoluteness of that approach.

Our reasons derive in significant part from our approach to questions 1 and 2(a). The High Court's view was that when considering whether something is, for example, objectionable, no account should be taken of any process of consultation nor of any designation nor of any process of consideration of alternatives. With respect we have difficulty in seeing how that approach can be reconciled with the Act and its fundamental purpose.

As discussed earlier, it turns out that the designation is in fact decisive. Consideration of alternatives and consultation must be relevant to whether something is objectionable. If the subject-matter serves an important resource management purpose and, after consideration of alternatives and consultation is found to represent the best way of achieving that purpose, it may well be appropriate to say that it is not objectionable. In similar circumstances the

subject-matter might have been objectionable, provisionally at least, if no consideration of alternatives or consultation had taken place.

In the present case the Maori cultural blessing ceremony, while not decisive, must surely have been relevant as a factor which the Environment Court, representing the community as a whole, was entitled to take into account as and to the extent it saw fit in deciding whether the proposed activity and work was objectionable to a qualifying extent.

Question 3

This question focuses on s 319 which provides:

> **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) The Environment Court shall not make an enforcement order under paragraphs (a)(ii), (b)(ii), (c), (d)(iv), or (da) of section 314(1) against a person who is acting in accordance with –
>
> (a) A rule in a plan; or
>
> (b) A rule in a proposed plan to which section 19 applies (changes to plans which will allow activities); or
>
> (c) A resource consent, –
>
> if the adverse effects in respect of which the order is sought were expressly recognised by the person that approved the plan, or notified the proposed plan, or granted the resource consent, at the time of approval, notification, or granting unless, having regard to the time which has elapsed and any change in circumstances since the approval of the plan, the notification of the proposed plan, or the granting of the consent, the Environment Court considers that it is appropriate to do so.

Section 319(2) does not in terms give protection against enforcement orders to those acting in accordance with a designation. The likely reason is that such people are already protected under s 176(1)(a) as discussed above. Section 175(1)(d) requires a territorial authority to include a confirmed designation in its district plan "as if it were a rule". That mode of expression does not turn a designation into a rule for the purposes of s 319(2). If that were so there would be a conflict between s 176(1)(a) and that part of s 319(2) which follows the lettered paragraphs. It seems clear that designations were deliberately omitted from s 319(2) so as to avoid any clash with s 176(1)(a). The "as if it were a rule" approach of s 175(1)(a) neither literally nor as a matter of necessary implication equates a designation with a rule for the purposes of s 319(2).

Rather more problematical are ss 373 and 374 which deal with what the heading to the sections describes as "Transitional District Plans". The effect of s 373(1) is that the designation in this case was deemed to be included as a provision of the deemed district plan on the commencement of the Act. Section 374(3) deems the designation to be a district rule in respect of a permitted activity. It can thus be argued that the designation, as such "deemed rule", is a rule for the purposes of s 319(2).

That cannot have been intended because of the inevitable clash that would arise with s 176(1)(a) and because of the clear intent not to include designations in s 319(2). It is one of those aspects of the Act where there is a lack of

harmony between various complex interrelated provisions. It is most unlikely that by the side wind of a transitional provision Parliament intended to undermine the clear distinction made for the purposes of ss 176 and 319 between a designation on the one hand and rules and resource consents on the other.

Question 4

This question involves Mrs Minhinnick's proposition that the Treaty of Waitangi gives her a right to veto Watercare's proposed work and activity. Salmon J dealt with this point by saying that s 8 in its reference to the principles of the Treaty did not give any individual the right to veto any proposal. We entirely agree. It is an argument which serves only to reduce the effectiveness of the principles of the Treaty rather than to enhance them.

Answers to questions

For the reasons given above our answers to the formulated questions of law, which we will repeat for convenience, are as follows:

1. Question: "Whether the High Court was correct in law in holding that the Environment Court misdirected itself in its adoption of an objective test by reference to members of the community at large, for the purposes of ss 17(3) & 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act')."

   Answer: No.

2. Question: "In particular, whether the High Court was correct in law in holding that, in relation to an activity on a site claimed to be waahi tapu:

   (a) The test as to whether that activity is offensive or objectionable, in terms of ss 17(3) & 314(1)(a)(ii), is whether, objectively, it is offensive or objectionable to a reasonable Maori person representative of the Maori community at large."

   Answer: No.

   "(b) In determining whether that activity is offensive or objectionable, no account is to be taken of any process of consultation, nor of any Maori cultural blessing ceremony, nor of any designation of the activity under the Act or any previous legislation, nor of any process of consideration of alternatives to the activity."

   Answer: No.

3. Question: "Whether, contrary to the decision of the Environment Court, the granting of an enforcement order is precluded by s 319(2) of the Act."

   Answer: No.

4. Question: "Whether for the purposes of s 17(3) and s 314(1)(a)(ii) of the Resource Management Act 1991 ('the Act') or otherwise the High Court was correct in law in holding that s 8 of the Act did not provide the Appellant with a right of veto."

   Answer: Yes.

Disposition of appeal – Costs

The appeal is allowed. Under s 144 of the Summary Proceedings Act 1957, which applies by dint of s 308 of the Act, this Court has the same power to

adjudicate as the High Court had. Consequently we have the same powers as are given to the High Court by s 112 of the Summary Proceedings Act.

In the exercise of those powers, we reverse the decision of the High Court to remit the matter back to the Environment Court for reconsideration. We direct that Mrs Minhinnick's appeal to the High Court be dismissed. The Environment Court's decision to refuse an interim enforcement order must stand.

The High Court's order awarding Mrs Minhinnick costs of $8000 against Watercare is set aside. Costs in the Environment Court were reserved. That order will stand on the basis that the Environment Court is to fix the costs of the proceedings before it in the light of the outcome of the proceedings overall.

To cover costs in both the High Court and this Court we award Watercare the total sum of $12,500 against Mrs Minhinnick plus disbursements to be fixed by the relevant Registrars including the reasonable travel and accommodation expenses of one counsel in this Court to be fixed by the Registrar of this Court.

Appeal allowed: cross-appeal dismissed.

Solicitors for the appellant: *Russell McVeagh McKenzie Bartleet & Co* (Auckland).

Solicitor for respondent: *Simon Reeves* (Auckland).

Reported by: Chris Corry, *Barrister*

TAB 18

Whangamata Marina Society Inc v Attorney-General

High Court Wellington CIV 2006-485-709
15, 16, 17 August; 18 September 2006
Fogarty J

Resource management – Coastal permit – Restricted coastal activity – Report by Environment Court to Minister of Conservation for final decision – Whether minister has power to reconsider factual findings of Environment Court – Resource Management Act 1991, ss 104, 107A and 119.

Administrative law – Natural justice – Decision by Minister of Conservation following report from Environment Court – Minister considered some evidence-in-chief and briefs but full transcripts unavailable – Whether appropriate course – Whether sufficient time available to minister to consider material – Whether breach of natural justice.

Administrative law – Ministerial decision – Decision by Minister of Conservation following report from Environment Court – Requirement to refer new matter back to Environment Court – Meetings between minister and interested parties – Whether procedural error – Resource Management Act 1991, s 119(3).

The Whangamata Marina Society applied for two coastal permits for restricted coastal activities associated with its proposed marina at Whangamata. In accordance with the Resource Management Act 1991, following the hearing of the appeal before the Environment Court that Court made a report and recommendation to the Minster of Conservation for a final decision under s 119 of the Act. The transcripts of the Court hearing and the briefs of evidence had been incomplete and unavailable until the evening of Thursday, 2 March 2006. On Tuesday, 7 March 2006, the minister declined to grant the coastal permits and the society sought judicial review of that decision. The society challenged the minister's decision on a number of grounds, including that it was impermissible for him to re-evaluate and redetermine the evidence before the Environment Court, and that in any event he had done so unfairly, and in addition acted improperly and unfairly in holding a series of meetings with interested parties before making his decision, even though he gave evidence that he had disregarded what had been said at those meetings.

Held: 1 Under s 119 of the Resource Management Act the minister had a discretion to differ from the recommendation of the Environment Court, provided that recommendation was taken into account and reasons were given. The minister's discretion was relatively confined, however. Specifically, it was not the function of the minister to hear witnesses and test the quality of the evidence and submissions marshalled in support of the relevant criteria; that

was the role of the Environment Court. If further clarification of factual aspects of a matter were needed, the minister should request an explanation or amplification from that Court. In this case the minister had set about reconsidering the evidence and in doing so made a procedural error of law (see paras [54], [78], [91], [94]).

2 Even if the minister had the power to reconsider the evidence, he had not done so in a fair manner. A reconsideration should have been conducted in the presence of counsel for the parties who were present at the hearing. Further, it was unfair to leave this critical task to the weekend prior to delivery of the decision on the last day, the following Tuesday (see para [108]).

3 The statutory prohibition in s 119(3) on the minister granting or refusing the coastal permits based on a new matter not considered by the Environment Court, without referring the application back to the Environment Court under s 119(4) for a report on that matter, could not be avoided by a simple declaration that the comments at meetings were not taken into account. The minister had had a series of meetings with interested parties prior to making his decision. Although he gave evidence that he had disregarded the comments made at those meetings, the guiding principle was one of apparent procedural fairness. There could be no confidence that the minister had complied with s 119(3) and (4), and this was a procedural error (see paras [126] and [131]).

Kioa v West (1985) 159 CLR 550; 62 ALR 321 referred to.

Result: Application granted; minister's decision set aside.

Other cases mentioned in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680 (CA).

Attorney-General of Canada v Inuit Tapirisat of Canada (1980) 115 DLR (3d) 1.

Canterbury Regional Council v Banks Peninsula District Council [1995] 3 NZLR 189 (CA).

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 All ER 935.

CREEDNZ Inc v Governor-General [1981] 1 NZLR 172 (CA).

Hastings District Council v Minister of Conservation [2002] NZRMA 529.

New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA).

R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213; [2000] 3 All ER 850.

R (Bibi) v Newham London Borough Council [2002] 1 WLR 237.

Watercare Services Ltd v Minhinnick [1998] 1 NZLR 294 (CA).

Wilson v Selwyn District Council [2005] NZRMA 76; (2004) 11 ELRNZ 79.

Application

This was an application by the Whangamata Marina Society Inc for judicial review of a decision by the Minister of Conservation under s 119 of the Resource Management Act 1991 refusing to grant two coastal permits to the society.

M Chen, *C Mark* and *A Smithyman* for the society.
B H Arthur and *J S McHerron* for the Attorney-General.

Cur adv vult

FOGARTY J.

Table of contents

Table of contents

Introduction

[1] The plaintiff seeks judicial review of a decision of the Minister of Conservation. On 7 March of this year he refused to grant the two coastal permits required for the restricted coastal activities for the plaintiff's proposed marina at Whangamata.

