Green v Auckland Council

High Court Auckland CIV-2013-404-3468; [2013] NZHC 2364
6, 7, 9 August; 11 September 2013
Priestley J

Resource consent — Notification — Non-notified basis — Judicial review — Unreasonableness — Council's decision not to notify unreasonable — Error of law — "Less than minor" — Council applying the wrong test — Whether remedy should be granted in judicial review — Delay — Financial impact on defendants — Variation to consent notice — Building platforms — Change in location of building platforms — Comparative analysis required — Judicature Amendment Act 1972, s 4; Resource Management Act 1991, ss 94, 95, 95A, 95B, 95C, 95D, 95E, 104, 127 and 221.

The plaintiffs and second defendants owed properties in Piha, West Auckland. The plaintiffs' property occupied slightly higher ground than the second defendants' and had good views over Lion Rock and the beach. The second defendants' property was bare land and subject to a consent notice that stipulated a single building platform on the land.

The second defendants took title to their property on 18 June 2012. They considered that the stipulated building platform would not be suitable for the type of house they planned. They wanted to move the building platform to higher ground, and closer to the plaintiffs' home.

The second defendants applied to the Auckland Council for consents to change the building platform. While the Council recognised that there would be adverse effects to the second defendants' neighbours from moving the building platform, it found that those effects "would have no more than a minor adverse effect on the amenity" of those dwellings. The Council decided that the applications should be dealt with on a non-notified basis. The Council granted the consents on 26 October 2012.

On 15 April 2013 the second defendants obtained building consent, and site excavation began in July. At that stage the plaintiffs obtained the Council's property file. The plaintiffs sought judicial review of the consents granted to the second defendants, contending that the Council acted unlawfully by failing to notify them of the second defendants' application.

Held: (granting the application)

(1) The second defendants' proposal to use a new building platform, which was closer to the plaintiffs' land and several metres higher than the designated building site, would inevitably have an effect on the plaintiffs' land. To suggest that moving the building site would have had an adverse effect which was less than minor was unreasonable. The Council was obliged to give limited notification under s 95B of the Resource Management Act 1991. By not doing so it erred in law (see [82], [83], [84], [85], [86], [91], [97], [98], [99], [100], [120], [121], [122], [123], [124], [125], [132]).

Coro Mainstreet (Inc) v Thames-Coromandel District Council [2013] NZHC 1163, [2013] NZRMA 442 applied.

Discount Brands Ltd v Westfield (New Zealand) Ltd [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337 applied.

Ferrymead Retail Ltd v Christchurch City Council [2012] NZHC 358 referred to.

Upland Landscape Protection Society Inc v Central Otago District Council (2008) 14 ELRNZ 403 (HC) referred to.

(2) By using the words "no more than minor" when considering the notification issue, the Council applied the wrong test. The statutory tests of "minor", "more than minor", and "less than minor" can only be informed by context. Where the line might be drawn between the categories might not be easily determined. "Less than minor" however, was the only category which relieves a consent authority of its s 95E obligation to notify (see [126]).

(3) An examination of a variation to a consent notice necessarily entails an examination of the condition which is to be varied. When the Council was considering the application, there should have been some comparative analysis of the designated site and the proposed new site. The Council ought to have considered the original building site and the reasons for it and then, by way of comparison, evaluated the environmental impact of the proposed new site. The Council's failure to compare the two building sites made it easier for it to minimise the adverse effects for the plaintiff (see [127], [128], [129], [130]).

(4) The plaintiffs acted promptly after seeing the Council file. Further, the affidavit evidence filed by the parties was not cross-examined. In this context, and in the circumstances of this proceeding, the plaintiffs ought not be denied relief because of undue delay (see [137], [138], [139], [140], [141], [142], [143], [144], [145]).

Beach Road Preservation Society Inc v Whangarei District Council [2001] NZRMA 176, [2001] NZAR 483, (2000) 7 ELRNZ 1(HC) referred to.

King v Auckland City Council [2000] NZRMA 145, (2000) 6 ELRNZ 79 (HC) referred to.

Turner v Allison [1971] NZLR 833 (CA) referred to.

Vining v Nelson District Council HC Nelson CP23/99, 16 November 2000 referred to.

(5) While the second defendants are largely innocent parties, and there would be significant financial prejudice to them, the plaintiffs ought to be granted relief. The error committed by the Council was serious as far

as the plaintiffs were concerned. The plaintiffs were denied the opportunity of any input, comment or ability to propose mitigating conditions. Further, the second defendants purchased the land knowing that they were entitled to build on only one designated site, and there is a clear policy of limited notification under s 95E of the Act (see [146], [147], [148], [149], [150], [151], [152], [153]).

AJ Burr Ltd v Blenheim Borough Council [1980] 2 NZLR 1 (CA) referred to.

Hill v Wellington Transport District Licensing Authority [1984] 2 NZLR 314 (CA) referred to.

Just One Life Ltd v Queenstown Lakes District Council [2003] 2 NZLR 411, (2003) 9 ELRNZ 210 (HC) referred to.

Cases mentioned in judgment

Auckland Regional Council v Rodney District Council [2007] NZRMA 535 (HC).

Auckland Regional Council v Rodney District Council [2009] NZCA 99, [2009] NZRMA 453, (2009) 15 ELRNZ 100.

Petone Planning Action Group v Hutt City Council HC Wellington CIV-2006-485-405, 10 October 2006.

R(CD) v Secretary of State for the Home Department [2003] EWHC 155.

Re Meridian Energy Ltd [2013] NZEnvC 59.

Judicial review

The plaintiffs judicially reviewed the Auckland Council's decision to proceed with the second defendants application to alter a consent notice on a non-notified basis.

AGW Webb for the plaintiffs.

WS Loutit and *KM Stubbing* for the first defendant.

GR Milner-White and *NJ Amos* for the second defendants.

PRIESTLEY J.

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Introduction

[1] The plaintiffs and second defendants are, in reality, neighbours. Both own property on the western side of that section of Piha Road which descends to the settlement and beach. The two properties are separated by a narrow plantation reserve.

[2] As one would expect, the two properties each have superb views down the line of a wide gulley to the Tasman Sea. The views include the well known landmark Lion Rock, the broad ironsand beach being constantly pounded by white surf and, in the distance, the sweep of North Piha.

[3] The plaintiffs' property occupies slightly higher ground than the second defendants'. The latter property was, until recently, bare land. The plaintiffs live, with their children, in a two storey building. The top storey has commanding views. The house is set back slightly from the Plantation Reserve and was extended and renovated in recent years. Formerly it was a holiday bach owned by one of the plaintiff's grandfather.

[4] The second defendants took title to their property on 18 June 2012. During the preceding two months they had visited the site on a number of occasions, met and talked briefly to the plaintiffs, and held a meeting with the first defendant's (Auckland Council) officials.

[5] When the second defendants purchased their property it was subject to a consent notice. That notice stipulated a single building platform on the land. The origins of the consent notice (registered on the title in June 2007) stemmed from the granting of subdivisional consents in November 1999 by the Waitakere City Council and consent orders made subsequently in the Environment Court on 26 June 2001.

[6] The second defendants considered the stipulated building platform might not be suitable for the type of house they planned. They wanted to move the building platform eastwards, on to higher ground closer to Piha Road and inevitably somewhat closer to the plaintiffs' home.

[7] To achieve the change they wanted they lodged applications with Auckland Council under the Resource Management Act 1991 (the Act).

After investigation and consideration detailed later in this judgment[1] the consents were granted on 26 October 2012. The way was thus clear for the second defendants to build their house on the new building site.

[8] The plaintiffs, for their part, were unaware that approval had been given to vary the consent notice and move the building platform. They were aware that the second defendants, with whom they had met and spoken on the site, intended to build there. Indeed it would be idle for them to expect anything other than that, one day soon, a building would be erected on the neighbouring land. The reason why they were unaware of the Auckland Council's approval to vary the consent notice, thereby permitting the second defendants to build on the new site, was quite simply because Auckland Council took the view it was under no obligation to notify the plaintiffs of the second defendants' application.

[9] The second defendants next applied for building consent which was granted on 15 April 2013. Preparatory work got underway in late June 2013. A building contract was signed between the second defendants and a builder. Site excavation began in the first half of July, at which stage the plaintiffs obtained Auckland Council's property file.

[10] The plaintiffs seek judicial review of the consents granted to the second defendants by Auckland Council. They contend that by failing to notify them of the second defendants' application, Auckland Council acted unlawfully. As part of this proceeding Woodhouse J issued an interim injunction compelling the second defendants to stop their building work.

The issue

[11] The central issue is thus whether the plaintiffs have established a basis to grant judicial review under the Judicature Amendment Act 1972 to quash Auckland Council's decision under the Act to grant consents to the second defendants. A secondary issue is, if such a basis has been made out, whether this Court, in the exercise of its discretion, should grant the plaintiffs the relief they seek.

The second defendants' application and Auckland Council's decision

[12] On 24 April 2012, a few weeks before the second defendants took title to their property, a pre-application meeting took place at the site. This meeting was attended by the second defendant, Mr Taylor, his architect Mr Cowell, and two Auckland Council representatives, being a planner Mr Lindsay, and Mr G Griffin who was at that stage described as a landscape architect.

[13] The record of this meeting was produced in evidence. It runs to six pages. It is not necessary to canvass it fully. Mr Taylor presented plans to the Council officers. He explained that:

> The general concept was to construct a two storey dwelling on the lower portion of the site (within the identified building platform) with garage and parking on the higher portion outside the identified building platform close to Piha Road.

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1 Below [12]–[38].

[14] The Council officers "commented" that the design concept had merit and would ensure that most of any future building would not be "visually obtrusive when viewed against the sea or skyline" from public places such as the beach and roads.

[15] Mr Lindsay, a Council planner, noted that the original subdivision had imposed a number of consent notice restrictions. Mr Taylor himself:

> ... advised his understanding that the subdivision of the site had fixed a building platform on the site (on which the dwelling would need to be built) and asked what process would need to be followed to build outside that building platform to a **minor degree.**[2]

Mr Lindsay, for his part, noted that he had not thoroughly reviewed the City's subdivision file. He noted further (and correctly) that if the building platform was specifically fixed by a consent notice, any proposal to build outside that platform would require a separate application to vary the consent notice under s 221 of the Act. He opined (not having reviewed the older file at that stage) that the building platform could have been fixed for a variety of reasons, including geotechnical or visual reasons.

