Foster v Rodney District Council

Environment Court Auckland A23/09
22, 23, 24 July; 14 August; 18 November 2009
Judge Smith

Resource consent — Subdivision — Variation of consent notice registered against title — Discretionary activity consent — Buildings limited to defined area under consent notice — Balance of land to be used for rural productive use — Developers seeking to subdivide land further — Non-complying activity — Resource Management Act 1991, ss 5, 8, 104, 104B, 104D, 105, 127, 221 and 290A and Part 2; Hauraki Gulf Marine Park Act 2000.

The subject site, in Omaha Flats, was created as a result of resource consent granted in settlement of an appeal, being the subdivision of approximately 20 ha into four lots. The consent order conditions included a requirement that a consent notice be registered against the title. This required that buildings were limited to a defined impermeable area, identified on the relevant subdivision plan as "W", with the balance of the land to be utilised for rural productive use.

The appellants sought to subdivide a 5.4205 ha lot of the site into two approximately 2.7 ha each. It did not seek to site a house in position W and it sought to have a building site, plus curtilage, in respect of each subdivided section. A house was a permitted activity on the sites if created but more than one was prevented by the consent notice. Each house would involve areas of land currently identified as being required for horticulture production in the consent notice.

The application was originally presented to the Court as being an appeal from a refusal of the Rodney District Council to grant a non-complying activity consent for the subdivision of the property. However, in order to be able to grant any consent for the subdivision, the Court needed to be able to cancel or vary the consent notice against the property. It concluded that it had to grant a discretionary activity consent to either cancel or vary the consent notice if it was to grant any consent for the subdivision.

Held (dismissing the appeal)

1 The consent notice itself was put in place for the purposes of retaining productive use of all land but the area W. This application would

at best substitute a similar requirement for a slightly smaller area of land. It was less likely, whatever the consent notice might say, that productive use would be made of the land with the smaller lots. There were concerns about the enforceability of such consent notices, particularly as the lot sizes fell below 4 ha. As the lot sizes fell below 4 ha there was a tendency for a movement towards residential activity as the predominant activity rather than a productive use of the land (even as a secondary activity). Although the effects in terms of intensification of use were small they were cumulative on existing effects which showed this area as particularly sensitive to further intensification (see para [124]).

2 In respect of the application to vary or cancel the consent notice the purpose for which it was imposed remained as pertinent today as it did in 2001. In particular, retaining versatile lands for primary production was a key purpose. The application in fact sought to at best retain the consent notice with minor derogation of the area. Given that the Court was not satisfied as to the enforceability of a consent notice on 2.7 ha allotments, it considered that only areas of land over 4 ha should be subject to such consent notices (see para [128]).

Cases mentioned in judgment

Ahn v Christchurch City Council EnvC Christchurch C68/2007, 24 May 2007.

Baker Boys Ltd v Christchurch City Council [1998] NZRMA 433.

Batchelor v Tauranga District Council [1993] 2 NZLR 84, (1992) 2 NZRMA 137.

Batten v Rodney District Council EnvC Auckland A66/09, 6 August 2009.

Bayley v Manukau City Council [1999] 1 NZLR 568, [1998] NZRMA 513 (CA).

Dye v Auckland Regional Council [2002] 1 NZLR 337, [2001] NZRMA 513 (CA).

Kapiti Environmental Action Inc v Frandi [2003] 2 NZLR 338, [2003] NZRMA 337, [2003] 9 ELRNZ 235 (CA).

McKinlay Family Trust v Tauranga City Council EnvC Auckland A119/08, 29 October 2008.

Rodney District Council v Gould [2006] NZRMA 217, (2004) 11 ELRNZ 165.

Whistler v Rodney District Council EnvC Auckland A228/02, 19 November 2002.

Appeal

This was an appeal from a decision of the Rodney District Council declining to grant a non-complying activity consent for the subdivision of property.

P T Cavanagh QC for the appellant.

J P Hassall and *J R Gregor* for the respondent.

