IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA103/2021
[2022] NZCA 423

BETWEEN	IAN WALLACE LYSAGHT AND ADRIANNE JUNE LYSAGHT Appellants
AND	WHAKATĀNE DISTRICT COUNCIL First Respondent
AND	GULATI ENTERPRISES LIMITED Second Respondent

Hearing:	16 November 2021
Court:	French, Cooper and Gilbert JJ
Counsel:	M J E Williams for Appellants A M B Green for First Respondent V J Hamm and T J Conder for Second Respondent
Judgment:	8 September 2022 at 4:00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondents' costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] The Whakatāne District Council (Council) granted a non-notified application for resource consent by Gulati Enterprises Ltd (Gulati) to develop an unmanned service station with four petrol pumps and a truck stop, which would operate under the Mobil brand. The site has frontage both to State Highway 30 and an unnamed Māori roadway (Roadway). Vehicles would enter the site from the Roadway, having made a left-hand turn off State Highway 30 before turning right into the station. After refuelling, vehicles would leave the site by turning left at a vehicle crossing giving access directly onto State Highway 30.

[2] The appellants, Ian and Adrianne Lysaght, are co-owners of the Roadway together with Gulati and two whānau of Ngāti Awa. The Lysaghts have been engaged in property development in the area for decades. They are trustees of two family trusts which have formed a partnership trading as Lysaght Developments. They are in the course of promoting an industrial subdivision on land opposite the proposed service station. They considered they were adversely affected by Gulati's proposal and commenced an application under the Judicial Review Procedure Act 2016 challenging the Council's decision to deal with Gulati's application without either public or limited notification under the Resource Management Act 1991 (RMA).

[3] An application for judicial review was also made by Te Rūnanga o Ngāti Awa. Both applications were heard by Whata J in the High Court. The application by

Te Rūnanga o Ngāti Awa was successful in part and resulted in the High Court setting aside the decision to grant the resource consent application on a non-notified basis.[1] But the Judge dismissed the Lysaghts' application and they have appealed against that decision.[2]

[4] Given that the result of the High Court judgment was to set aside the consent granted to Gulati, we initially entertained some doubt as to whether the appeal was moot; however, in the absence of opposition by the respondents, we decided that we should hear the appeal and determine it. Principally, that was because the issues of concern to the Lysaghts are likely to arise again in the context of the Council's reconsideration of Gulati's resource consent application, which must now be dealt with afresh.[3]

The application and the district plan

[5] Gulati's proposed service station would be located on land zoned "Light Industrial" in the Council's operative district plan. Under r 3.4.1.1(27) of the district plan, "Service stations" in the Light Industrial zone are a permitted activity. That means, pursuant to s 87A(1) of the RMA, that the service station activity does not require resource consent unless it fails to meet some other requirement of the district plan. In this case, resource consent was required because:

(a) The proposed Mobil pylon sign would exceed the maximum permitted signage display area of 12 m^2 under r 11.2.19.1. The proposed sign would be 12.5 m^2 in area. This aspect of the proposal required discretionary activity consent.

(b) The Roadway would not meet the required minimum width of 18 m under r 13.2.2. Works proposed to be carried out in conjunction with the service station development would widen the Roadway to 10 m. For this, discretionary activity consent was required.

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1 *Lysaght v Whakatāne District Council* [2021] NZHC 68, [2021] NZRMA 423 [High Court judgment] at [114]–[115].

2 At [113].

3 Te Rūnanga o Ngāti Awa, having succeeded in their application, did not appear at the hearing of this appeal.

[6] As is often the case, a report was prepared for the purposes of the Council's decision which dealt with both the notification issue and the decision of whether consent should be granted (the Report). Dated 23 April 2020, the Report reflected modifications to the application that had taken place in discussions and correspondence between representatives of both the Council and Gulati as the notification issue was being considered. In its final form, the proposal was granted consent for a 24-hour, 7-days-a-week, unmanned service station with four petrol pumps and a truck stop. There would be two 60,000 litre underground fuel storage tanks, four light vehicle petrol pumps and one truck petrol pump. The tank installation would require earthworks, and there would be landscaping around the perimeter of the site.

[7] On the question of site access, the Report recorded:

> 2.2 Site access is proposed to be provided from SH30 via the Māori Roadway. Two new vehicle crossings are located on the western boundary of the lot to facilitate this. Other physical works are also proposed within the Māori Roadway to facilitate access. Egress is proposed to be provided by way of a new vehicle crossing to SH30 at the south-east corner of the site. No-right-turn rules will be imposed for traffic entering SH30 from the Māori Roadway and at the site egress.
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> 2.3 The applicant proposes to install a median strip within the New Zealand Transport Agency (**NZTA**) SH30 corridor for a distance of approximately 150m from the western end of the existing median leading to the SH30/Keepa Road roundabout. The new median will therefore extend past the Māori Roadway to approximately halfway along the frontage of the property to the west … A deceleration lane is also proposed. …

[8] Because of the egress to State Highway 30, written approval of the New Zealand Transport Agency (NZTA) was required, and this was provided on 9 October 2019. The Council asked Gulati to provide written approvals from the other co-owners of the Roadway, but Gulati declined to do so. The Report observed:

> Further consideration of this matter has been undertaken following close consideration and refinement of the areas of non-compliance, including the matters to which discretion is restricted, and after seeking a legal opinion. It is now concluded that written approvals are not required to enable the application to be processed non-notified. This is addressed further elsewhere in this report.