[16] Under the heading "post meeting comments" Mr Lindsay (who approved the accuracy of the record of the meeting) made the following comment:

> A further review of the subdivision file and relevant documentation confirms that [the] consent notice ... restricts building on the subject site to the area shown as "N" on the approved survey plan. Accordingly to build outside the building platform will require an application under s 221 of the Act to vary that consent notice.
>
> As noted previously, Council will need to be satisfied that the variation does not give rise to any significant adverse effects, having regard to the reasons the consent notice was registered in the first place. In order to understand those reasons, it will be necessary to review the subdivision consent reports in detail.

The comments go on to record the Council would accept a single application that combined both an application for resource consent and variation of the consent notice. Adverse effects, flowing from moving the building platform, was thus identified by Auckland Council as an issue at an early stage.

[17] The second defendants purchased the property. On 14 September 2012, they lodged applications with Auckland Council both to amend the consent notice and for land use consent to construct a dwelling. Two application forms were completed, the first being an application for resource consent in respect of the proposed dwelling and the second being an application, focused on the Waitakere District Plan, seeking a variation of the consent notice. The latter application submitted a geotechnical report prepared in 1999 at the time of the subdivision. Auckland Council's form (form A) for resource consent which the second

2 Emphasis added.

defendants submitted, is marked in the "No" box when the question, which includes the s 95E test, is posed, as to whether any person should be notified who is likely to be adversely affected. The second application form (form B9) similarly has the "No" box ticked for the same notification question.

[18] There can be no challenge to the accuracy and detail of the applications and supporting documents prepared and submitted on the second defendants' behalf. They were professionally prepared by the second defendants' architect and agent Mr Cowell. A supporting letter he wrote dealt comprehensively with the relevant statutory planning and environmental considerations. The letter does, however, opine that the proposed new building site would have less impact on neighbouring properties and was "set back from the wider views enjoyed by [the plaintiffs' property]".

[19] The last page of Mr Cowell's letter headed "addendum" deals with the application to vary the consent notice. Building outside the designated building platform was clearly to be more substantial than the "minor degree" indicated by Mr Taylor earlier that year.[3] Mr Cowell explained it thus:

> The resource consent application involves locating the dwelling, garaging, and water tanks in an area outside the designated building platform described in [the consent notice]. We wish to change condition number 28 in Schedule A of the Environmental Court Conditions of Consent dated 26 June 2001 ... The reason for requesting the building platform be moved to the proposed location is so that a single level dwelling may be constructed with a direct link to garaging in a position taking advantage of the level area for vehicle manoeuvring.
>
> The effects of the changed position are that:
>
> There would be less impact on the landscape overall as a single storied contour hugging building can be designed rather than a two storey unconnected form which the current platform size and position encourages. This is important on land which is classified as located on a "sensitive ridge".
> – There would be less impact on the neighbouring property if the proposed position is set back from the wider views enjoyed by [the plaintiffs' property]. The proposed position is set further away from the site at [another Piha Road property].[4]

[20] Mr Cowell's property goes on to consider the impact (minimal) of the proposed new building platform on vegetation. The second defendants had also employed Riley Consultants to investigate the proposed new building site for geotechnical suitability. Subject to certain conditions, the new site, from a geotechnical perspective, was suitable and well clear of steep slopes.

[21] The letter concludes that one of the second defendants, Mr Taylor, had:

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3 Above [15].

4 In general terms the new site faces in a different direction and overlaps the old site by approximately 20 per cent in one corner.

> Viewed the subdivision resource consent and found no written rationale for the position of the building platform. Riley Consultants who did the geotechnical work for the subdivision, told Mr Taylor that the position was relatively random, aside from the fact that it had to be over 10.0 m from the steep country to the north.

[22] Auckland Council planners then made their assessment. There are three key documents which are:

(a) The Council's report dated 26 October 2012 considering the issues of notification of the applications and the granting of consent.
(b) The Council's decision granting the application for land use consent (relating to the building of the second defendants' dwelling).
(c) The Council's decision granting the second defendants' application to amend the consent notice.

[23] The decision-maker in all respects was Auckland Council's officer, Mr Robert Buxton, whose designation is "Team Leader – Resource Consents". But the three documents were all prepared and clearly written by Mr Gordon Griffin, an Auckland Council resource consents planner.[5] There was some suggestion, sourced in emails from Mr Griffin himself, that during this period he was working under time constraints and pressure because of impending leave. Because (as is normal in judicial review cases) there has been no cross-examination of deponents, I am reluctant to make any finding on this issue. If indeed Mr Griffin was anxious to clear the decks before he went on leave, that does not seem to have compromised the scope or detail of his reports.

[24] All three documents and Mr Buxton's decisions are dated 26 October 2012.

[25] Section three of Mr Griffin's report is headed "notification assessment (sections 95A to 95E)". This topic is central to this proceeding. The gravamen of the plaintiffs' complaint is that they were never notified of the second defendants' applications, particularly the application to vary the consent notice. Thus, they were denied the opportunity of input and comment, and also denied the right to appeal Auckland Council's decision to the Environment Court.

[26] Mr Griffin correctly addressed the interrelationship between ss 95A (public notification) and 95B (limited notification). He observed that any development by the second defendants "as of right" would require all buildings to be within the building footprint identified in the consent notice on the title, and not to be obtrusive "in regards to effects on the sensitive ridge".

[27] Mr Griffin then turned to consider adverse effects. He rightly concluded that the effects of construction would be temporary. He then considered adverse effects in the category of "Visual Amenities and Landscape Character". Significantly, Mr Griffin makes his assessment on

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5 Mr Griffin, it will be remembered, attended the pre-application meeting in April 2012. Above [12].

the premise that the second defendants' building will be on the new proposed building site and not the consent notice site.

[28] Turning to the height of the building (on its proposed site), Mr Griffin refers to a very minor (.225 m) infringement on part of the roof section but:

> With regard to assessment criteria ... the building would not intrude on the surrounding natural landscape nor would it intrude into the privacy of adjoining sites or interrupt views from sites nearby. It would fit appropriately with the coastal village's character, and would not physically dominate adjoining sites.

[29] After considering a total of twelve potentially adverse effects, Mr Griffin concludes:

> In summary, having assessed the adverse effects of the activity on the environment, I consider that the activity will have no more than minor adverse affects on the environment.

[30] He thus concluded the application could be processed without public notification.

[31] Turning next to the limited notification issue, Mr Griffin correctly formulates the test (s 95E(1)) that a council must decide if there are any affected persons entitled to limited notification. A person is affected if the effects of the activity on that person are minor or more than minor (but not less than minor).

[32] This section of the report makes no specific mention of the plaintiffs' property. There is little other than a consideration of the statutory provisions. Mr Griffin concludes:

- The proposed dwelling would be well separated from adjacent dwellings and screened by existing and/or proposed planting and would have no more than a minor adverse effect on the amenity of these dwellings including the views from them.

There is a clear error here. The words "would have no more than a minor adverse effect" would, on a literal reading, fall inside the s 95E(1) definition, suggesting, as the words do, that the adverse effects could be at least minor. Mr Griffin subsequently deposed in his affidavit in this proceeding that what he in fact meant to say was that the effects would be "less than minor". Some corroboration for this is provided by another Auckland Council planner, Ms Redward, who worked with Mr Griffin on the site assessments. She states that she and Mr Griffin jointly concluded that the effects on the plaintiffs' property of the proposed building platform change would be less than minor.

[33] Nonetheless, whether carelessly, unwittingly, or otherwise, Mr Griffin, when considering the critical issue of notification, has mangled the relevant statutory threshold. Instead of considering whether, for limited notification purposes, the adverse effects were minor or more than minor, as stipulated in s 95E(1), he has arguably conflated or blended that test with the s 95A(2)(a) test of the "more than minor" threshold relevant to public notification.

[34] In any event, Mr Griffin's conclusion was that, for limited notification purposes, there was no-one he considered to be adversely affected by the activity. His recommendation was thus the application proceed on a non-notified basis.

[35] As stated, Mr Griffin also prepared Auckland Council's decision on the second defendants' application to vary the consent notice. This, the third of the documents mentioned in [22] of this judgment, runs to three pages and was adopted by Mr Buxton as his decision.

[36] Under the heading "background" the decision notes that the shape of the allotments created by the subdivision, of which the second defendants' land was a part, was "determined by identifying suitable building platforms as required by [a building ordinance]. Individual building platforms were subject to geotechnical reports prepared by a registered engineer".

[37] The decision then goes on to state:

> In addition to geotechnical suitability, the building platforms may have been selected also on the basis of visual considerations.
>
> The proposed building location is supported by updated geotechnical information, would not obstruct any identified public view and although visible against the sea as viewed from Piha Road outside the site, would have good amenity and would fit with the local neighbourhood character.

The decision next considers "visual amenity and neighbourhood character".

> Placement of the buildings closer to the road as proposed would place the dwelling north of the adjacent dwelling at [the plaintiffs' property], placing it less within its view towards the beach and Lion Rock, while being well away from this dwelling (with the Plantation Reserve between). The location would have suitable privacy and separation relative to dwelling locations on adjacent sites or nearby, and the proposed development would fit with the neighbourhood character and be subservient to the natural environment.

[38] The decision was to permit the variation pursuant to s 221(3) of the Act. It noted that a registered engineer (Riley Consultants Ltd) had provided a geotechnical report, thus ensuring that the foundations of residential buildings had been subject to specific investigation.

Additional evidence

[39] In this section I deal with the affidavits filed by Mr Griffin and by the respective planners engaged by the parties. I stress again that, in the context of this judicial review hearing, there has been no cross-examination. In my assessment of the evidence I am not interested in resolving whether the planning decisions which the various deponents support are correct. The focus remains on lawfulness. The area of central concern must be Auckland Council's decision not to notify the application to change the building platform through variation of the consent notice.