C T Walker and *N C Z Khourie* for Aenid Seventeen Ltd and A I Gibbs (s 274 party).

L C Thompson for Whangateau HarbourCare Group Inc (s 274 party).

JUDGE SMITH. [1] Messrs R Foster, K & E Reynolds, B Cruickshank (Foster) seek to subdivide a 5.4205 ha lot at Jones Road, Omaha Flats, into two lots of approximately 2.7 ha each.

[2] The subject site, lot 1 DP 205792, was itself created as a result of resource consent granted in settlement of an appeal in 2001, being the subdivision of an approximately 20 ha lot into four lots in 2001.

[3] The 2001 consent order conditions included a requirement that a consent notice be registered against the title. Relevantly, this requires that buildings are limited to a defined impermeable area identified on the relevant subdivision plan as area "W", and the balance of the land be utilised for rural productive use. Annexed hereto and marked "A" is a copy of the original subdivision plan and annexed and marked "B" is a copy of the consent notice under s 221 of the Resource Management Act 1991 (the Act).

Current application

[4] The current application was originally presented to the Court by Foster as being an appeal from a refusal from Council to grant a non-complying activity consent for the subdivision of the property.

[5] However, in order to be able to grant any consent for the subdivision, the Court will also need to cancel or vary the s 221 consent notice against the property for the following reasons:

(a) the applicant does not seek to site a house in position W;
(b) it seeks to have a building site, plus curtilage, in respect of each subdivided section. A house is a permitted activity on the sites if created but more than one is prevented by the consent notice; and
(c) it appears to be agreed that each house will involve areas of land currently identified as being required for horticulture production in the consent notice.

[6] We have concluded that the Court must grant a discretionary activity consent to either cancel or vary the s 221 notice, if it is to grant any consent for the subdivision.

Interrelationship of s 221 consent notice and subdivision application

[7] We have concluded that the subdivision consent could not be operated upon without the Court granting at least a variation of the consent notice to accommodate the proposed non-complying activity. Annexed hereto and marked "C" is a concept site plan. We have utilised this because it shows the general intentions of the entire site and includes the Fosters' calculations as to various areas.

[8] Section 221(3) has been amended to overcome the effect of the Court of Appeal decision in *Kapiti Environmental Action Inc v Frandi*.[1] The amendment introduced by s 92(1) of the Act 2005 has essentially made a cancellation of a consent notice provision subject to the same procedures as variations under s 127 of the Act.

---

1 *Kapiti Environmental Action Inc v Frandi* [2003] 9 ELRNZ 235 (CA).

[9] The impact of this has not been discussed in any detail beyond a decision in *McKinlay Family Trust v Tauranga City Council*.[2] In particular, the discussion by the Court of Appeal in *Frandi* as to the criteria to be applied in considering whether to vary or cancel a condition of a consent notice:

(a) the circumstances in which the condition was imposed;
(b) the environmental values it sought to protect; or
(c) pertinent general purposes of the Act as set out in ss 5 – 8.

We conclude these criteria may still have some relevance under the discretionary consent procedure.

[10] Any such consideration is subject to the criteria of s 104(1) of the Act, and accordingly, subject to Part 2 or the Act itself as a full discretionary activity.

[11] The Court also notes that the application for subdivision consent itself is a non-complying application under both the Rodney district operative plan (PC55) and also under the largely operative Rodney district proposed plan (the proposed plan) (excepting the rural section). The provisions of the proposed plan in respect of this application, particularly the rural objectives and policies, are settled, and it is unlikely that any of the rule changes still subject to negotiation would impact upon this application.

[12] Accordingly, this application is considered in the context of:

(a) a change in the legislation since 2005 relating to consent notices; and
(b) significantly clearer position in relation to the plan provisions than has been the case for nearly a decade in the Rodney district.

The approach of the Court

[13] The case was originally presented to this Court on the basis that having passed the two threshold tests of s 104D of the Act, the consent should properly be granted because the effects were no more than minor and it was not contrary to the objectives and policies of the plan. This approach does not fit with either the provisions of the Act or with well-established case law which this Court considered was well settled since at least *Bayley v Manukau City Council*[3] in 1998.

