

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2021] NZEnvC 118

IN THE MATTER

of the Resource Management Act 1991

AND

an appeal under s120 of the Act

BETWEEN

T & L DRACH

(ENV-2020-CHC-141)

Appellants

AND

TASMAN DISTRICT COUNCIL

Respondent

AND

P & L SHIRLEY AND MOTUEKA
TRUSTEE (No 2) LIMITED

Applicants

Court: Environment Judge J J M Hassan
Deputy Environment Commissioner S G Paine

Hearing: at Nelson on 5, 6 and 7 July 2021

Appearances: J Ironside for the appellants
C Thomsen & C Luiseth for the respondent
E Chapman & S Galbreath for the applicants

Date of Decision: 11 August 2021

Date of Issue: 11 August 2021

INTERIM DECISION OF THE ENVIRONMENT COURT



- A: The appeal is allowed only to the extent that Conditions 9 and 10 are amended as shown in [85]. The appeal is, in all other respects, declined.
- B: Tasman District Council ("TDC") is directed to file for the court's approval, a further version of the consent, in TDC formatting, to reflect the findings in this decision.
- C: Costs are reserved and a timetable is set.

REASONS

Introduction

[1] Lynette and Paul Shirley and Motueka Trustee (No 2) Ltd (together, 'Shirleys')¹ live at 85 Dawson Road (Lot 27 DP 20482) ('Property', 'Site') in a Rural Residential enclave in the hills overlooking Māpua, called 'Māpua Estates' ('Estates'). The appellants, Thomas and Loreley Drach ('Drachs'), live in the Estates at 61 Dawson Road.

[2] The Estates is zoned 'Rural Residential (Māpua) Zone' under the Tasman Resource Management Plan ("TRMP"). It occupies an area of some 91 ha accessed via Dawson Road from Stagecoach Road. Dwellings typically have generous section sizes, sufficient to allow for some hobby farming. Between boundary sections are bushed gullies with associated wildlife. Many residents enjoy open expansive views from their properties towards the estuary and coastline, and across to the ranges.

[3] The Shirleys' Property is some 2.1 ha in area. That is generally typical of sections sizes in the Estates. They seek to subdivide their property into two

¹ The Shirleys' application, the decision on which is the subject of the appeal, was in the name of P & L Shirley and Motueka Trustee (No 2) Ltd.

allotments ('Proposal'):²

- (a) Lot 1 would comprise 1.0718 ha and would include their present dwelling;
- (b) Lot 2 would comprise 1.0371 ha. It would include a 842m² Building Location Area ('BLA') to allow for construction of a second dwelling.

[4] Under the Proposal, access to Lot 2 would be via a separate driveway further along Dawson Road as shown on the application plans. For completeness, the Proposal includes discharge of treated domestic wastewater to a denoted part of Lot 2 (the Estates presently not having reticulated services). However, the discharge permit granted for this part of the Proposal was not appealed.

[5] As is the case for other residential properties in the Estates, the Shirleys' property is the subject of a consent condition restricting application for consent for further subdivision. The condition was imposed as part of subdivision consent RM980189 granted for the Estates (in 1998) and is carried onto the Shirleys' title by a registered 'consent notice' under s221,³ RMA. The condition (Condition 1(j)) reads:⁴

That the registered proprietor (of the land) for itself and its successors from time to time shall not apply to Council for consent to subdivide the land, as that term is defined in the Resource Management Act, to the intent that the land will not be further subdivided except that this condition shall not apply to any subdivision that is a permitted [or] controlled activity or is a minor boundary adjustment.

[6] As we later explain, s221, RMA provides capacity for landowners whose titles are the subject of 'consent notice' conditions to apply to cancel the condition. Hence, the Proposal the subject of the application to TDC included a s221

² As shown in the Annexure from Exhibit P10, Common Bundle, p 8.

³ Resource Management Act 1991.

⁴ As referenced in the notice of appeal copy of TDC's decision on appeal, at [28].

application for cancellation of this condition.

[7] The Drachs were one of a few Estates' residents who were notified of the Shirleys' application. They submitted in opposition and presented their case at the hearing before independent commissioners. The commissioners granted the application in full.

[8] Substantially, the Drachs oppose further subdivision of the Site. Hence, their appeal seeks that the s221 decision be overturned to the effect that Condition 1(j) of consent RM980189 remains in force. Secondary to that, they seek improvement to the expression of Condition 9(a) of consent RM191100.

Does the appeal allow scope to decline the subdivision?

[9] A preliminary issue is as to whether the Drachs' appeal provided scope to fully decline consent for the Two-Lot Subdivision (i.e RM191100). The issue arises from the somewhat ambiguous expression of the notice of appeal, bearing in mind the appeal concerns both Condition 1(j), part of the original Estates subdivision consent (RM980189), and the two-lot subdivision consent granted by TDC (RM191100). In particular, the notice of appeal:

- (a) states that it is in relation to the "whole of the decision to cancel Condition 1(j) of consent notice 406066.3 ... and ... Condition 9(a) of subdivision consent RM191100" (but numbered TDC consent RM980189);
- (b) seeks by way of relief that "the decision to cancel Condition 1(j) of consent notice 406066.3 is itself cancelled" but with the additional statement:

Condition 1(j) should remain applicable, with the result that subdivision consent RM191102 is also cancelled.

Submissions

[10] Mr Ironside submitted that jurisdiction should be approached in a realistic and workable (and not unduly technical) manner. A successful challenge to the decision to remove the consent notice restriction against further subdivision of the site would result in the continuance of that restriction. That necessarily impugns the subdivision consent that has been granted.⁵ Counsel further submitted that, as the appeal is substantively against the further subdivision of the Site, it allows scope for consequential relief in effect to prohibit the submission of the survey plan for approval (in the event that the appeal against cancellation of Condition 1(j) succeeds).

[11] Mr Chapman replied that the Drachs were simply seeking to engineer a way around the narrow scope of their appeal which is plainly confined to aspects of the wording of Condition 9(a) of the consent. As such, counsel submitted that it is beyond scope to seek to suspend capacity to give effect to the two-lot subdivision ('Two-lot Subdivision') consent (RM191100).

