Rodney District Council v Gould

High Court Auckland CIV 2003-485-2182
13 May, 18 June; 11 October 2004
Cooper J

Subdivision — Cumulative effects — Precedent — Whether precedent was a mandatory consideration to which the decision maker was required to have regard — Appeal on questions of law — Resource Management Act 1991, ss 3, 5, 6, 7, 8, 104, 105, 120, 125, 272, 299, 300.

This appeal concerned a proposal to subdivide a 2.34 ha rural property into two lots. Resource consent was required for a non-complying activity. The appellant contended that the grant of consent should not be upheld based on reasons relating to the cumulative effects of the proposal and precedent, and that the Environment Court had accordingly erred in law when considering whether the proposed subdivision was contrary to objectives and policies.

Held (dismissing the appeal)

1 In assessing whether a non-complying activity was contrary to objectives and policies, the decision maker was not required to consider rules which, by necessity, compromised due to the non-complying nature of the proposed activity (see para [76]).

2 The obtaining of written approval from neighbours could properly be taken into account when considering issues of precedent and district plan integrity (para [90]).

3 Concepts regarding the integrity of planning instruments, coherence, public confidence in the administration of the district plan, or precedent were not mandatory considerations in any given case due to the absence of any reference to them in the Resource Management Act 1991, A reasoned decision which found that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be challenged for legal error simply because it failed to refer to district plan coherence, integrity, public confidence in administration of the plan, or precedent (see para [99]).

4 Concerns about precedent and coherence were, however, legitimate matters able to be taken into account by the decision maker in relevant cases (see para [102]).

5 The proposed activity had considerations outside the generality of cases, and the grant of consent for the subdivision would not give rise to

cumulative effects, and the potential effects of the activity were not significant (see para [102]).

Cases mentioned in judgment

Arrigato Investments Ltd v Auckland Regional Council [2001] NZRMA 481; [2002] 1 NZLR 323 (CA).
Auckland City Council v Wotherspoon [1990] 1 NZLR 76.
Batchelor v Tauranga District Council (No 2) [1993] 2 NZLR 84.
Body Corporate 97010 v Auckland City Council [2000] NZRMA 202 (HC); [2000] 3 NZLR 513 (CA).
Clifford Bay Marine Farms Ltd v Marlborough District Council (Environment Court, Christchurch C 21/03, 4 March 2003, Judge Jackson).
Dye v Auckland Regional Council [2002] 1 NZLR 337 (CA).
Heaney v Rodney District Council (High Court, Auckland CIV 2003-404-3480, 16 March 2004, Gendall J).
Hopper Nominees Ltd v Rodney District Council [1996] NZRMA 179.
Manos v Waitakere City Council [1996] NZRMA 145 (CA).
McGregor v Rodney District Council (High Court, Auckland CIV 2003-485-1040, 24 February 2004, Harrison J).
Murphy v Rodney District Council [2004] NZRMA 393; [2004] 3 NZLR 421.
NZ Rail v Marlborough District Council [1994] NZRMA 70.
O'Shea v Auckland City Council [2002] NZRMA 117.
Reith v Ashburton District Council [1994] NZRMA 241.
Wellington Regional Council (Bulkwater) v Wellington Regional Council (Environment Court, Wellington W 3/98, 7 January 1998).

Appeal

This was an appeal to the High Court on questions of law under s 299 of the Resource Management Act 1991 from the decision of the Environment Court regarding the grant of resource consent for the subdivision of land.

R B Enright and *J F Verry* for Rodney District Council.
K R M Littlejohn for K F Gould and Y F P Gillain.

COOPER J. [1] The appellant (the council) appeals under s 299 of the Resource Management Act 1991 from an interim decision made by the Environment Court on 22 September 2003. By its decision, the Environment Court allowed an appeal by the present respondents against the refusal by the council to consent to the subdivision, into two lots, of a 2.34 ha property situated at 155 Spur Road, Stillwater.

[2] The numerous questions contained in the appeal are set out in the appendix to this judgment. The issues raised concern alleged errors of law in the way that the Environment Court interpreted the district plan, considered the precedent implications of the proposal, and dealt with the council's arguments about cumulative effects. Issues are also raised concerning the manner in which the Court dealt with some of the evidence. Because an appeal from the Environment Court can only raise questions of law, the questions about the evidence consist of allegations

that the Court ignored, or failed to take certain evidence into account: the council accepts that the weight to be accorded the evidence was a matter for the Environment Court, unable to be challenged on appeal. Finally, the council argues that the Court failed to carry out its mandatory duty to consider s 7 of the Act, and this is said to be a fatal error.

Background

[3] The subdivision proposal was that the land be divided into lots of respectively 1.1 ha and 1.24 ha in area. Such a subdivision required consent, if it was to proceed, as a non-complying activity under the relevant provisions of the council's district plan. At all relevant times, there were an operative transitional district plan, a proposed change to that district plan (known as proposed plan change 55) and a proposed district plan which had been publicly notified in 2000. The proposed subdivision required non-complying activity consent under all of these instruments. However, the main thrust of the argument in the Environment Court concerned the meaning and proper application of proposed change 55, and the proposed district plan. That has been the case in this Court as well.

[4] In its decision, the Environment Court held that any adverse effects of the subdivision on the environment would be no more than minor and that, in the case of plan change 55 and the proposed district plan, the proposal would not be contrary to their objectives and policies. Holding as a consequence that the jurisdictional hurdles in both paras (a) and (b) of s 105(2A) of the Resource Management Act had been cleared, the Court then went on to consider the merits of the application under s 104 of the Act. It held that the relevant district plan provisions to which it had been referred did not stand in the way of consent being granted under s 104(1)(d). It was, of course, a proposal which was admittedly contrary to the relevant rules, but the Environment Court applied the decision of the Court of Appeal in *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323, to reject an argument which had been advanced on behalf of the council that the appropriate inquiry under s 104(1)(d) was to consider whether or not a proposal is supported or envisaged by, aligned with, or accords with the spirit of the district plan. In the Environment Court's view, although the proposal was not "entirely supported by the generality of issues and explanations", when the matters raised by s 104(1)(d) were properly considered, they were not such as to lead to consent being declined.

[5] The Environment Court rejected an argument which had been made to it by the council that adverse cumulative effects would flow from the grant of consent. Applying the decision of the Court of Appeal in *Dye v Auckland Regional Council* [2002] 1 NZLR 337, it held that cumulative effects could not embrace what counsel for the council had described as "effects on community expectations". Further, it held that the issues of precedent and the integrity of the district plan should be addressed in the context of s 104(1)(d) and (i), but not under s 104(1)(a).

[6] The Court found that there would be no adverse effect on the environment which, considered under s 104(1)(a), should lead to consent being declined.

[7] In so far as the issues of precedent and the integrity of the district plan were concerned, the Environment Court's decision tended to treat those issues as two aspects of the same thing. In any event, it found that there were a number of characteristics of the subject proposal which took it outside the generality of cases, with the consequence that precedent effects of the kind held relevant in *Dye v Auckland Regional Council* would not arise.

[8] In summary, the proposal's differentiating factors were first, that the actual and potential effects on the environment of the proposal would be less than minor. Secondly, the site was located in an area where subdivision to the average lot size proposed was already relatively common and, proportionately, would not be significantly altered by the proposal. Thirdly, every adjoining neighbour had given express written approval to the development. Finally, the council itself had recently publicly adopted a policy of increased density for countryside living which was consistent with the "intent" of the application.

[9] The Environment Court referred briefly to Part II of the Act, stating that its attention had not been drawn to aspects of ss 6, 7, or 8 against which the proposal would offend. It said that it was satisfied that the proposal met the purpose of the Act, which by s 5 is stated to be promoting the sustainable management of natural and physical resources. Expressing its conclusions about s 5, the Court said:

> We consider that this is achieved in the sense that the use, development and protection of natural and physical resources is achieved in a way which enables the appellants to provide for their social and economic well-being, and that the proposal adequately sustains the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations, and avoids adverse effects on the environment. In addition, there was no evidence that the proposal would not safeguard the life supporting capacity of air, water, soil or eco-systems.

[10] The Court then held that consent should be granted and reversed the council's decision. Its decision was made an interim one, however, to enable the parties to confer about the conditions to which the consent should be subject.

The appeal

[11] The council lodged an appeal in this Court against the Environment Court's decision. By its notice of appeal dated 9 October 2003, the council identified approximately 25 errors of law.

[12] In accordance with procedural directions made for the disposal of the appeal in this Court, counsel for the council lodged written submissions prior to the hearing, some 63 pages long. In response to the respondents' submissions, also filed prior to the hearing, counsel lodged another 20-page document, said to be in "rebuttal", and attached to that document was a schedule setting out amended questions of law.

[13] The matter was argued before me on 13 May, having been set down for one day. During the argument further changes were sought to be made to the questions to be determined. At the end of that day, the

appellant's submissions were not finished and a further day was allocated for the matter to be completed on 18 June 2004. For the resumed hearing, counsel filed additional submissions. Again, during argument on 18 June 2004, the questions of law underwent further change, and some were deleted.

[14] Mr Littlejohn, for the respondents, did not oppose the various changes which the council proposed to the questions and consequently I allowed the amendments to be made. It is not to be supposed that the Court would in future adopt a similarly tolerant approach to frequent changes sought to be made to an appeal under s 299 of the Act, especially if the amendments were opposed by the respondent. Section 299 of the Resource Management Act is limited to appeals on a point of law. Section 300(5) requires that a notice of appeal shall specify the error of law alleged, the question of law to be resolved, and the grounds of the appeal with sufficient particularity for the Court and other parties to understand them. It is the notice of appeal when filed which should contain those matters, and it will not generally be appropriate for an iterative approach to be taken, as was the case here, to the formulation of the questions.

[15] Even as amended, and as counsel for the council claimed "refined", the questions are numerous. In the circumstances, I have attached them to this judgment in the form of an appendix. That appendix reflects the final form in which counsel for the appellant was content to leave them, including the numbering. In the judgment which follows, I adopt the headings dividing the questions between the "first question of law" to the "seventh question of law", as set out in the appendix. There is no third question. The appeal as filed had raised the issue of effects on "community expectations", but the question was abandoned.

