BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 04 – Subdivision and Development chapter

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CASEBOOK FOR QUEENSTOWN LAKES DISTRICT COUNCIL

Hearing Stream 4
Subdivision and Development

22 July 2016

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1 Referenced in the Council's Opening Legal Submissions with the unreported citation of *Clevedon Protection Society Inc v Warren Fowler Ltd* C43/97.

DOUBLE SIDED ORIGINAL Tab 1

Decision No. W 38/98

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	**AQUA KING LIMITED**
	(RMA 167/97)
	Appellant
AND	**MARLBOROUGH DISTRICT COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

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

HEARING at BLENHEIM on the 25th day of May 1998

APPEARANCES

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

DECISION ON PRELIMINARY POINT OF LAW

Background

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

THE SEAL OF THE

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

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

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

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

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

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

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

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

Status of the Activity

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

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

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

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

[10] Under the PMSRMP controlled activities include:

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

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

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

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

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

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

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

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

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

Scope of Conditions

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

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

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

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

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

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

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

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

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

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

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

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

Later, at page 20, he stated:

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

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

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

Determination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[40] The question of costs is reserved.

DATED at WELLINGTON this 23rd day of June 1998

S E Kenderdine
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Tab 2

ORIGINAL

Decision No. C 43 /97

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under section 311 of the Act for declarations concerning a quarry at McNicol Road, Clevedon

BETWEEN **CLEVEDON PROTECTION SOCIETY INC.**

(ENF 181/96)

Applicant

AND **WARREN FOWLER LTD**

First Respondent

AND **THE MANUKAU CITY COUNCIL**

Second Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)
Environment Commissioner J R Dart

HEARING at AUCKLAND on 24 and 25 March 1997

APPEARANCES

Mr M J Savage for the applicant
Mr G J M Rawnsley for the first respondent

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Mrs H Sargisson and Ms V K H Parr for the second respondent

Mr J F Burns for Auckland Regional Council (withdrew by leave)

DECISION

Introduction

This is an application under section 311 of the Resource Management Act 1991 [1] for declarations concerning the operation of a quarry at McNicol Road, Clevedon (Part Lots 26 and 27 DP 49440, CT 9A/474 Auckland Land Registry) operated by the first respondent [2] and located in the district of the Manukau City Council [3]. The Clevedon Protection Society Inc[4] is concerned about proposals to increase the scale and intensity of quarrying at the quarry, and so seeks declarations from the Court as to the extent of a deemed resource consent already held by the company. The parties hope that a decision in this proceeding will assist in defining issues in other proceedings between the parties about the quarry.

The company at present quarries under the terms of a planning consent issued by the Council and dated 2 October 1978 which granted consent to the then lessee of the land for "the excavation of greywacke rock".[5] It is the terms of that resource consent which are the principal subject of this proceeding. The resource consent contains no express words limiting the quarry operations or the rate of extraction of rock but the society seeks declarations that there are such limits. Its argument is:

(a) The proposal for which planning consent was sought was described in a formal application and in further information and a plan supplied at the Council's request;

(b) The Council's jurisdiction in granting the planning consent was limited to consenting to the proposal as described in the documents referred to in (a); and

---

1 called "the Act"
2 called "the company"
3 called "the council"
4 called "the society"
5 called "the resource consent"

(c) Therefore the society is entitled to a declaration indicating how the express terms and conditions of the resource consent are limited by the application and supporting documents.

For their parts the respondents, the Council and the company, giving different reasons, deny that there are such limiting terms. They have filed affidavits as to the factual background to the issues, and from planning consultants, giving the Court the deponent's view of the meaning of the resource consent. We do not intend to rely on those affidavits. Indeed, expert (or other) evidence as to the meaning of a rule or resource consent would normally be inadmissible.[6].

Background

The relevant facts are not in dispute. The original application for planning consent to quarry was by Warren Shaw Limited[7]. The application dated 7 July 1978 is on a standard form [8] and states:

> "(State fully what is proposed). Quarrying rights for the excavation of metal, for resale in an area that is envisaged would service the Clevedon area in general. The following provisions should also be allowed for:
>
> 1. the use of explosives;
> 2. the erection of an implement shed - 20 ft x 30 ft;
> 3. the erection of a magazine 6 x 3; the siting of Nos. 2 and 3 to be approved by the local authority;
> 4. Provision for metal crusher."
>
> The property in respect of which this application is made is situated at "McNicol Road, Clevedon", 3 1/2 miles from Clevedon on the left.
>
> The legal description of the property is Certificate of Title No. 9A/474 DP 49440, Lots 26 and 27."

The Council, through its city planner, sought further information from the applicant by a letter dated 17 July 1978:

> "I acknowledge receipt of the above application in respect of part Lots 26 and 27 DP 49440 pursuant to the Town and Country Planning Act 1977.

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6 *Toy Warehouse v Hamilton City* (1986) 11 NZTPA 465 (HC)
7 called "the applicant"
8 called "the application"; it is on Form A of the Town and Country Planning Regulations 1978.

However, I wish to advise that Council cannot fulfil its obligations to publicly notify this application until the following information has been supplied.

1. Three copies of a larger scale plan indicating approximate site, and location of any possible buildings.

2. Information as to the likely scale of operations and number of trucks servicing the quarry daily.

3. Whether any amenities, such as an ablution block, are to be provided."

Yours faithfully etc"

The applicant by undated letter [9] received by the Council on 1 August 1978 supplied further information in these terms:

"The answers to your questions are as follows:

1. Enclosed are three copies of larger scale plan.

2. By using figures from a quarry which was operated as a registered quarry, and with town planning approval by my father, Mr M D Shaw, only a few hundred yards from where the present site is being applied for, I believe they may be of some significance.

The quarry averaged 10,000 cubic yards a year and was used predominantly to service the Clevedon urban and rural area.

Bearing in mind that the quarrying was stopped re: Mr M D Shaw's retirement some fifteen years ago and registered with the Mines Department as a "closed quarry", and the growth of both rural and urban activity in the district, I would expect an annual operation to be somewhere between 15 and 20 thousand cubic metres a year.

It should be noted that there is presently no quarry operating in the district, and supplies of suitable metal are difficult to obtain. Also, extra expense is accrued through -

1. Cost of the material available;

2. Cost of the transport.

[9] called "the further information"

3. As it is envisaged that the quarry face can be worked by rippling and dozing only, and that the rock sold from the quarry will be pit run, this will make the likely scale of operations quite small. Also, with no labour being employed, it is not proposed that any amenities such as an ablution block will be constructed.

Yours faithfully etc"

The application was publicly notified on 15 August 1978. After describing the applicant and identifying the locality, the newspaper advertisement said, succinctly, "Proposal: quarrying".

There was then a hearing by the Council. Subsequently, on 16 October 1978, the Acting City Manager wrote to the applicant advising of the grant of the planning (resource) consent in the following terms:

NOTIFIED APPLICATION FOR PLANNING CONSENT FOR QUARRY RIGHTS TO EXCAVATE METAL FOR RESALE IN THE CLEVEDON AREA. I wish to advise that at its meeting on 2 October 1978 Council's Town Planning Committee resolved as follows:

"That the application received from Mr W B Shaw as Manager and Director of Warren Shaw Limited, dated 7 July 1978, for Council's consent to allow the excavation of greywacke rock from a quarry site located on the east side of McNicol road, the site being described as Parts Allotments 26 and 27 Otau Parish (the land being owned by R T & L C Ranstead) be approved as a conditional use pursuant to Sections 67 and 72 of the Town and Country Planning Act 1977 subject to the following conditions:

A. 1. That the operation of the quarry shall comply fully with the requirements of Ordinance 9/7 of Part 2 of the Operative District Scheme as if the site were a Quarry Zone.

2. That the applicant be required to produce within 6 months, a development plan of quarry operations showing stages of development and final floor levels which shall in no case be less than 2m above the stream bed.

3. That the quarry working area approach no closer than 10m from the stream depicted on Plan B17/3 and at no time should the stream be allowed to become blocked as a result of quarrying operations.

4. That the working area of the quarry floor be restricted to 5000m^2, and that any area of the quarry floor in excess of 5000m^2 be topsoiled and sown in grass as working proceeds on an annual basis.

5. That the applicant upgrade the access track to the satisfaction of the City Engineer and enter into negotiations with the City Engineer for the contribution of metal in lieu of a road upgrading contribution, and further that the underwidth culvert on the road be upgraded at the applicant's expense, to the satisfaction of the City Engineer.

6. That no buildings be erected on the site other than those depicted on Plan B17/3.

7. That it is necessary that all works fully comply with Council's Bylaws, Engineering Standards and other relevant Statutory Requirements.

B. That the applicant be advised that he should obtain such water rights as the Regional Water Board may require.

C. Costs

That pursuant to the provisions of section 175(1) of the Town and Country Planning Act 1977 and Regulation 38(5) of the Town and Country Planning Regulations 1978 the applicant be charged an amount of $100 plus cost of public notification.

D. Reasons for the Decision

The Committee is of the opinion that consent can be granted for the following reasons:

1. The proposal meets the requirements of the District Scheme with regard to quarries.

2. The provision of a plentiful resource from local supplies is desirable from an energy conservation viewpoint.

3. Small scale workings on this site may establish the existence and extent of a substantial deposit of blue metal, an important regional resource."

The Issues

The society, in effect, alleges that the resource consent is limited by four inferred terms. These are that:

(a) the quarried metal is to be sold in the Clevedon area;

(b) the quarry operation is limited to 12 trucks per week day;

(c) the quarrying operation is limited to a maximum extraction rate of 20,000 m^3 per year;

(d) the quarry operation is to be conducted by one person.

We comment on each inferred term in turn.

(a) *The quarried metal is to be sold in the Clevedon area.*

This restriction derives from the heading to the letter advising of the resource consent [10] and is supported by the first two lines of the application which state that the proposal is for consent to "quarrying rights" for the excavation of metal, "for resale in an area that is envisaged would service the Clevedon area in general". Mr Rawnsley opposed any inferred conditions in terms of (a) on the grounds that it is *ultra vires* because the condition is irrelevant (neither the Town and Country Planning Act 1977 nor the Act being concerned with end uses of non-renewable resources) or void because it is so uncertain as to be unenforceable. We agree and do not consider (a) further.

(b) *The quarry operation is limited to 12 trucks per week day.*

This figure does not appear in any of the documents we have quoted. It derives from the planner's report on the application which was exhibited in the affidavit of Mrs L R Dalton filed on behalf of the Society. However, at the hearing before us, Mr Savage, for the Society, accepted that the Court could not look at the town planner's evidence given at the 1978 hearing by the Council. That is consistent with precedent: in *NZ Post Limited v Moore*[11] the Tribunal refused to look at "background information" on Council's files. Equally we hold that it would be wrong for us to do so in this case. That would be quite unfair to any subsequent consent holder who can have no idea what is in planners' reports (often given years before).

(c) *The quarrying operation is limited to a maximum extraction rate of 20,000m^3 per year.*

10 quoted on p5 of this decision

11 [1992] 1 NZRMA 215. This case is looked at in more detail later.

This derives from the second paragraph of the further information letter. We consider this further below.

(d) The quarry operation is to be conducted by one person.

Before we can consider (c) and (d) we have to decide whether we should look at any extrinsic evidence at all. Mr Savage said we could (and should). Mr Rawnsley submitted that we had no power to do so. Mrs Sargisson, for the Council, submitted we had jurisdiction to look at the application and further information, and to consider the resource consent in their light, but that on their true interpretation they did not restrict the resource consent.

The Cases

The parties referred a number of cases to us, some in great detail. And we have discovered others. It became apparent that there are two general, but opposing, lines of authority, so we have chosen to go through the cases at some length.

The first case referred to was *Attorney-General v Codner*[12]. This was the heart of Mr Rawnsley's case for the first respondent. It concerned an application to the Supreme Court for a declaration (which was granted) that a consent granted by the Northcote Borough Council to the defendants was *ultra vires* and of no effect. The defendant, Mr Codner, had applied for consent to the conditional use of his property as a *childcare centre*. The application did not say how many children would be there, although at the Council's hearing Mrs Codner said that there would be no more than ten, thus allaying the fears of persons who might otherwise have appealed to the Planning Tribunal. The Northcote Borough Council granted conditional use consent, not to a childcare centre, but to a *boarding house* and without specifying the number of children that might stay. McMullin J decided the case on the grounds that:

> "the use intended for the premises by the Codners was not one which could properly be made the subject of a conditional use application as a boarding house and the purported grant of the conditional use for that purpose was invalid."[13]

12 [1973] 1 NZLR 545
13 ibid p.551

So anything else the Judge said was strictly *obiter*, but he continued to consider other submissions for the plaintiff. In the course of his decision he said:

> "I accept, that, if a planning permission incorporates by reference other documents such as letters or plans put in in connection with the application, then those other documents can be referred to as assisting in the interpretation and construction of the planning permission, but it is equally clear that, if a planning permission fails to incorporate such documents, then they may not be referred to at all. *Slough Estates Ltd v Slough Borough Council* (No. 2) [1971] AC 958; [1970] 2 All ER 216."[14]

Codner's case has been cited as authority for two principles, first that it is not just the face of the resource consent which needs to be looked at, but also other documents may be incorporated by reference to them in the consent. Secondly, evidence given in support of the application may not be looked at to determine the meaning of the resource consent. The second principle has been followed consistently since, but not so the first.

In *Freemans Bay Community Committee v Auckland City Council*[15] Planning Judge Sheppard considered an application for a planning consent which had three parts:

(i) the formal application (which followed generally Form A of the First Schedule of the Town and Country Planning Regulations 1978) seeking consent to construct ten new storage tanks.

(ii) a covering letter with details as to what is to be stored in the tanks, and volumes involved.

(iii) two plans showing layouts in relation to property boundaries and streets.

It was argued that because the formal application, (i) above, did not seek consent for the storage of substances in the tank, and because the letter (ii) accompanying the application was not referred to in the application, there was no jurisdiction to grant consent to the storage of hydrocarbons in the tanks.

14 ibid p.552
15 Decision A67/88

His Honour stated that "the question whether items (ii) and (iii) are included in the application is one of fact to be decided on the evidence before me"[16]. He held that they were included. The effect of this case is to widen the meaning of "application" so that it includes words or documents not expressly referred to in the formal application.

This sentence was cited with approval by the Planning Tribunal (differently composed) in *Briscoes (NZ) Ltd v Christchurch City Council*[17]. Briscoes had been trading (unlawfully) for years as a retailer on a site zoned for wholesale business. It applied to the Christchurch City Council for a specified departure "for a limited period". An explanatory statement lodged with the formal application and a solicitor's covering letter both made it clear that consent was sought for a maximum period of 18 months.

The Council refused consent and Briscoes appealed, asking the Tribunal for consent for three years. The Council and objectors argued that was beyond the jurisdiction of the Tribunal because the application included the documents which were lodged with it (which contained the 18 months restriction). The Tribunal rejected this approach on the grounds:

(a) that the accompanying information and letter were not part of the application;

(b) the Council had power to grant consent on such conditions as it thought fit[18] and a condition suggested by the applicant could not, therefore, limit the outcome of the application (i.e. a consent)

(c) if the accompanying information had the potential to mislead objectors that could be cured upon appeal.

We believe that each of these grounds (a) - (c) would be unlikely to apply now for these reasons:

16 ibid at p.4

17 (1990) NZTPA 275

18 section 67 Town and Country Planning Act; there is a similar provision in the Resource Management Act in section 108

(a) is wrong in view of the Court of Appeal decision in *Sutton v Moule*[19] which we discuss shortly;

(b) the Tribunal held that there was no prejudice to actual objectors but the real issue is whether there was prejudice to **potential** objectors[20];

(c) the reason for the Tribunal's error is that in seeing the issue as one of conditions rather than jurisdiction the Tribunal has begged the question. It missed the key point which is that <u>if</u> there is prejudice to potential submitters, <u>then</u> there is no jurisdiction.

The next case, *NZ Post Ltd v Moore*[21], goes back to the approach of *Attorney-General v Codner*. In the course of interim enforcement proceedings, Judge Bollard sitting alone, was asked to interpret a deemed resource consent originally granted in 1984 under the Town and Country Planning Act 1977. The respondent sought to place before the learned Judge certain background information from the council's file for the purpose of determining the meaning of the conditions attached to the consent. His Honour concluded:

> "... in construing a land use consent, a successor in title such as [NZ Post] in the present case, is entitled, in my view, to regard the consent as entire on its face, simply taking account of any other documents *expressly* incorporated by reference in the consent. This is, in essence, the view that commended itself to Mr Justice McMullin in *Codner* ..." (our emphasis)[22]

This was an extempore decision and it appears that the Court was not referred to the *Freeman's Bay* case. This was the case where the word 'expressly' was introduced to qualify reference to other documents, although it is not clear whether that adds anything.

Next there is a decision of the Court of Appeal: *Sutton v Moule*[23]. In delivering the judgment of the Court, Thomas J gave the essential background facts as being that:

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19 (1992) 2 NZRMA 41

20 *Cameron v North Canterbury Hospital Board* [1980] 2 NZLR 1 (H.C.)

21 (1992) 1 NZRMA 213

22 ibid at p.216

23 (1992) 2 NZRMA 41; the proceeding started as an application to the Planning Tribunal under the Act, but the transitional provisions of the Act entailed that it fell to be decided under the Town and Country Planning Act 1977.

> "Mr Sutton is Mr Moule's neighbour. Their properties are situated in a residential zone. But Mr Moule has twice obtained planning permission from the Auckland City Council to use his property as real estate offices. The council's first planning approval limited the consent to the earliest of ten years, the life of the building, or the real estate business no longer being operated by Mr Moule. The second consent, granted some six years later, omitted this condition."

At first instance Judge Treadwell had made declarations based on his findings that the council's consent in 1982 related to the **land** use, and that the 1988 application was restricted to the modification of the **building** and therefore the second consent was limited to that also. Thus an issue for the Court of Appeal was whether the second consent was beyond the scope of Mr Moule's application and therefore *ultra vires,* unless it was limited to fit within the application.

The Court of Appeal dealt with the issue by examining the scope of the second (1988) application. First it pointed out that

> "(t)he application was prepared by Mr Moule himself, no doubt without regard to legal niceties, and the substance or gist of his application is what must count."[24]

Secondly the Court referred to the earlier (1982) application relied on by the Planning Tribunal. At first sight it looks as though the Court is using the earlier application to assist with the interpretation of the second (1988) application and consent. But on a closer reading that is wrong. The Court is simply comparing the applications and marking that they use the same words. So that, because the first application and consent state the applicant wished "to modernise and extend an existing building" and that permitted a land use in 1982, the same formula must logically have had the same effect in 1988. Thirdly, it relied on a letter from Mr Moule which he wrote and attached to his second (1988) application. The letter is also referred to in that application. The Court said:

> "Further support for this construction [that the application was for a more general land use] is contained in the letter which Mr Moule wrote and attached to the application. We reject [the] ... suggestion that this letter cannot be examined for the purpose of construing the scope of the application; it is dated the same date as the application, it is attached to the application, and it is expressly referred to at the foot of the application. While it is appreciated that material supporting an application which may change the substance of what has been notified or advertised may not be referred to in order to enlarge the scope of

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24 ibid p.47

> an application, any approach which declined to accept the letter as part of Mr Moule's application in this case would be unduly niggardly. In any event, we entertain no doubt that the letter can be referred to for the purpose of clarifying or amplifying the application."[25]

This part of the Court's decision is, with respect, a little difficult to follow. The Court appears to hold that Mr Moule's letter did (enlarge) amplify the application, and that is acceptable because the letter was 'part' of the application.

Of more relevance to the present case is the Court of Appeal's wide understanding of 'application'. The decision is of course binding on this Court but also, with respect, such a commonsense approach is more in tune with the Act than the over-precise approach in *Briscoe's* case. Of further assistance is the Court's passing comment that material supporting an application may not enlarge the scope of the application (or by inference, the consent) but that such material may *limit* the application and again, by inference, the consent.

A further case drawn to our attention was *Darroch v Whangarei District Council*[26] which was concerned with the scope of conditions (the maximum number of stock to be allowed in a stockyard). The Planning Tribunal stated[27]:

> "We hold that it is the original application and any documents incorporated in it by reference which defines the scope of the consent authority's jurisdiction. In appropriate cases, where consistent with fairness, amendments to design and other details of an application may be made up to the close of a hearing. However they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required."

This is consistent with the *Freeman's Bay* case, but helpfully goes beyond it in identifying the reason for the inferred limitation: fairness - and although this decision does not say so, it is fairness, not only to submitters but also to persons who are not submitters but might have been (if the scope of the application had not been limited).

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25 ibid p.47
26 Decision A18/93
27 p.27

In *Canterbury Regional Council v Canterbury Frozen Meat Co Limited*[28] the Planning Tribunal was concerned with the interpretation of a condition relating to the maximum concentration of sulphides in effluent. The Tribunal said:

> "We accept that the terms of the grant should be interpreted on their own, and without reference to the events leading up to it. *Attorney General ex rel Hing v Codner* [1923] 1 NZLR 545; *New Zealand Post v Moore* (1992) 1 NZRMA 213".

The Tribunal was not prepared to look behind the report of the Special Tribunal which set the 'ambiguous' condition when granting consent. The Tribunal did not find it necessary to look at the application or any documents accompanying it: it found the condition was not ambiguous by referring to the decision of the Special Tribunal which set the condition. The facts of the case are too different for it to be useful in establishing what the principles are for looking at the application and accompanying documents.

In *Queenstown Bungy Centre Limited v Hensman*[29] the Planning Tribunal (differently composed again) considered the scope of a resource consent which had been granted to establish and run a bungy jumping operation adjacent to the Skyline gondola in Queenstown. The jumping platform was actually constructed by Mr Hensman some 10m closer to the Skyline gondola than the application showed. In addition the platform was longer, and therefore more visible from the Queenstown foreshore than had been shown on the original plans.