Discussion

[12] Given the ambiguity in the notice of appeal, a purposive interpretation of the relief it seeks is required.

[13] There is a preliminary matter to clarify concerning the appeal's reference to Condition 1(j) as being "of consent notice 406066.3". A similar description of this condition is given in TDC's appealed decision, namely "condition 1(j) of consent notice 406066.3 on Record of Title NL 13C/705".⁶

[14] More correctly, Condition 1(j) is part of the subdivision consent RM980189 granted for the original Estates development in 1998. The s221(3) application was for the purposes of cancelling that condition which is part of the original

⁵ Submissions for the appellants, at [31].

⁶ Exhibit P13, Common Bundle, Tab 15.

subdivision consent. Under s134(1) RMA, that consent continues in force for the benefit of the Shirleys and attaches to the land to which it relates (including the Shirleys' Site). The substantive effect of TDC's decision was to cancel that subdivision consent condition. Similarly, the issue on appeal is as to whether that subdivision consent condition is to remain or be cancelled. The cancellation of the related consent notice, as it is registered on title, is a matter for the Registrar-General of Land, not TDC nor this court (s221(5), RMA).

[15] The notice of appeal gives the following reasons for the relief it seeks:

The decision to cancel condition 1(j) of the consent notice failed to have proper and sufficient regard to the existing environment, the actual and potential effects of allowing the cancellation, and the contribution the consent notice restrictions make towards preserving and protecting amenity values and rural residential character as an important component of the Mapua Estates development as a whole. The consent notice restrictions remain apt and applicable, by reference to the relevant objectives and policies in chapters 5 and 7 of the TRMP.

An amendment to condition 9(a) of the subdivision consent (consent notice stipulations) was proposed through the applicant's written reply, which the appellants had no ability to comment on. ... The condition imposed was not as proposed by the reporting officer, or by the applicant at the hearing. ...

[16] Those reasons reveal that the Drachs oppose the further subdivision itself, not simply the cancellation of Condition 1(j) of RM980189. The reasons also reveal that the Drachs' opposition to Condition 9(a) of the Two-lot Subdivision consent RM191100 is secondary to their primary relief, including cancellation of that consent.

[17] On the other hand, if the appeal was read as confined to seeking retention of Condition 1(j) of RM980189, that could lead to a perverse outcome. It could endorse continuance of the Two-lot Subdivision consent, despite this being at odds with Condition 1(j) of the pre-existing consent RM980189. Hence, we find a proper purposive reading of the notice of appeal is that it seeks, by way of relief,

the cancellation of the Two-lot Subdivision consent RM191100.

[18] Therefore, the relief sought in the appeal is:

- (a) retention of Condition 1(j) of RM980189 (with the consequence that the related consent notice remains in place);
- (b) cancellation of subdivision consent RM191100 (i.e. the Two-lot Subdivision consent); and
- (c) subject to that primary relief, change to the wording of Condition 9(a) of RM191100.

The statutory framework

[19] We have the same powers, duties and discretions as the first instance decision-maker. We may confirm, amend or cancel the appealed decisions (s290). We must have regard to the appealed decisions (s290A).

What discretion do we have in determination of the appeal?

[20] The Two-lot Subdivision consent is classed as a restricted discretionary activity under TRMP r 16.3.8.4. Section 104C, RMA prescribes that where an application is for a restricted discretionary activity:

a consent authority must consider only those matters over which ... —

- (b) it has restricted the exercise of its discretion in its plan or proposed plan.

[21] That constraint applies on appeal through s290, RMA.

[22] However, for appeals on decisions under s221 as to the cancellation of consent notice conditions, ss290 and 221(3A), prescribe a broader discretion. It encompasses all of the relevant matters in s104, RMA and other matters.

[23] Given those statutory directions:

- (a) are we confined to considering only the matters specified for a restricted discretionary activity under the 'TRMP' or
- (b) can we consider other matters within the scope of s221?

[24] Submissions were generally framed on the assumption that we may consider matters within the broad scope of s221, RMA. Counsel referred to the High Court authorities in *Green v Auckland Council*⁷ and *Ballantyne Barker Holdings Limited v Queenstown Lakes District Council*.⁸ These identify that it is relevant to consider the purpose of the consent notice and whether there has been a change in circumstances such as to mean the consent notice is of no further value.⁹ In *Ballantyne Barker Holdings Limited*, the High Court observed that consent notices:¹⁰

... should only be altered when there is material change in circumstances (such as a rezoning through a plan change process), which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purposes of the RMA.

[25] It was not a matter of dispute that a 'change in circumstances' can encompass both changes to the physical environment and the District Plan framework. However, different perspectives were offered as to what would be sufficient by way of changes to the District Plan framework to allow for cancellation of the consent notice. We return to these differences later in this decision.

[26] We find that ss 221 and 104C direct that we approach determination of the appeal in the following sequence:

- (a) have circumstances materially changed since Condition 1(j) was imposed such that it no longer achieves the RMA's sustainable

⁷ *Green v Auckland Council* [2013] NZHC 2364.

⁸ *Ballantyne Barker Holdings Limited v Queenstown Lakes District Council* [2019] NZHC 2844.

⁹ *Green*, at [129], *Ballantyne Barker Holdings Limited*, at [44]-[45].

¹⁰ *Ballantyne Barker Holdings Limited*, at [45].

management purpose?

- (b) if so, within the matters of restricted discretion, should the Two-lot Subdivision consent be cancelled or confirmed?
- (c) if confirmed again as a restricted discretionary activity, what if any changes are warranted to conditions (including Condition 9(a))?

The evidence

[27] Thomas Drach and Lynette Shirley gave evidence on their respective concerns, interests and issues. Neighbours, Michael Lynch, Brett Mercer and Alasdair Gardiner also gave lay evidence in support of the appeal. Landscape architect, Elizabeth Gavin, gave evidence as a witness for the Shirleys. We also heard from three planning witnesses, Ms Victoria Woodbridge (called by the Drachs), Mr Hayden Taylor (called by the Shirleys), and Ms Jenna Wolter (called by TDC).