[14] It is well-established that s 104D tests are threshold tests which can be addressed either as entry or exit tests. Nevertheless, one must be fulfilled for a consent to be granted. Beyond this, the Court is still required under s 104(1) of the Act to have regard to all the factors outlined therein, and is particularly directed to Part 2 of the Act in reaching a discretionary decision as to whether it should grant consent.

[15] In doing so, the deciding authority must be satisfied that the grant of consent will meet the single purpose of the Act, being sustainable management, as that term is used in s 5. It must take into account all of

---

2 *McKinlay Family Trust v Tauranga City Council* EnvC Auckland A119/08, 29 October 2008 at [31].

3 *Bayley v Manukau City Council* [1998] NZRMA 513 (CA) at 521. Also discussed in *Ahn v Christchurch City Council* EnvC Christchurch C68/2007, 24 May 2007 at [11] – [13].

the provisions of relevant plans, including district and regional plans, and all effects which are more than minimal. In particular, this Court must include in its consideration:

(a) all other provisions of a plan in addition to policies or objectives; and
(b) effects that are more than minimal, but less than minor

in reaching its conclusion on a non-complying application.

[16] In establishing an approach to these matters the Court in *Baker Boys*[4] suggested that an appropriate approach was to:

(a) examine all the effects of the proposal (including beneficial effects);
(b) all relevant provisions of the plan; and then to
(c) examine whether the adverse effects are more than minor; or in the alternative
(d) whether the proposal is contrary to the objectives and policies of the plan.

[17] Another procedure is to consider the threshold tests first and this is still adopted from time to time by witnesses before this Court. The difficulty, demonstrated in this case, is that:

(a) in identifying only effects that are more than minor, they discount those which are more than minimal, but less than minor. This can have particular impact where there are multiple or cumulative effects each of which is not significant, but is more than minimal; and
(b) after addressing the objectives and policies of the plan the witness forgets to return to consider all the other provisions of the plan before addressing the various criteria under s 104(1).

[18] It is this conflation of the examination of effects which are more than minor and the objectives and policies of the plan, with the discretionary criteria in s 104(1) of the Act which creates a trap still encountered by this Court from time to time in evidence given by expert witnesses. In this case the planning witnesses on both sides failed to consider:

(a) effects that were more than minimal but less than minor; and
(b) provisions of the operative and proposed plans other than the policies and objectives.

[19] In this case the Court was left trawling through extensive evidence trying to ascertain whether a particular effect has been identified as more than minimal, and whether other provisions of the plan which are not objectives and policies are relevant to the determination of the appeal.

The threshold test

[20] The time is now being reached where the Court is entitled to disregard evidence produced in this way. This issue was raised with

4 *Baker Boys Ltd v Christchurch City Council* [1998] NZRMA 433.

witnesses in this case, particularly Mr B W Putt and Mr R B Scott. The witnesses sought to address some of these failings orally. (Mr Cavanagh made extensive submissions in reply, but no leave was sought to produce further or better evidence).

[21] Unfortunately, Mr Cavanagh's final submissions misstated the concerns of the Court as:

(a) relating to only s 104(1)(a) of the Act, whereas it relates to both s 104(1)(a) effects, and (b) relevant provisions of various statements and plans; and
(b) that it is not appropriate to review the objectives and policies in the relevant plans in isolation to determine the gateway test prescribed in s 104D(1)(a) is met.

[22] Neither statement correctly states the Court's concerns.

[23] Again, the concern of the Court is simply that:

> It is mandatory in a consideration of a non-complying application that regard is had to:
>
> (a) any actual and potential effects, including all of those which are more than minimal, and
> (b) any relevant provisions of relevant statements or plans.
>
> In exercising the Courts discretion in considering the grant of a non-complying consent under s 104(1) of the Act.

