

Decision No. W 010 /2007

IN THE MATTER of the Resource Management Act 1991
AND

IN THE MATTER of an appeal under s120 of the Act

BETWEEN A D WILSON & K H SMITH
(ENV-2006-AKL-000889)
Appellants

AND THE WHANGAREI DISTRICT COUNCIL
Respondent

AND BREAM BAY VISTAS LIMITED
Applicant

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner K A Edmonds
Environment Commissioner W R Howie

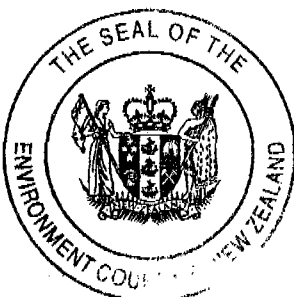
Heard at Whangarei on 6 and 7 March 2007; site visit 8 March 2007

Counsel:

S Brownhill for A D Wilson and K H Smith

G J Mathias for the Whangarei District Council

R M Bell for Bream Bay Vistas Limited



DECISION

Introduction

[1] In May 2006 the Whangarei District Council granted a resource consent to enable the subdivision of a rural property of 125.5ha at Durham Road, Waipu, into 25 residential lots, with a 26th lot being an access road to vest in the Council. The land is presently in two titles and is used as a dry stock farm, although it has been a dairy farm in its past.

Proposal description

[2] The proposal has been somewhat modified, in terms of its layout, between the grant of consent and the hearing before us although the total number of lots has remained constant. Lot sizes vary between 1.3ha and 15.8ha, depending largely on topography, but 16 of them are between 4 and 5ha, and the overall average is 4.97ha. Some 60.387ha – 48% of the site - is to be retained in indigenous vegetation, protected by either QE II trust covenants or conservation covenants under s77 Reserves Act 1977. These areas are largely in the valleys and gullies dropping away from the rounded tops and spurs which are something of a feature of the site. Two main access roads off Durham Road will lead to the lots. A building site on each lot will be shown on a Concept Plan, with maximum building heights to be determined by a formula set in the consent conditions.

General area description

[3] The land lies on the west side of the Waipu River Catchment in a series of hills and foothills encircling the flats surrounding Waipu township, about 40km south of Whangarei. The site itself is about 6.5km southwest of Waipu township. From its higher points there are very attractive views to the north and east across rolling and flat land to the sea and the islands lying off Bream Bay. It is described by Mr Bruce McKenzie, Bream Bay Vista's consultant landscape architect, as being ...*within the developing rural and coastal settlement patterns from Mangawhai to Whangarei Harbour.*

[4] In general there is relatively little rural residential development in the vicinity but to the north, some 400m distant at nearest point, there is rural-residential development of mixed quality along Brooks Road. The northwestern slopes of the proposal's site are within sight of Brooks Road and could fairly be said to be within the same *environment*. We were told that



along the 5.8km length of Brooks Road there are up to 50 lots (not all presently developed) of between 4000m² and 4.5ha in area.

[5] Carter Holt Harvey has production forestry blocks serviced by Durham Road, and its logging trucks are a significant user of it. Through contractual arrangements, the company enforces speed restrictions on vehicles operated by its staff and contractors so as to minimise the dust nuisance caused by them. We had no definite information on how much longer logging is scheduled for the current planting rotation, although Mr Marriott, a neighbouring farmer, believed that there was about a year's work remaining.

The parties' positions

[6] Mr Wilson and Ms Smith together own a rural-residential property on Durham Road, with its entrance a little more than 1km closer to the intersection with Waipu Gorge Road than the proposal— meaning that traffic to and from the proposed subdivision will pass their gate. Their land is densely covered with mature trees, although they have also added further plantings. Their house is not visible from the road, nor can they see the land involved in the proposal. They bought the land in 1999 as a subdivision of an existing farm, and built a house on it soon after. They enjoy it as a weekend and holiday retreat. The core of their concern is the argued effects of the proposal on rural amenity, its conflict with Plan provisions, and its precedent value for possible future subdivision applications.

[7] The Council is content with its decision to grant consent to the proposal, regarding it as not having adverse effects that are more than minor, and as not being contrary to the Objectives and Policies of its Proposed Plan.

