

**BEFORE THE NEW PLYMOUTH DISTRICT COUNCIL APPOINTED
INDEPENDENT HEARINGS COMMISSIONER GINA SWEETMAN**

IN THE MATTER

of the Resource
Management Act
1991 ("RMA")

AND

IN THE MATTER OF

Section 357
objection to the
decline of a non-
notified
subdivision
consent
SUB22/48013 at
118 Wortley
Road, Lepperton,
New Plymouth

**OUTLINE OF SUBMISSIONS OF COUNSEL
FOR THE APPLICANT TARA AND AARON STEPHENS**

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MAY IT PLEASE THE INDEPENDENT HEARINGS COMMISSIONER

Introduction

1. Land use consent for a second dwellinghouse on the property was obtained in 2017. Subsequently, that second dwellinghouse was built and lived in by the applicant's family since 2019 (situated on proposed Lot 2). Their older ca 1950's dwelling house (situated on proposed Lot 1) has been used as a residential tenancy since 2019 – and generally used as a residential/lifestyle property now for over 15 years; with no connection to, or use associated with, the relatively small scale rural activities conducted on the property¹.

2. The applicant aims to subdivide to efficiently create separate titles for the already separate dwellinghouses and associated land uses - to provide for the applicants and their children's future² - (in terms of providing for people's social and economic wellbeing and health and safety) – while potential (mitigated) adverse effects are minimal.

Issues and Effects

3. The critical issues requiring determination in this case are:
 - (i) Whether or not the proposal passes through one (or more) of the threshold "gateway" tests in s. 104D Resource Management Act 1991 ("RMA"); and, if so:

 - (ii) Whether or not granting consent to the proposed (non-complying) activity will promote the sustainable

¹ Tara & Aaron Stephens, EIC paras 42-58

management of natural and physical resources - the purpose of the RMA; and, whether or not granting consent will be consistent with the relevant provisions under the relevant statutory instruments³ - fairly appraised, and read as a whole⁴.

4. Provided the proposal passes through one (or more) of the s. 104D thresholds (gateways) the application must be determined on its merits in accordance with the provisions of s. 104 RMA.
5. Pursuant to s 104B, you may grant or refuse the application and, if granting it, may impose conditions under s108; including conditions offered/agreed to by the applicant under s. 108AA RMA.
6. It is respectfully submitted that the result of this case should be one that the Commissioner believes best achieves the purpose of the RMA: the sustainable management of natural and physical resources as defined in s. 5(2) RMA; and, as enshrined in the relevant statutory instruments.
7. In my submission the proposal can pass through both of the s. 104D "gateways" in the particular facts and circumstances of this case (for all the reasons expanded on in the evidence called by the applicant, and later in these submissions); and will promote the sustainable management of natural and physical resources in a way (or at a rate) which will enable the social, economic, and cultural wellbeing and health and safety

² Tara & Aaron Stephens, EIC para 29

³ Falling for consideration under s. 104(1)(b) RMA

⁴ *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency*, [2024] NZSC 26 at para [79].

of people and communities of New Plymouth, Taranaki region and New Zealand generally to be provided for.

8. A further critical issue is, (of course in every case), after mitigation of adverse effects – are the adverse effects so significant that the necessary consent should be declined? Clearly not, in my respectful submission; the proposal will appropriately avoid, remedy or mitigate any adverse effects of activities on the environment (and achieve all the relevant caveats in s. 5(2)(a)-(c)).
9. Adverse effects must be considered by the consent authority having regard to their mitigated version, taking into account proposed conditions of consent⁵.
10. The finer detail of those mitigation measures, and proposed conditions of consent (further mitigating the adverse effects of the proposed activity (which are already minimal in this case)), are addressed in evidence to be called for the applicant.
11. All of the applicant's neighbours, deemed potentially affected by the proposal, have given written approval to the application (in terms of s. 104(3)(a)(ii) RMA).
12. Pre-hearing expert witness conferencing was held between the expert planning witnesses during which the planners reached agreement about most consent conditions should consent be granted – regrettably it did not resolve all the outstanding issues between those expert witnesses; as is recorded in the Joint Witness Statement filed on 17 November 2025 (JWS).

⁵ *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC), at para [129]

Mitigation Measures Proposed

13. The JWS (and evidence to be called for the applicant) records the mitigating measures proposed through consent conditions, offered by the applicant and/or agreed on, generally summarised as follows:
- Increased size of esplanade strip to 15 metres (from 10 metres), adjoining true right bank Waiongana Stream for the purpose of providing riparian protection and recreation;
 - Landscaping and native vegetation planting of 5 metres of Waiongana Stream edge; and fencing and stock exclusion etc;
 - Limitations on the number of habitable buildings per lot; and on future subdivision;
 - Balance area (Lot 2) of 3.18ha (more or less) maintaining the open character of the existing rural environment, spaciousness and the ability to continue to productively farm that area without long term loss of Highly Productive Land ("HPL");
 - No complaints covenants (and consent notice) regarding lawful rural activities and operations.
14. It is submitted that this combination of measures will further appropriately avoid, remedy or mitigate any adverse effects of the activities on the environment; and will lead to better environmental outcomes than could otherwise be achieved under the relevant permitted activity thresholds of the District Plan; ultimately promoting sustainable management and ensuring that any potential adverse effects will be less than minor (or certainly no more than minor).