[9] During the processing of the application the Council's roading engineers raised some concerns about heavy vehicles needing to cross the centre line of the Roadway while making the left-hand turn from State Highway 30. Issues were raised as to whether the Roadway was sufficiently wide to enable safe and efficient access to heavy vehicles, and whether there was the potential for unacceptable conflict with other users of the Roadway. The Report recorded:

> This was communicated to the applicant on 30 March and a written response was provided on 6 April, followed by a meeting between the engineers and the applicant on 14 April. Conditions were agreed as a consequence. An amended plan was provided by the applicant on 20 April and accepted by Council Manager Transportation on 22 April 2020.

[10] The Report took the approach that the non-compliance of the Mobil pylon sign would not have an impact on the potential effects of the activity as a whole. This meant that although discretionary activity consent was required to exceed the maximum signage area allowed by the district plan, that would not have the effect of requiring the whole application to be considered as a discretionary activity. In the result, the remaining issue that required consent, being the width of the Roadway, was able to be considered as a restricted discretionary activity under the relevant district plan rules.

[11] Rule 13.2.2 of the district plan is headed "Roads and Property Access (excluding State Highway)". Rule 13.2.2.1 provides:

> Any new road or **accessway** shall be designed, constructed and located to accommodate the volume and type of traffic likely to use it in a safe and efficient manner.

[12] Rule 13.2.2.2 then relevantly provides:

> Compliance with the following standards shall satisfy Rule 13.2.2.1. Non-compliance with these standards shall be considered a Restricted Discretionary activity:
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> a. Roads and **accessways** shall be designed to meet the design standards set out in Appendix 13.7.5. Widths shall be selected to ensure that adequate movement lanes, footpaths, berms, and batters can be provided to retain amenity values (including landscaping) and enable utility services to be provided safely and in economical and accessible locations;
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> …

[13] The design standards set out in Appendix 13.7.5 require a minimum road width of 18 m, eight metres more than what was proposed. Rule 13.4.7 specifies matters that the Council can consider when determining an application that is not compliant with r 13.2.2.2. That Rule, also headed "Roads and Property Access excluding State Highway", provides:

> 13.4.7.1 **Council** shall restrict its discretion to;
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> a. traffic volumes and traffic mix relative to existing and future patterns, access, parking and loading on-site;
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> b. pedestrian and cyclist safety;
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> c. construction traffic volumes, traffic mix and hours of operation;
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> d. the ability of the site to accommodate the traffic anticipated and the nature of the adjacent roading pattern, including the position of the road in the roading hierarchy;
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> e. formation of the road or access;
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> f. the total land area proposed to be used for access, parking and loading in the Rural Plains Zone; and
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> g. aspects of the proposal that could compromise the safety and convenience of pedestrians as well as individual and cumulative adverse effects associated with traffic movements.

[14] The Report examined each of these considerations with the exception of r 13.4.7.1(f), which did not apply. The High Court quoted this section of the Report in full.[4] It is not necessary for us to set it all out again. It is sufficient for present purposes to give a summary highlighting the most relevant extracts.

[15] In relation to the first consideration the Report went into some detail. This was as follows:[5]

> ▪ *Traffic volumes and traffic mix relative to existing and future patterns, access, parking and loading on-site;*
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> 6.11 The effects on the state highway, the intersection with State Highway 30, and the wider roading network have been

[4] High Court judgment, above n 1, at [35].
[5] Italics in original.

addressed through the Transportation Assessment provided as part of the application with further information provided by the applicant between 14 February and 2 March 2020. These effects have been concluded to be less than minor.

6.12 In relation to the traffic flow and existing and future traffic patterns within the Māori Roadway, the applicant provided additional evaluation on 28 February 2020 highlighting the low traffic generated by existing activities which future use for industrial purposes would increase from 1-2 trips per hour (tph) to 8tph. Additional information was requested to review the potential for conflict between safe pedestrian access and service station traffic, including in particular heavy vehicles turning into the roadway, with the need to cross into the opposing traffic lane and then enter the service station from the roadway. This was provided on 6 April 2020 and an amended plan provided to Council on 20 April 2020.

6.13 The additional information has been reviewed by Council's Transportation team. The Council is now satisfied that the amended design provides appropriately for safe access for all users of the roadway and into the site from the roadway. It will minimise the potential effects on other sites served by the Māori Roadway and the potential conflict arising from vehicles crossing the roadway to enter the service station. The assessment provided by Traffic Solutions Ltd … identified that there were potential benefits for future users of the roadway arising from the upgrade, as follows:

"The trafficable width of the roadway is presently about 7m where vehicles turn into it from the highway. This is quite narrow for an access to industrial zoned land where truck movements are expected to be generated, and the kerbs at the intersection with the highway presently require all trucks, even rigid trucks, to cross the centreline when turning into the roadway. If the fuel facility proceeds then the roadway at its entry will be widened considerably to accommodate large truck rigs that the development will generate. This will provide a benefit to the other lots served by the roadway because more width will be available for heavy vehicles associated with any future industrial development to turn into the roadway without unduly obstructing exiting vehicles, a situation that cannot presently occur."