[2] The two restricted coastal activities for which the plaintiff sought coastal permits were:

(1) to contain four ha of the coastal marine zone, and to construct a 300 m breakwater and control structures, and dredge a marina basin and channel; and

(2) to reclaim 1.4 ha of the coastal marine zone by placement of fill on to a salt marsh for development of a hard stand and parking area for the purposes of a 205-berth marina

all on the seabed of the Moanaanuanu Estuary of the Whangamata Harbour.

[3] The decision of the minister was made under the Resource Management Act 1991 (the RMA). Where anyone applies for a coastal permit to carry out an activity which a regional coastal plan describes as a "restricted coastal activity" (an RCA), a special process is required by the RMA.

[4] The normal processes of applications follow, but the application is heard in the first instance by a committee of the regional council that also includes a person appointed by the Minister of Conservation. This committee then makes a recommendation. There is a right of appeal from the recommendation of the committee to the Environment Court. This was taken advantage of here. There is a right of appeal on the law to the High Court from the Environment Court report. Ultimately the Environment Court makes a recommendation to the Minister of Conservation.

[5] What is unusual about this process is that the final decision is made by the Minister of Conservation, not by the regional council or, after an appeal, the Environment Court. It is unusual because the Environment Court's principal function is plainly to ensure that resource management issues will be resolved in difficult cases by a specialist Court. There are no qualifications required for members of hearing committees of territorial and regional councils. Nor are qualifications required for commissioners appointed by councils. However, the

Environment Court sits in panels consisting of a professional environment Judge, and a number of environment commissioners. The latter do not have to have formal qualifications, but in practice have an extensive background in resource management.

[6] Obviously, the reason for the special power reserved to the minister, in the case of an RCA, is the importance attached by Parliament to coastal development.

[7] The plaintiff contends that the minister's decision was not according to law and so should be set aside. Before discussing these contentions, I make some general observations on the supervisory jurisdiction of the Court in judicial review proceedings. All cases of judicial review proceed by comparing what happened with what the law requires. Parliament defines tasks for decision makers according to the goals it seeks to pursue. There is no standard template of decision making by exercise of statutory power: for example, there is a similar but different duty on the minister to recommend or not the making of a water conservation order (ss 214 and 215). Accordingly, to judge whether or not a person exercising a statutory power has fallen into any error of law it is necessary to examine carefully the task that Parliament has set.

[8] In this case the Minister of Conservation, the Honourable Christopher Joseph Carter, has been the minister for some years. As minister, he considers approximately 25 RCAs each year. His practice is to undertake site visits, considering that maps or photographs are never as satisfactory as first-hand experience of the environment. This is a practice commonly, if not invariably, followed also by the Environment Court, hearing committees and the professionals employed in RMA processes, be they specialist witnesses or counsel.

[9] As minister he receives briefings from the Department of Conservation (DOC). This again is normal practice. Whenever a minister of the Crown is exercising a statutory power, the Courts understand that his or her staff will be composed of skilled advisers who by preparing briefing papers will make practicable the discharge of all the duties that the minister has.

[10] It is also part of this minister's usual practice "with major issues" to speak to interested members of the community before making his decision. This he did on 30 January at the Thames Coromandel District Council Service Centre in Whangamata. This became a controversial step. The plaintiff objected to it having taken place, although it participated.

[11] The minister had a further meeting with the plaintiff's representatives nearly a month later on 24 February, having written to them on 22 February highlighting concerns and suggesting that the plaintiff focus on two issues: replacement fill on to the salt marsh (the salt marsh issue); and the tangata whenua issues, including access to kaimoana, which is the issue of access to the second pipi bed (the iwi concerns).

[12] After the meeting on 24 February, the minister agreed to provide the plaintiff's solicitors with a copy of a draft briefing paper that would be prepared for him. This was provided to the plaintiff on 2 March, as well as to the minister. The plaintiff was given one day to comment on the paper and it was agreed that the minister's decision would be made by Tuesday, 7 March. One of the reasons for the very short time frame was that the minister was at the end of the maximum statutory timetable for decision.

[13] The minister received his draft briefing paper on the evening of Thursday, 2 March, and considered the materials, amid his other duties, over the next few days. He made his decision on Tuesday, 7 March.

The plaintiff's contentions

[14] The plaintiff argues that the minister exceeded the scope of his powers, as his decision was based on a re-evaluation and redetermination of the evidence that had been considered by the Environment Court. Rather, his duty was to consider the applications, deferring to the Environment Court on evidential matters.

[15] Further, he exceeded the scope of his power by instigating a hearing process on 30 January, when he had a series of meetings, hearing the views of persons for and against the marina.

[16] Even if the minister was able to revisit the evidence his decision was unlawful, because he had inadequate time to consider the Environment Court decisions and report and the staff briefing papers and witness briefs. In addition, he was ill-equipped to do this task, as he did not have all the evidence, nor the skill set, to properly consider evidence that was available.

[17] The plaintiff also argues that the minister's evaluation was premised on his own findings on the evidence on the salt marsh and iwi issues and that he afforded tangata whenua and ecological issues veto weight without balancing environmental and developmental objectives as required by s 5.

[18] Further, he took into account information not considered by the Environment Court, including information received at the 30 January meeting and other communications, when he was required by the RMA to refer those matters back to the Environment Court.

[19] As a second theme of submissions, the plaintiff argues that the minister's processes were in breach of natural justice. The plaintiff argues that the minister had predetermined the matter based on impermissible information received before he received his formal briefing in March. The plaintiff argued that the meetings on 30 January were illegal and unfair. In any event, the plaintiff argued that they had a legitimate expectation that he would approve the permits because of an earlier settlement agreement back in 1999, whereby a DOC appeal against the hearing committee's support of the marina was settled.

[20] In addition, the plaintiff argues that the minister failed to affirm or protect the plaintiff's right to natural justice under s 27(1) of New Zealand Bill of Rights Act 1990 (the BORA).

[21] The plaintiff also claims that the minister's decision is irrational, unreasonable and disproportionate.

The response of counsel for the minister

[22] Ms Bronwyn Arthur, for the minister, defended the minister's decision by relying first on the comprehensive briefing he received from DOC in March. Using this material, she argued that the minister did do as he was required by s 119 of the RMA: take into account the Environment Court's report and have regard to the matters set out in s 104. She argued the minister was not obligated to refer any matters back to the Environment Court, as the minister refused to grant the permits for reasons based on the two matters that were particularly

considered by the Court – the salt marsh issue and the iwi concerns. She argued the minister was entitled to consider not only the Court's report, but also the conflicting evidence before the Court.

[23] Ms Arthur also argued that the minister did not conduct a consultation or rehearing process prior to making his decision. He held a public meeting so that many groups, in particular the plaintiff, iwi and surfers, could express their views. There was nothing in the RMA prohibiting the minister from listening to what interested groups might want to say to him. He was performing his role as the minister and not the consent authority. However, ultimately his decision was based on the material contained in the briefing, not on what he heard at these meetings. He excluded from consideration the comments made to him on 30 January and in the emails and other correspondence.

[24] Ms Arthur disputed that the minister gave "veto" weight to the salt marsh issue and to the iwi concerns without balancing all relevant matters under Part 2 and under s 104. In the latter respect she submitted he did have regard to the relevant statutory instruments: the New Zealand Coastal Policy Statement (the NZCPS), the relevant regional coastal plan (the RCP), the proposed regional coastal plan (the PRCP), as well as the regional policy statement (the RPS). She relied upon his written decision.

[25] Referring back to the minister being careful not to take into account any extraneous material, Ms Arthur also submitted in the alternative that there was nothing in s 119 that would prevent the minister from doing so, as that is recognised positively in s 119(3). If a minister wished to refuse or grant a permit for a reason based on a matter that *was* considered by the Environment Court, there was no provision requiring the minister to refer the matter back.

[26] She argued that the minister had kept an open mind to the end, relying particularly on his affidavit, where he said that. She disputed strongly the proposition that there was any legitimate expectation that the minister would confirm the Environment Court's final report because of the DOC appeal settlement in 1999.

[27] Finally, she resisted the application of s 27(1) of the BORA, and the contentions of irrationality.

First issue – To what extent does the minister have the power to reconsider the findings of the Environment Court?

Introduction

[28] In this exercise the Minister of Conservation is a consent authority, and is defined as such in s 2 of the RMA.

[29] Section 119 of the RMA provides:

> **119. Decision on application for restricted coastal activity –**
> (1) Within 20 working days of receiving –
> (a) A recommendation on an application for a coastal permit for a restricted coastal activity; or
> (b) Where an inquiry by the Environment Court into that recommendation has been made, the report of the Environment Court –
> the Minister of Conservation shall make a decision on the application and give reasons for that decision.

(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.

(3) The Minister of Conservation shall not grant or refuse to grant a coastal permit for a restricted coastal activity, or include any conditions in a permit, if the reason for granting or refusing the permit or including the condition is based on a matter that was not considered by the hearing committee under section 117 or, where there was an appeal, by the Environment Court in its inquiry, without the written agreement of the parties to the hearing or appeal, as the case may require.

(4) Where the Minister of Conservation considers that subsection (3) may apply, the Minister of Conservation may, if the Minister of Conservation considers it is appropriate in the circumstances, refer the application back to the hearing committee or Environment Court (whichever dealt with it last), and seek a recommendation or report on the matter in relation to the application.

(5) Where an application is referred back under subsection (4), the provisions of sections 117 and 118 shall apply accordingly and the period of 20 working days specified in subsection (1) shall not begin until the Minister of Conservation has received the recommendation or report requested under subsection (4).

(6) The Minister of Conservation must not grant a coastal permit for a restricted coastal activity if the activity is contrary to –

(a) section 107 or section 107A or section 217:

(b) an Order in Council in force under section 152:

(c) any regulations:

(d) a *Gazette* notice referred to in section 26(1), (2), and (5) of the Foreshore and Seabed Act 2004.

(7) Where the Minister of Conservation decides to grant a coastal permit for a restricted coastal activity, the permit shall commence on the date of the decision or such later date as the Minister of Conservation states in his or her decision.

[30] The minister's decision and his reasons are contained in his letter of 7 March 2006. Having refused to grant the two RCA permits in his second paragraph, the third paragraph of the letter reads:

> "3. In making this decision I have taken into account the report of the Environment Court, and have had regard to the matters set out in section 104 of the RMA. *I have also considered the evidence presented to the Court, the Court transcripts that were available and the comments that the applicant has provided to me on 24 February 2006 and 3 March 2006*." (Emphasis added.)

[31] There is no issue with the first sentence. It is a summary of the content of subs (2) of s 119. The issue is with the emphasised sentence – could the minister take this additional step? Although it is not apparent immediately, the consideration that the emphasised sentence refers to was a reconsideration of

the evidence. The minister did not read the evidence in order to better understand the report of the Environment Court. He read it to reconsider the findings of the Environment Court.

