BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 182

IN THE MATTER	of an appeal under Clause 14 of Schedule 1 of the Resource Management Act 1991 (**the Act**) concerning Variation 1 to the Kaipara District Plan, and an appeal under Section 120 of the Act
BETWEEN	C CALVELEY (ENV-2012-AKL-000138) Appellant MANGAWHAI HEADS HOLDINGS LIMITED (ENV-2013-AKL-000012) Appellant
AND	KAIPARA DISTRICT COUNCIL Respondent

Hearing:	at Auckland 5-9 and 29-30 May 2014
Court:	Environment Judge J J M Hassan Environment Commissioner R M Dunlop Deputy Environment Commissioner J Illingsworth
Appearances:	Mr A Webb for C Calveley and Mangawhai Heads Holdings Limited Mr M Allan for the Kaipara District Council Mr M Savage for Catherine Hawley, John Hawley, Mangawhai Ratepayers and Residents Association, Marunui Conservation Limited, The Friends of the Brynderwyns Society Incorporated (section 274 parties)
Date of Decision:	27 August 2014
Date of Issue:	27 August 2014

DECISION OF THE ENVIRONMENT COURT

The MHHL appeal

A: For the reasons set out:

(a) The appeal is disallowed in part and the Council's decisions are confirmed to the extent that:

(i) Land use consent to establish seven houses on Lot 1 DP 316176 is refused;

(ii) The appellant's application for lots 15 and 17 to 20 to be included as part of the subdivision of Lots 1 and 2 DP 316176 is refused;

(b) To allow for the inclusion in the subdivision consent for the subdivision of Lots 1 and 2 DP 316176 of conditions that give effect to this decision, we direct the Council to confer with the appellant and section 274 parties and file for the Court's approval, within 20 working days of the date of this decision, a full set of conditions that modify the 30 May Draft Conditions in the following respects:

(i) Ensuring Conditions 1p, 1q, 1r, 1s and 2f contain validly specified restrictions and principles to allow for the imposition of associated consent notices (in the manner we indicate for Condition 1p in Annexure A) and making consequential adjustments (as may be required) to those conditions referencing these "consent notice" conditions); and

(ii) Removing draft Condition 1n (concerning the Council's proposed rehabilitation (weed control) plan for the four valley floor wetland areas);

(iii) Removing or amending those draft conditions of the subdivision consent as pertain to Lots 15 and 17 to 20 and/or the land use consent for dwellings; and

(iv) Reflecting our decision in other respects.

(c) Pursuant to section 116(1) RMA, the subdivision consent shall not commence until the date of issue of our final decision on this appeal amending the Council's subdivision consent decision in respect of those remaining consent conditions to which paragraph (b) above refers (or such other date as that final decision specifies);

(d) For the avoidance of doubt, it is recorded that this decision is *final* in respect of our findings in (a) and (b) above, but *interim* in relation to the conditions as they are yet to be finalised;

(e) In the event that mutually agreed conditions are not filed by the Council, leave is reserved for any disputing party to file and serve submissions as to the subject condition(s) within a further five working days of the Council filing the updated conditions in accordance with paragraph (b) above.

The Plan appeal

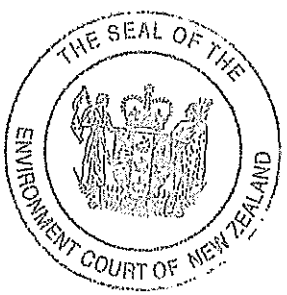
B: For the reasons set out by this interim decision:

(a) We direct the Council to amend Variation 1 to the Plan by the inclusion of a restricted discretionary activity rule to be prepared in accordance with our direction in paragraph (b) below;

(b) We direct the Council to confer with other parties and prepare and file with the Court for approval, draft rule(s) and related provisions for inclusion in Variation 1 to the Plan, to the following effect:

(i) To provide that, in respect of each Lots 1-4 and 6-14 of the subdivision consent the subject of the MHHL appeal (to be identified by appropriate Council consent number), the erection and use of a single dwelling that exceeds 50m^2 gfa on land to which that certificate of title has issued is a restricted discretionary activity provided that:

1. the dwelling does not exceed 350m^2 gfa; and
2. the subdivision consent has not lapsed; and
3. the land use consent for any such dwelling does not commence, pursuant to section 116 RMA, until a certificate of title has issued as a consequence of the subdivision of Lot 2 DP 316176 by the implementation of that identified subdivision consent;



(ii) To specify that the consent authority's power to decline a consent, or to grant a consent and impose conditions on the consent, is restricted to those matters specified in Condition 1p of the subdivision consent in the form to be approved by the Court;

(iii) To consequentially amend Rule 12.10c(1)(b) to reflect the inclusion of this restricted discretionary activity rule;

(c) Pending the issue of our final decision to allow the appeal in part by changing Variation 1 of the Plan in the manner we approve, Rule 12.10c(1)(b) remains unchanged;

(d) Leave is reserved for parties to make application for directions to allow for submissions as to the finalisation of any Plan provision wording issues as may remain in dispute between parties. Any such application must be made on notice and may not be made until after the Council has complied with the directions in (b).

Costs

C: Costs in both appeals are reserved, with a timetable to be set in our final decision(s).

REASONS

[1] Our reasons are in three parts – Part A is a general introduction, Part B concerns the subdivision appeal by Mangawhai Heads Holdings Limited, and Part C the Plan appeal.

PART A - INTRODUCTION

The subject site and environment

[2] These are related appeals in regard to some land at the end of Kapawiti Road, near the coastal township of Mangawhai in the Kaipara district. The land (*the Subject Site/Site*) has an area just over 47 hectares, and runs up a south-facing spur of the Brynderwyn Ranges.

[3] The Ranges are a prominent landscape feature of this part of the Kaipara and of the adjoining Whangarei districts. Under Variation 1: Landscapes to the proposed

Kaipara District Plan, the Ranges are classified as an Outstanding Natural Landscape (*ONL*) and the Site is part of ONL 14 *Bream Tail - Brynderwyn Ranges*.

[4] The Site is in two allotments:

(a) Lot 2 DP 316176 (the *Lower Part*) is 18.102 hectares in area;
(b) Lot 1 DP 316176 (the *Upper Part*) is 29.273 hectares in area. It is bisected by a 4-wheel drive access track that climbs the spur to the south-eastern boundary of the Whangarei district, on the ridgeline.

[5] While indigenous bush now predominates on the Site, historically it was used for grazing. Several grassed clearings (and access tracks) remain visible from public viewing points. Two telecommunication masts are also clearly visible higher up the ridgeline, to the east of the Site.

The rural residential subdivision proposal

[6] In separate applications made in October 2009, Mangawhai Heads Holdings Limited (*MHHL*) applied to the Kaipara District Council (the *Council*) for:

(a) Subdivision consent for a 20 lot development of the Site, and
(b) Land use consent for seven dwellings on the Upper Part of the Site.[1]

[7] "If required", access between the house lots in the Upper Part of the Site and Kapawiti Road was proposed to be via the existing 4-wheel drive track (as a private way). The application also included provision for the underground reticulation of power and telecommunication utilities.[2]

[8] Specific measures were proposed for the protection and enhancement of indigenous bush. These included:

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1 The application is somewhat ambiguous, referring to "seven houses on a lot (2 permitted, 5 additional)" and "5 additional houses" (i.e. on the basis that certificates of compliance are held for the dwellings shown for Lots 16 and 21). However, contour data, building platform and area, area and depth of excavation and other information was included for all proposed dwellings (including those for Lots 16 and 21). That was also the case for the accompanying drawings showing dimensioned floor plans, elevations and yard setbacks (where relevant). In view of that, we accept Mr Webb's explanation that the application was for all seven dwellings.

2 Land Use Consent Application: Subdivision Application Vol 3, Drawings C121 and C127. The application also proposed a vehicle parking bay and truck turnaround areas.

(a) A covenant over almost 19 hectares of the Site for bush conservation, protection and enhancement purposes;

(b) Obligations not to clear vegetation on each house lot beyond the curtilage of each defined dwelling building platform and to maintain remaining bush areas;[3] and

(c) Obligations in relation to pest and weed control.[4]

[9] The development was proposed to be implemented in seven stages over 10 years. MHHL sought a corresponding minimum consent term.[5]

[10] MHHL supported its application with a range of ecological, landscape and visual effects,[6] geotechnical, infrastructural and other technical assessments.[7]

The MHHL appeal

[11] Through its independent commissioner,[8] the Council refused five of the proposed lots[9] and associated dwellings in the Upper Part of the Site.[10] Of the 15 house lots approved, 13 were in the Lower Part of the Site.

[12] MHHL appealed the Council's decisions on both the subdivision and land use applications.[11] Effectively, MHHL's appeal sought to secure the full extent of rural-residential subdivision development it had applied for. It also challenged several of the conditions imposed in respect to the entire Site (and proposed revised conditions).

[13] Four submitters (Marunui Conservation Limited, Friends of the Brynderwyns Society Incorporated, C Hawley, and Mangawhai Ratepayers and Residents

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3 Application for Subdivision for 20 Rural-Residential Lots Kapawiti Road, Mangawhai, Vol 3 (*Subdivision Application Vol 3*) (e.g. Drawings C141-143).

4 Application for Subdivision for 20 Rural-Residential Lots Kapawiti Road, Mangawhai, Lot 2, Annexure 1.

5 Subdivision Application, Vol 1 at [7.1].

6 The visual and landscape assessment included recommended mitigation measures in regard to plantings on lots and the accessway, building heights and materials: Application for Land Use Consent, Kapawiti Road, Mangawhai, Vol 1 (September 2009) (*Land Use Consent Application*) at [1.11], Subdivision Application, Vol 2, Landscape and Visual Assessment at [12.0].

7 Submitted with the subdivision application.

8 Mr David Hill.

9 Lots 15 and 17-20.

10 Lots 16 and 21 were approved in the Upper Part of the Site.

11 Agreed Bundle, p.61, Notice of Appeal at [1].

Association) joined as section 274 parties (*section 274 parties*). They presented a joint case.

The Calveley Plan appeal

[14] C Calveley's appeal (*Plan appeal*) is the last remaining appeal against Variation 1 of the Kaipara District Plan (the *Plan*).[12] Prior to the hearing, C Calveley sought to confine the Plan appeal to assisting MHHL's intended development of the Subject Site, now included in an Outstanding Natural Landscape (*ONL*) classification under the Plan. The appellant gave notice withdrawing most of its original relief and seeking instead an exemption from the $50m^2$ gross floor area requirement in Rule 12.10.3c(1)(b) of the Plan for dwellings on the 13 consented lots of the Lower Part of the Site.[13]

[15] The section 274 parties[14] argued that this change of relief was beyond jurisdiction.[15] We set out why we disagree with that in Part C of this decision.

PART B - MHHL APPEAL

Statutory framework and relevant principles

The statutory framework

[16] The statutory framework for determination of the MHHL appeal is as follows:

(a) Section 290 gives us the same powers, duties, and discretions that the Council had at first instance, and empowers us to confirm, amend, or cancel those decisions (within the scope of the MHHL appeal);

(b) Section 290A requires us to have regard to the Council's decision;

(c) Section 104D specifies a "threshold" requirement which must be passed so that non-complying activities are eligible to be consented;

(d) Section 104 governs our consideration of the appeal;

(e) Section 104B (within the scope of the appeal) says we have discretion to grant or refuse the consents sought, with or without conditions;

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12 We refer to it as "the Plan" (instead of "the proposed Plan") since the Plan is operative except for the Calveley appeal on Variation 1 to the Plan.

13 Memorandum of Counsel for the Appellants, dated 5 May 2014.

14 The s 274 parties were the same as those who joined the MHHL appeal, except that C and J Hawley joined in the joint capacity (rather than C Hawley). Each were submitters on Variation 1.

15 Submissions on behalf of the section 274 parties, 29 May 2014. The Council did not oppose the change to relief.

(f) Sections 108 and 220 govern our discretion to impose conditions (section 220 applying only to the subdivision consent appeal); and

(g) Part 2 describes the RMA's purpose and principles to inform, guide and direct our determination of the appeal.

Non-complying activity classification and "bundling"

[17] It was common ground (and we agree) that:

(a) The Plan determines the activity classes for the subdivision and associated dwellings;[16] and

(b) Both the subdivision and associated dwellings should be "bundled" to be classified as "non-complying" activities.[17] That is in view of the inherent overlap between these activities and their consequential or flow-on effects.[18] For instance, the proposed subdivision consent conditions are designed to mitigate effects of the proposed dwellings on landscape values associated with the ONL.

Approach to assessing effects on the environment

[18] Determining the MHHL appeal requires that we assess the effects of the proposed subdivision and land use on the environment.[19]

[19] Part of that is to determine the state of the environment that would be affected. That is largely a factual enquiry on the evidence. As the perspective must be of the future (i.e. when the proposed activities are taking place), it involves a prediction as to the likely future state of the environment to be affected.

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16 That is by virtue of section 86F of the Act, by reason that the Calveley appeal is the only outstanding appeal on, and does not challenge those aspects of, the Plan.

17 The Plan classified the dwellings as a discretionary activity land use and the subdivision as a non-complying activity.

18 Case law indicates bundling is appropriate in such circumstances. See *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA), at [22], where the Court of Appeal found the absence of such overlap meant bundling was not appropriate; *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350, at [15], where the High Court found the presence of such overlap made a bundling approach appropriate; and *Tairua Marine Ltd v Waikato Regional Council* [2001] NZRMA 350, at [30], where "overlap" was described in terms of whether consideration of one application would affect the outcome of the other.

One of the alternative "threshold" tests for non-complying activities under section 104D, requires us to be satisfied that the adverse effects of the proposed subdivision and land use on the environment will be "minor" (section 104D(1)(a)). If section 104D is passed, section 104(1)(a) specifies that we must, subject to Part 2, have regard to actual and potential effects on the environment of allowing the proposed activities (together with other matters).

[20] A future environment can be modified through the implementation of presently-unimplemented resource consents or enjoyment of permitted activity rules. On that matter, the Court of Appeal decision in *Hawthorn*[20] is the leading authority. The passage usually cited is at [84]:

> In our view, the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[21] In *Save Kapiti Inc,*[21] D Gendall J observed that the distinction the Court of Appeal sought to draw in *Hawthorn* was between activities that were likely to happen and those that were not. That was in the sense that it was not appropriate to consider a future environment that was artificial.[22]

[22] MHHL argued that we should treat the future environment as being modified through the exercise of a list of current statutory rights and authorities it had obtained for the Subject Site.[23] All had been obtained after June 2009.