After referring to the *Briscoes* and *Darroch* cases, the Tribunal, presided over by Judge Skelton, agreed with the test in the *Freeman's Bay* case. As a consequence, the Tribunal made an enforcement order that the respondent cease operating the bungy-jump until he applied for a variation or a fresh consent.

In *Epsom Normal Primary School Board of Trustees v Auckland City*[30] the Planning Tribunal (Judge Sheppard sitting alone) followed the approach in *Sutton v Moule* in holding that an application to remove trees did not include a (necessary) application for a vehicle crossing and therefore there was no jurisdiction to grant consent to the latter activity. The *Epsom Normal* case also emphasises the salutary

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28 Decision A14/94
29 [1994] NZRMA 360
30 Decision No: A11/95

point - not relevant in this case - that a resource consent may also be limited by the terms of the notification.

In *Marchant v Marlborough District Council*[31] the Environment Court was asked to make a declaration as to the interpretation of resource consents (coastal permits) for marine farming. The Marlborough District Council's decision stated:

> "At a meeting held on Wednesday 16 June 1993, members considered an application for marine farming of Green-shelled Mussels, (Perna canaliculus), Scallops (Pecten novaezelandiae) and Flat Oysters (Tiostrea lutaria) by the method of subsurface longlines within an area of ...
>
> It was resolved that subject to section 105 of the Resource Management Act 1991, after considering application ... for a resource consent, the Marlborough District Council grants consents for this activity subject to the following conditions ... :
>
> 1. Structures -
>
> (a) Each buoy marked on the attached map shall ... "[32]

The buoys referred to in the coastal permit quoted above are navigational buoys at the four corners of the marine farm, not flotation buoys for the "subsurface longlines". There is no express reference to the existence or location of flotation buoys in the coastal permit itself. While it was common ground at the Tribunal hearing that the longlines needed to be 10 metres underwater to comply with the consent, the issue was whether flotation buoys were to be underwater as well, or whether they could be on the surface (and thus visually and navigationally obtrusive). The Tribunal concluded:

> " ... subsurface flotation methods, by which the method of subsurface marine farming was intended to take place, do not appear as part of the text of the council's decision or as part of the conditions of its consent. There is no corresponding identification in the consent to the applications and plans. A consent does not automatically incorporate supporting or related documents unless specific reference is made to the material in the consent: see Darroch v Whangarei District Council ... and in that regard also, the conditions of the consent are to be interpreted on their face, or by reference to documents expressly incorporated into the consent (see New Zealand Post Limited v Moore [1992] 1 NZRMA 213, 216).

31 Decision W22/97
32 ibid p.3

> Further, the EIA accompanying the 1993 applications does not state quite what the council and Mr Marchant depict, i.e. specific reference to structures of the type shown in the accompanying plan. The EIA concludes that the physical effect on the locality including any landscape and visual effects will be minimised by the applicant's use of *"subsurface technology"* which will reduce visual impact to a minimum (given the need to maintain a visual identification of the site for navigational and management purposes). It also states aesthetic impacts will be minimalised by the use of the *"new subsurface techniques"*. The new techniques and subsurface technology presumably referred to, are the small subsurface buoys and anchoring systems, and the method attaching the subsurface longlines which was indicated on the accompanying plans. But the EIA therefore did not make specific reference to structures of a specific type in the plan - it simply refers to techniques and technology."[33]

The Court refused to make a declaration that the coastal permits did not authorise the use of surface buoys for support of the longlines. Although this decision is, with respect, right on the facts because of the wider language in the "EIA"[34] which could be read as enlarging the ambit of the formal application, it went further than it needed to in endorsing the *NZ Post* approach.

Finally, in *Walker v Queenstown Lakes District Council*[35] the Court considered an application for a declaration as to whether the applicants were required as a condition of a resource consent to erect a dwellinghouse on a building platform shown on a 'landscaping plan' submitted with an application for subdivision consent. The Tribunal stated:

> "We are quite clear, as was the Tribunal in New Zealand Post Limited -v- Moore (1992) 1 NZRMA 213 that in construing a land use consent, a landowner and a successor in title is entitled to regard a consent as entire on its face, taking into account any of the documents incorporated by reference in the consent. Here we have the situation where not one of the documents identified refers to, or places constraint on, the siting of the building platforms. And it is equally clear that none of the planning instruments so carefully analysed by Mr Hitchcock in his submission, contain any condition requiring the dwelling to be erected on a particular building platform; all have only the usual requirements only for setbacks." (our emphasis)[36]

This case appears to be correct on the facts since any proposed condition would probably be void (and severable) for uncertainty in this case: the building platforms

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33 ibid p.14
34 The Assessment of Environmental Effects under the Fourth Schedule to the Act
35 Decision W26/97 (4/4/97)
36 ibid p.3

are not clearly located on the plan which is the only place they are identified at all. However, the perpetuation of the *NZ Post* principle - even with the omission of "express" - is, with respect, unfortunate because it overlooks the jurisdictional issue as to the limit of the council's (and Court's) jurisdiction.

To summarise: the cases show a range of views. At one end is the view that a resource consent should be plain on its face and only incorporates other documents if they are *expressly* referred to in the resource consent[37]. The opposing view is that a resource consent is limited by the terms of the application ('application' in the wider *Sutton v Moule* sense): a council cannot grant more than is applied for[38] and therefore the application also must be looked at if the accurate scope of a consent is to be ascertained. An extension of the second view is that yet other public documents may cut down the application, (and therefore the resource consent), if the consent "refers" to them or if they have been lodged as further information required by the council[39].

With the benefit of hindsight it is easy to see how the inconsistencies arose. Except for the early case of *Codner*, most of the first group of the cases was concerned with the identification, often long after a planning or resource consent has been granted, of the terms of the consent where they are not clear. The principal issue in the Court's mind in those cases was the fairness to subsequent holders of the planning (resource) consent. By contrast, many of the cases in the second group were concerned with whether the Court had jurisdiction to hear applications (on appeal) because the consent requested at the hearing was alleged to be wider than the consent applied for. It was usually fairness to non-parties (potential submitters) that was most relevant in those cases.

37 *Attorney General ex rel Hing v Codner; New Zealand Post v Moore; Canterbury Regional Council v Canterbury Frozen Meat Co Limited; Marchant v Marlborough District Council; Walker v Queenstown Lakes District Council*

38 *Pope and Hitchings* [1980] 8 NZTPA 3 (discussed on page 18), *Darroch, Sutton v Moule*

39 *Freemans Bay, Queenstown Bungy cases*

Analysis

The starting point is the principle that every resource consent is limited by the terms of the relevant application. If the resource consent goes beyond what is sought in the application it is *ultra vires*[40].

An example of this is *Pope and Hitchings v Wellington City Council*[41] where the Planning Tribunal was concerned with a simple application to move the Shamrock Hotel from one site to another in Wellington. The notification of the application went further by referring to the conversion of the building into three shops, a restaurant and studio apartments. The shops and restaurant were non-permitted activities in the relevant zones.

The Tribunal held that:

> "any person on whom a copy of the application was served ..... might well have remained unaware that the council might on that application consent to the establishment of non-conforming uses in the relocated buildings"[42].

It stated the relevant principle as being:

> "... it is fundamental that the application for planning consent define the extent of the consent sought. Neither the council to whom such application is made in the first instance, nor this Tribunal on appeal, has jurisdiction to grant consent to anything more than is sought in the application."[43]

In *Booth v Thames-Coromandel District Council*[44] the Planning Tribunal stated:

> "It is fundamental that the scope of planning consent is defined and limited by the application which is originally made and publicly notified."[45]

That fundamental principle means that the other proposition that a resource (or planning) consent should be able to be read on its face without reference to other

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40 *Sutton v Moule* [1992] 2 NZRMA 41 at 46
41 [1980] 8 NZTPA 3
42 Ibid p.5
43 Ibid p.4
44 Decision A102/83
45 Ibid p.1

documents is a simplification or an expression of desirable practice rather than an absolute principle. Therefore cases such as *Codner, NZ Post*[46], *Canterbury Frozen Meats*[47], *Marchant*[48] or *Walker*[49], need to be read subject to the qualification that a resource consent may be limited or subject to terms or conditions contained in the application and inferred from but not (expressly) referred to in the application: (*Freemans Bay Community*[50], *Sutton v Moule, Epsom Normal*[51] *Queenstown Bungy*[52])

It should also be borne in mind that under section 88 of the Act (making an application) an application for resource consent is directed to include some specific information, including:

- a description of the activity, and its location[53]
- an assessment of environmental effects in the form in the Fourth Schedule to the Act[54]
- any information made by a plan or regulations[55]
- a statement of other resource consents required and whether applied for[56]

Since all that information has to be included in the application it must, under the Act, be part of the application as a matter of law.

The principal issue in this case is whether further information supplied by an applicant after the filing of the application can be used to qualify the application in some way. It is clear that supplementary information required under section 92 of the Act cannot *enlarge* an application[57] but it may limit or scope an application and therefore the corresponding consent (if granted). The section 92 power to require further information from an applicant is subject to the qualifications[58] that the

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46 Decision A14/94
47 Decision W22/97
48 Decision W26/97
49 Decision A67/88
50 Decision A67/88
51 Decision A11/95
52 [1994] NZRMA 360
53 section 88(4)(a)
54 section 88(4)(b) and 88(5)
55 section 88(4)(c) - see Resource Management (Forms) Regulations 1992
56 section 88(4)(d)
57 *Wellington Rifle and Gun Club Inc v Wellington City Council* - Decision W141/95
58 section 92(4) of the Act

information must be necessary to enable the consent authority to understand better:

(i) the nature of the activity; or

(ii) the effect it will have on the environment; or

(iii) the ways in which adverse effects may be mitigated.

It appears to us that it is a question of fact in which category (i) - (iii) any information goes (following *Freemans* case), but that if the information is required to better understand the nature of the activity (ie category (i) in section 92(4)) then it may be a part of the application as a matter of law. If in category (ii) or (iii) then it is a question of fact as to whether it is part of the "wider application".

For what the distinction is worth, the interpretation of the limits of a resource consent is a jurisdictional issue, rather than an evidential one. There should be no conflict over the evidence - the documents relied on in this kind of case are part of the council's records and therefore readily accessible by the public. They include:

(a) the formal application and any accompanying document as part of the statutory process ("the wider application");

(b) any request for further information;

(c) the public notification;

(e) the further information.

[(a) to (d) are together called "the application documents"].

It is because there is a jurisdictional issue involved that we believe the *Codner* line of cases has to be read carefully. A resource consent has to look back at the application documents because the consent cannot go beyond those documents which set the initial framework and the limits beyond which the notification and consent cannot go.

Decisions which state that consents must be interpreted on their face and without reference to the application documents are, in effect, following a 'no extrinsic evidence' rule that is more appropriate in contract or other private law situations (eg wills). We believe these decisions have been stated too widely, and that an error has crept in by approaching the issue as evidential rather than jurisdictional.

To summarise, the principles which generally apply are:

(1) the resource consent may go beyond or enlarge the formal application to the extent allowed by the wider application; but subject to that

(2) the resource consent is **limited** by the application documents, and this is a jurisdictional issue, not just an evidential one as to conditions.

(3) under the Act the supplementary information is usually part of the application documents as a matter of law, or sometimes of fact.
[(3) is irrelevant to the issues we have to decide in this case since it falls to be decided under the 1977 statute - see (4) below.]

(4) under the Town and Country Planning Act 1977 any supplementary information supplied at the request of the Council may also restrict the scope of the wider application and this is a matter of fact to be determined in each case. It is this last principle which we apply in this case.

Findings

We now return to the issues identified earlier as to whether there are limits on the resource consents as follows:

- limiting extraction to 20,000m^3 per year;
- providing that the operation should be carried out by one person.

It is of course possible that those points, having been given in the further information, were mere background information or statements of intention[59]. However the request by the council for further information specifically asks for "information as to the likely scale of operations". Consequently, the council is entitled to treat the applicant's responses as serious and binding.

The applicant's reply gave a number of answers[60] to the council's request and all reinforce the idea that rate of extraction was to be limited. The further information states that:

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[59] to use the words of Else-Mitchell J in the *Ryde Municipal Council* case quoted in *Codner*

[60] Quoted on pages 4-5 of this decision

- the former quarry averaged 10,000 cubic yards per year
- the quarry was expected to move 15-20,000 m^3 per year
- the quarry face was to be worked by rippling and dozing only (i.e. we infer, no blasting)
- the likely scale of operations would be "quite small"
- no labour would be employed (it would be a "one-man" operation)
- there would be no ablutions block.

Since limiting extraction is both more definite and more flexible than confining the operation to one person, it appears to us that the latter concept can be seen as a statement of intention that the volume of extraction be limited to a maximum of 20,000m^3 per year. Collectively all the items referred to would lead a reader of the application documents to understand a small, limited quarry operation.

Mrs Sargisson, for the Council, submitted that the restriction was only the applicant's expectation of what would be removed, and that it was not intended to be a self-imposed limitation on the quantity of metal which could be extracted. But the statement needs to be considered in the context of the following factors:

- Mr Shaw had received, and was answering, a formal request about the scale of operations; and
- Mr Shaw was acting for his small company, apparently without the benefit of legal or other assistance, and so he might well have wished to build in some flexibility by giving the range of 15,000 - 20,000 m^3, especially if the quarry had never achieved the volumes he was mentioning. In the end, he did give a maximum figure: 20,000 m^3;
- both the council and other interested parties (potential objectors) were entitled to rely on the statement Mr Shaw made as to the maximum volume.

Mr Rawnsley submitted that the council (in its decision) "addressed the real issue raised by the volume of extraction, namely the impact which it would have in a planning sense, and imposed a condition as to quarry floor area which properly addressed that issue." But we do not accept that as correct for two reasons. First, there are other off-site effects as to noise, dust and traffic safety, which might be

met, in part, by limits on volume and rate of extraction. Secondly, his approach is fallacious because it suggests the case is about implied conditions, rather than about inferred jurisdictional limits deriving from the application documents.

We do not overlook that in accordance with condition A2 of the resource consent[61] the applicant eventually produced a development plan of quarry operations. There is nothing in that which relates to rates of extraction. But even if there was it could not, in our view, be seen as enlarging the scope of the application (and consent), both because it was filed years after the application (and more than six months after the consent) and because, as the applicant's document, prepared after the resource consent was granted, it would have been self-serving.

In the circumstances of this case we find that the additional information supplied by the applicant at the council's request limited the scope of the application, and therefore the consent, to the extent that the maximum volume of material which may be quarried in any year is 20,000 m^3. If there had been no such volunteered restriction in 1978 other objectors might have opposed the application.

Determination

1. Under section 313 of the Act we have a wider discretion in respect of the form of the declarations sought than was formerly the case under the Town and Country Planning Acts. Bearing that in mind, while we are not prepared to make any of the declarations sought in paragraph 1(a), (b), (c), (d), (e), (f), (h) or (i) of the application, we are prepared to make a declaration as to the limits of the resource consent as we have found them to be.

   Accordingly, the Court declares under section 313(b) of the Act that the deemed resource consent granted by the Manukau City Council on 2 October 1978 (and confirmed by the Council's letter dated 16 October 1978) is limited by the application and the further information supplied by Warren Shaw Limited with the effect that the maximum rate of extraction of rock from the quarry shall not exceed 20,000m^3 in any year.

61 Quoted on page 5 of this decision

2. The other declarations sought by the society are that:

"(g) No effective air or water consents have been granted in respect of the quarrying operation at McNicol Road, Clevedon;

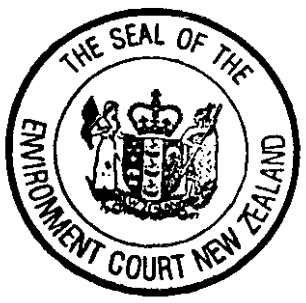
(h) The first respondent ... cannot lawfully operate ... (ii) without first obtaining all necessary air and water consents."

We expressed concern at the hearing about these declarations. Our concerns continue upon reflection. Declaration (g) involves another authority - the Auckland Regional Council - which is not a respondent to this proceeding. Mr Savage admitted some of the difficulties with (g) and gave us some alternative wordings but we are disinclined to use them. He wished to emphasise that the first respondent could not operate under the discharge permits granted by the Auckland Regional Council because those consents are subject to appeal to this Court. We are quite sure that the first respondent is aware of its obligations and its right to apply under section 116 if it wishes.

And Declaration (h) is vacuous in that it simply restates the obligations of the first respondent. In the event, the declarations may be unnecessary anyway because of our decision under 1. above. We therefore refuse to make these declarations.

3. We record that the other proceedings between the parties, viz:

ENF 200/95 - Warren Fowler Limited v Auckland Regional Council
RMA 40/96 - D.J. Gibson v Auckland Regional Council
RMA 42/96 - D.J. Gibson v Auckland Regional Council
RMA 87/96 - L.R. Dalton v Auckland Regional Council
RMA 315/96 - Warren Fowler Limited v Manukau City Council



were adjourned to the next sitting of the Court in Auckland (for a list call only) so that the parties can advise the Court then - if not earlier - as to whether they are to proceed.

DATED at CHRISTCHURCH this 23rd day of May 1997.

J R Jackson
Environment Judge

Tab 3

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. C 10 /2009

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to section 120 of the Act
BETWEEN	GLENTARN GROUP LIMITED (ENV-2008-CHC-000324) Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing at: Queenstown on 10-12 December 2008

Court: Alternate Environment Judge FWM McElrea (presiding)
Environment Commissioner SJ Watson
Environment Commissioner ID Stewart

Counsel: Mr ME Parker for the appellant
Mr GM Todd and Ms LR Barnett for the respondent

Date of Decision: 18 February 2009

DECISION OF THE ENVIRONMENT COURT

RESULT:

A. Appeal allowed; land use resource consent granted.
B. Costs reserved.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Introduction

[1] This is an appeal against a refusal of land use resource consent sought by Glentarn Group Limited ("Glentarn") to enable construction of a dwelling with associated landscaping, roading and earthworks, in an attractive rural setting east of Diamond Lake, Paradise, at the head of Lake Wakatipu.

[2] An important issue in this appeal is the extent to which the purpose of a proposed structure (in this case a farmhouse) is relevant in deciding whether a new building should be allowed in an outstanding natural landscape.

The application, and location

[3] Consent is sought to erect a single storey dwelling with associated works including landscaping, roading and earthworks, in the Rural General zone at the head of Lake Wakatipu. The dwelling will have a floor area of 222m^2 plus 111m^2 verandah, a total of 333m^2, with a maximum height of 6.5 metres. The preferred building site is close to an existing barn completed in February 2007 pursuant to a resource consent granted on 4 July 2006.

[4] Carey Vivian, who gave resource management evidence for the appellant, considered that the current proposal is not unlike the barn, being modest in scale and recessive in design. As Mr Vivian describes the proposed building, it has been purposefully designed to resemble a farm cottage - we would suggest "farmhouse" - featuring a pitched roof of 30^0, a substantial verandah, and cladding of Glenorchy schist, karaka green Colorsteel and wooden beams around the decks and structural elements. It is certainly unlike the angular, heavily-glassed, modern buildings that sometimes signal a "lifestyle" owner.

[5] The application was publicly notified but drew no submissions for or against. The applicant had obtained written approvals from neighbours and consulted with other parties in the vicinity of the site. Neutral submissions were made by the New Zealand Fire Service and the New Zealand Historic Places Trust.

[6] The address of the property is given as 1134 Glenorchy-Paradise Road, Glenorchy. It does not have frontage on to that road (which is some 2 kilometres away) but rather to Old Paradise Road. Judged from the grid lines of exhibit BE4 the site is approximately 1 kilometre north-east of Camp Hill and 1.5 kilometres south-east of the Earnslaw Burn.

[7] The site is on the largest of three contiguous lots presently used as one farming unit for equine and agricultural purposes. The total land holding is 55

hectares in area and roughly triangular in shape. The legal description of the three lots is section 34 and part sections 35 and 36 Block 1, Earnslaw Survey District.

[8] Section 34, on which the proposed residential dwelling would be sited, is 21.0209 ha in area. The appellant has offered as part of the present application a covenant to prohibit subdivision and redevelopment on the remainder of the 55 ha land holding, and has also agreed to amalgamate the two titles for the property.

The appellant

[9] The applicant/appellant is a small private company under the control of Mr Roger Taylor and his partner Ms Karen Luttrell. They are both directors of Glentarn and (together with AWS Trustees Limited) are registered proprietors of the land as trustees of a family trust. The farming business is conducted by Glentarn with most labour at present being supplied by Mr Taylor and Ms Luttrell.

Witnesses

[10] For the appellant Mr Parker called evidence from Mr Taylor, as well as from Carey Vivian (on resource management issues) and Ben Espie (landscape architect). Mr Todd called Andrew Henderson (resource management) and Anthony Rewcastle (landscape architect), and supplied affidavit evidence from Ian Marshall as to traffic counts on Rees Valley Road.

Site history and farming reasons for the application

[11] According to Mr Taylor's researches, legal title for the site was first issued on 2 October 1888, to one George Cockburn. A homestead was built on the site soon afterwards but was destroyed by fire in the early 1890s. The remnants of the stone fireplace are still visible in the lower part of the site.

[12] It appears that no further residence was built upon the site as the next owner was Charles Haines who owned adjoining property on the southern side of Camp Hill. For most of the ensuing 111 years the property was owned either by Mr Haines (1894 – 1945) or by Rose Grant (1954 – 2005). Ms Grant was apparently a well-known Glenorchy identity who lived alone at another of her properties closer to the Glenorchy township. The present owners purchased the property from Ms Grant's heir in October 2005.