Mr Griffin

[40] Mr Griffin, when considering the building platforms created in the 1999 subdivision, opined that the platforms were likely to ensure

geotechnical stability and may have been selected on the basis of visual consideration.[6]

[41] Mr Griffin deposes that he had found a February 2004 report by Riley Consultants lodged in support of subdivisional approval. He endeavoured to find a landscape report prepared by Mr E S Brown (also to be a deponent) and was aware, because of his historic involvement in the original subdivision, that Mr Brown too had been involved. He was unable to find any landscape report but, because he himself was a landscape architect he was "very conscious of landscape and amenity matters ...". He considered the selection of the building platform stipulated in the consent notice was "likely" to have been to ensure geotechnical stability.

[42] Candidly Mr Griffin accepts that it was not until this proceeding had been filed that he was able to research the issue further and had found the files relating to the original subdivision. He sets out the history, over which there can really be no contest.

[43] On the issue of notification, Mr Griffin deposes that initially he started drafting a separate report to deal with the variation application. He did not complete it, however, because he became involved in discussions with his team leader, Mr Buxton (the decision maker) and Mr M Wright "with regard to how to deal with the assessment of adverse effects section to the variation". There was also discussion about unnecessary repetition were there to be two reports dealing with the application to vary the consent notice and the notification aspect. Mr Griffin further states " ... in the interests of keeping it succinct, it was decided to combine the two rather than to continue with the separate variation report". He noted that "a new dwelling would be located partly within the original building platform". The original building platform was 225m^2. The proposed coverage of the second defendants' dwelling and roof overhang amounted to 225.46m^2 as a result of which Mr Griffin considered this in the context that the original building platform allowed development within an area of 225m^2.

[44] Mr Griffin devotes some space explaining his unchallenged recommendation that public notification under s 95A was not necessary. He then turns to whether there were any affected people who should be notified pursuant to ss 95B and 95E. He identified five adjacent properties, one being the plaintiffs'.

[45] He and Ms Redward had "reviewed" photographs they took on their first site visit on 27 September 2012. He refers to a second site visit five days later when he and Ms Redward placed a telescopic height flag to represent the proposed building's north-east corner. The two officers then considered the original building platform and concluded it was located "on a visually more prominent part of the site" and that moving the platform to the new location and closer to the road "would improve its placement relative to the site".

[46] I set out those portions of Mr Griffin's affidavit which deal specifically with the plaintiffs' property and the matters he considered in that regard on the notification issue.

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6 Above [37] and below [41]

7.36 We discussed whether the property at [the plaintiffs' property] was potentially affected and noted this site was separated by the Plantation Reserve. I discussed how I had processed the application for the additions and alterations on that property and that the conditions had included planting requirements, including within part of the Plantation Reserve. We did not go on to the property at [the plaintiffs' property]. We did walk on the Plantation Reserve but only close to and from the subject site.

7.37 In considering the potential effects on the property at [the plaintiffs' property] I was cognisant of the planting and landscape treatment requirements both within the site and along the Plantation Reserve. Having assessed the [the plaintiffs' property] Application I knew the planting proposed as part of the application was intended to contribute to privacy and the sense of separation relative to the Plantation Reserve and hence to [the second defendants' property]. Further, the proposed native re-vegetation planting required by the proposed conditions of consent for [the second defendants' property] would provide screening and contribute to the privacy of adjoining sites.

7.38 I was aware of the planting requirements for the resource consent at [the plaintiffs' property] both on the property and within the adjacent Plantation Reserve. In considering the Application I also considered the likely mitigation to be provided through conditions requiring native re-vegetation planting. In the District Plan's Coastal Natural Area rules, natural regeneration is desirable. In assessing the Application I was conscious that native vegetation (both planted and naturally regenerating) with the 10.5m wide Plantation Reserve between the dwellings at [both properties] will continue to establish and provide screening. This regeneration may in the future continue to change the views presently available from the dwelling at [the plaintiffs' property].

7.39 The Application required consent because of the 10m long, 1.5m wide x 225mm high height infringement associated with the proposed dwelling at [the second defendants' property]. With regard to privacy and potential domination, this is a small infringement at the north-end of the dwelling. In my view, if this element of the design of the dwelling was reduced to comply with the District Plan's permitted rule, this will be unlikely to alter any potential adverse effects.

7.40 A building generally blocks a section of view and a small increase in height such as the 225mm involved here, will have a minimal additional adverse effect in this regard.

7.41 Ms Redward and I noted any dwelling on the subject site would be in view from [the plaintiffs' property] under both the original building platform and the proposed platform. In considering the location of views and other factors, I was of the opinion that because the original building platform was to the north-west of the dwelling at [the plaintiffs' property], this would obscure the focal part of the view from this property ([the plaintiffs' property]).

[47] It should be noted:

(a) Mr Griffin did not go on to the plaintiffs' property. He ventured on to the Plantation Reserve but only close to and from the second defendants' property.

(b) He factored in the planting requirements of the Plantation Reserve in the context of screening and privacy.

(c) He considered that further planting could be a mitigation condition.
(d) As to the height infringement, he did not consider there would be adverse effects. However, he considered this aspect solely on the assumption that the new building platform would be the one used.
(e) On the issue of blocking “a section of view”, and again with reference to the 225mm height infringement, he considered the adverse effect would be minimal. But that was minimal against the view being blocked.
(f) He and Ms Redward considered that on either building site, a dwelling would be visible from the plaintiffs’ property. Mr Griffin was of the opinion that building on the original platform would obscure the focal part of [its view].

[48] Mr Griffin concluded, referring to both the second defendants’ applications:

> 7.44 I was satisfied that for both the proposal for a new dwelling and the proposal to move the building platform there were no affected parties. I had assessed the potential effects on the environment of both of these activities as part of my assessment.

[49] Mr Griffin, on the basis of these investigations and reasoning, recommended that the application proceed on a non-notified basis. He regarded both applications as being “intimately connected” and therefore considered them both together. He concludes, in his affidavit, that a consideration of potential adverse effects associated with the proposal “inevitably involved the proposed location of the building and was linked to the associated variation to the consent notice”.

Ms Redward

[50] Ms Redward, the Council officer who accompanied Mr Griffin on two site visits (2 August 2012 and 2 October 2012), refers to identifying the two relevant building sites on the second defendants’ land and the taking of some 14 photographs. On the issue of adverse effects on the plaintiffs’ property (and clearly Ms Redward and Mr Griffin assessed matters together and were speaking with one voice), Ms Redward says:

> 18. Mr Griffin and I discussed the separation distance of [the plaintiffs’ property] and noted the fact that Mr Griffin had assessed the application for the dwelling at [the plaintiffs’ property] previously. We reviewed the plans for [the second defendants’ property] and discussed that, with the relocation of the original building platform, any effects on the property at [the plaintiffs’ property] would be reduced from any dwelling being constructed within the footprint of the approved building platform under the parent subdivision. We did not enter the property at [the plaintiffs’ property], but did discuss the following:
> (a) The location of the windows and the prevailing view over Lion Rock and North Piha beach;
> (b) The 10.5 metre Parks Reserve, allowing a certain amount of screening affording a separation distance uncommon between residential properties; and

(c) The screen planting required under the Resource Consent for [the plaintiffs' property] and the potential to request screen planting under the current application (LUC-2012-1005).

19. Overall, Mr Griffin and I were able to reconcile that the effects on [the plaintiffs' property] of the change in the building platform at [the second defendants' property] would be less than minor as the position of the proposed building platform, being moved eastward toward Piha Road, would allow greater potential for viewing from [the plaintiffs' property] out of Lion Rock and up to North Piha. In addition, screen planting could be imposed through conditions of consent (as for [the plaintiffs' property]) to afford privacy to both properties. Further to this, Mr Griffin and I felt that the reserve separating the two properties gave considerable separation and screening. All these things being considered, Mr Griffin and I came to the conclusion that the property at [the plaintiffs' property] was not an "affected person" under section 95B and limited notification was not required.

[51] In short, it is Ms Redward's assessment that the decision not to notify the plaintiffs was made in the context of:

(a) Not entering the property.
(b) Discussing window locations and what they considered to be the prevailing view.
(c) The Plantation Reserve and screening considerations.
(d) Leaping to the conclusion that the effects on the plaintiffs' property would be less than minor because moving the building site would give the plaintiffs "greater potential for viewing ... out over Lion Rock and up to North Piha".

Mr Brown

[52] I turn next to the affidavit evidence of Mr Stephen Brown. He gave expert evidence on the plaintiffs' behalf. Mr Brown is a distinguished landscape architect of some 31 years experience. He has specialised in landscape assessment for planning purposes. He has particular knowledge of the relevant Piha area. He was engaged to produce reports relating to the 1999 subdivision of which the second defendants' land formed a part. A major concern for him at that time was the visual effect of dwellings on the various subdivision lots. For two of the lots (the second defendants' land being one), he recommended that care be taken to minimise the intrusive nature of site development and to ensure that a site be bedded into a bench platform below Piha Road. As Mr Brown observes, the varied new building platform is more elevated and closer to the road.

[53] In his 1990s reports, Mr Brown gave specific consideration to the terrain and elevations of the second defendants' lots:

> However, I also recognised that the separation of Lots 2's (sic) building platform from Piha Road and its location beyond a small knoll near that road would help to significantly reduce the effects of housing development. Furthermore, the 3m strip of planting subsequently required as a condition for development on Lot 2 was to be located between the building platform and the road corridor, largely on the knoll that I have just described. This was designed to filter views to a new dwelling, reduce its visual presence, and

help to retain a reasonably natural context for views of the nearby coastline. These matters were addressed in the course of my site analysis in 1997, and the conditions related to the mitigation planting that I have just described were incorporated in the final 1999 application, then Schedule A (clauses A2 and 3) of the Environment Court consent order (RMA No 1171/99 of 26 June 2001).

[54] Mr Brown then deposes that he revisited the site of the plaintiffs' home and noted two features of the repositioned building platform:

- The average ground level of the revised platform is some 4–5 metres higher than the consented platform and this has also shifted the house up-slope so that it is much closer to Piha Road and the adjoining dwelling on No 69. It sits much closer to the point where the ridge "rolls over" to meet Piha Road.
- The house currently under construction is not so much benched into the site, as elevated above it; indeed, I was quite surprised that the tops of the poles shown on my Attachment 2 represent the floor level of the proposed house.

[55] Then Mr Brown considers the effects of the second defendants' proposed home on the plaintiffs' land. He describes the existing views. He considers (with reference to a photograph on which a structure had been artificially superimposed)[7] the views of hills to the north would be lost together with the currently visible stretch of North Piha Beach.