[8] Unsurprisingly, Bream Bay Vistas Ltd supports the grant of consent and has, as mentioned, modified the proposal somewhat with the intention of further lessening any adverse effects it might be said to have. In his closing submissions, Mr Bell indicated that the modified version was a fallback provision, and that the applicant's first preference was the version given consent by the Council. That was not the way we understood the evidence.

None of the applicant's witnesses advanced the original proposal, and the discussions focussed solely on the revised version. Realistically, that is the version we need to address.



Zoning and planning status

[9] At the time the application for consent was lodged – September 2005 – the land was zoned Rural A under the Transitional District Plan – County Section and the proposed activity, because of the number of lots and lack of evidence that the land was unsuitable for agricultural use, was classified as *non-complying*.

[10] For completeness, we record that the planning witnesses agree that under the Proposed Plan the land is within the Countryside Environment, and the proposal would be a *discretionary* activity. The consequence of that is that, again as a matter of strict interpretation, both *non-complying* and *discretionary* consents are required under the two Plans –: - see *Bayley v Manukau CC* [1998] NZRMA 513 and s104. That however does not affect the issue of relative weight to be given to the Plans.

[11] In all but two presently irrelevant respects, the Proposed District Plan is now beyond challenge and for the purposes of assessment the Transitional Plan is to be given no weight. The Proposed Plan is the effective planning document. However, we are sure that the planner witnesses are correct in saying that, technically, the Transitional Plan's *non-complying* status survives. That means that the proposal must pass either of the two s104D thresholds (ie that its adverse effects are not more than minor, or that it is not contrary to the objectives and policies of the Plan) before it can be considered under s104.

Permitted baseline

[12] We were not told what the permitted baseline might have been under the Transitional Plan, but we note that the Rules of the Proposed Plan are to be treated as operative under s19 RMA. Under the Proposed Plan it is plain that farming could continue on the property and there would be no requirement for formal pest or weed control programmes, and no bush protection, except for that provided by Rule 28.21. Perhaps more relevantly, there could be six houses on the property as of right (ie one per 20ha lot) and under Rule 28.23A each lot could also have a minor residential unit with a maximum floor area of 70m² located not more than 15m from the main residence. There could therefore be, as of right, twelve residential units on the property together with any number of farm buildings so long as they did not in total exceed 5% of the net site area.



[13] Rule 28.9 contains a traffic generation maximum for permitted activities of 30 vehicles per day (vpd) per title for non-residential activities. (There is no maximum for residential activities). As this site presently is in two titles there could be more than 60 vehicles per day and they could (although it would be somewhat unlikely) almost all be trucks or other heavy vehicles.

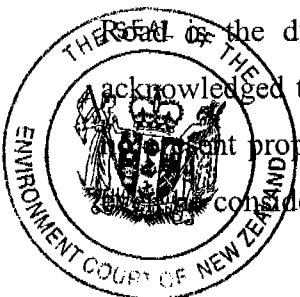
[14] Ignoring the possibility of minor residential units because it is both difficult to quantify and could balance out in both scenarios, the difference between the number of buildings permitted, and those sought, is such as to make a comparison rather meaningless. We should add that in November 2006 Bream Bay Vistas was granted consent for a six lot subdivision as a controlled activity, but, traffic generation aside, we do not think that that significantly adds to the factors to be taken into account in assessing that permitted baseline. Non-residential traffic generation could of course increase to a permitted maximum of 180vpd in that scenario.

Adverse effects – traffic

[15] Presently Durham Road is an unsealed, no exit country road formed to a width of between 6m and 7m. The Council maintains the road to a point 4.17km from its intersection with Waipu Gorge Road. The site straddles the end- point of that Council maintained stretch.

[16] The traffic engineers called by the parties, Mr Alan Hopkinson and Mr Steve Gibson, generally agree that as a rule of thumb urban residences are taken to generate 9.5 vpd and that it is reasonable, for rural residential residences of this type, to reduce that to an estimate of six vpd. If the proposal goes ahead there would therefore be an estimated 150 vpd generated, all moving along Durham Road. Evidence as to the number of existing houses on Durham Road varied somewhat, but putting it at its maximum of approximately ten, there could therefore be approximately 210 residence-generated vpd (again excluding the possibility of minor residential units).