[13] Like the original farmers, Mr Taylor and Ms Luttrell wish to build a farmhouse so that they can live on the land and attend to their stock. They have

other occupations but spend most of their "spare" time in the evenings and weekends attending to farming duties.

[14] It is clear that this no "hobby farm". Mr Taylor's evidence gives details of their development of the farm since the time of purchase. At that stage soils and grass had not been maintained, the property was being over-grazed, boundary fences were not containing stock, and internal fences had fallen over and were a potential hazard to stock. A considerable sum has been invested in fencing, planting shelter belts, undertaking soil assessments, applying fertiliser, constructing the barn for storing hay and miscellaneous equipment, introducing stock (progressively), intensive spraying of weeds, upgrading the water supply, and roading.

[15] Current stock numbers are 33 cattle, 33 sheep, two horses and one pony. In addition, grazing and hay has been supplied to adjoining station owners who were short of winter feed. Ms Luttrell has a particular interest in breeding horses from this property.

[16] Mr Taylor explained the difficulties of trying to manage the property without living on it:

> *During periods of extreme weather we are not on hand to ensure the welfare of our stock... The cow that died whilst calving was a result of our not being on hand to identify a problem early enough to ensure that she received veterinary attention....*

He concluded his evidence-in-chief as follows:

> *Being able to live at the property will enable better management and husbandry of the livestock, better utilisation of the property through enabling further intensification and more efficient use of our time by eliminating the frequency of trips that have to be currently made.*

[17] We accept this evidence and find that there are good farming reasons that support this application.

The offering of an alternative site by the applicant

[18] The appellant offered to the Court an alternative building site on the same lot, in a less prominent location. This is down by the Rees River ("site B") rather than sitting atop the escarpment by the barn ("site A"). However there was no request to amend the application so as to substitute site B for site A, and site A is still the preferred location for the appellant. Mr Parker put it on the basis that if the Court was not minded to approve the application as made to the Council (for site A), his client would accept site B.

[19] Mr Todd accepted that site B could be considered without the need to re-advertise the application, as the proposal was essentially the same as that notified. It had similar characteristics and effects (indeed, subject to what we say at para 108 landscape effects would be less at site B), the scale and intensity of the activity would be no greater at site B than at site A, and no-one is likely to have objected to site B who would not have objected to site A. (See eg the discussion in ***Mills v Queenstown Lakes District Council*** [2005] NZRMA 227.) Thus it was common ground between counsel that the Court had jurisdiction to consider site B.

[20] Mr Parker was not able to cite any cases providing meaningful assistance on the question of alternative sites being considered on the hearing of an application for a single site. The situation raises obvious difficulties. Upon consideration of the various issues the position might best be summarised thus:

(i) An application for a resource consent must provide the location of "the proposed activity" (in a way that enables it to be "easily identified"), and attach an assessment of environmental effects of "the proposed activity" – see form 9, Schedule 1, Resource Management (Forms, Fees, and Procedure) Regulations 2003. These and other provisions do not anticipate an application being made for alternative locations or alternative types of activity.

(ii) It is therefore not appropriate to put various options before a consent authority and ask it to choose as between them.

(iii) If the activity for which consent is sought can be justified in its own right, there is no need for a consent authority to consider alternatives. Indeed, it would probably be an abuse of process to require Councils or Courts (or submitters) to have to consider or assess (or argue) alternative proposals, unless one proposal was simply a lesser version of the other – eg "seven storeys instead of nine". Every Court has the implied power to prevent such abuse, and could do so by staying (in effect, refusing to set down) or striking out an applicant's appeal concerning multiple proposals.

(iv) There is jurisdiction to amend an application so long as the amended proposal is within the scope of the original application, applying established criteria.

(v) Appeals relating to successive applications cannot be set down for hearing together as of right. In general an applicant could be expected to elect as between the competing proposals and present its evidence accordingly.

(vi) While there is nothing to stop a further application (and appeal) concerning a different proposal, parties having to respond to successive applications for the same site might be able to obtain orders for indemnity costs to compensate them for repeated involvement in legal proceedings.

[21] In the present case we accept that the application is for site A only, there has been no request to amend the application, and no abuse of process has occurred. Therefore we proceed to consider the site for which consent was sought and refused, site A. Site B does not become relevant unless the appeal fails in respect of site A.

The Rural General zoning and farming

[22] The relevant plan in this case is the Queenstown Lakes Partially Operative District Plan (here called "the Plan") under which the subject site is zoned Rural General. This plan is operative in all respects relevant to this application. The site is also within an outstanding natural landscape, being situated on a terraced valley floor in mountainous country near the confluence of the Rees and Dart Rivers at the head of Lake Wakatipu.

[23] While many provisions of the Rural General zone's objectives and policies relate to the protection of the landscapes which are such an important asset of this district, it is nevertheless timely to remember an important, if not central, purpose of the Rural General zone: it is basically to do with farming. Thus the first objective (5.2 Objective 1 – Character and Landscape Value) is:

> *... to protect the character and landscape value of the rural area by promoting sustainable management of natural and physical resources and the control of adverse effects caused through inappropriate activities.*

[24] Farmland may of course be a resource in more than one sense. The land is farmed for its crops (for milling), pasture (for animals), fruit and vegetables, and other produce. The land is also part of a landscape that, particularly in this part of New Zealand, has very real value for tourism and other recreational purposes. Many of the provisions of the District Plan focus on the landscape value of land, but alongside that must be a recognition of the usual value of rural land in this country, namely as farmland.

[25] While (as Mr Parker noted) the farming purposes of the Rural General zone are not clearly spelled out, they are there to be found in the Plan. Thus Objective 1 (just quoted) acknowledges in different places the importance of farming activity:

(i) *"the character...of the rural area"* This character is, by dint of local history, intrinsically bound up with the farming of the land.

(ii) *"sustainable management of natural and physical resources"* Given that farmland is such a resource, it is impossible to ignore the farming value of rural land in this context.

(iii) *"the control of adverse effects caused through inappropriate activities"* The obvious implication here is that adverse effects from *appropriate* activities may be expected. Whether an activity is "appropriate" or not must depend in large measure upon its purpose. If it is a farming purpose then the activity itself is unlikely to be "inappropriate". Understandably, the Plan does not attempt to direct farmers as to what farming activities they should undertake, except for specific forms of farming such as factory farming (which is discretionary in the Rural General Zone).

[26] The policies to support Objective 1 further develop these themes. Thus Policy 1.2 allows for the establishment "of a range of activities, which utilise the soil resource of the rural area in a sustainable manner". These will be, *par excellence*, farming activities.

[27] Similarly Policy 1.3 warns against compromising the potential value of land for rural productive activities – ie farming - by inappropriate location of other developments and buildings.

[28] Again, Policy 1.4 distinguishes between activities that are based on the rural resources of the area and those that are not; the latter should occur only where the character of the rural area will not be adversely impacted.

[29] Importantly Policy 1.5 is to "provide for a range of buildings allied to rural productive activity and worker accommodation". A farmhouse is certainly "allied to rural productive activity" and will usually also provide "worker accommodation".

[30] Admittedly other policies (specifically 1.1 and 1.6) aim to protect the "landscape values" of the district, while Policy 1.7 seeks to "preserve the visual coherence of the landscape by ensuring all structures are to be located in areas with the potential to absorb change". Whether a change in the landscape (by the addition of a building) needs to be "absorbed" must depend upon whether it impacts upon the "visual coherence of the landscape". In our view the addition of a building designed and used as a farmhouse on land which is clearly farmed, is much less likely to damage the "visual coherence" of the landscape than a building unrelated to a rural landscape.

[31] Finally, there is Policy 1.8 – to "avoid, remedy or mitigate adverse effects of the location of structures and water tanks on skylines, ridges, hills and prominent slopes". Although site A is above (and set just back from) an escarpment, it cannot be described as on a skyline, ridge, hill or prominent slope. Even if Policy 1.8 included escarpments, there are provisions in this case to "mitigate adverse effects" of this type - by locating the farmhouse close to the existing barn, using recessive colours, and adding additional planting to soften the appearance of the new structure as seen from the vicinity of the Rees River. Thus Policy 1.8 is addressed.

[32] Significant also, as Mr Parker reminded us, is the *Explanation and principal reasons for adoption* found on page 5-5 of the Plan, which acknowledges that "a wide range of activities occur in the rural areas, including traditional livestock farming and the growing of supplementary crops, as well as more intensive new pastoral and horticultural enterprises".

[33] Objective 1 and its supporting policies therefore recognise *both* the farming character of much rural land and its landscape value. We consider that the objective of protecting both values is achieved in part by recognising that farming activities will generally be appropriate, and non-farming activities inappropriate, within the Rural General zone, subject to questions of location of structures. Even here the language of the supporting policies for Objective 1 is not absolute. The addition of a farmhouse to a rural area that is clearly being farmed is unlikely to threaten the "visual coherence of the landscape" – or to put the matter differently, such a landscape may have the potential to absorb change of this particular type.

[34] Objective 2 for the Rural General zone is the retention of the life-supporting capacity of soils and vegetation in the rural area. This objective explicitly recognises the importance of farming. Related environmental results anticipated in the Rural General zones include (para 5.2.1) the retention *and enhancement* of the life-supporting capacity of soil and vegetation, and the *continued development* and use of land in the rural area (our emphases). Once again, the Plan contemplates ongoing, and indeed additional, farming activity, and there is nothing that excludes outstanding natural landscapes from these policies and objectives.

[35] Other objectives and policies for the zone are not relevant. They deal with the protection of rural amenity (this proposal cannot be said to detract from rural amenity values) as well as water quality, mineral extraction, the development of ski areas, airport buffers, and a sensitive area of Lake Wanaka.

Approval of the existing barn

[36] In granting consent for the construction of the appellant's barn on 4 July 2006, Hearings Commissioner David W Collins noted that the central issue involved in that application was the effect of the proposed building on the landscape. Having noted the site was part of an Outstanding Natural Landscape ("ONL") and was therefore to be protected from "inappropriate" development (s 6(b) of the Act) the Commissioner observed:

> *I consider that what is inappropriate depends on function as well as appearance.*

At para [27] the Commissioner stated:

I see it as significant that the [barn] building would clearly read as the sort of building one could expect as part of an intensively grazed farming landscape and that the density of buildings would still be such that the structures would not appear to be a significant element.

[37] The Commissioner concluded:

...the proposed structure will not in my assessment significantly undermine the landscape in which it will sit because of the modest scale, colour and planting, the clear functional association with the unusually (for an ONL) manicured setting, the low density of existing structures, and the distance of the only practical public viewpoint.

[38] Although the proposed barn had the status of a restricted discretionary activity, whereas this proposal involves a discretionary activity, our approach is similar to that of Commissioner Collins. We, like Commissioner Collins, see purpose or function as relevant to appropriateness, and important in the assessment for this site.

Landscape assessment and the unity of the ONL

[39] Mr Espie accepted fully the outstanding nature of the surrounding landscape. We consider that he puts the matter well at para 3.3 of his evidence:

The rugged forms of the mountains that rise up from the more tamed and verdant pastoral valley floors are striking to visitors to the area and are undoubtedly romantic in nature. Changing light, weather (including frequent snow cover) and atmospheric conditions can create dramatic effects and I believe that it would be generally shared and recognised by observers that these mountain ranges are majestic, natural and memorable.

[40] However he continues at para 3.4:

The farmed valley floors are not as natural or dramatic in appearance. I believe that it would generally be obvious to observers that these valley floors have been much more modified than the mountain slopes, are less striking and have more in common with many parts of rural agricultural New Zealand. The expansive gravel beds of the braided rivers themselves are however remarkable and obviously natural features.

[41] While we accept that there is a distinction between the "farmed valley floors" and the surrounding "mountain slopes", we consider that the landscape is in fact one landscape in which the valley floors (including nearby Rees River and Diamond Lake) provide a contrast to the vast, steep mountain slopes of the area – these being the Richardson Range to the east of Rees Valley, the Humboldt Range to the west of the Dart Valley, Mt Earnslaw and other snow-capped peaks forming the Forbes Range between the Rees and Dart Rivers, and Mt Alfred standing sentinel-like at the convergence of the Rees and Dart Rivers.

[42] Indeed, the generally flat and often terraced floors of these valleys, a result of the glacial history of the land (and the earlier intrusion of Lake Wakatipu into the Rees Valley), are part of the natural landscape and provide a marked contrast with the soaring mountains on all sides. They produce a different landscape to similarly grand mountains that lack flat valley floors – a landscape in which the contrast between the horizontal (floor) and the vertical (mountain sides) is an integral part of what is seen and remembered. We therefore discourage any suggestion that the farmed valley floor can be altered without affecting the overall landscape.

[43] However it is true that the farmed valley floors (both here and in other parts of the district) have been much more modified than the mountain slopes, and are obviously farmed. This is seen not just from the fencing and concentrations of stock, but also from the way the land has mostly been kept clear of scrub or bush. As Commissioner Collins puts it, this site is an "unusually ... manicured setting" for an ONL. (Indeed, Mr Rewcastle considered that the former, less-intensive farming regime "may have provided for reversion towards a natural state in parts of the site" - para 6.26.) Thus the open character of the landscape can itself be a product of farming activity.

[44] Mr Espie accepts that previous decisions of this Court have rejected a method of landscape categorisation that separates the valley floor from its walls (eg ***Wakatipu Environmental Society Incorporated v QLDC***, Decision C13/2002, para 33). We of course agree with that proposition but disagree with his assessment that the immediate surroundings of the site are "not particularly outstanding or natural in themselves".

> *It is relatively unremarkable in terms of topography, its ecology has been very considerably modified by continuous farming use over many decades and in terms of formative processes it is clearly distinct from the dramatic mountain slopes (para 3.8).*

[45] In our view the site and its immediate surroundings are both outstanding and natural. Thus Mr Espie's photograph 3A – and Mr Rewcastle's photo G (also taken from Rees Valley Road) - demonstrate the natural, terraced effect of the land surrounding site A, the regular angles of the escarpment below the site, and the flat flood plain associated with the Rees River extending from the foot of the escarpment across to the braided edge of the river.

[46] Thus it is not necessary, in order to agree with Mr Espie's conclusion (that site A and site B are both acceptable), that the valley floor be treated as an inferior part of the ONL. The more valid route to his conclusion is to accept that the valley floor is an integral (and contrasting) part of the ONL but is clearly a part in which farming activity is, by now, an integral element that can in turn contribute to openness of the landscape. (However we agree that the more cultured, farmed

part of the landscape can more readily absorb a farmhouse than the less modified hillsides.)

[47] Where does this take us? Once it is accepted that the horizontal (or valley floor) element of the landscape has long been farmed, the addition of a new farming activity (a farmhouse) is no surprise, as it is consistent with the modification which human activity has already made to this part of the landscape.

Evidence for the Council

[48] Not surprisingly Mr Henderson relied on Mr Rewcastle for his assessment of landscaping matters – just as Mr Vivian relied on Mr Espie for such assessment.

Mr Rewcastle

[49] The essence of Mr Rewcastle's opinion is to be found in the concluding paragraphs of his evidence-in-chief where he describes the landscape as displaying a low level of domestication and asserts that the proposed domestication associated with the development will compromise the open and natural character which is presently displayed by the smooth stepped river terrace system in the context of a wider rugged and romantic landscape. In his view the development would exceed the scale and nature of development that could be absorbed by the landscape.

[50] Mr Rewcastle starts by identifying the site as part of an outstanding natural landscape (district wide). He explains:

> *The pastoral flood plains and river terraces within which the subject property is located forms [sic] part of a dramatic mountainous and natural setting which includes the Rees River and Diamond Lake. I consider the landscape is picturesque and romantic in nature...(para 5.3).*

[51] Mr Rewcastle correctly points out that there are four outstanding natural features in the near vicinity of the site. These are Camp Hill, Mt Alfred, and the Rees and Dart Rivers. (The Dart River is not really in the near vicinity of the site but instead one could add Diamond Lake, which is visible in some of the photographs of the site as produced in evidence).

[52] Mr Rewcastle's assessment of environmental effects depends heavily on the fact that the site is visible from Rees Valley Road and other public places. He does not give much weight to the very limited public use of those places and nowhere in his written evidence does he give any credit for the fact that the building has a farming purpose. Instead he relies heavily on an increased level of "domestication", without considering whether domestication which is part of a

farming activity would be properly part of the present rural landscape. To the contrary he states (para 6.21):

> *I consider the proposed development introduces a level of domestication that is not consistent with the natural character of the landscape and increases the level of built form in an otherwise open area.*

[53] Mr Rewcastle favours "the low intensity management regime which existed prior to the property being purchased by the current owners", because it "provided ecological stability and may have provided for reversion towards a natural state in parts of the site" (para 6.26).

[54] However, that "low intensity" management regime finished with the purchase of the property by the present owners; they have introduced a more intensive farming regime involving new fencing, the introduction of horses and cattle, the planting of shelterbelts, the application of lime fertiliser and the construction of a farm shed. Although Mr Rewcastle may regret the signs of "domestication of the landscape", they are permitted by the Rural General zoning and cannot be regarded as some inferior type of farming regime. To the contrary, the more productive the farming regime, the better is the use of the soils.

[55] In fact Mr Rewcastle's correct statement (para 6.25) that "the current, relative absence of human activity creates a sense of isolation" points to what we consider is his real concern – the loss of that sense of isolation. He continues in para 6.25:

> *The proposed development would introduce an element of domestication that will result in gradual modification of this unique landscape. The extent of adverse effects associated with this modification may not be fully realised upon construction of the dwelling but are likely to occur as a more gradual domestication of the landscape over time.*

[56] It is true that the absence of human activity creates a sense of isolation, and for many that may be a wonderful attribute of an accessible, outstanding natural landscape. However neither the RMA nor the District Plan discourage human activity as such, or justify a view that human activity should be at a low level. If the land is suitable for more intensive farming, involving increased human activity, then the previous "sense of isolation", which was itself a product of less-intensive sheep and/or cattle stations, cannot be expected to remain.

[57] To put the matter more simply, the sense of isolation resulting from minimal human activity is a product of natural and economic forces that have created a type of farming typified in high country sheep stations. Farming practices were not developed in order to preserve a sense of isolation; rather the latter was a by-product of the former. More intensive farming must mean more

human activity. However this is likely to be an appropriate activity precisely because it continues and supports the rural character of the land use.

[58] Quite different considerations would apply if this were not a farmhouse but simply a dwelling for people wishing to live in or visit an ONL.

[59] Mr Rewcastle complains (para 7.1) that Mr Espie:

> *... appears to undervalue the contribution the flat pastoral areas, of which the subject site forms part, makes [sic] as a refined display of natural topography...*

To the contrary we suggest that the "pastoral" nature of these areas, and the "refined" display of natural topography, are present because the land has been kept clear for farming purposes (ie by and for human activity). Mr Espie is therefore able to accept the proposed farmhouse as consistent with the rural zoning.

Mr Henderson

[60] Mr Henderson notes that discretionary activity status has been afforded by the Plan in ONL's because:

> *in or on outstanding natural landscapes and features the relevant activities are inappropriate in almost all locations within the zone, particularly within the Wakatipu Basin or in the inner Upper Clutha area; (part 1.5.3(iii)) of the Plan.*

However this explanation of the status of activities is an introductory comment and must give way to the actual provisions of the Plan and the Act concerning the particular activity in question.

[61] Mr Henderson does not dwell on the reference to the relevant activities being "inappropriate in almost all locations within the zone". It can be accepted that a new farmhouse is likely to be inappropriate in almost all locations within the zone, simply because most farms can be expected to already have a farmhouse upon them. But even confining the enquiry to the appellant's 55-hectare block, the fact that the dwelling is for farming purposes and not visitor accommodation – and that it will be located beside an existing barn thus limiting buildings to a "cluster" with an associated curtilage - points to the relevant activity being appropriate in this location.

[62] In cross-examination Mr Henderson accepted that s 7(b) – "the efficient use and development of natural and physical resources" – does suggest that the purpose for which a dwelling is to be used is a proper consideration under s 104, if (he added) that purpose contributed to such efficiency. He also conceded to Mr Parker that having a farmhouse on this farm would have a number of advantages to the farmer.

[63] Mr Henderson also accepted in cross-examination that there is, to a degree, a distinction between what one would see around a farmhouse compared with a lifestyle type of property; and, in relation to para 5.4.2.2(2)(c)(iv), that the reference to "inappropriate domestication of the landscape" implies that there may be an appropriate level of domestication.

[64] Considering Mr Henderson's evidence in the light of these admissions, we felt that it did not clearly undermine the appellant's case.

Landscape and visual amenity

[65] The over-arching objective concerning landscape and visual amenity on a District-wide basis is that development should be undertaken in a manner that avoids, remedies or mitigates adverse effects on the landscape and visual amenity values: see para 4.2.5 (Objective).

[66] The four policies that support this objective, in respect of ONLs (District-wide), are:

(a) *To maintain the openness of those outstanding natural landscapes and features which have an open character at present.*

(b) *To avoid subdivision and development in those parts of the outstanding natural landscapes with little or no capacity to absorb change.*

(c) *To allow limited subdivision and development in those areas with higher potential to absorb change.*

(d) *To recognise and provide for the importance of protecting the naturalness and enhancing amenity values of views from public roads.*

[67] As to (a), openness of character is characterised by the lack of trees as well as the lack of structures, whereas "open space" refers primarily to a lack of buildings: ***Just One Life Limited v Queenstown Lakes District Council*** Decision C163/02 at para 44. We accept that the open character of the ONL will be slightly reduced by adding an additional building at this location. However the effects of the proposed dwelling on the openness of the landscape will be limited by containing all items of obvious domestic activity (garden items, paving, car parking areas, clotheslines and such like) within a specified curtilage area, and by the choice of building materials and colours. (We do not see new amenity planting as contributing to open character.)