Lay evidence

Mr Drach

[28] Mr Drach described the Estates as well thought out, in design terms, with “sweeping views, large areas of open space between residences, areas for rural activities, vegetated gullies and watercourse”. He talked about the convenience he enjoyed in the Estates’ relatively close proximity to Māpua and other centres.

[29] When cross-examined, he gave further colour to the amenity values he enjoyed from his property and whether the Proposal would materially impact on them.

[30] He accepted that the Proposal would not impact upon the broad views he enjoyed from his dwelling, over the hills above Nelson and north towards the sea. He also accepted that a dwelling constructed on the Shirleys’ proposed BLA would

not be visible from his dwelling's living areas.¹¹ He suggested that there was a risk a future owner of a dwelling on the proposed BLA could "grow trees that may interfere or otherwise impede amenity values", although he accepted that trees "would be part of a rural environment" and there are covenant restrictions. When it was put to him that there would be no affect on his amenity values, he answered:¹²

I would consider that a fairly broad question and I cannot say that there's no effect.

...

There's additional traffic. Certainly during the construction period, but long-term, any increase in traffic and noise in the community will have a deleterious effect on amenity values in my opinion, yeah, so ...

[31] Cross-examination revealed that Mr Drach's overriding concern is that allowing further subdivision would be "contrary to the certainty" that he and his family expected "when we decided to make a purchase in that development".¹³ As he sees it, all owners in Estates are subject to the same restrictions and hence there is an overarching issue of importance that this be maintained. He spoke about the related importance of avoiding "ad hoc subdivision" within the Estates. In answer to the court, he explained that he did not make a submission on the most recent District Plan change affecting the Estates ("PC60") because he had understood Condition 1(j) would not allow further subdivision. He indicated that nothing short of decline of the further subdivision would ameliorate his concerns, commenting:¹⁴

What we're concerned about is the entire development is at risk of having the same decision-making process applied to every parcel in the property.

[32] He accepted, however, that there were different interpretations of the

¹¹ NOE, p 55, l29 – p 56, l 5.

¹² NOE, p 57, l 5-10.

¹³ NOE, p 56, l 32-34.

¹⁴ NOE, p 63, l 18-28.

meaning of Condition 1(j) in terms of expectations it imposed on purchasers.

[33] When asked, Mr Drach answered that they had approached “nine parties in the immediate area and ended up selecting three to testify” in support of the appeal.¹⁵

Michael Lynch, Brett Mercer and Alasdair Gardiner

[34] Mr Lynch’s dwelling (101 Dawson Road) is orientated to face over Seaton Valley and intervening ridges, not the Site. He understood a “fundamental principle” is that there would be no further density of development within Estates. Under cross-examination, he noted a concern that further subdivisions would increase the amount of wastewater needing to be distributed over the same area of land. In addition, he is concerned that the higher the population density, the greater the risks and pressures for bird life.¹⁶

[35] Mr Mercer lives at 66 Dawson Road, a property down a long shared driveway. He described the importance of separation from neighbours and quiet and safe roads and other amenities. When cross-examined, he conceded that he could not see the Shirleys’ property from his. He explained that, when he purchased, he had interpreted the due diligence documentation provided to him to mean further subdivision was not allowed.¹⁷

[36] Mr Gardiner lives at 103 Dawson Road, some distance from the Shirleys. His property is also down a long driveway. One of his neighbours further subdivided their property some years ago. In cross-examination, he explained that he was surprised when that occurred as he had understood the consent notice condition to preclude it. When asked how this had affected him, he noted that he was aware others in the neighbourhood now thought they could subdivide. He noticed a “wee bit” more traffic and more parking on the road. He accepted that

¹⁵ NOE, p 64, l 17-29.

¹⁶ NOE, p 35, l 5-27.

¹⁷ NOE, p 41, l 1 – p 42, l 6.

he did not know whether the cars he noticed were from the new dwelling built following that subdivision.

Lynette Shirley

[37] Ms Shirley explained how the pre-purchase legal advice she and her husband got was that the inability to subdivide could change with time. While they did not nurse a subdivisional intention when they bought their property, they were deliberate in siting their dwelling so as to allow for the future possibility of doing so. She noted the lack of productive value of their land and their intentions, after subdivision, to improve on that by growing a small orchard. She explained that they now sought to subdivide for family reasons. In particular, it would enable their daughter's family to live beside them.

Landscape evidence

[38] Ms Gavin was the only landscape expert called to give evidence and her professional opinion was not significantly challenged. She is a landscape architect based in Nelson. She has significant experience in landscape assessment in Nelson, Tasman, Marlborough, Christchurch and Queenstown. We are satisfied that her opinion was duly informed by both her field work and consideration of relevant RMA planning instruments, notably the TRMP. She considers that the overall landscape and amenity effects associated with the Proposal are low. In summary, that is for the following reasons:

- (a) the Site is not part of any Outstanding Natural Landscape or Feature ('ONFL') or Significant Natural Area ('SNA') or within a protected ridgeline, prominent slope or area that breaks the skyline;
- (b) the resulting landscape character would be consistent with the patterns of development found in the receiving environment (in terms of lot size, separation between dwellings, and building location);
- (c) a future building on the proposed BLA would not be dominant in the landscape from any viewpoint or primary amenity area, given that

- consent conditions require a single storeyed dwelling with no more than three bedrooms and recessive exterior treatment;
- (d) the Proposal “closely reflects the subdivision pattern and housing typology” of the existing surrounding environment. It would have a rural residential character with potential for ancillary rural activity and this is consistent with the character that has developed within the visual catchment of the Site and with the TRMP’s anticipated landscape outcomes. It would “sit comfortably within the surrounding environment” and have “minimal impact on the overall visual amenity and character of the landscape”;
 - (e) rural residential levels of privacy would be maintained for the Drachs and their views of Tasman Bay, Rabbit Island, Nelson City and the mountains would not be materially impacted.

[39] Cross-examination did not significantly challenge those opinions. We accept them.

Planning evidence

[40] Much of the focus of the planning evidence was on the planning history, including concerning the District Plan provisions in force at the time of the application for the Estates’ development and how it subsequently evolved.