[32] The last paragraph of his reasons is as follows:

> "23. In making this decision I am very conscious of the time and resources that have been committed to the proposal. I also acknowledge that the Court has heard extensive evidence and questioning of witnesses. However, as the final decision-maker on restricted coastal activities under section 119 I am able to depart from the views of the Court as long as I do this in a proper and lawful manner. I would not adopt this course lightly, but I consider that it is appropriate in this case."

[33] The question examined in this first issue is whether or not subs (2) states comprehensively the task of the minister. The issue may be framed more particularly as whether and to what extent the minister can differ as to findings on disputed evidence in the Environment Court report. To resolve this issue it is necessary to examine the nature of the task set by Parliament for the minister. For when considering judicial review, the Courts have long recognised that it is impossible to judge the limits of authority of a decision maker without first understanding thoroughly the task that has been set by Parliament. One could cite numerous authorities to this effect. But I wish to discuss just one, the decision of the Court of Appeal in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172.

[34] In that case the Court was examining the power of the Governor-General in Council to grant consents under the National Development Act 1979, following on a report by a planning tribunal. The issue was quite different from here. It was whether or not the property owners affected were entitled to a second hearing before the Executive Council after the report. Here the issue is not whether the minister ought to conduct a hearing, but to what extent he can revisit findings against contested evidence in the report.

[35] However, it is appropriate to note that the legal method followed by the Court of Appeal in *CREEDNZ* was one of examining carefully, and realistically, the statutory scheme of the National Development Act. The Court held in that case that where decisions are left to ministers of the Crown it is unlikely that the minister is under a duty at all to follow a procedure analogous to a judicial procedure (see p 178). The Court followed a decision of the Supreme Court of Canada in *Attorney-General of Canada v Inuit Tapirisat of Canada* (1980) 115 DLR (3d) 1. In that respect Cooke J said in his judgment at p 178:

> "In a judgment delivered by Estey J the Supreme Court stressed that 'the very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council'. The Court said that it is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply."

[36] Adapting this dictum, I follow the method of construing the statutory scheme as a whole in order to see to what degree, if any, Parliament intended the minister to assume the role given to the hearing committee and on appeal to the Environment Court of testing the evidence of submitters to the Court (see ss 117 and 118 of the RMA).

The constraints of a s 104 consideration

[37] To do this, it is necessary to appreciate the statutory constraints within which resource consents are granted. For it is plain on the face of subs (2) that Parliament intended the Minister of Conservation to make the decision in compliance with the requirements of s 104. Accordingly, this analysis begins by examining the character of a s 104 consideration.

[38] The RMA is premised upon consent authorities identifying first whether there are any significant actual or potential effects on the environment of allowing a proposed activity. Secondly, the consideration moves on to an evaluation of those effects; to examine whether or not they warrant rejecting resource consent or allowing the consent, including allowing it subject to conditions. Those conditions may restrain some of the potential adverse effects or impose steps to mitigate those effects.

[39] It is for this reason that s 104 begins:

> . . .
>
> (a) any actual and potential effects on the environment of allowing the activity . . .

[40] These are the present terms of s 104 as amended on 1 August 2003. Previously, and when the RCA applications were lodged in this case, the section began thus:

> **104. Matters to be considered –** (1) Subject to Part 2, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –
>
> (a) Any actual and potential effects on the environment of allowing the activity . . .

[41] Whether there will be any actual or potential effects on the environment of allowing the activity is a forward-looking inquiry. Therefore it calls for a judgment. Sometimes the judgment will be easy and sometimes it will call for expertise. Essentially, that judgment can be described as factual.

[42] "Effect" is defined in s 3 as follows:

> **3. Meaning of "effect" –** In this Act, unless the context otherwise requires, the term effect includes –
>
> (a) Any positive or adverse effect; and
>
> (b) Any temporary or permanent effect; and
>
> (c) Any past, present, or future effect; and
>
> (d) Any cumulative effect which arises over time or in combination with other effects –
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes –
>
> (e) Any potential effect of high probability; and
>
> (f) Any potential effect of low probability which has a high potential impact.

[43] It is important to note para (a), that an effect can be positive or adverse. Accordingly, this first task of identifying actual and potential effects is neutral in the sense that the consent authority is seeking at the start merely to identify effects. The second step is as to character. This step is evaluative in that one has

to decide whether it is positive or adverse. But that is not a particularly significant judgment in most cases. The remaining paragraphs are all factual aspects of effects: for example, "temporary", "permanent", "scale".

[44] Having identified any actual or potential effects, and their relevant factual aspects, the next task of the consent authority is to examine those effects against a large number of statutory criteria. Those criteria are set out principally in Part 2 of the RMA, comprising ss 5 – 8. They are also set out in a hierarchy of derivative statutory instruments usefully captured, at present, in s 104(1)(b):

> **104. Consideration of applications –** (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to –
>
> . . .
>
> (b) any relevant provisions of –
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement:
>
> (iv) a plan or proposed plan; and . . .

[45] The concept of a hierarchy of instruments was approved by the Court of Appeal in *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 at pp 193 – 194. The scheme of the Act is that instruments which are subordinate within a hierarchy must not be inconsistent with superior instruments. This requirement limits the discretion of the subordinate authority. Delivering the judgment of the Court, McKay J said at p 194:

> "We agree that the Act provides what may be described as a hierarchy of instruments, to the extent that regional policy statements must not be inconsistent with national policy statements and certain other instruments (s 62(2)), and district plans must not be inconsistent with national policy statement or regional plan (s 75(2)). It does not follow, however, that there can be no overlap between the functions of regional authorities and territorial authorities. The functions of the latter are set out in s 31, and there is no need to read that section in any restricted way. To the extent that matters have been dealt with by an instrument of higher authority, the territorial authority's plan must not be inconsistent with the instrument. Beyond that, the territorial authority has full authority in respect of the matters set out in s 31. Its decisions can, of course, be contested by appeal to the Planning Tribunal under the provisions of the First Schedule."

[46] Consideration of these instruments is "subject to Part 2". This does not mean that these statutory instruments can be ignored, allowing the decision maker to do a "green fields" analysis, simply from the statutory provisions of Part 2. For the statutory instruments that the decision maker "must, subject to Part 2, have regard to" are themselves the product of Part 2 analysis. Each one of these statements and plans or proposed plans is itself produced from a rigorous process designed to give effect to the criteria contained in Part 2. For more detail see *Wilson v Selwyn District Council* [2005] NZRMA 76 at paras [75] – [80].

[47] The character of the constraint of those derivative instruments which are operative can be illustrated by an example drawn from the context of this case.

By reason of s 104(1)(b)(iii) the minister is obliged to have regard to the NZCPS. This is a document produced from a rigorous statutory procedure, including examination and report by a board of inquiry and final approval by the Minister of Conservation.

[48] It is likely that this Minister of Conservation does not personally agree with the content of the current NZCPS. He commissioned a review of it in 2003. This was announced publicly on 6 August 2004. The day after the minister delivered his decision, on 8 March 2006, the minister issued a press release announcing that a board of inquiry was to be appointed to review issues around coastal development and the NZCPS. In that press release the Minister of Conservation is quoted:

> "'There has been considerable anxiety expressed by communities around the country about the amount of development on the New Zealand coastal line, the impact this is having on the character of the coast and on the traditional Kiwi lifestyle', Mr Carter said. 'Because of these concerns, I initiated a review of the New Zealand coastal policy statement shortly after becoming Minister. An independent review has been completed and policy development is underway. I expect to be able to release a new draft policy statement for public consultation later this year through a board of enquiry . . .'"

[49] The initiation of the review was a political decision, in the sense that it was an Executive Government initiative, not the discharge of a statutory duty to review the existing NZCPS. However, the establishment of a board of inquiry is the only way the minister can obtain any amendment to the current NZCPS. For an NZCPS can only be prepared by following the statutory process set out in ss 46 – 52. Section 47 provides that the minister *must* appoint a board of inquiry to inquire into and report on a national policy statement. The minister is given power to set the terms of reference. But the board of inquiry then proceeds by way of public notification and hears submissions, including giving submitters a right to be heard, before producing their report.

[50] Ms Arthur agreed that when exercising the power under s 119 the minister was obliged to follow the policy contained in the current NZCPS and could not bring to bear his own views of the need for a review. For to do so would circumvent the statutory protections built into the RMA in ss 46 – 52. Parliament never intended that a Minister of Conservation applying s 119 can unilaterally impose a different policy as to coastal development, bypassing the statutory processes of the RMA.

[51] Furthermore, as Ms Arthur also properly acknowledged, once there is a NZCPS (as here) there is then an obligation on the relevant regional councils to give effect to that through their regional policy statements (s 62(3)). Regional policy statements are a mandatory requirement and they in turn are given effect to through regional plans (s 67(1)). The only mandatory regional plan is a regional coastal plan (s 64(1)). Its purpose is as defined in s 63(2):

> To assist the regional council, in conjunction with the Minister of Conservation, to achieve the purpose of the Act in relation to the coastal marine area of the region.

[52] The Environment Court correctly integrated consideration of these instruments with the consideration of relevant criteria from Part 2 of the RMA. All were considered under one heading of "Overall Evaluation" in its final decision (see paras [56] – [77]).

[53] On top of that, per s 104(1)(c), the minister must, subject to Part 2, have regard to:

> (c) Any other matter the consent authority considers relevant and reasonably necessary to determine the application.

However, the minister cannot have regard to any other matter unless it is already a matter which has been considered by the Environment Court in its inquiry, unless there is written agreement of the parties to the appeal (see subs (3) of s 119). If the Environment Court has had regard to such other matters in addition to the other statutory instruments, then the minister must have regard to those matters.

[54] Using only the above selection of material it is abundantly plain that the discretion conferred by Parliament on the minister under s 119 is relatively confined. Because it is a s 104 decision, the decision of the minister does not in fact have a political character, as in *CREEDNZ*. It is thereby amenable to judicial review.

The evaluative character of RMA matters for consideration; to what extent is it factual?

[55] I turn now to consider further how a s 104 assessment is undertaken, and in particular its evaluative nature. This is relevant to identifying the nature of the Environment Court report and the extent to which the minister can depart from its analysis and recommendations.

[56] As has been explained, there is a workable distinction under the RMA between:

> (1) findings as to any actual and potential effects (positive or adverse) on the one hand; and
> (2) evaluation of the significance of those effects against the criteria in Part 2 and any relevant provisions of other statutory instruments, themselves derived from Part 2, and against any other matter the consent authority considers relevant and reasonably necessary in order to determine the application.

[57] Usually it is possible to read an RMA decision by the Environment Court or by a hearing committee of a territorial or regional consent authority and be able to distinguish the findings as to actual and potential effects from the evaluation of their significance against the objects of the RMA.

[58] However, the factual evidence presented to hearing committees and the Environment Court goes to evaluating their significance as well as to proving or disproving any actual or potential effects. So the evaluation task also involves making findings of fact.