[17] All parties agree that the principal issue arising out of traffic movements on Durham Road is the dust nuisance. It is acknowledged to be a problem at present and it is acknowledged that, obviously enough, more traffic will make the problem worse. There are present proposals to seal Durham Road and Mr Gibson's evidence was that it would not be considered for a sealing subsidy until vehicle movements exceed 200vpd. There is



therefore some prospect that if the proposal goes ahead it would bring forward the possibility of the road being sealed. But that is such a faint and nebulous prospect that we could hardly responsibly take it into account. Mr Gibson estimated that sealing the whole length of the road would cost of the order of \$1M, and would not be supportable by this project alone. But he suggested that Bream Bay Vistas should offer to seal the road for 100m in front of any residence located within 50m of the road (there are said to be four), and that would certainly go a good way towards mitigating the acknowledged adverse effect. There was no commitment from Bream Bay Vistas to do so, at least in part because of a concern that it would find itself effectively paying twice for development contributions levied under the Local Government Act. But it remains for us to consider as a possible condition, if the consent is to be confirmed.

[18] The question of dust aside however, the evidence is clear that Durham Road is, in Mr Gibson's terms, *...perfectly capable of dealing with the projected volumes.*

[19] That the proposal would add to traffic on Durham Road cannot be in doubt. But this is a country road after all, and the worst of the dust issue can be mitigated to an acceptable degree. The volumes are not such that, of themselves, they will cause unacceptable effects. In all we agree that the additional adverse effects from the proposal will not be more than minor.

Adverse effects – rural amenity

[20] Mr Wilson expressed concern at the scale of the subdivision and the prospect of the farming land being developed for what he describes as *urban-related purposes* contrary to his interpretation of the Objectives of the District Plan. He believed that the development would have significant adverse effects on the rural character and amenity values of the area. He points out that the Council's planning report confirms that the *...subject site has high amenity values associated with its rural openness...* and that it was *...relatively remote.*

[21] Mr Wilson remained concerned about the adverse effects of traffic not just in terms of the dust nuisance but also in terms of noise and unspecified *...health and safety concerns.* He

also had a view that the artificial lighting generated by 25 new residential dwellings will have adverse effects on the *...current pristine night sky and neighbouring properties in the surrounding rural area.* He expressed the view that *...all residential dwellings have lights that will glow in the dark for miles.*



[22] Mr Wilson would have to acknowledge, of course, that his own property has added to traffic traversing Durham Road and that it must have introduced night lighting to the area which was not previously present. So his concern is one of scale and that is echoed in the evidence of Ms Melean Absolum, a consultant landscape architect engaged by Mr Wilson and Ms Smith. She summarises the point in saying:

With careful design and appropriate planting, buildings on some of the spurs could potentially be accommodated within this landscape. The difficulty we face here is the sheer number of buildings being contemplated.

Ms Absolum points out that the noises and activities likely to arise from residential development will change the nature of the existing environment and that separation distances proposed between residences are, in some instances, as close as 50m, with many less than 100m. That too she believes will increase the impact on rural amenity values in that part of the valley. She concludes that a subdivision of this scale is not compatible with the character of the surrounding environment and would appear sporadic and incongruous within the landscape context. Ms Absolum agrees that there are 10 areas on the site capable of absorbing residential development – the point of disagreement is on how many houses each of those areas can accommodate.

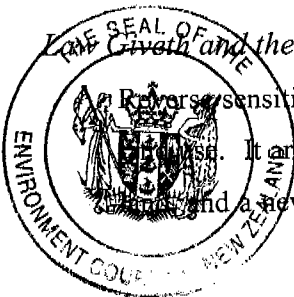
[23] From the whole of the evidence, we have come to agree however with the views expressed by Ms Melissa Needham, the Council's Environmental Planner, Consents, Mr Brett Hood, the applicant's consultant planner, and Mr Bruce McKenzie, the applicant's consultant landscape architect. That is, that this piece of land can absorb a subdivision of this scale, particularly one as comprehensively and sympathetically designed as this one appears to be, without having more than minor adverse effect on the surrounding amenity values, and that the design and layout provide for *internal* amenity values also.

Adverse effects – reverse sensitivity

[24] The issue of reverse sensitivity was raised by the appellants. This is the phenomenon described in an article by Bruce Pardy and Janine Kerr: *Reverse Sensitivity – the Common*

Law Giveth and the RMA Taketh Away (1999) 3 NZJEL 93:

Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new use. It arises when an established use is causing adverse environmental impact to nearby uses and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new



use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

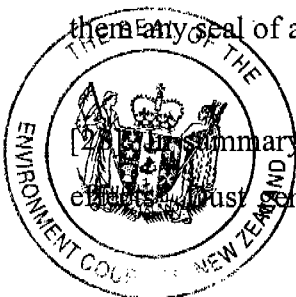
The issue was given focus in this appeal by the evidence of Mr Vernon Marriott, a dairy farmer whose farm straddles Durham Road, and borders the proposal site. He milks some 300 cows at present.