6.14 The upgrade will therefore provide appropriately for future industrial use of sites served by the roadway. There will be some change in effects for those living on or served by the roadway, but the level of changes [is] not unreasonable or unanticipated since the land was subdivided in 1999 … and zoned for industrial use. In addition, the applicant has demonstrated that large trucks can still practically manoeuvre within the 10m width, albeit utilising the full width, and two-way traffic movements are possible. The proposal and technical non-compliance with width does not change the overall type and volume of traffic anticipated and legally able to use the roadway now and in the future, based on the zoning of the land. The scale of adverse effects is therefore concluded to be generally acceptable and less than minor as a result of the non-compliant width.

[16] The Report also addressed pedestrian and cyclist safety, the second of the district plan assessment considerations. It noted that there was currently limited pedestrian and bicycle movement along the Roadway and State Highway 30, and said the service station activity was not expected to change demand or use because it lacked a retail component that could attract pedestrians or cyclists. Future development leading to increased movement of people and cyclists on the Roadway would be accommodated, in the amended design, by means of a footpath to be located on the eastern side of the Roadway.

[17] The Report went on to state that the potential effects of construction traffic would be controlled by consent conditions, and any adverse effects were considered to be temporary and less than minor. No adverse effects on State Highway 30 and the wider roading network were anticipated as a result of traffic generated by the service station. The Roadway would be able to accommodate the traffic leaving State Highway 30 on its way into the service station.

[18] As to "formation of the road or access", the consideration in r 13.4.7.1(e), the Report noted simply that Council standards would be complied with and "conditions are recommended". The Report then addressed the final consideration, that in r 13.4.7.1(g), as follows:

> 6.20 The evaluation relates to the under width roadway and the effect on both these aspects has been evaluated above.
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> 6.21 The upgrade works to the intersection of the state highway and roadway, including the deceleration lane and widening, are expected to be compatible and support further development of the other light industrial land served by the roadway and may avoid the need for further works in the future by subsequent developers. This could in turn facilitate development of the land, as anticipated [by] the District Plan. Whilst not a consideration for the notification decision, these positive effects may be considered as part of the substantive decision under [s 104] of the RMA.

[19] It was in the context of that discussion that the Report reached the conclusion that the effects of the proposal on the environment would be less than minor. Further, the Report stated:

> 6.24 The effects of the proposal have been considered in relation to adjacent properties, particularly those at 46B and 46D

> State Highway 30 which are used for residential purposes, but are zoned Light Industrial. The service station itself would be a permitted activity if the roadway was 8m wider to meet the access standard. The aspects such as noise, lighting, and traffic generation are compliant with the permitted activity standard and on-going compliance can be required through conditions. Therefore, although the relationship may not be favourable for the existing residential activities, there are no rules in the [district plan] through which more rigorous standards can be imposed.

[20] The Report formed the basis of the Council's decision. The Council's Manager of Resource Consents, Mr Avery, granted consent under delegated authority by signing the last page of the Report on 24 April 2020, ticking a box marked "[g]ranted subject to the conditions of consent specified [in the Report]".

[21] It is relevant to note that among the conditions were some requiring the development to take place in accordance with plans submitted. Gulati was also required, amongst other things:

(a) to provide a report to the Council's General Manager of Planning and Infrastructure from an independent, qualified road pavement engineer on the current structural capacity of the Roadway, the impact of increased traffic and the need for any additional structural strengthening of the Roadway pavement. If structural strengthening was required, Gulati would need to reconstruct the pavement to meet any new design life requirements; and

(b) before commencing the service station operation, to complete all road-upgrading works as shown in a report from Traffic Solutions Ltd and the road pavement report mentioned above. The road-upgrading works were to be undertaken in accordance with the Council's Engineering Code of Practice and certified by the General Manager of Planning and Infrastructure.

[22] Other conditions dealt comprehensively with the specifics of the road-upgrading works, and their formation and construction. The works on State Highway 30 were also required to be implemented in accordance with NZTA's requirements prior to the commencement of the operation of the service station.

The High Court proceeding

[23] In the High Court, the Lysaghts advanced three grounds in support of their application for judicial review. First, it was said the Council had failed to have regard to the effects of the proposed median strip to be located on State Highway 30, which was said to be a mandatory consideration under r 13.4.7.1 of the district plan. Secondly, it was claimed the decision was unreasonable insofar as the co-owners of the Roadway were not considered to be affected persons and there was no reasonable basis for the Council's conclusion that the effects on the Lysaghts would be less than minor. Thirdly, it was said the Council erred in law in determining that there would be no adversely affected parties on the basis of the mitigation works proposed, which was reliant on both third-party land and third-party approval in order to proceed. This allegation included a claim that it was beyond a consent authority's lawful powers to approve a resource consent application on the basis of mitigation that would involve or infringe on a third party's rights.

[24] The Judge rejected each of these grounds. Insofar as the median strip was concerned, he noted it was a permitted activity and could be built at any time with approval of the NZTA. It was therefore open to the Council, pursuant to s 95E(2) of the RMA, to disregard any effects of the median strip on the co-owners of the Roadway.[6] The Judge considered there was nothing in the evidence to suggest that the Council's decision on this issue was unreasonable. He noted that although the issue had not been expressly addressed in the Report, correspondence between the Council and the NZTA showed that the Council's transportation team had accepted the installation of the median strip was appropriate.[7] The Judge's conclusions on this issue were not challenged in this Court.

[25] In respect of the second cause of action, the Judge considered the "central evaluative issue for the Council" was whether the co-owners of the Roadway and the occupiers of the land adjacent to it (including the Lysaghts) would be adversely affected by the proposal in terms of the safe and efficient use of the Roadway, to a minor or more than minor degree, having regard to the considerations in r 13.4.7.1.