[56] He also refers to the vertical scale of the dwelling dominating views and the overall outlook from the plaintiffs' deck areas, and possible privacy concerns. Mr Brown's concluded view is:

> In my opinion, the degree of visual intrusion and building dominance anticipated might not be so important in a more urban or suburban setting, but the orientation of the Green/Biles house to make the most of its outlook, and the highly appealing, panoramic nature of current views means that these changes, and related amenity effects, would be very significant.
>
> While I therefore also consider that the current planting, and any further planting within the Plantation Reserve – at the interface between both properties – might ultimately help to reduce the feeling of the Taylor/Palmolungo residence "turning its back" on the Green/Biles property, this would not in any way, offset the intrusion and building dominance anticipated, or the dramatic loss of views.
>
> I have also considered the effects of a house on the originally consented building platform. In my opinion, it is highly likely that such a structure would also encroach on the plaintiffs' views, with Lion Rock and most of the North Piha beachfront likely to be lost behind a new house. However, it would also sit some 4–5m lower down – potentially more if benched into the site – with the result that its roofline would, in all likelihood, be closer to the floor level of the Taylor Palmolungo residence as currently proposed. This

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7 Mr Milner White for the second defendants objected to the accuracy of the superimposed structure on the photograph. Certainly the structure was in the nature of a block rather than a designed facsimile of the proposed home. Leave was given to the second defendants to produce their own photograph, but understandably, since the site was visited, this was not done.

> would therefore leave most of the northern hill country, Te Waha Point and much of the Tasman Sea visible. Importantly, the panoramic breadth of the current view appears to remain intact, above any new residential form.

Mr Brown's opinion that the effects on the plaintiffs' property would be "very significant" has relevance to the notification issue.

[57] Mr Brown then turns to the notification issue itself. He had read the affidavit evidence of both Mr Griffin and Ms Redward, and had looked at Ms Redward's photographs. He listed four points which he considers "most salient to the current situation".

> • Firstly, neither Ms Redward nor Mr Griffin have actually been on the property at No 69 Piha Road and, much as their assessments appear to have been undertaken with the best of intentions, that is precisely why they have under-estimated the effects of relocating the Lot 2 building platform on No 69. In my opinion, neither the photos nor the written analysis provided explain this discrepancy.
> • Secondly, it appears that neither Mr Griffin nor Ms Redward have attributed any weight to the views obtained from adjacent part of Piha Road or the informal lookout next to it. That vantage point was taken into account in the original layout of the Byers subdivision, and it was reflected in the requirement for planting between Lot 2's building platform and Piha Road – as originally consented by Waitakere City Council, then incorporated in an Environment Court consent order. Although "informal", the area of road in question is still important in terms of the public's first impressions of Piha. Consequently, I am unclear why this matter has been overlooked by Mr Griffin and Ms Redward.
> • Thirdly, the dwelling approved by Mr Griffin and Ms Redward is not "grounded" or benched into Lot 2 in the manner that I have previously referred to; instead it would be elevated above the underlying and surrounding terrain on timber piles. Given the sensitive location of the revised building platform – relative to No 69 and the adjoining road corridor – it seems to me that every effort should have been made to reduce the profile of the proposed building. This does not seem to have occurred.
> • Lastly, much as the Plantation Reserve appears to loom large in the thinking of Mr Griffin especially, yet it is clear from the images that I have provided (attachment 7) that the panoramic views enjoyed by Mr Green and Ms Biles would remain largely intact, even with significant growth within that reserve. On the other hand, it is unlikely to greatly reduce or mitigate the building over-dominance and intrusion arising from relocation of the Taylor/Palmolungo residence.

[58] Mr Brown's conclusion is that the effects on the plaintiffs' property were not adequately addressed when the consent for relocation of the building was assessed and granted.

Mr Putt

[59] Expert evidence was given for the plaintiffs by Mr B W Putt. He is a planner of some 39 years experience in both New Zealand and the United Kingdom. He describes the effect of the new building platform:

> 14. My site visit to the subject site and the plaintiffs' site immediately raised in my mind the different effect the proposed new building platform has on the plaintiffs compared to the approved platform. The new platform has the adverse effect of dominating the plaintiffs' outlook and northeast

> to northwest facing living space. In this spacious suburban setting, consideration of the amenity of the neighbour is one of the important assessment criteria. It is important enough to be mentioned in the assessment criteria for subdivision in Rule 9 discussed above. By contrast the approved building platform covered by the consent notice allows a new dwelling to be built further away and not be so dominant in the broad line of sight and outlook from the plaintiffs' home.

[60] Mr Putt goes on to consider Mr Griffin's report and his deployment of the wrong test (no more than a minor adverse effect),[8] and correctly concludes that this alone should have led to notification of at least the plaintiffs.

[61] In broader terms, on the issue of notification, Mr Putt states:

> In my opinion the notification review ought to have included an assessment of the likely effects to be experienced from the plaintiffs' property and related those findings to the purpose of the consent notice. This would require examination of the purpose of the consent notice as the means of enforcing a condition of consent on a continuing basis to implement a resource consent. Consideration of the relevant assessment criteria for subdivision under Rule 9 mentioned above needed to be part of the assessment. Without examining this basic point there is no means of judging the merits of the varied (new) building platform with the purpose of the original building platform. This process was not followed and it does not appear that the plaintiffs' site was visited in order to take the primary step in assessing the difference in effects. Fundamentally the effects have not been addressed in terms of the requirements of s 221(3A) and there is no evidence that there was sufficient or reliable information to assist in that process. Accordingly the notification process was inadequate and did not meet the standards set by ss 95D and 95E of the Act to determine effects and affected persons. Had the correct analysis been followed, the plaintiffs would have been identified as affected persons and been notified.

[62] In suggesting a comparative analysis of the original building platform and the new building platform, Mr Putt's approach differs from that of Mr Lala's.[9] But certainly Mr Putt is correct when he observes that there was apparently no visit to the plaintiffs' site to assess the difference in the effects.

Mr Lala

[63] Expert evidence for Auckland Council was given by Mr V N Lala, who is a resource management planning consultant of some 18 years experience. Mr Lala's affidavit comprehensively reviews all relevant planning documents and rules. An early conclusion (not really being in dispute), is that the assessment of the second defendants' applications was acceptable and "not inconsistent with the relevant objectives and policies of the District Plan".

[64] On the issue of an assessment of adverse effects, Mr Lala states:

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8 Above [32].
9 Below [65].

> [47] ... In my view, the Council Officer reports appropriately addresses (sic) these matters, such that the decision maker has the relevant information before it, in order to make an informed decision on the proposed development.

[65] Mr Lala then considers the relevant processes which he sees attaching to an application to vary a consent condition relating to the building platform:

> [49] Indeed, the relevant RMA test for moving a building platform which has been set down via a consent notice through a subdivision consent condition is a standard section 104 assessment against the relevant planning controls as opposed to an assessment of the difference in effects between the previous building platform and any proposed building platform. That is, it is not a s 127 variation of consent condition test, where the difference in effects between the previous development and the proposed development is undertaken. Instead, it is an analysis against the actual and potential effects on the environment and any relevant provisions of, in this case, a District Plan. Whilst it is clear that there will be a change in effects resulting from a development on N, compared against a development on N1, as I have noted above, I do not consider that the correct RMA test is a comparison between the two building platforms, but instead an assessment of N1 and the associated proposed building, against the District Plan provisions.[10]

[66] Continuing with his assessment of adverse effects, Mr Lala notes (this not being startlingly new) that it is important when assessing actual potential effects, to have regard to the relevant provisions of the District Plan. He further notes that there is a 10.5m wide open space (the Plantation Reserve) between the two properties, which provides a wide buffer and which, in his view, is unusual in a residential setting of this nature. He considered the Plantation Reserve served the important purpose of providing separation and buffering.

[67] Mr Lala deals economically with the central issue of non-notification:

> [53] An exercise I have undertaken is to assess the proposed development on the site against the relevant planning controls and to consider whether it would be reasonable for such an application to be processed on a non-notified basis and for consent to be granted for that development, ignoring the previous building platform (N).
>
> [54] In my view, a key consideration in forming a view on these matters is the presence of the 10.5m wide Plantation Reserve, which I have addressed above, as well as the extent of consent matters for the proposed development. The Council Reports on these matters addresses these issues and in my view makes a reasonable recommendation to process the application operation a non-notified basis with the written approval of the Auckland Council Parks Department. Consequently, I consider that the Council made an appropriate determination on non notification of the application and it is one that any reasonable Council would have made.

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10 N is the original building platform and N1 the platform flowing from the proposed variation.

[68] Mr Lala's conclusion is that land use consent could be granted for the second defendants' proposed development on a non-notified basis, and that such infringements as there were by building on the new site, were minor in nature and appropriately addressed.

[69] Mr Lala's considered view was that if Auckland Council was obliged to consider the application again, it was likely that the outcome would be the same. He further said that any reasonable consent authority would have come to the same conclusion.

[70] This, of course, is important opinion evidence in a judicial review context.

Mr Buxton

[71] Finally, I turn to the affidavit of Mr R B Buxton, who was the decision-maker. Mr Buxton's current position is "Team Leader Resource Consents West" with Auckland Council, a role which he had held for 13 months at the time he made the decision. He has had 25 years experience with other territorial authorities. Additionally, he wore the hat of Mr Griffin's Team Leader. Mr Buxton and Mr Griffin had weekly meetings to discuss Mr Griffin's workload and consents of interest or where particular questions arose. One such issue was whether the second defendants' application should be processed as two applications or one. Mr Buxton's advice was that, because the application for a change of consent notice under s 221 had to follow the same process as a resource consent, the notification assessments under ss 95–95E should be combined. Mr Buxton's time sheets show that on 25 October 2012, the day before the decisions were made, he spent over two hours reviewing the documents presented by Mr Griffin, and discussing "suggested amendments" with him. Given the passage of time, Mr Buxton cannot recall the detail of those discussions. Nor is there evidence on what amendments were made. However, he deposes that he had full confidence in Mr Griffin's assessment and recommendations, given his many years of experience in landscape assessments. He was also aware that Mr Griffin was "very familiar" with the wider Piha area.