[24] Quite simply, this Court's understanding of the law is that s 104D is a threshold or high-level test which establishes jurisdiction for the Court to grant a consent under s 104(1). It is fundamental that the two tests are different and that the threshold tests under s 104D are a broad or high-level filter, and do not mean that an application passing these tests should or will be granted consent under s 104(1).

[25] We shall see in due course that these matters are of some particular importance in this case given:

(a) the gestation and current position of the Rodney planning provisions; and
(b) the Court is here dealing with ephemeral issues around rural character and amenity which are at the best of times difficult to quantify.

[26] We intend to firstly examine:

(a) the provisions of the relevant plans, then
(b) the effects, and
(c) any other matters under s 104(1)(c)

before moving to a consideration of the threshold tests and then reaching a final conclusion under s 104 and Part 2 of the Act if appropriate. In doing so, we need to keep in mind that we are examining not only the application for subdivision, but also the application for cancellation and/or variation of the consent notice under s 221 of the Act.

Planning provisions

[27] Neither Mr Scott nor Mr Putt addressed the New Zealand coastal policy statement or Hauraki Gulf Marine Park Act 2000. They both commenced their consideration with the Auckland regional policy statement and moved on to consider the other district plan provisions.

[28] Ms Foster, a planner giving evidence for HarbourCare, referred to the New Zealand coastal policy statement and merely notes that the application doesn't consider the policy statement or the need to protect ecosystems. She does not mention the Hauraki Gulf Marine Park Act, which in our understanding of the general geography of the area would include Omaha Flats. In the absence of any evidence on the matter, we can only assume that the application is consistent with the provisions of both Acts or otherwise that the considerations arising from them are subsumed within the regional and district documents which we will shortly discuss.

The Auckland regional policy statement (ARPS) and regional coastal plan

[29] Ms Foster points out that the Whangateau Harbour is recognised as a significant harbour, sensitive to the ways in which the land and their catchments have been developed and used, and that strategic objective 2.5.1(3) of the ARPS is:

> (3) To protect the soil resources, amenity values, rural character, landscape values ... from the regionally significant effects of inappropriate subdivision, use or development.

[30] The ARPS also has this to say about the effects of activities within rural areas in strategic policy 2.3.3:

> ... The effects on the environment that result from activities in rural areas are often separated from those activities by time and space and the cumulative effects must be considered. The consistent administration of policy statements and plans is of key importance for the management of cumulative effects in order to achieve the objectives of policy statements and plans.

[31] Strategic policy 2.5.2(4) states that:

> (4) Countryside living is to be subject to constraints as to location, scale and extent so as to avoid remedy, or mitigate adverse effects.

Similarly, urban development is not permitted outside the metropolitan urban limits (MUL).

[32] Questions then arise as to whether particular density levels constitute either urban living or countryside living. Appendix D of the ARPS defines countryside living as low density residential development on rural land, and is said to include the concepts of rural residential development and residential bush lots. The proposed subdivision clearly fits with such a definition of low density residential development on rural land but so may the existing subdivision.

[33] Chapter 2 of ARPS, 2.5.3 "Reasons" (p 17) identifies that:

> Unless limited in location, scale and extent, countryside living has the potential to undermine the policies of containment and sustaining the potential of the rural resources as well as undermining the character and amenities of rural areas.

[34] Plan change 6 – LGAAA (PC6) does not seem to divert from these key proposals. PC6 is at this stage still at appeal and little weight can be given to its provisions.

[35] The issues of containment within the MUL in managing adverse effects on new development on the environment continue and are strengthened in the regional plan: coastal (the coastal plan). Mr Scott and Mr Putt do not identify this plan as relevant, although Ms Foster deals with it briefly. She states that the subject site is part of the area covered by the coastal plan, and the objectives and policies include the need to protect the coastal area from inappropriate use and development and provide mitigating measures. The Whangateau Harbour and its environs (which we understand includes the subject site) are classed as coastal protection area 2 (CPA2) and the coastal plan has special protection provisions. We do not understand this plan to affect this particular site, which has no harbour frontage.