[68] As to (b) and (c), the potential of this particular landscape to absorb development is assisted by the use of recessive colours, and by the farming nature of the present use of the land and of the proposed structure – that is, the structure is consistent with the rural aspect of the landscape and is therefore more easily absorbed into it. Further, proposed vegetation of the escarpment's upper edge will reduce visibility from the Rees River margins. As the vegetation

matures, visibility from Rees Valley Road - which is at some distance (and only intermittent) - will also be reduced by the proposed vegetation. Further, the location of site A adjoining the existing barn provides some screening (from Old Paradise Road) and reinforces the farming nature of the use of the structure. All of these factors contribute to the ability of the landscape to absorb change of this nature.

[69] As to (d), without in any way detracting from the importance of protecting the naturalness and enhancing amenity values of views from public roads, the location and low public usage of the public roads relevant to this appeal are significant. Further the "naturalness" of those views is already affected by the modification of the landscape by farming activity and this further modification sits comfortably in that context. For these reasons also, amenity values will not be significantly affected.

Assessment matters for ONLs (District wide)

[70] The Plan sets out four assessment criteria at para 5.4.2.2 (2), each of which we now consider in turn.

(a) Potential of the landscape to absorb development

[71] Under this heading, the first issue is the extent of visibility from public places. The site is not visible from the principal public road in the area, the Glenorchy-Paradise Road. It is visible at a distance from the Rees Valley Road, on the far side of the Rees River. These views however are from distances of between 1.1 and 2.6 km and are intermittent due to road-side vegetation. It is the opinion of Mr Espie for the appellant that in these views, proposed vegetation and proposed cladding colours will mean that the dwelling will be a minor element visually in a vast landscape panorama.

[72] The site is also visible from Old Paradise Road, being that stretch of legal road that runs from the location of the (former) Old Rees River Bridge (immediately south-east of the site) to the Earnslaw Burn to the north-west. This portion of road constitutes the existing access to the site from the west and will be connected to the Glenorchy-Paradise Road by a realignment of Camp Hill Road.

[73] However Old Paradise Road carries very little existing traffic, principally due to the fact that it does not go beyond the appellant's site, and thus is not a through-road.

[74] Likewise traffic volumes on Rees Valley Road across the river are low. The evidence of Mr Ian Marshall, Roading Manager for the Council, is that average daily traffic over a 7-day period in February 2008 was only 83 vehicles.

Similar figures were obtained in most of the previous eight years. It is accepted that most of these vehicles would belong to farm workers, or trampers, climbers, hunters or fishers travelling up Rees Valley for recreational purposes.

[75] It is not suggested that there is likely to be any major change to the low traffic volumes on Old Paradise Road and Rees Valley Road in the foreseeable future. As already noted the site is not visible at all from the most-used road in the area, that linking Glenorchy and Paradise.

[76] The next issue is visual prominence. We agree with Mr Espie's assessment that the proposed development will not be visually prominent to the extent that it dominates or detracts from views otherwise characterised by natural landscapes. This is because this part of the landscape is obviously farmed, with flat, uniform paddocks of exotic grass, both new and old fencing and both the appellant's barn and another barn to the west visible at most places from which the farmhouse will be visible. The dwelling will have, as Mr Espie says (para 4.17):

> *...the overall appearance of a modest, traditional farm dwelling and would not appear as an entirely unexpected element in either of the proposed location options.*

[77] For reasons already covered, we consider that this development will not dominate or detract from the natural landscape.

[78] The remaining issues under heading (a) - eg effects on indigenous ecosystems - have no application in this case.

(b) effects on openness of landscape

[79] We accept that site A is "broadly visible" from some public places, although these have very little public use. We also accept that the open space values of the site and surrounding landscape will be adversely affected by the addition of the only dwelling in these views. As already indicated at para 67 there will be some reduction in the openness of this landscape.

(c) cumulative effects on landscape valules

[80] Before dealing with the Plan's provisions regarding cumulative effects, we need to comment specifically on the only development in the vicinity mentioned by any witness.

[81] Mr Todd provided the Court with copies of the various decisions regarding a consented development at Camp Hill, known as the Earnslaw Station development. This is a 26-lot subdivision approved for the west side of Camp Hill, with its nearest boundary only about 1 kilometre west of site A. It has some

surprising aspects of its planning history which suggest that it should not be regarded as a precedent:

- First, it seems to have emerged as a Council proposal for a Rural Residential zone in the 1990s, allowing intensive subdivision (eg into 36 allotments) as a controlled activity. This status avoided the need for public notification of a subdivision application: see s 93 of the Act.

- In 2004 an application was made seeking resource consent as a controlled activity for a subdivision into 36 allotments. The Council determined under s 94 that no one would be adversely affected by the activity, and therefore no party was served with notice of the application. That consent was granted.

- Thirdly, the present consent relates partly to land in the Rural Residential zone and partly to land zoned Rural General. It required consent as a non-complying activity, which was granted partly because Commissioner Parker considered that the effects would only be "minor" – this despite the scale of the development and the fact that it was in an outstanding natural landscape.

- Finally, Commissioner Parker was prepared to act on evidence from two former Councillors alleging that the boundaries of the Rural Residential zone as expressed in the Plan were not those intended by the Council. With respect, such intention was legally irrelevant in the absence of any appeal against the boundaries of the Rural Residential zone, or any plan change seeking to amend those boundaries. The zoning boundaries as settled by due process became part of the law of the land, and the Commissioner should not have been influenced by Councillors seeking to undermine the published boundaries on the basis that they believed them to be contrary to the intentions of Council. The Council's intentions are to be gauged by the decisions that it makes and publishes. Any other "intention" may or may not have become the law, depending on objections and appeals.

[82] We acknowledge however that the present consent replaced an earlier consent which may have had more serious environmental effects. Thus the "permitted baseline" would have provided a significant argument in favour of the application - assuming a discretion to disregard that baseline was not appropriate under s 104(2).

[83] Mr Espie's evidence was that the consent given to this development was on condition that it not be visible from Rees Valley Road. Therefore, it was argued, no cumulative effect of the two developments would arise. As Mr Todd commented, a study of Commissioner Parker's decision contains no such comment, and nor is the lack of visibility a condition of consent. Having read the relevant decision, and given also that members of the Court were able to see

building poles on the Camp Hill site in the same view as the subject site from Rees Valley Road – a matter on which no party took the opportunity offered to recall any witness – we do not accept Mr Espie's evidence on this point.

[84] Our view of the Earnslaw Station development, if it proceeds, is that it will result in a significant degradation of the landscape values of the area to the west of the subject site and will affect the present impression of isolation for those approaching the subject property by road – and probably also for those looking west from parts of the Rees Valley Road. Consequently the receiving environment against which the present application must be considered is one already modified by earlier decisions of (or on behalf of) the Council regarding Camp Hill.

[85] Applying the Plan's guidelines as to the cumulative effects of development on the landscape (section 5.4.2.2 (2)(c)), we do not consider that the proposed development will result in the introduction of elements that are inconsistent with the (modified) natural character of the site and surrounding landscape. This is because the purpose to which the structure will be put (a farmhouse) will merely reinforce existing modifications of the natural character of the landscape for farming purposes – the barn, shelter belt, fencing and roading.

[86] Given that the Earnslaw Station Development would be clearly a residential or lifestyle development, while the subject application relates to a single farmhouse, we do not see the effects of the latter as being likely to exacerbate adverse effects from the former. Nor do we see the Earnslaw Station development as representing a threshold with respect to the subject site's ability to absorb further change. The two sites will not normally be seen in the same view. Of course some further domestication will occur by the addition of this farmhouse but it is of an appropriate type given the rural zoning and well established farming usage of the land. The guidelines of the Plan refer to "inappropriate domestication of the landscape".

[87] Putting all these aspects together, it is unlikely that there will be adverse cumulative effects resulting from granting this consent.

(d) Positive effects

[88] A positive effect noted by the witnesses was the opportunity to protect open space from further development. The appellant has volunteered a covenant to ensure that the proposed dwelling will be the only dwelling within the entire area of the appellant's 55-hectare landholding. Also volunteered is a condition that all land outside the marked curtilage area shall be maintained by some agricultural or horticultural land use, and that the farming of the land will continue at least the same level of intensity. These conditions will, as Mr Espie notes (para 4.45), preserve the entire farmed flats component of this landscape that is visible from Rees Valley Road in an agricultural use, with one attendant

dwelling. Indeed at the hearing the appellant went further and agreed to a condition requiring amalgamation of the separate titles for its land, to ensure that it continues to operate as one farming entity.

[89] There are also some positive effects of the proposal on ecology. This will be achieved through the proposed areas of gully revegetation planting on the escarpment adjacent to the proposed dwelling, covering an area of approximately 3500m^2. The escarpment is currently showing some effects of erosion and the proposed gully planting will help stabilise the slope and provide a natural filtration system for run-off.

[90] The revegetation (using native species) will also have some positive effects on biodiversity and will ultimately help connect the farmed flats visually to the native forest to the north.

[91] We accept these as positive effects of the proposed activity.

[92] Mr Rewcastle for the Council did not in his evidence refer to any positive effects but agreed in cross-examination that they were present.

Outcome of consideration of assessment matters

[93] Bringing all four assessment matters together, the landscape has very limited ability to absorb development, and there will be some reduction in the openness of the landscape, but cumulative effects are unlikely and some positive effects will result from the development. However our view of the assessment matters is at different points coloured by both the purpose and appearance of the farmhouse, which will help it to merge into what is both natural and farmed landscape as an appropriate form of domestication.

The decision of the Council

[94] The hearing of the application was delegated by the Council to two Commissioners, David Clarke and David Collins. Like us, they disagreed with Mr Espie's view that the mountains dominated the landscape, stating instead that they formed one part of a whole package. However they considered that an application in this location should be assessed almost entirely on landscape effects, and in our view gave insufficient weight to the purpose or function of the dwelling as a farmhouse for a working farm. Interestingly, the Commissioners noted Commissioner Collins' view, when consenting to the barn, that what is appropriate depends on function as well as appearance, but they then deem the proposed dwelling inappropriate "because it does not protect the outstanding natural landscape and therefore is contrary to this section [s 6(b)].

[95] For the future benefit of the parties we stress that this sort of reasoning is tautological and erroneous. The Commissioners' view means that ONLs are to be protected from all activities that do not protect them, which is nonsense. It amounts to saying that all activities are inappropriate if they do not protect an outstanding natural landscape, whereas s 6(b) seeks to protect such landscapes only from "inappropriate" activities.

[96] Secondly, there are places where the Commissioners tend to elevate individual policies to the status of pre-conditions of consent. For example, they state that the visibility of buildings "must not compromise open space values" - whereas the Plan lists open space values as *one* matter amongst others to be taken into account, and, even then, the *extent* of adverse affect is to be considered. Later they assert that while development is not prohibited in the Rural General zone, "it certainly has to take place in areas [where] it can be absorbed in the landscape. This proposal cannot achieve that." With respect, that is to treat each policy as a cumulative requirement of all development, and fails to deal with the concern of the objective with "inappropriate activities".

[97] Finally, the Commissioners attached much more weight to the limited views of the site from Rees Valley Road than we are prepared to do.

[98] As required by s 290A of the Act, we have had regard to the Commissioners' decision under appeal. It is a careful decision but we disagree with its reasoning and conclusion.

The framework of s 104

[99] We have considered the actual and potential effects on the environment of allowing the activity, and for reasons already spelled out we do not find that these will be adverse. We have considered the provisions of the Plan, relating both to the Rural General zone and to ONLs, and conclude that those provisions, taken as a whole, support the application. Although we accept that there will be some reduction of the openness of the landscape, it will not be inappropriate in its context

[100] In terms of any other relevant matters, we have no concerns that approval of this proposal will create an unwelcome precedent. Few serious farming ventures are unlikely to be without a farmhouse on or near the farm, and the detail of this development should allow it to sit comfortably in the rural setting of the valley floor without compromising the ONL.

Conditions of consent

[101] Section 104B enables a consent to be granted subject to conditions. Draft conditions were submitted by the appellant and modified slightly during the course of the hearing.

[102] It was accepted at the hearing that a consent granted on the basis that this dwelling was needed as a farmhouse for a substantial farming activity, could be rendered hollow if farming activity on the property was discontinued or cut back, or if the dwelling was used instead for other types of residential activity. Either type of change would have effects inconsistent with the evidence offered in this case and relied on by the Court. The appellant was prepared to accept conditions that would avoid these outcomes.

[103] In relation to other types of residential activity, visitor accommodation (as defined in the Definitions section of the Plan, would require a separate resource consent and we were assured that no such application would be made. However, other residential uses are homestay accommodation (up to four persons permitted) and registration as a holiday home, which would allow the dwelling to be let out for up to 90 days each year. The appellant has offered a condition that would prevent either of these activities, and this is acceptable to the Council and the Court.

[104] As to the question of farming activity, the Court left it to counsel to try and word an appropriate condition. As a result the applicant offered to add to condition 17(d) (requiring that all land outside the curtilage area shall be maintained by some agricultural or horticultural land use such as some form of grazing or cropping) so as to provide for a minimum of a 120 stock units all year round with minimum areas for the production of hay and/or baleage.

[105] The Court is reluctant to specify fixed numbers of stock units or areas for production of hay or baleage. Amongst other reasons, such a formula may be overtaken by events, and suggests that the Court is telling the applicant how to farm its land, which is not the intention.

[106] Instead we consider that the condition should provide that the land will continue to be farmed at least as intensively as at present, as described in evidence by Mr Taylor. Given that the applicant intends to increase production from the property as further areas are fenced off and developed, such a condition should not be at all onerous but will ensure that any consent granted is linked to the evidence put forward to justify it, specifically the evidence that a farmhouse for it was needed on the site for farming purposes.

[107] Mr Todd in oral submissions appeared to accept the need for some such condition. He expressed the Council's concern in this case in this way, that recognising that farmers need to have a dwelling, the consent authority needs to be satisfied via conditions that the situation said to justify the need for a dwelling is going to remain. Further, he said, effects of the dwelling need to be considered and protections put in place for the future.

Brief comment on site B

[108] Given our view that site A should be approved within the criteria set out in s 104 (and in particular having regard to the provisions of the District Plan) it is unnecessary for us to consider site B as an alternative. We would add however for the benefit of the parties, that we did not consider that it was necessarily a "better" site from an environmental point of view. While it was less visible than site A from certain positions, it is within or dangerously close to the flood plain for the Rees River, it would involve the use of additional farmland for roading access, and it relies on trees outside its own boundary – particularly willow trees – to maintain its relative seclusion from public view.

Part 2 considerations and conclusions

[109] The provision of a farmhouse for the applicant's farm will promote the sustainable development of natural and physical resources (s 5). Specifically, the life-supporting capacity of this land will be improved, and there will be social and economic benefits to its farmers who will not have to travel some distance each day to attend to the farm. The potential of the land to meet the needs of future generations will not be diminished, and adverse effects on the environment – some reduction in the openness of the landscape – will be mitigated by conditions of consent.

[110] The only relevant matter of national importance (s 6) is the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development. No subdivision is involved; in fact, the two titles for the property will be amalgamated into one. The proposed farmhouse will not compromise any outstanding natural feature, although it is near to Camp Hill (already seriously compromised by earlier decisions of the Council). While the escarpment upon which site A is situated is part of an outstanding (indeed, majestic) natural landscape, its use as a site for a farmhouse (the only dwelling on the farm) is appropriate. Both the purpose (or function) and the appearance of the structure are relevant in this assessment, and in both respects this proposal is appropriate. If this proposal had been for a non-farming activity it would probably not have had our support.

[111] In terms of the "other matters" listed in s 7, the proposal will assist the efficient use and development of natural and physical resources and will not detract from (rural) amenity values.

[112] Overall, the proposal is supported by the provisions of the Act and of the Plan, particularly when both rural and landscape values are considered together.

[113] These conclusions have been reached without having to consider an alternative site offered by the appellant.

[114] The appeal is accordingly allowed and consent granted in terms of the attached conditions.

Costs

[115] Costs are reserved.

Dated at Auckland this 18th day of February 2009

For the Court:

FWM McElrea
Alternate Environment Judge

Issued: 18 Feb 2009

CONDITIONS of CONSENT: GLENTARN GROUP LTD

For the reasons discussed above, consent is granted subject to the following conditions:

General Conditions

1. The development is to be carried out in accordance with the plans (stamped as "received" by the Council's on 3 July 2007 and produced in evidence as exhibits CV4 and CV5) and the application as submitted, with the exception of amendments required by the following conditions of consent.

2. Compliance with any monitoring requirement imposed by this consent shall be at the consent holders' expense.

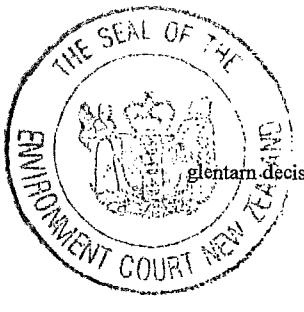
3. The consent holder shall pay to the Council an initial fee of $240 for the costs associated with monitoring of this resource consent in accordance with section 35 of the Act.

Engineering Conditions

4. All engineering works shall be carried out in accordance with the Queenstown Lakes District Council's policies and standards, being New Zealand Standard 4404:2004 with the amendments to that standard adopted on 5 October 2005, except where specified otherwise.

5. The owner of the land being developed shall provide a letter to the Council advising who their representative is for the design and execution of the engineering works and construction works required in association with this development and shall confirm that these representatives will be responsible for all aspects of the works covered under Sections 1.4 & 1.5 of NZS4404:2004 "Land Development and Subdivision Engineering", in relation to this development.

6. Prior to the commencement of any works on the land being developed the consent holder shall provide to the Queenstown Lakes District Council for review, copies of specifications, calculations and design plans as is considered by Council to be both necessary and adequate, in accordance with Condition (1), to detail the following engineering works required:



(a) The provision of a water supply to the dwelling in terms of Council's standards. The dwelling shall be supplied with a minimum of 2,100 litres per day of potable water that complies with the requirements of the Drinking Water Standard for New Zealand 2005.

(b) The provision of a stormwater disposal system that is to provide stormwater disposal from all impervious areas within the site. The proposed stormwater system shall be designed by a suitably qualified professional as defined in Section 1.4 of NZS4404:2004 and subject to the review of Council prior to implementation.

(c) The provision of an access way to the dwelling that complies with the guidelines provided for in Table 3.2(a) of the NZS4404:2004 amendments as adopted by the Council in October 2005. This shall be trafficable in all weathers and be capable of withstanding a laden weight of up to 25 tonnes with an axle load of 8.2 tonnes or have a load bearing capacity of no less than the public roadway serving the property, whichever is the lower.

(d) The provision of an effluent disposal system designed by a suitably qualified professional as defined in Section 1.4 of NZS4404:2004in terms of AS/NZS 1547:2000 that will provide sufficient treatment / renovation to effluent from on-site disposal, prior to discharge to land. To maintain high effluent quality such a system would require the following:

- A requirement that the lot must include systems that achieve the levels of treatment determined by the specific design.
- Regular maintenance in accordance with the recommendations of the system designer and a commitment by the owner of the system to undertake this maintenance.
- Intermittent effluent quality checks to ensure compliance with the system designer's specification.
- Disposal areas shall be located such that maximum separation (in all instances greater than 50 metres) is obtained from any watercourse or water supply bore.

(e) The drinking water supply is to be monitored in compliance with the Drinking Water Standards for New Zealand 2005 for the presence of E.coli, by the consent holder, and the results forwarded to the Queenstown Lakes District Council. The Ministry of Health shall approve the laboratory carrying out the analysis. Should the water not meet the requirements of the Standard then the management group for the lots shall be responsible for the provision of water treatment to ensure that the Drinking Water Standards for New Zealand 2005 are met or exceeded.

(f) In the event that the number of persons to be accommodated in the dwelling is to be greater than 3, then the Queenstown Lakes District Council will require commensurate increases in the water supply to that lot at the rate of 700 litres per extra person per day.

(g) Prior to the occupation of the dwelling, domestic water and fire fighting storage is to be provided. A minimum of 20,000 litres shall be maintained at all times as a static fire fighting reserve within a 30,000 litre tank. Alternatively, an 11,000 litre fire fighting reserve is to be provided for each dwelling in association with a domestic sprinkler system installed to an approved standard. A fire fighting connection in accordance with Appendix B - SNZ PAS 4509:2003 is to be located within 90 metres of any proposed building on the site. Where pressure at the connection point/coupling is less than 100kPa (a suction source – see Appendix B, SNZ PAS 4509:2003 section B2), a 100mm Suction Coupling (Female) complying with NZS 4505, is to be provided. Where pressure at the connection point/coupling is greater than 100kPa (a flooded source - see Appendix B, SNZ PAS 4509:2003 section B3), a 70mm Instantaneous Coupling (Female) complying with NZS 4505, is to be provided. Flooded and suction sources must be capable of providing a flow rate of 25 litres/sec at the connection point/coupling.

The reserve capacities and flow rates stipulated above are relevant only for single family dwellings. In the event that the proposed dwellings provide for more than single family occupation then the consent holder should consult with the NZFS as larger capacities and flow rates may be required.

The Fire Service connection point/coupling must be located so that it is not compromised in the event of a fire. The connection point/coupling shall have a hardstand area adjacent to it that is suitable for parking a fire service appliance.

The hardstand area shall be located in the centre of a clear working space with a minimum width of 4.5 metres. Pavements or roadways providing access to the hardstand area must have a minimum formed width as required by QLDC standards for rural roads (as per NZS 4404:2004 with amendments adopted by QLDC in 2005). The roadway shall be trafficable in all weathers and be capable of withstanding a laden weight of up to 25 tonnes with an axle load of 8.2 tonnes or have a load bearing capacity of no less than the public roadway serving the property, whichever is the lower. Access shall be maintained at all times to the hardstand area.