> [12] ... For these reasons, I knew the assessment of effects and consideration of affected parties had been undertaken with particular regard to any potential visual effects of the proposal on those neighbouring properties including the plaintiffs' property.

[72] On that basis, Mr Buxton made the decisions he did, and granted consents. He was satisfied that there were no persons considered to be adversely affected by the activity.

[73] Since these proceedings were launched, Mr Buxton has reviewed the documentation and (unsurprisingly perhaps), agrees with the decision he made in respect of non-notification.

The law

[74] Relevant statutory provisions under the Act were common ground. They include:

Notification

> **95. Time limit for public notification or limited notification** — A consent authority must, within 10 working days after the day an application for a resource consent is first lodged, —

(a) decide whether to give public or limited notification of the application; and

(b) notify the application if it decides to do so.

95A. Public notification of consent application at consent authority's discretion — (1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.

(2) Despite subsection (1), a consent authority must publicly notify the application if —

(a) it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor; or

(b) the applicant requests public notification of the application; or

(c) a rule or national environmental standard requires public notification of the application.

(3) Despite subsections (1) and (2)(a), a consent authority must not publicly notify the application if —

(a) a rule or national environmental standard precludes public notification of the application; and

(b) subsection (2)(b) does not apply.

(4) Despite subsection (3), a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.

95B. Limited notification of consent application — (1) If a consent authority does not publicly notify an application for a resource consent for an activity, it must decide (under sections 95E to 95G) whether there is any affected person, affected protected customary rights group, or affected customary marine title group in relation to the activity.

(2) The consent authority must give limited notification of the application to any affected person unless a rule or national environmental standard precludes limited notification of the application.

(3) The consent authority must give limited notification of the application to an affected protected customary rights group or affected customary title group even if a rule or national environmental standard precludes public or limited notification of the application.

(4) In subsections (1) and (3), the requirements relating to an affected customary marine title group apply only in the case of applications for accommodated activities.

...

95E. Consent authority decides if person is affected person — (1) A consent authority must decide that a person is an affected person, in relation to an activity, if the activity's adverse effects on the person are minor or more than minor (but are not less than minor).

(2) The consent authority, in making its decision, —

(a) may disregard an adverse effect of the activity on the person if a rule or national environmental standard permits an activity with that effect; and

(b) in the case of a controlled or restricted discretionary activity, must disregard an adverse effect of the activity on the person that does not relate to a matter for which a rule or national environmental standard reserves control or restricts discretion; and

(c) must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.

(3) Despite anything else in this section, the consent authority must decide that a person is not an affected person if —

(a) the person has given written approval to the activity and has not withdrawn the approval in a written notice received by the authority before the authority has decided whether there are any affected persons; or

(b) it is unreasonable in the circumstances to seek the person's written approval.

[75] I have deliberately excluded s 95D which relates to public notification under s 95A(2)(a). (There is no challenge to Auckland Council not publicly notifying the second defendants' applications).

Decision making power

104. Consideration of applications — (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to —

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of —

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

...

127. Change or cancellation of consent condition on application by consent holder — (1) The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent, subject to the following:

(a) the holder of a subdivision consent must apply under this section for a change or cancellation of the consent before the deposit of the survey plan (and must apply under section 221 for a variation or cancellation of a consent notice after the deposit of the survey plan); and

(b) no holder of any consent may apply for a change or cancellation of a condition on the duration of the consent.

(2) *Repealed.*

(3) Sections 88 to 121 apply, with all necessary modifications, as if —

(a) the application were an application for a resource consent for a discretionary activity; and

(b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

(3A) If the resource consent is a coastal permit authorising aquaculture activities to be undertaken in the coastal marine area, no aquaculture decision is required in respect of the application if the application is for a change or cancellation of a condition of the consent and does not relate to a condition that has been specified under section 186H(3) of the Fisheries Act 1996 as a condition that may not be changed or cancelled until the chief executive of the Ministry of Fisheries makes a further aquaculture decision.

(4) For the purposes of determining who is adversely affected by the change or cancellation, the consent authority must consider, in particular, every person who —

(a) made a submission on the original application; and

(b) may be affected by the change or cancellation.

[76] As a matter of interpretation I consider the plaintiffs are not covered by subs (4). They were not people who made a submission on the original subdivision application in the late 1990s which led to the creation of the consent notices. The "and" requires consideration of adverse effects on people who made submissions on the original applications, not people who fall outside that category.

Power relating to consent notices

221. Territorial authority to issue a consent notice — (1) Where a subdivision consent is granted subject to a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners after the deposit of a survey plan (not being a condition in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued), the territorial authority shall, for the purposes of section 224, issue a consent notice specifying any such condition.

(2) Every consent notice must be signed by a person authorised by the territorial authority to sign consent notices.

(3) At any time after the deposit of the survey plan —

(a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:

(b) the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.

(3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3).

(4) Every consent notice shall be deemed —

(a) To be an instrument creating an interest in the land within the meaning of section 62 of the Land Transfer Act 1952, and may be registered accordingly; and

(b) To be a covenant running with the land when registered under the Land Transfer Act 1952, and shall, notwithstanding anything to the contrary in section 105 of the Land Transfer Act 1952, bind all subsequent owners of the land.

(5) Where a consent notice has been registered under the Land Transfer Act 1952 and any condition in that notice has been varied or cancelled after an application or review under subsection (3) or has expired, the Registrar-General of Land shall, if he or she is satisfied that any condition in that notice has been so varied or cancelled or has expired, make an entry in the register and on any relevant instrument of title noting that the consent notice has been varied or cancelled or has expired, and the condition in the

consent notice shall take effect as so varied or cease to have any effect, as the case may be.

[77] It is of significance that consent notices are, under subs (4) registrable, and deemed to be interests in the land under the Land Transfer Act 1952. Such was the case in respect of the designated building platform on the second defendants' land.

Site visit

[78] On Saturday 10 August 2013, I conducted a site visit. This occupied approximately 30 minutes. I was accompanied by counsel, a court taker, and a Judge's clerk. Mr Green and Mr Taylor were present at their respective properties. Towards the conclusion of the hearing, this site visit had been proposed by both Mr Milner-White and Mr Loutit. Mr Webb was effectively neutral.

[79] The purpose of the site visit was solely to give me a better appreciation of such matters as the lie of the two properties, their proximity, and a visual appreciation of the two building sites and the views from the plaintiffs' home.

[80] I am satisfied this site visit was helpful, not in any sense relevant to powers exercised and decisions made under the Act, but rather to supplement the detail shown in various photographs put in evidence. Photographs do not always convey a comprehensive impression, and particularly was this the case with size and distance.

[81] The second defendants had endeavoured, by erecting four blue-topped poles, to mark out the original building site which the consent notice had designated on their land. The positioning of these poles had not been surveyed and were approximate. Mr Webb specifically noted in a memorandum that the plaintiffs didnot accept that the designated building site had been correctly marked for the purposes of the site visit. Counsel may be correct, but for the purposes of this decision and my site visit, nothing hangs on that.

Discussion

[82] This is not an appeal from the Environment Court. Nor is it an appeal from decisions made by Auckland Council under the Act. It is a judicial review application. The focus is not on the merits of Auckland Council's decisions made on 26 October 2012. The focus must instead be on core judicial review issues such as lawfulness and reasonableness.

[83] I adopt, with respect, the broad but nonetheless accurate summary of the function of judicial review in resource consent matters made by Wylie J in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*:[11]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor will the Court assess the merits of the resource consent application or the decision on

11 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442.

> notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

[84] I have indicated elsewhere[12] that the central focus, so far as judicial review is concerned, must be on Mr Buxton's 26 October 2012 decision not to notify the plaintiffs under s 95E of the application to vary the building platform consent notice.

[85] Were the second defendants entitled, as of right, to build anywhere on their land then, in my clear view, a judicial review challenge would be inappropriate and bound to fail. There are various infringements against planning rules by the proposed dwelling on the new building site, but such infringements have beencorrectly identified, competently assessed, and are (if I needed to express a view) for s 95E purposes, less than minor.

[86] But the non-notification of the application to change the building site is more complex. The parties' (and I am painting with a broad brush – not trivialising counsel's extensive submissions) respective positions are clear.

[87] Mr Webb's position was that from the time the plaintiffs acquired their property from relatives and planned and improved the dwelling on it, the adjacent vacant land had a designated building site registered on the title. The plaintiffs were neither fully consulted about, nor notified under the Act, of an application seeking to move that building site. The proposed new building site occupied higher ground and would thus inevitably be more obtrusive visually. It would change the view from their property (although it was accepted that property owners have no right to a view which is not preserved by provisions in a District Plan or covenants running with the relevant land). Because they were denied notification, the plaintiffs, as a matter of natural justice, have no right of input, no right to make submissions, and no right to have Auckland Council's decision tested in the Environment Court.

[88] Mr Loutit submitted that granting judicial review would be a futile exercise. Mr Buxton's decision on non-notification was not flawed. It was a proper discretionary planning decision under the Act, made when he was in possession of all relevant information. Even if the Court were satisfied that grounds for judicial review had been made out as a matter of discretion, it should decline relief. He further submitted that inevitably a building would have been built on the second defendants' land. Such an event was both expected and within the permitted baseline.

[89] Mr Milner-White echoed Mr Loutit's submissions. Were judicial review to be granted, the second defendants would be in a catastrophic situation. They had acted at all times in reliance on the advice

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12 Above [39].

they had received from the experts. They had prepared the site, laid down poles, and drawn down money. In that situation, even if there were grounds for judicial review, relief should be denied.

[90] The second defendants' plight would be aggravated not only by the prospect of an appeal from my judgment, but if my judgment was correct, there would be lengthy delays from a re-assessment by Auckland Council and the possibility of the plaintiffs exercising rights of appeal.

[91] The core issue, for judicial review purposes, must be whether Auckland Council was legally correct when it decided on 26 October 2012 that the activity of changing the site of the second defendants' building platform did not have adverse effects on the plaintiffs which were minor or more than minor.