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6 High Court judgment, above n 1, at [48]. Section 95E(2)(a) of the RMA allows a consent authority to disregard an adverse effect of an activity if a rule permits an activity with that effect.

7 At [48].

The Judge considered it was clear from the Report that the issue had been carefully considered on the basis of adequate information. He was satisfied the information demonstrated the likely level of traffic movement that would be generated was broadly what might be expected in a Light Industrial zone and the probability of conflict between a vehicle exiting the Roadway and a heavy vehicle was "exceedingly small: about 0.01 [per cent]".[8]

[26] This meant that the Council's conclusion as to the low level of effects on the Lysaghts in terms of safe and efficient use of the Roadway was plainly available to it. The Judge said he was fortified in this conclusion by the absence of any evidence from an independent expert to the contrary.[9]

[27] The Judge held, rejecting the Lysaghts' argument to the contrary, that the need for consent of the other co-owners of the Roadway to the works proposed was a separate property issue, not relevant under the RMA. He held that the RMA is not concerned with the enforcement of property rights, and a resource consent does not authorise infringement of such rights.[10] Here, the condition imposed by the Council requiring the works to be carried out meant the Lysaghts would need to consent or Gulati would need to obtain a court order to enable the works to be undertaken.[11] The physical impacts on the Roadway were not, in any event, a relevant consideration under r 13.4.7.1.[12]

[28] The essence of the Judge's reasoning for rejecting the third cause of action appears from the following passages of the judgment:

> [76] In the present case, there is no requirement for agreement to be reached with the Lysaghts and the consent does not otherwise purport to derogate from (or deprecate) the Lysaghts' existing property or consented rights. Quite the reverse, the required roadworks are expressly framed as a condition precedent to the operation of the station, which carries no implication that the Lysaghts must agree to or otherwise implement the proposed mitigation works. Rather, it places the entire burden on Gulati to either obtain the Lysaghts' agreement or otherwise obtain lawful authority to undertake the requisite roadworks. In this respect, the condition is a paradigm

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8 At [68].
9 At [68].
10 At [58].
11 At [60].
12 At [61]. Although the Judge refers to "r 13.4.7.2" in this paragraph, it is apparent this is meant as a reference to "r 13.4.7.1" of the district plan.

example of a valid condition precedent referred to by Fisher J in *Westfield v Hamilton City Council*.

> [77] Mr Williams sought to distinguish the *Westfield v Hamilton City* [*Council*] condition precedent on the basis that the present condition related to private land, not public land or public works. But that is a distinction without consequence because, as I have said, Gulati must obtain the Lysaghts' agreement or otherwise obtain lawful authority to undertake the roadworks. In the result, the Lysaghts' property rights, including to the use and enjoyment of the Roadway, remain unaffected until that agreement or the requisite court order has been obtained.

[29] The Judge noted a further submission by the Lysaghts that it did not make resource management sense to impose conditions requiring a range of works to be carried out on a road without involving the other co-owners of it.[13] However, he considered it significant that the relevant conditions were expressed in terms that required the works to be carried out before the service station operation could commence on the site. He considered this was a valid condition precedent. To the extent that the works would be necessary on private land, that simply meant that Gulati would need to obtain agreement from the Lysaghts or otherwise obtain lawful authority to undertake the works.[14]

The appeal

Summary of arguments on appeal

[30] The principal argument addressed in this Court was that the High Court was wrong to determine the Lysaghts were not affected parties on the basis of the "condition precedent" principle addressed in *Westfield (New Zealand) Ltd v Hamilton City Council.*[15]

[31] Mr Williams also submitted the High Court erred in finding that the effects of the physical impacts on the Roadway, which the Court accepted were adverse on the environment, were not relevant under r 13.4.7.1 of the district plan. Mr Williams further argued that the combination of the effects of the modifications to the Roadway

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13 At [70].

14 At [76]–[77]. Gulati has made an application to the Māori Land Court for orders permitting the necessary works to take place on the Roadway; that proceeding stands adjourned pending the determination of these judicial review proceedings.

15 *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC).

and the traffic that would be generated by the service station amounted to effects on the Lysaghts that were at least minor, and it was unreasonable for the Council to have concluded otherwise. The latter submission reflects the relevant provisions of the RMA concerning public notification and limited notification, which we discuss below.

The condition precedent argument

[32] Turning to the "condition precedent" issue, Mr Williams argued that because they were co-owners of the Roadway, the Lysaghts should have been regarded as affected persons for the purposes of the RMA. He noted that they faced the prospect, recognised by the High Court, of a significant increase in use of the Roadway and multi-rig trucks crossing the centre line when turning into it. The Lysaghts' land would be called upon to mitigate those effects. Mr Williams submitted that the principle discussed in *Westfield* was not designed to address this type of situation. He argued that a resource consent condition that infringes third-party rights or requires the consent of a third party is invalid, relying on *Dart River Safaris Ltd v Kemp*.[16]

[33] Mr Williams also submitted that, as a matter of principle, it did not make resource management sense to impose conditions requiring a range of works to be carried out on the Roadway without involving all its co-owners. Mr Williams contended that, on the facts of this case, the condition precedent imposed by the Council could not and would not cure what he described as "property related physical impacts", which the High Court had otherwise found to be relevant effects on the environment. He submitted:[17]

> The reason for that is that in this situation the Consent Decision is being relied on as the platform for seeking orders from the Māori Land Court, directing that the owners of the roadway 'permit' the very improvements to the Roadway required by the resource consent for the service station.