[41] Ms Woodbridge contrasted the approaches of the Transitional District Plan (Waimea Section) (“TDP”) and proposed Tasman Resource Management Plan (“pTRMP”) on rural residential subdivision as were in force when the Estates was consented in October 1998. As she summarised the position:

- (a) the TDP Rural D (Farmlet Zone) provided opportunities for rural lifestyle and hobby farms and specified a 2 ha minimum lot and 4 ha average lot size;
- (b) the pTRMP sought to protect land with high productive value. It provided more detailed objectives/policies on amenity value, rural

environment, landscapes (Obj 7.1.0, Pols 7.1.1.7 - 13, Chs 5 and 9).¹⁸

[42] Turning to the current TRMP, Ms Woodbridge considered this to take a materially similar approach to that of the pTRMP as at October 1998. She noted the fact that the TRMP maintains a minimum 2 ha lot size for controlled activities in the Rural Residential Zone. She characterised Pol 7.2.3.4 as clarifying the previous Pol 7.2.3 in terms of its application to the Rural Residential Zone, also referring to the related definition of ‘rural residential character’. She also pointed to the changes to the level of building coverage as providing ‘greater certainty with a clearer limit on building coverage’ and also to the provision made for a second ‘minor dwelling’ as a controlled activity.¹⁹

[43] Ms Wolter and Mr Taylor materially differed from Ms Woodbridge in their interpretation of the intent of the current TRMP. Both agree that it materially departs from the intentions of the former TDP and pTRMP:

- (a) Mr Taylor observed that the TDP and pTRMP did not provide guidance on a merits-based assessment.²⁰ Ms Wolter generally concurred;²¹
- (b) Mr Taylor characterised the current Māpua Rural Residential Zone as ‘directive of subdivision occurring’ provided that the matters of discretion can be addressed by evidence or conditions. He commented that it invites a merits-based approach to assessment. He analysed the TRMP’s objectives and policies as being enabling of further subdivision. He referred, in particular, to Pol 7.2.3.4 as enabling this outcome provided its three factors are satisfied;
- (c) Ms Wolter referred to Pol 7.3.3.18 as seeking to enable additional development in the Estates subject to servicing requirements and

¹⁸ Evidence of Victoria Emily Jane Woodbridge, dated 17 May 2021 (redacted), supplementary statement of Victoria Emily Jane Woodbridge, dated 2 July 2021.

¹⁹ Supplementary statement of Victoria Emily Jane Woodbridge, dated 2 July 2021

²⁰ Summary sheet of Hayden Craig Taylor, dated 2 July 2021, at [2.7], [2.8].

²¹ Rebuttal evidence of Jenna Jan Wolter, dated 31 May 2021 (redacted), at [11].

evaluation of effects according to the design guide.²² She contrasted this with policies for zones where the emphasis is on the protection of highly productive soils.²³ She described the Māpua Rural Residential Zone as an area that the Plan envisages for further rural residential development, subject to detailed scrutiny of proposals. She referred to the TRMP's 16.3.20 as setting out the rationale for related rules, namely:²⁴

... an expansion of the Mapua urban area intended to cater for residential and business growth to 2031 and beyond. It provides for residential and rural residential development on the hills behind Mapua.

[44] The planning evidence also traversed, to some extent, the proper interpretation of Condition 1(j) and how this pertains to consideration of amenity values. For example, Ms Woodbridge described the original Estates' development as intending to maintain a balance between built form and open space "to ensure high levels of amenity".²⁵ She characterised cancellation of Condition 1(j) as contrary to that in allowing for a doubling of "development rights" in an area of the Site that is "currently open undeveloped amenity space".²⁶

Related exhibits including as to the original consenting of the Estates

[45] Several related exhibits were entered by consent, generally pertaining to the history and background of the Estates' development, the District Plan and the Proposal.

[46] The Estates was originally consented as a non-complying activity, by a TDC

²² Brief of evidence of Jenna Jan Wolter, dated 17 May 2021 (redacted), at [42].

²³ Brief of evidence of Jenna Jan Wolter, dated 17 May 2021 (redacted), at [56].

²⁴ Brief of evidence of Jenna Jan Wolter, dated 17 May 2021 (redacted), at [17].

²⁵ Evidence of Victoria Emily Jane Woodbridge, dated 17 May 2021, at [95].

²⁶ Evidence of Victoria Emily Jane Woodbridge, dated 17 May 2021, at [88].

officer²⁷ under delegation, in October 1998.²⁸ It was a substantial development of some 60 rural-residential allotments over three stages. It was non-complying because the allotment sizes were smaller than the 4 ha minimum lot size standards of the then District Plan.²⁹ Hence, in order to be consentable, it had to satisfy the prerequisites that were then specified in the equivalent provision to s104D, RMA.

[47] What is now termed ‘Condition 1(j)’ was imposed as part of a suite of related development controls.

[48] The condition originated from correspondence as between the then TDC subdivisions officer and the developer’s planning consultant, during the processing of the application prior to it being granted under delegation. An officer (M D Morris, the ‘Resource Planner’) proposed that the condition be added to the ‘draft decision’ as it was standard practice to include such a condition.³⁰ The consultant, on the developer’s behalf, accepted the inclusion of the condition.³¹ That correspondence occurred approximately one week prior to the consent being issued.

[49] The Estate’s decision records the following broad reasons for granting consent on conditions (including Condition 1(j)):

The site is zoned Rural D under the Waimea Section of the Transitional District Plan. Under Ordinance 518.2, the minimum area for any new allotment is 2.0 hectares, with an average of all allotments (including balance areas) being not less than 4.0 hectares. Because this application does not meet the standard, it is considered to be a non-complying activity.

The site is zoned Rural Residential under the Proposed Tasman Resource Management Plan. Under Section 16.3.10(b) the minimum area for a Controlled

²⁷ Environment and Planning Manager, D C Bush-King.

²⁸ Exhibit P7, Common Bundle, Tab 8.

²⁹ Exhibit P7, Common Bundle, Tab 8.

³⁰ Exhibit H12.