[92] The Supreme Court has set out very clear principles relating to notification policy in *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[13] Since that decision, a statutory presumption has been removed from the statute, arguably bringing about a different notification scheme. However, there is clear authority that the principles enunciated by the Supreme Court have not in any way been undercut.[14]

[93] Tipping J said at [146] of *Discount Brands:*

> [146] Before a consent authority can properly conclude that adverse effects will be no more than minor, there must be an adequate informational basis for that conclusion. Information should be distinguished from assertion. The level of adverse effect may in some cases be physically self-evident as no more than minor. In others, such as the present, whether that is so becomes a matter of assessment. Sections 93 and 94 read together clearly indicate that the assessment must be made on the basis of information which is adequate, both in the sense of reliability and in the sense that it is sufficiently comprehensive. It is a significant step to preclude opposition to a resource consent application, particularly when the application is of a substantial kind like the present, and, additionally, is of a kind which the district plan itself required to be thoroughly evaluated.

[94] In similar vein, Blanchard J stressed the adequacy and reliability of information before the consent authority:

> [114] So, in summary to this point, the information in the possession of the consent authority must be adequate for it: (a) to understand the nature and scope of the proposed activity as it relates to the district plan; (b) to assess the magnitude of any adverse effect on the environment; and (c) to identify the persons who may be more directly affected. The statutory requirement is that the information before the consent authority be adequate. It is not required to be all-embracing but it must be sufficiently comprehensive to enable the consent authority to consider these matters on an informed basis.
>
> [115] The statutory requirement addresses more than the scope of the information. The consent authority must necessarily be satisfied as well that the information is reliable, especially so where an expert opinion is tendered.

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13 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, [2005] NZRMA 337.

14 *Ferrymead Retail Ltd v Christchurch City Council* [2012] NZHC 358 at [79]–[80]; *Coro Mainstreet (Inc) v Thames-Coromandel District Council* (above n9) at [42].

> The authority will need to consider whether the author of the opinion is both appropriately qualified to speak on the subject and sufficiently independent of the applicant so as to be seen as giving expert advice rather than acting as an advocate for the applicant.
>
> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[95] The Chief Justice, for her part, pointed out the jurisprudential consequences of non-notification:

> [21] A decision not to notify has significant consequences. It deprives others of the right to participate in the determination of the resource consent application. It also precludes any person other than the applicant from appealing or participating in the hearing of an appeal to the Environment Court from the grant or refusal of resource consent. The Environment Court is a specialist tribunal which on appeal conducts a full rehearing of the application and is able to substitute its judgment for that of the consent authority. Non-notification precludes the opportunity for anyone other than the applicant to seek such reassessment and from further appeal on a point of law to the High Court

[96] Mr Webb further relied on an over-arching constitutional consideration, stressed by Keith J in *Discount Brands*. His Honour correctly observed that a consent authority was effectively acting as a gatekeeper on non-notification issues, and that no hearing was involved. Keith J distanced himself from the Court of Appeal judgment under appeal which focused on a non-notification decision being a discretionary exercise, and whether there was sufficiency of evidence. His Honour said:

> [54] With respect, I do not agree. The power to review a gatekeeping decision such as that in issue in this case is an aspect of determining the scope of the right to be accorded natural justice affirmed in s 27 of the New Zealand Bill of Rights Act 1990, a power which the Courts have, traditionally, directly and fully exercised. It was not enough for the public body to show that its procedural direction was reasonable or that it was based on some material of probative value. We are not here concerned with the review of a substantive decision taken by the body authorised by statute, where the reviewing Court will not in general be in a position to substitute its assessment for that of the body by making, for instance, a de novo decision. But the cases on which the Court of Appeal principally relies for its essentially deferential position do concern such substantive decisions taken by public bodies with relevant expertise, democratic accountability or both. In some of the cases moreover there had been a hearing before the substantive decision was made and in others the decision in question involved the allocation of scarce resources.
>
> [55] I do not get beyond that preliminary obligation of the North Shore City Council committee to assess the adequacy of the information which they were to bring to bear on the procedural decision and their satisfaction about that, about which, as I have said, they were to be satisfied before being satisfied about the effects identified in s 94(2)(a) and (b). The record does not

> show how the members of the committee in making the decision not to notify addressed their minds to their being satisfied that the information they had was adequate. That is so although they were clearly advised on more than one occasion that the council officers did not think there was adequate information and had sought further information. There is no evidence at all about the members' response to the officers' opinion that the information was inadequate. They do not for instance claim to act on the basis of their general experience or background knowledge of the issues. The resolution on notification they adopted moves directly to the assessment of the effects – the subject-matter of s 94(2). While the members may say that it was implicit that they were satisfied that they had adequate information in terms of s 93(1), they do not say that and they give no reasons for reaching that conclusion with its important consequences, although they had been plainly put on notice on that matter.

[97] The Supreme Court's principles are particularly pertinent in a judicial review context. It is not the correctness of the non-notification decision which is being scrutinised. Scrutiny instead is on the adequacy and reliability of the information which, in this case, was gathered and assessed by Mr Griffin and formed the basis of Mr Buxton's decision not to notify anyone of the consent notice variation application. Was it (the information) adequate for Mr Buxton to understand the nature and scope of the requested activity? Was it adequate to assess the magnitude of any adverse effect? Was it adequate to identify people who may be more than directly affected? Was the information reliable? Was it sufficiently comprehensive? In particular, was the information sufficiently comprehensive and adequate against the background that a decision not to notify would "shut out from participation in the process those who might have sought to oppose it?"[15] Was Mr Buxton reasonably satisfied in the circumstances that the information he was considering was indeed adequate?

[98] This focus on adequacy and reliability of information was considered by Fogarty J in *Upland Landscape Protection Society Inc v Central Otago District Council:*[16]

> [53] The problem ULPS faces with this limb of its argument is that adequacy is a question of degree. A question of degree is a question which can be answered reasonably in different ways. There is a significant latitude in the reasonableness of the response by the local authority in this situation. On the face of it the local authority was presented with sophisticated visual depictions prepared and supported by expert landscape architects. There was no readily apparent deficiency.
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> ...
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> [55] The fact that ULPS has to prove error in the above manner tells against it having a reasonable cause of action. A local authority receiving and examining applications for resource consent is not expected by the statutory provisions to conduct a hearing. It is entitled to recognise documentation coming with the application as being an assessment of environmental effects.

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15 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n13, at [116] per Blanchard J.
16 *Upland Landscape Protection Society Inc v Central Otago District Council* (2008) 14 ELRNZ 403 (HC).

> Whether or not it is adequate can be a reasonably sophisticated judgment. The local authorities will employ qualified staff. As adequacy poses a question of degree, there is room for reasonable persons to differ on that. The fact that reasonable persons may differ on adequacy does not mean and cannot mean that the local authority has fallen into reviewable error. Moreover, a judgment as to adequacy has to be made in a practical fashion. The local authorities are entitled to rely on what appear to be professionally prepared assessments of environmental effects.

[99] I do not see these dicta of Fogarty J as a departure from the principles of *Discount Brands,* or some semantic quibble. Rather, His Honour has correctly pointed out that different people (like beauty being in the eye of the beholder) can *reasonably*interpret adequate or reliable information in different ways.

[100] So, did Mr Buxton have adequate and reliable information to reach his decision under ss 95B(1) and 95E(1), that the adverse effects on the plaintiffs' land was not minor or more than minor, and thus limited notification of the second defendants' application was not required?

[101] Mr Webb submits that the information is clearly inadequate and that Auckland Council erred in deciding not to notify. In support of that proposition he advances a formidable list of reasons:

(a) 3.5 of Mr Griffin's report,[17] the limited notification section, although correctly setting out at its start the criteria of ss 95B and 95E, concludes that the proposed dwelling "would have no more than a minor adverse effect on the amenity of adjacent dwellings including their views". This error seems to have passed both Mr Griffin and Mr Buxton (who on his evidence had requested various amendments to Mr Griffin's report the previous day) by. Mr Griffin deposes that he made a written error but had nonetheless applied the correct statutory test.[18]

(b) No Council officer, particularly Mr Griffin and Ms Redward, went on to the plaintiffs' site. This was a fundamental error in trying to assess effects, and resulted in inadequate information.

(c) The photographs taken by Ms Redward (11 of which are looking outward from the second defendants' site and not inward) were inadequate and made no attempt to show the effects of the proposed new building platform.

(d) The reasons for the designated building platform (evidence of which was given by Mr Brown) were not available to Mr Griffin to the full extent, because when he wrote his report, he was unable to find the 1997–1999 subdivision files.

(e) Mr Griffin and Mr Buxton decided to conflate the two applications made by the second defendants, with the result that there was no comparison of the effects of moving the building site from the position stipulated by the consent notice to the new position which the second defendants preferred.

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17 Above [22](a).

18 Mr Webb fairly submitted that the Court should exercise caution when considering ex post facto reasons for a decision which might not have been articulated at the time. See *Petone Planning Action Group v Hutt City Council* HC Wellington CIV-2006-485-405, 10 October 2006; *R(CD) v Secretary of State for the Home Department* [2003] EWHC 155.

[102] Thus, submitted Mr Webb, the information available to Mr Buxton in the sense stipulated by *Discount Brands* was inadequate. A reasonable decision on notification, particularly as it might relate to the plaintiffs, could not be made.

[103] Although accepting that the application to vary the consent notice required a discretionary planning decision under s 104 of the Act, it was mandatory for Auckland Council to consider s 104(1)(c). The effect of moving the stipulated building platform on the plaintiffs' land was something which was both relevant and reasonably necessary to determine. The available information was additionally insufficient for that purpose.

[104] I now turn to the contrary submissions mounted by counsel for Auckland Council and the second defendants.

[105] Perceiving, particularly from Mr Brown's evidence, that a major concern of the plaintiffs was the loss of their view to the north, Mr Loutit submitted that it was clear law, that the Act did not confer any right to a view.[19]

[106] Mr Griffin was an experienced planner who knew the relevant site and surrounding sites well. He made three visits to the site when assessing the second defendants' application. It was not fatal that he had failed to go on to the plaintiffs' land and assess the view from their balcony: *Auckland Regional Council v Rodney District Council* [2007] NZRMA 535 (HC) at [76].[20]

[107] Mr Loutit further submitted that there is no mandatory requirement under the Act to consider the original purpose of the consent notice building platform and related subdivision rules. Such matters might be considered, but there was no requirement so to do. The plaintiffs were trying to draw the Court into matters relating to s 104 merits. In any event, an analysis of the original consent notice might have limited relevance, given the effluxion of 14 years.