[25] Mr Marriott expresses concern that having residential development along his boundary may hamper the productive use of his land. He is concerned with issues such as spray drift (he having, for instance, recently used a helicopter to spray gorse and scrub close to the site boundary), machinery noise and so on. He is also concerned with issues such as domestic dogs straying onto his land and the possibility of sewage pollution of groundwater on his land.

[26] We think that on issues such as dogs and sewage pollution Mr Marriott conceded that his concerns were perhaps a little overstated and that they were no more than faint possibilities. In terms of the reverse sensitivity issues we think that Mr Mathias was right in pointing out that there was no evidence that Mr Marriott cannot conduct his farming operations in accordance with all regulations and good practice and so internalise their adverse effects. Further, we observe that a neighbouring farmer would be no less concerned about the prospect of spray drift than would a neighbouring residential owner. We note too that about 50% of the boundary between the site and the Marriott land will be retained in vegetation, so the boundary will not be lined with houses.

[27] We were certainly not convinced that reverse sensitivity was more than a speculative issue in these circumstances. We note, as an added assurance for Mr Marriott or other neighbouring farmers, that the proposed lots would be sold subject to notices requiring incoming owners to acknowledge the presence of neighbouring farming activities and their effects. In respect of the neighbouring production forestry activities being conducted by Carter Holt Harvey, we understand that the lots would be sold subject to a positive *no complaints* covenant in respect of the adverse effects of those activities. We record that no issue was raised about the validity of such covenants, but we are not to be taken as giving them any seal of approval.

In summary, we think that the evidence did not support the claimed extent of adverse effects. Justification aside, the possible effects on rural amenity will at worst be slight.



The proposal is not visible from the Wilson/Smith property at all. Even at night there will not be street lights or illuminated signs on the land. Mr Wilson's claim of effects on...*the pristine night sky and neighbouring properties*...seems rather exaggerated.

Objectives and policies – the Transitional Plan

[29] None of the submissions or planning evidence covered the Transitional District Plan, and we were not provided with a copy of it. We do note that the Council's decision records that in its view the proposal is consistent with the objectives and policies of the Transitional Plan, and we were not given any reason to disagree with that.

Objectives and policies – Amenity, and sprawling and sporadic development

[30] We were referred to a good number of the provisions of the Proposed Plan but we think that we can deal with the real issues by reference to a specific few. From the Plan's *Chapter 5 – Amenity Values* we mention:

Objective 5.4.5 – Countryside environments:

To ensure rural amenity values in the countryside environments are protected from subdivision, use or development that is sporadic or otherwise inappropriate in character, intensity, scale or location.

Policy 5.4.7 – Intensity and Design of Subdivision and Development

To encourage that subdivision and development does not unduly compromise the outlook and privacy of adjoining properties, and to be appropriate to the Environment in which it is located.

Particular regard should be had to:

- The layout and intensity of subdivision;
- The location, design and siting of buildings and structures...

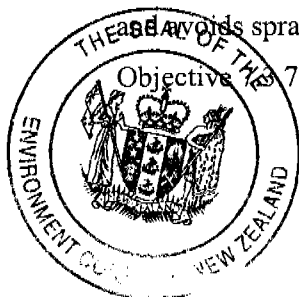
[31] From *Chapter 7 – Subdivision and Development*, we mention these:

Objective 7.3.2

Subdivision and development that does not detract from the character of the locality and avoids conflicts between incompatible and uses.

Policy 7.3.3

Subdivision and development that ensures consolidated development in appropriate locations and avoids sprawling or sporadic subdivision and ribbon development.



Subdivision and development that provides for comprehensive development of land with a range of allotment sizes and is appropriate to the character of the Environment in which it is located.

Policy 7.4.18 – Consolidated Rural-Residential Development

To direct rural lifestyle and rural-residential development to appropriate locations adjacent to existing settlements, rather than allowing sporadic development throughout rural and coastal areas.