³¹ Exhibit H13.

activity subdivision in the Mapua unserviced area is 4 hectares. Submissions have been lodged seeking a lesser minimum area. Because the application does not meet the standard in the Proposed Tasman Resource Management Plan, it is considered to be a Discretionary activity.

The subdivision has been carefully designed to ensure that adverse effects on Council's roading resource and on amenity, natural heritage and landscape values are avoided, remedied or mitigated. If the subdivision is carried out with the proposed conditions then the effect on the environment will be no more than minor. Conditions have been imposed to mitigate the effect the subdivision will have on Council's roading resource.

While some of the lot sizes are much smaller than what is allowed for in the Transitional and Proposed Plan, they have been carefully designed with special restrictions on building sites to ensure that adverse effects are kept to a minimum. Consent notices are to be imposed to protect the natural heritage values of the native vegetation and wetlands. Also additional planting of appropriate native species has been required prior to construction of dwellings on the allotments. With these restrictions and covenants, it is considered that there is lesser chance of adverse effects from this subdivision than from a complying 4 hectare allotment subdivision.

The building site areas (subject to an amended plan) are to be set back from adjoining properties within the standards of a rural residential zone to ensure that adverse effects on neighbouring properties are kept to a minimum. It is considered that the proposed subdivision (in the context of its zoning as rural residential) will not have an adverse effect on neighbouring properties.

The proposed subdivision is not contrary to the policies and objectives of the Regional Policy Statement, the Transitional District Plan and the Proposed Tasman Resource Management Plan. The subdivision will not result in fragmentation of highly productive land and it will ensure that adverse effects are kept to a minimum.

Submissions

Submissions for the Drachs

[50] Mr Ironside submitted that the starting point is to consider the purpose intended by Condition 1(j) and what it specifies.

[51] As for its purpose, counsel submitted that it was part of an integrated set of development controls that contemplated “an end state of development over a significant area (93.2 ha)”. Importantly, the further subdivision restriction was imposed across all lots to achieve an “overall balance”.³²

[52] Pertaining to that, at the time the Estates was consented, it was not intended to allow for an individual lot owner to subsequently seek further subdivision. Rather, as reflected in the expression of Condition 1(j), further subdivision was only intended to be enabled if and when there was a District Plan change to the effect of enabling further subdivision for all lots in the Estate either as a controlled activity or minor boundary adjustment.³³ Counsel submitted that the Proposal fails the requisite test of whether there has been a material change in circumstances, in terms of the District Plan regime. That is in terms of the test counsel submitted must be satisfied, namely:³⁴

... do the relevant plan provisions indicate that an application to subdivide this site should be treated as if it is a controlled activity under the TRMP[?]

[53] Counsel submitted that there would be related significant adverse impacts in allowing the Proposal. Those are not only in terms of amenity but in setting an adverse precedent and undermining confidence in the design intentions of the Estate.

³² Submissions for the appellants, at [6], [9].

³³ Submissions for the appellants, at [7], [9].

³⁴ Submissions for the appellants, at [10]-[13].

Submissions for the Shirleys and TDC

[54] It is convenient to deal with these submissions together, as they closely inter-relate.

[55] Messrs Chapman and Thomsen disagree with Mr Ironside’s interpretation of the condition’s reference to controlled activity subdivisions. Rather than this being a trigger for when a s221 application could be made, they submit that it is intended only as an exemption to the effect that the condition does not apply to such classes of subdivision.³⁵ They also disagree with Mr Ironside that the current TRMP can be put aside as not materially changing the Plan regime. Rather, they say that it is sufficient if further subdivision would be consistent with the current TRMP’s intentions. Mr Thomsen submitted that, according to the guidance in the Supreme Court decision in *NZ King Salmon*,³⁶ we should treat the Plan as fleshing out pt 2 RMA for the purposes of s221. As such, a “key consideration” is whether the resource management purpose of the consent notice at the time of the grant of consent is still consistent with the outcome contemplated for the activity in the Plan”.³⁷ Similarly, Mr Chapman submitted that the test was as to whether the consent notice continued “to add legal value to the interpretation of plan rules and policies” or “over and above a reading of plan provisions”.³⁸

Discussion

[56] For the following reasons, our answers to the questions posed at [26] are as follows:

Have circumstances materially changed since Condition 1(j) was imposed such that it no longer achieves the RMA’s sustainable management purpose?	Yes
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³⁵ Opening submissions for the applicants, at [39], submissions for TDC, at [37].

³⁶ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38.

³⁷ Submissions for TDC at [30], [31].

³⁸ Opening submissions for the applicants, at [36]-[41].

If so, within the matters of restricted discretion, should the Two-lot Subdivision consent be cancelled or confirmed?	Confirmed
If confirmed, what if any changes are warranted to conditions (including Condition 9(a))?	As per [85]

What does Condition 1(j) mean and what is its purpose?

[57] Condition 1(j) was imposed as part of a comprehensive set of controls. These were to satisfy the non-complying activity threshold and broader RMA requirements for consent as a non-notified application.

[58] Plainly, on its face, Condition 1(j) leaves unconstrained both the statutory right to apply for cancellation of the condition and the discretion to determine any such application. It refers to controlled activity subdivision (and permitted activity subdivision) only insofar as to exclude these categories of application from the condition itself.

Have there been material changes in circumstances?

[59] We find Mr Ironside's approach to the consideration of the TRMP unduly narrow. There is no sound basis to regard changes to the TRMP as relevant only insofar as the TRMP is changed to enable controlled activity subdivision. Rather, we consider the TRMP according to the approach signalled by *King Salmon, R J Davidson*³⁹ and *Tauranga Environmental Society*.⁴⁰ That is as an RMA instrument serving to flesh out pt 2, RMA in its local context. It is to be read for what it seeks to achieve through its objectives, policies and rules. Hence, in comparing the District Plan regime in place at the time Condition 1(j) with the TRMP, we consider whether the TRMP seeks any materially different outcome for use and development of land of the Estates including for the purposes of pt 2, RMA.

³⁹ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

⁴⁰ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2020] NZEnvC 43.

[60] We find there have been material changes in circumstances from that prevailing when Condition 1(j) was imposed, in terms of both the District Plan regime and the receiving environment.