The iwi concern for one of the two pipi beds illustrates the evaluative process

[59] One of the two issues that the minister focused on in this case can be used to illustrate the factual aspects of evaluation. Part of the proposed activity

was to dredge one of the channels of the Whangamata River to allow vessels to pass through to the marina. The dredging would have the adverse effect of preventing walking across the estuarine bed at low tide to one of two local pipi beds.

[60] The extent of that effect would depend upon the number of persons who would otherwise want to go to the pipi bed by that route, now and potentially in the future. However, one also needs to consider whether there was a suitable alternative route. To the extent that that number of harvesters was diminished, there would also be a different effect on the amount of pipi taken from that bed. That in turn would have an effect for the future on the quantity of pipi in the bed. These issues are largely of a factual character.

[61] The second stage of the analysis is to evaluate the significance of these effects for the purpose of the RMA. Pipi beds are kai moana (food of the sea). They are part of the taonga (treasure) of Maori. Accordingly, it becomes relevant by s 6(e) and s 8 of the RMA to consider how these effects impact on the relationship of the local Maori with the pipi bed. As discussed above, these issues are addressed in the NZCPS and in the regional plans. The evaluation of these issues has a factual character. This can be illustrated by examining the core criteria in s 6 (which are worked out to a degree in the NZCPS, RCP and other instruments, but also directly applicable in s 104 analysis):

> **6. Matters of national importance –** In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (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*:
>
> . . .
>
> (d) The *maintenance* and *enhancement* of *public access* to and along the *coastal marine* area, *lakes*, and *rivers*:
>
> . . .
>
> (e) The *relationship* of Maori and their *culture* and *traditions* with their *ancestral lands*, *water*, *sites*, *waahi tapu*, and *other taonga*.
>
> . . .
>
> (g) the protection of *recognised customary activities*.

(I have italicised the words above to emphasise that they all have a factual aspect.)

[62] In its final report the Environment Court analysed this issue as follows:

> "**Tangata whenua values and concerns**
>
> [46] In the course of the 2001 decision we observed at paragraphs [40] and [41]:
>
> > Against the background of the PRCP's general concern to maintain the natural character and attributes of the upper harbour, the appellants have raised strenuous argument concerning perceived potential adverse effects upon kaimoana through modification of the channel by dredging, and consequential restriction of access to shellfish across the

> deepened channel. We note, however, that access to the shellfish resource would remain available from Moana Point some 400m away, and that TCDC is prepared to consider providing additional carparking there should circumstances so warrant.
>
> Other evidence for the appellants bearing on alleged waahi tapu and other ancestral issues in relation to the coastal area involved in the proposal proved relatively unpersuasive. Answers given under cross-examination were either lacking in consistency or unconvincing when weighed against the analysis advanced for the society by Mr B Mikaere, a former director of the Waitangi Tribunal, and a person qualified in Maori Studies and well-versed in Maori issues generally. These matters, however, (including those in the previous paragraph), would have to be assessed, along with other issues such as the ecology of the area and presence of wildlife, should it be proposed to change the PRCP to afford recognition to the [siting] of a marina within this portion of the estuary.

[47] On the issue of shellfish gathering in the vicinity of Moana Point, evidence was called by the society from several witnesses familiar with the coastal area who attested to not having observed any such activity. Be that as it may, we accept the assertions made for the iwi appellants that the historical nature and continuing availability of the resource are factors that are cherished and important. We are not persuaded, however, that construction of the channel will affect the resource significantly, given the intended presence of rock retaining to maintain the channel's position and integrity within the marine environment. We consider also that reasonable access will still be available from Moana Point – a location that is readily accessible within the general confines of Whangamata in the vicinity of the Moanaanuanu Estuary. It was stated for TCDC at the hearing in 1999 that TCDC would be prepared to review carparking provision at Moana Point should a need for additional parking be evident following the marina's establishment. We do not consider it necessary to stipulate that such upgrading be undertaken as a precondition to the marina proceeding, but expect TCDC as a responsible body to abide by its stated intent, so as to ensure that ready and convenient access remains available.

[48] The greater concern for the continuing existence of the general area for possible shellfish gathering is the notable onset of mangrove growth in the vicinity of the proposed marina basin. The change in that respect between our previous inspection of the area prior to the 2001 decision and our inspection this year was very noticeable – bearing out evidence by Mr Don at the 2004 hearing concerning the changed conditions, and the firm view on his part that the area proposed for the marina basin is without special conservation value and suitable for the purpose intended. Assisted by our having inspected the area, we accept his evidence in preference to views expressed by Mr Shaw as to the area's degree of ecological significance.

[49] As to the views expressed at paragraph [41] of the 2001 decision (refer above), we confirm our remarks having again reviewed the evidence of witnesses called on behalf of the iwi appellants and from Mr Mikaere for the society. We accept, however, that the iwi appellants and those they

represent have strong ancestral ties to Whangamata Harbour inclusive of the Moanaanuanu Estuary – that being reflected by the concerted and sustained opposition on the iwi appellants' part to the marina proposal.

[50] Ms P Clarkin, an administrator for the iwi organisation Te Kupenga O Ngati Hako [Inc], was called as an additional witness at the 2004 hearing. She concluded her evidence by stating:

> We wish to reiterate that we are not opposed to marina developments, only when the location affects areas of cultural, spiritual and historical significance to tangata whenua and limits our ability to exercise our customary practices and kaitiakitanga as we have always done. The current marina proposal affects these things and that is why we are opposed.
>
> In conclusion I defer to the statements made by the late Mrs Laura Hiku:
>
> > Customary gathering practices have been developed over thousands of years. The pipi beds are where God placed them. We do not believe they should be moved.
>
> And the late Mr Ropata Rare:
>
> > . . . this harbour was frequented by our ancestors for many generations and bequeathed to us in healthy condition, with its mauri intact. We wish to hand that taonga onto our own mokopuna.

[51] We acknowledge the concerns expressed by Ms Clarkin and other iwi appellant witnesses, stemming from their view that the marina proposal runs counter to tangata whenua values based on cultural, spiritual and historical considerations. Yet as observed in other cases, such considerations, while requiring due appraisal under relevant provisions of Part II of the RMA, do not have the effect of trumping all else, where other considerations, pertinent to achieving the Act's single purpose under s 5, fall as well to be considered. In the ultimate an overall judgement is required which –

> . . . allows for a comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome: *North Shore City v Auckland Regional Council* [1997] NZRMA 59, 94.

[52] Applying such a judgment against the background of various considerations pointed to in the 2001 decision, and to considerations mentioned, and to be mentioned, in this decision, we conclude that appropriate recognition and provision and particular regard to matters under ss 6(e) and 7(a) of the RMA, and account of relevant treaty principles (including openness and active protection), will be reasonably achieved on the basis of the conditions relating to tangata whenua as proposed for inclusion in the various consents under draft conditions submitted for the society and endorsed by the two councils (a copy of such draft conditions being appended to this decision) – hereafter referred to for convenience as 'the draft consent conditions'.

[53] In so concluding, we have had regard to the Hauraki Iwi Management Plan dated March 2004. No other iwi plan was referred to us in evidence or submissions. That plan is concerned with protection and management of

coastal areas and refers to various matters which, in many respects, are consistent with those raised in the regional planning instruments – for instance in relation to the importance of wetlands and water pollution control. Amongst a wide range of recorded environmental concerns, mention is made of coastal habitat loss and shellfish depletion, along with a perceived need to improve water and seabed quality. In relation to kaimoana, 'assured access to a customary take for Hauraki tangata whenua' is expressed as a desired outcome. Amongst other outcomes, 'greater understanding of coastal values by communities' is cited. Matters such as the importance attaching to the role of tangata whenua as kaitiaki, including active protection of ancestral taonga from the impacts of growth, are also pointed to.

[54] On the question of water pollution within the harbour, we confirm our remarks at paragraph [42] of the 2001 decision where we noted that, against the background of a more satisfactory boat mooring system, and the comprehensive security and control that would be expected in operating the marina –

> . . . concerns raised by the (iwi) appellants as to adverse effects on shellfish through oil leakages and sewage disposal from boats would be better met via the comparatively high standards of the marina. The present proposal also involves removal (by agreement) of a slipway operated by Ocean Sports Club in Beach Road – a move anticipated to be environmentally beneficial on account of current risks of harbour contamination from anti-fouling agents and the like employed at the slipway.

[55] While we have noted various aspects of the iwi management plan as above, we have had regard to the whole document, along with all we heard in evidence from Ms Clarkin, Mr Mikaere and others. We later refer to conditions of consent stemming from our assessment of this branch of the case, together with other conditions relating to the reinstatement and enhancement works to be undertaken by the society."

[63] It can be seen that much of that reasoning is factual. Paragraphs 46 and 47 have a distinct factual character to them, including to what extent there was wahi tapu. Wahi tapu is an expression found in s 6(e) of the RMA but not defined in the Act. It is defined in s 2 of the Historic Places Act 1993 as:

> **wahi tapu** means a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.

[64] The extent of value actually given to a natural area or resource such as pipi is significant in judging to what extent it was truly tribal taonga (treasure).

[65] At para [48] the report addressed changing conditions of mangrove growth and a clash between two witnesses as to its degree of ecological significance.

[66] At para [54] the Court concluded that water pollution would be better met via the comparatively high standards of the marina.

[67] For the most part this reasoning resolves the evaluative issues by fact finding. However, for reasons not fully explained at para [41] of the 2001 decision, some evidence on alleged wahi tapu and other ancestral issues was not persuasive.

[68] Essentially, the Environment Court resolved these issues by preferring the evidence of Mr Mikaere from that of several witnesses for Ngati Po. With the exception of Ms P Clarkin, whose evidence was taken in 2005, these witnesses were examined prior to the 2001 decision. Obviously, they were cross-examined strenuously. As a result, the Environment Court did not find their answers taken as a group convincing. No transcript of their cross-examination was available.

The ability to supplant the report, consideration of subss (3) and (4) of s 119

[69] As a starting point, I note that there is no express provision in s 119 stopping the minister from re-examining the evidence that was led before the Environment Court. The opening phrase of subs (2)(a) is to "take into account the . . . report". Plainly those words do not bind the minister to follow the Environment Court's report. Equally plainly the word "shall" mandates that the minister take account of the report in the course of considering his or her decision on the application.

[70] It is pertinent to read subs (2) in the context of subs (3). As already noted, subs (3) prohibits the minister from either granting or refusing to grant a RCA permit or including conditions in it on a matter that was not considered in the report. There is an exception if there is a written agreement from the parties for a decision to be made with reference to a matter not considered in the report. By subs (3) Parliament has therefore made it plain that all matters giving rise to reasons for granting or refusing a RCA permit have to be tested in an adversarial process, be that before the hearing committee or the Environment Court. It is not possible for the minister to grant or refuse a permit for reasons based on untested matters.

[71] It may also be noted that s 119 contains no provisions which contemplate that the Minister of Conservation will himself listen to the persons who have themselves, or their associates, appeared before the hearing committee or the Environment Court.