First question of law

[16] It can be seen from the appendix that the issues raised under the first question of law give rise to not one but a variety of legal issues. There is an apparent confusion in the drafting. The question commences by raising the issue of error in the interpretation of plan change 55 and the proposed district plan, but then implies that the error in interpretation was a failure to have regard to the "relevant considerations" which are then listed in para 1.1 and the following paragraphs. Normally, one would draw a distinction between an error in interpretation and a failure to have regard to relevant considerations. However, having heard Mr Enright's argument, I gather that what is suggested is that the Environment Court fell into error in its interpretation of the planning instruments, because it failed to have regard to or properly take into account the various provisions in those planning instruments which are itemised in paras 1.1 – 1.5 within the first question of law. I will proceed to deal with the matter on that basis.

[17] The other preliminary observation which I think should be made is that even if the gist of the first question of law is as I have just described it, para 1.5 raises a different kind of consideration altogether.

The council argues that its planning witness, Mr Simmons, had given evidence on the question of whether the proposed subdivision was (for the purposes of s 105(2A)(b)), contrary to the objectives and policies of the proposed district plan, and that the Environment Court wrongly concluded that there was no such evidence.

[18] A conclusion that there was no evidence on a particular issue may be an error of law. If there was such evidence and it was relevant to an issue in the case, then failing to consider the evidence would be an error of law if the evidence might have affected the decision. However, that is a wholly different argument from one which is based on alleged interpretative error, which the first question of law plainly is. Put simply, I do not see how a Court can err on a matter of interpretation, by wrongly concluding that there was no evidence about something. Such a proposition simply confuses law and fact. At para [20] of its decision in *Dye v Auckland Regional Council*, the Court of Appeal distinguished between the concepts of failing to take account of a relevant consideration, and misinterpreting the objectives and policies in a district plan. As the Court put it:

> Failing to give any weight to a relevant consideration is broadly equivalent to failing to take account of a relevant consideration. It is not equivalent to misunderstanding or misinterpreting a plan provision to which ex hypothesis, you have given consideration.

[19] I do not consider that the issue raised by para 1.5 requires any further consideration. In my view, the Environment Court could not have misinterpreted the relevant planning instruments, on the basis alleged.

[20] Returning then to the principal issues raised by the first question of law, there is, I think, a more fundamental difficulty. That is that the council did not, in the course of its voluminous written and lengthy oral submissions, identify what the error in interpretation of plan change 55 and the proposed district plan was. An error in interpretation of a district plan (or any other instrument, for that matter) must involve giving the wrong meaning to some words which have been used in it. To establish that such an error has occurred, I would have thought that it was necessary to identify the particular words said to have been wrongly interpreted, to explain how or in what way they had been wrongly interpreted, and to demonstrate by means of argument what the correct interpretation, for which the appellant contends, is. The appellant has done none of those things.

[21] I apprehend that the council is concerned that, in its discussion of what it thought were the relevant objectives and policies in the district plan, the Environment Court said that it could find no clearly articulated difference between zones called (in proposed change 55) respectively the Countryside Living 1 (Rural) activity area, and the Countryside Living 2 (Town) activity area. In this regard, Mr Enright points to two paragraphs in the Environment Court's decision:

(a) Paragraph [42](e), in which the Court held that the quantified subdivision provisions in the rules were really the only point of difference between the two zones.

(b) Paragraph [43], in which the Environment Court said:

> In essence, the similarity in the Countryside Living 1 and 2 Activity Area materials described allows of no strong basis for differentiating between the two Areas and, in particular, the form of development each is intended to accommodate. A sharper difference in the objectives, policies, Environmental Performance Criteria (EPC) and Intended Environmental Results (IER) would have provided a more robust basis for achieving different outcomes. (It might also have been different if the rules had been aligned in a more discernible manner with specific policies and objectives, and actively supported by them.)

[22] Then, in relation to the objectives and policies in the proposed district plan, the Environment Court held at para [46](e):

> Once again, none of the Countryside Living Zones – General Objectives and Policies contained in Section 7.8.5, elucidate the difference between the two Countryside Living zones, including as to their minimum subdivision lot sizes.

[23] As I understand Mr Enright's argument, it is that if the Environment Court had properly taken into account the matters itemised as paras 1.1 – 1.4 within the first question of law, then it might have reached conclusions different to those that are recorded above. However, the reasons for the Environment Court's conclusion, and the detailed basis which it set out for arriving at it are not of themselves alleged to be wrong. Clearly, the conclusions which I have earlier identified reflected a detailed reasoning process, the elements of which are not themselves subject to challenge in the first question of law. But in order to hold that there had been some error of interpretation, this Court would have to be satisfied, as I have already indicated, as to what the provision misinterpreted was and what its proper interpretation should be.

[24] Any other approach is likely to lead to the error which the Court of Appeal held had occurred in the High Court in both *Arrigato Investments Ltd v Auckland Regional Council* and in *Dye v Auckland Regional Council*. To quote from para [13] of the latter:

> The Judge did not interpret the objectives and policies and then identify the manner in which they had been misinterpreted or misunderstood by the Environment Court. Rather he worked backwards. He reasoned that because the proposal was not consistent with the objectives and policies, as he saw them, the Court must have misinterpreted or misunderstood them. There is a difficulty with that reasoning. The Environment Court may well have taken a different view from the Judge about whether the proposal was contrary to the objectives and policies. It was not for the Judge to differ on an appeal limited to questions of law.

[25] The council's approach on this part of the appeal is similar to that which was criticised by the Court of Appeal. An outcome with which the council is not comfortable is impugned on the basis that because the result is unsatisfactory, that must be as a result of misinterpretation or

misunderstanding of the relevant objectives and policies. But that is not a legitimate approach.

[26] For the reasons I have already given, it is my view that the various questions posed under the heading "First question of law" should be answered in the negative. However, in case there is any error in my approach I go on to address the questions on the basis of particular issues raised in argument by Mr Enright. For this purpose, paras 1.1 and 1.4 can conveniently be dealt with first, because each relates to objectives and/or policies in the proposed district plan. I will then consider para 1.3, also based on an alleged failure to consider a policy; and finally para 1.2 which raises a different issue, based on the district plan rules.

Paragraph 1.1 — objective 7.3.7/policy 7.4.7

[27] Objective 7.3.7 in the proposed district plan is expressed in the following terms:

> To maintain and enhance a land tenure pattern which enables the rural land resource to be used for a range of activities on a sustainable basis for present and future generations.

[28] Policy 7.4.7 seeks to achieve that objective. It reads:

> The rural land resource should remain in a land tenure pattern that has a range of site sizes so that a wide range of appropriate relationship activities and different demands by present and future generations can be accommodated on the land.

[29] Mr Enright did not present a developed argument that the Environment Court had made an error of law in failing to refer to this objective and policy, beyond asserting that they should have been expressly considered, because they are "clearly relevant".

[30] Objective 7.3.7 is one of 13 objectives stated in the proposed district plan for the rural part of the council's district. Policy 7.4.7 (which seeks to achieve objective 7.3.7) is one of 19 stated policies by which the rural objectives are sought to be achieved. More detailed objectives and policies for the particular rural zones and policy areas in the proposed district plan are provided in part 7.8 of the plan. At the relatively high level of abstraction where objective 7.3.7 and policy 7.4.7 are placed, the drafting clearly avoided differentiating between the various zones.

[31] While it is correct that neither objective 7.3.7 nor policy 7.4.7 were referred to in the Environment Court's decision, each is expressed in very general language. As is apparent from the decision, the Environment Court concluded that, as with proposed change 55, the proposed district plan did not clearly differentiate between the two Countryside Living zones in terms of the objectives and policies applicable to each. The only real difference was in the rules.

[32] That was a conclusion open to the Environment Court on the basis of the reasoning set out at paras [24] – [44] of its decision in the case of proposed change 55, and paras [45] – [47] in the case of the proposed district plan. The Environment Court is not obliged to refer in its decision to every objective or policy of a district plan which might be of

marginal relevance to its decision. Such is the complexity and some would say prolixity of such plans that to impose so strict a requirement would be unworkable, and would serve no useful purpose. It is enough if the main reasons which have led the Environment Court to reach a particular conclusion are set out, and that was done in the present case.

[33] In *O'Shea v Auckland City Council* [2002] NZRMA 117 the Environment Court explained the approach it had felt obliged to take in the case of a district plan which, it was said by the council itself, contained so many objectives and policies relevant to the application that it would have been practically impossible to assess the proposal against each one individually. The Court said:

> [79] Our present purpose is to explain as clearly as we can the process by which we arrive at our decision, and showing that we have complied with Parliament's procedural directions. Quoting in full, with context, all of the contents of the district plan which may be relevant, and explaining the place in reaching the decision of even those of peripheral relevance, of trite generality, or of repetitive content, would make this a very lengthy document, but would not necessarily advance that purpose.
> [80] A possible solution would be to have regard to all of the contents of the district plan that are cited and relied on by any of the parties or any of the expert witnesses. However, in our experience that course risks giving attention to statements of such generality, arguable relevance, or repetition that they do not provide a helpful guide to decision-making. Such a course would also provide an incentive to some parties to draw out hearings unduly.
> [81] We have concluded that despite the City Council's warning, the only practical course, for the purpose of explaining that step in the process by which the outcome was arrived at, is to refer to those which we consider should influence the decision. We apply the combined expertise of the members of the Court to choose contents for mention. In doing that we will be guided by submissions by the parties, and by evidence of expert witnesses called by them. Also, in doing so we aim to read the document fairly and understand its contents in context.

I see no error in such an approach.

[34] In view of the expressed basis for the Court's conclusion in the present case that there was no significant policy difference between the two zones, it is not possible, in my view, to argue that either objective 7.3.7 or policy 7.4.7 should have led to a different conclusion. Their language is too broad for that to be said. Even if they were relevant, their terms do not deal with (and would have made no difference to) the issue which the Environment Court identified. Both Countryside Living zones apply to parts of the council's district identified as appropriate for "countryside living". It is difficult to see how either the objective 7.3.7 or policy 7.4.7 could have had any effect on the Environment Court's conclusion that there was no clear policy differentiation between the two zones. If the Court could conclude that the proposal was not repugnant to the objectives and policies of the relevant zone, there is nothing in either the objective or the policy (which come from a general section of the plan) which would have required a different conclusion.