[34] Mr Williams claimed the road-improvement works required by the conditions of consent could be completed against the Lysaghts' will by the direction of the Māori Land Court. He complained that, at the very least, the Lysaghts will be forced to defend their position in that Court, "the resourcing of which [would be] an adverse

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16 *Dart River Safaris Ltd v Kemp* [2000] NZRMA 440 (HC).
17 Footnote omitted.

effect occasioned by the Consent Decision, in its own right". Mr Williams said this was another basis upon which the present case could be distinguished from *Westfield.*

The r 13.4.7.1 and cumulative effects argument

[35] Mr Williams then mounted a separate argument based on r 13.4.7.1. He submitted the High Court was wrong to decide that the physical impacts of the works on the Roadway, which were necessary to meet the conditions of consent, did not fall within the scope of the discretion reserved for the Council under r 13.4.7.1(e), which we have set out at [13] above.

[36] Mr Williams accepted the High Court was right to hold that the considerations in r 13.4.7.1 are directed to the achievement of the objective expressed in r 13.2.2.1, namely that any new road or accessway must be "designed, constructed and located to accommodate the volume and type of traffic likely to use it in a safe and efficient manner". Mr Williams emphasised the fact that the objective referred to construction and argued that it should not be interpreted in an unduly narrow way. On that basis he submitted the High Court was wrong to conclude on the one hand that property-related physical impacts were environmental effects of legitimate relevance under the RMA for general purposes but then, on the other hand, exclude them from the ambit of the restricted discretion available to the Council in this particular case.

[37] He also submitted there were cumulative effects establishing that the Lysaghts were adversely affected to an extent that was at least minor in terms of s 95E of the RMA. He listed the effects of concern as:

(a) the effects of physical works associated with widening and reforming the Roadway, including proposed curb realignments;

(b) the delays and inconvenience experienced during the construction phase of the project;

(c) the permanent and ongoing effects resulting from the greater frequency of vehicles using the Roadway, including by multi-rig trucks crossing the Roadway's centre line on an irregular but ongoing basis; and

(d) the possibility of further widening being required, encroaching directly on the Lysaght Developments' office site. This was in reference to a plan showing a possible widening of the Roadway on the Lysaghts' land with the label "[p]ossible alternative kerb setback by others". However, this was not proposed as part of the resource consent application, nor required by the consent, and we do not need to address it further.

[38] Mr Williams also criticised the reasoning in the Council's decision, which he claimed had been endorsed by the Judge, that drew on the assumed benefits of the works on the Roadway in concluding that the effects would be less than minor. This, Mr Williams said, was wrong: the test for notification is limited to adverse effects and should not take into account compensating or offsetting positive effects.

[39] For all these reasons Mr Williams submitted that the decision to exclude the Lysaghts from the consent process on the basis they were not adversely affected persons was unlawful, irrational and unreasonable.

[40] Mr Green, for the Council, and Ms Hamm and Mr Conder, for Gulati, made submissions in support of the reasoning in the High Court judgment. Their submissions are reflected in the analysis that follows.

Analysis

The statutory scheme

[41] Although the statement of claim before the High Court alleged error by the Council in deciding both not to publicly notify the application or require limited notification, the focus of the argument in this Court was on ss 95B and 95E of the RMA, which relate to limited notification. Under s 95E(1), for the purposes of giving limited notification of an application for resource consent, a person is an affected person if the consent authority decides the activity's adverse effects on that person are "minor or more than minor (but are not less than minor)". Mr Williams' arguments were designed to establish that the adverse effects on the Lysaghts were at least minor.

[42] Under s 95E(2)(b), because of the proposal's status as a restricted discretionary activity, the Council was obliged, in assessing adverse effects on the Lysaghts, to disregard any adverse effects that did not relate to a matter to which the Council had restricted its discretion. So the necessary analysis could only relate to the matters set out by the Council in r 13.4.7.1 of the district plan.

[43] The provisions of s 95E(2) are consistent with s 87A(3) of the RMA, which provides:

> **87A Classes of activities**
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> …
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> (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—
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> (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
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> (b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

[44] Consistent with that again, under s 104C of the RMA, when considering an application for resource consent for a restricted discretionary activity, the Council must consider only those matters to which it has restricted the exercise of its discretion.[18] Further, under s 104C(3), if the Council grants the application, it may impose conditions only in respect of those same matters.[19]

[45] These provisions together form a coherent group which makes it plain that, in the case of restricted discretionary activities, at each stage of the consent process only those matters to which the Council has restricted the exercise of its discretion may be considered. This was underlined by the Supreme Court in *Auckland Council v Wendco (NZ) Ltd*.[20] The Court confirmed that unless a relevant adverse effect can

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18 Resource Management Act 1991, s 104C(1)(b).
19 Section 104C(3)(b).
20 *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008.

be said to be a matter to which the Council has reserved discretion, it must be disregarded. In so holding the Court rejected an argument that would have introduced "a disconnect between ss 95E(2) and 104C", which would not be "consistent with the overall legislative scheme".[21]

[46] Before turning to the matters to which the Council reserved the exercise of discretion in this case, some general observations are appropriate.