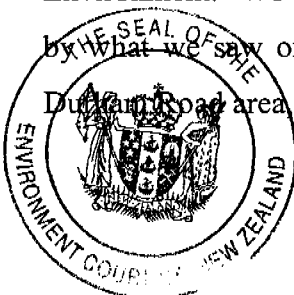
[32] There are two broad themes here. The first is to do with maintaining character and protecting amenity. *Amenity values* are of course ...*those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.* (s2 RMA). Section 5(2) of the Proposed Plan has a list of matters said to be representative of the countryside environment and which, to a degree, define its amenity values. These are:

- Open landscapes and views;
- A low intensity of development;
- Feelings of remoteness and community;
- Low noise levels, particularly at night;
- A high level of privacy;
- Daylight and sunlight access;
- Low levels of vehicular traffic;
- Green unspoilt landscape.

[33] Mr Brett Hood, Bream Bay Vista's consultant planner, expresses the clear view that the land classed as Countryside Environment is not homogenous over the whole of the Whangarei District. He says:

The character of the zone varies across the district and what may be characteristic of the Durham Road area, may not be characteristic for other parts of the Countryside Environment such as Ruakaka.

His view is that the Plan's list is not representative of many parts of the Countryside Environment. We have to say though that on our assessment of the evidence, given context by what we saw on our visit to the site, almost all of the listed factors are present in the Durham Road area to a greater or less degree, depending on exactly where one happens to be.



[34] The second theme is whether this proposal would be *sprawling* or *sporadic* development, or is otherwise to be regarded as *inappropriate*. Mr Hood provides a definition of *sprawling* from the Collins Compact Dictionary as ...*to spread out untidily over a large area*. The Concise Oxford defines *sporadic* as ...*occurring at irregular intervals or only in a few places*. We do not think this proposal deserves the epithet of *sprawling*. There has been considerable effort – we think successfully – to take advantage of the topography for a sympathetic blend of vegetation and building sites, and to give the development a sense of coherence. In the sense that it is not adjacent to an existing settlement and is separated by about 400m (at their closest points) from the rural-residential properties on Brooks Road, it might be said to be *sporadic*. At worst, it might be said to be contrary to Policies 7.3.3 and 7.4.18.

Conclusion on s104D

[35] It is self-evident that a non-complying activity will rarely, if ever, find direct support in the objectives and policies of a Plan, but an absence of support does not equate to the activity being *contrary* to those provisions. *Contrary to* in this context means ...*repugnant to...* or ...*opposed to...* the objectives and policies considered as a whole: - see *Monowai Properties Ltd v Rodney DC* (A215/03).

[36] Looking at the objectives and policies as a whole, we conclude that the layout and design of the proposal, particularly with half its area in covenanted vegetation areas means that its character, intensity and scale are not inappropriate, and that it does protect amenity values, even if it might be said to be *sporadic*. (Objective 5.4.5) The outlook and privacy of adjoining properties will not be unduly compromised, and the internal layout and intensity of subdivision has been well considered. (Policy 5.4.7) In terms of Objective 7.3.2 the character of the locality remains essentially rural, and we have discounted issues of reverse sensitivity. Similarly, the development is comprehensive and gives a range of allotment sizes appropriate to the environment. (Objective 7.3.7).

[37] Taken overall, it is our view that the proposal is not repugnant to, or opposed to, the thrust of the Objectives and Policies of both Plans. Nor are its adverse effects more than minor. The proposal can therefore pass both s104D thresholds, and can be considered under



Section 104

[38] Working through the factors in s104(1), we can summarise our views. Actual and potential adverse effects have already been discussed in some detail. Neither individually, nor cumulatively, do we regard them as being more than minor. We remind ourselves also that there are positive effects to be considered. The proposal will make efficient use of the land resource and will provide a substantial area of covenanted indigenous vegetation. It will enable 25 individuals or families to enjoy a rural-residential lifestyle if that is what they wish for.

[39] There are no relevant provisions of any National Policy Statement or the New Zealand Coastal Policy Statement.

[40] Ms Needham discusses such points from the Regional Policy Statement and the Northland Regional Water and Soil Plan as seem to be relevant at paras 5.15 to 5.16.2 of her evidence-in-chief. We note that she points out that dust emissions from roads are a permitted activity – that is of course an inevitable consequence of them being public roads on which the public have an unrestricted right to drive vehicles. We heard nothing which contradicted her views that the proposal is consistent with those provisions, and we agree with her.