Paragraph 1.4 – policies 7.8.5.3.2.2 and / 7.8.5.4.2.2

[35] Policies 7.8.5.3.2.2 and 7.8.5.4.2.2 of the proposed district plan apply respectively to the Countryside Living (Rural) and Countryside Living (Town) zones. The former states that sites should be no smaller than 2 ha in order to retain the open space nature of the zone; the latter that sites should be no smaller than 1.5 ha in order to retain the open space nature of the zone, unless transferable title rights are obtained.

[36] However, those policies are said not to apply until a financial contributions regime initiated under the Resource Management Act 1991 is able to be applied, a position which has not yet been reached: this follows from rule 22.17.3 of the proposed district plan, as the Environment Court expressly recognised at para [47] of its decision. Until then, policies which have the same number, but a different wording, apply as "alternative" policies. The alternative policy 7.8.5.3.2.2 states that no subdivision of land below 4 ha should occur in the Countryside Living (Rural) zone until the new financial contributions regime is able to be applied. Alternative policy 7.8.5.4.2.2 is in exactly the same terms in respect of the Countryside Living (Town) zone.

[37] Mr Enright correctly submits that the Environment Court in its decision did not refer to both of the "alternative" policies, and he argues that the proposed subdivision would "on the face of it" be contrary to both policies. He submits that, while that is an issue for the Environment Court to assess, the alternative policies should have been expressly considered.

[38] The Environment Court referred to policies 7.8.5.3.2.2 and 7.8.5.3.2.3, at para [46](f) of its decision, as part of its reasoned basis for concluding that there was not a clear differentiation between the two Countryside Living zones. It expressly noted that those policies would not come into effect until a variation was notified relating to financial contributions. The council does not appeal on the failure to refer to alternative policy 7.8.5.3.2.3, and so I do not discuss it further. The argument is that alternative policies 7.8.5.3.2.2 and 7.8.5.4.2.2 should have been expressly referred to, and the proposal assessed against them.

[39] Mr Enright frankly acknowledged that neither of these alternative policies had been drawn to the attention of the Environment Court in his submissions. Nor had they been referred to in the evidence of the council's expert planning witness, Mr Simmons. However, he submitted that they had been produced to the Court in an agreed bundle and hence were before the Court. In response to a question from the Bench, he submitted that while the Environment Court is entitled to have material provisions drawn to its attention by counsel, that might not be the sole consideration. The other considerations, he argued, include the purpose of the Act.

[40] The bundle of documents which was handed to me for the purpose of this appeal on questions of law comprised two volumes, totalling 764 pages. Of those, pp 278 – 682 (404 pages) consisted of extracts from the district plan in its various forms. The bundle included, in addition, the Silverdale structure plan, 81 pages long, not part of the district plan and not, so far as I can tell, relevant to any of the questions I need to decide. In this Court, faced with such a plethora of material, one

simply adopts the defensive posture of not referring to anything which is not made a part of the argument of the parties.

[41] The Environment Court is a busy one, and from time to time its resources have been under pressure. Although its jurisdiction is in a majority of cases an appellate one, it customarily hears matters afresh; on an appeal under s 120 of the Act, it forms its own view as to whether a proposal should be consented to. In making its judgment it is sometimes said that the Court has duties in the public interest not to confine itself strictly to the arguments and evidence presented by the parties, and that must indeed often be the case when the Court comes to apply the expertise it has as a specialist Court in considering resource consent application appeals and district plan references in accordance with the requirements of the Act. Doubtless the Court has an ability to take that approach whenever it considers that achieving the purpose of the Act requires it, although procedural fairness will often require the parties to be given the right to be heard on particular matters considered by the Court to be important, if they had not been canvassed in the hearing.

[42] These are different propositions, however, to that advanced by Mr Enright. Put simply, his argument is that the Environment Court has a duty to decide the question of whether a proposed activity is contrary to district plan objectives and policies on the basis of provisions of that plan not relied on by the parties in the hearing; and it commits an error of law liable to be corrected on appeal to this Court if it does not comply with that duty.

[43] I reject that argument which would have widespread implications for the ability of the Environment Court to perform its functions under the Act, having regard to the complexity and length of the planning instruments with which it has to deal. In the case of district plan provisions, the Court must be able to rely on the parties bringing what is allegedly relevant and important to its attention; that must be one of the principal reasons for the Court conducting a hearing on an appeal, something it is obliged to do by s 272 of the Act.

[44] It is apposite here to refer again to what was said by the Environment Court in *O'Shea v Auckland City Council*, in the passage quoted above. The passage indicates in general terms the detailed nature of district plans, and the enormity of the task that might have to be assumed if the Environment Court were held to have the duty contended for by Mr Enright.

[45] Mr Enright supported his argument by reference to two cases: the decision of the Court of Appeal in *Dye v Auckland Regional Council*, and the decision of the High Court in *Heaney v Rodney District Council* (High Court, Auckland CIV 2003-404-3480, 16 March 2004, Gendall J). In so far as *Dye* is concerned, Mr Enright relied on the passage I have already quoted in para [18] above. He argued that since the two policies referred to were relevant, a failure to consider them by the Environment Court was an error of law, even if they had not been referred to by the parties.

[46] However, the point being made at para [20] of *Dye* was that failing to take into account a relevant consideration is to be distinguished

from interpretative error. As I have already pointed out, the first question of law alleges the latter. Although the precise nature of the interpretative error was not defined in the council's argument, I have inferred that the error alleged consisted in the conclusion that there was no clear policy difference between the two Countryside Living zones. That being the case, since the alternative policies 7.8.5.3.2.2 and 7.8.5.4.2.2 use exactly the same language, and both stipulate that no subdivision should occur below 4 ha, they were in fact a further indication that the Environment Court's conclusion about the lack of difference between the zones was correct. Consequently, there can be no foundation for an argument that a failure to take the policies into account can have contributed to the alleged error.

[47] This case is different from *Heaney v Rodney District Council*, the other case on which Mr Enright relied. There, the High Court was able to conclude that the Environment Court had wrongly held in one part of its decision that there was no provision in the district plan for new helicopter operations of the kind proposed, when in other parts of its decision it had recognised that there were such provisions. Because the former conclusion was material to the Environment Court's reasoning and was held to be incorrect, Gendall J concluded that an error of law had "inexplicably" occurred, even though in other parts of the decision the Environment Court had referred to the correct position: see paras [43] – [49] of the decision.

[48] However, unlike that case, the alleged error in the present case is not apparent on the face of the Court's decision. It arises from policies said not to have been considered, and where the parties themselves did not refer to them. Perhaps the provisions were considered by the Court, but simply not mentioned in its decision, a perfectly reasonable reaction to something not referred to by the parties. But fundamentally, the argument breaks down when it is accepted, as it must be, that the policies in question would have reinforced and not detracted from the conclusion said to be in error.

[49] For the reasons given, I do not consider that the failure to consider alternative policies 7.8.5.3.2.2 and 7.8.5.4.2.2 of the proposed district plan (if indeed they were not considered) amounted to an error of law.

Paragraph 1.3 – policy 5

[50] Paragraph 1.3 refers to policy 5 in proposed plan change 55. Leaving aside the rules themselves (to be addressed under para 1.2), it is the only part of the proposed plan change relied on by the council in the first question of law.

[51] Policy 5 in plan change 55 is headed "Transferable Title Rights". It sets out a policy of enabling the amalgamation of existing small sites with adjacent sites in the Production, Special Character, and Conservation Activity Areas. In exchange, it contemplates transfer of the title right foregone to land within the Countryside Living (Town) activity area, subject to certain standards. Those standards include a requirement that the title right be transferred to one of the two Countryside Living (Town) activity areas closest to the site to be amalgamated, and a

stipulation that the number of sites created in the Countryside Living (Town) activity area:

> . . . shall not exceed a ratio specified as being adequate to provide an incentive for the transfer to occur while not resulting in adverse effects on natural and physical resources.

[52] The "ratio" referred to in the part of the proposed plan change just quoted is contained in rule 11.1.5(ii). It enables up to two sites to be created under transferable title rights additional to the number which would be able to be created by virtue of the normal subdivision rules contained in rule 11.1.5, provided that no site so created may have an area less than one ha.

[53] It is correct that policy 5 was not referred to in the Environment Court's decision. Mr Enright argues that it should have been. He submits that the policy was a relevant consideration for the Court in analysing the essential differences between the two Countryside Living activity areas, and that it provides a "strong linkage" with the "1 hectare site size imposed in the Countryside Living (Town) Zone".

[54] Once again, Mr Enright was forced to concede that policy 5 had not been referred to in any of the submissions made or expert evidence called in the Environment Court. The observations made in respect of such an omission in addressing para 1.4 of the appeal are equally applicable here. However, even if it were now appropriate for the issue to be addressed, I would be far from satisfied that the Environment Court's omission to refer to it is a matter of any significance.

[55] I say that because it is apparent that the main purpose of the policy is to encourage the amalgamation of sites in the Production, Special Character and Conservation activity areas. Thus the opening words of the policy announce its intent to "limit the potential adverse effects of sporadic countryside living in the Production, Special Character, and Conservation Activity Areas by enabling the amalgamation of existing small sites without household units with adjacent sites".

[56] It is correct to observe that the Countryside Living (Town) activity area is the zone in which transferable title rights are provided for, and that such rights are not available in the Countryside Living (Rural) activity area, but the thrust of the policy is really to encourage amalgamation of sites in the other zones referred to. If there was to be a policy framework encouraging such amalgamations, then it was no doubt appropriate to provide for the transferred rights to be available in the Countryside Living (Town) activity area which provides for a greater intensity of development than the Countryside Living (Rural) Activity Area. However, the alleged error made by the Environment Court was its failure to find a clearly articulated difference between the objectives and policies applicable to the two Countryside Living activity areas. Policy 5 itself contains no explanation of the difference, and could not, by its terms, detract from the Environment Court's detailed reasoning, at paras [24] – [44], for the conclusion it reached.