[47] First, it is appropriate to emphasise that the RMA is an environmental statute: its purpose, set out in s 5(1), is "to promote the sustainable management of natural and physical resources". "Natural and physical resources" is a widely defined term embracing "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures".[22] Similarly, the definition of sustainable management in s 5(2) refers to the "use, development, and protection of natural and physical resources", and "avoiding, remedying, or mitigating any adverse effects of activities on the environment".

[48] Resource consents must be obtained for land uses that, amongst other things, contravene a rule in a district plan.[23] "Use" is another term comprehensively defined to include a wide range of actions in relation to land.[24] Consistent with these provisions, s 87 defines the term "resource consent" as meaning a consent to do something that otherwise would contravene s 9 or s 13: this is a "land use consent".[25] Other kinds of consent are subdivision consents, coastal permits, water permits and discharge permits.[26] These are all activities in relation to natural resources.

[49] A resource consent for a restricted discretionary activity is a particular kind of land use consent. None of the relevant statutory provisions discussed above, whether expressly or by implication, extends to property rights. Property rights arise under the general law or pursuant to statutes other than the RMA. This is reflected in the fact

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21 At [37] per William Young, O'Regan and Ellen France JJ, followed in *Speargrass Holdings Ltd v van Brandenburg* [2019] NZCA 564 at [53] and [55]–[58].
22 Resource Management Act, s 2 definition of "natural and physical resources".
23 Section 9(3)(a).
24 Section 2 definition of "use".
25 Section 87(a).
26 Section 87(b)-(e).

that under s 122(1) of the RMA, a resource consent is said to be neither real nor personal property.[27] And while the holder of a land use consent to do something that would otherwise contravene s 9 may transfer the consent under s 134(3), that is the exercise of a statutory right, not a property right.

[50] The RMA enables a resource consent application to be made in respect of any land. The applicant does not have to own the land, or occupy it actually or prospectively (although implementation of a consent will obviously require permission from the landowner if that person is not the consent holder). Additionally, rights to make submissions if an application is notified are given broadly without a standing qualification: s 96(2) states simply that any person may make a submission.[28]

[51] We note further that s 95E(1) makes it plain that a person is an "affected person" if the consent authority considers that the activity's adverse effects on the person are minor or more than minor. The effects are on the person; they include effects on the person's property, but not the person's property rights. Such rights are not natural and physical resources.

[52] These general observations establish the appropriate context in which to address two of the arguments advanced in support of the appeal. First, it is not possible to ground in the statutory scheme an argument that a person should be regarded as an "affected person" for the purposes of s 95E because an application for resource consent might have an impact on that person's property rights as opposed to the property itself. The RMA is concerned with the latter, not the former. Secondly, a resource consent cannot confer a right to use land which the consent holder does not own, or have the right to occupy, so as to enable exercise of the consent. A council cannot confer such a right by granting resource consent. It obviously has no general power to do so and no such power is conferred by the RMA itself.[29] Mr Williams' contention that the Council should in some way have been influenced by the fact that

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27 Consents can attract *some* of the *incidents* of property, but only pursuant to specific provisions of the RMA, as explained in *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, [2016] NZRMA 369 at [105].

28 There are restrictions for trade competitors, under pt 11A of the RMA.

29 *Hampton v Canterbury Regional Council (Environment Canterbury)*, above n 27, at [104].

interested parties other than Gulati share property in the Roadway is not a proposition which finds support in the RMA.

The condition precedent argument

[53] These general observations about the nature of the RMA also point to the resolution of the Lysaghts' "condition precedent" argument. Unless or until Gulati obtains the authority necessary to carry out the works on the Roadway required as a condition of consent, there will be no impact on the Lysaghts' property interests.

[54] The resource consent could not and did not purport to authorise the carrying out of works against the wishes of the other co-owners of the Roadway. It is doubtless for this reason and in anticipation of the Lysaghts not agreeing that Gulati has applied to the Māori Land Court for an order which would enable the works to be carried out. If such an order is made it will be because it is considered appropriate by that Court under Te Ture Whenua Māori Act 1993. We heard no submissions as to the considerations that would be relevant to the application made to that Court, nor would it have been appropriate for us to be influenced by those considerations in this Court. It is not an RMA matter and we are sitting on an application for judicial review of a decision to grant resource consent on a non-notified basis. The tenor of Mr Williams' submissions was to suggest that if the resource consent were upheld then a decision of the Māori Land Court authorising the works would almost be inevitable. We are not in a position to say whether or not that will be the case. But if that were true, it would be because of the nature of the land interests concerned and the Māori Land Court's view of the merits of the application before it. We do not see how this can possibly influence the decision to be made on the present appeal.

[55] Situations commonly arise where the implementation of a resource consent is dependent upon the consent holder obtaining some other statutory authority or the agreement of landowners that some necessary element of the consent may take place on their land. That does not make the landowner an affected party in RMA terms. Mr Green addressed the relevant principles in his submissions, which he illustrated by reference to this Court's decision in *MacLaurin v Hexton Holdings Ltd*.[30]

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[30] *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570, (2008) 10 NZCPR 1.