Evidence

15. The applicant will call evidence from the following witnesses:

Lay Witnesses

- (a) Tara and Aaron Stephens – the Applicant. Mr and Mrs Stephens' evidence covers their ownership of the site and its history including the background leading to the proposal; existing uses and rural activities of/on, and/or associated with, the proposed lots; consultation with neighbours and their current tenants (Mr & Mrs Cudmore); and, the Officer's Report – much of which they strongly disagree with for the reasons they have provided. For all the reasons in all of the evidence (and these submissions), they consider, that it is appropriate in this case to subdivide; and there will be minimal, if any, adverse environmental impact.⁶

Mr and Mrs Stephens are generally happy with the proposed draft consent conditions provided in the JWS – and thank the Commissioner for assisting with that process. However, they do not agree with the Officer's view that the vehicle crossing adjacent to proposed Lot 1 should be entirely relocated to mitigate amenity effects – and are of the view that the Officer's view in this context is unfounded – the scale of the effects does not warrant shifting that vehicle crossing completely (at no doubt considerable expense) for the reasons that they state in their evidence.⁷

⁶ Tara and Aaron Stephens, EIC para 59

⁷ Tara and Aaron Stephen's, EIC paras 46-50

Mr Rendall is also of the same view (as Mr and Mrs Stephens) as was set out in para 3.11 of the JWS. In my respectful submission such a condition would be unreasonable in the circumstances of this case - given the temporary short term minor (or less than minor) adverse effects in respect of same; and, bearing in mind that the property is situated in a working rural environment (and there have been no issues in respect of these matters since the original dwelling was constructed in about 1950 as far as the parties are all aware). As noted in paragraph 50 of Mr and Mrs Stephen's evidence – if the Commissioner was of the view that the accessway should be moved further away from the dwelling on proposed Lot 1 (as a condition of granting consent) – then there is the ability to move the accessway slightly on the same existing vehicle crossing - to provide further distance (and that would not involve a relatively significant cost, such as moving the entire vehicle crossing altogether would).

- (b) Martin and Jessica Cudmore – Mr and Mrs Cudmore reside in the dwelling on proposed Lot 1 – rented from Mr and Mrs Stephens. Their evidence covers their time living there to date and their views on the proposed subdivision. They especially enjoy the surrounding rural environment – and have no issues with that rural environment. They fully support the application which “presents no adverse effects”.⁸

Expert Witnesses

- (a) Branden Darlow – Agribusiness Consultant, AgFirst Taranaki Limited. Mr. Darlow's evidence covers his involvement in respect of the proposal including his critical productivity

assessment of the site conducted for the application with particular focus on the National Policy Statement – Highly Productive Land (NPS-HPL) – concerning land based primary production.

His expert evidence finds that the proposed subdivision has no material measurable effect on land based primary production, nor productive capacity.

The proposed subdivision affects an unmeasurable negligible loss of HPL land in the context of the district's Class 3 land.

Furthermore, as no new dwellings or sensitive activities are proposed as a result of the subdivision – there are no reverse sensitivity adverse effects (and there is also management proposed by the applicant in respect of same).

He is also of the view that cumulative effects and potential adverse land fragmentation effects are not significant issues in this case, for the reasons he thoroughly sets out in the context of his expertise.

Ultimately he concludes that the proposed subdivision retains the overall productive capacity of HPL land over the long term – does not cause a measurable cumulative loss of HPL within the district – creates no new reverse sensitivity effects – and is consistent with the relevant provisions of the NPS-HPL.⁹

- (b) Chris Rendall – Independent Planning Consultant, Landpro Limited. Mr Rendall prepared the Objection application; and

⁸ Martin and Jessica Cudmore, EIC paras 4-14

⁹ Branden Darlow, EIC paras 4.1-11.2 – and Appendix 1

provides expert evidence about the proposal, background and context of the receiving and surrounding environment and consultation, information considered, assessment of effects and conclusions in respect of same also considering all of the evidence called for the applicant (expanded on in his evidence); planning issues; relevant regulatory framework; effects and mitigation/consent conditions; the Officer's Report, and sustainable management under Part 2 RMA.

He disagrees with the Officer's recommendations (to decline consent) – and is of the view that the Officer's Report has fundamental flaws, and has taken a narrow approach in weighing certain objectives and policies in this case – for all of the reasons he comprehensively sets out.

Overall, following a detailed structured analysis, Mr Rendall's view is that granting consent will promote the purpose and principles of the RMA, and is consistent with, and not contrary to, the relevant provisions under the relevant statutory instruments – fairly appraised and read as a whole – in the particular facts and circumstances of this case¹⁰.

In my respectful submission, the evidence called for the applicant highlights a number of flaws, inaccuracies and narrow approaches in the Officer's Report (which is not accepted by the applicant). It is respectfully submitted that for those reasons alone, the Officer's Report should be given little weight in this case; and the evidence for the applicant, which is accurate and robust, should be preferred.

Law/Legal Principles

16. The proposal has non-complying status and must, therefore, be first considered in terms of the threshold/gateway tests in s.104D RMA.

Gateway test in Section 104D RMA

17. Section 104D provides as follows:

[104D Particular restrictions for non-complying activities

- (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
- (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of—
 - (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or
 - (ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or
 - (iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.
- (2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.
18. Subsection 1(a) of s 104D requires you to be satisfied that the adverse effects of the activity on the environment ... will be minor. The other available gateway in subsection 1(b) is that the application should not be contrary to the objectives and policies of relevant plans and/or proposed plans.