Underground tanks or tanks that are partially buried (provided the top of the tank is no more than 1 metre above ground) may be accessed by an opening in the top of the tank whereby couplings are not required. A hardstand area adjacent to the tank is required in order to allow a fire service appliance to park on it and access to the hardstand area must be provided as above.

Fire fighting water supply may be provided by means other than the above if the written approval of the New Zealand Fire Service is obtained for the proposed method.

The fire fighting water supply tank and/or the sprinkler system shall be installed prior to the occupation of the building.

(h) The provision of mounding on the uphill side of the dwelling to mitigate any potential stream flows from the small tributaries draining off the Cockburns Bush area during storm events. The mounding shall be designed by a suitably qualified professional and incorporate recommendations made in the Royden Thomson Geologist Assessment, dated 29/11/2005.

7. Prior to commencing works on site, the consent holder shall submit a traffic management plan to Council for approval. The Traffic Management Plan shall be prepared by a Site Traffic Management Supervisor (certification gained by attending the STMS course and getting registration). All contractors obligated to implement temporary traffic management plans shall employ a qualified STMS on site. The STMS shall implement the Traffic Management Plan.

8. The consent holder shall install measures to control and or mitigate any dust, silt run-off and sedimentation that may occur including those measures defined in the site management plan submitted in relation to the application by Aurum Consultants. Specific attention shall be given to protecting silt laden waters from entering any water course or boggy area on the site. These measures shall be implemented **prior** to the commencement of any earthworks on site and shall remain in place for the duration of the project.

9. The consent holder shall provide Council with the name of a suitably qualified professional as defined in Section 1.4 of NZS4404:2004 who is to supervise the excavation procedure. This

engineer shall continually assess the condition of the excavation and implement any design changes / additions if and when necessary.

10. Prior to construction of any buildings on the site a suitably qualified engineer experienced in soils investigations shall provide certification, in accordance with NZS 4431 for all areas of fill within the site on which buildings are to be founded (if any).

11. Within four weeks of completing the earthworks the consent holder shall submit to Council as built plan of the fill. This plan shall be in terms of New Zealand Map grid and shall show the contours indicating the depth of fill. Any fill that has not been certified by a suitably qualified and experienced engineer in accordance with NZS 4431 shall be recorded on the as built plan as "uncertified fill".

12. At the completion of the earthworks all earth-worked areas shall be top-soiled and grassed or otherwise permanently stabilised within 6 weeks.

13. No earthworks, temporary or permanent, are to breach the boundaries of the site.

14. Prior to the occupation of the dwelling, the consent holder shall complete the following:
    (a) The submission of 'as-built' plans and information required to detail all engineering works completed in relation to or in association with this development.
    (b) The completion of all works detailed in Condition (6) above.
    (c) The consent holder shall provide a suitable and usable power supply and telecommunications connection to the dwelling.

Amalgamation

16. Prior to the construction of the dwelling, the landowner shall amalgamate Titles OT 87/46 and OT 203/240 into a single title.

Restrictive Covenant

17. Prior to the construction of the dwelling, a covenant in favour of the Council shall be registered pursuant to section 108(2)(d) of the Resource Management Act 1991 on the Certificate of Title for the property (Section 34, Part Section 35 and Part Section 36 of Block 1 Earnslaw Survey District

(ie the entire 55 hectare landholding)) for the performance of the following conditions on a continuous basis:

(a) All elements of domestic curtilage associated with the dwelling (such as car parking areas, lawns, domestic landscape planting, outdoor storage areas, clothes lines etc) shall be contained within the demarcated curtilage area.

(b) There shall be no more buildings on the property.

(c) There shall be no further subdivision of the property (including the cancellation of any amalgamation condition imposed by condition 16).

(d) All land outside the demarcated curtilage area shall be maintained by some agricultural or horticultural land use such as some form of grazing or cropping. The property shall farmed at no less than the level of intensity described in the evidence of Roger John Taylor at the hearing of this appeal.

(e) Structural landscape planting shall be installed as per the approved Structural Landscape Plan. If any plant shall become diseased or die the landowner shall replace it in the first planting season.

(f) Any fencing shall be done using post-and-wire fencing only (including deer and other stock fencing).

(g) The road entrance shall consist of traditional rural elements only. Decorative walls, lighting, signage and entrance features are prohibited.

(h) The residential unit shall not be operated as a homestay or registered with the Council as a homestay or holiday home as defined within the Partially Operative District Plan.

(i) The following tree species which have wilding characteristics shall be prohibited from being planted on the allotments:

- Contorta of lodgepole pine (Pinus Contorta)
- Scots pine (Pinus sylestris)
- Douglas fir (Pseudotsuga menziesii)
- European Larch (Larix decidua)
- Corsican Pine (Pinus Nigra)
- Radiata Pine (Pinus Radiata).

Accidental Discovery

17. If the consent holder:

(a) discovers koiwi tangata (human skeletal remains), waahi taoka (resources of importance), waahi tapu (places or features of special significance) or other Maori artefact material, the consent holder shall without delay:

(i) notify Council, Tangata Whenua and New Zealand Historic Places Trust and in the case of skeletal remains, the New Zealand Police.

(ii) stop work within the immediate vicinity of the discovery to allow a site inspection by the New Zealand Historic Places Trust and the appropriate runanga and their advisors, who shall determine whether the discovery is likely to be extensive, if a thorough site investigation is required, and whether an Archaeological Authority is required.

(ii) Any koiwi tangata discovered shall be handled and removed by tribal elders responsible for the tikanga (custom) appropriate to its removal or preservation.

(iii) Site work shall recommence following consultation with Council, the New Zealand Historic Places Trust, Tangata Whenua, and in the case of skeletal remains, the New Zealand Police, provided that any relevant statutory permissions have been obtained.

(b) discovers any feature or archaeological material that predates 1900, or heritage material, or disturbs a previously unidentified archaeological or heritage site, the consent holder shall without delay:

(i) stop work within the immediate vicinity of the discovery or disturbance and;

(ii) advise Council, the New Zealand Historic Places Trust and in the case of Maori features or materials, the Tangata Whenua and if required, shall make an application for an Archaeological Authority pursuant to the Historic Places Act 1993 and;

(iii) arrange for a suitably qualified archaeologist to undertake a survey of the site.

Site work may only recommence following consultation with Council.

Review

18 Within ten working days of each anniversary of the date of this decision the Council may, in accordance with sections 128 and 129 of the Resource Management Act 1991, serve notice on the consent holder of its intention to review the conditions of this resource consent for any of the following purposes:

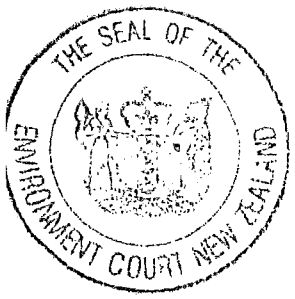
(a) To deal with any adverse effects on the environment that may arise from the exercise of the consent which were not foreseen at the time the application was considered and which it is appropriate to deal with at a later stage.

(b) To deal with any adverse effects on the environment which may arise from the exercise of the consent and which could not be properly assessed at the time the application was considered.

(c) To avoid, remedy and mitigate any adverse effects on the environment which may arise from the exercise of the consent and which have been caused by a change in circumstances or which may be more appropriately addressed as a result of a change in circumstances, such that the conditions of this resource consent are no longer appropriate in terms of the purpose of the Resource Management Act 1991.

Advice Note

• The consent holder shall be responsible for obtaining any necessary ORC consents/permits for this development prior to commencing works at the site.



Tab 4

ORIGINAL

BEFORE THE ENVIRONMENT COURT

[2010] NZEnvC 034

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

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

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

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

DECISION OF THE ENVIRONMENT COURT

THE SEAL OF THE NEW ZEALAND ENVIRONMENT COURT

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

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

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

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

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

REASONS FOR DECISION

Introduction

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

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

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

Issues

[3] The Commissioner determined that:

[a] the activity was a controlled activity;

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

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

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

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

[a] the extent of the earthworks;

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

[c] access issues including public access;

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

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

Background

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

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

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

The Application

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

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

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

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

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

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

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

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

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

Recreation and Other Land

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

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

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

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

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

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

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

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

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

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

Boundaries and Jurisdiction

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

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

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

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

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

[28] Our reasoning follows.

Controlled Activity Conditions

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

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

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

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

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

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

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

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

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

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

Others Matters of Control

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

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

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

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

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

Subdivision Design Rule 704

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

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

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

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

Traffic Movements and Linkages Rule 704.1 and Rule 704.2

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

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

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

Pedestrian Access Rule 704.3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Archaeological and Cultural Heritage Sites

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

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

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

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

Amenity Values and Landscape Character

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

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

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

[a] the beach;

[b] the foredune area;

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

[d] the steep coastal hills.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[c] the extensive replanting of the coastal hills,

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

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

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

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

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

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

Biodiversity Values

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

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

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

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

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

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

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

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

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

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

[b] there are adequate launching places for boats in and around Opito Bay, including near this subdivision.

Broader Considerations

[79] Much of the evidence of witnesses discussed provisions of the Act, particularly Part 2, various statutory documents, Regional Plans and the broader provisions of the District Plan. It has been clear from our consideration that the Court's powers to impose conditions is limited only to those areas specifically reserved in the District Plan. Although reference to Part 2 or the broader terms of Regional and District Plans might help inform the wording of those reserved areas of control, it has not been necessary in this case. In fact nothing we have seen in relation to the Regional or other District documents gives any concern as to the interpretation we have adopted in this case.

[80] The District Plan is operative and we must assume that it meets the purpose of the Act as expressed in Part 2 and that it complies with all superior documents. Nothing in the evidence has given us any cause to doubt those conclusions. Overall this District Plan takes a liberal approach to subdivision within the areas identified as CRPA.

[81] Although there was some criticism of this being an urban-like development, that is not a concern to this Court. We prefer the installation of proper roading, lighting, footpaths, wastewater and stormwater. The Plan enables these matters to be properly controlled and, accordingly, limits the ongoing impact to the wider environment.

[82] With the various controls we have outlined and those proffered as part of the hearing, we are satisfied that the impacts of this development will be localised and for the most part short term. In the longer term we believe the benefits of the adjacent planting on the coastal hills and the provision of recreation and access areas to the beach will

improve the environmental amenity of this part of Opito Bay. Greater public access will be provided to the northern part of the bay. Accordingly, we are satisfied that the conditions we have outlined and which need to be finalised for this controlled activity will meet the purposes of the Plan and in particular Sections 701 – 709 being reserved areas for control.

Final Directions

[83] The court directs:

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

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

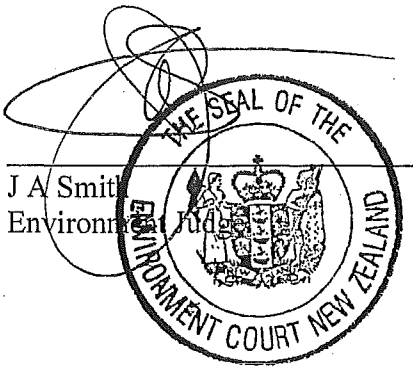
[c] **If matters cannot be agreed the applicants are to file their proposed conditions within a further 10 working days (40 days from this decision) and other parties may file their responses within a further 10 working days thereafter.**

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

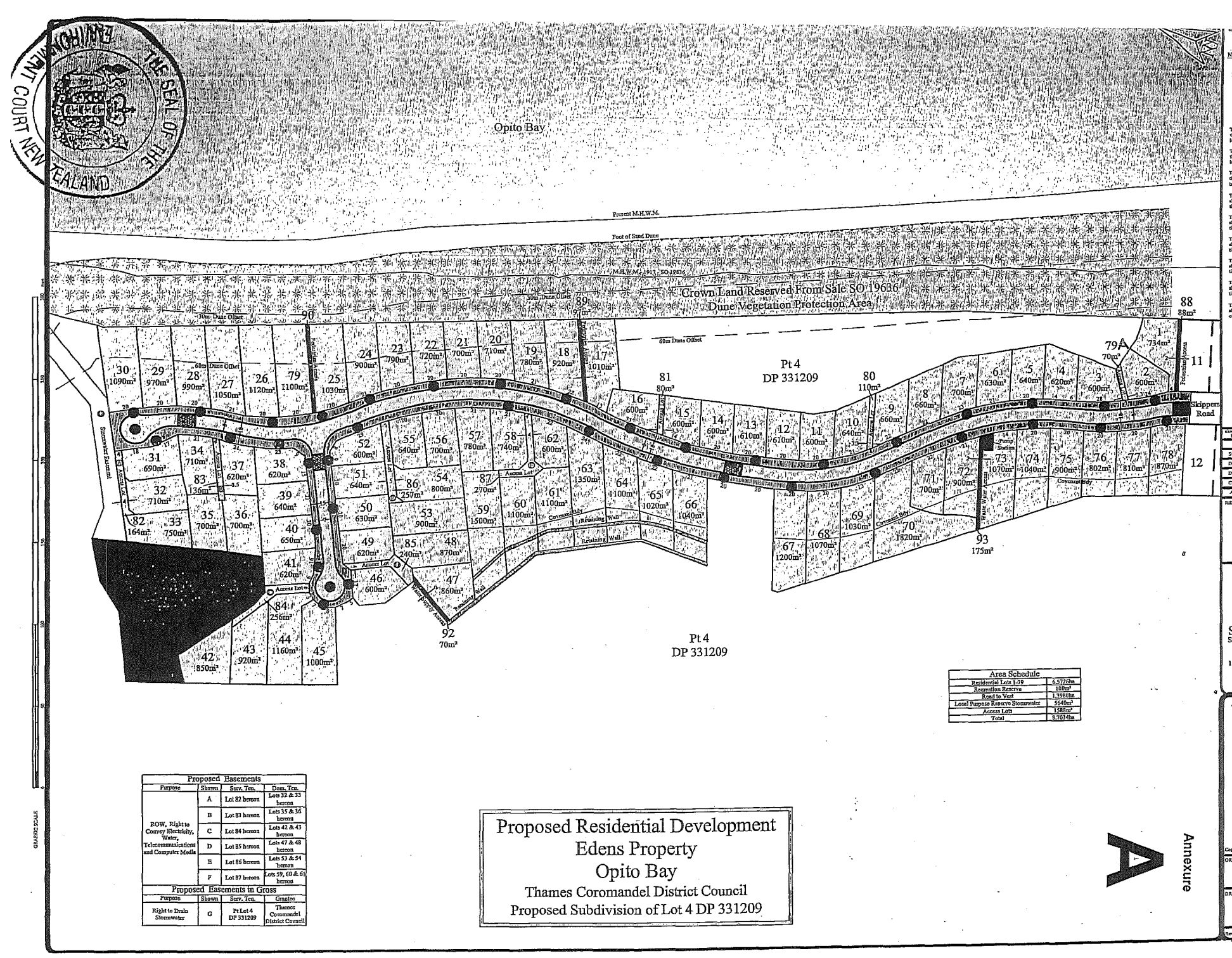
[e] **Any application for costs to be filed within 40 working days. Responses to be filed 10 working days thereafter.**

DATED at Auckland this 10th day of February 2010

For the Court:



J A Smith
Environment Judge



Notes

1) All lots can contain a 20m shape circle
2) Lots 88, 89 & 90 are to Vest in Council as Accessways under the Local Government Act

Amalgamation Conditions

That Lot 79 hereon (Legal access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith

That Lot 80 hereon (Legal access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith

That Lot 81 hereon (Legal access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith

That Lot 82 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 32 and 33 hereon and one certificate of title be issued in accordance therewith

That Lot 83 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 35 and 36 hereon and one certificate of title be issued in accordance therewith

That Lot 84 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 42 and 43 hereon and one certificate of title be issued in accordance therewith

That Lot 85 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 47 and 48 hereon and one certificate of title be issued in accordance therewith

That Lot 86 hereon (Legal access) be held as to 2 undivided one half shares by the owners of Lots 53 and 54 hereon and one certificate of title be issued in accordance therewith

That Lot 87 hereon (Legal access) be held as to 3 undivided one third shares by the owners of Lots 59, 60 and 61 hereon and one certificate of title be issued in accordance therewith.

Area Schedule	
Residential Lots 1-79	6.5726ha
Recreation Reserve	100m²
Road to Vest	1.3980ha
Local Purpose Reserve Stormwater	5640m²
Access Lots	1588m²
Total	8.7034ha

Proposed Easements			
Purpose	Shown	Serv. Ten.	Dom. Ten.
ROW, Right to Convey Electricity, Water, Telecommunications and Computer Media	A	Lot 82 hereon	Lots 32 & 33 hereon
	B	Lot 83 hereon	Lots 35 & 36 hereon
	C	Lot 84 hereon	Lots 42 & 43 hereon
	D	Lot 85 hereon	Lots 47 & 48 hereon
	E	Lot 86 hereon	Lots 53 & 54 hereon
	F	Lot 87 hereon	Lots 59, 60 & 61 hereon
Proposed Easements in Gross			
Purpose	Shown	Serv. Ten.	Grantee
Right to Drain Stormwater	G	Pt Lot 4 DP 331209	Thames Coromandel District Council

Proposed Residential Development
Edens Property
Opito Bay
Thames Coromandel District Council
Proposed Subdivision of Lot 4 DP 331209

Annexure A

Checked by	Rev. No.	Description	DATE
		NAME	DATE	SIGNED
Surveyed				
Designed				
Drawn		NP	4/10/06	
Checked				
Approved				

REFERENCES

S & L CONSULTANTS LTD
SURVEYORS - ENGINEERS - PLANNERS

111 Cameron Road, Tauranga, New Zealand
P.O. Box 231 Ph.(07)577-6069
Fax(07)577-6065
Email: slconsultants@slnz.co.nz

TITLE

Proposed Residential Development Opito Bay

ORIGINAL SCALES 1:1000 @ A1

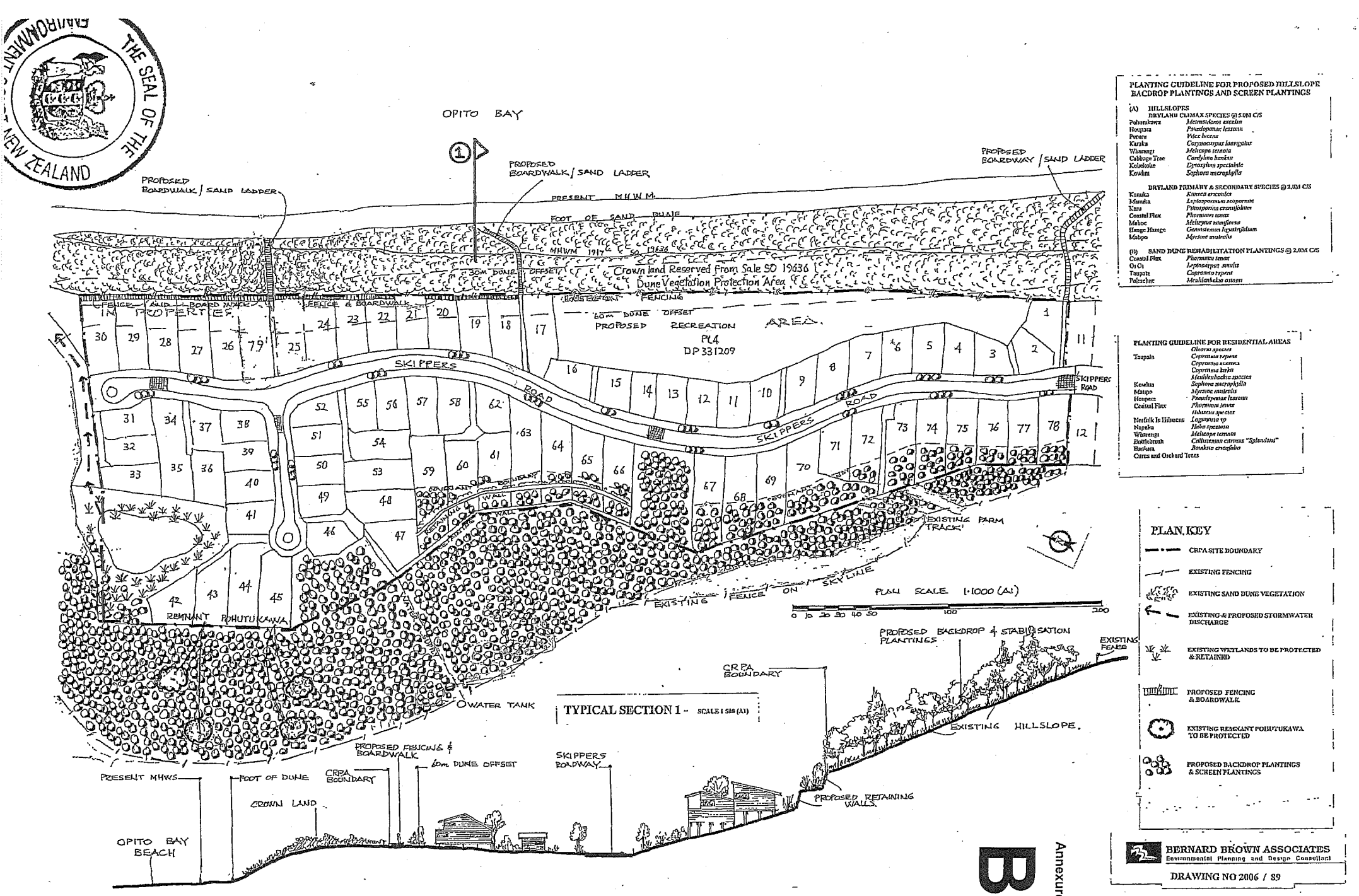
DATE 20/3/07

DRAWING No 18089 - RC1

Revision:

ARTERIC DESIGN

GRAPHIC SCALE



PLANTING GUIDELINE FOR PROPOSED HILLSLOPE BACKDROP PLANTINGS AND SCREEN PLANTINGS

(A) HILLSLOPES

DRYLAND CLIMAX SPECIES @ 5.0M C/S

Pohutukawa	*Metrosideros excelsa*
Houpara	*Pseudopanax lessonii*
Puriri	*Vitex lucens*
Karaka	*Corynocarpus laevigatus*
Wharangi	*Melicope ternata*
Cabbage Tree	*Cordyline banksii*
Kohekohe	*Dysoxylum spectabile*
Kowhia	*Sophora microphylla*

DRYLAND PRIMARY & SECONDARY SPECIES @ 2.0M C/S

Kanuka	*Kunzea ericoides*
Manuka	*Leptospermum scoparium*
Karo	*Pittosporum crassifolium*
Coastal Flax	*Phormium tenax*
Mahoe	*Melicytus ramiflorus*
Hange Hange	*Geniostemon ligustrifolium*
Mahoe	*Myrsine australis*

(B) SAND DUNE REHABILITATION PLANTINGS @ 2.0M C/S

Coastal Flax	*Phormium tenax*
Oi Oi	*Leptocarpus simplex*
Taupata	*Coprosma repens*
Pohuehue	*Muehlenbeckia axillaris*

PLANTING GUIDELINE FOR RESIDENTIAL AREAS

	Olearia species
Taupata	*Coprosma repens*
	Coprosma acerosa
	Coprosma kirkii
	Muehlenbeckia species
Kowhia	*Sophora microphylla*
Maipo	*Myrsine australis*
Houpara	*Pseudopanax lessonii*
Coastal Flax	*Phormium tenax*
	Hebesia species
Norfolk Is Hibiscus	*Lagunaria sp*
Nepuka	*Hoheria specioasa*
Wharangi	*Melicope ternata*
Bottlebrush	*Callistemon citrinus "Splendens"*
Hankara	*Banksia ericaefolia*
Citrus and Orchard Trees	

PLAN KEY

- CRPA SITE BOUNDARY
- EXISTING FENCING
- EXISTING SAND DUNE VEGETATION
- EXISTING & PROPOSED STORMWATER DISCHARGE
- EXISTING WETLANDS TO BE PROTECTED & RETAINED
- PROPOSED FENCING & BOARDWALK
- EXISTING REMNANT POHUTUKAWA TO BE PROTECTED
- PROPOSED BACKDROP PLANTINGS & SCREEN PLANTINGS

BERNARD BROWN ASSOCIATES
Environmental Planning and Design Consultant

DRAWING NO 2006 / 89

B Annexure

APPENDIX 4

M J & S A EDENS – PROPOSED SUBDIVISION OF LOT 4 DP 331209 – OPITO BAY
PROPOSED LANDSCAPE MANAGEMENT CONCEPT –

Annexure

C

13.1 The consent holder shall implement the following procedures to initiate the protocols set out in [.....]:

- A suitably qualified and experienced archaeologist familiar with the [.....] area and proposed activity locations shall be on site during all earthworks operations authorised under this consent.
- The consent holder shall provide for a training session on the protocols with the archaeologist, iwi representatives and earthwork contractors to ensure all parties know what will happen on site, who must be contacted and who is responsible for works to cease and to re-start.
- In the event of any archaeological site or koiwi being uncovered during the exercise of this consent, activities in the vicinity of the discovery shall immediately cease, and the site supervisor and archaeologist shall be notified immediately.
- The archaeologist shall notify the Tangata Whenua representatives including [.....] and [.....]

13.2 The consent holder shall notify the Regional Council as soon as possible following discovery of an archaeological site or koiwi.

13.3 The consent holder shall not recommence works in the area of the discovery until the relevant Historic Places Trust approvals or other approvals to damage, destroy or modify such sites have been obtained, where necessary.

13.4 Prior to commencement of works authorised by this consent, the consent holder shall give an opportunity to the governing body of [.....] to carry out a ceremony at the site as deemed appropriate by [.....]. For the purposes of this condition, the governing body of [.....] shall be deemed to be the [.....] unless otherwise advised to the Regional Council. The opportunity shall also be given to [.....] and [.....] to take part in the ceremony or conduct their own ceremony or ceremonies as deemed appropriate by them. In particular the consent holder shall give [.....] the opportunity to carry out their own ceremony before the works are carried out to unearth and identify the rock referred to as [.....] and the opportunity to conduct their own ceremony before any works are carried out on the [.....] Stream banks and channel between [.....] Street and the [.....] Lagoon. The consent holder shall confirm by notice in writing to the Regional Council that the opportunity to conduct a ceremony or ceremonies has been given and that a ceremony or ceremonies have been undertaken where desired by the iwi.

13.5 The consent holder shall provide reasonable opportunity for tangata whenua to be involved in future reporting and decision making in respect of on-going monitoring, management and maintenance of the works. For the purpose of implementing this condition [.....] shall be considered as one of the groups to be consulted. This shall include but not be limited to a person nominated by tangata whenua to be on site during all earthworks to ensure the protocols for the discovery of koiwi, artefacts or archaeological features is complied with.

13.5 The consent holder shall provide reasonable opportunity for tangata whenua to be involved in future reporting and decision making in respect of on-going monitoring, management and maintenance of the works. For the purpose of implementing this condition [.....] shall be considered as one of the groups to be consulted. This shall include but not be limited to a kaitiaki person nominated by [.....] to be employed by the consent holder to be on site during all earthworks to ensure the protocols for the discovery of koiwi, artefacts or archaeological features is complied with.

Annexure

D

Please note the amended and new conditions are included underlined and in blue font. The portion of Condition 30 to be deleted is shown with strikethrough through the text to be removed.

Schedule of Conditions

The Thames-Coromandel District Council **RESOLVES** pursuant to Sections 104, 104A, 106 and 108 of the Resource Management Act 1991, **TO APPROVE THE SUBDIVISION AND LAND USE CONSENT** to Subdivide 79 residential lots within the Coastal Zone (Residential Policy Area) and consent for earthworks and retaining walls and infrastructural services. The application involves 82200m^3 of cut and fill across the site, construction of two 3m high retaining walls, construction of a stormwater pond and stormwater and wastewater reticulation through the site and revegetation of approximately 5.0 hectares of hillside on Lot 4 DP 381209, being land located at the end of Skippers Road identified as 844 Black Jack Road OPITO BAY, subject to the following conditions of consent:

CONDITIONS PURSUANT TO THE RESOURCE MANAGEMENT ACT 1991

1. That the development proceeds in accordance with the plans and information provided with the application, namely:

   - The application and plans submitted by S & L Consultants Ltd dated 20/12/06;
   - The additional information and plans submitted by S & L Consultants Ltd dated 31/05/2007 as part of a Section 92 response;
   - Proposed Subdivision Plan and referenced Drawing No 18089-RC1 dated 20/3/07;

2. Should any archaeological site, remains, artifacts, taonga or koiwi be unearthed, dislodged, uncovered or otherwise found or discovered on the site, work shall cease immediately, the area shall be secured and any uncovered material shall remain untouched. The consent holder shall advise representatives of the Local Iwi (including Ngati Hei and Ngati Whanaunga), Historic Places Trust and the Thames-Coromandel District Council within 48 hours. Any artifacts will be removed in accordance with

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appropriate iwi protocols and any legal requirements of the Historic Places Act 1993, which shall be implemented prior to work recommencing on site.

3. The consent holder shall prepare a Pest Management Plan to be submitted to Council's Development Planning Manager for approval which sets out the animal pest control programme along the beach front in accordance with the recommendations of the Kessels & Associates Ltd report "Assessment of Ecological Effects" 280507.

4. The consent holder shall pay the Council a consent compliance monitoring charge of $1000 (inclusive of GST), plus any further monitoring charge or charges to recover the actual and reasonable costs that have been incurred to ensure compliance with the conditions attached to this consent. (This charge is to cover the cost of inspecting the site, carrying out tests, reviewing conditions, updating files, etc, all being work to ensure compliance with the resource consent).

5. The $1000 (inclusive of GST) charge shall be paid as part of the resource consent fee and the consent holder will be advised of the further monitoring charge or charges as they fall due. Such further charges are to be paid within one month of the date of invoice.

6. A copy of this consent is to be held on site at all times that the works which the consent relates to are being carried out. The consent holder is to notify Council, in writing, of their intention to begin works a minimum of three days prior to the commencement of the proposed works (Please refer to the attached sheet.) Such notification shall be sent to the Council (Monitoring Officer) (facsimile: 07 868 9027) and include the following details:

    - Name and telephone number of the project manager and site owner
    - Site address to which the consent relates
    - Activity to which the consent relates
    - Expected duration of works.

    By notifying Council of the intended start date this will enable cost effective monitoring to take place. The consent holder is advised that additional visits and administration required by Council officers to determine compliance with consent conditions will be charged to the consent holder on an actual and reasonable basis.

A: Prior to the survey plan being signed pursuant to Section 223 of the Resource Management Act 1991, the following conditions are to be complied with:

1. Pursuant to Sections 239 and 243 of the Resource Management Act 1991, any necessary easements as required shall be included in a memorandum of easements endorsed on the survey plan. This shall include all the easements relating to access over the boardwalks on private land to permit pedestrian access. The applicants shall meet all costs relating to the creation of easements.

2. All public services, where they cross private property boundaries, shall be shown as an "Easement in Gross" in favour of the Thames-Coromandel District Council.

3. Any private service leads or drainage lines, where they cross property boundaries including the wastewater pipeline shall be protected by an easement and shall be shown on the submitted survey plan within a Memorandum of Easements.

4. That Lot 79 hereon (Legal Access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith.

5. That Lot 80 hereon (Legal Access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith.

6. That Lot 81 hereon (Legal Access) be held as to 1 undivided share by the owner of Pt Lot 4 DP 331209 hereon and one certificate of title be issued in accordance therewith.

7. That Lot 82 hereon (Legal Access) be held as to 2 undivided one half by the owners of Lots 32 and 33 hereon and one certificate of title be issued in accordance therewith.

8. That Lot 83 hereon (Legal Access) be held as to 2 undivided one half share by the owners of Lots 35 and 36 hereon and one certificate of title be issued in accordance therewith.

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9. That Lot 84 hereon (Legal Access) be held as to 2 undivided half share by the owners of Lots 42 and 43 hereon and one certificate of title be issued in accordance therewith.

10. That Lot 85 hereon (Legal Access) be held as to 2 undivided half shares owner of Lots 47 and 48 hereon and one certificate of title be issued in accordance therewith.

11. That Lot 86 hereon (Legal Access) be held as to 2 undivided one half by the owners of Lots 53 and 54 hereon and one certificate of title be issued in accordance therewith.

12. That Lot 87 hereon (Legal Access) be held as to 3 undivided one third shares by the owners of Lots 59, 60 and 61 hereon and one certificate of title be issued in accordance therewith.

13. That Lots 88, 89 and 90 are to Vest in Council as Accessways under the Local Government Act.

14. The proposed road which is an extension to Skippers Road and the cul-de-sac are to vest in Council as road under the Local Government Act.

15. That ROW "C" hereon (Legal Access) shall include the TCDC as a Dominant Tennant to allow for access to Lot 91. This access shall be utilised as well as Stormwater Easement "G".

16. That Lot 91 is to vest in the Thames-Coromandel District Council as Local Purpose Reserve (Stormwater).

B: **Prior to the completion certificate being signed pursuant to Section 224(c) of the Resource Management Act 1991, the following conditions of consent are to be complied with:**

1. The consent holder shall submit As-built plans for approval (to the satisfaction of the Group Manager, Service Delivery) prior to s224(c) certification. All fees for approval and inspections are to be paid prior to the release of this certificate.

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2. The consent holder shall (if applicable) submit data of assets to be vested in Thames-Coromandel District Council (if applicable) prior to s224(c) certification. These assets shall be presented in Council's Acquisition/Disposal of Operational Asset – Schedule format.

3. The consent holder shall submit an Operations and Maintenance (O & Manual) for incorporation into the Council's Maintenance Contract with United Water or approved contractor.

GENERAL

4. The consent holder shall appoint an official representative in respect of engineering works, with whom all correspondence relating to engineering matters will be undertaken by Council.

5. The consent holder shall submit engineering plans and specifications for the approval of the Group Manager, Service Delivery. No work is to be undertaken on the site prior to the plans and specifications being approved.

6. The construction and completion of all physical works shall be certified by a Chartered Professional Engineer, or other suitably qualified person for whom Council's approval has been obtained, or their delegated agent, as in accordance with the approved plans and specifications and Thames-Coromandel District Council's current "Code of Practice for Subdivision and Development" as per schedule 1B & 1C NZS 4404:2004. All materials used therein are to be certified to be in accordance with the relevant New Zealand standards.

7. The consent holder shall submit a Quality Management Plan for the approval of the Group Manager, Service Delivery, and also to Ngati Whanaunga and Ngati Hei for approval, prior to the commencement of works. This plan shall be compiled to a level of sophistication appropriate to the nature and scale of the proposed works, and in the case of minor works this may simply entail documentation of an inspection by a suitably qualified person.

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8. The consent holder shall seek written approval from Council for any variation to the approved quality management plan or non-compliance. Records shall be made available to Council's engineering representative on demand for auditing purposes.

9. The onus shall rest with the consent holder to demonstrate that the completed works meet Council requirements and accepted engineering standards. To this end, developers are advised to employ suitably qualified and experienced contractors, and maintain records of the quality control process.

10. All works that are to be vested in the Thames-Coromandel District Council are subject to an 18 month maintenance period (except the Wetland Pond system that shall be 5 years maintenance period) that does not commence until issue of 224c, or once any bonded works are completed, which ever is the latest. A bond of 150% of the agreed sum will be required for this work as per the TCDC Code of Practice.

ASSETS

11. The consent holder shall submit RAMM as-builts for the approval of the Group Manager, Service Delivery, and all fees for approval and inspections are to be paid prior to the release of the 224(c) Certificate. The consent holder shall engage a suitably qualified RAMM technician to produce as-builts of the all roading assets vested, which may include, but not be limited to, pavement surfacing, pavement layers, surface water channels, footpaths, signs, road marking, streetlights. The consent holder shall, prior to undertaking data gathering, confirm the data tables required with Council's Roading Manager.

12. The consent holder shall provide a concrete path 2.0m in width (boundary to boundary) within Lot 88, 89 and 90, from Skippers Road to the Dune vegetation protection area as shown on S&L Plan of Proposed Boardwalk and Sand Ladders Referenced 18089 – BW1 Each of lots 88, 89 and 90 are to have a 1.2m high close wooden board fence installed on the boundaries of the neighbouring lots.

LANDSCAPING

13. Any landscaping considered or required as part of this subdivision needs acceptance from Council. A planting plan must be forwarded to Councils Senior Development

Engineer for consideration and approval before any planting occurs. Landscaping design and construction shall comply with NZS 4404: 2004, Land Development and Subdivision Engineering – Part 7 Landscape Design and Practice, Part 8 Reserves, Clause 3.4.16 berms and landscaping.

13a. The consent holder shall ensure that the final landscaping plan including the final design of beach access, fencing along the eastern boundary of the lots adjoining the foredune, backdrop planting and coastal planting and street planting has been developed in consultation and with the approval of Ngati Whanaunga and Ngati Hei prior to be submitted to Council for approval.

14. The consent holder shall complete the mass backdrop plantings across the hillside areas (comprising approximately 1 hectare within the Coastal Zone (Residential Policy Area) and 5 hectares in the Coastal Zone (Outside All Policy Area). A planting plan, timetable of planting and plant sizes and an ongoing maintenance schedule and process for continued maintenance shall be submitted to Council's Development Planning Manager for approval prior to implementation. This planting shall be generally in accordance with Bernard Brown Drawing No. 2006/89 with the deletion from the drawing (including the key to the drawing) the reference to the "proposed sand dune rehabilitation plantings". If application for 224 (c) Certification is made prior to the completion of this planting and maintenance period the consent holder may apply to Council for a bond to cover this work. All costs associated with the bond including any legal costs shall be met by the consent holder.

15. The consent holder shall also complete additional planting of Pohutukawa at 20m centres across the eastern boundary of the Structure Plan Area within the Site.

15a. The consent holder shall submit a street planting plan to Council's Development Planning Manager for approval prior to the undertaking of any street planting and shall ensure that the trees planted within in the street berm areas are Pohutukawa.

16. The consent holder shall prepare a detailed design of the retaining walls to be constructed which shall include the materials and design of the walls as well as the visual screening proposed within or adjacent to the retaining walls. This detailed design and planting programme shall be approved by Council's Development Planning Manager prior to any construction of the retaining walls. The retaining walls shall be located as shown on the S&L Consultants Ltd Plan 18089-RC1.

THE SEAL OF THE ... NEW ZEALAND

17. The consent holder shall provide the boardwalk and sand ladder structures for pedestrian access as approved by the Department of Conservation and shown on Drawing No 18089 –BW1 and BW2. The boardwalks on public property are to have railings as detailed on both sides. Those on private property for use of the property owners are to have as a minimum a railing on the seaward side of the boardwalk. The boardwalk is to be constructed entirely within the footprint of the boardwalk and is to be constructed progressively from the landward ends so as to provide for the carrying of materials along the completed sections. Piles are to be placed no more than two bays ahead of the completed decking.

18. The consent holder shall landscape the Treated Effluent Landscape Application Area in accordance with the Drawing No 18089 – W02 and the concept plan prepared by Bernard Brown. Final details of the planting, plant sizes and the maintenance programme shall be submitted to Council's Development Planning Manager for approval prior to any planting work commencing on site.

19. The Council will require a bond in relation to the landscaping conditions set out in Conditions 14 – 17. The bond will be for a period of 3 years and will cover the replacement cost of plants and materials and maintenance of the works and plantings. The bond will be 150% of an agreed sum required to cover this work.

SERVICES

20. The consent holder shall install separate electricity and telephone services to lots, to a standard satisfactory to the Development Planning Manager, and in accordance with the specifications and criteria set out by the respective utility network provider. Evidence that the requirements of each network provider have been met shall be provided to Council at the time of s224(c) certification. All electric wiring and telephone cables within the subdivision shall be underground.

21. The consent holder shall install stormwater reticulation to the subdivision, designed for the 10yr 10min rainfall event plus 20% minimum global warming factor. Lots 1 to 79 shall be provided with separate connections to the reticulation.

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22. The consent holder shall construct stormwater wetland pond system and associated outlet structures for the subdivision in accordance with the conditions of the Environment Waikato consents # 116593 and 117249. Both Environment Waikato consents shall be transferred to TCDC at the completion of works and a 12 month maintenance period.

23. The consent holder shall construct a 1.8m high fence on the boundaries of the neighbouring residential lots surrounding the Wetland Pond (Lot 91). An approved lockable gate shall be installed gaining access from ROW "C" to the Wetland Pond and access from Skippers Road to the Wetland Pond via the stormwater easement (G). The purpose of the fencing is to ensure that children cannot climb into the stormwater and wetland area. The fence is to be constructed of a type of fencing material such as closely boarded wooden fencing pails or iron railing to ensure that it cannot be easily climbed. The consent holder shall construct a stock proof fence where the wetland area adjoins farmland.

24. The consent holder shall install wastewater reticulation to the subdivision. Lots 1 to 79 shall be provided with separate connections to the reticulation.

25. The consent holder shall construct a wastewater treatment and disposal facility to serve the subdivision in accordance with the Environment Waikato resource consent # 116594.

26. The consent holder shall install wastewater re-use reticulation to the subdivision. Lots 1 to 79 shall be provided with separate connections to the wastewater re-use reticulation. These connections are to be labelled for identification as wastewater re-use only.

27. The wastewater reticulation, treatment and disposal facility, and wastewater re-use reticulation will be owned and operated by the development, therefore the applicants is to demonstrate how the operations and maintenance of the system will take place and under what authority.

28. The applicants shall provide to Council a copy of the Operations and Maintenance manual of the wastewater reticulation plus the treatment and disposal facility prior to 224c.

29. Any culverts constructed as part of this resource consent, shall have erosion protection placed at their inlets and outlets by way of rip-rap, reno mattress, concrete headwall structures, or approved alternative to the satisfaction of the Group Manager Service Delivery.

ROADING

30. The consent holder shall construct the proposed new public road (Skippers Road extension) and turning head, plus the cul-de-sac and turning head in compliance with Council's Roading standards specified in Council's District Plan and "Code of Practice for Subdivision and Development". The following criteria are to be adhered to:

Skippers Road extension:

- Carriageway – 8.0 m.
- Flush Kerb both sides of carriageway.
- Swales.
- Footpath constructed on beach side of road.

Cul de Sac:

- Carriageway – 7.0 m.
- Flush Kerb both sides of carriageway.
- Swales.
- Footpath constructed on one side of road.
- Street Name – To reflect area history.

The consent holder shall upgrade existing Skippers Road in compliance with Council's Roading standards specified in Council's District Plan and "Code of Practice for Subdivision and Development". The following criteria are to be adhered to:

Skippers Road existing:

The consent holder shall upgrade existing Skippers Road and meet the cost of the same. The work shall be in compliance with Council's Roading Standards specified in Council's District Plan and "Code of Practice for Subdivision and Development". The following criteria are to be adhered to:

- Carriageway – 8.0 m.

- Flush Kerb both sides of carriageway.
- Swales.
- Footpath constructed on beach side of road.