[72] The absence of any procedure to retest a matter already considered is striking. This is because the RMA envisages hearings replete with procedural safeguards to ensure a fair and rigorous process by which evidence and submissions are tested.

Parliament's intention that the minister rely on the reports is reinforced by the time limits

[73] Parliament could have provided for the Minister of Conservation to hear the matter de novo and conduct his own hearing to that extent. It did not. Nor was that Parliament's intent. Parliament has given only 20 working days to the minister to make a decision. (In this case the parties took the view that the minister had the power, as consent authority, under s 37 to double that time limit unilaterally and beyond that if the applicant agreed. Using these powers the period was extended from 20 days to 40 days, together with an additional one day by agreement from the applicant.) However, on any view of it, be it 20 or 40 days, that is not enough time for the Minister of Conservation to reconsider the evidence in the case.

[74] By way of comparison the Environment Court sat at Whangamata on 4, 5, 6, 7 and 8 October 1999; 16, 17, 18, 19 and 20 October and 13 November 2000; 19, 22, 23, 24, 25 and 26 November 2004; and at Thames

on 7, 8 and 9 September 2005. Even allowing for the fact that a lot of the time was spent on applications for resource consent over which the Court had the full power of decision, the fact of the matter is that these were the hearings considering the proposed marina. These days do not collect the time spent by the Court considering the issues and writing their reasons.

[75] Counsel were agreed that if the minister has the power to reconsider the evidence it would have to be by way of a fair procedure. So within the 20 days one has to allow for appropriate notice being given to the parties, opportunities to prepare submissions and an opportunity to participate in the hearing prior to consideration of the matters heard. Then time has to be allowed to write and deliver reasons for it, because the power under s 119 can only be exercised with reasons. Twenty or 40 days is not enough for those processes.

The need to go behind a recommendation or report if the content is obscure

[76] Ms Arthur, for the Crown, argued that there is a practice of the ministers to go behind these reports, particularly in the case of hearing committees. She said sometimes the reasons given, particularly by hearing committees, explain inadequately the matters heard and considered. The Court can readily understand this predicament of the minister. There are indeed passages of the final report in this case which are difficult to interpret. The excerpt from para [41] of the 2001 decision quoted above is an example. However, it needs to be kept in mind that these are *reports* by either the hearing committee or the Environment Court. They are not decisions. When persons holding a judicial function make decisions, in the absence of a statutory provision to the contrary, their task ends when the decision is made.

[77] But, where a delegate has prepared a report for a decision maker, there is no reason why further assistance cannot be obtained from that delegate. This commonsense proposition is reflected in s 119(3) and (4).

[78] Where the minister either has difficulty understanding part of the report or perceives the need to have some part of a report amplified, it is quite appropriate for the minister to request such explanation and/or amplification. This would not involve the hearing committee or the Environment Court rehearing the matter under the processes of ss 117 and 118, but simply giving a fuller explanation for their reasoning in a particular part of the report. Plainly this could and would be provided promptly.

[79] For example, to return to para [41] of the 2001 interim decision, reported at para [46] of the final report, the Environment Court said:

> "*Other evidence* for the appellants bearing on alleged waahi tapu and other ancestral issues in relation to the coastal area involved in the proposal proved relatively unpersuasive. *Answers* given under cross-examination were either lacking in consistency or unconvincing when weighed against the analysis advanced for the society by Mr B Mikaere [setting out his qualifications] . . ." (Emphasis added.)

[80] What was the "other evidence"? What were the "unconvincing" answers? There is nothing to stop the minister asking these questions. The Environment Court that wrote the final report was comprised of the same members as comprised it when it made its interim decision. They are therefore able to confer and prepare a supplement to their report amplifying these two sentences.

Consideration of hearing committee or Environment Court reports

[81] The Environment Court report replaces completely the hearing committee report. If the application has gone to the Environment Court, the minister does not consider the report of the hearing committee. Subsection (2)(a) makes that clear:

> (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* . . . (Emphasis added.)

[82] The fact that subs 2(a) rules out consideration of the hearing committee report, if it is supplanted, tends to reinforce the proposition that the minister cannot go behind the factual findings of the Environment Court report. That report is the result of an appeal from the hearing committee.

Section 119 is a compromise, preventing the minister from relying upon rejected evidence

[83] The minister is not confined to the reasoning of the report. Nor is he or she confined to the matters considered. By subss (3) and (4) Parliament implicitly recognises that the minister may identify reasons and matters independently of the report: personally, or via a staff analysis, or perhaps as a response to a representation being made. However, in subs (3) Parliament has prohibited the minister from relying on a reason based on a matter not considered without first referring the application back and seeking a recommendation or report on that matter in relation to the application. If the minister is minded to rely on that reason, then it will be "appropriate in the circumstances" to seek a report on the matter. Subsection (4) is cast as a power, not a duty. But if a minister considers a possible reason may arise out of a matter not considered, he or she cannot rely on that reason, unless the matter is referred back under subs (3) for a further report.

[84] Subsections (3) and (4) are very unusual. They have no counterpart in the RMA. They constrain the exercise of discretion of the minister. Plainly, Parliament has decided that all matters of relevance to the reasons for granting or refusing a permit are to be tested in an adversary hearing, by a hearing committee, and/or on appeal by the Environment Court. In that respect there is a compromise between other policy alternatives of giving full power of decision to either the Court on appeal, or to the minister.

[85] The minister is required to take account of the report and any supplementary report and have regard to the matters set out in s 104. On that exercise it would be irrational for the minister to rely upon evidence that has been rejected as unreliable. For were the minister to do so the minister would be circumventing the safeguard which Parliament has inserted in subss (3) and (4) of s 119. That safeguard is there to ensure that the minister relies only on matters which have been tested and evaluated. If Parliament considered that the minister could rely on untested evidence, there would have been no need for subss (3) and (4).

[86] If evidence is rejected it will be because its factual elements are unreliable. For one does not reject the evaluative elements. They are weighed. Take the iwi concerns. There is no doubt that the two pipi beds are there.

The Environment Court has accepted that the "historical nature and continuing availability of the resource are factors that are cherished and important" (see para [47] of its report). Evidence that was rejected included the factual proposition that "We are not persuaded, however, that construction of the channel will affect the resource significantly" (para [47]).

The scope of "a matter"

[87] It is clear, then, that Parliament intended that the minister would take into account the Environment Court report and, by analysis, that the minister would not rely upon evidence that the report has rejected. What, however, of situations where the report does not address a matter that the minister thinks is relevant to the grant of a RCA permit? It is to this issue which I now turn.

[88] In his affidavit the minister says that he did not consider any matters other than those that were considered by the Environment Court. This is a critical proposition. For Ms Arthur submitted that if a matter has been considered the minister cannot refer it back. Note also that subs (4) of s 119 is drafted as a discretion: "may". The language can accommodate a situation where the minister has a doubt as to whether a matter has been considered, and for that reason refer it back. It is quite plain on the face of it that both he and the Environment Court focused on the salt marsh issue and the iwi concerns, these being the two matters standing potentially in the way of granting the application. In that sense it is obviously true that these two matters that the minister considered were the same two matters that the Environment Court had considered. However, put that way, one is interpreting the word "matter" as meaning the *subject-matter*. The question becomes whether that is the meaning intended by Parliament. The plaintiff's counsel submitted that any new information was intended by Parliament to be a new matter. Thus, the minister could not rely on any information or contentions which had not been considered by the Environment Court.

[89] There is doubt as to what Parliament means by "a matter". The term is not defined. But it is the same term used in s 104(1)(c) – "any other matter the consent authority considers relevant and reasonably necessary to determine the application".

[90] It is also a concept used elsewhere in the RMA, for example in s 107A. Section 107A is particularly relevant for it is a constraint referred to expressly in s 119(6). Section 107A provides:

> **107A. Restrictions on grant of resource consents –** (1) A consent authority must not grant an application for a resource consent to do something that will, or is likely to, have a significant adverse effect on a recognised customary activity carried out in accordance with section 17A(2), unless written approval is given for the proposed activity by the holder of the relevant customary rights order.
>
> (2) In determining whether a proposed activity will, or is likely to, have a significant adverse effect on a recognised customary activity, a consent authority must consider the following *matters*:
>
> (a) *the effects* of the proposed activity on the recognised customary activity; and
>
> (b) *the area* that the proposed activity would have in common with the recognised customary activity; and

(c) *the degree* to which the proposed activity must be carried out to the exclusion of other activities; and

(d) *the degree* to which the recognised customary activity must be carried out to the exclusion of other activities; and

(e) *whether* the recognised customary activity can be exercised *only in a particular area*; and

(f) whether an alternative location or method would *avoid*, *remedy*, or *mitigate* any significant adverse effects of the proposed activity on the recognised customary activity; and

(g) *whether any conditions* could be included in a resource consent for the proposed activity that would avoid, remedy, or mitigate any significant adverse effects of the proposed activity on the recognised customary activity.

(3) Despite sections 77B(2)(a) and 104A, subsection (1) may prevent the grant of an application for a resource consent for a controlled activity. (Emphasis added.)

[91] The emphasised words are all aspects of the subject-matter of whether a proposed activity "will, or is likely to, have a significant adverse effect on a recognised customary activity carried out in accordance with s 17A(2)". The "matters" listed in subs (2) are aspects of the subject-matter of subs (1). Plainly, in s 107A "a matter" can be any *aspect* of a relevant consideration. It does not mean a *topic*. There is no need to read "matter" any differently where it appears in subs (3). Recall this statute is all about considering effects. As we have already seen, the meaning of "effect", in s 3, separates out all kinds of aspects of effect. It follows that *any new aspect* of a matter, not yet considered, is "a matter that was not considered", in subs (3) of s 119. Staying with the pipi bed example, if the minister is moved to consider allowing or rejecting the application by an aspect of the pipi bed issues, he needs to be sure it is an aspect which has been tested by the Environment Court. Otherwise, unless the parties agree, subss (3) and (4) of s 119 require him to refer it to the Environment Court for a further report before he can rely upon that aspect to provide a reason for granting or rejecting the permit.

The minister's power to differ

[92] It is important to emphasise at this point that the minister is not bound by the recommendations of the Environment Court. The minister can differ from the Environment Court in the *weight* to be given to the matters set out in s 104, provided he or she gives reasons (s 119(1)(b)). Given that the Environment Court will have given detailed reasons, and coupled with the short time frame for consideration, decision and reasons, the minister's reasons should explain why he or she accepts or rejects the report. Normally they should be referenced to the pertinent reasoning of the report.

[93] It is not the case that the minister brings a different "national perspective" from the Environment Court. For that Court takes a national perspective in any event, and when having regard to the NZCPS. Wild J's emphasis on the minister's national perspective in *Hastings District Council v Minister of Conservation* [2002] NZRMA 529 at para [50] should not be

misunderstood. In that case the Environment Court's report was merely an endorsement of a mediated settlement of parties who essentially had a local, or at best, regional perspective.