[41] In discussing s104D we have mentioned and analysed what seem to be the relevant Objectives and Policies of the Proposed District Plan and there is no need to repeat what we there said.

Section 104(1)(c) – Plan integrity

[42] We mentioned earlier that Mr Wilson and Ms Smith raised issues of plan integrity - in the sense that they argued that granting consent to this proposal would open the door to further similar proposals in the immediate area or in the Countryside Environment of the District generally.

[43] This is an argument that is, to be blunt, overused and it can rarely withstand scrutiny when measured against the provisions of the RMA. Considered as a *non-complying* activity it needs to be recalled that the Act specifically provides that if a proposal is not contrary to the Objectives and Policies of the Plan, or has adverse effects that are no more than minor, then it should be considered on its merits. If there should still be another application waiting *in the*



wings in Whangarei District which still is to regarded as *non-complying* then it will stand or fall on its own merits. Under the Proposed Plan a proposal similar to this would be *discretionary*. Again the Act specifically provides for the consideration of such a proposal. It may well be that there will be future applications for broadly similar proposals. If so, they can and should be dealt with on their merits.

Part 2

[44] In terms of Part 2 issues, there are no relevant matters arising under s8, or s6(e) – Treaty issues, or the relationship of Maori with ancestral lands and other taonga. Nor indeed do other matters of national importance arise under s6.

[45] Under s7 – matters to which we are to have particular regard – paras (b) *the efficient use and development of natural and physical resources*; (c) *the maintenance and enhancement of amenity values*; and (f) *maintenance and enhancement of the quality of the environment*; all arise and are discussed elsewhere in this decision. In respect of (b), Mr Shane Hartley, the appellant’s consultant planner, raises the issue of the residents of such a development necessarily using vehicles for relatively long commutes to employment, for shopping, recreation, and so on. All of that requires the use of fuel, and increases their carbon footprints in comparison with their counterparts in the suburbs. That is undoubtedly true, and it is a factor to be put in the balance and weighed with all the others. It may perhaps be seen in counterpoint to the social benefit for those who wish to enjoy a rural-residential lifestyle. In terms of (c) and (f) we have mentioned factors such as the protection of substantial areas of vegetation, sympathetic layout and the like, as being factors which, on the whole, at least maintain and in some respects enhance amenity values and the relevant environment. Mr David Slaven is a consulting ecologist who examined the site for Bream Bay Vistas. He confirmed that he had considered it in the light of s7(d) – *intrinsic value of ecosystems*. He concluded that the proposal ...*will have negligible adverse ecological effects on any of the indigenous habitats of the site*. In fact, he thought that proposed mechanisms to protect the areas of bush would have ...*significant ecological benefits*.



The Council's decision – s290A

[46] Assuming the transitional provisions to apply, we have had regard to the Council’s decision and the reasons given for it. As will be apparent, we agree with the Council’s

[47] All of that leads to and informs an overall decision as to whether the proposal overall promotes the *sustainable management of natural and physical resources*, as that term is defined in s5 RMA. For the reasons we have outlined we conclude that it does.

Result

[48] The Council's decision is confirmed and the consents are to be granted, subject to:

- (a) the plan of subdivision being that presented at the hearing and referred to in evidence as the *Mark III* version.
- (b) the addition of a condition that, subject to the Council's agreement, Bream Bay Vistas should pay for the sealing of a 100m stretch of Durham Road outside any existing house that is located within 50m of the road boundary. We record that this is to mitigate increased dust generation, but the road is vested in the Council and we cannot require that it be done without its consent. We record also that this is not a *condition precedent*. If the sealing cannot go ahead, the effects of the increased dust generation would not be such as to justify refusing consent, and the decision would stand nevertheless. Although we cannot make orders to that effect, we do record our view that such cost should be taken account of in setting any development contributions.

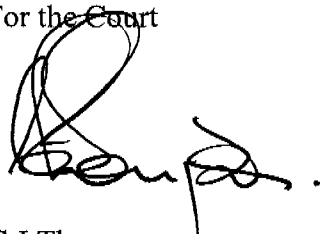
Counsel should confer about the precise wording of conditions and present them to the Court for approval by 20 April 2007.

Costs

[49] Any application for costs should be lodged within 15 working days of the date of issue of this Decision, and any response lodged within a further 10 working days.

Dated at Wellington this 27th day of March 2007

For the Court



C J Thompson

Environment Judge



Issued: **27 MAR 2007**