[56] In that case, Hexton sought to construct a bottling plant on its property, which it claimed was landlocked. It applied for land use consent, and made an application to the High Court under s 129B of the Property Law Act 1952 to secure vehicular access to its property. The Gisborne District Council granted consent to the bottling activity and there was an appeal to the Environment Court. That Court delivered an interim decision in which it approved the establishment of the proposed bottling plant in principle, but indicated it was not prepared to grant resource consent until the access issue was resolved. In the High Court, Hexton put up for consideration a number of access options; one involved a proposed route over the MacLaurins' land, the other two involved proposed routes over the MacLaurins' land and the land of others. The High Court granted Hexton's application, having found its land was landlocked, and granted an easement over the MacLaurins' land. The MacLaurins appealed against both the Environment Court and High Court decisions.

[57] When the matter reached this Court, it held that the Environment Court should have brought the proposal to a conclusion.[31] This Court observed:[32]

> [47] With respect, we think the Environment Court was wrong not to decide the issue. And Hexton was wrong not to press that issue to finality before commencing its s 129B application. The structure of the Resource Management Act is such that "any person" may apply for resource consents affecting land over which they might have no ownership or other rights … What consent authorities are concerned with is the proposed activity's effects, not the nature of the applicant's legal rights or interest in the particular land. Of course, obtaining a resource consent in circumstances where the applicants have no rights to the land in question will not avail those applicants unless they can acquire an interest in the land which permits them to make use of the resource consent obtained. In this case, there is no reason why the Environment Court could not have evaluated the three access options Hexton put up. If minded to grant the resource consent, the Environment Court could have specified which of the various options it found satisfactory. Hexton would then have known which option to pursue in the High Court. What we have said the Environment Court should have done is exactly what the Gisborne District Council had done at first instance.

[58] In the circumstances of that case this Court considered the appropriate course to follow was to secure resource consent, and then make the necessary application to

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31 The appeal was allowed because this Court determined that the land was not landlocked, a point not relevant here.

32 Citation omitted.

secure the right of access to the land.[33] We see no reason to reject that approach in the circumstances of this case.

[59] This brings us to the decision of the High Court in *Westfield*.[34] This was an appeal from an Environment Court decision upholding aspects of the proposed Hamilton City district plan providing for additional retail activity in commercial services and industrial zones. One of the issues in the case concerned the power contained in the proposed plan to impose conditions on retail activities classified as controlled activities. It was argued this power was not a valid means of avoiding adverse traffic effects because the conditions that would need to be imposed would nullify the consents to which they were attached. That argument rested on assumptions that the conditions would be either so onerous as to remove the substance of the consent or would be dependent upon the activities of third parties over whom the applicant for consent had no control.

[60] The Council had provided in its proposed district plan that, when consenting to controlled activities, it could impose conditions relating to the impact of proposals on the external roading network with respect to access, traffic volumes and traffic capacity. The Council gave itself the power to require the provision of new roads, the upgrading of existing roads or the payment of a levy as conditions of consent. There was a tension between the breadth of those powers and the nature of a controlled activity, to which the Council was obliged to grant consent subject to appropriate conditions.[35]

[61] Fisher J held that a condition attached to a consent will usually be regarded as unreasonable if incapable of performance. He gave as an example a consent to erect additional dwellings subject to a condition requiring access over a 4.8 m wide strip when access to the applicant's property was in fact possible only through an existing strip with a width of 3.7 m.[36] He continued:

> [56] … a condition precedent which defers the opportunity for the applicant to embark upon the activity until a third party carries out some

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33 At [47] and [50].
34 *Westfield (New Zealand) Ltd v Hamilton City Council*, above n 15.
35 See generally Resource Management Act, s 104A.
36 *Westfield (New Zealand) Ltd v Hamilton City Council*, above n 15, at [55].

> independent activity is not invalid. There is nothing objectionable, for example, in granting planning permission subject to a condition that the development is not to proceed until a particular highway has been closed, even though the closing of the highway may not lie within the powers of the developer …

[62] The Judge observed that there was a critical distinction between two ways in which a condition might be framed. One would require an applicant to bring about a result that was not within the applicant's power, for example a requirement to construct a new roundabout on a nearby roadway when the roadway was controlled by NZTA. The other kind of condition would require that a development not proceed until an event occurred, for example until the roundabout was constructed. The Judge considered it was clear that, by wording a condition in appropriate terms, a council would have the power to impose valid conditions of the kind challenged in the case before him.[37]

[63] Mr Williams was right to point out that the discussion in *Westfield* took place in a very different context from the present, but we do not consider that point assists him. The discussion in *Westfield* was about the lawfulness of conditions imposed on applicants requiring work to be carried out on property beyond their control. The concern was such applicants would be powerless to bring about the requisite state of affairs with the consequence that the consent itself would be rendered nugatory. But *Westfield*, and the other cases referred to in that judgment, were not cases about protecting the rights of third-party landowners. They proceeded on the basis of considerations of fairness to the applicant for resource consent.

[64] This case concerns a completely different situation. We have already quoted — at [28] above — what Whata J said on this issue in the High Court. Here Gulati has sought resource consent on the basis that it would carry out the works required by the conditions of consent. It has voluntarily submitted to the imposition of the conditions, and they must be complied with before it can commence its service station activity. The works can be carried out if the other co-owners of the Roadway consent, or the Māori Land Court makes an appropriate order. *Westfield* does not found an argument for the invalidity of the conditions, still less the consent itself, in these

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[37] At [60].

circumstances. We also agree with the Judge's conclusion that the fact the works will be required on private land as opposed to public land is not a distinction of any significance.