Conclusion on scope of s 119(2)

[94] By s 119(2) Parliament has reserved to the minister a discretion to differ, provided he gives reasons, from the recommendation of the hearing committee or report of the Environment Court, as the case may be, as to the weighting to be given to relevant criteria. But it is not the function of the minister to hear witnesses and test the quality of the evidence and submissions marshalled in support of the relevant criteria. That is what the hearing committee and the Environment Court do. From an appeal the Environment Court resolves and finds the factual aspects of the matters to be considered. Accordingly, the last sentence in para 3 of his 7 March decision demonstrates that the minister made a procedural error. He set about the task of reconsidering evidence, a power Parliament did not entrust to him. That was an error of law.

Second issue – If the minister can reconsider the evidence, did he do so fairly in this case?

[95] This Court has found that the minister went beyond his powers when reconsidering evidence presented to the Court. In case I am wrong, it is desirable, however, to go on to consider whether, if indeed the minister did have that power, he did so in accordance with the law.

[96] It is appropriate to begin by restating the last sentence of para 3, for it contains within it a qualification not readily discernible:

> "I have also considered the evidence presented to the Court, *the Court transcripts that were available* and the comments that the applicant has provided to me on 24 February 2006 and 3 March 2006." (Emphasis added.)

[97] The emphasised words suggest the minister considered all the evidence (on the salt marsh issue and the iwi concerns). This was not the case. There is no transcript for the hearings before 2004, in particular for the hearings leading up to the 2001 decision. This is because no stenographer was used and there was no request for a transcript to be transcribed from the audiotapes. What the phrase is therefore recording is that the minister considered such of the Court's transcripts as were available. As I have already noted, this did not include the transcripts of the answers given under cross-examination by iwi witnesses, which were described as being either lacking in consistency or unconvincing. (Paragraph [41] of the 2001 decision and para [46] of the 2005 decision.) So what the minister was doing was considering the *evidence-in-chief*, supplied by written brief, of some of the relevant witnesses. He was therefore making a second call from that of the Environment Court *without knowing* the evidence which the Environment Court heard orally, as those witnesses were questioned. Accordingly, the minister did not consider all the evidence presented to the Court on these two issues. In the case of the "salt marsh" issue, I note that some of the transcripts were also not available, particularly the evidence of Mr Don (pre-2004) or Dr Grace.

[98] Secondly, the minister did not receive those briefs of evidence and other transcripts of evidence that were available until the evening of Thursday, 2 March, at the end of his extended 41-day period. He received three Eastlight

folders of materials containing in all about 1500 pages. The relevant evidence and transcripts on the issues which his staff recommended he focus on had been marked along the margin in yellow pen, so he could find them. These marked pages totalled, on the Crown's estimate, 165 pages of material to be selected out of 590-odd pages of material. The rest was less relevant. Counsel for the applicant considered the minister had realistically to look at more pages. What is significant is that one only finds the pages by turning over each page to look for passages marked with a yellow highlighter. Those highlighters were predominantly down the margin.

[99] To assist him in the analysis the minister had a briefing from his staff. These staff briefings are routine and well recognised by the case law. For example, Richardson J (as he then was) commented in *CREEDNZ* at pp 200 – 201:

> "Lord Diplock reminds us in *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608, 613; [1980] 3 WLR 22, 28 of the need to consider the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached at the national government level. As he said, at p 613; 28, and I have no doubt that his remarks apply equally in New Zealand, the Minister has available to him 'the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise are to be treated as the minister's own knowledge, his own expertise'. And where, as here, it is the decision of the Governor-General in Council which is impugned, the realities of decision-making at that level must be recognised. It was in that context that Estey J speaking for the Supreme Court of Canada in *Attorney-General of Canada v Inuit Tapirisat of Canada* (1980) 115 DLR (3d) 1 said, at p 15:
>
> > 'The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject-matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature.'"

[100] Of course, as already noted, care must be taken not to misinterpret this passage as indicating that in this particular case the minister can take into account matters of policy which are not already reflected in the instruments which he must have regard to under s 104(1)(b), let alone matters that have not been considered by the Environment Court. Such a restriction was not present in *CREEDNZ*. As I emphasised earlier, the scope of discretion of a minister of the Crown in these sort of cases is a matter to be judged only after a thorough examination of the statutory scheme within which the minister's discretion is located.

[101] Returning to the evidence before the minister, the relevant points of the witnesses' testimony were summarised from their evidence-in-chief only. These included evidence-in-chief by way of rebuttal. Where transcripts were available the minister was advised by his staff that the relevant sections were highlighted

and that he should read those transcripts in addition to the evidence so as to inform himself as to the nature of the questioning of the witness and the responses to those questions.

[102] The minister was warned that no transcripts were available for the 1999 hearings: that this meant he had to be careful as he could not review the questioning of Dr Grace and Mr Don (at that time), and all the Maori witnesses except Ms Clarkin.

[103] It was left to the minister, without the aid of counsel who had been in the hearing, to absorb, analyse and evaluate the competing evidence of the witnesses, to the extent that it was still available.

[104] Counsel were in agreement that once the minister decided to consider the evidence he had assumed a duty (imposed by the common law) to do so fairly to all the participants in the hearings.

[105] Ms Arthur, for the Crown, argued that the minister had discharged this duty because his staff had provided to the applicant solicitors on 1 March a draft briefing paper. As a result they knew the materials that were going to be provided to the minister. The plaintiff, as applicant, was given an opportunity to make comments by way of suggested amendments to the briefing paper and they did.

[106] Ms Arthur could not elevate this step to a proposition that the plaintiff agreed with this process. Litigants in this kind of position, where an unorthodox process is being embarked upon by a decision maker, usually have little option but to go along with it. The fact that the plaintiff did make comments does not mean that the minister's process was fair. That is tested objectively.

[107] Ms Chen's most severe criticism of the process was directed to the timing of delivery of this voluminous material to the minister and the absence of the transcripts. Whenever appellate Courts embark on reconsidering the evidence they do so only with considerable reservation and with a great deal of care. It is difficult to do so fairly. Unless a transcript of evidence is read slowly and with a degree of imagination it is almost impossible to recapture the hearing. Secondly, and even more importantly, Judges have a set of skills which enables them to be extremely wary of relying solely upon witnesses' words. The reliability and credibility of witnesses' evidence is usually considered by placing one person's evidence against another and against as many hard facts as are possible to be assembled. It is self-evident that the Environment Court did this in its deliberations. For example, at para [47] of its analysis it refers to testing the unconvincing answers of the iwi witnesses against the "analysis" of the appellant's expert witness, Mr Mikaere. One cannot do this task of comparison simply by reading the material sequentially. It requires consequential comparison and contrast analysis. It is best done with the assistance of counsel who were there when the evidence was given.

[108] If he had the power to conduct such a reconsideration, then it would have been most desirable for the minister to have conducted the review in the presence of counsel for the parties who were present at the hearing. He should have used most of the available statutory period of 20 days to do the task. To have this critical task left essentially to the weekend prior to delivery of the decision on the last available day, the following Tuesday, is unfair. It is

accordingly in breach of the common law standards of natural justice and another error of law on the part of the minister. The reason why it was left so late is dealt with under the next part of this decision.

Third issue – Did the minister act properly and fairly when noting that he had disregarded the "comments made to me" on 30 January at Whangamata?

[109] On 30 January, early on in the statutory period, the minister visited Whangamata. He held a series of meetings during that day with interested parties, who expressed their views on the recommendation of the Environment Court. The purpose of the meetings seems to have been "to hear the views of the various parties".

[110] Prior to the meeting the minister was given legal advice. The minister was advised:

> "• You should not use this site visit as a justification to reach a decision different to that recommended by the hearing committee or the Environment Court.
> • If you intend to hold a meeting then it is important that all people with a vested interest in the outcome be at that meeting. This is to avoid accusations that you are treating people unfairly by not inviting them to the meeting.
> • You are able to hear the views of the various parties.
> • It is not appropriate for you to express your views at this stage."

[111] At the 30 January meetings the minister was accompanied by advisers who took notes, as well as Mrs Williams. Mrs Williams was the nominee of the Minister of Conservation on the hearing committee which initially considered this RCA permit. She dissented. As discussed, by s 119(2)(a) the minister considers only the Environment Court report, not the hearing committee report, let alone a dissenting report. This point was obscured in *Hastings*, for the Court's report followed a mediation only. Both the Court's report and that of the hearing committee were forwarded to the minister (see para [12] of that decision).

[112] In addition to the advice he received as to how to conduct the 30 January meeting the minister also received from his staff a two-page note before the meeting. This note was headed: "Notes on Issues associated with Whangamata Marina RCA application". There was no comment in this note by the staff expressing any concern about the Court findings. The note set out six bullet points of issues raised by iwi and six bullet points of Court findings adverse to iwi interests.

[113] The report went on under the heading: "Other Matters" (that is, distinct from Court findings) as follows:

> "• Recent large number of submissions by Iwi requesting decline, possibly originating from a form submission promoted by Hauraki Iwi. Same issues raised.
> • Whangamata appears to be of great concern to Hauraki Iwi. Reasons may not have been fully disclosed. Wider foreshore, seabed ownership issues possibly involved."

[114] The report went on to deal with the salt marsh issues in seven bullet points and six bullet points on surfing issues. In the latter respect it noted that the Environment Court in 2001 treated similar claims by surfers as overstated.

[115] The best evidence of the programme and who the minister heard appears to be the programme obtained by the plaintiffs under the Official Information Act 1982. It was a series of private meetings with persons with various conflicting vested interests for and against the marina. It took the following form:

"PROGRAMME FOR WHANGAMATA COMMUNITY DISCUSSIONS WITH HON CHRIS CARTER, MINISTER OF CONSERVATION

MONDAY 30 JANUARY – 1.00 PM TO 4.30 PM

THAMES COROMANDEL DISTRICT COUNCIL SERVICE CENTRE

620 PORT ROAD

WHANGAMATA

Programmed	**Actual**	**Community Group**
1.00 pm	1 – 1.15 pm	Environment Waikato / Waikato Conservation Board
		David Pearks (staff), Arthur Hinds (EW Councillor/Cons Board Member)
1.20 pm	1.30 – 1.50 pm	Whangamata Ratepayers Association
		Ross Wightman (Chairperson and three representatives)
1.40 pm	1.55 – 2.15 pm	Whangamata Maori Committee and Whangamata Salt Marsh
		Grant McIntosh and David Steele
2.00 pm	2.20 – 2.40 pm	Te [Runanga] O Ngati Puu Inc
		Edward (Ted) Shaw, Graham King and Joe [local kaumatua]
		(Don Shaw, David Te Rare and others) [Staff were not sure who would come]
2.20 pm	2.45 – 3.00 pm	ECO NZ
		Clive Monds
2.40 pm	3.05 – 3.30 pm	Whangamata Surfers
		Paul Shanks and others
3.00 pm	3.35 – 4.00 pm	Whangamata Marina Society
		Joan Forret, Mick Kelly, Simon Menzies
	15 mins	*Break*
3.30 pm	4.15 – 5.30 pm	Hauraki Maori Trust Board (3)
		Ngati Whanaunga Inc
		Te [Kupenga] O Ngati Hako

Te Runanga A Iwi o Ngati Tamatera
Te Runanga O Ngati Puu Inc (approx 10)
Whangamata Maori Committee (2)"

[116] It was appropriate for the minister to visit the site, since a site visit enabled the minister to understand better the issues which were being discussed by the report. However, the legal advice to the minister that he should not use the site visit as a justification to reach a decision different to that recommended was wise. For if as a consequence of his site visit he took account of aspects of the site which had not been taken into account by the Environment Court, again that matter should have been referred by the minister back to the Environment Court as required by subss (3) and (4).