[108] Mr Loutit submitted that the information to be considered by Mr Buxton was reliable and adequate. In particular, the Council had:

(a) Researched the history and the original purpose of the consent notice.
(b) Specifically addressed the relevant Transitional Plan rules relating to the identification of building platforms.
(c) Concluded from that research that, in addition to geotechnical suitability, the building platform may have been selected on the basis of visual considerations.
(d) Concluded that in relation to visual effects and neighbourhood character, placing the proposed building closer to the road resulted in it being further away from the plaintiffs' view towards

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19 *Re Meridian Energy Ltd* [2013] NZEnvC 59.

20 This High Court authority raises somewhat different issues. Rodney District Council had granted a building consent for a dwelling on a ridgeline visible only by the users of a public walkway. Arguably the consent was inconsistent with the Auckland Regional Council's regional policy statement. The Regional Council had not been notified of the consent. Ultimately the Court of Appeal in *Auckland Regional Council v Rodney District Council* [2009] NZCA 99, [2009] NZRMA 453 held that, on a commonsense application of s 94, the effect on the ARC was not the sort of adverse effect contemplated.

> the beach and Lion Rock while still being well away from the plaintiffs' dwelling, because of the intervening Plantation Reserve.[21]

[109] Dealing with the registrable nature of consent notices, Mr Loutit submitted that these were "not as important" as some other registered interests (such as easements and registrable covenants). Furthermore they could be modified by mechanisms under the Act.

[110] On the notification issue, Mr Loutit submitted that the central question was whether notification of the consent notice variation was a discretion. If so, was it properly exercised?

[111] On the issue of whether it was mandatory to compare the two sites, Mr Loutit accepted that Mr Putt and Mr Lala had come to different conclusions. This was a difference on which the Court could properly rule.

[112] The fact that both the second defendants' applications were processed and determined together was not a fundamental flaw. Nor, submitted counsel, was the unfortunate use by Mr Griffin of the words "no more than minor".[22] His report contained a number of references to the correct criterion and, in any event, his affidavit confirmed his view that effects on adjacent properties would be less than minor, thus satisfying s 95E(1).

[113] Nor was the absence of a comparative assessment of the original building site against the proposed new site a fundamental flaw. What was required was a full assessment under s 104. That had been undertaken.

[114] Mr Milner-White for the second defendants adopted Mr Loutit's submissions. He questioned whether there was any proper legal basis for the former Waitakere City Council to impose a consent notice requirement as a condition of the land use (subdivisional) consent. He mounted, in tentative fashion, an argument that although the consent notice could not be invalid per se, its legal validity might be a matter for the Court to take into consideration in the exercise of its discretion.

[115] I can deal with that submission rapidly. This is not a situation where the consent notice was obtained by some form of fraud or forgery.[23] The consent notice was, from 2007, registered against the title of the second defendants' land, and was deemed to be an interest in land. It was notice to the world at large. Its status cannot be diluted.

[116] Prophetically, perhaps, Mr Milner-White's submissions were focused mainly on the issue of whether this Court should use its discretion to grant judicial review if grounds were made out.

[117] Dealing with the plaintiffs' submission that they had relied on registration of the consent notice defining the building platform, or at the very least were entitled to rely on such registration, Mr Milner-White submitted that reliance was not a relevant consideration under the Act.

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21 This was a reference to Mr Griffin's report.
22 Above [32].
23 Considerations relevant to lifting the protection of Land Transfer Act and indefeasibility provisions.

[118] He further submitted that assessment of effects was a normal part of the statutory process. The same assessment was part and parcel of the notification exercise. But the process did not mean that consultation with an affected owner was required. What had occurred was a perfectly normal and justifiable assessment under the Act, leading to an exercise of the notification discretion.

[119] Supplementing Mr Loutit's submission, counsel submitted that a comparison of the two sites under s 104(1)(c) was ultimately a discretionary matter. It was not an error of law to fail to carry out such a comparison because it was not mandatory so to do.

Analysis

[120] It is important not to lose sight of common sense. The plaintiffs had for some years owned their property and constructed their current home on it. On the other side of the Plantation Reserve, sitting across a slope, was a section of bare land for many years covered with scrub. From 2007, a consent notice designating a specific delineated building site was registered against the title of the bare land.

[121] Any owner or occupier of the plaintiffs' land would know that one day a dwelling would be built on the land below. All that was certain was that a dwelling could only be built on the designated building platform.

[122] The second defendants buy the bare land. They want to build a house on it. With care they make inquiries before they purchase the land. Afterwards they file the applications under the Act which have been described. What they propose is to use a new building platform which will not only be closer to the plaintiffs' land, but several metres higher than the designated building site, layered over the knoll which Mr Brown has described in his affidavit. If Auckland Council so permits, the certainty of a house being built on the designated site is removed. There is a new site elsewhere.

[123] Inevitably there will be an effect on the plaintiffs' land. The fact of the new position, coupled with a shorter separation distance, a greater altitude and elevation, and impeded view lines must have an adverse effect on the plaintiffs. Whether, in the round, such adverse effect is minor or more than minor and if so, what mitigating conditions might be imposed and indeed what form of planning decision should be made, all lie ahead. Those are indeed discretionary areas within which Auckland Council would need to make planning decisions. But to suggest that moving the building site has an adverse effect which is less than minor on the plaintiffs' land not only defies common sense, but would be a facile finding and clearly unreasonable.

[124] This conclusion is consistent with the evidence of both Mr Brown (who saw the changes as "very significant")[24] and Mr Putt which I find compelling. The altitude and positioning of the new site would have an effect on the plaintiffs' land which cannot sensibly be described as less than minor. The removal (on a comparative assessment)

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24 Above [56].

of the benched building site is significant. The new site is closer to the plaintiffs' land. Both Mr Griffin and Ms Redward initially assessed the new site as being on a visually more prominent part of the second defendants' land.[25]

[125] I have the firm view that under s 95E(1), and for the reasons I have stated, Auckland Council as consent authority was obliged (because the activity's adverse effects were minor or more than minor) to give limited notification under s 95B(1).

[126] To any extent that it is necessary to buttress this decision, I am also of the view that both Mr Griffin and Mr Buxton, when considering the notification issue applied the wrong test. The use of the words "no more than minor" might have been attributable to carelessness or been an unwitting error of the type which, when preparing a lengthy 30 page document under time pressures, would be easy to make. The statutory tests of "minor", "more than minor", and "less than minor" can only be informed by context. One is dealing with degrees of smallness.[26] Where the line might be drawn between the three categories might not be easily determined. "Less than minor", however, is the only category which relieves a consent authority of its s 95E(1) obligation to notify.

[127] I note, on Ms Redward's evidence[27] that she and Mr Griffin "were able to reconcile" the effects of the change to the building platform and described them as less than minor because, by moving the platform, one view would be enhanced. But that attempt at reconciliation (and the property was not visited) is silent on other adverse effects such as proximity and obstruction of the two unimpeded view lines. Although Mr Griffin in his report, in somewhat clumsy language, tries to summarise that reconciliation,[28] he does not spell out any reason why he considers (had he articulated the correct test) the adverse effects to be less than minor.

[128] I consider further that when Auckland Council considered the application to vary the consent notice, there should have been some comparative analysis of the designated site and the proposed new site. Both Mr Loutit and Mr Milner-White are correct when they submit there is no statutory requirement for such a comparison. Applications for variation under s 221(3) clearly (as specified in s 221(3A)) trigger a s 104 consideration. That is a discretionary exercise. But, as a matter of commonsense (again) an application for variation necessarily entails an examination of the condition which is to be varied.

[129] I am reluctant to lay down a firm rule for the process of consent notice variation applications. But certainly, on the facts of this case, in so far as a designated building site was concerned, the discretionary planning evaluation under s 104 should sensibly consider the original building site and the reasons for it and then, by way of comparison, evaluate the environmental impact of the proposed new site.

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25 In the round, Mr Putt's evidence was that the non-notification process was inadequate. For the reasons apparent in the previous paragraphs of this judgment I agree.

26 Not quite as futile as trying to decide how many angels can dance on a pinhead but nonetheless having aspects of that conundrum.

27 Above [50].

28 Above [37].

I agree with Mr Putt in that regard. His evidence states that good planning practice should require an examination of the purpose of the consent notice and an inquiry into whether some change of circumstances has rendered the consent notice of nofurther value. I disagree with Mr Lala's opinion evidence. Although Mr Lala was correct that s 127 did not apply here, a comparison should have been one feature (and certainly not the only feature) of the required analysis.

[130] In the context of this case, Mr Griffin's failure to consider in a more detailed fashion a comparison of those two building platforms has made it easier for him to minimise or read down the adverse effects on the plaintiffs which the change of building platform entails.

[131] I do not, incidentally, consider Auckland Council was wrong to deal with both applications in the one report. There was much sense in so doing, and certainly unnecessary duplication was avoided. Nonetheless, as Mr Webb submits, there was a large degree of conflation and an element of the cart coming before the horse. Had the effects of the variation application been considered first, the adverse effects on the plaintiffs' land would have been more evident.

[132] My conclusion is thus that the decision of Auckland Council not to notify at least the plaintiffs under s 95B(2) was unreasonable and infringed the relevant statutory criteria.

Discretion

[133] Much more difficult is the decision whether, in the exercise of this Court's judicial review discretion, I should grant the plaintiffs the relief they seek. The effects of quashing Auckland Council's relevant decision and requiring reconsideration will have a very serious effect on the second defendants who are largely innocent parties. Their plans and their expectations will be subjected to considerable delay. Regardless of any appeal from my decision, if I were to grant relief there would have to be a hearing before a Commissioner with the possibility of an appeal to the Environment Court.

[134] There are two potential obstacles to granting relief which were raised in the hearing. The first was Mr Loutit's submission that granting relief would be "futile" because it would be "inevitable" the same or a similar outcome would result given the provisions of the District Plan. The second obstacle is Mr Lala's expert evidence to similar effect.

[135] The second defendants have spent a considerable sum of money on their architect and plan preparation. They have drawn down a portion of a loan. Poles to support the house have been driven into place. Materials are on site. Although some of these materials could be reused, there will inevitably be wasted costs.

[136] If I do not grant the relief the plaintiffs seek, there is no possibility of the adverse effects which flow (alone) from moving the building site being mitigated.