¹⁰ Chris Rendall, EIC paras 18, 121, 129-135, 148-150

19. In the Environment Court's decision in SKP Incorporated v Auckland Council¹¹, for example, Principal Environment Judge Newhook (at that time) provided a useful analysis on the correct legal approach to s 104D as follows;

"[47] Bearing in mind that the positions of the Applicant and the Council under s 104D(1)(a) are different (with Mr Wren giving his opinion that this limb of the gateway is not met because of some particular more-than-minor effects), it is worth noting a concession by the Council's counsel Mr Allen that the *Cookson Road* decision about an holistic approach is consistent with earlier authority on a predecessor provision to s 104D (s 105(2A)), citing *Stokes v Christchurch City Council*.¹² We appreciate Mr Allan's candid submission that ultimately the assessment will involve conclusions by the Court as to facts and the degree of effect. We find that Mr Wren has been unduly conservative, and prefer the legal analysis offered by his counsel.

"[48] As to the "effects" gateway we may take into account aspects of mitigation and outcomes of imposing conditions of consent.

"[49] As will be seen from our later analysis of effects on the environment, there are some which individually can be described as more than minor, for instance in connection with visual amenity from certain properties, but the law is that the evaluation under this provision is to be undertaken on a "*holistic basis, looking over the entire application and a range of effects*",¹³ not individual effects.

"[50] The evaluation under subsection 1(b) is again, not an approach focussed on each relevant provision, but rather something more of a holistic approach. As has been observed in many other decisions, it is usually found that there are sets of objectives and policies running either way, and it is only if there is

¹¹ [2018] NZEnvC 81

¹² *Stokes v Christchurch City Council* [1999] NZRMA 409 at p434.

¹³ See for instance *Cookson Road Character Preservation Society Inc v Rotorua District Council* [2013] NZEnvC 194 at [46] and subsequent paragraphs.

an important set to which the application is contrary, that the consent authority might conclude that this gateway is not passed.¹⁴

20. Provided the proposal passes through one of the s. 104D gateway tests, the Application must be determined on its merits in accordance with the provisions of s. 104 RMA.

Section 104D(1)(a) RMA

21. It is submitted that the proposal passes through the minor adverse effects gateway contained in s.104D(1)(a), “on a *holistic basis, looking over the entire application and a range of effects*”, not individual effects.”¹⁵
22. Particularly so, in my respectful submission, when that evaluation is undertaken considering the salient case law in respect of the legal interpretation of the word “minor”; and the words “less than minor”.
23. While not defined under s. 2 RMA, well established (and accepted/followed) case law has determined that “minor” is a comparative word.
24. In *Bethwaite and Church Property Trustees v Christchurch City Council*¹⁶, His Honour Judge Skelton held¹⁷ (on pages 7 and 8):

“The word “minor” is not defined in the Act but dictionary meanings suggest that in its primary sense, which is the appropriate one here, it is a

¹⁴ See for instance *Cookson Road Preservation Society* decision; *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [73] – [74]; *Man O’ War Station Limited v Auckland City Council* [2010] NZEnvC 248. Guiding this jurisprudence has been the seminal decision of the Court of Appeal, *Dye v Auckland Regional Council* [2002] 1 NZLR 337.

¹⁵ *SKP Incorporated*, supra, at para [49]

¹⁶ C85/93.

comparative word. Thus, the Concise Oxford Dictionary gives as the primary meaning "lesser or comparatively small in size or importance...".

The Collins Concise Dictionary gives as the primary meaning "lesser or secondary in amount, importance,". "

"It seems clear therefore, that Parliament did not intend that there should be no adverse effects. Nor, so it seems to us, did it intend that any adverse effects should be minimal. That is to say, again having recourse to the dictionaries, "smaller or very minute or slight". Thus, in using the word "minor" Parliament intended that whatever adverse effects there might be they had to be *less than major, but could be more than simply minute or slight.*"

"Then too, we think it is permissible to consider this question having regard to any mitigation of effects that might be achieved by the imposition of conditions. Put another way, it is permissible to have regard to the effects of the activity, controlled by conditions that would limit or proscribe that activity and its effects. This has been done before – see for example Shell Oil NZ Ltd v Rodney District Council Decision No: C19/93..... It would not be sensible to have to rule out a proposed activity on the grounds that it failed to comply with both the pre-conditions in section 105(2)(b) of the Act if it was clear that by the imposition of conditions on the granting of consent, such a result could be avoided. [Emphasis added].

25. Subsequently, in Stokes v Christchurch City Council¹⁸ (recently referred to in SKP Incorporated¹⁹ above) - His Honour Judge Jackson confirmed²⁰ his agreement with the Planning Tribunal's findings in Bethwaite (supra) that the word "minor" means "less than major, but could be more than simply minute or slight.". Then, His Honour went on to hold that:

¹⁷ In the context of the then s. 105(2)(b)(i) RMA - now s.104D(1)(a) - but this wording has not changed significantly.

¹⁸ [1999] NZRMA 409

¹⁹ Supra, at para [47]

²⁰ At pages 432-434

“The test is whether the adverse effects, as proposed to be remedied and/or mitigated, and taken as a whole, are more than minor”²¹.

26. It is submitted that the adverse effects of the proposal on the environment, as proposed to be remedied and/or mitigated, and taken as a whole, will be no more than ‘minor’ - as that term is legally understood following *Bethwaite* and *Stokes* – and undertaking the evaluation, “on a “*holistic basis, looking over the entire application and a range of effects*”, not individual effects.”²².
27. It is further respectfully submitted that any potential adverse effects in this case will be “less than minor” or *de minimis* – in the particular facts and circumstances of this case; and all of the applicant’s evidence which supports this finding in this context.
28. This is in the context where the High Court has said, in respect of that standard (less than minor or *de minimis*)²³:

“Less than minor” means an effect insignificant in the “overall context” and so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.