[117] The minister will naturally be aware, either directly or from reports from staff, of media coverage of an issue. It cannot have ever been Parliament's intention that the Minister of Conservation cease being a politician during the statutory period of consideration of whether or not to adopt the recommendation in the report. It would therefore be quite natural for the minister to take a political register of the character of the decision that he has to make by holding such meetings.

[118] However, that does not mean he can depart from s 119. In this regard, it is not easy to draw a line between the inevitable notice that the minister will have of the controversial character and views of affected parties such as he received in the staff memorandum under "Other Matters". While the meetings he held on 30 January occupied an afternoon, it is not easy to distinguish those meetings from emails that might be sent to his office, telephone calls placed to him or simply being bailed up in the Koru Lounge at Auckland airport. From all such sources different views can be put to any minister on the application of s 119. However, I have chosen to concentrate on the meeting of 30 January. I do so because that meeting is expressly referred to in the minister's formal decision.

[119] The prohibition placed by Parliament on the minister by s 119(3) is not to grant or refuse a permit for a reason based on an aspect of a matter that was not considered. The more that the minister reads or listens to views as to what he or she should do, the more likely that the minister will have to refer those views back to the Environment Court for consideration. If the minister is in doubt about whether a view he has heard may give rise to a reason for or against a RCA permit based upon an aspect of a matter that was not considered by the Environment Court, he must refer it back, for all powers have to be exercised in good faith and for their proper purpose (see s 119(4)).

[120] Immediately following the meeting staff of the minister started to insert into a draft briefing paper for the minister some of the notes taken by the minister's advisers during these meetings on 30 January. They were obviously inserted as matters that he should take into account. That briefing paper was never sent to the minister. Indeed, there was no briefing paper sent to the minister until 2 March, over a month later.

[121] The plaintiff's solicitors complained about the meetings having taken place. Ms Arthur said a decision was taken not to rely on those meetings because of that complaint. Plainly, the minister's staff worked out that it was

quite dangerous for the minister to rely on the discussions that took place at those meetings. The solution has a legal neatness about it. The minister was to disregard what he learned during the meetings.

[122] The departmental briefing to the minister, delivered to him on the evening of Thursday, 2 March, and headed "Departmental Submission", had a 35-step series of recommended actions or matters to be noted pending the final two steps, which were to either grant subject to no conditions or to conditions prepared by the department, or to refuse to grant both of the coastal permits.

[123] Note (h) immediately followed the notation of the Environment Court's recommendations as part of the discharge of the obligation of taking those into account. Note (h) then read:

> "You should disregard the comments made to you in your 30 January meetings and any other comments or correspondence you have received which were not considered by the Court."

[124] The minister's decision on 7 March reads:

> "4. In making my decision I have not considered any matter that would require me to refer the matter back to the Court in terms of section 119(3) of the Act, and I have disregarded the comments made to me on 30 January 2006 in Whangamata . . ."

[125] The minister's decision of 7 March went on:

> "5. I should also respond to your assertion that I had formed a tentative view on this proposal before being briefed by my Department. That is not the case. I had developed concerns about the proposal on the basis of the Environment Court decisions, [advice] from officials and my site visit. I then met with you and your client to provide an opportunity for a response to those concerns. I can assure you that I had not formed a tentative view on this decision, and that I maintained an open mind on this matter until I had considered the formal briefing from my Department and had made my decision. As identified in paragraph 4 above, the information which formed the basis of my decision was only that information that I could properly take into account, and this is set out clearly in the briefing from my Department."

[126] There is no principle of public law which says that a decision maker can listen to the views of interested parties and then eliminate that event by declaring that he or she is not taking their views into account. Whether the information can be disregarded is a question of mixed fact and law. It is not resolved by a simple declaration. Nor is it resolved by subjective belief. Ultimately it is a judgment to be made by this Court on review, for it is an aspect of procedural fairness. It is axiomatic at common law that the guiding principle of procedural fairness is *apparent* procedural fairness, which maintains the confidence of the public in the process. A decision maker must not only endeavour to be fair, and be satisfied personally in that regard; his or her processes must also appear to be fair to reasonable observers.

[127] The point was considered by Brennan J in *Kioa v West* (1985) 159 CLR 550. The High Court of Australia was considering whether two illegal Tongan overstayers should be allowed to stay in Australia. The decision was made by the Minister for Immigration and Ethnic Affairs. A departmental report to the minister's delegate included the following paragraph:

> "22. Mr Kioa's alleged concern for other Tongan illegal immigrants in New Zealand and Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern."

[128] That information was never put to Mr and Mrs Kioa for their comments. The delegate, in his reasons for decision, did not refer to it.

[129] One of the Judges of the High Court, Brennan J, thought that Mr and Mrs Kioa should have had an opportunity to respond to that information. At p 629 Brennan J said:

> "It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account."

[130] I am quite satisfied that this is one of those cases. The date of 30 January was an important day. It was the day on which the minister visited the site. He heard interested parties directly in a series of meetings, for half a day. His staff took notes and were disposed originally to use some of these in a brief to him, as matters to be taken into account. The minister had a statutory prohibition on considering new aspects of these two contentious matters as a reason for granting or permitting the RCA permit. This prohibition cannot be avoided in this case by a simple declaration that he was not taking the comments into account.

[131] It is a reasonable possibility that the minister did hear on 30 January comments which raised additional aspects. It is also important to keep in mind that the next paragraph of his decision, para 5, indicates that his tentative views on the proposal were developed as early as the site visit. That was the same day as these meetings. There can be no confidence that the minister has complied with subss (3) and (4) of s 119 on these facts. Declaring he had disregarded these comments was an inadequate resolution of the consequences of having the meetings. That declaration was a procedural error.

Fourth issue – Was the minister biased by way of predetermination?

[132] The plaintiff submitted that the minister had breached public law obligations of natural justice by predetermining the matter before considering all the relevant material. They argue particularly that there was clear evidence that he had made up his mind by 1 March.

[133] On 1 March there had been a telephone call from the minister's office to Mayor Robert Harvey. On that same day Mr Harvey sent an email to a Mr Smythe asking him:

> ". . . to assemble for the Minister a range of spokesmen to support him in his decision on Whangamata Bar."

Mr Smythe was the surfing group lobbyist.

[134] The plaintiff argued that that email was evidence that the minister had in fact decided to disallow the application by 1 March. The minister denied that in his affidavit, and so did Mr Harvey. Mr Harvey said he was not told what the decision was or what it was likely to be.

[135] There is no doubt that by 1 March the minister had formed tentative views. That is plain from his correspondence with the plaintiff.

[136] On 22 February, writing to the lawyer for the plaintiff, the minister said:

> "As you are aware I have some concerns about the Marina proposal, and I thought it would be useful to highlight those concerns prior to the meeting."

He then sets out concerns relating to the salt marsh and to the iwi issues. These are the same concerns reflected in his final decision.

[137] As already noted in this judgment, his formal decision of 7 March refers to forming tentative views at para 5. That paragraph places those tentative views being formed going back to the site visit, on 30 January.

[138] When any person embarks upon a decision-making process which ultimately requires the exercise of discretion, there is an obligation to keep one's mind open until the process is completed. But that obligation does not and never has been understood as preventing tentative views being formed along the way. That is indeed inevitable. Our minds react to material as we consider it.

[139] To succeed on this ground the plaintiff has to establish that the minister irrevocably closed his mind, at least by 1 March, before he received the briefing papers and further submissions from the applicant.

[140] The two leading decisions in this regard are *CREEDNZ* and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544. In both cases the Court of Appeal applied the irrevocably committed or irretrievably committed test.

[141] In *CREEDNZ* Richardson J put it at p 194:

> "Before the decision can be set aside on the grounds of disqualifying bias it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions."

[142] To that dictum must be brought to account the significance of such a finding of a closed mind. It is not lightly made. I accept the minister's affidavit that he did not make his decision until 7 February when he went through the steps recommended by his staff in the briefing paper. This ground fails.

Fifth issue – Did the minister err in refusing to grant the two RCA permits by giving "veto" weight to salt marsh and tangata whenua values without balancing all relevant matters under Part 2 and s 104 of the RMA?

[143] There is no doubt that the minister focused exclusively on these two issues throughout his considerations.

[144] Much of the work of consent authorities under the RMA involves balancing different criteria in respect of particular proposals. The RMA is not a conservation statute. It is a management statute. The preservation criteria of the RMA do not operate as veto criteria. The RMA does not operate to preserve absolutely the natural character of the physical environment, let alone the natural character of the coastal environment.

[145] In its report at para [51], set out above, the Environment Court emphasised that s 6 matters, while nationally important, are not intended to be interpreted as "veto provisions". This is established law. The decision of the Court of Appeal in *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 is relevant in this regard.

[146] In that case, the Court of Appeal, consistent with the Environment Court and the High Court decisions, found that such questions have to be approached in an objective fashion. Writing the judgment of the Court, Tipping J said at p 305:

> "The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural well-being, while one of the aspects of s 5, is accompanied by social and economic well-being. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject-matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made."

[147] That case involved the application of s 314, which does not apply here. Even so, it is a good guide as to the weighing and balancing of s 5 and s 6 considerations. That formulation of approach inherently rejects the concept of any right of veto or any consideration under s 7 being a veto consideration. The Court of Appeal went on formally to hold that s 8 of the Act did not provide the appellant with a right of veto.

[148] In this case the plaintiff argued that the minister responded to concerns from Maori as to the salt marsh and the second of the pipi beds in a fashion which gave a veto quality to their submissions. In particular, the plaintiff contended that the fact that Maori had made these submissions meant the application could not be granted.

[149] That is not the way that the formal decision of 7 March reads. Having addressed the two matters of the ecological value of the salt marsh and the iwi concerns (both s 6 matters of national importance) the minister did go on to make an overall evaluation in terms of s 104 and Part 2 of the Act. At the very least, as a matter of form, the minister subsumed these two considerations into his overall evaluation.