[137] An additional problem is that the affidavit evidence filed by the parties relating to meetings on the site, conversations, timelines, and the inevitable criticisms of one another, have not been the subject of cross-examination.

[138] Mr Milner-White raises firstly, delay in the context of the Act and judicial review. In general terms, depending on the facts, if a third party has been adversely affected by delay the remedy of judicial review may be refused. The principles were discussed in *Turner v Allison*.[29] The remedy sought, as the date of the case suggests, was not judicial review but the prerogative writ of certiorari. The Court of Appeal considered that a long period of time during which the respondents remained inactive was a barrier to the Court exercising its discretion in their favour.

[139] More recently in *Beach Rd Preservation Society Inc v Whangarei District Council*,[30] the Court, although not refusing relief, identified an important question of whether delay had led one person to alter his position to his detriment relying on the other person's apparent acceptance of the Council's decision. In *Vining v Nelson District Council*,[31] Gendall J considered a four month delay between discovering a consent had been granted and commencing judicial review proceedings was critical. In *King v Auckland City Council*,[32] Randerson J declined relief where there was clearly an arguable case for the invalidity of a non-notification error because of the plaintiff's delay and the advanced state of building works would result in serious prejudice. The plaintiff had become aware of work being carried in mid-June 1999 but did not take any steps for five months.

[140] Mr Milner-White helpfully prepared a chronology (which he submitted demonstrates delay) which I adopt in part:

Date	**Description**
14 April 2012	Initial meeting on site between plaintiffs and Mr Taylor where there was discussion (according to Mr Taylor) of the possibility of moving the original building platform. (The plaintiffs do not recall this).
24 April 2012	Pre-application meeting with Council officials.[33]
18 June 2012	Title to property taken by second defendants.
18 September 2012	Applications filed with Auckland Council.
Late September 2012	Mr Taylor pegs out (at Council's request) proposed building platform. Mr Taylor states he showed the plaintiffs their resource consent plans and explains the pegs.
26 October 2012	Council grants consents.
28–29 January 2013	Mr Taylor commenced scrub-cutting and states he told Mr Green he is clearing the site in preparation for surveyor.
11 February 2012	Building consent application lodged with Auckland Council.
Early March 2012	Mr Taylor speaks with Mr Green on site and discusses various aspects of the building.

29 *Turner v Allison* [1971] NZLR 833 at 850 and 854 (CA).
30 *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176, [2001] NZAR 483 (HC) at [51]–[60].
31 *Vining v Nelson District Council* HC Nelson CP23/99, 16 November 2000.
32 *King v Auckland City Council* [2000] NZRMA 145 (HC).
33 Above [12].

15 April 2013	Auckland Council grants building consent.
23 June 2013	Mr Taylor clears boundary pegs for builder and informs Mr Green building will commence the following week.
24 June 2013 (approx)	Builders commence work.
26 June 2013	Mr Green telephones Auckland Council to arrange to see the property file.
27 June 2013	Building contract signed between builder and second defendants.
Late June–mid-July	Site works begin.
8 July 2013	Plaintiffs obtain the property file from Auckland Council.
7 July 2013	Plaintiffs' counsel put second defendants on notice.
12 July 2013	Formal letter from plaintiffs' counsel indicating judicial review would be pursued.
16 July 2013	Judicial review filed.
18 July 2013	Woodhouse J issues interim injunction to stop building works.

[141] Mr Milner-White's chronology has been drawn in the main from the second defendants' affidavits. The plaintiffs' affidavits, however, do not accept the detail of the very few discussions between the parties which took place on site. Ms Biles for her part says she has no recollection of meeting Mr Taylor in April 2012. She does, however, recall speaking to Mr Taylor on 22–23 September 2012 when he told her the proposed house would be at a lower level, not elevated off the ground, and stepped down the contour of the slope, not across the contour of the section. She is uncertain what plans she was shown but only took a brief look. There was particular emphasis on the house being stepped down the slope. She is also adamant that no mention was made of resource consents during that conversation.

[142] Mr Green for his part is certain that Mr Taylor never gave him or Ms Biles full information about the site development they were proposing. At no stage was there a visit with a full set of plans to sit down and discuss. Nor was there any discussion about the potential effects of moving the building platform. At most, he says, the parties had five or six brief discussions and that it was he who pushed for information.

[143] Mr Green, of course cannot be held responsible for the short delay between contacting Auckland Council and obtaining access to the planning file. Once the plaintiffs had seen the file, I am satisfied they acted promptly.

[144] Subject to the clear inability I have to make credibility findings, I am not prepared to find that the plaintiffs have been responsible for any inordinate delay. There is some corroboration of the evidence of Mr Green and Ms Biles that the extent and the effects of the proposed new building site were not raised. That corroboration is in Mr Lindsay's report of the 24 April 2012 pre-application meeting where he states that

Mr Taylor advised that he was contemplating building outside the building platform "to a minor degree".[34]

[145] In the context and circumstances of this proceeding, I am not satisfied the plaintiffs should be denied relief because of delay.

[146] I turn to other discretionary factors raised by counsel. Mr Milner-White, referring to the affidavit evidence of the second defendant, Ms Palmolungo, pointed to the significant costs incurred since consent was granted in late October 2012. Additionally, the second defendants have entered into a building contract to construct the dwelling for approximately $560,000. It was their hope that works would be completed in late November and the home would be occupied before Christmas.

[147] Work has commenced which includes foundation excavations, the construction of subfloor framing and placement of substantial pole foundations. The required fire-fighting water tanks have been sited and delivered. These costs, on Ms Palmolungo's evidence total approximately $187,000, including pre-ordered materials.

[148] Although I do not accept that the plaintiffs have sat on their rights, I certainly accept that there is a considerable degree of financial prejudice to the second defendants. The building contract, for instance, was executed on 27 June before the second defendants were put on notice by letter from the plaintiffs' counsel. The plight of the second defendants is a factor I must weigh. As I have indicated, they are largely innocent parties. The only criticism which can attach to them, on the basis of the affidavits filed, is their failure to explain in detail to the plaintiffs (whom they had met) their desire to move the building site away from the original building platform on to higher ground.

[149] A further factor to consider is the seriousness of the error. In a resource management context, it has been said that courts should take "a broad-based view of the features of the case in determining whether relief should be granted". The tendency is to look at substance rather than form. The nature of the statutory requirement, the degree of non-compliance and the effect of that non-compliance are all highly relevant.[35]

[150] There is some force in Mr Milner-White's submission that *Just One Life Ltd* is analogous. One aspect of that case was the siting of a building platform. The issue of possible adverse effects was not raised until after consent had been given to a non-notified application. Panckhurst J accepted that the non-notification decision was defective and adverse effects had not been separately considered. However, on the basis of the evidence, His Honour noted that adverse effects were minor or indeed de minimis and that such effects were limited to public views from segments of a distant road. His Honour concluded (at [65]) that there was no reviewable error but even if he was wrong, there should not be relief because the complaint was at best "somewhat technical".

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34 Above [15].

35 Per Panckhurst J, *Just One Life Ltd v Queenstown Lakes District Council* [2003] 2 NZLR 411, (2003) 9 ELRNZ 210 (HC) at [50]. See also *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314, 324 (CA), and *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4.

[151] I part company, however, with Mr Milner-White when he submits that the plaintiffs' complaint that they were not notified is "of a highly technical nature". The new building platform and the dwelling on it do not create potentially adverse effects to the public or from a distance. The environmental impact is hard by the plaintiffs' land. They were not notified and they ought to have been. The policy of s 95E has not been overlooked in a minor or technical way. It has been overlooked, so far as the plaintiffs are concerned, in a major way. Additionally, the failure to notify, as both the Chief Justice and Keith J observed in *Discount Brands*[36] has denied them the opportunity of any input, comment or ability to propose mitigating conditions.

[152] The final issue to address is Mr Loutit's robust submission that granting relief would be futile.[37] Coming as it does from counsel highly experienced in resource management areas, that is a worrying submission. Relevant to some extent too is Mr Lala's evidence.[38] But, with respect, I consider the submission is slightly flawed. It is based on the assumption that had the plaintiffs received notification and aired their concerns, Auckland Council would have given identical approvals. Perhaps it might have. But to so assert is speculative. Would the building platform have been moved, in its entirety, to where the second defendants wished? Would poles of the height the second defendants wished have been approved? Would the Council would have allowed the second defendants to utilise the knoll to the extent that they have? Neither I nor Mr Loutit have any idea what reports or evidence the plaintiffs might have submitted or what their effect might have been.

[153] Returning to the balancing exercise, given the nature of the non-notification breach, the undoubted fact that when they acquired their land the second defendants were entitled to build on only one designated portion of it, the clear policy of limited notifications under s 95E, and the plight of the second defendants, I find myself, by a small margin, unable to exercise my discretion against granting relief.

Result

[154] For the reasons stated in this judgment, I make the following orders:

(a) An order under s 4(2) of Judicature Amendment Act 1972 setting aside and quashing the first defendant's decision and related decisions under the Resource Management Act 1991 dated 26 October 2012.

(b) There is a direction pursuant to s 4(5) of the Judicature Amendment Act 1972 that the first defendant reconsider its decisions and make new determinations (by different officers), such reconsideration to proceed on the basis that the plaintiffs have received notification under ss 95B(2) and 95E(1) of the Resource Management Act 1991.

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36 Above [95]–[96].

37 Coming from the decision maker's counsel it might be argued such a submission was a component of pre-determination if Auckland Council is directed to reconsider.

38 Above [69].

(c) Leave is reserved to the parties to seek supplementary orders (consistent with the tenor of this judgment), should the need arise.
(d) The 18 July 2013 interim orders of Woodhouse J will remain in force until further order.

Costs

[155] Counsel are agreed that costs should be reserved. It is my hope that costs can be agreed.

[156] Clearly the plaintiffs are entitled to costs and their reasonable disbursements.

[157] I am disinclined to order costs against the second defendants. I also assume that there is a practice in terms of which the first defendant can avoid liability for the second defendants' full costs, but may be exposed to a contribution.

[158] If costs cannot be agreed, the plaintiffs should file a memorandum within 25 working days, and the defendants five working days thereafter. Counsel will need to be alert that I retire from the judiciary on 19 December 2013.

Reported by: Catherine McGrath