[57] In my view, the Environment Court was not in error in omitting to discuss policy 5.

Paragraph 1.2 – the rules

[58] Paragraph 1.2 stands apart from the other issues raised under the first question of law, because it is based on the rules of proposed plan change 55 and the proposed district plan, and not the objectives and policies. In essence, the council argues that the rules should have been referred to by the Environment Court as a guide to the interpretation of the objectives and policies. As I have earlier observed in relation to the first question of law as a whole, the argument is not based on any articulated difference in the interpretation of the objectives and policies themselves, which would have followed from consideration of the rules. Rather, it is simply asserted that the Court might have concluded that there was a significant difference between the objectives and policies for the respective zones had it taken account of the rules applicable to each. Why, how, or in what manner reference to the rules would have had this result was not explained.

[59] Unlike the matters discussed under paras 1.3 and 1.4, this argument was put by the council to the Environment Court, and firmly rejected at paras [48] and [50] of its decision. At para [48], the Court said:

> Mr Enright, on behalf of the Council, endeavoured to draw upon evidence given by Mr Simmonds [sic] to make a submission that the proposal would be contrary (in the sense of repugnancy in accordance with the test formulated in *NZ Rail v Marlborough District Council* [1994] NZRMA 70) to the relevant objectives and policies of each district plan instrument. Emphasis having been placed, in that evidence, on the objectives and policies of PC 55, Mr Enright underlined Mr Simmonds' [sic] strongly expressed wish (as *we* term it) that a strong case for differentiation in lot sizes as between the CL Rural and CL Town zones, be recognised as coming from the *rules* as to lot sizes and averaging. Mr Enright called those rules an "interpretative signal" in PC 55, carried through into the proposed plan.

And at para [50], the Court referred to the council's reliance on the rules to "shore up the clear shortcomings of the objectives and policies".

[60] The council's argument is encapsulated in the following extract from Mr Enright's primary written submissions:

> In fact a central theme in the evidence, accepted as correct by the Environment Court, was that the primary differentiation between the Countryside Living Rural and Town zones arises from the methods of implementation – ie the district plan rules. Hence, it was vital that the Court have regard to those rules, in order to understand and apply the differences between the two zones, in particular when interpreting the objectives and policies.

He further submitted that the rules were "a relevant consideration when interpreting the objectives and policies under the s 105(2A) gateway test".

[61] Under s 104(1)(d) of the Act, the Environment Court was, of course, obliged to consider not only the objectives and policies, but also the rules of the district plan. However, the focus of Mr Enright's

argument was that the rules should also have been considered when considering the objectives and policies under s 105(2A).

[62] Section 105(2A) in the form it had at the times relevant to this appeal provided as follows:

> (2A) Notwithstanding any decision made under section 94(2)(a), a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that —
> (a) The adverse effects on the environment (other than any effect to which section 104(6) applies) will be minor; or
> (b) The application is for an activity which will not be contrary to the objectives and policies of, —
> (i) Where there is only a relevant plan, the relevant plan; or
> (ii) Where there is only a relevant proposed plan, the relevant proposed plan; or
> (iii) Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan.

[63] It may be contrasted with s 104(1)(d), which provided simply that, subject to Part II, when considering an application for resource consent the consent authority shall have regard to:

> (d) Any relevant objectives, policies, rules or other provisions of a plan or proposed plan.

[64] The reference to "objectives and policies" in s 105(2A)(b) has, so far as I am aware, always been thought to exclude the rules from consideration. Section 105(2A) is a provision with particular and exclusive application to non-complying activities. Those are activities which by definition do not comply with the rules. It makes no sense in such cases to require that the application would not be contrary to the rules, at the jurisdictional or threshold stage to which s 105(2A) applies.

[65] That point has probably not been better made than it was by Greig J in *NZ Rail v Marlborough District Council* [1994] NZRMA 70 at p 80:

> . . . the essential question was whether the consent to the proposed use and development was "contrary" or not to the relevant objectives and policies. The Tribunal correctly I think, with respect, accepted that that should not be restrictively defined and that it contemplated being opposed to in nature, different to or opposite. The *Oxford English Dictionary* in its definition of "contrary" refers also to repugnant and antagonistic. The consideration of this question starts from the point that the proposal is already a non-complying activity but cannot, for that reason alone, be said to be contrary. "Contrary" therefore means something more than just non-complying.

[66] In *Arrigato Investments Ltd v Auckland Regional Council* Tipping J, writing for the Court, referred to s 105(2A)(b) at para [18] as recognising that:

> A non-complying activity will not be permitted by the plan, yet it may be granted provided it will not be contrary to the objectives and policies of the plan.

[67] Section 105(2A) prevents the grant of resource consent to a non-complying activity unless one or the other of its paragraphs is satisfied. Since councils are empowered to grant resource consents for such activities, it would have defeated the statutory purpose if para (b) were to have included a reference to rules: it is of the nature of a non-complying activity that it is contrary to a rule, and requiring that non-complying activities be not contrary to a rule would have created in effect a prohibited activity. But the Act provides separately for those, defines them, and provides simply and directly that they may not be consented to: s 105(2)(c).

[68] In enacting s 104(1)(d), the legislature provided for the rules to be one kind of the plan provisions to which regard was to be had, as one of a number of relevant considerations on a resource consent application. But this point is only reached once the threshold of s 105(2A) has been passed and, in the appropriate case, a proposal has been held to be not contrary to the objectives and policies of the district plan.

[69] Given the relationship between s 105(2A) and s 104(1), it is not sensible to suppose that the omission of reference to rules in s 105(2A)(b), and inclusion of such a reference in s 104(1)(d), was anything other than deliberate, and logical. Mr Enright, I think, ultimately accepted that that was so. His argument, however, was that the rules should nevertheless be considered under s 105(2A)(b) to assist in the interpretation of objectives and policies. However, in that formulation of his position, I do not see what it adds to say that that consideration should occur "under s 105(2A)(b)".

[70] If, as I consider the position to be, rules are not part of the s 105(2A)(b) considerations, the only question which needs to be answered is whether a proposal is contrary to the objectives and policies. It is necessary to decide what the objectives and policies mean before that issue can be resolved. Deciding the meaning, in other words, must occur before s 105(2A)(b) is applied, not as part of applying it.

[71] While there have been a number of cases in which objectives and policies have been resorted to for the purpose of resolving ambiguities in rules, I am not aware of cases in which the reverse process has been applied and rules have been used to resolve ambiguities in objectives and policies.

[72] However, the council asserted that the decisions of this Court and of the Court of Appeal in *Body Corporate 97010 v Auckland City Council*, respectively [2000] NZRMA 202 and [2000] 3 NZLR 513, were authority for the proposition that rules can be taken into account as a relevant consideration, to assist in the interpretation of objectives and policies.

[73] A multitude of issues fell for determination in that litigation. One of them concerned the proper approach to s 125 of the Act, which deals with the lapse of resource consents. At the relevant time, s 125(1) provided as a general rule for the lapse of unimplemented resource consents on the expiry of two years. However, under s 125(1)(b), the period could be extended if the consent authority were satisfied as to three

matters, the last of which was that the "effect of the extension on the policies and objectives of any plan" was minor (s 125(1)(b)(iii)).

[74] In the High Court, Randerson J rejected a submission made by both the developer and the council that only the objectives and policies were required to be considered under s 125(1)(b)(iii), and not the rules. At para [149], he said:

> It was submitted for STC and the Council that the consent holder is required only to consider objectives and policies and not rules. It followed that the Council was not required to consider the rule in the Proposed Plan which reduced the maximum height limit to 15 metres. In my view, this is to take an unduly narrow view of s 125(1)(b)(iii) because the rules in the District Plan are the means by which its objectives and policies are implemented. To the extent that the rules give substance to and define the objectives and policies, they ought to be considered by the consent authority. The real question is whether the Council and its reporting officer gave adequate consideration to the effect of the extension on the Proposed District Plan.

[75] The Court of Appeal expressly endorsed Randerson J's approach, stating as follows at para [82]:

> He then rejected the argument that the council was not obliged to consider the effect on the 15 m height limit in the proposed plan, rightly saying that this was to take an unduly narrow view of s 125(1)(b)(iii) because the rules in that plan are the means by which its objectives and policies are implemented and that, to the extent that the rules give substance to and define the objectives and policies, they ought to be considered.

[76] However, I am not persuaded that the reasoning followed in that case can appropriately be applied in the different setting of s 105(2A)(b). I say that principally because of the clear linkage between s 105(2A)(b) and s 104(1)(d), and what I have described as the deliberate and logical exclusion of reference to rules in the former, which is to be contrasted with inclusion of rules in the latter. Put simply, the scheme of the Act for non-complying activities does not work if rules are included among the matters to be considered under s 105(2A)(b).

[77] Further, I do not consider that in *Body Corporate 97010* either Randerson J or the Court of Appeal were indicating that the rules should be referred to in order to resolve any ambiguity or difficulty in the meaning of relevant rules or objectives. Rather, the approach taken was to say that the rules should be considered, as well as the objectives and policies, under s 125(1)(b)(iii) as part of the consideration of the effect of the extension of the resource consent on the policies and objectives of the district plan. The reasons given by both Courts for adopting that approach are included in the passages which I have set out above. They do not indicate any conclusion that the rules needed to be referred to so as to assist in the interpretation of the objectives and policies. Consequently, the judgments are not in my view authority for the proposition that Mr Enright sought to advance, and I reject it.

[78] The various questions posed within the first question of law are ultimately directed to alleged interpretative error. I do not consider that in any of the respects alleged the Environment Court erred in law.

Second and fourth questions of law (combined)

[79] As amended the appeal asks six questions under this heading which are broadly related to precedent, and the effect of granting consent to the proposed subdivision on the integrity of the district plan. The council argues that the Court erred by fusing its consideration of these two issues when it should have dealt with each separately; that it erred by failing to consider either matter under s 105(2A)(b); and that it erred by failing to make a finding on district plan integrity, and by failing to consider whether, as a result of the grant of consent, public confidence in the administration of the relevant planning instruments would be "shaken or challenged". A subsidiary issue was also relied on, that in its consideration of the precedent effect of granting consent, the Court wrongly took into account the fact that the owners of the land adjoining the site of the proposed subdivision had given written approval to it.