29. Most recently (again, in the High Court), less than minor has been described by Wilkinson-Smith J in *Auckland International Airport Ltd v Auckland Council*²⁴ as requiring:

... a finding that the effects would be *de minimis* and could be safely disregarded as irrelevant and unimportant.

²¹ *Ibid*

²² *SKP Incorporated*, *supra*, at para [49]

²³ As stated in *Lysaght v Whakatane District Council* [2021] NZHC 68 Whata J at [4]

²⁴ [2024] NZRMA 484 at [100]

30. The experts for the Stephens' all find effects on the environment to be "less than minor" in this sense. This takes into account the existing environment in this case.
31. The evidence called by the applicant also establishes that there will be potential beneficial/positive effects of the activity on the environment for reasons that are provided in that evidence (and which will be discussed further under s.104(1)(a) RMA, where their relevance is applicable).

Section 104D(1)(b) RMA

32. Mr Rendall concludes that the application is for an activity that will not be contrary to the objectives and policies of the District Plan for reasons which have been clearly set out²⁵.
33. It is submitted that he is correct, and the relevant case law analysis below, combined with the holistic evaluation approach summarised in *SKP Incorporated*²⁶ above – and fairly appraised and read as a whole - (which he has properly applied and appraised), reinforces his views.
34. In *Arrigato Investments Ltd v Auckland Regional Council*²⁷ the Court of Appeal observed²⁸ that a non-complying activity, by reason of its nature, is unlikely to find direct support from any specific provision of the plan. At paragraph [18] the Court held:

"The issue in this case was not whether the plan supported the activity but rather, given that it did not, whether it was nevertheless appropriate to allow

²⁵ Chris Rendall, EIC para 121

²⁶ Supra, at para [50]

²⁷ [2001] NZRMA 481 (CA).

²⁸ At para [17]

it. Indeed gateway (b) recognises that a non-complying activity will not be permitted by the plan, yet it may be granted provided it will not be contrary to the objectives and policies of the plan.”

35. As was succinctly stated by Justice Grieg in the High Court’s decision in *New Zealand Rail Limited v Marlborough District Council*²⁹:

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

36. More recently in *Wilson v Whangarei District Council*³⁰ His Honour Judge Thompson put it this way:

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

37. It is submitted that the proposal is not repugnant to, opposed to or contrary to the thrust of the objectives and policies of the District Plan evaluated holistically – and fairly appraised and read as a whole – on the merits of this application (and on its particular facts and circumstances) – for the reasons

²⁹ [1994] NZRMA 70 (HC), at page 80.

comprehensively set out in Mr Rendall's evidence; and in light of the relevant case law referred to above.

38. In my respectful submission, the proposal can pass both s104D gateways/thresholds, and stands to be considered under s. 104 and Part 2 RMA.

Section 104(1) and Part 2 RMA

39. In this case, s 104(1) identifies the matters to which the consent authority must have regard, subject to Part 2:

[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 and [and section 77M], 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:
 - (vii) a plan or proposed plan; and]]
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

40. The Supreme Court has recently confirmed that the approach to sustainable resource management requires a "structured analysis" – recognising that a weighing exercise is required in

³⁰ W20/2007, at para [35].

respect of judgements to be made (rejecting the long followed “overall judgement” approach).³¹

41. Mr Rendall’s evidence provides that structural analysis in this case, in my respectful submission.

Part 2 RMA

42. It is now well settled since the Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council*³² that Part 2 remains relevant and directly “accessible” in the resource consent context. The longstanding observation of the Environment Court in *Shirley* also remains relevant:³³

The purpose of the Act meant that in every appeal about the grant of a resource consent there is only one ultimate question to be answered, that was, will the purpose of the Act be fulfilled?

43. The purpose of the RMA is set out in s 5:

5 Purpose

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

³¹ *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency*, [2024] NZSC 26 at paras [195] – [226]

³² [2018] NZCA 316

³³ *Shirley Primary School & Anor v Christchurch City Council* [1999] NZRMA 66 (EnvC), pg. 67,(2); pg. 99,(115).

- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

44. In my submission, the proposal will clearly contribute in a positive way to the social, cultural, and economic wellbeing of people and the communities of Lepperton, New Plymouth and Taranaki generally in terms of section 5(2) of the RMA; and is suitable for consent on appropriate conditions. In particular, it is submitted that the caveats in ss 5(2)(a) to (c) are met.
45. It is accepted, however, that Part 2 may add little to the evaluative exercise where planning documents have been competently prepared in a manner that appropriately reflects the provisions of Part 2.
46. In this case, the relevant District Plan provisions are recent, generally coherent and are unlikely to add much to consideration of a usual consent application such as this.
47. Notwithstanding the above, for completeness, in the context of the District Plan, and Part 2 enshrined therein - it is submitted that the proposal recognises and provides for the nationally important matters in ss 6(a) and (d); and, has particular regard to ss 7(aa), (b), (c), (d), (f), and (g).
48. In terms of ss 7(b), (c), (f) and (g) - the proposal will maintain and enhance amenity values, and the quality of the environment, in the context of the existing environment and relevant zoning - and already integrates well with the surrounding environment - and provides an appropriate and sound use for a finite resource.