[23] They included a certificate of compliance (*CoC*) for two dwellings, and CoCs for farming, vegetation clearance and forestry (issued in 2009), and for track maintenance (issued in 2010). All of these CoCs will be superseded by exercise of the consents under appeal unless they have earlier lapsed (which is probable). On that basis, we agree with Mr Savage that it would be artificial and invalid to treat any of them as modifying the future environment. The same goes for a 10 lot subdivision consent for the Site that MHHL invited us to treat as modifying the future environment. That consent, which commenced in May 2012 would be superseded by the exercise of the consents under appeal.

[24] In addition, MHHL suggested we treat the environment as modified by the exercise of a set of unimplemented building consents (issued in 2011) for building a

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20 *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; [2006] NZRMA 424 (CA).
21 *Save Kapiti Inc v New Zealand Transport Agency* [2013] NZHC 2104(HC), D Gendall J.
22 *Save Kapiti Inc* at [70].
23 Appellant's opening submissions at [12]-[20].

number of sheds.[24] The age of the building consents suggests they have lapsed or will do shortly. In any case, their exercise would be superseded by the exercise of the consents under appeal. Therefore, it would be invalid for us to regard them as sources of environmental modification. Finally, Mr Webb proposed that we treat the future environment as being modified through the exercise of a permission to form a right of way which the Council apparently granted under the Local Government Act 1974. As that permission is not an RMA right, we consider it would be invalid to treat it as modifying the future environment.

Whether we can compare the environmental consequences of other scenarios

[25] Mr Webb also argued that these various statutory rights and authorities were relevant in terms of assessing the overall merits of MHHL's appeal (under section 104(1)(c)). That was in the sense that MHHL could revert to implementing some or all of them, in the event that it did not secure its preferred option or that option was rendered unviable.[25]

[26] As MHHL did not call any evidence on what would trigger it to revert to other options, Mr Webb's submission invited speculation, which we are not prepared to do. However, we accept that we can take judicial notice of the potential for MHHL to elect not to exercise the consents it secures following determination of its appeal.

[27] The subdivision consent conditions (and associated consent notices) are the means by which the proposed bush protection covenants and restrictions on vegetation clearance would be secured and enforced. Therefore, were MHHL to elect not to exercise the consents it secures, that would mean there would be no associated obligation to protect against bush clearance other than as provided for under the Plan (unless the 10 lot subdivision consent were exercised).

[28] We accept that it is relevant to take some account of that risk, under section 104(1)(c). For example, it is relevant to our application of section 6(c) (to "recognise and provide for" "the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna" as a "matter of national importance").

24 Joint Statement as to Contested Issues, 4 May 2014 at [21].
25 Appellant's opening submissions at [18], [19]; Appellant's reply submissions at [80].

However, in the absence of evidence, we can only draw broad conclusions on the extent of this risk.

[29] The position is similar in regard to landscape protection and visual effects. Non-exercise of the consents would mean protections under the consent conditions would not be triggered and matters would default to the lesser protections assured by the Plan (qualified by any existing use rights).

[30] We return to consider those comparisons in our later assessment of environmental effects.

Permitted baseline – section 104(2)

[31] It was common ground (and we agree) that our assessment of effects on the environment should not seek to discount the significance of any adverse effects according to the "permitted baseline" principle.[26]

Issues as to conditions – Newbury principle and Estate Homes

[32] The MHHL appeal seeks changes to a number of the conditions imposed by the Council's resource consents' decision. In considering issues as to conditions, we have applied the so-called *Newbury*[27] test. The test is that, to be valid at law, a resource consent condition must fulfill the following three conditions:[28]

(1) It must be imposed for a planning purpose;

(2) It must fairly and reasonably relate to the development for which permission is being given; and

(3) It must be reasonable, that is to say, it must be a condition which a reasonable local authority properly advised might impose.

26 In his opening submissions, Mr Webb noted that MHHL does not rely on the Court exercising discretion to consider a permitted baseline. That was also the position of other parties.

27 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER 731.

28 *Newbury District Council v Secretary of State for the Environment* 1 All ER 731 at 761.

[33] The application of the *Newbury* test to the RMA was clarified by the Supreme Court in *Estate Homes,*[29] as follows:

> ... conditions must be imposed for a planning purpose, rather than one outside of the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.
>
> ...
>
> The majority in the Court of Appeal appears to have decided that, in combination, s 104 and common law principles required that there be a causal link between conditions that might be imposed and effects of the proposed subdivision.
>
> ...
>
> We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not, for example, relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

The planning framework

[34] Under section 104(1)(b) we must, subject to Part 2, have regard to various policy and planning instruments. We find that the relevant statutory instruments are[30] the Northland Regional Policy Statement (*RPS*) and proposed Regional Policy Statement (*proposed RPS*), and the Plan.

[35] The RPS includes objectives on outstanding natural landscapes (part 19.3) and ecology (part 23.3). The proposed RPS also includes provisions that address the effects of activities on indigenous ecosystems and species and outstanding natural landscapes.[31] As the proposed RPS is currently at the appeal stage,[32] however, we treat the operative

29 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149; (2007) 13 ELRNZ 33 at [61]-[66].

30 We agree with Mr Raeburn (Raeburn, evidence-in-chief at [8.7]) that the Site is not in the coastal environment. Therefore, we find that the New Zealand Coastal Policy Statement 2010 is not relevant. It was common ground (and we agree) that there are no relevant national policy statements, national environmental standards or regulations.

31 O'Connor, evidence-in-chief at App. 5.

32 O'Connor, evidence-in-chief at [67].

RPS as the dominant policy statement. We agree with Mr Raeburn[33] that the relevant Plan objectives, policies and other provisions give effect to the RPS in relevant respects.

[36] As Mr Raeburn identified, the Plan's relevant objectives and policies addressed the central issues in the MHHL appeal concerning access design, landscape and visual amenity and ecology. The essential difference between some of the planning experts was in how those provisions should influence consideration of the issues.

[37] We set out our findings on the influence of the various Plan (and RPS) objectives and policies in the next part of this decision, in the context of our findings on the various substantive issues.

Our findings on the substantive issues

Joint memorandum as to contested issues

[38] The evidence revealed the substantive issues for our determination of the MHHL appeal according to the statutory framework we have set out. A joint memorandum of the parties (*Joint Memorandum as to Contested Issues*) provides a helpful framework for our consideration of those issues.[34]

Whether ROW 1 enables safe access

[39] The *New Zealand Oxford Dictionary* defines "safety" as (relevantly), "the condition of being safe; freedom from danger or risks".[35]

[40] The safety or otherwise of ROW 1 for its intended users (particularly those who would live in or visit the dwellings sought for the upper part of the site) is relevant to our consideration of the proposal under Part 2, RMA. In particular, section 5(2) defines "sustainable management" in terms that refer to enabling people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.

33 Raeburn, evidence-in-chief at [8.6].

34 Memorandum of Counsel for the respondent Attaching a Joint Statement of Contested Issues, dated 4 May 2014 (*Joint Memorandum as to Issues*).

35 *New Zealand Oxford Dictionary*, Oxford University Press (2005).

[41] In addition, the Plan includes the following Rural zone Policy[36] (and associated explanations):

> **12.6.17**
>
> **By requiring the provision of safe and practicable vehicular access from a public road to each site.**
>
> *Vehicular access to sites must be practicable, safe and convenient, and should avoid adverse effects on the environment. This may require the upgrading of existing roads or the provision of new roads within the subdivision to connect the subdivision to the District roading network.*

[42] As noted, MHHL's consent application proposed that dwellings in the Upper Part of the Site be served by a private way (referred to as *ROW 1*) running along the alignment of the present 4-wheel drive track. The application did not initially propose any upgrade to the existing track, and proposed this access subject to the qualifier "if required". It was explained that ROW 1 would have:

(a) A horizontal alignment of 5.5m (in the lower 660m section), 4.5m (in the middle 610m section) and 3m wide (in the top 430m section);[37] and

(b) A variable vertical alignment including grades ranging up to 30% (over a 60m length in the lower section) and greater than 20% (over lengths totaling 390m) in the middle section including a 120m length in excess of 27.9%.[38]

[43] In the face of the Council commissioner's finding that this is a "difficult and potentially hazardous accessway",[39] MHHL did not propose any change to its alignment on appeal. Instead, it proposed to address safety issues by the addition of a set of "mitigation" measures, namely:[40]

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36 We note that Mr Raeburn also identified as relevant Policy 12.6.18 *(by ensuring that roads provided within subdivision sites are suitable for the activities likely to establish on them and are compatible with the design and construction standards of roads in the District roading network to which the site is required to be connected to)*. However, the Plan defines "road" in terms that link to section 315 of the Local Government Act 1974. As ROW 1 would remain a private way, and not vested as a public road, we are not satisfied that it would come within that definition. As such, we do not consider Policy 12.6.18 would apply.

37 Young, evidence-in-chief at [8].

38 Bishop, evidence-in-chief at [5.1], [5.2].

39 Agreed Bundle, p.11 ff. [Council decision], [24.21].

40 Young, evidence-in-chief at [47].

(a) Use of a high friction exposed aggregate concrete surface;

(b) A prohibition on heavy commercial vehicles and a truck length restriction;

(c) Warning signage;

(d) A one way traffic signal system for the narrowest section between chainages 1060 and 1670;

(e) Retention of the parking area;

(f) Passing/stopping bays;

(g) Additional curve widening; and

(h) Safety barriers.

[44] The essential issue is whether those (and some other) "mitigation" measures are sufficient to ensure safe access to the Upper Part of the Site, or whether a more fundamental access re-design (particularly as to the horizontal and vertical alignment) is required. If the latter, a further issue arises as to whether we have jurisdiction (within the scope of the MHHL appeal) to provide for a fundamental re-design of the access.

[45] On the question of the safety of ROW 1, we heard from three transportation engineers – Mr Philip Young (for MHHL), Mr Neville Bishop (for the Council) and Mr Dean Scanlen (for the section 274 parties). In addition to their individual statements, these experts produced three joint statements.[41] We heard from Mr Craig Jepson (for MHHL) on the matter of the suitability of aggregates and Mr Scott Parker (for MHHL) on the capacity of trucks to negotiate ROW 1. We also heard from two New Zealand Fire Service (*NZFS*) officers (Mr Philip Nesbit, for MHHL and Mr Michael Moran for the Council) on the issues associated with NZFS and other emergency service vehicles accessing the Upper Part of the Site.[42] In addition, the planning experts addressed related Plan provisions.

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41 Traffic Engineering Caucusing Statement of P Young, N Bishop and D Scanlen (30 July 2013) (*30 July Joint Statement*), Updated Traffic Engineering Caucusing Statement of P Young, N Bishop and D Scanlen (9 December 2013) (*9 December Joint Statement*), Joint Statement of Transportation Engineering Witnesses, 8 May 2014 (*8 May Joint Statement*).

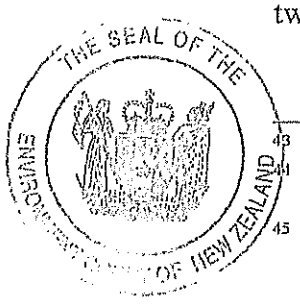
42 In addition, we received unsworn rebuttal and supplementary statements of evidence from Mr Michael Lister, NZFS Area Commander for the Whangarei Kaipara Area. The evidence was on behalf of the Council and entered by consent (in view of Mr Lister's then unavailability for medical reasons). Mr Lister's evidence was as to fire fighting services and capability including in rebuttal of Mr Nesbit.

[46] Mr Bishop, for the Council, explained what various standards and guidelines specify for vertical and horizontal alignments, as follows:[43]

Rule 12.10.25 of the Plan	Amongst its permitted activity driveway standards, it specifies a minimum width of 5.5m (if serving 7 – 30 dwellings) and maximum gradients of 1:5 (sealed) and 1:8 (gravel). Amongst its restricted discretionary activity criteria, it refers to whether, and to the extent, the vehicle access meets the Rule's[44] performance standards, and the Kaipara District Council's Engineering Standards 2011 (*Council Standards*).
The Council Standards	Amongst other things, these specify (in Table 5.1), for household equivalents of 4-6 dwellings in the rural sector, a minimum 50m sight distance and maximum 12.5% gradient (with an expectation of specific Council approval of gradients greater than 20%).
Austroads "Guide to Road Design Part 3: Geometric Design"	This indicates grades of 15-33% as "very slow" for light vehicles and "not negotiable" for commercial vehicles (with a note that, in terms of suitability, such grades are only to be used "in extreme cases and be of short lengths (no commercial vehicles))".
NZS 4404:2010 Land Development and Subdivision Engineering (*NZ Standard*)	This indicates maximum grades no steeper than 1 in 5, for private ways, private roads and accesses (although noting that grades of 1 in 4.5 may be used on straight lengths of access over a distance of up to 20m).

[47] As Rule 12.10.25 is a permitted activity rule, it does not operate as a binding standard. However, together with the other standards and guidelines, it provides some context for our consideration of the inherently relative concept of safe access design. The fact that the proposed ROW 1 was so much at variance from these various standards and guidelines put a significant premium on reliable expert opinion.

[48] As is the Court's usual practice, we directed that the transport engineers caucus with a view to narrowing points of difference. However, very little was achieved by the two joint witness statements of the transportation engineers lodged prior to the hearing.[45]



43 Bishop, evidence-in-chief at [3.4], [4.1], [4.4]-[4.15].
44 We agree with Mr Bishop that the reference in this provision to Rule 12.10.24 (signage) is a typographical error, and the reference should be treated as referring to Rule 12.10.25.
45 30 July Joint Statement, 9 December Joint Statement.

Following further Court directions during the hearing, the witnesses undertook further caucusing. Their resulting 8 May Joint Statement specified a series of agreed design conditions. However, it also revealed that, on the key issues of vertical and horizontal alignment, the opinions of Messrs Bishop and Scanlen remained fundamentally different from those of Mr Young.