[65] For completeness, we add that *Dart River Safaris Ltd v Kemp* does not assist the Lysaghts either.[38] In that case, resource consent was granted by the Environment Court for a new jet boating tourism activity on the Dart River subject to a condition that the applicant and an existing jet boat operator file an agreed draft operating memorandum for jet boat operations on the river. It was argued by the existing operator that the condition was unlawful, and that it could not be required to agree to such a memorandum, which would have the effect of curtailing its rights under its own resource consent. Panckhurst J held the condition was invalid to the extent it was couched in obligatory terms.[39] We see that case as very different from the present. There is no attempt to require a third party to take any steps in the present case. The reverse is true; unless Gulati can secure the right to carry out the works on the Roadway the works will not be able to be carried out, and the resource consent will not be able to be implemented.

[66] For these reasons, we reject the ground of appeal based on the condition precedent issue. We turn now to consider the issue of whether the cumulative effects of the proposal are at least minor.

The r 13.4.7.1 and cumulative effects argument

[67] As has been seen, one of the matters to which the Council restricted its discretion under r 13.4.7.1 of the district plan was the "formation of the road or access". Whata J held that the considerations in r 13.4.7.1 did not encompass the physical impacts of the works necessary to achieve a design that complied with the objective in r 13.2.2.1, namely that any new road be designed, constructed and located to accommodate the volume and type of traffic likely to use it in a safe and efficient manner.[40]

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38 *Dart River Safaris Ltd v Kemp,* above n 16.
39 At [27].
40 High Court judgment, above n 1, at [61]–[62].

[68] The considerations set out in r 13.4.7.1 follow r 13.4.7, which lists the various rules to which the considerations relate. One of those is r 13.2.2. As has been seen, restricted discretionary activity consent was required under r 13.2.2.2 because the Roadway did not comply with the design standards set out Appendix 13.7.5.

[69] We are not persuaded the Judge erred in his approach to these rules. They are a coherent set of provisions that address what is necessary to ensure access is provided over a road that is appropriate to accommodate the volume and type of traffic likely to use it, safely and efficiently. The emphasis is on the physical aspects of the Roadway and how it will function. It is not about any adverse effects of the method of construction during the construction process. It was not inconsistent for the Judge to hold that while there would be physical impacts from the carrying out of the works, the impacts were not relevant to whether the modified Roadway could be used safely and efficiently once the works were carried out. The construction impacts were not relevant, in other words, to the considerations to which the Council had restricted the exercise of its discretion.

[70] Ultimately Mr Williams' argument on this point cannot overcome the effect of s 95E(2)(b) of the RMA with its clear direction that, in assessing an activity's adverse effects on a person for the purposes of the section, the consent authority:

> … must, if the activity is a … restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule … restricts discretion …

[71] These conclusions have obvious implications for Mr Williams' argument based on cumulative effects. We listed the matters of concern to the Lysaghts at [37] above. The issues relating to the physical works associated with the widening and reforming of the Roadway, and the delays and inconvenience experienced during the construction phase, are not matters which can be taken into account under the restricted list of considerations in r 13.4.7.1.

[72] However, what Mr Williams described as the permanent and ongoing effects resulting from the greater frequency of vehicles using the Roadway, by contrast, are plainly relevant. But the difficulty the Lysaghts then face is the extensive discussion those issues were given in the Report, which addressed the relevant

considerations. We have earlier quoted and summarised what was said in the Report on the relevant matters, and need not repeat it here. The Report formed the basis upon which the Council decided that the application did not need to be notified, whether publicly or on a limited basis. The Council's conclusion that the effects of the proposal on the environment would be less than minor was reached after a thorough examination of the relevant matters, given the restricted ambit of the considerations set out in r 13.4.7.1. And contrary to Mr Williams' submission, the decision about notification did not take into account the positive effects of the proposal, as para 6.21 of the Report (quoted in [18] above) made plain. We see no basis to differ from the High Court's conclusion confirming the Council's assessment that the effects on the Lysaghts were less than minor.

[73] We emphasise this is not a case in which it is argued that the Council did not have adequate information on which to make its decision about notification. The Report was comprehensive. The Judge found:[41]

> … the consenting officers had adequate information upon which to base their findings that the pleaded effects of the proposed activity on the Lysaghts, in terms of the safe and efficient use of the Roadway, were less than minor.

We have no reason to disagree with that conclusion.

[74] Contained in the material before the Council was a letter dated 6 April 2020 from Gulati's traffic engineer, Mr Constable, in which he assessed the existing and future traffic flows on the Roadway such as the vehicle movements generated by the proposal, including by multi-rig trucks. He wrote:

> Based on these flows it can be calculated that there is a 1% probability that a multi-rig truck accessing the fuel facility will be present on that part of the roadway adjacent to the fuel facility site at any given time. There is a 0.01% probability that a multi-rig truck and any other opposing vehicle will be on that part of the roadway simultaneously, at any given time. This is a very small incidence where a conflict could occur between a large multi-rig truck and an opposing vehicle, and hence my conclusion that the operational and safety effects of the fuel facility as proposed will be negligible.

[75] This advice was directly relevant to what we have held was the only relevant cumulative effect identified in Mr Williams' submissions. It went to the heart of the

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[41] High Court judgment, above n 1, at [68].

concerns raised. And, as noted by the Judge, no expert evidence to the contrary was adduced in the High Court.

Result

[76] The appeal is dismissed.

[77] The appellants must pay the respondents' costs for a standard appeal on a band A basis and usual disbursements.

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