49. Amenity values can be assessed by the consent authority (in terms of assessing effects on the environment) - which must apply the law objectively in performing these functions: *Gisborne District Council v Eldamos Investments Ltd*⁶⁴.
50. The word “environment” embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears *likely* that those resource consents will be implemented: *Queenstown Lakes District Council v Hawthorn Estate Ltd*⁶⁵.
51. When considering this issue, for example, in *Far North District Council v Carrington Farms Limited*⁶⁶ - the Court of Appeal considered a non-complying activity subdivision consent application - where the applicant had already obtained a land use consent to establish 12 units on that land. Adopting the above approach in *Hawthorn*⁶⁷ - the Court of Appeal, inter alia, found (endorsing the Environment Court's approach and findings), as follows:

“... the Environment Court recorded that but for that threshold factual finding it would have allowed the appeal if the application for subdivision consent had been considered on its own in the context of the existing environment without the prospective addition of 12 residential units. In that event **the proposal would have been contrary to the relevant statutory objectives and policies. But,**

⁶⁴ *HC GIS CIV-2005-485-001241 [26 October 2005]*, Harrison J, at para [42]

⁶⁵ [2006] NZRMA 424 (CA)

⁶⁶ CA 705/2011[2013]NZCA 221

⁶⁷ *Ibid*

once the future environment was considered with the additional 12 residential units, a different result followed.”³⁸

“Also, as the Environment Court acknowledged, the subdivision simply enabled the issue of freehold titles to reflect what was already approved and likely to be implemented under the land use consent.”³⁹

“... In considering the merits in the context of the future environment including 12 residential units the subdivision consent was not contrary to the district plan’s objectives or policies (s 104D(1)(b)(i)).”

“... Any adverse effects of Carrington’s development would be a consequence of implementing the land use consent arising out of its development of the 12 unit residential development and its associated earthworks, infrastructure works and vegetation clearance and not the subdivision consent.”⁴⁰

“... The consent authority is required to consider the state of the environment at the time when it may reasonably expect the activity – that is, the subdivision – will be completed.”⁴¹

“... The environment refers to a state of affairs which a consent authority must determine and take into account when assessing the effects of allowing an activity ...”⁴²

“... Acting within those parameters, it was open to the Court to find as a matter of fact that the potential effects on the environment of implementing the resource consent would be minor when viewed in the context of a future environment that would include the 12 dwellings permitted as a result of the land use consent.”⁴³

³⁸ At para [64]

³⁹ At para [67]

⁴⁰ At para [79]

⁴¹ At para [80]

⁴² At para [91]

⁴³ At para [93]

"We accept that the Environment Court had an overall discretion in determining whether the resource consent should be granted. But that discretion had to be exercised by reference to the relevant statutory criteria. Because this application was for consent to a non-complying activity, the Court first had to find that either of what are known as the gateway tests provided by s 104D was satisfied. This was the starting point for its enquiry into the merits. After consideration, the Court concluded that the application satisfied the second of the gateway tests – that is, it was for an activity that will not be contrary to the objectives and policies of the relevant plan."⁴⁴

"However, the Court's enquiry did not end there; it did not treat satisfaction of the gateway test as determining its decision. Instead, **the Court concluded after consideration of the evidence that any adverse effects on the environment would have been brought about by Carrington's implementation of the land use consent, not by the subdivision proposal. As noted, the Court was satisfied that the company would build the residential units even if subdivision consent was not granted. This critical evaluative finding inevitably shaped the Court's exercise of its discretion, which had to be related to the merits of the application for subdivision consent.**"⁴⁵

"... In this case, the subdivision consent did not enable a more intensive use of the site than is allowed by the land use consent. It simply enabled titles to be issued for the 12 units which Carrington has a right to construct".⁴⁶ (emphasis added).

52. As noted in the Memorandum of Counsel for the Applicant dated 31 October 2025 (and evidence for the applicant generally), the applicant's land use consent in respect of their house was granted in 2017 and the effects in respect of same considered at that time (as also noted in Mr Rendall's evidence).

⁴⁴ At para [99]

⁴⁵ At para [100]

⁴⁶ At para [105]

53. That consent was implemented in 2019; and the “environment” must be considered on that basis accordingly.
54. In this context, in my respectful submission, the subdivision consent (if granted) will not enable a more intensive use of the site than was allowed by the land use consent now implemented. It will simply enable titles to be issued for the two lots on which dwelling houses (and associated buildings etc) are already lawfully constructed. This is the approach taken by the Court of Appeal in *Far North District Council*⁴⁷.

Section 104(1)(a) RMA

55. Section 104(1)(a) requires the consideration of any actual and potential effects on the environment of allowing the land to be subdivided.
56. Actual and potential beneficial positive effects must be considered, as well as actual and potential adverse effects.

Adverse Effects

57. These have been comprehensively addressed in the application and evidence for the applicant (and these submissions). It is submitted that the totality of the evidence called for the applicant establishes that adverse effects are less than minor, or certainly no more than minor (also taking into account the implementation of appropriate conditions) – and that potential adverse effects of the subdivision are not of such significance to warrant declining consent in this case.

58. As noted in Mr Rendall’s evidence⁴⁸ (and these submissions) – in the particular facts and circumstances of this case the subdivision effect is just lines on paper, or a plan – as it will not intensify development – and thereby neither increase the density of occupation – nor impact adversely on infrastructure and other amenities.
59. Such issues have been considered by the Courts in some cases.
60. For example, as the Court of Appeal has noted, it is reasonably clear why Parliament chose a precise transactional definition in s 218(1) RMA. It was not seeking to capture each and any interest created in land, but only those transactions with material environmental implications.⁴⁹
61. For example, in my submission, this is also illustrated by two matters which must be recognised and provided for as matters of national importance, under ss 6(a) and (b), as follows (emphasis added):
- “(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them *from inappropriate subdivision*, use, and development:
 - (b) The protection of outstanding natural features and landscapes *from inappropriate subdivision*, use, and development.”