[49] Mr Scanlen indicated that a vertical gradient above 22.2% could be satisfactory, provided that the maintenance regime would ensure that the carriageway was free of detritus and moss at all times.[46] Mr Bishop remained of the view that a gradient above generally 20% was not acceptable (other than in straight lengths less than 20 metres, where he considered 22.2% would be acceptable). In answer to the Court, following presentation of the 8 May Joint Statement, Mr Bishop said:

> I'm not convinced that, in this particular environment ... grades of up to 30% are acceptable from a safety point of view. And I stand by the baseline from the Standards and Guidelines that we collectively use throughout New Zealand although I do accept that there can be some departures from those ... where appropriate. As this stage, I cannot see ... the mitigation measures proposed ... give me confidence that this particular proposal could be as safe as I would prefer to see it.[47]

[50] On the matter of vertical alignment, Mr Young disagreed:

> No I think the grades as they stand on the [longitudinal] section can be accommodated. The big issue with safety ... is that traffic volume [is] very low, the speeds are very low, all of the people who will use it are familiar, they are volunteers, it's not a public road where you'd have things applicable to all comers, so I think that the disadvantages of grade can be overcome by first of all having a one-way operation and as wide [a] pavement as possible ... And as we can see from the video, and anybody who has actually driven up there, the grade while you're there on the site is not so much of an issue as it is when you're looking at a series of plans.[48]

46 8 May Joint Statement, table, item 11.
47 Transcript, p.504 at [23].
48 Transcript, p.505 at [2].

[51] On the matter of horizontal alignment, the 8 May Joint Statement recorded that safety could be improved in the sections where a 4.5 metre and 3 metre width was proposed. However, it also recorded that no agreement was reached as to the wording of a suitable condition.[49]

[52] We were not satisfied that Mr Young had a sufficiently reliable basis for the opinion he presented. It became apparent during Mr Allan's cross-examination that Mr Young had not prepared, directed or even supervised the preparation of the set of design plans he presented.[50] He relied significantly on a video he produced[51] showing a truck and cars driving up and down, and turning on the existing track. However, we found the video of limited value for testing the effectiveness or otherwise of his mitigation measures. He gave various examples of roads and accesses[52] in New Zealand with vertical alignments significantly steeper than the relevant guidelines. However, none was of an access in an environment bearing any sensible comparison.

[53] We acknowledge as valid Mr Young's point that the more challenging sections of ROW 1 would have very low traffic volumes and speeds compared to a public road, and most of its users could be expected to have close familiarity with it. However, we do not consider those factors mean we can rest assured that Mr Young's proposed mitigation measures would be adequate. That is especially given that the environment presents a combination of steep terrain, sharp back-to-back curves, dense adjacent covenanted vegetation and limited forward visibility. The dense vegetation would cause shading, dampness and detritus. We were not satisfied that the associated loss of traction risk would be adequately answered by a maintenance condition alone. This

49 8 May Joint Statement, table, items 1 and 2. In addition, Messrs Scanlen and Bishop recorded that "it may not be feasible to implement" such a condition. We understood that to refer to those witnesses' uncertainty as to the legal limits of what a condition can address within the scope of the application and appeal. We return to that topic later.

50 Transcript, p.156 at [25]-[34], p.157 at [1]-[5].

51 Young, rebuttal evidence at [24], Annexure C.

52 Famous amongst those is Baldwin Street, Dunedin, which Mr Moran explained was used by the NZFS for training. Transcript p.202 at [19]-[22].

would leave mitigation of the loss of traction risk overly reliant on successive dwelling owners and/or the management entity continuing to comply with the condition.[53]

[54] We have a related more general concern that, as a private way, ROW 1 would be at greater risk of deterioration over time than would be the case if it were to be vested in the Council as a local road. The Council made it clear to us that it would not want to have it vested.

[55] For all those reasons, we are persuaded that Mr Bishop was correct to observe that the proposed gradients would:

> ... present a risk to road users from excessive speeds and the inability to restrain an out-of-control vehicle, which when associated with the reverse curves presented in the mid-section of [ROW 1], give rise to a very high risk of severe or potentially fatal crashes.[54]

[56] Therefore, on the matter of vertical and horizontal alignments, we prefer the opinions of Messrs Bishop and Scanlen over those of Mr Young.

[57] As a result, we are in substantial agreement with the Council commissioner's findings.[55]

[58] The flaw in MHHL's approach has been in rigidly adhering to the alignment of the existing 4-wheel drive track. Overall we consider that the nature of the environment through which ROW 1 would pass is such as to require more than the mitigation measures Mr Young has proposed (and which were supplemented by the 8 May Joint

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53 On the topic of traction loss, we record that we were not persuaded that there would be any material risk that aggregate polishing would occur over time. On this topic, we prefer the opinions of Mr Jepson and Mr Young over that of Mr Bishop. Mr Jepson impressed us as a witness with significant practical experience as to the qualities and tolerances of different aggregates. By contrast, Mr Bishop did not appear to draw from his own experience and did not provide other reliable support for his theory. Specifically, he drew from an article concerning aggregate polishing in a high speed highway setting, well removed from the very low traffic loading of ROW 1. He also drew from a photograph of a concrete driveway demonstrating surface wear and reduced friction. However, his answers to the Court indicated that he had no knowledge of how the concrete driveway was constructed, what its concrete strength was, or what nature of aggregate was used. However, that does not overcome our concern as to the risk that traction loss could occur in this environment from the causes we have referred to.

54 Bishop, evidence-in-chief at [3.2].

55 Agreed Bundle, p.31, [24.21].

Statement). Specifically, on the weight of evidence, we find that a vertical alignment of generally not more than 22.2% would be necessary along most of the length of ROW 1.

[59] Finally, we note that our findings are not sensitive to MHHL's argument that we should assess the safety risk on the basis of discounting the two dwellings for which CoCs are held in the Upper Part of the Site.[56] Whether the precise number of dwellings to be accounted for is five or seven, we find that the safety deficiencies of proposed ROW 1 would be contrary to Policy 12.6.17 of the Plan. Those deficiencies are such that granting consent to the additional lots and dwelling in the Upper Part of the Site would not promote the sustainable management purpose of section 5(2).

Jurisdiction and scope

[60] That leads us to the second key issue on this topic, namely whether we have jurisdiction, within the scope of the MHHL appeal, to allow for necessary changes to the alignment of ROW 1.

[61] Realigning the relevant sections of ROW 1 horizontally and vertically would require significant earthworks (and associated indigenous vegetation clearance). We have no evidence on which to draw conclusions on the landscape and ecological effects of those additional activities.

[62] A related complication is that MHHL has not applied for the requisite resource consents. As the Site is within an ONL, Rule 12.10.1b applies. While we cannot be precise (in the absence of evidence as to design), we note Mr Raeburn's opinion that the earthworks could be a restricted discretionary activity and the vegetation clearance a discretionary activity under the rule.[57] In any event, it is likely to be appropriate to bundle these activities together with the related subdivision and dwellings so that they are all treated as non-complying. The inherent overlap between all these activities is emphasised by the fact that Rule 12.10.1b specifies consideration of the ONL values in its assessment criteria. It is also emphasised, in regard to ecology, in Policy 6.6.3:

56 MHHL opening submissions, Transcript p.4 and [9]-[19], p.8 at [14]-[20], p.22 at [18]-[29].
57 Raeburn, evidence-in-chief at [5.7a, b].

> By managing earthworks and vegetation clearance in all areas of the District in order to avoid, remedy or mitigate adverse effects on significant ecological areas, recognising that complete information on the exact geographic location of all these valued areas may not be available.

[63] In terms of the difficulties this causes, we were assisted by Mr Raeburn's answers to our questions of him.[58]

[64] We cannot draw any firm conclusion as to the effects that the significantly greater excavation and vegetation clearance would have or as to the Plan's related objectives and policies, in the absence of relevant evidence. As such, we cannot be satisfied that the requirements of section 104D would be met. Nor can we draw any safe conclusions as to whether a redesigned access would satisfy sections 6(b) and (c) RMA (as to outstanding natural landscapes and areas of significant indigenous vegetation and significant habitats of indigenous fauna).

[65] In his closing submissions, Mr Webb invited us to consider issuing a decision specifying the parameters for a safe access, acknowledging that other consents may be required to achieve it but leaving the implementation risk with MHHL.[59]

[66] We do not consider that we could make a decision that granted the consents MHHL seeks for the Upper Part of the Site. MHHL's application was framed on the basis that the existing access track would be used. It did not seek to encompass earthworks and vegetation clearance as would trigger Rule 12.10.1b. The assessment criteria of Rule 12.10.1b and Policy 6.6.3 demonstrate that those activities cannot be regarded as peripheral. An applicant can secure no more than has been applied for: *Shell New Zealand Ltd v Porirua City Council.*[60] We have no jurisdiction to expand the scope of what has been applied for, in determining the appeal: section 290.

[67] The best that can be offered, in regard to this option, is for MHHL to take cognizance of our reasoning should it re-consider its position in light of our decision.

58 Transcript, in answer to Commissioner Illingsworth and Judge Hassan – pp 641-646.
59 Transcript Part 2 Mr Webb closing p.132.
60 CA57/05, 19 May 2005, at [7]. See also *Sutton v Moule* (1992) 2 NZRMA 41 at 46; *Darroch v Whangarei District Council* A18/93 at p.27; *Manners-Wood v Queenstown Lakes District Council* W077/07 at [22].

[68] Alternatively, Mr Webb invited us to issue an interim decision for the purpose of enabling further evidence to be called. Compared with the alternative approach of declining the consents, he submitted that an interim decision would be comparatively shorter and less laboured, and probably less costly, for all parties.[61]

[69] For the following reasons, we do not consider this option appropriate.

[70] MHHL did not cite authority for its adjournment request. However, *AFFCO*[62] remains the leading authority. Where an applicant had omitted to apply for some of the consents necessary to implement its proposal, the Planning Tribunal granted an adjournment to allow the gap to be filled.

[71] However, unlike us, the Tribunal was satisfied that the substance of the proposal was already before it and that an adjournment would not unduly prejudice other parties.

[72] By contrast, the form of access design we have found necessary is not part of MHHL's access proposal (either as reflected in its application or the evidence before us). Even in light of the 8 May Joint Statement of the transportation engineers, Mr Webb maintained that MHHL considered "its design is OK, even for the extra lots".[63] While we have a broad adjournment discretion (through s 269), we must be careful to keep within the scope of MHHL's appeal in exercising it.

[73] There is also an issue of potential prejudice to other parties (including those not represented before us).

[74] The potential for prejudice is aggravated by the fact that the earthworks and vegetation clearance activities, as inter-related activities, should be bundled with the subdivision and dwelling activities. That is in order that the effects can be considered holistically in the manner that the Act and the Plan intend. The parties before us have not been able to inform our findings on those wider inter-relationships so that we could properly account for them in our decision.

61 Transcript Part 2 Mr Webb closing p.134.
62 *AFFCO New Zealand Limited v Far North District Council* (1994) 1B ELRNZ 101; [1994] NZRMA 224.
63 MHHL closing submissions, Transcript, p.134.

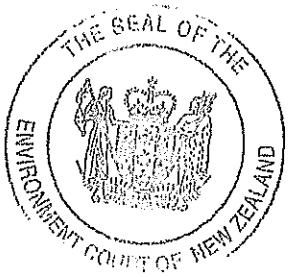
[75] While directions for further evidence could address this to some extent, it would be on the basis that we have in this decision recorded findings on the subdivision and land use activities. In any case, to attempt to cover this gap through directions for further evidence would also be potentially prejudicial to those who could seek to become section 274 parties as submitters on applications for excavation and vegetation clearance consent.

[76] At this point, we note that the ultimate decision made by the Tribunal in *AFFCO* (following its grant of adjournment), was to allow AFFCO's appeal and cancel the Council's resource consents decision. That occurred in circumstances where Northern Abattoir sought a further adjournment, which the Tribunal declined. The reasons are recorded by the Tribunal in its Record of Oral Decision.[64] The Tribunal's primary concern was that "the present proceedings have become unduly complicated". Those complications included "the possible participation, at a late stage, in the original appeals, of parties who did not take part in the original hearing of those appeals" and "the possibility of reopening the original appeals to hear fresh evidence" on the basis of an application by one of the new parties. Similar concerns and complexities arise in the current proceedings.

[77] For those reasons, to the extent we have any discretion to grant an adjournment, we decline to do so.

[78] In light of our earlier findings that ROW 1 as proposed would pose unacceptable safety risks for its intended users, we find that it would be contrary to both the RMA's sustainable management purpose (in section 5(2)) and Policy 12.6.17 to grant consents to the Lots 15 and 17 to 20 and the associated dwellings sought in the Upper Part of the Site.

[79] Therefore, we decline those aspects of MHHL's appeal.



[64] *AFFCO v Northland Regional Council* A21/95, delivered 13 March 1995.

Ecology issues

[80] On these issues, we heard from three ecologists – Mr Mark Poynter (for MHHL), Mr Myles Goodwin (for the Council) and Dr Andrea Julian (for the section 274 parties).

[81] In addition, we heard from three witnesses called by the section 274 parties on the topic of dogs and kiwi. Dr Hugh Robertson is a principal scientist with the Department of Conservation and long term researcher and peer-review author on kiwi. Mrs Wendy Sporle is a contract employee with Kiwis for Kiwi (a national charitable trust) with particular experience in advising on what is called "Kiwi Aversion Training" for dogs). Mrs Catherine Hawley is a section 274 party, and Managing Director of Marunui Conservation Limited (*Marunui*), a privately-owned Brown Kiwi sanctuary.

[82] The ecologists agreed that "covenanting the bush on the property which includes the [former] N65 feature, is a significant environmental benefit".[65] Within that context, the ecology issues contested were confined. They concerned the topics of dogs and risk to kiwi, Hochstetter's Frog habitat, wetlands, and pest management.[66]

[83] As context for the consideration of those issues, section 6(c) provides:

> 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 ... (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[84] As to the meaning of "areas of significant indigenous vegetation" in section 6(c), the Plan refers to triggering criteria in the RPS.[67] Those indicate that an area's vegetation can be treated as "significant", for the purposes of section 6(c), if the vegetation would form[68] "ecological buffers, linkages or corridors to other areas of significant vegetation or significant habitats of indigenous fauna". The evidence we discuss shortly satisfies us that the Site's indigenous vegetation is part of such a corridor. On that basis, we are also satisfied that section 6(c), RMA applies.

65 Joint Witness Statement of Ecologists (undated) arising from 3-17 December caucusing (*Joint Ecologists' Statement*), [4f]. The N65 feature was a provision of the former district plan, serving to identify an area with section 6(c), RMA qualities.

66 Joint Memorandum as to Contested Issues, 4 May 2014.

67 See [6.3] of Chapter 6 on Ecological Areas.

68 See RPS App III at [5].

[85] In addition, we were referred to relevant Plan and RPS provisions on ecology. Of most relevance are Plan Objectives 6.5.1-6.5.3 and Policies 6.6.2-6.6.3. In the interests of economy, we do not set them out.

