BEFORE THE ENVIRONMENT COURT

Decision [2010] NZEnvC 177
ENV-2009-CHC 000098

IN THE MATTER	of an appeal under s120 of the Resource Management Act 1991
BETWEEN	BLUESKIN BAY FOREST HEIGHTS LIMITED Appellant
AND	THE DUNEDIN CITY COUNCIL Respondent

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

Hearing: at Dunedin 19 & 20 April 2010. Site visit: 20 April 2010
Closing submissions received: 6 May 2010

Counsel/Appearances:

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

K M Lloyd for Blueskin Farm Ltd - s274 party

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

DECISION OF THE COURT

Decision issued: 21 May 2010

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

Costs are reserved

Introduction

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

Background

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

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

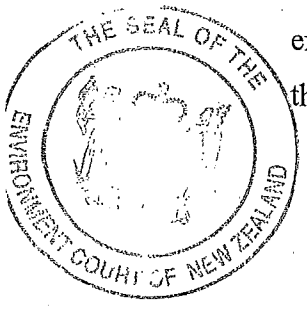
[4] The end result of all of that was that, for reasons which remain obscure, a land use consent had not been granted at all, leaving Blueskin Bay with a subdivision consent for a total of 11 lots, but without a land use consent authorising the construction of houses on them. It was not until sometime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

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

The parties' positions

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

Section 104D – adverse effects more than minor?

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

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

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

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

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

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

> Require rural subdivision and activities to be of a nature, scale, intensity and location consistent with maintaining the character of the rural area and to be undertaken in a manner that avoids, remedies or mitigates adverse effects on rural character. Elements of the rural character of the district include, but are not limited to:
>
> (a) a predominance of natural features over human made features,
>
> (b) high ratio of open space relative to the built environment,
>
> (c) significant areas of vegetation in pasture, crops, forestry and indigenous vegetation,
>
> (d) presence of large numbers of farmed animals ... .

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

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

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

Conclusion on s104D

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

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

Adverse effects

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

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

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

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

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

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

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

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

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

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

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

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

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

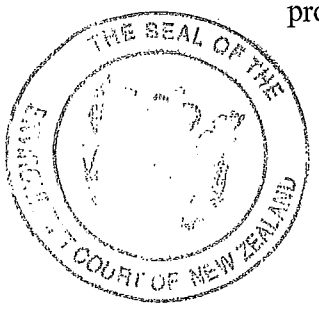
adverse effects would flow from that unlawful activity, it could become all but impossible to grant a resource consent for any activity at all. We have to assume both that the terms of a resource consent will be complied with, and the general law obeyed: - see *NZ Kennel Club v Papakura DC* (A1/2006).

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

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

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

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



Positive effects

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

Permitted baseline

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

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

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

Conclusion on effects

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

Section 104(1)(b) – planning documents

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

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

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

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

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

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

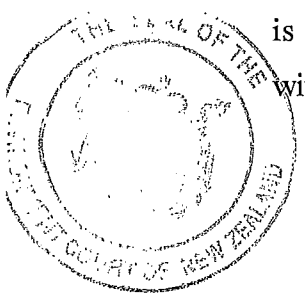
proposal has to be considered on its own merits. If a proposal can pass one or other of the s104D thresholds, then its proponent should be able to have it considered against the s104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides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

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

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

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

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



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

Part 2 – section 8 and section 6

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

Part 2 – section 7

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

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

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

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

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

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

Section 290A – the Council's decision

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

Result

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

Conditions

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

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

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

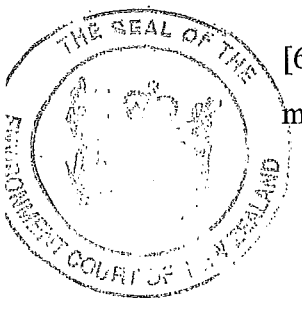
[58] Blueskin Bay responds that the existing conditions require compliance with Mr Moore's landscape mitigation plan including the schedule of species and density of planting. It further states that the estimated growth rates referred to in condition 17 were included in Miss Smetham's evidence to explain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

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

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

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

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



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

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

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

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

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

Costs

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

Dated at Wellington the 21ST day of May 2010

For the Court

C J Thompson

Principal Environment Judge