~~Streetlights~~

- ~~Within the subdivision three streetlights are to be provided at the walkways (i.e. adjacent to Lots 88, 89 and 90). Specific detailed design of the streetlights shall be provided to Council at engineering design stage to ensure that the streetlights provide down light only and minimise light spill.~~

31. Overland flow paths for events greater than the capacity of the proposed primary stormwater system shall be designed and shown on a plan at the engineering drawing stage (also the overland flow paths shall be identified on an as built plan to be submitted before the release of the section 224 certificate). Overland flow paths shall be directed along a route to a controlled discharge point so as to not worsen any flooding downstream of the site or enter buildings sites in the 1% AEP event. This may require physical works and/or the imposition of minimum habitable floor levels for each new residential lot. In the case of the latter a consent notice shall be placed on the title of each residential lot.

32. The consent holder shall construct the Right of Ways "A - F" in compliance with Council's standards of the District Plan. The geometric design of the Right Of Way shall meet with the Right of Way requirements of Council's "Code of Practice for Subdivision and Development" (2.7m concrete carriageway width). Stormwater runoff from the ROW is to be disposed of in a controlled manner.

33. The consent holder shall install streetlights in compliance with Council's "Code of Practice for Subdivision and Development". A street lighting plan shall be submitted as part of the engineering plan approval.

34. The consent holder shall install a complying vehicle crossing to ROW "A, B, C, D, E, F" to the standards specified in Council's "Code of Practice for Subdivision and Development".

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35. The consent holder shall install a complying vehicle crossing to Lot 1 to the standards specified in Council's "Code of Practice for Subdivision and Development".

36. The consent holder shall install a complying vehicle crossing to Lot 44 to the standards specified in Council's "Code of Practice for Subdivision and Development".

37. The consent holder is required to contact Council's roading management consultants, Opus Consultants Ltd, on (07)867 9321, to formally apply for a vehicle crossing permit which shall be inspected and approved in writing by Opus prior to s224 certification.

38. The consent holder is required should any work be planned within the Council's road corridor, to contact Council's roading management consultants, Opus Consultants Ltd, on (07)867 9321, to formally arrange for a Road Opening Notice for the work to occur.

EARTHWORKS

39. The consent holder shall carry out all 'Cut and fill' earthworks in accordance with the relevant provisions of NZS4431:1989, entitled "Code of Practice for Earth Fill for Residential Development". Upon completion all earthworks shall be certified by a suitable qualified Chartered Professional Engineer or suitably qualified professional, to the satisfaction of the Group Manager, Service Delivery.

39a. The consent holder shall ensure that within Lots 17-30 and Lot 79 that there is no cut and fill earthworks undertaken forward of the 60m covenanted coastal foredune offset line.

40. That a Geotechnical Investigation and report be undertaken for all lots upon the completion of all earthworks within the development, by a suitably qualified and experienced Geotechnical Chartered Professional Engineer. The report is to consider the classification of all lots and the recommendation of the wording of consent notices to be placed on the respective lots.

41. The consent holder shall, within 3 months of the completion of earthworks, regrass or hydroseed all exposed earthworks to achieve an 80-90% grass strike.

42. The consent holder shall obtain written sign off from Environment Waikato that all EW consent conditions have been satisfied with regard to EW Resource Consent # 116592 – Land Disturbance, prior to issue of 224c.

SILT AND DUST CONTROL

43. The consent holder shall take all practicable steps to ensure that run-off from the site is treated so that sediment is retained on site and the discharge does not cause adverse effects on the environment by entering either the kerb and channel, the stormwater system, or a natural watercourse.

44. Silt control measures shall be to the satisfaction of the Group Manager, Service Delivery prior to the commencement of earthworks, and shall generally conform to the Waikato Regional Council (Environment Waikato). Erosion and Sediment Control Guidelines for Soil Distributing Activities, May 2003, Technical Publication No TR2002/01.

45. The consent holder shall regularly wet land disturbed by earthworks during dry periods, to ensure that dust nuisance is maintained within the site. Dust control measures shall ensure that there are no adverse effects on the neighbouring properties.

H: CONSENT NOTICES

46. A Consent notice, pursuant to section 221 Resource Management Act 1991, shall be registered against the relevant certificates of title. These notices shall specify the following conditions as relevant to each lot:

    1. An application for a vehicle crossing to serve Lots 2 to 31, 34, 37 to 41, 45, 46, 49 to 52, 55 to 58, and 62 to 79 shall be made at the time of building consent application for a garage or dwelling. The vehicle crossing shall be constructed within six (6) months of Council granting the building consent. The vehicle crossing shall be installed to the standards specified in Council's "Code of Practice and Development".

2. The consent holder is required to contact Council's roading management consultants, to formally apply for a vehicle crossing permit which shall be inspected and approved in writing.

3. Foundation design for all lots shall be undertaken in accordance with the recommendations contained in the Geotechnical Completion Report for this development. **(This consent notice wording to be finalised once Condition 40 above has been completed).**

4. Effluent disposal for lots 1 to 79 shall be by way of primary treatment of effluent on each residential site with an interceptor tank, pumped into a sealed reticulation connection provided as part of the development. The interceptor tank is to be installed at the time of building consent. The interceptor tank shall be owned and operated by the individual lot owner.

5. Primary stormwater disposal for lots 1 to 79 shall be by way of Engineer designed retention tank, designed for the 10 yr 10min rainfall intensity event plus 20% global warming factor, with overflow to the public stormwater reticulation, at the time of building consent. The retention tank and associated pipe work to the stormwater connection at the property boundary shall be owned and operated by the individual lot owner.

6. Water supply for lots 1 to 79 shall be by way of roof water to on site storage tank, installed at the time of building consent. The water tank shall be owned and operated by the individual lot owner. Note: The water tank and stormwater retention tank (Consent notice 4 above) may be designed as one tank for both requirements.

7. That the land owners of those lots adjoining the Crown Reserve (Lots 1, 17 to 30, 79 and Pt4 DP 331209) maintain the existing or a replacement, fence in the current position, and, in the respective areas within their lots on the seaward side of the fence, not to remove or allow to be removed any of the existing native dune vegetation nor plant or allow to be planted any non-native plants and shall remove any weeds likely to be detrimental to the existing vegetation, including any "Pest Plants" identified in the Waikato Regional Council publication "Plant Me Instead".

8. That the owners of Lots 1 to 79 inclusive and Pt 4 DP 331209 adjoining the Crown Reserve shall not access the beach other than via the approved public accessways vested in the Thames-Coromandel District Council and the board walks on Lots 1, 17 to 19, 22 to 29 and 79.

9. That the owners of Lots 1 to 79 inclusive shall not keep or harbour any cats, dogs, mustelids or livestock on their properties.

10. That the owners of Lots 1 to 79 inclusive shall not plant on their lots any of the "Pest Plants" identified in the Waikato Regional Council publication "Plant Me Instead".

11. That the owners of Lots 1, 17 to 30 and 79 shall not construct nor allow to be constructed on their land any buildings on the eastward side of the sixty metre setback line.

12. That the owners of Lots 1 and 28 to 30 where the existing fence is landward of the sixty metre setback line, shall not construct nor allow to be constructed any building foundations on that part of their land seaward of the existing fence.

13. The owners of Lots 1 to 79 inclusive shall ensure that all buildings on the sites are in compliance with the requirements recommended in the Bernard Brown Landscape Assessment "Summary of Recommended Visual Mitigation Measures" dated December 2006.

14. The owners of Lots 1 to 79 inclusive shall ensure that prior to any earthworks being undertaken in relation to the construction of any buildings on the site, silt control measures are in place in line with the requirements of the Waikato Regional Council (Environment Waikato). Erosion and Sediment Control Guidelines for Soil Distributing Activities, May 2003, Technical Publication No TR2002/01.

15. The owners of the balance lot shall ensure that the mass backdrop planting required in Condition 14 of RMA2006/439 is planted in general accordance with the Bernard Brown Assessments - Drawing No 2006/89 and shall be retained and maintained in a healthy state to the satisfaction of the Development Planning Manager.

16. The owners of the balance lot shall ensure that the planted area shown on S&L Consultants Drawing No 18089 –W02 and the concept plan prepared by Bernard Brown Associates be retained and maintained in a healthy state to the satisfaction of the Development Planning Manager.

Advice Note: Local Government Act Development Contributions

The following development contributions shall be paid pursuant to Sections 102, 198 and 208 of the Local Government Act 2002.

1. A reserves contribution is payable on this subdivision. The amount payable is the average market value of 15m2 of land per additional lot within the subdivision. The payment is to be accompanied by an assessment from a Registered Valuer approved by Council, of the estimated market value per lot. This assessment shall be subject to the approval of the Group Manager, Environmental Services, and shall be less than 90 days old on the date which payment is to be made.

2. A development contribution is payable on this subdivision. A letter stating the amount payable will be issued within 10 working days of the date of this decision.

   These contributions are required in accordance with Council's Development Contributions Policy. The Development Contributions Policy provides a review provision under Section 8.5. Any request shall be in writing and shall set out the reasons for the review. The notice of review must be received by the Council within 15 working days of receipt of the formal development contribution letter.

   The applicant is liable to pay a development contribution upon the granting of this subdivision consent and prior to the completion certificate being issued pursuant to Section 224(c) of the Resource Management Act 1991.

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Decision No: C194/2000

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **RAVENSDOWN GROWING MEDIA LIMITED**
(formerly Australasian Peat Ltd)

RMA: 184/99

Appellant

AND **THE SOUTHLAND REGIONAL COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith
Environment Commissioner I G McIntyre
Environment Commissioner N J Johnson

HEARING at INVERCARGILL on 4, 5, 6, 7 and 8th days of September 2000

APPEARANCES

Mr K G Smith for the applicant
Mr B J Slowley for the respondent
Mr W Goldsmith for W R Heads
Mrs D F Heads in person

INTERIM DECISION

Introduction

[1] This is an appeal under section 120 and 121 of the Resource Management Act 1991 (**the Act**) by Ravensdown Growing Media Limited (formerly Australasian Peat Limited). The appeal relates to certain

conditions of an air discharge permit (**air permit**) granted by the respondent, The Southland Regional Council (**The Regional Council**). The air permit relates to peat harvesting operations undertaken by the appellant at a site in the Browns/Hokonui area of central Southland at Tanner Road, map reference D45:177:627 being Section 248 Block XVI Forest Hill Hundred.

[2] The respondent opposes granting the changes to conditions sought on appeal as do Mr W R (Ross) Heads and his parents, Mr and Mrs D F Heads, both section 271A parties. Mr W R Heads lives on and operates a farming property adjoining the subject site along its southern boundary. Mrs Heads is the mother of Mr W R Heads and has an interest, together with her husband, in her son's farming operation.

[3] The appeal originally also sought changes to the consent period for the air permit and water discharge permits but those aspects of the appeal have now been withdrawn. No party opposed the withdrawal or sought costs.

The Scope of the appeal

[4] The appeal as it subsists relates to condition 3 of the permit as granted which reads:

> *"After 30 April 2000 there shall be no emissions of wind borne peat from the site onto or over property beyond the boundary of the consent holder's property as a result of the consent holder's management of the site."*

It was acknowledged by all parties before the Court that the appeal related to conditions only and accordingly the Court was constrained to consider

only appropriate conditions rather than the grant of the consent itself. It was the appellant's submission to the Court that having granted consent, the conditions cannot negate the consent granted. Counsel relied upon ***Taranaki Regional Council v Willan***[1] and ***Residential Management Limited v Papatoetoe Borough Council***[2]. Neither the respondent nor the section 271A parties argued that the conditions could negate the consent and all parties seemed to acknowledge that the activity should be able to continue on the site provided appropriate conditions were in place.

[5] The peat harvesting operation itself is subject to existing use rights and also holds water permits as well as the air discharge permit. In accordance with the existing use rights the applicant is entitled to harvest peat on the site. The air discharge permit is granted on conditions the subject of this appeal and permits the discharge of contaminants to air. We have therefore concluded that we are constrained to the extent that we are not able to interfere with the right:

(a) of the appellant to harvest peat on the site; and
(b) to allow contaminants to be discharged to the air.

We conclude our role is restricted to a consideration of appropriate conditions to avoid, remedy or mitigate the adverse effects of the activity.

[6] On its normal and natural construction the existing condition 3 cannot stand. The condition purports after April 2000 to not permit any discharge to air over the boundaries and therefore effectively countermands the consent granted in the air discharge permit. The respondent expert witness accepted the nil limitations as being impossible to achieve. It transpired

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1 W150/96.
2 A62/86.

that the Council officers' evidence supported a more general condition largely similar to that sought by the appellant.

[7] Mr Slowley, counsel for The Regional Council accepted in opening that condition 3 was not intended to control secondary dust sources on the site such as stockpiles, roads and "the sticks" (an area of unharvested bog to the southwestern side of the site). We shall refer to these discharge sources as the **ancillary areas.** Mr Slowley indicated that the intention was only to impose a restriction on peat particulate discharge to air from the harvested bog area. He also indicated that the condition was not intended to catch minimal discharges from the peat bog, notwithstanding the wording of the consent clause. The Regional Council accepted immediately the restrictions on the wording of condition 3. The Court notes that condition 3 imposed on the consent granted was not in accordance with The Regional Council's expert advice or supported by evidence from the respondent before the Court.

Issues for Determination

[8] As a result of this positioning statement by the respondent, the parties had further discussions and were able to advise the Court that appropriate conditions for the operation of the ancillary areas could be agreed between the parties. A draft management plan was produced and the Court was advised that with expansion that draft document could control the ancillary discharges on site. The Court was advised that the best practicable option approach could be adopted in respect of those ancillary discharges. For the reasons given later in this decision we agree that the best practicable option is appropriate for the ancillary areas.

[9] This left in dispute before the Court the appropriate air discharge conditions in respect of the peat bog itself - an area now reduced from

some 50 hectares to 33 hectares. The applicant seeks and accepts a condition restricting the area of the harvested bog to 33 hectares and this position was accepted by the other parties. The major concern of Mr Heads relates to the harvesting method used which he believes makes the bog more susceptible to wind erosion.

The Method of Harvesting Peat

[10] The harvesting method was described to the Court by Mr Stephen Smith for the applicant. He is the manager of the subject site although another person is responsible for the day to day operation and management of the site. Mr Smith described the peat bog itself and also the operation. The bog is of a type derived from sphagnum moss known geologically as a High Moor Peat Bog. He noted the formation as follows:

> *"This generally means that the peat bogs have grown on their clay base and are raised up above the surrounding landforms in a dome type formation. There is little or no water ingress from the surrounding land to these peat bogs resulting in a silt free environment. This leads to the development of a particularly pure grade of sphagnum peat.*
>
> *Sphagnum moss peat is capable of absorbing something in the region of 26 times its own dry weight in moisture. Due to this, it is an extremely versatile product."*

He further advised:

> *"The mushroom industry quality demands are such that the only peat identified in New Zealand able to meet the specifications of top mushroom growers is from the Tanner Road peat bog owned by RGM*

[Ravensdown]. Alternative product of similar quality and quantity is imported Canadian or Irish peat. Due to the higher price constraints of the imported product, RGM's market share in this sector is approximately 90%."

He added:

"The Tanner Road peat product is used exclusively by the mushroom industry. The peat quality means that it is demanded nationally by mushroom growers. Peat is harvested, stockpiled and loaded out in bulk, directly to all New Zealand customers."

The harvesting operation itself was described as follows:

"Peat harvesting at the Tanner Road site occurs during spring, summer and autumn. The bog is then dry enough to allow vehicle access. Last year RGM harvested for a total of 40 days, during this period."

The peat bog is drained in sections, these sections are 30 metres wide and 600 metres long. Each one is called a "land". The lands are harvested for peat.

The top 25 to 50 millimetres of peat is cultivated using a spin tiller and then allowed to partially dry.

At approximately 70 to 80% of wet weight by volume the partially dried peat is propelled by a standard agricultural forage harvester into a covered and modified silage trailer pulled by 4WD tractor. When the trailer is full it is transported to a stockpile area on site. ...

During the 1999/2000 season RGM harvested 24,247 cubic metres of peat from the Tanner Road site.

The stockpiled material is trucked off-site during the course of the year, for use in the mushroom industry, depending on their weekly requirements. RGM is currently selling its entire harvested stock within one year of harvest. The entire Tanner Road peat product stocks are despatched to New Zealand mushroom growers."

All parties accepted this as an outline of the operation. We now move to consider the particular issues raised by this appeal. First we should refer to the earlier consent subject to determination by the Court in 1997.

The previous consent

[11] This operation has been the subject of a previous determination by the Environment Court - Decision No: C44/96[3]. The appeals the subject of that determination included the question of air discharge and adopted a best practicable option approach to the control of dust. By consent the term was short to enable the appellant's undertaking to be reviewed. Many of the conditions agreed between the parties related to dust control over the storage heaps and the common access road which are now identified in this hearing as the ancillary areas. Condition 5 contained in decision C44/96 and agreed between the parties reads:

"Condition 5.
Harvesting of peat shall not take place when weather conditions are such that adjacent owners and occupiers are likely to be significantly

[3] ***Australasian Peat Limited v Southland Regional Council.***

adversely affected by suspended or deposited peat particulate matter."

What transpired at this hearing is that even that condition which apparently relates to the bog is considered as relating to an ancillary discharge of the harvesting operation itself rather than particulate matter coming off the bog area itself.

Conditions to Control Peat Particulate Discharge

[12] The Court understands the core issue of concern relates to control of the dust from the surface of the peat bog itself during the harvesting season. The only wind direction that seems to have been of concern to the parties is the wind from the northwesterly direction. In certain circumstances this wind can have the effect of lifting peat particulate from the surface of the bog and driving it onto Mr Heads' property which is directly downwind of the site. Evidence was given by the respondent and Mr Heads that the conditions imposed by agreement on the last occasion had not been effective in avoiding the discharge of peat particulate from the bog surface onto Mr Heads' property and into his home.

[13] The applicant for its part accepts that there have been occasions when there has been significant peat particulate deposition onto Mr Heads' property and also into his house but said:

(a) that that situation was historical and that significant improvements in the management and operation changed the likelihood of the severity of that occurrence; and
(b) that it occurred only in extreme conditions; and
(c) that there were further steps that could be taken to mitigate, although not avoid, the effects on Mr Heads' property.

[14] The applicant's position is that the matter should properly be controlled by conditions which seek to adopt the best practicable option (as amended from time to time). An appropriately strict management plan and review conditions would also be necessary to ensure the best practicable option was in place. This was accepted by the applicant as an appropriate approach.

[15] The Regional Council's position is that the conditions should seek to avoid or minimise the effect on Mr Heads. However their expert witness also accepts that the best practicable option approach is appropriate in the circumstances.

[16] For Mr Heads, the position is that Ravensdown's current peat harvesting method gives rise to inevitable adverse effects and impacts on Mr Heads and his property which are unacceptable. Mr Heads contends that the discharge permit granted should be subject to a condition or conditions necessary to ensure that those unacceptable effects and impacts do not occur. Mr Goldsmith, counsel for Mr Heads, made it clear that Mr Heads agreed the matter of ancillary areas discharges could be resolved by consent. In Mr Head's view the core issue is that there should be minimal peat particulate discharged from the peat bog surface itself during north westerly winds.

[17] Mr Heads' position is that the consent should be subject to conditions which require a change of harvesting method to avoid the spin tilling of the peat bog surface. His evidence was that spin tilling allows the peat to dry on the surface and therefore become subject to lifting in north westerly winds. Mr Heads however does accept that the applicant should be able to harvest the peat from the site provided the method is changed so that peat

particulate discharge in north westerly winds does not significantly affect his property or person.

[18] Mr Heads contended that the existing condition 3 of the Council consent was appropriate to the extent that it sought to prevent the emission of peat particulate from the bog surface onto his property. An alternative approach suggested on behalf of Mr Heads was to require a change in harvesting method. That issue was the subject of evidence and submission before the Court and is covered in more detail later in this decision.

[19] The Regional Council and Mr Heads sought a decision only on the conditions relative to emission of peat particulate from the bog surface. The parties agreed that an interim decision is sought to enable the parties to consider final conditions in light of the decision.

Distinguishing emissions from ancillary areas

[20] We are concerned as to whether emissions from ancillary areas can be distinguished from emissions from the bog surface or other general emissions in the district which may pass across this land in a north westerly wind. Although it is common ground that some peat particulate which can become airborne is quite large, it was also accepted that there could be peat particulate material which could vary in size down to less than 10 microns.

[21] Evidence given before us satisfied us that it would not be possible with any known form of condition to differentiate between emissions from ancillary sources and from the peat bog surface itself. This evidence is confirmed in a number of photographs that were shown to the Court, many of which seemed to involve emissions from the stockpile and access road areas (ancillary areas) as the main contributors to the "dust emissions" depicted.

Evidence as to peat particular emissions

[22] Mr Roger Cudmore, an air quality management consultant, was the expert called by the applicant in respect of emissions issues. He gave evidence as to the emissions from the ancillary areas which are no longer in contention for the reasons already given.

He stated that the peat bog retains high moisture content, being harvested when its moisture content by weight was between 60 and 80%. It was his view that it was generally necessary for north westerly winds of approximately 70 kmh or higher to blow before there could be significant peat dust erosion from the bog surface. Where there had been a recent substantial rainfall event he would expect the erosion from the bog surface to be minimal even with winds gusting over 100 kmh. In his opinion there was a requirement for sustained drying conditions for a day or more followed by a strong north westerly wind before substantial erosion of the peat bog would occur.

[23] He accepted that in those circumstances substantial erosion across the peat bog can occur. In such conditions there is likely to be a visible dusty plume that extends across the boundary of the Ravensdown site. His view was that having regard to the rarity and short duration of that combination of climatic events the effects overall are only of minor consequence.

[24] He suggested that whether the ongoing situation should be deemed offensive or objectionable includes the FIDOL factors, namely frequency, intensity, duration, offensiveness and location. Having regard to the fact that extreme winds over 70 kmh occurred some .05% of the time, i.e. a few hours per year, he looked at the issue on a holistic basis concluding that the temporary loss of amenity value is not unreasonable. He pointed to the distance of around 1 kilometre to the actual home of Mr Heads - the only

home apparently affected - and the minor impact of the dust on pastures and stock.