[61] The Estates' consent decision (RM980189) gives the following description of the then environment:⁴¹

The site of the proposed subdivision is situated between Seaton Valley Road and State Highway 60. It is an elevated site rising up to the Old Coach Road⁴² which runs along the ridgeline separating Seaton Valley and Gardner Valley. The land has, until recently, been planted in pines with some regeneration of native bush in the gully running towards Dominion Road and eventually into the Mapua estuary.

The property has frontage to formed roads, Seaton Valley Road which is sealed, Old Coach Road which is of metal formation and the Coastal Highway which has an existing legal road access.

[62] That description gives some insight into the advantages the land would have had for rural lifestyle development, in terms of accessibility and proximity to Māpua. The District Plan regime at the time of the consent application in 1998 similarly reflected the fact that this predominantly rural area was experiencing increasing demand for 'lifestyle block' living.

[63] That was evident in provisions of both the then operative ('transitional') district plan ('TDP') and pTRMP.

[64] As noted, under that Plan regime, subdivision below the specified minimum areas was classed as non-complying (under the TDP) and discretionary (under the pTRMP). Related policies of both the TDP and pTRMP reflected intentions to protect against the loss of highly productive land and its associated values:

⁴¹ Exhibit P7, Common Bundle, Tab 8.

⁴² We infer this is a reference to Stagecoach Road.

- (a) the TDP's Rural D (Farmlet) Zone, in which the Estates was located, gave a policy direction that the minimum lot size rules were 'to encourage landowners to subdivide their less productive areas from their farm but leave the productive areas with sufficient land area to maintain viability' (Pol 2.75.3(i)). Related policies referred to intentions to achieve compatibility 'with surrounding rural uses' and the protection of the rural character and lifestyle of the area (Pols 2.75.3(i) and 2.75.3(i));
- (b) the pTRMP reflected a similar theme of managing land use change. Its policies similarly sought to limit subdivision of highly productive land and to manage subdivision to limit loss of such land (Pols 7.1.1 and 7.1.3). Added to that were two further priorities in regard to the control and management of subdivisional development. One was to 'limit the intensity of development where sewage reticulation and treatment are not available' (Pol 5.1.3). Another was to 'discourage subdivision developments and activities which would significantly alter the visual character of land in outstanding landscapes (including adjoining national parks)' (Pol 9.1.5).

[65] Ms Wolter helpfully summarised the environmental change that has transpired:⁴³

The receiving environment was rural in nature and relatively undeveloped. The current environment is predominantly rural residential, with a much denser pattern of residential development.

[66] Those observations reflect what we observed on our site visit. Firstly, in the wider environs, there is further residential development on the perimeter of Māpua and connecting sealed roads between it and SH6, reflective of the continuing residential development of the area. The Estates itself is now an established Rural Residential enclave, signposted at its Stagecoach Road entrance,

⁴³ Synopsis of evidence of Jenna Jan Wolter, dated 4 July 2021, at [3].

and with many established dwellings accessed off the sealed spine road (Dawsons Road).

[67] While the current TRMP maintains broadly similar minimum lot sizes, it materially changes the related development intentions towards accommodation of further subdivision. That is under the TRMP's Rural Residential Zone.

[68] Provision 7.1.20.1 explains that the Rural Residential Zone, together with the Papakainga, Rural Industrial and Tourist Service zones, are of the 'small parts of the wider rural environment' that are mostly 'of lower productive value'. It explains:

... the Plan provisions have not been developed to protect or maintain any such values within the zoned area.

[69] Related to that is the change of activity classification for breach of the minimum lot size standards to restricted discretionary activity (r 16.3.8.4). There is a material shift in the direction given by related TRMP objectives and policies and in terms of the matters for consideration under the restricted discretionary activity rule.

[70] For the Rural Residential Zone, there are objectives to retain opportunities for non-productive uses including Rural Residential living (Objs 7.2.2.1 and 7.2.2.2). That is backed by related policies. Notably, lack of sewage reticulation and treatment is no longer identified as a necessary barrier to subdivision. Rather, policies allow for consideration of onsite management, or provision of offsite reticulation (Pol 7.3.3.10). The Estates is identified to be within the 'Māpua Rural Residential Zone'. For this, there is a bespoke policy to enable consideration of the adequacy of servicing requirements (and evaluation of the effects of specific proposals in accordance with the 'Coastal Tasman Area Subdivision and Development Design Guide') (Pol 7.3.3.18). Overarching this, Pol 7.2.3.4 is to 'enable' further subdivision and residential development within any existing Rural Residential Zone provided that the land:

- (a) 'is not affected by natural hazards, within and beyond the boundaries of the site, including wildfire risk and coastal, flood, stormwater, geotechnical or earthquake hazards';
- (b) 'can accommodate the proposed development without adverse effects on landscape or rural, rural residential or coastal character and amenity values and adjacent plant and animal production'; and
- (c) 'can be adequately serviced for water, wastewater, stormwater and road access and by the road network'.

[71] The matters for discretionary consideration similarly reflect a material shift in focus to providing for the further development of land that is Rural Residential, rather than productive, in both established nature and purpose. Hence, the matters for discretion include:⁴⁴

- (a) the relationship between the subdivision proposed and subsequent development, including effects of location and scale of buildings and other structures;
- (b) effects on the rural landscape and amenity values;
- (c) the ability of the wider landscape to absorb the extent of development proposed;
- (d) actual and potential cumulative adverse effects; and
- (e) bonds, covenants and financial contributions.

Does Condition 1(j) promote the RMA's sustainable management purpose?

[72] We accept the planning evidence of Ms Wolter and Mr Taylor in finding that, in view of that material change in the District Plan intentions, Condition 1(j) no longer serves the RMA's sustainable management purpose either for the Estates generally or for the Site and the Proposal in issue.

⁴⁴ Exhibit P15, Common Bundle, Tab 17.

[73] Considering the Estates generally, Condition 1(j) is now at odds with the enabling intentions of the TRMP in regard to further subdivision of land within Māpua Rural Residential Zone. To that extent, it is obstructive of the RMA's sustainable management purpose.