[80] In its decision, the Environment Court dealt first with the issue of whether the proposal's adverse effects on the environment would be minor, and concluded that they would be. The requirement of s 105(2A)(a) was accordingly satisfied: para [19] of the decision. It then embarked on a discussion of the district plan provisions, at paras [20] – [47] before expressing separately its conclusions about the s 105(2A)(b) gateway (paras [48] – [51]) and under s 104(1)(d) (paras [52] – [55]). The Court's intent to structure the decision in this way had been foreshadowed at para [14], and in that paragraph, para [20] and para [52], the observations made by the Court show that it was well aware that the consideration of district plan objectives and policies was necessarily to be broader under s 104(1)(d) than under s 105(2A)(b).

[81] At para [50] of its decision, the Court expressed its conclusion that, having regard to its analysis of the objectives and policies relating to the Countryside Living (Rural) activity area, there was no basis for holding the proposal repugnant to them. It then recorded its view that while there was no conflict between those objectives and policies, and the more general objectives and policies, the specific ones did not flow clearly from the general ones. Then it said:

> We can go further, and hold that even if our task were to be to consider the objectives and policies of PC 55 and the proposed plan in the wider sense for the purposes of s 105(2A)(b), there would be no basis for holding the proposal to be repugnant to them.

[82] It was after this discussion that the Court recorded its conclusion that the proposal met the s 105(2A)(b) gateway. It moved next to consider the proposal under s 104(1)(d), concluding "at this stage" that analysis under that provision would not "produce a result that is negative to an exercise of discretion to grant consent". That was the conclusion "at that stage" because the Court had yet to consider the issue of precedent, "so far as it may be relevant under s 104(1)(d)" (para [55]).

[83] That issue was then the subject of the discussion in paras [56] – [70] of the decision. In those paragraphs the Court dealt first with an argument evidently given some emphasis by the Council, but not pursued in this Court: that an effect on "community expectations" about the

Countryside Living Rural environment, should be taken into account under s 104(1)(a). The Court rejected that approach, holding that it was an attempt to bring the issues of precedent and integrity of the district plan into s 104(1)(a), which the Court held would be contrary to the decision of the Court of Appeal in *Dye v Auckland Regional Council*.

[84] Then, at para [60] the Court began to address specifically the issues of precedent and integrity of the district plan, noting that they were to be considered in the context of s 104(1)(d) and (i) of the Act. It rejected a submission made by the council that an applicant for a non-complying activity consent needed to demonstrate uniqueness, holding that it would be sufficient if there were shown to be some clear distinctions between the subject land and application and that of potential neighbouring applicants. The Court then listed four matters which had been relied on by Mr Littlejohn for the applicant, as taking the proposal outside the generality of cases. They were:

- The actual and potential effects on the environment of the proposal (including visual and landscape) are less than minor.
- It is set in an area where subdivision to the average lot size proposed is relatively common, and proportionately, will not be significantly altered by this proposal.
- Every adjoining neighbour has given express written approval to the development.
- It is set in an area where Council has publicly adopted a forward policy of increased Countryside Living density, which is consistent with the intent of the application.

[85] The Court considered each of those matters, and essentially found that they were sufficient, taken in combination, clearly to distinguish the subject site and application from other potential sites and applications. Although it did not say so in precise terms, it is in my view a fair reading of paras [63] – [69] of the decision to say that, because of the four matters which it identified and discussed, the Court was satisfied that granting consent to the proposal would not create a precedent.

[86] In this Court, the council attacked this reasoning process on the basis reflected in the various issues raised under the second and fourth questions of law (combined). Mr Enright argued first that the fact that all six adjoining landowners had given consent was irrelevant to the issue of whether there would be impacts of precedent and on plan integrity. Secondly, the Court had wrongly "fused" its consideration of precedent and integrity. Thirdly, it had failed in fact to make a finding on plan integrity. Finally, although the Court had correctly directed itself as to the requirement to consider precedent and integrity under s 105(2A)(b), it failed actually to consider either matter when evaluating the proposal under that provision. Each of these matters was said to amount to error of law.

[87] As to the approvals of neighbouring landowners, Mr Enright argued that the approval of neighbours is only relevant to the issue of adverse effects on that neighbour. He contended that if it is relevant under s 105(2A)(a) and s 104(1)(a), then it cannot be considered, in terms of

precedent or plan integrity under s 105(2A)(b) and s 104(1)(d) and (i). He submitted that this was confirmed by s 104(6), which provides that where a person has given a written approval, the consent authority must not have regard to any actual or potential effect on that person, and any such effect shall not be a relevant ground to refuse consent. He argued that s 104(6) has the effect that approvals from adjacent neighbours cannot be considered in relation to plan and integrity and precedent.

[88] I do not consider that s 104(6) has the consequence for which Mr Enright contended. The subsection is confined to the issue of adverse effects on persons who have given written approvals to an application, and provides that such effects shall not be had regard to, nor be relevant grounds for refusing consent. It has no greater object, or consequence.

[89] Leaving s 104(6) on one side, I do not accept that the existence of written approvals of neighbours is a consideration which is necessarily irrelevant to issues of district plan integrity and precedent. Mr Enright appeared to argue that if an issue is relevant for consideration under s 105(2A)(a) and s 104(1)(a), then it follows that the same issue can not again be considered under s 105(2A)(b) and s 104(1)(d) and (i). However, that cannot be correct. District plan objectives and policies often concern actual or potential adverse effects on the environment, as is hardly surprising given that they are made under the authority of a statute which has as its purpose promoting the sustainable management of natural and physical resources. Matters relevant to the question of whether a proposal will be contrary to a district plan's objectives and policies will often also be relevant to the issue of the proposal's effect on the environment, and the relevant considerations will not neatly arrange themselves into those solely relevant to the former and those solely relevant to the latter.

[90] In the specific case of written approvals of neighbours it is not hard to think of situations in which they might be relevant to issues of precedent and plan integrity. Take, for example, the common case of a district plan rule limiting the height of buildings in relation to the boundaries of their sites. Such rules are often the method by which policies aimed at preventing dominance and shadowing on neighbouring properties are given effect. In an appropriate case the written approval of the neighbours whose properties would be adversely affected by a development contrary to the rule would result in there being no relevant adverse effect (because of s 104(6), s 104(1)(a) would be satisfied) and at the same time no adverse precedent or threat to the integrity of the plan, because the district plan's objective of protecting neighbouring properties from adverse effects would not be called into question in this particular case. Different considerations might apply of course, if in addition to the goal of protecting neighbouring properties from adverse effects on their amenity, the policy sought to achieve some wider purpose of urban design which would be threatened by the grant of consent, and it is always necessary for the relevant objectives and policies to be properly interpreted and applied. Nevertheless, in the example I have given, where the policies were aimed only at preventing dominance and shadowing it could legitimately be said that the existence of the neighbour's written

approval could properly be taken into account for the purposes of considering the issues of district plan integrity and precedent.

[91] If written approvals can be taken into account in assessing the precedent effect of granting consent and effect on district plan integrity, then the question of whether they should be taken into account in any given case, and the weight which should then be given them will generally be matters for the consent authority, and for the Environment Court on appeal. But it was Mr Enright's argument that they were irrelevant as a matter of law. I reject that argument for the reasons I have given.

[92] The foregoing discussion has reflected the council's contention that the issues of precedent and the integrity of the district plan are separate and discrete, and that the Environment Court, being legally obliged to consider each, erred when it "fused" its consideration of them (para 3.4 of the appeal). That is an issue, however, which must now be confronted.

[93] Mr Enright referred in this part of his argument to the decision of the Full Court in *Batchelor v Tauranga District Council (No 2)* [1993] 2 NZLR 84. He relied in particular on a passage in the judgment in which the Court had rejected an argument that the then Planning Tribunal had misdirected itself as to the weight to be afforded to the statement of general purpose of the Act set out in s 5 when interpreting s 104 and s 105(2)(b) of the Act, in the form in which it had been first enacted. The basis on which it was contended that the alleged misdirection had occurred emerges from the observations on which Mr Enright relied at p 89 of the judgment:

> It is difficult to see how this could constitute an error of law. The Act does not either expressly or inferentially specify the weight which is to be attached to its general purpose when applying the requirements of s 104. Mr Cavanagh submitted that the introduction of the concept of the coherence and integrity of, and public confidence in, the plan was erroneous because the Act was primarily concerned with effects on the environment. Section 104(1) requires that regard be had to the "effects" (widely, but not comprehensively, defined in s 3) of allowing the particular activity. Section 104(4)(a) and (b) require that regard also be had to the rules of a plan and to its relevant policies or objectives. In our view, those provisions envisage consideration of the integrity of the plan. The weight to be given to any effect on that integrity must be a matter of judgment for the consent authority or the tribunal.

[94] It is plain, as Mr Enright submitted, that the Full Court considered that, in combination, s 104(1) and s 104(4)(a) and (b) of the Act, in the form in which they then stood, contemplated that the integrity of the district plan was a relevant matter to be considered in deciding whether or not a resource consent should be granted.

[95] Next, Mr Enright referred to the decision of the High Court in *Hopper Nominees Ltd v Rodney District Council* [1996] NZRMA 179, a case decided after the enactment of the Resource Management Amendment Act 1993, which had substantially amended s 104 of the Act. What had previously been a reference in s 104(1) to "actual and potential effects of allowing the activity", was now replaced by a new s 104(1)(a)

in which the requirement was to have regard to the "actual and potential effects on the environment of allowing the activity". Given the addition of the words "on the environment", the appellant argued that the paragraph was no longer sufficiently wide to include the integrity of the district plan, or public confidence in its consistent administration, amongst the relevant considerations.