Dogs/risk to kiwi

[86] The Council and the section 274 parties sought that the following condition imposed by the Council's consent decision be retained:[69]

> A consent notice is to be imposed on each title requiring that no stock, cats, dogs or mustelids are permitted on any of the proposed lots except where stock are contained behind stock-proof fencing outside of covenanted areas.

[87] MHHL sought that the condition be modified such as to allow dogs to be present outside the bush covenanted areas provided that they have been certified under the Kiwi Aversion Training certification programme.[70]

[88] As to those respective positions, the Joint Memorandum described various sub-issues. From the substantial body of evidence heard, we reach the following findings.

[89] Marunui is a 426 hectare QEII Trust covenanted property[71] approximately 2km to the west of the Site. The 236 hectare Brynderwyn Scenic Reserve is approximately 1km from the western boundary of the Site.[72] With the support of the Department of Conservation, a programmed release to Marunui of Brown Kiwi, a threatened species with a conservation status of "Nationally Vulnerable",[73] began in 2013. It is expected that there will be 40 founding birds released there by 2015[74]. The aim is to return a viable population of Brown Kiwi to their recent distributional range in accordance with the objectives of the Kiwi Recovery Plan 2008-2018.[75]

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69 Agreed Bundle, tab 2, p.44.

70 In his opening submissions for MHHL (at [45]), Mr Webb also offered an amended condition to require dogs to be contained within a secured kiwi-proof run if unleashed and to be excluded from covenanted areas.

71 Hawley, evidence-in-chief at [5].

72 Dr Robertson explained that the Reserve boundary was approximately one kilometre from the western boundary of the Site (Robertson, EIC [5.13], [5.14]). The Scenic Reserve, located between Marunui and the Site, is shown in Mrs Hawley's EIC, Attachment A.

73 Robertson, evidence-in-chief at [6.6] (referring to *Robertson et al*, 2013).

74 Dr Robertson, evidence-in-chief at [1.5]. Dr Robertson is a long-term researcher and peer-review author on the subject of Brown Kiwi. Since 1991, he has worked as a scientist conducting and overseeing research work on kiwi, including as a member of the Kiwi Recovery Group. More particularly, since 1994 he has been involved in a long-term study of Brown Kiwi in central Northland.

75 Robertson , evidence-in-chief at [1.5], Kiwi Recovery Plan 2008-2018 (*Holzapfel et al*, 2008).

[90] As the Brown Kiwi population at Marunui increases, birds will need to disperse to establish their own territory".[76] We accept Dr Robertson's opinion, based on his experience in Northland, that "the prospects of re-establishing a viable population of Brown Kiwi in the Brynderwyn Hills are very good".[77] It was explained to us that the Site is well within the dispersal range of Brown Kiwi.[78] We also understand that the Scenic Reserve provides continuous suitable forest habitat between Marunui and the Site (and eastwards of it nearly as far as Bream Tail) with "no major obstacles in the way to prevent dispersal of kiwi such as rivers or tidal inlets".[79] On that basis, we accept that there are good prospects that kiwi will become established in the Reserve and a realistic potential that they will reach the Site.

[91] The evidence demonstrated to us that dogs are a serious risk to kiwi populations (particularly of Brown Kiwi) in Northland.[80] Dr Robertson explained that the life expectancy of adult kiwi in Northland (14 years) is about a third of what it is in locations where dogs (and ferrets) are scarce.[81] We accept that the successful dispersal of kiwi beyond Marunui will require ongoing effective predator management, especially of dogs. We heard that, if pest control stops, pests will very rapidly return.[82] There is added risk here in the fact that the Reserve's predator control programme relies on volunteers. As for the many private properties adjacent the Site, we understand that the potential for kiwi dispersal is unknown but likely to be limited to those properties with active predator control.[83] We understand, from Dr Robertson, that kiwi on properties

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76 Robertson, evidence-in-chief at [5.15].

77 Robertson, evidence-in-chief at [6.10].

78 Robertson, evidence-in-chief at [5.1]ff. Dr Robertson explained that, although the ability of kiwi to disperse is limited relative to other species, some young Brown Kiwi are known to disperse over relatively long distances. He said that, in one study it was shown that the "mean total dispersal distance, measured as the sum of all inter-capture distances, was 13.3 km, and the maximum distance was 54.9 km". (Mr Goodwin also regarded the bush of Marunui, the Scenic Reserve, and the Site as effectively "continuous", Goodwin, evidence-in-chief at [4.7]).

79 Robertson, evidence-in-chief at [5.13].

80 Robertson, evidence-in-chief at [6.6] (referring to *Robertson et al*, 2013). Dr Robertson also referred to statistics from peer-reviewed journal articles. In one study of 248 adult birds over a four year period (1994-98), 44% of bird deaths were caused by dogs. The study also showed 32% of sub-adult deaths were attributed to dogs. In a second (and we presume extreme) example about 500 Brown Kiwi in the Waitangi Forest are believed to have been killed by a single dog over a six week period.

81 Robertson, evidence-in-chief at [3.2].

82 Transcript, p.372

83 Joint Witness Statement of Ecologists (undated) arising from 3-17 December 2013 caucusing, [4(c)].

between the Scenic Reserve and the Site[84] would be at risk as they are at all mainland New Zealand sites.[85]

[92] It was explained that the Kiwi Aversion Training programme run by the Department of Conservation, although designed primarily for hunting and working dogs,[86] is increasingly being used to train domestic dogs.[87] We were told that the training would offer benefits for all dogs, although it would not eliminate the risk. Although the RMA is not a "no risk" statute, we understand from the evidence that some trained dogs would still present a significant risk to kiwi. Ms Sporle attested that there would still be a "very high risk for the kiwi".[88] Mr Poynter, who favoured a condition requiring kiwi aversion training,[89] accepted there would be a need for training to be ongoing and repeated at regular intervals.[90]

Discussion

[93] We find that the Plan does not provide explicit policy encouragement for a dog exclusion condition in this case. Rather, Policy 6.6.2b (and related explanatory text[91]), encourages the use of such conditions only in identified "high kiwi density" areas. Marunui is not listed as a "high density area" in Appendix F of the Plan (or in the other referenced sources). However, Method 6.7.1.5 refers to the Appendix F map as an example of where the Council may impose dog keeping conditions. The Method also refers to other referenced databases where high density kiwi habitat may be identified. As such, the Plan does not contend that dog keeping conditions be confined to Appendix F areas.

[94] On the weight of evidence, we are satisfied that a condition to restrict or prohibit dogs on the Site is justified and warranted under section 6(c), RMA.

[95] The Plan assists us in applying section 6(c) by identifying that a trigger for determining whether there are "areas of significant indigenous vegetation and significant habitats of indigenous fauna" is whether an area's vegetation would form "ecological

84 Shown on Exhibit 1 – Robertson.
85 Transcript, p.370.
86 Sporle, evidence-in-chief at [2.3].
87 Transcript, p.377.
88 Transcript, p.380.
89 Poynter, evidence-in-chief at [27].
90 Transcript, p.83 at [4]-[11].
91 Specifically, the Introduction to Chapter 6 and Associated Method 6.7.1.5.

buffers, linkages or corridors to other areas of significant vegetation or significant habitats of indigenous fauna". We are satisfied, on the basis of the evidence of Dr Robertson (supported by Mr Goodwin), that there is sufficient continuity and proximity between Marunui, the Scenic Reserve and the Site for this to form an effective linkage or corridor.

[96] As to pecking order, kiwi are our national bird. The evidence was unequivocal that they are at particular risk, especially from dogs, in Northland. Therefore, the protection direction in section 6(c) applies.

[97] We acknowledge that a condition restricting or prohibiting dogs on the Site would not address the risk that dogs from neighbouring properties could pose (indeed we encountered a less-than-friendly wanderer on our site visit). However, we are satisfied that this does not undermine the section 6(c) benefit and rationale for a condition. In particular, on the weight of evidence, we find that there is a sufficient likelihood that birds released at Marunui will establish in the Scenic Reserve. Despite the risk from dogs on neighbouring private land, the evidence satisfies us that there would be a sufficient potential that kiwi will reach the Site, as part of an ecological corridor. While that likelihood and potential is strongly reliant on continuation of a voluntary predator control programme in the Reserve, the RMA includes provision for condition review (section 128) should that programme fail in the future.

[98] For those reasons, we are satisfied that a dog prohibition or restriction condition would be sufficiently connected to the development (rather than being for ulterior purposes) in the manner expressed in *Newbury*, and clarified in *Estate Homes.*

[99] We are mindful of MHHL's concern that a full dog prohibition condition could detract from the desirability of the development in the eyes of some purchasers. However, we did not receive any evidence that would allow us to judge the degree of that risk. In any case, we accept as valid the concerns expressed by the Council and section 274 parties as to the enforcement and administration difficulties that would be presented by MHHL's alternative kiwi aversion training condition. Also, we find that MHHL's concerns about potential buyer resistance to such a condition are outweighed by the benefits of an effective condition for the purposes of section 6(c), RMA.

[100] On that basis, we have determined that we should retain a dog prohibition condition as intended by the Council's decision. As to how the condition is drafted, we note that it suffers from the same defects as proposed Condition 1p in purporting to direct that a consent notice be the means of prohibition. We make directions later in this decision for the condition to be redrafted to correct that defect.

Hochstetter's Frog

[101] We find that the section 274 parties' call for the inclusion of a condition for the protection, maintenance and enhancement of Hochstetter's Frog habitat was not justified on the evidence.

[102] The ecologists agreed that there had been no surveys and there was no record of that species of frog having been found on the Site.[92] However, Dr Julian argued for the potential existence of Hochstetter's Frog habitat on or in the vicinity of the Site, on the basis of her understanding of photographs that she attached to her evidence, dated January 2009 and February 2012. She labelled these "Hochstetter's frog in catchment". Dr Julian explained that the photographs were taken by a "neighbour living on the property adjacent to the south-west boundary of the site" who "found and photographed this species on two occasions in the stream immediately downstream from the subject site".[93] The neighbour was a submitter in opposition to the proposal at the Council hearing. As the neighbour did not give evidence before us, we have no way of knowing whether the photographs are a reliable foundation for Dr Julian's opinion. As such, we do not consider we can rely on Dr Julian's opinion on this matter to draw any safe conclusions.

[103] The consensus of the ecologists was that the main watercourse in the northern catchment of the Site (not presently of high quality) "may in the future be potential good quality" habitat. They agreed that this potential "should not be compromised by avoidable sediment input".[94]

[104] However, we are solely concerned with the proposal before us. As we have extensively discussed on the topic of the Safety of Access, the proposal does not involve

92 Ecologists' Joint Statement, [4(i)].
93 Dr Julian, evidence-in-chief at [3.8].
94 Ecologists' Joint Statement, [4(i)].

extensive earthworks for its access formation. While sediment could result from the establishment of building platforms, we did not hear evidence that the sediment controls imposed by conditions of the regional council resource consent would not be adequate. In any case, those consents were not appealed.

[105] For all those reasons, we are not satisfied that the condition sought by the section 274 parties is warranted or appropriate. As we reject the suggested condition on that basis, we do not consider it necessary to determine the question of jurisdiction raised by Mr Webb.

Wetland rehabilitation

[106] We find that the Council's call for us to impose additional requirements for rehabilitation of four wet areas (total approximately 1.23 hectares) on the valley floor of the Site is not justified on the evidence.[95]

[107] The Council's proposed rehabilitation involved herbicide spraying and native wetland planting programmes. The Council did not appear to claim that the four areas had any significance under section 6(c) nor under the Plan. Mr Goodwin referred to the areas as "modified wetlands", but acknowledged they were prone to significant drying in summer.[96] He accepted that the benefits of imposing these obligations were "not substantial". However, he considered they were worth imposing because he assessed the cost that the consent holder would incur as relatively small.[97]

[108] Mr Poynter pointed out that the bush covenant proposals, and requirements as to the exclusion of stock and control of weeds would each assist in restoring the areas, to the extent there was any value in doing so. He expected that the high fertility of the valley floor would also mean naturalised nutrient-tolerant wetland species would tend to continue to establish, irrespective of efforts to establish native species.[98] He considered the costs of initial restoration, and ongoing maintenance, would not be insignificant.

[109] Our site visit reinforced to us the relative lack of value that the four sites have in ecological terms. Even if Mr Goodwin is correct that the cost of these additional

95 Council submissions at [4.10].
96 Goodwin, evidence-in-chief at [15].
97 Goodwin, evidence-in-chief.
98 Poynter, evidence-in-chief [19(vi)].

requirements would be "small", that does not justify imposing a condition that does not have a sufficient resource management purpose. We do not consider that the additional requirements meet the *Newbury/Estate Homes* test of validity. In any event, we exercise our discretion against imposing them.

Rehabilitation of "deleted sites 15 and 17"

[110] The Joint Memorandum as to Contested Issues indicates that the section 274 parties also sought that "deleted sites 15 and 17" on the ridge be rehabilitated.[99] However, they did not significantly advance this in their evidence and submissions. We are satisfied that the bush covenant proposals, and the intended conditions as to the exclusion of stock and control of weeds, will be sufficient to address ecological rehabilitation on the Site. We decline to go further in the manner the section 274 parties have proposed.

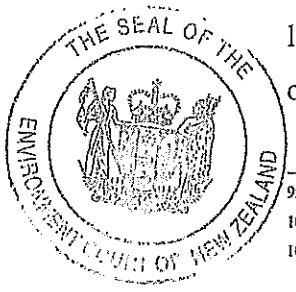
Pest management

[111] There were no issues as between the Council and MHHL on this topic. MHHL accepted the Council proposals for the relevant conditions (then 2(l) and (m)) to include three and five year timeframes, respectively, for the provision of reports on pest plant control work and implementation of the animal pest management strategy.[100]

[112] While the section 274 parties indicated they sought ongoing reports and more detailed weed and pest management conditions[101], they did not significantly advance this in their evidence and submissions. We are satisfied that, with the adjustments agreed between MHHL and the Council, the relevant conditions are adequate. Therefore, we decline to go further in the manner the section 274 parties have proposed.

Overall findings as to ecology

[113] We find that implementation of MHHL's proposal is overwhelmingly positive for the protection and enhancement of the Site's ecological values (leaving aside the unknown effects of any future access upgrade). If the consents are exercised in the limited form we have approved, that exercise will recognise and provide for protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna



99 Joint Memorandum as to Contested Issues, [13].
100 Joint Memorandum as to Contested Issues, [14].
101 Joint Memorandum as to Contested Issues, [14].