⁴⁷ supra

⁴⁸ Chris Rendall, EIC para 18 for example

⁴⁹ *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2018] 3 NZLR 661 (CA) at para [24]

62. In Spark the Court of Appeal observed that it is the intensity and scale of use of land, that the RMA regulation of subdivisions is concerned with and which s 218 focuses upon. It does so by regulating certain land transactions; those that carry the greater risk of intensifying the use of land and services, and of impairing amenities.
63. As the Court of Appeal noted:
- “The concern of s 218 is not therefore with land transactions unlikely to intensify development, and thereby neither increase the density of occupation nor impact adversely on infrastructure and other amenities.”⁵⁰
64. In my respectful submission a proposed subdivision such as that being considered in this case - is effectively just lines on a plan and no new use – and should not be considered by the consent authority in the same way as it would for a new use - as there are no material environmental implications – such as there might be if it were a new development.⁵¹ The real effect, if any, is from the land use activity, rather than from the subdivision; which was also the approach taken by the Court of Appeal in Far North District Council discussed earlier above.
65. Or put another way, where the use of land is protected as an existing use under s 10, then it is doubtful how far the consent authority can reasonably go in requiring that use to be assessed as if it were a new use.⁵²

⁵⁰ Spark supra at para [24]

⁵¹ See in this context for example: Re McKay [2019] NZRMA 134 at para [55]

⁵² Re McKay supra at para [52]

66. The Stephens' proposal is not for a subdivision that physically constitutes an activity in the true sense of that word - involving as they may roading works, earthworks, creation of building platforms etc - it is difficult to see, therefore, how a readjustment of lines upon a plan - which is what is effectively here suggested - is the type of activity that should be declined consent under the RMA.
67. Mr & Mrs Stephens' subdivision application in this case will not involve roading works, earthworks, creation of building platforms etc - or increase the density of occupation - or impact adversely on infrastructure and other amenities, as is clearly set out in all the evidence for the applicant.
68. In line with the approach taken by the Court of Appeal in *Spark* and *Far North District Council*, and the Environment Court in *Re McKay*, the proposed subdivision does not engage any environmental matter warranting the decline of the subdivision consent application (in the particular facts and circumstances of this case).

Positive Effects

69. The positive effects of the proposal are discussed in the evidence for the applicant – and include, for example, enhanced native vegetation plantings as noted in Mr Rendall's evidence.⁵³

⁵³ Chris Rendall, EIC para 58

Section 104(1)(b) RMA

70. The relevant provisions applicable under s. 104(1)(b) have been canvassed in this case by Mr Rendall.
71. Overall, he finds that the proposal is consistent with, and not contrary to, those provisions in my submission, for all the reasons he provides.

Section 104(3) RMA

72. Under Section 104(3)(a)(ii) the application *must* be considered without regard to any effect on a person who has given written approval to it.
73. Significantly in this case, all of relevant surrounding land owners have provided written approval, and are supportive of the application. In my submission it is those neighbours who enjoy the particular amenities of the area that are in the best position to judge the effect the activity will have on them in this case.
74. The Officer's Report is flawed (*inter alia*) in this regard; and fails to properly consider or give weight to the significant written approvals received in this case in my submission.
75. Unlike Section 104(2), the requirements of Section 104(3)(a)(ii) RMA are mandatory (not discretionary).
76. Although the effects of the proposal on the persons most closely affected by it in this case (i.e. the surrounding neighbours) cannot be considered (as they have given their approval) – the fact of that approval is a relevant consideration when weighing

the question of public confidence in the administration of the District Plan: Transit New Zealand v Nelson City Council⁵⁴ (district plan integrity is discussed further below).

Other Legal Issues

Cumulative Effects

77. A consent authority's duty to have regard to the effects of allowing an activity extends to cumulative effects that will arise in combination with effects of other activities⁵⁵.
78. Cumulative effects are those that will occur, rather than those that may occur; and they are distinct from precedent effects: Dye v Auckland Regional Council⁵⁶.
79. Accordingly, conclusions about adverse cumulative effects must be predicated on actual adverse effects.
80. The evidence in this case does not show any indication that the subdivision, or the activities that it would facilitate, would have actual adverse effects, including land fragmentation, that, in combination with effects of other activities, would have any adverse impact on the environment.
81. In my respectful submission, the above mentioned written approvals (under Section 104(3)(a)(ii)) and the applicant's consent conditions offers are also highly relevant to this issue; and reinforce Mr Rendall's evidence in respect of same (supported by Mr Darlow's evidence).

⁵⁴ W021/94 (PT), at page 3

⁵⁵ Section 3, RMA

82. The possibility that owners of other land might seek similar subdivisions to facilitate combinations of activities may deserve consideration as a precedent effect, but it is not a cumulative effect.

Precedent Effect / District Plan Integrity.

83. It is trite law that precedent in the strict sense does not arise from the grant of a resource consent, following the Court of Appeal's decision in Dye⁵⁷.
84. A precedent effect is a potential effect which may or may not happen; and levels of probability of occurrence, and of potential impact, have to be considered: Dye⁵⁸.
85. A consent authority is not bound by a previous decision of the same or another authority; the facts and circumstances of each case are never likely to be the same due to the many variables in each case – and there are multiple variables in this case, as thoroughly canvassed in Ms Rendall's evidence⁵⁹.
86. The non-complying activity status does not prohibit subdivision to smaller lots in appropriate cases. In my submission this is an appropriate case (for all the reasons in all of the evidence for the applicant and these submissions), and the subdivision is not contrary to the outcomes that the District Plan seeks.