[96] Tompkins J rejected that argument. He held at pp 186 – 187 that it was clear from the judgment of the Full Court in *Batchelor* that consideration of the integrity of the district plan was a relevant consideration under what was then (following the Resource Management Amendment Act 1993) s 104(1)(d), which required consent authorities to have regard to any relevant objectives, policies, rules or other provisions of a district plan. Tompkins J found support for this conclusion in the judgment of the Court of Appeal in *Manos v Waitakere City Council* [1996] NZRMA 145 at p 148 where Gault J had concluded that "the potential precedent impact" of a decision granting consent to an application could be taken into account under s 104(4)(b) (referring to the Act as it stood prior to its amendment in 1993).

[97] Tompkins J went on, at p 187, to record his view that confidence in the consistent administration of a district plan could also be considered under s 104(1)(i). He noted that in a particular case the consent authority might properly consider this to be another matter relevant and reasonably necessary to determine the application. He approved a statement of the Planning Tribunal in *Reith v Ashburton District Council* [1994] NZRMA 241 at p 255 that it might still be relevant and reasonably necessary to have regard to the effect of consenting to an activity where to do so would create a serious conflict with the relevant objectives and policies of the plan or adversely affect the public perception of its consistent administration. For the various reasons to which he had referred, Tompkins J concluded that in the case before him, the Planning Tribunal had not erred when having regard to public confidence in the plan.

[98] Both *Batchelor v Tauranga District Council* and *Hopper Nominees Ltd v Rodney District Council* were cases in which it was argued by the appellant that the Planning Tribunal had erred in considering the concepts of the coherence and integrity of, and public confidence in the district plan. They contained no discussion or analysis of differences between those two concepts themselves, or any differences which might exist between them and the concept of precedent. In as much as they simply decide that all those matters may be considered, they cannot be taken as authorities for the proposition that any one or all of them must be considered in any particular case.

[99] The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s 104(1)(d) or s 105(2A)(b) and their predecessors. No doubt the concepts are useful for

that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, a reasoned decision which held that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent. Consequently, I am not prepared to hold that the Environment Court erred in any way by "fusing its consideration of plan integrity and precedent (failing to separately consider each doctrine)" as the council alleges. Neither do I think that it was obliged to make a specific finding on plan integrity, or as to whether public confidence in the administration of the relevant planning instruments would be shaken or challenged, which are the subject of separate questions raised by the appeal under this heading.

[100] No doubt the Environment Court will continue to advert in appropriate cases to the concepts of the integrity and coherence of the district plan, public confidence in its consistent administration, and precedent. I do not suggest that there is any error in taking that course. I do not think, however, that the statute requires those matters to be referred to and the present case is one in which that course did not need to be followed.

[101] The decision of the Full Court in *Batchelor v Tauranga District Council* was given in an appeal on questions of law from a decision of the Planning Tribunal made early in the life of what was then new legislation. The Planning Tribunal, presided over by the then Principal Planning Judge, no doubt conscious that to some extent new territory was being charted, contained a careful analysis of the approach which should be taken to the grant of consents for non-complying activities under the Act. It is worth setting out what the tribunal said at pp 270 – 271 of its decision:

> By s 104(4), a consent authority is directed to have regard to any relevant rules, policies and objectives of a Plan. In general a District Plan containing rules which prohibit, regulate or allow activities in the way contemplated by s 76 (whether zoning is used or not) will be implementing policies designed to achieve stated objectives. General observance to the rules will depend at least in part on confidence that they will generally be observed, and that if necessary the administering body will (as required by s 84) enforce observance of the plan.
>
> In many classes of case where a non-complying activity would pass the constraints of s 105(2)(b), the grant of consent would not affect that confidence. That is because the circumstances of the particular case can be seen as having some unusual quality, such that the consent authority's action in granting consent cannot be perceived as inconsistent with its continuing to require general observance of the rule.
>
> However, other cases for non-complying activities may lack such an evident unusual quality. If a consent authority were to consent to those activities, public confidence in its consistent application of the rules may be impaired. Also, the District Plan may loose coherence [sic] if compliance with some rules is excused by the consent authority in cases where that conflicts with the policy which the rules are intended to implement.

[102] Successive amendments to the Resource Management Act mean that the particular statutory provisions to which the tribunal was there referring are no longer accurate. But the essence of the approach described remained valid down to and including the amendments enacted by the Resource Management Amendment Act 1997 (the form of the statute relevant to this appeal). It is to be observed that on this approach, it is where the circumstances of a particular case lack any evident unusual quality that granting consent may give rise to concerns about public confidence in the consistent application of the rules in the district plan. Conversely, where the circumstances of the particular case can be seen as having some unusual quality, the constraints of what is now s 105(2A)(b) may be overcome. In an appropriate case the Environment Court can decide that there are aspects of a proposal which take it outside the generality of cases, so that the case may be seen as exceptional and if it can be said that the proposal is not contrary to the objectives and policies of the district plan, it will not be necessary also to consider and make findings, on the issues of public confidence in the administration of the district plan and district plan integrity. Concerns about precedent, about coherence, about like cases being treated alike are all legitimate matters able to be taken into account, as the recent decision of Baragwanath J in *Murphy v Rodney District Council* [2004] 3 NZLR 421 again emphasises. But if a case is truly exceptional, and can properly be said to be not contrary to the objectives and policies of the district plan, such concerns may be mitigated, may not even exist.

[103] That is essentially the approach which the Environment Court took in this case. It identified the four considerations which in its view took the application outside the generality of cases, and decided that the proposal was not contrary to the relevant objectives and policies. That was an approach which it was entitled to take. In my view the decision was not wrong in law on the basis of any of the matters raised under the second and fourth questions of law.

Fifth question of law

[104] The questions raised under this heading concern the way in which the Environment Court dealt with the council's evidence and submissions on the issue of cumulative effects. The council argues first that that the Environment Court wrongly concluded that there was no evidence from its expert planning witness, Mr Simmons, on the issue of cumulative effects of the proposal on rural character and amenity. Secondly, it argues that the Environment Court erred by requiring evidence that future effects "will happen" rather than accepting, as sufficient, evidence that there is "sufficient probability" that the future effects will happen.

[105] Next, it is said that the Environment Court erred in finding that there were no cumulative effects by applying the test set out by the Court of Appeal in *Dye v Auckland Regional Council*. It was argued that *Dye* could be distinguished on its facts, and that it was not intended to be of general application. Alternatively, it was argued that what was said by the Court of Appeal in that case although binding on both the Environment

Court and, of course, this Court, was erroneous in four specified respects. Mr Enright advised that those are matters which the council might wish to pursue on appeal to the Court of Appeal in the hope that that Court could be persuaded to depart from the view that it expressed in that case.

[106] The first error of law alleged is that the Environment Court wrongly concluded that there was no evidence from the Council's witness, Mr Simmons, on the issue of cumulative effects to rural character and amenity. The Court addressed the actual and potential effects on the environment of allowing the subdivision in question at paras [15] – [18] of its decision.

[107] At para [15], the Court said that actual and potential effects, in the sense of physical effects on the environment resulting from the future development of an additional site, were not really an issue and that the council had "conceded in a careful way" that such effects would be no more than minor. It then recorded the evidence which had been given by Ms Jenkins, a planning witness called by the present respondents in the Environment Court. Having recorded the particular bases upon which Ms Jenkins had concluded that there would be no adverse effects on the immediate environment of the application site, the Court then referred to the evidence of Mr Simmons as being that there would be no "immediate effects" on the directly adjacent environment that would be any more than minor. Evidently it also accepted Mr Simmons' view that development on the newly subdivided lots would be unlikely to be noticed beyond the land to be subdivided and the land owned by those who had given written consent. However, in a passage in para [17] which was at the forefront of Mr Enright's criticisms, the Environment Court then said:

> It was Mr Simmond's [sic] view that the effects on the environment likely to arise would be cumulative and occur over a long time frame. This in our view was a misuse of the term "cumulative effects". Cumulative effects, (correctly understood) are as defined in paragraph [38] of the Court of Appeal decision in *Dye v Auckland Regional Council* are [sic] concerned with things that *will* occur, not things that *may* occur. Mr Simmonds [sic] was addressing the latter – unknown future possibilities. We heard no evidence that would allow us to find that there would be the former type of effect to any extent more than minor.

[108] Mr Enright submitted that it was apparent from the passage quoted that the Environment Court did not accept the evidence given by Mr Simmons as involving cumulative effects at all. It was, Mr Enright submitted, tantamount to a finding that there was no evidence as to cumulative impacts.

[109] This, it was said, was incorrect, because Mr Simmons had given evidence of an adverse effect on rural character which would arise from a grant of consent to the subject application. In this respect, Mr Enright referred to three brief paragraphs in the statement of evidence read by Mr Simmons in the Environment Court hearing. They were:

(a) A statement that instead of being solely concerned with the immediate effects upon the local environment, the appeal was more concerned with longer-term environmental effects, by

altering the character and amenity of the area, and community expectations for subdivision within the Countryside Living 1 (Rural) zone; and effects that are "double those envisaged as appropriate under the permitted baseline".

(b) A statement that the proposal would adversely affect both community expectations (heightened expectation of subdivision potential) and character (because it would exceed the permitted baseline by a factor of two).

(c) A conclusion expressed, under the heading "Consistent Administration of the Plan, Plan Integrity and Precedent" which reads as follows:

> The longer term effects on the environment will be to gradually change the character and amenities of this locality from one of "Rural" countryside living to one of "Town" countryside living, and change community expectations.

[110] As I have earlier observed, issues concerning "community expectations", although evidently emphasised before the Environment Court have not been pursued in this Court. It would be wrong, however, for the Environment Court, decision to be read now as if community expectations had not been raised by the council. In that Court, the council's argument about cumulative effects had been substantially based on what community expectations were alleged to be. It was the change in those community expectations that would have resulted in the cumulative effects upon which the council purported to rely. That this is so is apparent from a consideration of para [57] of the Environment Court's decision in which it was observed:

> [57] It was also the case for the Council that there would be adverse cumulative effects, despite the high level of agreement that there would be lack of immediate actual effects in the physical sense. This submission was bound up with the Council's submissions about "effects on community expectations" and its perception that a grant of consent would have the potential effect of causing people to have an altered expectation for the CL 1 (Rural) environment if, in Mr Simmond's [sic] words:
>
> > . . . the differences between the "Rural" and "Town" versions of the zone become blurred.