(section 6(c)). That exercise of the consents would also assist to fulfill the intention of a number of related Plan objectives and policies, in particular Objectives 6.5.1-6.5.3 and Policy 6.6.2b. Those benefits would arise through a combination of factors. Those include the proposed extensive bush covenants, restrictions on vegetation clearance, and associated conditions including for pest management and weed control, and total dog prohibition.

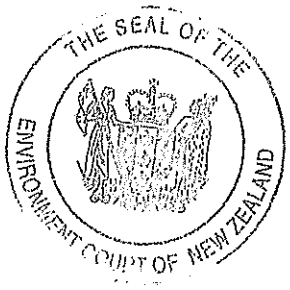
[114] However, those benefits hinge upon whether the development proceeds. We are mindful that our decision to decline the additional lots and dwellings sought for the Upper Part of the Site may impact on the development's viability (although MHHL did not call evidence on this). While that could be regrettable in ecological terms, Part 2 calls for us to weigh competing considerations. As we are not satisfied that ROW 1 would enable its future users to provide for their safety, we have reached our ultimate view that we should decline consent for the additional lots and dwellings.

Landscape and visual amenity effects

[115] On this matter, we heard from three landscape architects – Mr Simon Cocker (for MHHL), Ms Rebecca Skidmore (for the Council) and Ms Melean Absolum (for the section 274 parties). We heard from the planning experts on related Plan provisions.

[116] The Council opposed the additional dwellings sought in the Upper Part of the Site purely on "traffic safety and engineering grounds", noting that this marked a change from the position expressed in its commissioner's decision:

> ... the Decision also raised some landscape concerns in relation to houses on lots 18 – 20 and effects on the former N65 feature, however the Council's expert advice from Rebecca Skidmore indicates that consent can be granted for proposed lots 15 and 17 – 20, in visual/landscape terms, as, while there is potential for domestication of character, this can be mitigated adequately by imposing the standards in proposed condition [1p]. The Council is therefore not asking the Court to refuse consent for the Upper Lots on visual/landscape grounds on appeal (its concerns are focussed on traffic effects).[102]



[117] By contrast, the section 274 parties were concerned that the additional dwellings and ROW 1 would have a significant adverse effect on the landscape character of the

102 Council's opening submissions at [1.2a], [1.22].

Brynderwyns which they considered could not be adequately mitigated. Part of their concern was as to the cumulative effects the additional dwellings would have in conjunction with the consented Lower Part of the Site.[103]

[118] The fact that the Site is part of the Plan's ONL 14 Bream Tail – Brynderwyn Ranges (*ONL 14*)) is relevant to s 6(b), which directs us as follows:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance
>
> ...
>
> [b] The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

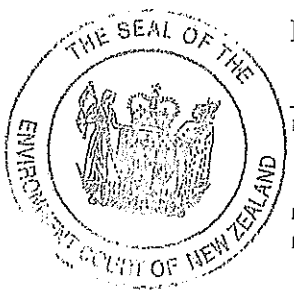
[119] In complying with that direction, we are guided by how the Plan has formulated this ONL and what it expresses as its related objectives and policies. We found Mr Savage's submissions on these matters particularly helpful.

[120] He submitted (and we agree) that:

> The starting point for the assessment of landscape effects must involve developing an understanding of the characteristics and values of this ONL.[104]

[121] We note that this is identified as the first step of landscape assessment under related Policy 18.6.1.

[122] As to how to identify the characteristics and values of ONL 14, Mr Savage referred to the applicable "worksheet" in the Kaipara District Landscape Technical Report 2010 (as did Ms Absolum).[105] Again, we agree. Mr Savage's approach is supported by the Explanation to Policy 18.6.1, which states that the key characteristics and values to be protected are "as identified in Appendix 18A and the worksheets of the Kaipara District Landscape Technical Report 2010".



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103 Joint Memorandum as to Contested Issues, [16(b)]. In addition, the Joint Memorandum recorded issues as to certain conditions (which are addressed below) and as to matters pertaining to the Plan appeal (addressed in Part B of this decision).

104 Section 274 parties' submissions at [26].

105 Referring to the copy in Absolum, evidence-in-chief, App 1 pp 718-722.

[123] We also agree with Mr Savage that, once the key characteristics and values are identified, the next step in landscape effects' assessment should be to consider what the Plan intends as its "planning approach", under its relevant objectives and policies.

[124] The intended planning approach is expressed through Objective 18.5.1 and Policy 18.6.1 (and their associated Explanation). Given their importance, we set them out in full:

> **18.5.1**
> To protect Outstanding Natural Landscapes from inappropriate subdivision, use and development, including in terms of the type, scale, design, intensity and location of any subdivision, use and development.
>
> **18.6.1**
> To recognise and protect Outstanding Natural Landscapes from inappropriate subdivision, use and development by:
>
> (a) identifying and confirming the extent, values and characteristics of Outstanding Natural Landscapes;
> (b) protecting natural and physical features and natural systems (such as landforms, indigenous vegetation and watercourses) that contribute to the character and values of Outstanding Natural Landscapes;
> (c) managing the potential adverse effects of activities including earthworks, vegetation clearance and the location, scale, design and external appearance of buildings structures and accessways;
> (d) protecting the character and values of features and landscapes by managing the potential significant adverse effects of locating inappropriate significant built elements outside Outstanding Natural Landscapes;
> (e) recognising the importance of views of Outstanding Natural Landscapes;
> (f) avoiding significant adverse effects that would compromise the values and characteristics of Outstanding Natural Landscapes, particularly when viewed from public places including public roads;
> (g) recognising the on-going contribution to the social and economic wellbeing of the District derived from activities and maintaining appropriate opportunities for these within Outstanding Natural Landscapes. These activities include farming, forestry operations and renewable energy activities and associated electricity transmission activities; and
> (h) encouraging and recognising the wider benefits of sensitive development that protects Outstanding Natural Landscapes.

The Council has recognised and protected Outstanding Natural Landscapes in the District and has mapped them. Subdivision, use and development within Outstanding Natural Landscapes will be managed so that the key physical characteristics and values that make up each individual landscape will be protected (as identified in Appendix 18A and the worksheets of the Kaipara District Landscape Technical Report 2010) from inappropriate subdivision, use and development. The impact of different activities on Outstanding Natural Landscapes will vary depending on the sensitivity of the landscape to a proposed activity. While generally, Outstanding Natural Landscapes have lower capacity to absorb change, this does not preclude built structures and elements or other land use activities where appropriate. The key focus is protecting the identified values of the Outstanding Natural Landscapes. However, it is recognised that there are other 'competing' policy directions such as the National Policy Statement on Renewable Energy that also need to be taken into account. When considering the effects of activities on these landscapes reference also needs to be had to Appendix 18B which contains assessment criteria.

Subdivision boundaries and the alignment and location of network utilities (including roading networks) should recognise natural topography, important natural features, views and patterns of the landscape to appropriately avoid adverse effects on landscape values. Enhancing existing environmental systems will be encouraged. For example, this may include extending areas of existing indigenous vegetation to provide ecological linkages and strengthen landscape patterns, and integrating elements such as waterways with subdivision, use and development. Activities which have the potential for adverse effects on these Outstanding Natural Landscapes will be subject to management through the Plan.

In assessing applications for resource consent for subdivision, use and development consideration will be given to the benefits of the proposal in terms of the protection and enhancement of scientific, geological and landscape values being offered. This could be by way of voluntary protection measures, covenant, consent notices or financial contributions. For example the use of covenants to control the volume and extent of land disturbance activities, protection of indigenous vegetation, design and external appearance and location of, accessways, buildings and structures including signage, lighting and fencing.

[125] However, we do not agree with how Mr Savage interpreted the planning approach expressed by those provisions.

[126] He submitted that the Plan's "objectives and policies" ought to lead us to "prevent the 'occurrence of', or 'not allow' development that will impact on the recognised values and characteristics of the ONL" (as identified from the technical

worksheet).[106] We understand that submission to draw on observations in *King Salmon*[107] as to the meaning of a requirement to "avoid adverse effects" in certain policies of the New Zealand Coastal Policy Statement 2010 (*NZCPS*). However, the Court was careful to note it was interpreting those words in the context of how they were used in that instrument.[108]

[127] Mr Savage argued that the word "inappropriate" (in the phrase "inappropriate subdivision, use and development", as is used in Objective 18.5.1 and s 6(b)) should be read with reference to what is "sought to be protected". That submission is soundly based on *King Salmon* where the Supreme Court (by majority) found (in regard to its interpretation of the NZCPS and section 6(b), that:

> ... where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use and development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is sought to be protected.[109]

[128] By majority, the Supreme Court explicitly rejected an interpretation of treating "inappropriate" (and "appropriate") as a mechanism that allowed an overall broad judgment such as to allow for "beneficial" development that would have serious adverse effects on what is sought to be protected.[110]

[129] However, we consider Mr Savage has erred in seeking to read Objective 18.5.1 and Policy 18.6.1 through the lens of cases that were not concerned with the Plan. According to the Court of Appeal decision in *Powell*[111] the proper approach to plan interpretation, where the meaning of a provision is not clear on its face, is to consider the provision in its immediate plan context. According to that approach, when interpreting the meaning of "inappropriate subdivision, use and development" in Objective 18.5.1, it is appropriate that we consider associated Policy 18.6.1. That contextual approach to interpretation also reflects the statutory purpose of plan policies as being to implement plan objectives.[112]

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106 Section 274 parties' submissions at [31].
107 *EDS v The New Zealand King Salmon Company and ors* [2014] NZSC 38.
108 *King Salmon* [62].
109 *King Salmon* [2014] NZRMA 195 at [101].
110 *King Salmon* [104].
111 *Powell v Dunedin City Council* [2004] 3 NZLR 721; (2004) 11 ELRNZ 144; [2005] NZRMA 174 (CA).
112 Section 75, RMA.

[130] As we read Policy 18.6.1, it is well-aligned with *King Salmon* in that it indicates that judgments as to what constitutes "inappropriate subdivision, use and development" should be made with reference to what is "sought to be protected". That is indicated by paragraphs (a) and (b) of the policy. The associated Explanation also guides us to refer to the applicable worksheet to determine an ONL's characteristics and values. To that extent, Mr Savage's submissions are sound.

[131] However, neither Policy 18.6.1 nor Objective 18.5.1 suggest that subdivision development inevitably must be inappropriate. Objective 18.5.1 itself directs that consideration should be given to the "type, scale, design, intensity and location" of the subdivision, use and development. Relevant to that, paragraphs (c) and (d) of Policy 18.6.1 allow for protection through the management of the potential adverse effects of the development in issue. Paragraph (h) invites us to encourage and recognise the wider benefits of sensitive developments that protect ONLs.

[132] In an overall sense, Objective 18.5.1 and Policy 18.6.1 recognise the potential for sensitively designed and managed developments to effectively protect an ONL's values and characteristics. Whether this will be so depends both on the development and the nature of the values and characteristics of the ONL itself. In that regard, we find that the worksheet indicates that ONL 14 has a capacity to tolerate some managed development without significant loss of identified values and characteristics. Mr Savage noted that the worksheet identifies the "paucity of buildings and structures located on the ranges" and the potential for any development to "detract from the simplicity and starkness of the unit". However, it also comments that the telecommunication towers to the east and "more generally, tracks … detract from the naturalness of the feature" and tend to "draw the eye".[113] The latter is certainly part of the landscape environment of the Subject Site. In addition, the worksheet identifies the "mitigating feature" of the predominately southern orientation of the Ranges. It notes that this often means hazy or shadowed views due to the angle of the sun. We experienced that on our site visit.

113 Absolum, evidence-in-chief App 1 at [721].

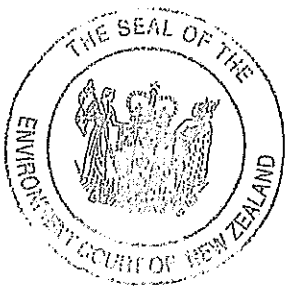
[133] With reference to *Upper Clutha Environment Society Inc*,[114] Mr Savage also submitted that it is important to distinguish effects on landscape values from those on visual amenity values.

[134] We accept that these concepts should not be conflated. One reason not to do so is that the RMA specifies different statutory directions. Section 6(b) directs us to "recognise and provide for" what it specifies. Section 7(c) directs us to have "particular regard to" the "maintenance and enhancement of amenity values" (and we find that encompasses visual amenity values).

[135] However, landscape values and visual amenity values can certainly overlap. As to their inter-relationship, we take guidance from Policy 18.6.1. It recognises the overlap between effects on visual amenity values and landscape values. In particular, paragraph (e) refers to recognising the importance of views of ONLs and paragraph (f) (on avoiding compromising the values and characteristics of ONLs) includes the phrase "particularly when viewed from public places including public roads". Policy 18.6.1 also recognises that landscape values go beyond simple visual reference points. In particular, paragraph (b) refers to protection of natural and physical features and natural systems (including indigenous vegetation).

[136] On the question of whether the landscape of the development could have affect beyond its visual impacts, we heard divergent opinions:

(a) Ms Absolum acknowledged that the adverse visual effects of the dwellings on the Upper Part of the Site would be "low/moderate". However, she considered the cumulative effect that these dwellings and 13 consented lots on the Lower Part of the Site would have on amenity values and landscape character would be significant.[115] She considered that the dwellings would sit "on the landform" rather than within it, and argued this was contrary to "accepted landscape principles".[116] She considered that the introduction of buildings and residential activity would be "intrusive, reduce the



114 *The Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* C104/2002.
115 Absolum, evidence-in-chief at [8.5].
116 Absolum, evidence-in-chief at [7.24].

naturalness of this landscape, change its character and adversely affect amenity values".[117]

(b) Ms Skidmore acknowledged that the clustering of dwellings on and in close proximity to the main ridgeline of the ranges would increase "domestication of the landscape". However, she noted that the site would be primarily viewed from distant locations.[118] She considered "existing vegetation and proposed revegetation and planting, together with controls on building scale, form and other elements of site development will ... assist to ensure site development is subservient to the surrounding natural patterns."[119] Mr Cocker supported Ms Skidmore's opinion.