[25] Dr Terence Brady gave evidence as to air quality matters and in particular on the wind strengths in the area. Although an interpolation of data sets from Lumsden site was required this appeared to equate with the evidence of the other parties in that winds above 50 kmh would be required before any problems had been noted. Again Dr Brady did not specifically differentiate between particulate emissions from ancillary areas and from the peat bog. However Dr Brady's evidence was that it was the ancillary areas that were more susceptible to dust emission than the peat bog itself. Mr Smith, the manager for the applicant, suggested there may be dust emissions from winds over 50 kmh but it was unclear whether this applied just to the peat bog or to the entire area including all ancillary dust emission sources.

[26] The Regional Council called two witnesses relating to specific events that had occurred. Mr Ian Welsh, water quality officer with the Regional Council, gave evidence of visiting the property on three occasions. In October 1997 winds were in excess of 50 km/h. On the second occasion, 7 November 1997, he attended the property and estimated the winds to be 70 to 80 km/h. On the third occasion, 18 October 1998, he described a strong wind. He did accept that this had been an occasion on which there were significant gale force winds later in the day with power lines and trees falling. Mr Paul Reid, environmental compliance officer with the Regional Council, described his attendance on the property on 3 October 1997. He described substantial peat deposits in the boundary drain.

[27] This evidence was again confirmed with similar evidence from Mr Heads, the neighbour to the south. Although not describing exact wind speeds Mr Heads' evidence accepted that peat dust occurred in more

extreme conditions. The photographs produced represented high wind or extreme wind conditions. The video shown to the Court appears to have been taken when winds were significantly higher than 50 kmh.

Conclusions on Evidence as to Emissions

[28] In our view the evidence of the witnesses was consistent; that peat particulate off the bog surface could begin to mobilise at wind speeds above 50 kmh provided the right preliminary conditions existed, including a drying wind, no rain and strong north westerly winds.

[29] It also seemed to be accepted by all witnesses that in circumstances where peat became mobilised by these extreme conditions it was difficult to contain. Although evidence was given about the ability for some of the rolling peat to be reduced with plantations and trees being grown we conclude that it is unlikely to have any significant effect on the dust plume (the finer particles) once they are airborne. We accept from having seen the photographic and video evidence that the dust plume consists of a wide range of particle sizes with the smaller finer particles mobilised well into the air above the height of any screening that could be erected. It is this particulate, particularly the very fine dust, which has the nuisance effect on Mr Heads' home.

Avoid remedy or mitigate

[30] Having established that there is an adverse effect from peat particulate from the bog in certain conditions, particularly with wind speeds over 50 kmh from the north west, we must then consider the primary obligation on the consent holder to avoid, remedy or mitigate the effect.

[31] Evidence was given by Mr Heads that there was a necessity for a change of harvesting method if there was to be any realistic prospect of avoiding the effect. Having heard Mr Heads and Mr Smith on this issue we are satisfied that there is at present no viable alternative method of harvesting. Mr Heads' position was that he could not suggest any alternative harvesting method but suggested it was for the applicant to discover one.

[32] We accept that the applicant has sought expert advice in this area and has undertaken research to identify alternative methods of extraction. We agree with Mr Heads that an alternative method of extraction which did not till the peat bog surface would be preferable. We also accept the applicant's position that no viable alternative is currently available.

[33] On this basis the applicant presently cannot avoid all emissions of peat particulate from the bog surface itself. Similarly, in light of all the evidence we have heard including that of Mr Heads, we conclude that some adverse effect in the circumstances described can not be avoided entirely. There will still be high to extreme wind events where there is an adverse effect on the Heads' property. As has already been noted by the Court this is not a situation where the Court has available the option of declining consent on the basis of the inability to avoid the adverse effects. The consent has already been granted and the only issue for this Court is the conditions relevant to that appeal.

[34] The Court is also directed to the potential for the adverse effect to be remedied. There does, in these circumstances, seem to be some potential for remedying adverse effects. The applicant whose parent company is a major fertiliser producer, suggested to Mr Heads that it might be possible to supply fertiliser to overcome any loss in production from the pasture due to the particulate emission. It also suggested the potential for meeting the

costs of cleaning Mr Heads' home after an extreme wind event. Some remedial benefit may also be seen in the future as the planting undertaken by the applicant grows and prevent the larger particulate moving across the boundary. However, not all adverse effects can be remedied.

Mitigation and best practicable option

[35] The Court is also directed to the potential for mitigation of adverse effects. It was in this regard the Court believes there is scope for conditions that may mitigate and remedy the effect on the Heads' property.

[36] Section 108(2)(e) of the Act provides:

> *Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source.*

Subsection (8) provides:

> *Before deciding to grant a discharge permit ... to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) ... subject to a condition described in subsection (2)(e) the consent authority shall be satisfied that, in the particular circumstances and having regard to -*
>
> *(a) The nature of the discharge and the receiving environment; and*

(b) Other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment -

the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.

[37] It was the case for the applicants on appeal that the criteria of section 108(8) were met and that a condition adopting the best practicable option could be utilised in this case. They pressed such an approach upon the Court on the basis that it was difficult to stipulate minimum conditions in respect of the receiving environment which had any realistic application. They pointed to the fact that in extreme wind conditions there would be significant wind erosion throughout the district. They pointed for example to the storm of 18 October 1998 when there was considerable wind damage including falling trees and power outages.

[38] We note that no party suggested any alternative conditions that might be imposed on the grant of this application which would in themselves mitigate the effect upon the Heads' property. Mr Heads' position was that this was an issue for the applicant to resolve. For its part the applicant said that the earlier conditions that it sought to include in the appeal notice were not appropriate for all situations and could be exceeded in sufficiently severe storm events. The appellant suggested that compliance with such conditions was not necessarily a sign of good or best performance by the company. Conditions which provided for emission levels to meet storm events could be utilised for emissions in light conditions when nil emissions should be achieved.

[39] The Regional Council through its expert accepted that a nil limit as imposed by the Council consent was not capable of compliance and there

were difficulties with the assessment of fixed emission limits as suggested in the original appeal. His suggestion was largely the same as the applicant's which was to impose a condition to avoid offensive or objectionable emissions.

[40] In our view sub-paragraph (b) of subsection (8) of 108 is met. We have considered all of the evidence provided and believe that there are significant difficulties in drafting minimum conditions of consent which would:

(a) achieve ongoing improvement by the applicant in its management practices on the site;
(b) be sufficiently flexible to provide for the various range of events that might occur; and
(c) pick up unreasonable emissions by the company. This is to ensure that emissions that were not due to extreme wind events were controlled while at the same time providing for the extreme events which may occur.

[41] We have also given consideration to the nature of the discharge on the receiving environment. There is no doubt that the bog particulate emission has an effect on the amenity of the Heads' property. We are satisfied that section 108(8)(a) criteria are met because:

(a) the events are of short duration and infrequent;
(b) there is no evidence of adverse environmental or health effects;
(c) the substance is one naturally occurring in the area.

[42] We have concluded a best practicable option approach is the most efficient and effective means of preventing or minimising actual or likely adverse effects. In saying this we recognise that in this case the ability to

use the best practicable option approach to improve management and extraction methods more properly meets the obligation under section 5(2) of the Act to avoid, remedy or mitigate adverse effects.

[43] In our view the appropriate approach in such a case is the development of a management plan and conditions based around regular reviews of the conditions to ensure environmental outcomes are being achieved. Such an approach requires regular reviews of the conditions of consent to enable the Regional Council to review progress and if necessary take action to alter the consent granted.

General condition as to offensive and objectionable emissions

[44] The applicant and the Regional Council suggested that there should be a general condition that there is to be no emissions of peat particulate from the bog area of the site which is, or is likely to be noxious, dangerous, offensive or objectionable. This wording is picked up from section 17(3)(a) of the Act.

[45] The Environment Court has previously considered the issue as to whether it is appropriate to deal with consents by way of generalised conditions such as this with a secondary set of standards.[4] In ***Turner et al v Allison et al***[5] the Court of Appeal considered whether conditions that provided for works to be undertaken to the satisfaction of a Council employee were valid. Where the condition only requires certification then such condition is valid. Where arbitral powers are delegated however such a condition is invalid. As Richmond J said in ***Turner***[6]***:***

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4 ***Walker & Carruthers et al v Manukau City Council*** C213/99 at 70-71, ***Wood and Ors v West Coast Regional Council*** 2000 NZRMA 193.

5 4 NZTPA 104.

6 Supra at 129.

In my view the effect of conditions 2, 5 and 7 is to impose conditions whereby the external appearance of the supermarket and landscaping and planting are required to be carried out to standards set by Miss Northcroft by reference to her own skill and experience. They do not purport to confer upon her an arbitral status.

[46] Any management plan cannot go so far as to provide any arbitral power to the authority in respect of its contents. However, in our view a standards/management plan approach can meet these requirements if coupled with review conditions as provided for in section 128 of the Act.

[47] Although the management plan should be scrutinised by the Court we have concluded that it should not be included as a condition of consent at this time. This gives flexibility to explore ongoing improvements and alternative harvesting methods if any become available. Each case must be considered on its facts but in this case the Court is satisfied that coupled with extensive review provisions and a management plan approved by the Court, this best practicable option approach is appropriate in the circumstances.

[48] The parties have asked that we issue an interim decision to allow the parties to discuss the potential implementation of this decision. The appropriate approach would include the following elements -

Conditions

1. There shall be no peat particulate emission from the Peat Bog Area which is or is likely to be noxious, dangerous, offensive or objectionable.

2. The applicant shall adopt the best practicable option to prevent or minimise any peat particulate discharge from the site. Such best practicable options shall be set out in a management plan revised in November and May of each year and provided to the Regional Council.

3. The peat bog surface shall be limited to no more than 33ha at any time and be identified both on the bog itself and in the Management Plan.

4.

(i) The Regional Council may review the conditions of consent pursuant to the Resource Management Act at regular 6 monthly intervals and in reviewing compliance with the best practicable options may consider

(a) Management Plan and compliance
(b) Monitoring or other data
(c) Emission events
(d) Complaints received
(e) Any other information relevant to the avoidance of adverse effect from peat particulate emission on site.

(ii) The Regional Council may on review:-

(a) require the applicant to undertake further works or amend the management plan so as to mitigate, remedy or avoid peat particulate discharge from the site;
(b) propose or invite the applicant to propose new consent conditions.

(iii) In addition to any other obligation to notify, Mr W R Heads shall be notified and entitled to give evidence and/or submissions at any such review.

Management Plan

1. Proper identification of the peat bog area with relevant monitoring.

2. Provision for independent monitoring of emissions from the site together with provision of a weather station to provide records including wind strength, direction and moisture level on the bog surface.

3. The comprehensive management plan would set out how the peat bog would be operated, steps to be taken in adverse or potentially adverse conditions, measurements, frequency for supply of information to The Regional Council, notification to Mr Heads and other matters.

4. Method of categorising and comparing emission events.

5. Provision for ongoing research into extraction methods.

Records

- Recording all emission events
- Method to identify whether the emission is from peat bog or from ancillary areas
- Regular reporting to Council
- Independent preparation and reporting.

[49] Having indicated the appropriate approach we now ask for written submissions as to appropriate final orders conditions and a draft initial management plan.

[50] If parties can agree a joint memorandum should be filed within 21 days. If not the applicant shall file within 21 days a memorandum, replies to be filed within 14 days thereafter and applicant's final memoranda 7 days thereafter. The memorandum of the applicant should have attached a draft initial management plan and draft consent conditions.

Costs are at this stage reserved.

DATED at CHRISTCHURCH this 5TH day of DECEMBER 2000.

J A Smith
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Tab 6

ORIGINAL

Decision No. W 150/96

IN THE MATTER of the Resource Management Act 1991

AND

DOUBLE SIDED

IN THE MATTER of an application pursuant to s.316 of the Act

BETWEEN **TARANAKI REGIONAL COUNCIL**

(ENF 222/95)

Applicant

AND **KEVIN GARRY WILLAN and JANICE CAROL WILLAN**

Respondent

BEFORE THE ENVIRONMENT COURT
Judge Treadwell sitting alone pursuant to s.279 of the Act

IN CHAMBERS at WELLINGTON

DECISION

This is a preliminary determination of law in relation to enforcement orders sought in terms of the Resource Management Act 1991 (RMA), seeking the removal of an access culvert erected by the respondents in 1992. The order is sought under s.314(1)(b)(ii) on the grounds that the structure is, or is likely to be, noxious, dangerous, offensive, or objectionable to such an extent that it has, or is likely to have an adverse effect on the environment. A further order is sought requiring the respondents before constructing a replacement structure, to apply for a resource consent.

The argument between the parties revolves around the provisions of s.319(2) of the Act, which prevents the making of an enforcement order against a person who is acting in accordance with a resource consent:-

> *"If the adverse effects in respect of which the order is sought were expressly recognised by the person that ... granted the Resource Consent, at the time ... of ... granting ..."*

The relevant facts appear largely undisputed. On 29 January 1992, or possibly the day before, an application was made on behalf of the respondents by Mr Holland of Scott Holland and Company Limited, consulting Civil and Structural Engineers of New Plymouth. The application was clearly pursuant to s.88 of the Act for a permit to *"divert, dam and/or use natural water as specified..."*. It was *"for construction of a*

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crossing of the Waiongana-Iti Stream for the purposes of providing access to a residential property at 31A Nikau Street, Inglewood."

The application was in proper form, including an Environmental Impact Assessment, which considered the potential effects on the environment and in particular, the environment upstream of the proposed structure. There appears to be no argument that all parties were aware of potential flooding caused by stream obstructions. In that regard the application indicated *"There will be no significant effect on neighbouring property"*.

The names of the nearest downstream and upstream neighbours were supplied.

On 19 February 1992, Mr R Powell, the Council River Control Engineer reported. Without reference to the respondents, he concluded that:-

> *"A consent can be granted under the* 'general authorisations' *pursuant to permitted activities under the Taranaki Regional Council Transitional Regional Plan ..."*

He then recommended that application number 92/010 (the resource consent application):-

> *"... be approved for a period to 1 June 2008 with review dates of 1996 and 2002 subject to the standard conditions and policy of the Taranaki Regional Council and the following special conditions..."*

That particular memorandum appears to be misdated, and should probably be 19 January 1992.

It appears then that the Permit Manager for the applicant, Mr A Feely, then cancelled the resource application and authorised the work under general authorisations. It appears that this document of 6 February may also be misdated.

By internal memorandum, the Permits Clerk appeared to cancel the invoice recording the receipt of the application fee and this was refunded to the respondents, but the refund did not indicate to the respondents that their Resource Consent application had effectively been cancelled. I accept that neither of the respondents had until recently realised that the credit invoice related to a general authorisation, and indeed as lay-persons, they would have had no idea of the purport of that particular expression. To add to the confusion, a telephone call recorded by Mr Powell on 29 January 1992, was a record of a Council advice the *"This water right application would not be notifiable"*. There were also a series of amended calculations regarding potential flood flows and levels. The engineers acting for the respondents clearly had no idea that the Council were embarking upon a different method of authorising the construction of the culvert.

At some stage the Council gave oral consent to the engineer to proceed with the structure; this was passed on the respondents who set about constructing it. Despite the fact that the original application supplied the names of upstream and downstream neighbours, there is no evidence that the Council made contact with them prior to giving approval to the structure, but I am perfectly satisfied that at this stage potential adverse effects had been fully explored and that the Council had

made the decision that consent should be granted, having regard to the flood history of this stream.

On 27 September 1993, the Council's Projects Manager also made a note that a consent could be issued under General Authorisation provisions *"recommending a conditional consent approval"*. The memorandum also suggested that in referring to the application as non-notifiable *"probably misunderstood the G A process"*. That particular memorandum, dated 19 February 1992 to A Feely from R ~~P???~~ Powell (Council Officers) made a significant statement in the last sentence on the first page where it is recorded:-

> *"Hingston is concerned about backwater on his property and it was known that this would occur when the Wellan (sic) structure was proposed."*

Mr Hingston is an upstream neighbour.

The respondents merely followed the advice of their engineer, and upon being told the consent had issued by Council, simply went ahead and constructed the culvert. I am told, and I believe, that they had never heard the phrase *"General Authorisations"* until 1995, and had no idea that there were any conditions attached to the consent.

The Council for its part, acknowledge a Water Permit Application for the construction of an access bridge. It acknowledged that this was supported by a report from engineers and an Environmental Impact Assessment. That assessment indicated that the only effect on the environment would be in the stream channel and banks immediately upstream and downstream of the crossing. The report also acknowledged marginal increase of the effects of flood events for a distance of approximately 40 metres. Various engineering calculations and assessments were given to Council and presumably cross-checked by Council officers.

The Council then acknowledges that it did not *"process"* the application for Resource Consent, whatever that expression may mean. Unilaterally the Council decided to deal with the matter as an authorisation under 5.22 of the Water and Soil Conservation Act 1967; a process authorised under s.368 of the RMA.

In 1994 following complaints, the Council wrote to the respondents seeking *"dialogue"*. A further letter was written on 9 March 1995 and following a lack of response again wrote inviting the respondents to apply for a Resource Consent. A General Authorisation in terms of the RMA sections 368 and 369 is deemed to be a Regional Rule in respect of the particular activity and in terms of that section the conditions attaching to General Authorisation are deemed to be Regional Rules. The Council then submitted that the applicants construction of the access bridge or culvert cannot be treated pursuant to a Resource Consent held by them, but conceded it to be a permitted activity under a rule by virtue of the sections of the RMA to which I have just referred.

The Council maintain that it was permitted by the Act to consider the application under General Authorisation procedures in that the activity proposed was a permitted activity. That immediately imported the general conditions attaching to the General Authorisation. In treating it in this way, the Council relied upon the assessment submitted by the respondent. The Council submit that adverse effects

upon the environment were not identified by the respondents in their application, namely bank erosion, damming and ponding, littering, siltation, deposition, esplanade reserve deterioration which are of course matters of fact.

As I apprehend the approach of Council these matters are contrary to the General Conditions now forming part of the Rule.

In respect of s.319(2) of the Act, I am perfectly satisfied that the adverse effects in respect of which the order is sought, were or should have been recognised by the person dealing with the grant of the Resource Consent. The respondents have at all times given to the Council all the information the Council have sought. However, I accept that the specific knowledge referred to in s.319 in respect of the present matter, can only be in relation to a Resource Consent, because I have absolutely no evidence whatsoever to suggest that the Rule in the Plan (the General Authorisation) was created with express knowledge of the precise effects in this particular stream. Indeed the expression *"General Authorisation"* indicates that it has far-ranging ramification throughout the district, and that in any particular instance the holder of such a right could not rely on s.319(2).

Therefore the situation as I see it, is that if the culvert were constructed pursuant to a Resource Consent, then the Court cannot make an order under s.319 because the Council had, or most certainly should have had, knowledge of potential effects, if not the exact extent of those effects. In that regard I agree with Counsel for the respondent that the protection afforded by s.319(2) is not negated by the degree of adverse effect, provided the degree of that adverse effect is reasonably within the parameters contemplated at the time of grant.

I have taken account of the authorities cited to me, but the only one I find of assistance in resolving the issue is the case of Goldfinch -v- Auckland City Council and Others (CA 267/94) 30 April 1996. This is similar in that the document relied on by the appellant in that case, was held to be a *"Certificate of Compliance"* notwithstanding the fact that it did not specifically use those words. I agree with counsel for the respondents, where he submits that although the approval in that case was not in the usual form of a Certificate of Compliance, it had to be taken as having the same effect giving the surrounding facts. The Court of Appeal held:-

> *"For us the essence of the two documents is identical. Both of them certify that certain identified proposals complied with the District Plan or Scheme. In each case the proposal and the land were clearly identified in the related documentation. It may well be unfortunate that different practices were followed in different parts of the city in this transitional phase, and in particular that the final document in this case did not expressly refer to Section 139. But as is recognised in both the Tribunal Decision and the High Court judgment such express reference is not required by Section 139."*

The similarity with the presence case is reasonably close in that the present respondents went about their business in reliance upon the fact that the Council had granted to them the resource consent they had sought and upon which they could rely; a consent based on full disclosure of all matters relevant to that consent which the Council might consider important, including the names and addresses of upstream and downstream parties. I find that the respondents thought they had received a non-notified consent, and that there was no impediment to the Council

granting such a consent on the facts before it. That is, I find that a decision of Council not to notify, (whether it be by way of general authorisation or Resource Consent), had been made and that that decision cannot be challenged before this Court. Having made that finding, the question of the label to be placed upon the consent is irrelevant. That respondents were entitled to rely on the fact that they had a consent in terms of the Act.

On the other hand, I find that the consent granted did contain conditions, namely the conditions attached to the General Authorisation.

Moving now to that question, and I record that this has not been argued before me, the general law is that a condition of consent cannot negate the consent granted. In the present case, consent was granted to a particular construction of particular dimensions, designed by engineers with flooding results considered and addressed. To use the terms of any of the conditions to now negate that specific structure, would in my view be unacceptable in law.

Conclusions

I have concluded for the reasons I have advanced, that the respondents hold a Non-Notified Resource Consent, subject to conditions, but that some of the general conditions are ultra vires if intended to be used to negate or cancel the consent granted in respect of the particular structure.

Even am I wrong in law I would not be prepared to exercise my discretion and grant an Enforcement Order if I were to hear the substantive case. That would be grossly unfair to the respondent. It appears to me that this is case where the Regional Council should itself take responsibility for remedial work without proceeding against the respondents to obtain orders which could have ultimate criminal repercussions. For the foregoing reasons, the application for Enforcement Order is dismissed.

DATED at WELLINGTON this 23rd day of October 1996

W J M Treadwell
Environment Judge

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