[111] The passages of Mr Simmons' evidence referred to me by Mr Enright, confirmed what the Environment Court said at para [57] in summarising the council's position. All three passages contained a reference to "community expectations". The Court held that the alleged effects on community expectations, potentially causing people to have an altered expectation for the Countryside Living (Rural) zone, were not "cumulative effects" able to be taken into account pursuant to the Court of Appeal's decision in *Dye v Auckland Regional Council*. In para [58] of its decision, the Environment Court recorded its agreement with submissions which had been made to it by Mr Littlejohn that cumulative effects (able to be considered under s 104(1)(a)) were different from "precedent effects", the latter only arising for consideration under s 105(2A)(b) and

s 104(1)(d) and (i), and not to be brought into account under s 105(2A)(a) and s 104(1)(a).

[112] Given the evidence of Mr Simmons on community expectations in the passages to which I have referred, I think the Environment Court was entitled to regard the evidence on those issues as being matters relevant to district plan integrity and precedent sought to be pursued under the guise of a cumulative effect. I do not consider that such an approach is consistent with the decision of the Court of Appeal in *Dye v Auckland Regional Council*, and I consider that the Environment Court was correct to reject it.

[113] However, Mr Enright argued that the Court had erred in not specifically considering the aspect of the evidence that had not referred to community expectations, but had mentioned an adverse effect on rural character. Referring to paras [57] – [59] of the decision he submitted that the Court had apparently ignored that aspect of the evidence. There are a number of difficulties with that submission. First, of course, it is axiomatic that no Court is obliged to make a finding of fact (unless the issue concerns a jurisdictional fact) and a failure to do so will not generally give rise to an error of law: *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 at pp 88 – 89. Secondly, and partly as a consequence, it is not possible to conclude that the Court did not consider evidence that is not referred to in its decision. It might have considered the evidence but not have thought it worthy of mention; there is no general duty on a Court to recite all the evidence it has heard, and give reasons for accepting or rejecting each statement made to it by a witness. Thirdly, when one looks at the passages in question if, as Mr Enright argues, the evidence about rural character was indeed advanced as a matter separate from the community expectations issue, it must have been based on something other than an adverse effect arising from the subject application because even Mr Simmons agreed that there would be no adverse effect on the environment noticeable outside the boundaries of the subject land and that of the neighbours who had given written approval. In other words, the evidence allegedly not considered must have been relied on to support the council's case based on precedent or cumulative effect. If that is the case, then the Court has made factual findings which show that in its view there would be no precedent effect, and the Court of Appeal's decision in *Dye v Auckland Regional Council* stands in the way of precedent effects being separately considered as cumulative effects, whether under s 105(2A)(a) or s 104(1)(a).

[114] The decision of the Court of Appeal in *Dye* clearly holds that a cumulative effect must be one which arises as an effect of the application for which consent is sought, and which is being considered in the particular case before the consent authority. It is not legitimate to consider, as cumulative effects on the environment of one application, effects of possible future applications which may or may not be made. So much is clear from what was said at paras [38] and [39] of the decision:

> [38] The present issue is the way the word "effects" should be construed in ss 104 and 105 of the Act. Each section is concerned, in its relevant part,

> with effects on the environment. In s 104(1)(a) the focus is on "any actual and potential effects on the environment of allowing the activity". In s 105(2A)(b) it is on "the adverse effects on the environment". The definition of effect includes "any cumulative effect which arises over time or in combination with other effects". The first thing, which should be noted, is that a cumulative effect is not the same as a potential effect. This is self-evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. The same connotation derives from the words "regardless of the scale, intensity, duration or frequency of the effect".
>
> [39] Potential effects by contrast are effects which may happen or they may not. Their definition incorporates levels of probability of occurrence. A high probability of occurrence is enough to qualify the potential effect as an effect, whereas a potential effect which has a low probability of occurrence qualifies as an effect only if its occurrence would have a high potential impact. The definition is such that any "precedent" effect which may result from the granting of a resource consent is not within the concept of a cumulative effect. That concept is confined to the effect of the activity itself on the environment. If the precedent effect of granting a resource consent is to fit within the definition at all, it must do so by dint of its potential effect and it would then have to satisfy the probability and, if applicable, the potential impact criteria. It is unnecessary to say more at a general level.

[115] It seems plain from the context that the reference to s 105(2A)(b) in the third sentence of para [38] is an error in the report. The provision quoted is obviously s 105(2A)(a), since that refers to "the adverse effects on the environment", and s 105(2A)(b) contains no such words.

[116] At para [40] of the judgment, the Court held that s 105(2A)(a) is directed to the "non-complying activity itself" and does not extend to any precedent effect deriving from the grant of the resource consent; to hold otherwise would involve an "unnatural and unintended extension of the concept of the environment". Then at paras [41] and [42], the Court held that s 104(1)(a) ("any actual and potential effects on the environment of allowing the activity") was to be construed as embracing only effects which are actual, or potential, and again, the effects to be considered were effects of the particular activity for which consent was sought. The provision did not include effects that allowing the particular application might have on "the fate of subsequent applications for resource consents". Such precedent concerns, if they arose, were to be addressed under s 104(1)(d) or (i), or at the threshold stage under s 105(2A)(b), as the Court made clear at para [49] of the judgment.

[117] It is clear that in the passages to which I have referred the Court of Appeal was setting out to explain the relevant statutory provisions, and in particular to construe the word "effects" as it is used in ss 104 and 105 of the Act. In the course of doing so the Court distinguished between cumulative effects and potential effects, and pointed out that any concerns about the precedent effects of applications were to be addressed as a matter relating to the district plan under s 105(2A)(b) and s 104(1)(d) or (i). Before this part of the decision, the Court had set out its views on the role of precedent at paras [32] – [36] of the judgment. I cannot see any merit in the proposition advanced by Mr Enright that the judgment can be "distinguished on its facts and is not intended to be of general application", given the detailed analysis that it contains of the statutory provisions in question. I was not referred to any important factual distinction that would justify any departure in the present case from the law as explained in *Dye*. Further, it seems obvious that in that case the Court of Appeal deliberately set out to explain the proper approach to ss 104 and 105 in a way which *was* intended to be of general application. Consequently, I reject the assertion that the Environment Court erred in the manner alleged in para 5.1 of the appeal.

[118] The appropriate course for the Environment Court to follow was of course to apply the law as the Court of Appeal had explained it to be. In my view it did so correctly. This Court is also bound by the Court of Appeal's decision, and I must apply it to hold that there is no error of law in the Environment Court's decision. In the circumstances, although the council in the amended form of the appeal now alleges that the Court of Appeal's decision is incorrect, that is not an argument that I can entertain. The matters raised in subparas (a) — (d) inclusive of para 5.3 appear to me to be directly contrary to the Court of Appeal's reasoning in paras [38] and [39] of *Dye* which I have set out above, and cannot therefore be accepted as correct in this Court. Beyond commenting that the assertions that they contain appear to overlook the simple fact that both s 104(1)(a) and s 105(2A)(a) invite consideration of the effects on the environment of the particular application for which consent is sought and do not contemplate consideration of the effects of other applications, I do not consider that anything else can usefully be said.

[119] That leaves for consideration one further issue under the fifth question of law, the matter that is raised by para 4.2, which asks whether the Environment Court applied the wrong legal test in its consideration of cumulative effects by requiring evidence that "the future effects 'will happen'", as opposed to evidence that "there is sufficient probability that the future effects 'will happen'." I have already held that the Environment Court did not err in the manner in which it reached its conclusion that the matters raised by the council as cumulative effects did not properly arise. Its determination in that respect was partly based upon its conclusion that the proposal would have no effect on the environment beyond the subject site, and the adjoining land whose owners had consented to the application. In addition, applying *Dye v Auckland Regional Council,* the Court concluded that the application could be regarded as exceptional and that the matters that the council sought to advance were not legitimately to

be regarded as cumulative effects. I do not read the Environment Court's decision as turning on the degree of certainty required to establish a cumulative effect.

[120] It is correct that in para [17] of its decision the Environment Court referred to *Dye* as holding that cumulative effects are things that *will* occur, not things that *may* occur. That was a perfectly accurate reflection of para [38] of the Court of Appeal's decision. But *Dye* did not turn on the standard of proof required to establish that an effect will happen, and there is nothing in the decision which suggests that that issue needs to be determined other than in accordance with the normal standard of proof applicable in non-criminal proceedings, namely the balance of probabilities. On that issue, I respectfully agree with the observations of Harrison J in *McGregor v Rodney District Council* (High Court, Auckland CIV 2003-485-1040, 24 February 2004) at para [34]. Contrary to Mr Enright's submissions, I do not consider that anything that was said by Harrison J in that case amounted to a "reading down" of the decision in *Dye*. For the reasons that it explained, the Court of Appeal held that a cumulative effect had to be an effect on the environment that would arise from the subject proposal. It said nothing about the standard of proof required to establish that such an effect would arise.

[121] The Court of Appeal's remarks about "cumulative effects" being effects that will occur must be read in the context of the argument with which the Court had to deal in that case. In summary the proposition made to it was that issues of a precedent nature, and the effects of future proposals not yet made that might be encouraged if consent were confirmed for the subject proposal, were to be brought into account as possible adverse effects on the environment of the subject proposal. That proposition was rejected, inter alia, because it could not be said that such effects would arise. "Cumulative effects" were to be contrasted with "potential effects" which, under s 3 of the Act, might be of high or low probability. Further, both s 104(1)(a) and s 105(2A)(a) were concerned with the effects of the activity for which consent is sought, that is effects on the environment which could be said to arise from that activity or, as the Court put it at para [38], "effects which are going to happen as a result of the activity which is under consideration". It is not possible to say, referring to what might happen if future applications are encouraged, or their path to consent smoothed, by an earlier precedent, that that is an effect that will occur. Apart from anything else, the actual applications might never come into existence, and even if they do, whether or not they achieve consent will depend on the circumstances when they are considered. So it cannot be said that such alleged effects will ever occur, and it is essentially for this reason that such remote outcomes cannot qualify as cumulative effects on the environment.