[137] These differences of opinion are largely overtaken by our decision to decline consents for the additional lots and dwellings sought for the Upper Part of the Site. However, we consider that we should record why we prefer the opinions of Ms Skidmore (supported by Mr Cocker) on these matters:

(a) We found Ms Skidmore's observation that viewing of the Site would be primarily from distant locations borne out by our site visit. That visit also confirmed to us the accuracy of comments in the technical worksheet for ONL 14 that the receiving environment is already modified, including by tracks (a feature on the Site) that "detract from the naturalness of the feature" and tend to "draw the eye". We also experienced the mitigating influence of the sun's haze, as noted in the worksheet. We consider that lights at night can be discounted on account of public viewing distances and few vehicle movements. As such, we are satisfied that the receiving environment is capable of absorbing well-managed development of the kind and in the locality MHHL has proposed.

(b) We are satisfied that Condition 1p, if redrafted in accordance with our directions, would ensure a development pattern in keeping with the planning approach intended by Objective 18.5.1 and Policy 18.6.1. In particular, we find Condition 1p's controls and restrictions on existing vegetation protection and proposed revegetation and planting, building

117 Absolum, evidence-in-chief at [7.24].
118 Skidmore, evidence-in-chief at [6.1].
119 Skidmore, evidence-in-chief at [4.9].

scale, form, building colour and materials, and other elements of site development, will be effective in ensuring the consented development is subservient to the surrounding natural patterns. As such, we found Ms Absolum's opinion that the dwellings would "sit on the land form" was not supported by the evidence.

(c) Ms Absolum and Ms Skidmore agreed that increased domestication would occur from allowing additional lots and dwellings in the Upper Part of the Site. While that would adversely affect the ONL, we agree with Ms Skidmore that it would not be sufficient in itself to render the development contrary to Objective 18.5.1 and Policy 18.6.1. Specifically, that is on the basis of our earlier finding on the capacity of the receiving environment to tolerate some well-managed development. In addition, as we read Policy 18.6.1, it does not intend to preclude residential development within an ONL where the "potential adverse effects of activities including earthworks, vegetation clearance and the location, scale, design and external appearance of buildings structures and accessways" are properly managed. We consider that would be the case for the proposal.

[138] With or without the additional lots and dwellings on the Upper Part of the Site, we find that the proposal is not contrary to Objective 18.5.1 and Policy 18.6.1. It is in keeping with the intentions of those provisions. Informed by those findings, we find the proposal recognises and provides for the matters in, and is not, contrary to section 6(b).

Whether the additional lots and dwellings satisfy section 104D

[139] We have considered the activities' adverse effects as a whole, in light of the mitigating influence of the proposed consent conditions (and in this case, also of the proposal's subdivision design): *Bethwaite; Stokes.*[120] We find that those adverse effects are more than minor. That is because of the unacceptable danger that we find ROW 1 would pose for its intended users, in the event that we were to grant consent to the additional lots and dwellings sought for the Upper Part of the Site. That danger overwhelms the proposal's positive ecological effects and acceptable (and we find, minor) landscape and visual effects.

[120] *Bethwaite and Church Property Trustees v Christchurch City Council* C085/93; *Stokes v Christchurch City Council* [1999] NZRMA 409.

[140] However, we also find that the proposal would not be contrary to the Plan's objectives and policies (section 104D(1)(b)). That is despite our finding that granting consent to the additional lots and dwellings in the Upper Part of the Site would be contrary to[121] Policy 12.2.17. As such, the proposal would satisfy section 104D.

[141] Mr Allan[122] referred to us several longstanding authorities.[123] He also helpfully noted two more recent related decisions (which we refer to as *Queenstown Central Ltd - (1)*[124] and *Queenstown Central Ltd - (2)).*[125] In those cases, the High Court found that a proposal was contrary to a single objective in the relevant plan. It determined that was sufficient for the proposal to have failed section 104D(1)(b).[126]

[142] We find the reasoning in those decisions assists in indicating the contextual nature of the section 104D(1)(b) inquiry. In *Queenstown Central Ltd - (2),* Fogarty J observed that ordinary principles on the interpretation of legal instruments apply to the interpretation of any plan change. He observed that those principles allowed account to be taken of the factual context and the "mischief" sought to be remedied.[127] We find the Environment Court decision in *Akaroa Civic Trust*[128] also assists on the importance of a contextual analysis of the relevant Plan provisions. There, the Court observed[129] that section 104D(1)(b) was "not a numbers game" and what was required was a consideration of the objectives and policies as a whole. That contextual analysis could result in a proposal passing or failing the section 104D(1)(b) gateway on the basis of even a single objective or policy (albeit in exceptional cases). We have also noted that *Man O'War*[130] expressed agreement with the legal analysis of section 104D(1)(b) in *Akaroa Civic Trust.*

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121 The meaning of "contrary to" in section 104D(1)(b) is well settled as opposed to in nature; different; opposite to: *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

122 Supplementary Submissions of Counsel for Kaipara District Council dated 29 May 2014 (*Council's Supplementary Submissions*).

123 *Tairua Marine Ltd v Waikato Regional Council* CIV-2005-485-1490, 29 June 2006, HC, Auckland, Asher J, (or the related Environment Court decision); *Dye v Auckland Regional Council* [2001] NZRMA 513; *Bunnings Ltd v Hastings District Council* (2011) 16 ELRNZ 767, at [127].

124 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZRMA 239.

125 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 817.

126 *Queenstown Central - (1)*, at [126]-[127]; *Queenstown Central - (2),* at [37].

127 *Queenstown Central - (2),* at [24].

128 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110.

129 *Akaroa Civic Trust* at [74].

130 *Man O'War Station Ltd v Auckland City Council* [2010] NZEnvC 248 at [124].

[143] However, we respectfully suggest that Mr Allan went somewhat astray in his application of a contextual approach to Policy 12.6.17 (and its companion Policy 12.6.18[131])[132]. That was in the fact that he sought to argue that those policies should be treated as having more dominant influence by reason of the evidence on the safety deficiencies of ROW 1. While we have found valid the Council's concerns as to those safety deficiencies, we consider it invalid to bring them into our contextual analysis of Policy 12.6.17. Rather, as *Powell*[133] has identified, the proper focus of a contextual analysis is on how particular Plan provisions fit within their immediate Plan context (not to be confused with the particular factual context in any case).

[144] As we read Policy 12.6.17 in its immediate Plan context, it is not intended to have the dominance that Mr Allan has argued for. Rather, it is simply a policy (as is Policy 12.6.18) amongst several others intended to have some influence in the mix of matters in any particular factual context. We find that the proposal (with or without the additional lots and dwellings sought for the Upper Part of the Site) would not be "contrary to the objectives and policies of" the Plan, in the sense of being "opposed to in nature; different; opposite to" the Plan's objectives and policies considered as a whole.

[145] On that basis, we have considered the proposal (including the additional lots and dwellings sought) under section 104.

Our consideration under section 104 (including as to Part 2)

[146] On the basis of our earlier findings, we find that we should decline consent for the additional lots and dwellings sought for the Upper Part of the Site.

[147] That is in view of our finding that ROW 1 would be unsafe for its intended users. While safety is a relative concept, we consider ROW 1's defects are unacceptable, bearing in mind Mr Bishop's well-founded opinion that they would pose a very high risk of severe, potentially fatal, crashes. While ROW 1 is a singular failing, it goes to the

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131 We acknowledge that Mr Allan (supported by Mr Raeburn) also saw Policy 12.6.18 as relevant (i.e. *By ensuring that roads provided within subdivision sites are suitable for activities likely to establish on them and are compatible with the design and construction standards of roads in the District roading network to which the site is required to be connected to*). We disagree with that as a private way does not appear to come within the Plan's definition of "road". However, for the reasons we have noted, it does not affect our finding concerning section 104D(1)(b).

132 Council's supplementary submissions at [12].

133 *Powell v Dunedin City Council* [2004] 3 NZLR 721; (2004) 11 ELRNZ 144; [2005] NZRMA 174 (CA).

heart of the proposal. Its deficiencies cannot be resolved through consent conditions, as achieving an acceptably safe vertical and horizontal alignment would require significant earthworks and vegetation clearance, for which further land use consent beyond the scope of MHHL's application would be required.

[148] Our consideration of the matters in section 104(1) is to be "subject to Part 2". We find granting consent to the additional lots and dwellings sought would not promote sustainable management in accordance with Part 2. That is because, contrary to section 5(2), such a decision would not enable intended users of ROW 1 to provide for their safety. In view of that, we find we must decline consent to the additional lots and dwellings despite the lack of any conflict with any of the provisions of sections 6-8 RMA, and the positive protection that the proposal would give to areas of significant indigenous vegetation and significant habitats of indigenous fauna (section 6(c)).

[149] We find that granting consent to the additional lots and dwellings sought would be contrary to Policy 12.6.17 of the Plan. Policy 12.6.17 does not bind our discretion, and we have noted a number of supportive objectives and policies in both the Plan and the RPS. However, we find Policy 12.6.17 to give us direction that is consistent with our findings concerning section 5(2). We have given it corresponding weight in our determination.

[150] In addition, we find that declining consents for the additional lots and dwellings in the Upper Part of the Site is more consistent with the intention of Policy 6.6.3 as to the management of earthworks and vegetation clearance to address ecological effects.

[151] On the basis of our earlier findings, having assessed the proposal on the basis that the additional lots and dwellings are excluded, we find that it would promote sustainable management in accordance with Part 2, and is supported by the Plan's objectives and policies considered as a whole. That finding is subject to the need to attend to various technical defects in the final set of proposed consent conditions, as we next address.

Issues concerning the proposed conditions (sections 104(1)(c), 108)

[152] As part of the relief in its appeal, MHHL sought changes to conditions imposed by the Council's subdivision consent decision, and offered a set of draft conditions.[134] These were the subject of further discussion which significantly narrowed points of difference between MHHL and the Council prior to and during the hearing. In light of those discussions, we received a number of iterations of possible condition wording, identifying points of agreement and disagreement between the parties. Subject to our following observations, we find that the final set of conditions[135] (*30 May Draft Conditions*) is appropriate for inclusion in the subdivision consent (on the basis that consents for the additional lots and dwellings in the Upper Part of the Site are declined).

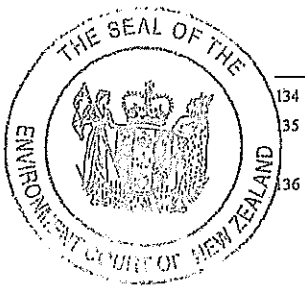
Whether Condition 1p is intra vires

[153] Our following findings concerning proposed Condition 1p are also relevant to Part C of our decision (concerning the Plan appeal).

Condition 1p[136] is designed to be the key means by which visual and landscape effects of the development are managed, in response to the Site's ONL classification.

[154] It commences "A consent notice (to be complied with on an on-going basis) is to be imposed on each of the titles of the household lots ... requiring that ..." and then sets out:

(a) A requirement to submit a detailed design report from a landscape architect to demonstrate compliance with specified design parameters;
(b) A list of matters for the Council to consider in its assessment of that detailed design report;
(c) A detailed prescription of how "compliance with the consent notice shall be determined" by the specified Council manager. This prescription (in the form of "standards" and "guidelines") purports to limit the relevant Council manager's "discretion" in determining compliance with the



134 Agreed Bundle, p.75 ff.
135 For convenience, we refer to the Council's document entitled "Annexure B Draft Set of Conditions (if Consent is Granted for Unconsented Dwellings and Lots)" dated 30 May 2014.
136 Initially, this was numbered "1r". It became "1p" in the final iteration of proposed consent conditions in Annexure B to Memorandum of Counsel for the Respondent Concerning Conditions, dated 28 May 2014 (*28 May memorandum*).

"consent notice". The prescription covers matters as to "design and landscape standards" (listed i – vi), architectural standards and guidelines (vii – x), a light reflectance standard (xi), and a number of "household lot – specific standards" (xii – xxxi).

[155] Condition 1p seeks to control the mass, form, design and appearance of dwellings. While it is somewhat unusual for a subdivision consent condition to encompass this extent of land use control, we do not consider this would invalidate the condition. In terms of our powers in sections 104B and 108(2), and *Newbury* and *Estate Homes,*[137] we are satisfied that there is a sufficient logical connection between the subject activity and the condition (and that it does not relate to external or ulterior concerns). That is in the sense that we have treated the subdivision and land use as bundled activities. Their inherent inter-relationship is reinforced by relevant Plan objectives and policies on the ONL and ecology issues.

[156] However, we find the drafting of Condition 1p is flawed in two related respects. One is that it purports to require the imposition of a consent notice[138] (i.e. "A consent notice ... is to be imposed"). Another is that it assumes that the Council has a discretion as to the imposition of a consent notice, and purports to direct and limit how the Council is to exercise that purported discretion.

[157] The obligation to issue a consent notice is provided for in section 221(1). That section does not contemplate any discretion. Rather, if the stated pre-requisites in section 221(1) are met, a consent notice *shall* be imposed. That obligation is triggered automatically if the subdivision includes a condition that imposes any restriction that is to be complied with by the subdividing owner and subsequent owners on a continuing basis after the deposit of a survey plan.[139]

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137 *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, at [66]. That decision clarified the application to the RMA of the common law tests expressed in *Newbury DC v Secretary of State for the Environment; Newbury DC v Synthetic Rubber Co Ltd.* [1981] AC 578; [1980] 1 All ER 731 (HL). Specifically, *Estate Homes* made clear that it was not necessary to establish an effects' nexus.

138 Under the RMA, "consent notice" means a notice issued under section 221. Under section 221(3), a consent notice is deemed to be an instrument creating an interest in land (within the meaning of section 62 of the Land Transfer Act 1952). It may be registered. When it is, it is deemed to be a covenant running with the land, binding subsequent owners.

139 A second requirement is that the condition cannot be one in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued.

[158] The High Court decision of Fogarty J in *Barker v Queenstown Lakes District Council*[140] signals that, to meet that prerequisite, the subdivision consent must include a condition that is, in substance, restrictive (i.e. imposing "restraint", rather than enabling) and required to be *complied with* on a continuing basis.