⁵⁶[2001] NZRMA 513 (CA), at paras 37-49.

⁵⁷ supra at paras 32-36

⁵⁸ supra at para 39

⁵⁹ At para 112

87. It is respectfully submitted that there is no evidence to support a finding that there is a high probability that owners of surrounding (or other) properties will seek to subdivide. Nor does the evidence indicate that, if there was a high occurrence of such applications, there would be a high potential impact on the environment.
88. The evidence for the applicant in this case shows that the proposed subdivision will have very little, if any, adverse environmental effect. The Officer's view that consenting to the subdivision would have an adverse precedent effect is entirely speculative and not accepted; and the robust well-reasoned evidence of Ms Rendall in this regard should be accepted.
89. Similarly, the Officers view that consenting to the subdivision might undermine the integrity of the District Plan is not accepted for all the reasons provided in Mr Rendall's evidence (and these submissions).
90. The proposed subdivision is a non-complying activity under the District Plan; and it is proposed to better facilitate lawfully consented and established activities (i.e. established dwelling houses) in the rural zone that will not unduly fragment rural land, nor adversely affect rural character and amenities.
91. Granting consent will not undermine, or be inconsistent with, the integrity of the District Plan in the particular facts and circumstances (and variables) of this case; and the above-mentioned fact of the written approvals given in this case is a

relevant consideration when weighing this question: Transit New Zealand⁶⁰.

92. Issues of plan integrity were considered, for example, in Wilson v Whangarei District Council⁶¹ where His Honour Judge Thompson put it this way:

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

"[43] This is an argument that is, to be blunt, overused and can rarely withstand scrutiny when measured against the provisions of the RMA. Considered as a *non-complying* activity it needs to be recalled that the Act specifically provides that if a proposal is not contrary to the Objectives and Policies of the Plan, or has adverse effects that are no more than minor, then it must be considered on its merits. If there should be another application waiting *in the wings* in Whangarei District which still is to [be] regarded as *non-complying* then it will stand or fall on its own merits. Under the Proposed Plan a proposal similar to this would be *discretionary*. Again the Act specifically provides for the consideration of such a proposal. It may well be that there will be future applications for broadly similar proposals. If so, they can and should be dealt with on their merits."

Reverse Sensitivity

93. It is well settled law now that reverse sensitivity is an adverse effect, and is therefore to be avoided, remedied or mitigated: Ngtarawa Development Trust Limited v The Hastings District Council⁶². Whether one should deal with an adverse effect by avoiding it, remedying it or mitigating it is a question of

⁶⁰ Ibid

⁶¹ W20/2007, at paras [42], [43].

⁶² EnvC W017/08, at para [22]

judgement in each case, depending on the circumstances:
Winstone Aggregates v Matamata-Piako District Council⁶³.

94. A description of the concept of reverse sensitivity considered helpful in Winstone Aggregates and Ngatarawa Development Trust⁶⁴ was as follows:

“Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use *is causing adverse environmental impact to nearby land*, and a new, benign activity is proposed for the land. The “sensitivity” is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.” (emphasis added).

95. It is submitted that an important point to consider relevant to that description is that there is no evidence to date in this case that any new use is proposed – or that any established uses of the applicant’s property *is causing adverse environmental impact* to the surrounding existing environment (including people).
96. Another significant factor in respect of this issue in this case, in the assessment of potential reverse sensitivity effects, is the distinction to be drawn between neighbouring activities coming to and accepting existing and known effects (for example Mr & Mrs Cudmore’s acceptance of the effects of Mr & Mrs Stephens relatively ‘low key’ rural activities in this case); and neighbouring activities having a new effects emitting activity or

⁶³(2005) 11 ELRNZ 48 (EnvC), at para [4]

⁶⁴Winstone Aggregates (supra), at para [2]; Ngatarawa Development Trust (supra), at para [22]

risk come to them: Orica Mining Services New Zealand Limited v The Franklin District Council⁶⁵.

97. It is inevitable that some lawful activities will at times be unable to totally internalise their effects and the law does not require that. This is generally understood and accepted by those who choose to live and work in rural areas, or who bring themselves within range of an effect emitting activity. There does need to be a measure of robustness about this⁶⁶.
98. Notwithstanding the above (and the applicant's witnesses' evidence that there is no reverse sensitivity effect in this case), as the Commissioner is aware, the applicant has offered a no-complaints covenant/consent notice condition as an extra safeguard and precaution.
99. Such mechanisms are commonly used and have been endorsed by the Environment Court over the years. For example, in Avatar Glen Limited v New Plymouth District Council⁶⁷ – his Honour Judge Thompson observed at paragraph [70]:

"We accept that no complaints covenants are not a universal panacea, but they do provide a level of reassurance to a person or organisation who or which may be at risk of complaint about some relatively low-level adverse effect. We certainly see no harm in them".