[122] Contrary to what was concluded by the Environment Court in *Clifford Bay Marine Farms Ltd v Marlborough District Council* (Environment Court, Christchurch C 131/2003, 4 March 2003 — see in particular the discussion at paras [49] – [51]) I do not consider that the Court of Appeal was suggesting that the prediction of the adverse effects on the environment arising from an activity can be assessed on any basis

akin to mathematical certainty, and that only those effects which can be established as certain can be taken into account. I consider that all that was said in *Dye* was that an effect that may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a "cumulative effect".

[123] The Court of Appeal quoted with explicit approval the passage from the decision of the Environment Court in *Wellington Regional Council (Bulkwater) v Wellington Regional Council* (Environment Court, Wellington W 3/98, 7 January 1998) which it set out at para [46] of its judgment. Notwithstanding what Baragwanath J said in *Murphy v Rodney District Council* at paras [36] – [38], the *Wellington Regional Council* decision seems to me to be in general accordance with what the Court of Appeal held the law to be, in so far as it relates to the assessments of effects on the environment *under s 104(1)(a) and s105(2A)(a)*. But s 104(1)(d) and s 105(2A)(b) are different. It is under those sections that precedent impacts can legitimately be considered, as the Court of Appeal expressly contemplated in *Dye*, and Baragwanath J confirmed in *Murphy*.

[124] I can see nothing in the Environment Court's decision which suggests that its approach was affected by any misunderstanding of *Dye*, and I do not consider that the Environment Court erred in the manner alleged in this part of the council's appeal.

Sixth question of law

[125] The issues raised under the heading "Sixth question of law" can be dealt with comparatively briefly. The council alleges that the Environment Court failed to have regard to s 7 of the Act, and that that failure is apparently intended to be particularised by assertions that the Court:

(a) failed to give reasons for rejecting the evidence of Mr Simmons on s 7 in the written brief from which he had read to the Court, or wrongly concluded that there was no such evidence; and
(b) failed to analyse the relevance of s 7 and make a determination as to whether it applied.

[126] In advancing these contentions Mr Enright focused on para [71] of the Environment Court's decision in which it said that its attention had not been drawn to aspects of ss 6, 7 or 8 of the Act that the proposal would offend, recorded its satisfaction that the proposal would meet the purpose of the Act and then explained why that was so in the passage that I have already quoted in para [9] above. Then, counsel referred to part of the evidence of Mr Simmons in which he had set out the text of s 7(b), (c), (f) and (g) and continued as follows:

> [They] are all relevant because these matters have guided the approach to sustainable management that has resulted in the character and amenity basis behind the zoning and subdivision provisions of the Plans.
>
> It is my conclusion that in terms of Part II of the Act this proposal does not promote sustainable management, nor does it maintain or enhance the amenity values of the quality of the local countryside living environment.

[127] Mr Enright submitted that by stating that its attention had not been drawn to aspects of s 7 that the proposal would offend, the Environment Court was confirming that it did not consider s 7 at all. Because the provisions within Part II of the Act are, as he put it, mandatory considerations for resource consent applications by virtue of s 104(1), the Court's failure to have regard to s 7(b), (c), (f) and (g) was an error of law. To a submission advanced by Mr Littlejohn that the Court had implicitly considered s 7, Mr Enright responded that there had been no express finding on s 7 matters, and that the omission was fatal.

[128] Again, I do not think that there is anything of substance in the council's argument. Section 7(b), (c), (f) and (g) refer respectively to the efficient use and development of natural and physical resources, the maintenance of amenity values, the maintenance and enhancement of the quality of the environment and any finite characteristics of natural and physical resources. The substance of those considerations was, in my view, addressed at various places in the Environment Court's decision.

[129] In this respect, Mr Littlejohn referred me to paras [15] – [17] of the Environment Court's decision in which the Court had:

(a) recorded that the actual and potential physical effects of the proposal on the environment were not really an issue;
(b) noted the council's concession that such effects would be no more than minor;
(c) recorded the evidence of Ms Jenkins about the lack of productive soils in the locality, the proposal's lack of effect on the existing character of the area, its no more than minor effect on local amenity, and the existence of mature screening vegetation on the land with resultant absence of visual impact from public viewing points;
(d) added its own observation about the distance of the property from the local road, and the orientation of the property, which avoided an immediate viewing audience;
(e) held that there would be no traffic or access difficulties, no noise effects or difficulties for infrastructural services; and
(f) recorded Mr Simmons' view that there would be no immediate effects on the directly adjacent environment that would be any more than minor, in fact that the development would be unlikely to be noticed beyond the subject site and those properties whose owners had given written approval.

[130] Leaving aside the council's argument about cumulative effects, which the Court rejected (for the reasons that I have already discussed and upheld) this was clearly a proposal with a very low environmental impact, as the council's own expert witness had agreed. So, in the Court's view, it passed through the s 105(2A) gateway (para [19] of the decision). Given this finding and the reasons for it, I consider that when the Court said that its attention had not been drawn to aspects of s 7 that the proposal would offend it was in effect finding that the proposal did not offend against that section. I disagree that that statement should be

seen as "confirming" that the Court did not consider s 7, as Mr Enright submitted.

[131] Mr Enright did not refer me to any factual matter that would have been relevant under s 7 but which had not been considered by the Court. He did submit that s 7 is clearly relevant to the issue of rural character, and referred to the definition of "amenity values" in s 2 of the Act in that context. However, the character of the subject site's location was a matter specifically addressed by the Court in discussing Ms Jenkins' evidence at para [15] of the decision, and if, as Mr Simmons told the Environment Court, the proposal would be unlikely to be noticed beyond the subject site and the properties of the approving neighbours, it is impossible in my view to say that there was any error of omission in the Environment Court's treatment of the amenity issue.

[132] I do not consider that the Court made the errors alleged by the council under this heading.

Seventh question of law

[133] The final question of law is expressed as being contingent on there being an error in the Environment Court's analysis of s 105(2A)(b). Because I have found that there was no such error in the Court's decision, this question must also be answered in the negative.

Result

[134] The council has not established that the Environment Court erred in law in any of the respects alleged in the appeal. The appeal is dismissed accordingly.

[135] The respondents are entitled to costs. If costs cannot be agreed, I will receive a memorandum from the respondents on that issue within twenty-one days of the delivery of this judgment. The council may respond to that memorandum within 14 days after it is served.

APPENDIX

First question of law

1. Whether the Environment Court erred in its interpretation of Plan Change 55 and the Proposed District Plan by failing to have regard to the following as relevant considerations:
   - 1.1 General objectives and policies in the Proposed Plan (ie Objective 7.3.7, Policy 7.4.7).
   - 1.2 Relevant rules, as a guide to interpretation of objectives and policies, in the Countryside Living Rural and Town zones for Plan Change 55 and the equivalent zones in the Proposed District Plan.
   - 1.3 Policy 5 in Plan Change 55.
   - 1.4 Policy 7.8.5.3.2.2 and 7.8.5.4.2.2 in the Proposed District Plan.
   - 1.5 By wrongly concluding that there was no evidence at all from the Appellant's planning witness on whether the proposed subdivision was (for the purposes of s 105(2A)(b)) contrary to the objectives and policies of the Proposed District Plan.

Second and fourth questions of law (combined)

2. Whether the Environment Court erred in its approach taken to precedent by:
   - 2.1 Having regard to the following irrelevant considerations:
     - a. the existence of written approvals to the subdivision from adjoining landowners;
3. Whether the Environment Court erred in its approach taken to plan integrity by:
   - 3.1 Having regard to the following irrelevant considerations.
     - a. the existence of written approvals to the subdivision from adjoining landowners;
   - 3.2 Failing to consider relevant considerations, namely:
     - a. the district plan instruments (the Transitional Plan, Plan Change 55, and the Proposed District Plan) and whether public confidence in their administration would be shaken or challenged.
   - 3.3 Failing to make a finding on plan integrity (instead simply finding there were clear distinctions applicable to the subject site).
   - 3.4 Whether the Environment Court erred by fusing its consideration of plan integrity and precedent (failing to separately consider each doctrine).
   - 3.5 Whether the Environment Court erred by failing to consider either plan integrity or precedent, as relevant considerations, under s 105(2A)(b).

Fifth question of law

4. Whether the Environment Court erred in finding that there were no cumulative effects by:
   4.1 Wrongly concluding that there was no evidence by Mr Simmons on the issue of cumulative effects to rural character and amenity.
   4.2 If the Environment Court did consider Mr Simmons' evidence, then in adopting the wrong definition (wrong legal test) for cumulative effects by requiring evidence that the future effects "will happen" rather than requiring evidence that there is sufficient probability that the future effects "will happen".
5. Whether the Environment Court erred in finding that there were no cumulative effects by applying the test in *Dye* (para 17, 57 – 58 of Judgment). The *Dye* test:
   5.1 Can be distinguished on its facts and is not intended to be of general application, with cumulative effects to be assessed on a case by case basis.
   5.2 In the alternative:
   5.3 The *Dye* test is binding on this Court, but is erroneous including for the following reasons:
      a. The definition of "cumulative effects" in s 3 applies for the purposes of s 105(2A)(a) and s 104(1)(a) (namely "any cumulative effect which arises over time or in combination with other effects . . . regardless of the scale intensity duration or frequency of the effect").
      b. Section 105(2A)(a) does not refer to "actual or potential" effects thus the general definition in s 3 of cumulative effect applies for the purposes of non-complying activities under s 105(2A)(a).
      c. The definition of "environment" imports cumulative effects into both s 105(2A)(a) and s 104(1)(a).
      d. Cumulative effects include future potential or actual effects, on either the subject site or other relevant sites.

Sixth question of law

6. Whether the Environment Court erred in failing to have regard to s 7 Resource Management Act, as a relevant consideration to which it must have "particular regard" by:
   6.1 Failing to give reasons for rejecting the evidence of Mr Simmons on s 7 in his written brief or wrongly concluding that there was no such evidence.
   6.2 Section 7 Resource Management Act having been put in issue, by failing to analyse the relevance of s 7 and make a determination as to whether it applied.

Seventh question of law

7. Whether (as a consequential error of law) if the Environment Court erred in its analysis of s 105(2A)(b), this led to error in its analysis of s 104(1)(d).