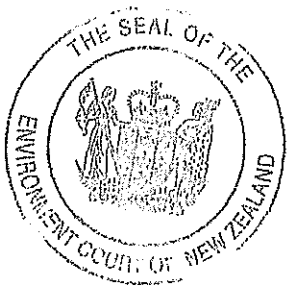
[159] Condition 1p refers to "standards" and "guidelines" on "design and landscape" (listed i – vi) and architectural design (vii – x), light reflectance (xi). It also refers to what it terms "household lot –specific standards" (xii – xxxi). These are intended as key means for addressing the various ecological, landscape and visual effects that we have discussed. We accept that these standards and guidelines are intended to impose ongoing compliance obligations (in the sense of restraining, not enabling, the subdividing owner and subsequent owners). However, the intended standards and guidelines need to be expressed within Condition 1p. The associated principles can guide the administration of Condition 1p by the relevant Council manager. However, that administration cannot legally be by means of the exercise of a non-existent discretion in the framing of related consent notices. The obligation to impose consent notices, carrying forward these obligations to successive owners, will be triggered by Condition 1p provided that the condition is correctly expressed.

[160] In essence, Condition 1p must set the boundaries of what is authorised and how associated administrative discretions are exercised.

[161] The task of fixing Condition 1p is reasonably significant. As such, we make directions on this matter later in this decision. To assist the parties in giving effect to those directions, we have included (in the Annexure A) indicative drafting notes.

Issues concerning other proposed conditions

[162] For the same reasons, proposed Conditions 1q and 1r will also need to be redrafted so that their requirements are expressed within those conditions (not assumed to be matters that associated consent notices will impose).



140 *Barker v Queenstown Lakes District Council* [2007] NZRMA 103; [2006] NZAR 716; (2006) 7 NZCPR 216, Fogarty J, (23 June 2006).

[163] Condition 2k specifies an obligation to pay a cash contribution in lieu of reserves, based on "1% of the assessed value of "nominal" building sites, the value to be determined by a registered valuer appointed by the Council (but paid for by the consent holder)". MHHL sought that this be amended to the effect that the consent holder would be able to obtain its own registered valuer's determination and to force any dispute between the valuers to arbitration. The Council opposed this change, raising concerns as to uncertainty and the unsuitability of arbitration within the context of a consent condition. MHHL submitted those concerns were misplaced.

[164] We agree with the Council that arbitration does not have a comfortable place within a consent condition of this kind. That is in the sense that it would treat a regulatory responsibility of the Council as a matter for negotiation. However, we consider the consent holder ought to have the opportunity to obtain their own registered valuer's report and provide this to the Council to consider. In addition, we consider that the Council's cost recovery ought to be according to the principles of s 36, RMA. Should the valuers' assessments differ, the Council should be left to reach its own determination on which assessment to prefer. We direct the Council to provide to us for approval a condition revised on that basis. With those changes, we consider the condition will provide a properly balanced basis for the Council's exercise of its statutory function in administration of the consent.

[165] As to proposed Condition 2i (as to planting), we accept MHHL's submissions in reply that this should specify a maintenance period of three years on the basis that we find that submission adequately supported on the evidence.

[166] MHHL's submissions in reply record that it accepts the Council's proposed review condition, a lapse period of seven years for the subdivision consent, and the latest proposed condition as to the establishment of a residents' association. On that basis, we accept the Council's submissions on those conditions, and direct that these be included in the subdivision consent on this basis.

PART C – THE PLAN APPEAL

Introduction

[167] As we have noted, the appellant now seeks only:

> an exemption from the requirement in Rule 12.10.3c(1)(b) of the District Plan that the gross floor area for dwellings on the 13 consented lots [of the Lower Site] do not exceed 50m^2 (the *modified relief*).[141]

[168] The reference to "the 13 consented lots" is to 13 house lots in the Lower Part of the Site that the Council granted subdivision consent for.[142]

[169] Rule 12.10.3c(1)(b) is a permitted activity performance standard pertaining to the erection and alteration of buildings and structures within an ONL. The rule reads relevantly, (our emphasis):

> (1) Subject to the exclusion in (2) below, the Erection and Alteration of Buildings and Structures (including dwellings) located in an Outstanding Landscape is a permitted activity if [it]:
>
> ...
>
> (b) Does **not exceed 50m^2 gross floor area**; or any alteration / additions to the building or structure do not exceed 40% of the gross floor area of the dwelling or 40% of the volume of the structure (whichever is the smaller)
>
> ...

[170] The appellant seeks relief only from the 50m^2 gfa requirement. It seeks that this be replaced with a maximum building coverage (not gfa) requirement of 350m^2 for dwellings on the 13 consented lots.

[171] Failure to meet any performance standard of Rule 12.10.3c results in "discretionary activity" status and triggers the following assessment criterion for the consideration of a resource consent application:

> Whether and the extent to which the proposal will affect the values of any Outstanding Landscape Area or Outstanding Natural Feature identified in Map Series 2 or Visual Amenity

141 Memorandum of Counsel for the Appellants, dated 5 May 2014, [2].
142 Council opening submissions, [8.1].

Landscape identified in Appendix G; and the extent to which the subdivision, use or development meets the additional assessment criteria contained in Appendix 18B.

Note 1: A description of the landscapes and features is provided in Appendix 18A. The values associated with Outstanding Landscape Areas and Visual Amenity Landscapes are described in the Kaipara District Landscape Report (2010).

[172] The essence of the appellant's argument was that Condition 1p (by its various controls on dwelling design and treatment and vegetation protection and planting) would provide sufficient control of the effects of dwellings in the Lower Part of the Site. As such, it argued that the additional controls imposed through Rule 12.10.3c(1)(b) were not warranted.

[173] The Council did not oppose this relief, provided certain provisos were satisfied.[143] One proviso was that the exemption had to be explicitly linked to the existing subdivision consent and confined to the 13 residential lots in the Lower Part of the Site. Further, it could only apply if the requirements of Condition 1p are included in consent notices on the titles. Finally, should the subdivision consent lapse without being implemented, the Council sought that Rule 12.10.3c(1)(b) apply as normal.[144]

[174] Those provisos were not questioned by the appellant.[145] Mr Webb explained that the only point of difference the appellant had with the Council concerned its preference for the 350m^2 limit to be expressed as building coverage rather than gfa (the Council's preference).[146] In essence, a building coverage limit would allow opportunity for a more generous maximum building area.

[175] The section 274 parties argued that the modified relief was beyond the scope of the appeal and hence beyond jurisdiction.

[176] They also argued that the modified relief was inappropriate. Their concern centred on potential landscape outcomes.

143 Council's opening submissions, [1.2(b)].
144 Council's opening submissions, [9.7(b)].
145 Appellant's submissions in reply, [97].
146 Appellant's opening submissions, [47], appellant's submissions in reply, [102].

[177] One dimension to this was loss of certainty. The s 274 parties were concerned as to whether the landscape outcomes likely to result from applying Condition 1p would be "sufficiently certain to justify an exemption from" Rule 12.10.3c(1)(b) "when compared with the outcomes likely to result, if dwellings were assessed against the criteria in Appendix 18B, which would otherwise apply".[147] They were also concerned that the modified relief would compromise the ability to address cumulative landscape effects.[148]

[178] The section 274 parties' first preference was that we decline the appeal and make no change to Rule 12.10.3c(1)(b). As an alternative (*section 274 parties' alternative option*), Mr Savage suggested that we could leave Rule 12.10.3c(1)(b) unchanged but add discretionary activity assessment criteria into Rule 12.10.3c. Those criteria would, in essence, refer to the matters specified in the proposed Condition 1p.[149] Mr Savage argued that this would allow for the cumulative effects of several dwellings to be considered in the context of consent applications.[150]

[179] Despite its looseness, we accept that the section 274 parties' alternative option falls somewhere between a full grant or decline of the modified relief. That is on the basis that the modified discretionary activity rule would be framed in a way that gave an applicant greater consenting security than it would have if Rule 12.10.3c was unchanged. As such, we consider we have jurisdiction to consider it.

[180] We have approached our consideration of the appeal on the footing that Condition 1p is redrafted according to our directions in Part B.

Statutory framework and principles for consideration of the issues

[181] Counsels' submissions and evidence did not generally address the RMA's statutory framework for determining the Plan appeal. However, we have identified this as follows:

(a) Sections 290 and 290A, as we describe in Part B of this decision, also apply to the determination of plan appeals;

147 Statement of Contested Issues, [17].
148 Transcript, p.597 at [8]-[13].
149 Transcript, discussion between Mr Savage and Judge Hassan, pp 605-607.
150 Transcript, Mr Savage, p.605.

(b) Clause 15 of Schedule 1, which governs the hearing of plan appeals;

(c) Section 72, which relevantly describes the purpose of plan preparation as being to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act;

(d) Section 74, which specifies a range of things plan preparation must be in accordance with (including Part 2 and the requirements of section 32) and directs that we have regard to certain matters;

(e) Section 75, which sets out the required content of district plans and what they must either give effect to or not be inconsistent with; and

(f) Section 76, which specifies the function and effect of district plan rules.

[182] Subject to being satisfied as to scope and jurisdiction, we understand that our task in testing the modified relief,[151] as against other options (primarily, leaving the Plan unchanged or somewhere in between), is to determine:

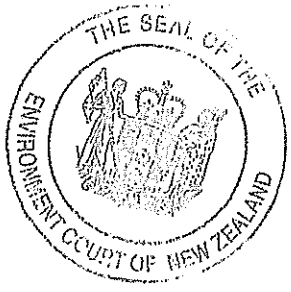
(a) Whether the modified relief would achieve the Plan's applicable objectives and achieve and implement its policies (sections 75(1), 76(1));

(b) What would be the most appropriate option for achieving the Plan's objectives (having regard to comparative efficiency and effectiveness, taking account of benefits and costs, and the risk of acting or not acting if there is uncertain or insufficient information) (sections 74, 32)[152];

(c) Whether the modified relief accords with Part 2; and

(d) What would better assist the Council to carry out its functions in order to achieve the RMA's purpose (section 72).

[183] As was the dominant focus in submissions and evidence, our inquiry centres on the relative implications for the protection of the identified landscape values and characteristics of ONL-14.



151 In regard to section 75(3) and (4), no party sought to argue that granting the modified relief would mean that the Proposed Plan would fail to give effect to any national policy statement, the New Zealand Coastal Policy Statement 2010 or the RPS (or the proposed RPS) nor to render the Proposed Plan inconsistent with any other relevant, planning policy or regulatory instrument. On the evidence, we are satisfied no such issues arise.

152 The applicable version of section 32 being the version that preceded the Resource Management Amendment Act 2013: see section 434 of that Act.

Scope and jurisdiction

[184] Given that the appellant's evidence did not address the full scope of relief sought by the Plan appeal, the Court directed the appellant to clarify its position. Just before the hearing, the appellant informed the Court and parties[153] of its narrowed and modified relief.

[185] In their submissions,[154] the section 274 parties argued that the modified relief went beyond the scope of the appellant's originating submission and hence was beyond jurisdiction.

[186] There was no material difference between counsel as to the relevant legal principles. In essence, the test is whether the submission, read as a whole, fairly and reasonably raised the relief either expressly or by implication. Analysis of the submission should be approached in a realistic and workable fashion.[155] Where the parties differed was in how those principles should bear upon our consideration of the modified relief.

[187] Mr Savage maintained that the appellant's originating Plan submission did not refer to the Site nor state anywhere that it sought an exclusion of the Site from Rule 12.10.3c. He argued that the submission, read as a whole fairly and reasonably, could not be construed as seeking such relief (either expressly or by implication).[156] On that basis, he said the modified relief went beyond the scope of the appellant's originating submission.

[188] For the Council, Mr Allan, submitted that the modified relief was within scope. Taking us through a copy of the originating Plan submission,[157] he pointed out that it specifically challenged Rule 12.10.3 (as it then was). The submission said the rule was

153 Memorandum of Counsel for the Appellants dated 5 May 2014.

154 Section 274 parties' submissions, [6(h)].

155 Mr Savage relied on *Re An Application by Vivid Holdings Ltd* [1999] NZRMA 467, *Campbell v Christchurch City Council* [2002] NZRMA 332, and *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408, at 413. Mr Allan referred to *Queenstown Airport Corporation Ltd v QLDC* [2013] NZEnvC 224 (where the Court referred to the above *Royal Forest & Bird* decision). Mr Webb adopted Mr Allan's submissions (Appellant's submissions in reply [97]).

156 Section 274 parties' submissions at [46].

157 Agreed Bundle, tab 4.

too onerous to be a permitted activity rule[158] and that the gross floor area restriction should be "at least 100m^2".[159] He noted that the submission sought, in the alternative, that the identified objectives and policies be amended or deleted "so that they present a sensible and manageable technique that is affordable in relation to the limited forms of development likely to occur and that do not denigrate from the provisions of any underlying zone".[160] Mr Allan observed that this was "leaving it fairly open in terms of the possibilities".[161]

[189] Mr Allan submitted that, in seeking an exemption from the 50m^2 gfa performance standard of Rule 12.10.3, the modified relief was simply a subset of the original relief. In the same way, he submitted that the fact that the modified relief was confined to just the Site was also fine.[162] On that basis, he submitted that the modified relief was conceivably what could have eventuated "further down the track".[163]

[190] In response, Mr Savage focused on the fact that the originating submission made no mention of the Site. He submitted that Mr Allan was "drawing rather a long bow" to say that people would understand "an unmentioned property should be excluded from the operation of the discretionary activity control".[164]

Discussion

[191] Subject to one proviso, we are satisfied that the modified relief is within the scope of the appellant's originating submission, and as such there is no jurisdictional bar to our consideration of it.

[192] Our proviso concerns the appellant's request that the 50m^2 maximum gfa requirement be replaced with one setting a limit of 350m^2 expressed as a maximum building coverage. Our concern is that the originating submission did not indicate that the appellant challenged the use of a gfa limitation *per se*. It recorded that this should be "at least 100m^2". That could have left a reasonable reader of the submission to assume acceptance of the use of gfa. As we later discuss, those differences are not simply

158 Agreed Bundle, tab 4, p.93, [2(g)].
159 Agreed Bundle, tab 4, p.93, [2(g)].
160 Agreed Bundle, tab 4, p.95, [4(b)].
161 Transcript, Mr Allan, p.601.
162 Transcript, Mr Allan, pp600-601.
163 Transcript, Mr Allan, p.602.
164 Transcript, Mr Savage, p.604.

technical but could result in different environmental effects. As such, we are not satisfied that we have jurisdiction to grant that aspect of the modified relief.