[74] Furthermore, we find that the Two-lot Subdivision would not materially impact on any other environmental quality or value or other matter in pt 2 RMA or as identified by the TRMP. That includes the amenity values held by the Drachs and all the other residents who gave evidence in support of the appeal.

[75] Under s7(c), RMA we must have 'particular regard to' 'the maintenance or enhancement of amenity values'. The RMA defines 'amenity values' to mean (s2(1)):

... those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[76] In his reply, Mr Chapman submitted that, given the direction given by the District Plan (noting Pol 7.2.3.4), the proper focus for considering amenity values is on the values "of the area" rather than those of "one particular person or groups of persons".⁴⁵ We find the focus is broader than that, and encompasses the values held by people who live at the Estates, as revealed by the evidence. However, from that broader perspective, we find that there are no material impacts from the Proposal on amenity values.

[77] Notably, neither Mr Drach nor other residents were able to identify any material impact of the Proposal on views, privacy or any other amenity value they enjoy and associate with their properties or the Estates generally. Even insofar as traffic and car parking effects were noted, these were plainly minimal and in

⁴⁵ Transcript of closing address of E Chapman for the appellants, p 10, 16-20.

keeping with living in a rural residential enclave.

[78] On the other hand, we find that the Proposal will give opportunity to the Shirleys to materially enhance their amenity values. That is in fact that it will enable them opportunity to enhance their landscaping and have family live beside them.

[79] We accept the evidence of Ms Gavin in finding that cancelling Condition 1(j) and enabling the Two-lot subdivision would not have any material effect on landscape or rural amenity values such as are identified and prioritised under the TRMP. Nor would it materially impact on views, levels of privacy or other amenity values. Similarly, on the evidence we find the Proposal would not materially impact on any quality of the environment of the Estates or more widely (s7(f), RMA). There are no further findings we need to make under any of ss 6-8, RMA.

Do any other matters mean cancellation of Condition 1(j) is not appropriate?

[80] Insofar as the Drachs or other residents nursed any misconception about the true legal nature of Condition 1(j), that is not a matter that favours the relief pursued. Rather, they are responsible for having made the choices they made on the extent of legal or other advice they received. Similarly, nor do we find any force in the Drachs' claim that cancellation of Condition 1(j) would give rise to adverse precedent. Rather, its cancellation is to enable a Proposal that satisfies the case for consent, in accordance with the TRMP's intentions for the Māpua Rural Residential Zone.

As a restricted discretionary activity, should consent be granted or declined?

[81] We accept the planning evidence of Ms Wolter and Mr Taylor on these matters. In any case, in light of our evidential findings, we are satisfied that the Proposal can and should be consented.

[82] In terms of the matters for restricted discretionary consideration under TRMP r 16.3.8.4, we accept the opinion of Ms Gavin (and the related planning

opinions of Ms Wolter and My Taylor) in finding that:⁴⁶

- (a) the BLA provides a suitable and appropriate location for construction of a further dwelling for Lot 2 and related conditions (including the amended Condition 9(a)) will provide appropriately for the control of its location and scale, having regard to the existing dwelling and neighbouring properties and dwellings; and
- (b) the Proposal would not have any material effects on the rural landscape and amenity values and will be effectively absorbed into the wider landscape and not give rise to any material cumulative adverse effects (actual or potential).

[83] On the evidence, we find the Proposal is properly consistent with and supported by relevant TRMP objectives and policies. In particular:

- (a) the Site can accommodate the Proposal without adverse effects on landscape or rural residential character and amenity values (other aspects of Pol 7.2.3.4 not arising on the evidence);
- (b) adverse effects on Site amenity and landscape values are avoided and adequately mitigated (other aspects of Pol 5.1.3.1 not arising on the evidence);
- (c) effects as specified in Pol 5.1.3.9 are avoided or adequately mitigated beyond the boundary of the Site;
- (d) no other effects or issues as are identified in relevant Policies arise on the evidence; and
- (e) the Proposal will assist to serve and achieve related TRMP objectives including Objs 7.2.2.1, 7.2.2.2 and 5.1.2.

What if any changes are warranted to conditions (eg Condition 9(a))?

[84] According to directions made prior to the close of the hearing, counsel for

⁴⁶ Exhibit P15, Common Bundle, Tab 17.

TDC filed a set of conditions including updating Condition 9(a). The update to Condition 9(a) is proposed with the support of the planning witnesses as satisfactorily clarifying its intent. It reads (tracking showing recommended change):

9. The following consent notice shall be registered on the Record of Title for Lot 2 pursuant to section 221 of the Resource Management Act 1991:
 - (a) Any new dwelling shall be constructed ~~generally~~ within the identified Building Location Area shown on Plan A attached to resource consent R.M191100.

[85] We find that revision is appropriate. However, Condition 9 itself (as well as Condition 10) needs to be recast to properly reflect the nature of such enduring conditions of consent (to which consent notice obligations under s221 apply). The conditions are to be revised to commence as follows:

Enduring consent notice conditions

9. The following are conditions in respect of which a consent notice issued by Tasman District Council shall be registered on the Record of Title for Lot 2 pursuant to section 221 of the Resource Management Act 1991:

...

[86] Purported 'Condition 11' is proposed by TDC as follows:

Consent notice cancellation

11. Pursuant to section 221(3) of the Resource Management Act 1991, Clause (j) of consent notice 406066.3 shall be cancelled from Record of Title NL13C/705.

[87] There is no need for such a condition as it is a function of this decision to cancel Condition 1(j). As noted, a further defect in this proposed drafting is that it would confuse the cancellation of this Condition with the function of the

Registrar-General of Land as to the cancellation from the Register of the related consent notice. Hence, purported Condition 11 will not be included in the Two-lot Subdivision consent confirmed by this decision.

[88] Subject to those changes, we are satisfied that the Two-lot Subdivision consent should be confirmed subject to the proposed conditions. As further tidying is required, this decision includes a direction to TDC to file, for the court's approval, a further updated and complete version of the consent in TDC format.

Result

[89] The appeal is allowed only to the extent that Conditions 9 and 10 are modified as set out at [85]. The appeal is otherwise declined.