[150] The relevant parts of his decision are paras 19 – 22:

> "19. I have considered the relevant matters of national importance as identified in section 6, the relevant other matters as set out in section 7 and the principles of the Treaty of Waitangi under section 8. I have then considered whether, in light of these matters, the purpose of the RMA would be achieved through the granting of these coastal permits.
>
> 20. In particular, I have considered the matters set out in section 6(c) (the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna) and 6(e) (the relationship of Maori and their

culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga). In relation to section 6(c), the Court concluded that appropriate recognition and protection would be afforded through the proposed enhancement programme. In relation to sections 6(e), 7(a) and 8, the Court concluded that appropriate recognition and protection will be reasonably achieved through the proposed conditions of consent.

21. I have conducted an overall evaluation of whether the proposal will meet the purpose of sustainable management as identified in section 5 of the Act. I do not agree with the conclusions of the Court described in paragraph 20 above in terms of the section 6, 7 and 8 matters. Further, I do not agree with the view of the Court, that weighing all aspects and affording Part II of the Act due primacy, an appropriate development outcome will be achieved within this part of the coastal environment, consistent with the purpose of the RMA. On this basis I have decided to refuse to grant the two coastal permits. Further, I do not consider that including additional conditions of consent would alter my view that the permits should not be granted.

22. In reaching this conclusion I have paid particular attention to both positive and negative effects of the proposal in terms of sustainable management as defined in section 5. While I acknowledge the positive benefits of the proposal, in my view these are outweighed by the adverse effects on the ecological values of the salt marsh and on Iwi matters. In making my decision I have considered the various components of the definition of sustainable management in section 5 as they apply in this context. These include people and communities providing for their social, economic and cultural wellbeing, the reasonably foreseeable needs of future generations, the life supporting capacity of air, water, soil and ecosystems, and the need to avoid remedy or mitigate the adverse effects of activities. In the end I am of the view that sustainable management would not be promoted by allowing this proposal."

[151] It is regrettable that one of the early staff memoranda to the minister for the 30 January meetings simply referred to the plaintiff's concern that these not be treated as veto matters as simply a "contention" without briefing the minister at that stage on the settled law. This was rectified, at the least partially, in the staff briefing in March (see para 129).

[152] I do not think that the plaintiff can prove that the minister did in fact give a veto effect to these considerations. In short there is no such error of law apparent on the face of the decision. Accordingly, this ground fails.

Sixth issue – Did the plaintiff have a legitimate expectation of approval of the report by reason of having entered into a settlement with the then Minister of Conservation in 1998 and a subsequent memorandum consent order with the Environment Court in 1999?

[153] The Minister of Conservation was a submitter to the plaintiff's application for resource consents for the marina. On the face of it, this appears to be rather odd given that the minister has to make the final decision. But for practical purposes this was a DOC submission.

[154] An agreement was entered into between DOC and the plaintiff on 27 July 1998. The context was that the Waikato Regional Council had

recommended to the Minister of Conservation that the RCA applications be granted. Various parties, including DOC, had lodged appeals against those recommendations and other decisions granting certain coastal permits to the plaintiff. This agreement settled the DOC appeal.

[155] The Minister of Conservation agreed to withdraw the DOC appeal. In turn, the plaintiff agreed to contribute towards the labour and costs of a Dotterel project with cash and labour. Part of the context is that the loss of some of the salt marsh to the new marina was going to disturb the habitat of wading birds, including the Dotterel.

[156] The agreement between the plaintiff and the then Minister of Conservation contained the following clause:

> "The terms of this agreement (except for clause 2 – withdrawing the appeal) are entirely conditional upon:
>
> (a) [The Society] obtaining all the necessary and other consents required to undertake the construction and development of the Marina; and
> (b) The Marina being constructed and becoming operational."

[157] The plaintiff argued that as a result of this agreement and the subsequent withdrawal of the minister's appeal they had a reasonable expectation that the minister would approve any subsequent recommendation. That argument cannot be right. Principally this is because it is not open to any minister to contract out of s 119. Secondly, the agreement did not contain any promise to contract out of s 119. In this regard, the plaintiff was unable to bring any of the large number of cases on legitimate expectation to bear on these facts. Normally legitimate expectation cases go to procedural expectations rather than to a substantive outcome. Two cases that the plaintiff ultimately relied upon were *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 and *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237. They are cases involving the housing of welfare beneficiaries. Explicit promises were made and the Court held the United Kingdom Government to keeping those promises. They are far removed on the facts. In particular, there was no statutory context of the sort we have here in s 119. There is simply no merit in this argument. To this end, I note that a similar argument failed in *Hastings* (see paras [65] – [69] of that decision). This ground fails.

Seventh issue – Was the minister's decision so irrational that it should be set aside upon that ground?

[158] This was a cumulative argument of the plaintiff. It was submitted that the minister's decision was so unreasonable and/or disproportionate that that in itself was a ground for setting it aside.

[159] The basic principles of public law are that any statutory power has to be exercised in good faith for its proper purpose taking into account relevant considerations and excluding irrelevant considerations. The underlying assumption is that if that process is followed the decision will be rational. The leading decision setting that standard is that of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[160] Sometimes the Court might be faced with a decision so outrageous in its defiance of logic that the Court will judge that no person applying the above

general principles to the question decided could have simply arrived at that same outcome (see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p 410).

[161] The plaintiff also sought to wrap into this argument the European law concept of proportionality.

[162] It is exceedingly hard for any plaintiff to make out a case of *Wednesbury* irrationality. It is not made out here. On the face of the written decision delivered on 7 March, the minister records taking into account the criteria made relevant by s 104. It is not manifestly irrational. This ground fails.

Other grounds for review

[163] I have considered the main grounds that were argued by the plaintiff. There were others. I briefly refer to them. Some of the arguments were built on a presumption that the Court might find that the minister was entitled to reconsider the evidence and hear parties. I have held that that was not a role given to the minister under s 119. Accordingly, the subsidiary arguments as to whether or not the minister erred in fact by basing his decision on inadequate probative evidence or mistake of fact, or the failure to provide the plaintiff with meaningful consultation, do not have to be considered separately.

[164] There was another argument that there had been a breach of s 27(1) of the BORA, which affirms the plaintiff's right to natural justice. This is another argument which presumes that the minister under s 119 was obliged to grant a hearing to the plaintiff. He was not. However, since he did, then as previously explained, the principles of natural justice come into play. In that context the minister may have assumed responsibilities under s 27 of the BORA. Riding on this premise the plaintiff then sought damages. Plainly, consideration of this argument is premature. Ms Chen was persuaded that this cause of action should be adjourned. Formally it is adjourned.

Consideration of this Court's discretion whether or not to intervene and set aside the decision of the minister

[165] The Court does not grant judicial review simply because a decision demonstrates an error of law or a breach of procedural fairness. The Courts have always reserved a discretion not to grant relief. Interference by the High Court of administrative decisions is always a sensitive matter. This is particularly so where it is a decision of a minister of the Crown, where the decision has been deliberately reserved to be made by a minister of the Crown by Parliament.

[166] I am satisfied this is a case where the High Court should intervene. By reason of their serious character it is not possible to judge the errors to be inconsequential. I record that I have considered whether the outcome was inevitable anyway such that any grant of relief would be futile. It was not. The early staff memoranda pointed to a decision the other way.

Relief and directions

[167] The minister's decision is set aside pursuant to s 4(1) of the Judicature Amendment Act 1972 (the JAA). In accordance with s 4(5) of the JAA, I further direct that the minister reconsider the whole matter to which the two RCA applications relate, by reason of the same errors. The next question is whether there should be any further directions under s 4(5B) of the JAA.

[168] Ms Chen submitted that the power should not be re-exercised by Mr Carter, the current minister. She submitted that any minister of the Crown could make the decision, notwithstanding that that minister not be the Minister of Conservation. She relied on s 7 of the Constitution Act 1986:

> **7. Power of member of Executive Council to exercise Minister's powers –** Any function, duty, or power exercisable by or conferred on any Minister of the Crown (by whatever designation that Minister is known) may, unless the context otherwise requires, be exercised or performed by any member of the Executive Council.

[169] Ms Arthur submitted that the Court should not make a direction in this regard.

[170] Plainly, the intention of Parliament when enacting s 119 was that the Minister of Conservation makes the decision. In this respect the Minister of Conservation has an institutional continuity within the RMA. The minister is also directly responsible for the NZCPS, and the content of regional schemes affecting coastal matters. Section 7 of the Constitution Act is an unusual power and is qualified by the phrase "unless the context otherwise requires". This is a relevant qualification here. However, and somewhat unusually, it would appear on the face of it that the power of the minister under s 119 can be delegated by the minister (see s 29 of the RMA).

[171] There are no findings in this judgment which would warrant an extraordinary direction by this Court that the present Minister of Conservation should not continue to be seized of this case. The errors identified can be corrected, and the directions below are designed to achieve this, clearing the way for a reconsideration by this minister.

[172] In this regard, this judgment should not be understood as making any decision either on the applicability of s 7 or upon the scope of the delegation power.

[173] Section 4(5B) of the JAA provides special powers to the Court to give the minister directions, applicable to his re-exercise of the discretion given to him by s 119. It provides:

> (5B) Where any matter is referred back to any person under subsection (5) of this section, that person shall have jurisdiction to reconsider and determine the matter in accordance with the Court's direction *notwithstanding anything in any other enactment*. (Emphasis added.)

[174] Pursuant to s 4(5) and s 4(5B) of the JAA I make the following directions:

(1) Assuming the two RCA applications are reconsidered by the present minister, he is to recommence the exercise as far as is possible afresh, governed by s 119 and other provisions of the RMA, applying s 119 subject to the following qualifications.

(2) Within 15 working days, to be calculated from the time of expiry of the right to appeal this decision, and if there is no appeal, the minister is to reconsider the application of subss (3) and (4) to any information or representations that he has acquired or heard, outside of the Environment Court report, interpreting "matter" as interpreted in this judgment, to include any aspect of a matter.

(3) To that end, the minister may ask the Environment Court to amplify its report. If so, time stops running on the 15-day period until an answer is received.

(4) The 20-working day time limit in s 119(1) is to be treated as beginning either on the date the minister decides not to refer any matter to the Court, or, if he does, from the date the Court reports (see s 119(5)).

[175] The cause of action seeking damages under the BORA is adjourned to be brought on for hearing upon application of the plaintiff.

[176] The plaintiff is entitled to costs. If the parties cannot agree costs, the plaintiff is to file written submissions. The defendant is to file submissions in reply within seven working days. The plaintiff has a limited right of reply to those submissions to be filed within three working days.

[177] Leave is reserved to either party to seek further directions on the conduct of the reconsideration of the whole matter.

Application granted; minister's decision set aside.

Solicitors for the society: *Chen Palmer* (Wellington).
Solicitors for Attorney-General: *Crown Law Office* (Wellington).

Reported by: Graeme Palmer, *Barrister*