[193] Aside from that proviso, we are satisfied that the originating submission can be fairly read, on its face, to have sought either the removal of Rule 12.10.3 or its amendment such as to result in what it is termed an "affordable" outcome for "the limited forms of development" to which the rule applied. Although it did not mention the Subject Site, it did seek that the Council prepare "an alternative landscape chapter in full consultation with affected landowners".[165] The Site was one that was included within the identified ONL regime and hence was one of the parcels of land to which the submission referred. As such, the Site was included by implication. The submission allowed the Council scope to give relief from some or all of Rule 12.10.3 for some or all of the land to which the submission referred. Conceivably, that could have been limited to modifying Rule 12.10.3c(1)(b) only insofar as the Site was concerned, and only in the manner now pursued by the modified relief.

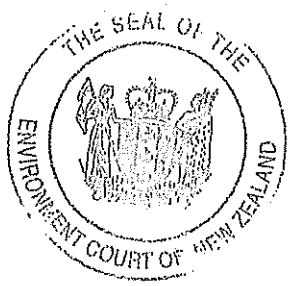
[194] Therefore, we agree with Mr Allan (and Mr Webb) that the modified relief (subject to our stated proviso) is within the scope of the originating submission. We consider it on that basis.

The evidence

[195] We heard from Mr Cocker, Ms Skidmore and Ms Absolum on landscape implications and Mr Putt, Mr Raeburn and Ms O'Connor on planning issues.

[196] That evidence presented two competing theories on landscape outcomes and related Council processes.

[197] Mr Cocker and Ms Skidmore each considered that the landscape assessment rigour that Condition 1p provided for the Site was potentially superior (and certainly not inferior) to that which could arise through a consent application process under Rule 12.10.3c(1)(b) (through the assessment criteria of Appendix 18B of the Plan). Mr Cocker considered Condition 1p superior in terms of the certainty of outcome it would



[165] Agreed Bundle, tab 4, p.95, [4(c)].

deliver.[166] Ms Skidmore considered the requirements of Condition 1p (secured by consent notice on titles) were "clear and specific to the characteristics of the subject site".[167] By contrast, she characterised the assessment criteria of Appendix 18B as "open-ended".[168]

[198] By contrast, Ms Absolum considered the consent notice process of Condition 1p was not an appropriate substitute for the statutory scrutiny of a resource consent application. This was in view of the level of potential adverse effects she anticipated to arise from residential development of 13 lots in the Lower Part of the Site.[169] Those potential effects made it important, in her view, that the Council retained an appropriate level of discretion. She noted that the Council would have that discretion with a consent application regime, but not in its administration of a consent notice. The 9 December Joint Witness Statement of Landscape Architects indicates that Ms Skidmore also recognised the legal difference between resource consenting and the administration of consent notices.[170]

[199] The planning witnesses generally concurred with the contrasting positions of the landscape experts on which they relied. In addition, Mr Putt characterised the modified relief as comprehensive and the unmodified operation of Rule 12.10.3c(1)(b) as *ad hoc*.[171] As to Ms Absolum's concern regarding the potential effects of adding 13 dwellings to the Lower Part of the Site, Mr Raeburn acknowledged that there was no consent specifically sought for those dwellings. However, he observed that there had been "considerable assessment of proposed dwelling sites and appropriate standards [imposed] in relation to those sites".[172] Ms O'Connor questioned whether there was a legal basis for the Council to refuse to issue a consent notice, in the event of dispute.[173] She noted that a factor favouring retention of Rule 12.10.3c(1)(b) unchanged was that it could be 13 or more years before dwellings were constructed.[174]

166 Cocker evidence-in-chief at [66].
167 Skidmore, evidence-in-chief at [5.2].
168 Skidmore, evidence-in-chief at [5.2].
169 Absolum, evidence-in-chief at [6.8].
170 Joint Witness Statement of Landscape Architects, dated 9 December 2014, [4.1].
171 Putt, evidence-in-chief at [6.2].
172 Raeburn, evidence-in-chief at [13.3].
173 O'Connor, evidence-in-chief at [27].
174 O'Connor, evidence-in-chief at [25].

Discussion

[200] We are mindful that the various witnesses' assessments have been on the basis of the present wording of Condition 1p. We have approached our consideration on the basis that Condition 1p is re-drafted in accordance with our directions.

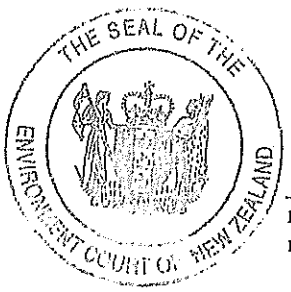
Would the modified relief achieve the Plan's objectives and achieve and implement its policies?

[201] The Plan contains a range of district-wide and Rural zone objectives and policies. It also includes objectives and policies specific to ONLs, in its Chapter 18 on Landscapes and Natural Features. We find that objectives and policies of Chapter 18 are of most relevance to the consideration of the modified relief (especially Objective 18.5.1 and Policy 18.6.1, the text of which we set out in Part B). In addition, Rural zone Policy 12.6.3a has some relevance. It allows for intensification partnered with effective off-setting.

[202] However, our findings, in Part B, that the proposal is not contrary to Objective 18.5.1 and Policy 18.6.1,[175] are of limited relevance to our consideration or the modified relief in the Plan appeal. That is because, by contrast to the Upper Part of the Site, we did not receive specific design evidence as to dwellings for the 13 consented lots in the Lower Part of the Site.

[203] The confined nature of the information before the Council commissioner on dwellings intended for the Lower Part of the Site led him to express the following rider to his decision to grant subdivision consent for the 13 lots:[176]

> I note the decision is made with some reservation because the associated land use residential dwelling application has not been made available for consideration at the same time. That, in my view, is a significant omission in terms of an integrated consideration of the overall proposed development. It is evident from the landscape and visual effect assessments that houses on some of these lower lots will have adverse effects. However, that is not a matter before me – I simply note that granting this part of the subdivision does not, and should not be presumed to, imply that houses on all lots will or should necessarily follow.



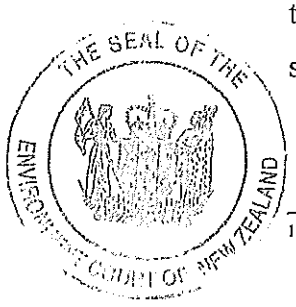
175 Refer [137(c)], [138].
176 Agreed Bundle, pp 39-40, [27.13].

[204] In view of the Council commissioner's expressed reservations, we are cautious about Mr Raeburn's observation that there had been "considerable assessment of proposed dwelling sites and appropriate standards [imposed] in relation to those sites". In addition to what was before the Council commissioner, we have the assessments of the landscape and planning experts. We have taken some assurance from the consensus opinions of Ms Skidmore and Messrs Cocker, Putt and Raeburn that Condition 1p would effectively address the substance of what Appendix 18A covers.

[205] We accept as valid the opinions of Mr Cocker and Ms Skidmore as to the clarity and specificity that Condition 1p could offer, as compared to the potential "open ended" nature of Appendix 18B's criteria. That is not to criticise those criteria. Rather, it is to reflect the relative uncertainty and openness of a discretionary activity consenting process. Under s 104, there can be no assurance that a comprehensive approach will be taken across various consent applications to deliver a comprehensive landscape outcome in keeping with Objective 18.5.1 and Policy 18.6.1. As Mr Putt observed, a case-by-case approach, as would arise under Rule 12.10.3c(1)(b), could be *ad hoc*. While an open discretionary consenting process would allow scope for considering cumulative effects, it does not give assurance that the cumulative outcome of individual consent decisions would be to protect the values and characteristics of ONL-14 as Objective 18.5.1 and Policy 18.6.1 intend.

[206] However, we cannot be fully satisfied that the modified relief would safely achieve Objective 18.5.1 and achieve and implement Policy 18.6.1, given that the evidence we have received from the landscape and planning experts has not been based on specific information on the design and bulk of dwellings in the Lower Part of the Site.[177] To that extent, we share the concerns of Ms Absolum and Ms O'Connor as to the risks that would be associated with complete exemption.

[207] In that respect, we are not satisfied that the modified relief would be adequate for the achievement of landscape outcomes in keeping with the Plan's ONL intentions and section 6(b).



[177] The subdivision application only went as far as identifying building platforms in the Kapawiti Road, Mangawhai Heads Geotechnical Investigation report included as part of the application.

[208] Incorporating Condition 1p (when redrafted) into the rules' regime would assist to achieve a more holistic landscape outcome for the Site, in keeping with Objective 18.5.1 and Policy 18.6.1.

[209] That takes us to the middle ground signaled by Mr Savage as section 274 parties' alternative option.

[210] To best ensure a comprehensive landscape outcome in keeping with Objective 18.5.1 and Policy 18.6.1, we consider the consent category chosen must deliver appropriate certainty to consent applicants. Mr Savage submitted that a "discretionary" activity categorisation was appropriate. For the reasons we set out, we consider that would be too uncertain. We consider the choice should be between "controlled" and "restricted discretionary" activity classification. Of those two, we have determined that restricted discretionary is the more appropriate as it would allow greater capacity to address cumulative ONL effects (and scope for decline if necessary).

[211] We give directions on this later in this decision.

What is the most appropriate option for achieving the Plan's objectives?

[212] For the same reasons, we conclude that the most appropriate option for achieving the Plan's objectives is a restricted discretionary activity rule including the elements we describe later in this decision. That is because we find this would be comparatively the most efficient and effective option. In reaching that view, on the relatively limited evidence before us, we have taken account of benefits and costs in the manner we have identified. As we have explained, we have also taken into account the fact that we did not receive specific information on the designs and bulk of dwellings in the Lower Part of the Site. We have also had regard to the commissioner's caution in the Council's decision, that the subdivision consent should not be presumed to imply that houses on all lots will or should necessarily follow. Similarly, we find that the matter is best managed by a regime that enables the consent authority to decline consent.

Would the modified relief be in accordance with Part 2?

[213] In view of our findings that we cannot be satisfied that the modified relief would safely achieve Objective 18.5.1 and achieve and implement Policy 18.6.1, we cannot be

satisfied that the modified relief would accord with Part 2. In particular, we cannot safely assume that the modified relief would give effect to our duty under section 6(b) as to ONL-14.

[214] However, on the basis of those findings, we are satisfied that a restricted discretionary activity rule (including the elements we describe later in this decision) would be in accordance with Part 2. Because it would achieve more certainty and continuity across the Site (through its linkage to Condition 1p), we are satisfied that it would be superior in this regard to leaving Rule 12.10.3c(1)(b) to apply unchanged to the Site.

What would better assist the Council to carry out its functions in order to achieve the purpose of this Act?

[215] Those same findings lead us to conclude that a restricted discretionary activity rule (including the elements we shortly describe) would best assist the Council to carry out its functions in order to achieve the purpose of this Act.

The Council's decision

[216] In accordance with section 290A, we have had regard to the Council's decisions on the Plan insofar as these pertain to C Calveley's originating submission. Relevant extracts were provided to us by Mr Allan,[178] in response to our directions following conclusion of the hearing.[179] The decision records that the relevant aspect of C Calveley's relief was accepted in part. However, it does not record reasons specific to that submission. Instead, its approach was to address reasons more generically. As the reasoning in the decision does not address anything material to the modified relief, we do not accord the decision any significant weight.

The key elements of a new restricted discretionary activity rule

[217] We have determined that both the modified relief and the status quo should be rejected in favour of including in the Plan (in conjunction with an unchanged Rule 12.10.3c(1)(b)), a new restricted discretionary activity rule that includes the following elements:

178 Memorandum of Counsel for the Respondent dated 5 August 2014.
179 Minute dated 30 July 2014.

(a) It would apply only to the 13 specified dwellings in the Lower Part of the Site, and be subject to the provisos sought by the Council;

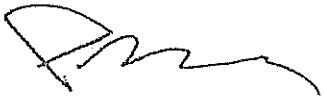
(b) It would apply to any such dwelling that exceeded the Rule's 50m^2 gfa restriction, but did not exceed 350m^2 gfa. (We record earlier that we are not satisfied that the appellant's request for gfa to be replaced with maximum building coverage is within jurisdiction. In addition, we reject this request on its merits as it could result in unacceptably large and dominant dwellings);

(c) It would specify that the consent authority's discretion to impose conditions is restricted to those matters specified in Condition 1p;

(d) Applications would be treated on a non-notified basis. We are satisfied that, in the particular circumstances, this is appropriate having regard to both due process and outcome dimensions. That is in view of the consenting history of this matter, the limited focus on up to 13 potential dwellings in the Lower Part of the Site, and the particular nature of the landscape assessment required.

[218] Mr Allan suggested[180] that the logical location for the exemption provision is at Rule 12.10.3c(2) (where an exemption is already expressed in respect of another subdivision). Given that we have found the more appropriate course is to leave 12.10.3c(1)(b) unchanged but include a new restricted discretionary activity rule, the precise location of it may need to be re-considered.

For the Court:



J J M Hassan

Environment Judge

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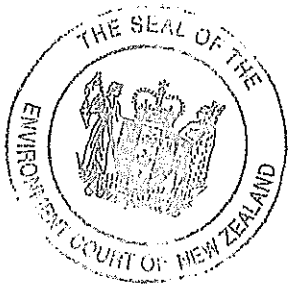

180 Council's opening submissions, [9.7(c)].

ANNEXURE A

Indicative drafting pertaining to directions in Part B

(p) This condition applies only in respect of [*specify applicable lots*] (*Subject Lots*) and must be complied with on a continuing basis by the subdividing owner and subsequent owners of each of those Subject Lots after the deposit of a survey plan.

(i) Prior to or at the time of a building consent application for a dwelling on a Subject Lot, a design report from a registered landscape architect that accords with the requirements of this condition (*Design Report*) must be submitted to the Council's Regulatory Manager (Resource Consents) for approval by the Manager.

(ii) No dwelling may be constructed on a Subject Lot prior to the approval of a Design Report for that dwelling.

(iii) To be approved, every Design Report must address:

- Site layout;
- Building mass and form;
- External building finishes and colour;
- Circulation and parking;
- Landscape design

and demonstrate to the reasonable satisfaction of the Manager (informed by a review of the Design Report by a Council-appointed independent landscape architect) that the design of the dwelling and associated landscape treatment of the Subject Lot will meet:

- Standards i) – xi) in the left hand columns of the tables below (having regard to any associated Guidelines listed in the right hand columns of those tables); and
- Standard [xii] under the following heading "Household Lot-Specific Standards", [*Note – this is presently unnumbered in the latest draft conditions, and pertains to chimneys and aerials*]; and

- Each of the following Standards listed under that heading as are specified to apply to the Subject Lot.

[*Note the following tables and draft conditions will need to be amended to reflect our decision to decline consents for the additional lots and dwellings sought in the Upper Part of the Site*].