[90] TCD is directed to file for the court's approval within ten (10) working days, a further complete copy of the consent revised to reflect our findings.

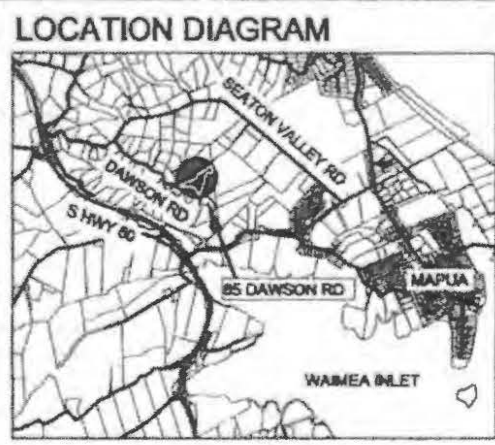
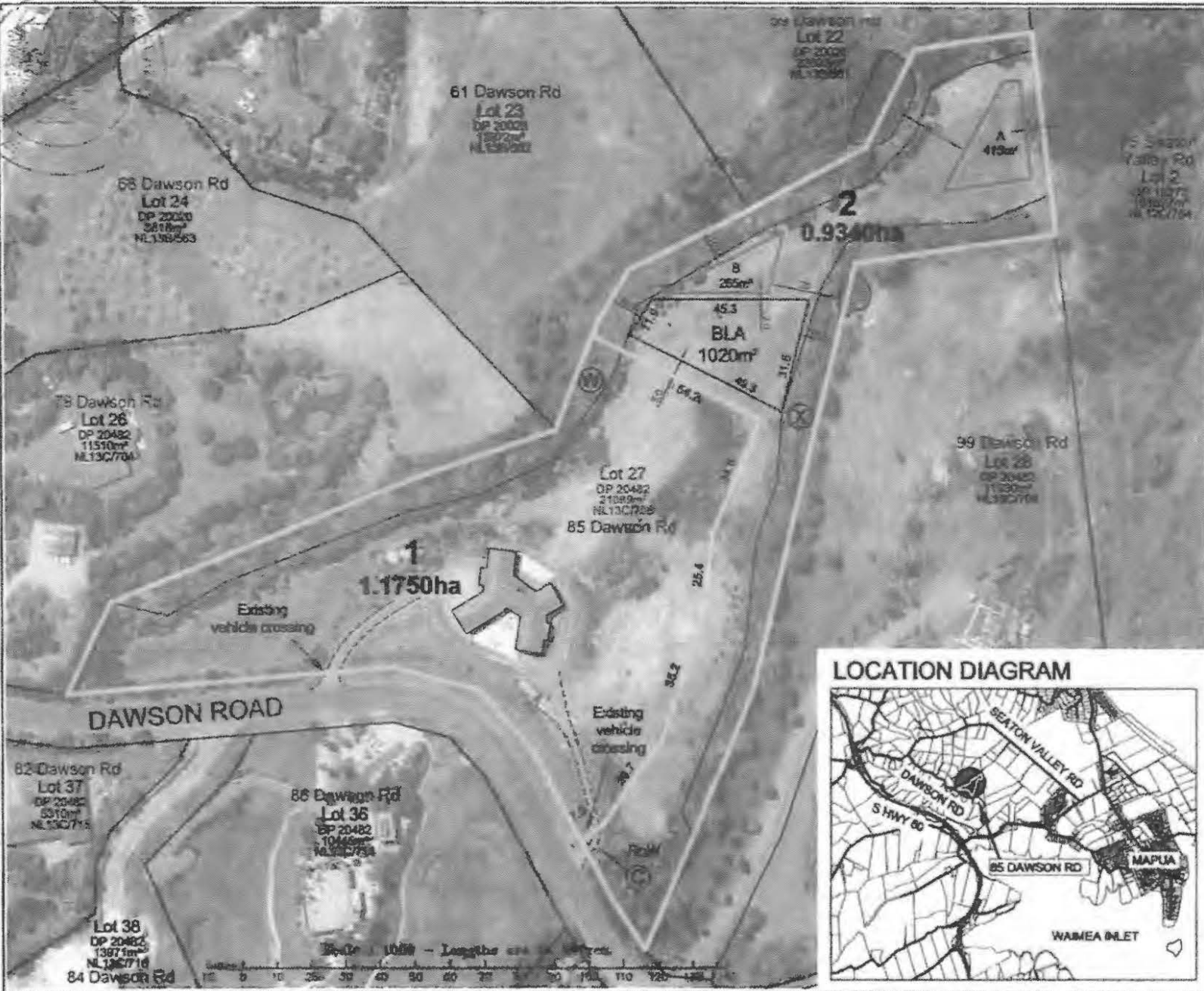
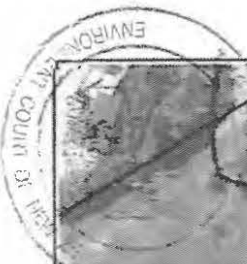
[91] Costs are reserved. It is directed that:

- (a) any application for costs must be made within fifteen (15) working days of the date of this decision; and
- (b) any reply must be made within a further ten (10) working days.

For the court


J J M Hassan
Environment Judge





NOTES

1. Areas and dimensions are approximate only and subject to final survey. The plan should not be used as part of a title and purchase agreement without appropriate verification.
2. Do not alter from original plan.
3. Distances between blocks are given where applicable.
4. Surveyed Land Dimensions (A & B) can be reduced.
5. New corners (C) in brackets of title.

P. L. Shirley

A. L. Shirley

Block	Area	Volume	Height	Weight
1	1.1750ha			
2	0.9340ha			

HEAPHY SURVEYING

JOB TITLE
**P & L Shirley
85 Dawson Road
Mapua**

DRAWING TITLE
**Lots 1 & 2
Being Proposed
Subdivision of Lot
27 DP 20482**

SHEET 1 OF 1	SCALE A3 1:1000
JOB NO. HSL273	DATE 25/06/21
ORIGIN NUMBER	REV
HSL273-001	1

RMA191100 and ors - application as lodged. Page 3 of 5