⁶⁵EnvC W32/09, at para [54]

⁶⁶Winstone Aggregates (supra), at para [12]; Ngatarawa Development Trust (supra), at paras [25], [29]

⁶⁷ Decision No [2016] NZEnvC 78

100. I note also, in the context of *Augier* conditions, for example – that his Honour Judge Thompson also effectively endorsed same and had no issues with them in *Avatar Glen Limited*⁶⁸.
101. Section 108AA (1)(a) RMA is aimed at the principle in *Augier v Secretary of State for the Environment*⁶⁹, that an applicant who volunteers a condition is bound by it: *Lindis Catchment Group Inc v Otago Regional Council*⁷⁰.
102. The Officer has voiced her concerns that such conditions/consent notices that have been offered by the applicant could effectively be picked apart and unwound in the future.
103. That contention is not accepted for the applicant – and such conditions are, in my submission, no different than any other consent conditions or consent notices imposed under the RMA in this context.
104. As Mr Rendall notes⁷¹ - people have a statutory right under the RMA to apply to a consent authority for consent conditions and/or consent notices to be varied and/or cancelled – and that is not disputed. However, there is a big difference, in my submission and experience, between making such an application and having it successfully granted – particularly in the context of a consent notice, as Mr Rendall notes, in respect of which it would need to be shown that there has been some material change of circumstances justifying its variation and/or

⁶⁸ (supra) – see para [34] and the comments therein, for example

⁶⁹ (1978) 38 P & CR 219 (QBD)

⁷⁰ [2020] NZEnvC 130

⁷¹ Chris Rendall, EIC para [147]

cancellation, for example. Moreover, any such application would need to be considered on its merits at the relevant time.

105. When considering an application for a variation of a consent notice under s 221(3) RMA, for example, it is necessary to carry out an examination of the purpose of the consent notice - and then undertake an enquiry into whether some change of circumstances has rendered that consent notice of no further value as held by the High Court in: *Green v Auckland Council*⁷². A consent notice should only be altered when there is a material change in circumstances which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purpose of the RMA.⁷³

Submissions and Conclusions

106. Each case must be considered and determined on its merits in light of the particular facts and circumstances.
107. The applicant has put forward a firm proposal for subdividing and efficiently using the natural and physical resources of the site in a way which will enable people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety - without significant (or any) adverse impact on the surrounding environment.
108. Furthermore, the proposal achieves a high degree of certainty about the appearance, location and intensity of the future use

⁷² [2013] NZHC 2364, [2014] NZRMA 1.

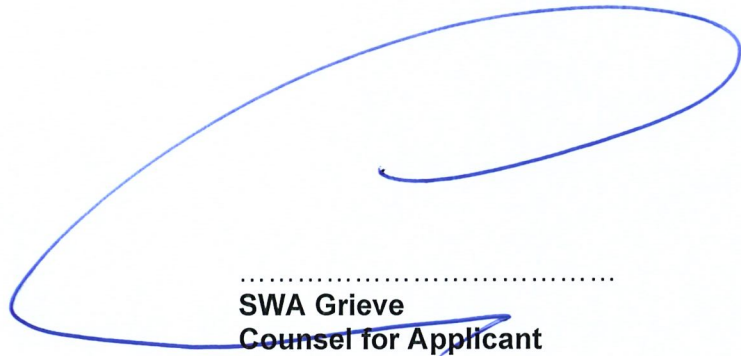
⁷³ See also *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844 followed in *Waimarino Queenstown Ltd v Queenstown Lakes District Council* [2024] NZEnvC 176, where the Court noted it was the approach consistently applied by the courts where an application has been made under s 221(3) of the RMA.

and development of the site; and provides future certainty to the community about the appearance of the site, and its integration with the surrounding environment. The proposal respects and enhances the surrounding environment in my submission.

109. Amenity values is a central issue which overlaps with the quality of the environment; and it is submitted that the applicant has sufficiently addressed the possible adverse effects, and ways to avoid, remedy or mitigate them, to the point where those effects are not an impediment to the granting of resource consent.
110. The proposed subdivision is a non-complying activity under the District Plan, and it is proposed to subdivide land on which is situated lawfully established activities (i.e. dwelling houses etc) in the rural zone - that will not unduly fragment rural land, nor adversely affect rural character and amenities. The proposal will have no change to the character, appearance or amenity of the relevant environment.
111. The proposal would assist to provide quality housing for people in a pleasant surrounding environment, in close proximity to Lepperton village and New Plymouth city, on separate titles. Subdividing the land would also be an efficient use and development of the finite site resource.
112. A potential consequence of the subdivision will be continuation of the existing rural activities on proposed Lot 2 - with no long term loss of Highly Productive Land.
113. That combination of activities will conform with the existing rural character and amenity of the area.

114. The proposal will have negligible adverse effect on amenity values, privacy and outlook, rural landscape and character (including cumulative effects, precedent effects and land fragmentation); there are no significant adverse effects on the environment that would result from the proposed subdivision. The adverse effects on the environment are less than minor based on the whole of the evidence.
115. The subdivision would not be contrary to the relevant objectives and policies and of the District Plan – fairly appraised and read as a whole - for all the reasons provided in Mr Rendall’s evidence, and these submissions.
116. Based on the whole of the evidence, and fairly appraising the relevant objectives and policies as a whole, the proposal is consistent with the provisions of the relevant statutory instruments to be considered under s 104(1)(b); and any adverse effects that might occur (if any) can be adequately and appropriately mitigated.
117. Following a “structured analysis” – and considering and weighing all the relevant facts, circumstances and evidence in this case - it is respectfully submitted that the proposal meets “the one ultimate question to be answered”⁷⁴ - the purpose of the RMA will be fulfilled – as the proposal promotes the sustainable management of natural and physical resources; accordingly, the necessary consent should be granted.

⁷⁴ *Shirley*, supra



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**SWA Grieve
Counsel for Applicant**