The Rodney district plans

[36] As we have already identified, the Rodney district operative plan is PC55 and also the partly operative proposed plan. However the relevant rural objectives, policies and other provisions have almost entirely been settled as they affect this appeal.

Plan change 55 operative plan

[37] Overall, the objective for the rural area is captured within objective 5.1 of PC55, which seeks:

> To maintain and enhance the rural character of the General Rural Activity Area.

Policy 5.2(i) notes that:

> 5.2 Policies
>
> (i) Activities should not adversely affect the established rural character of an area.

Objective 5.3 seeks:

> 5.3 Objective
>
> To promote and maintain environmental conditions enabling resources within the activity area to be used for primary productive purposes.

Policy 5.4 includes:

> Policies
>
> (i) Retention of existing rural character of the General Rural Activity Area through limiting activities which [sic] general adverse effects on the rural character and/or the operation of legally established activities;
>
> (ii) The level of amenity regarded as appropriate in the activity area to be based on the premise that the nuisance effects of the type generated by primary production activities currently legally established are acceptable;

(iii) Subdivision generally to be limited, but to allow for scattered residential sites which will be available for rural workers, and to allow the size of holdings to be altered by boundary relocations to suit rural landholders' needs;
(iv) Use of land to be regulated through limits on subdivision and [clearing] of bush and earthworks to maintain the long term value of the land resources tor productive fanning purposes.

[38] Objective 5.13 includes:

5.13 Objective
To manage the rural land and soil resources in such a way that they retain their productive potential.

[39] Policy 5.14 states:

5.14 Policy
The land and soil resource should remain in a titled structure that enables versatility of the resource and enables a range of activities to occur and operate on a long term sustainable basis.

[40] Given the lack of any discussion by the expert witnesses in respect of the other provisions of PC55, we consider that the Court would be entitled to refuse consent on the basis that the applicant did not make out grounds under the PC55 or identify the provisions of PC55 relevant. However, given that there has been some tangential discussion of these matters, and our more extensive discussion of these issues in other decisions (in particular *Batten v Rodney District Council*),[5] we consider that the following factual matters are clear:

(a) that the other provisions of PC55 reflect a strong preference for larger land-holdings to maximise the versatility of the land for primary productive purposes; and
(b) that the provisions within the plan for smaller land holdings (say under 20 ha) are particularly confined and essentially limited to areas identified within the planning documents as available for countryside living.

[41] We are also able to conclude as a matter of fact that when the plan speaks of an area, it is speaking of a part of the rural area of a district, rather than the entire rural zone of the district. Policy 5.2 notes "rural character of an area", compared to objective 5.1 "rural character of the General Rural Activity Area". For this reason, we conclude that PC55 intends that the area with which the comparison for the purposes of character amenity is drawn is the local area rather than the general rural character area as a whole.
[42] In that regard, the evidence before this Court was uniform that the proper comparative area is with the Omaha Flats rural area, which we understood to be something in the order of 560 ha in size.
[43] Objective 5.13 and policy 5.14 address some of the "Intended Environmental Results for the General Rural Activity" and the

5 *Batten v Rodney District Council* EnvC Auckland A66/09, 6 August 2009.

"Environmental Performance Criteria for the General Rural Activity" are found at pp 48 and following of the plan. This demonstrates, for example under 8(i)(b):

> 8. Environmental Performance Criteria for the General Rural Activity
>
> ...
>
> (i)(b) Excavation of soil, spoil or other materials does not exceed 200 m^2 unless either no adverse effects result or adverse effects can be mitigated

[44] Under 7(iii) "Character" we note that the plan anticipates:

> 7. **Intended Environmental Results for the General Rural Activity Area**
>
> ...
>
> (iii) Character
>
> A non-urban character that reflects a relatively low density of occupation and related built structures (including roads and other infrastructure) is retained and protected.

[45] Under 8(iii)(a) and 8(iii)(b):

> 8. ...
>
> (iii)(a) Activities should be consistent with the non-urban character of the area which reflects a low density of occupation and related built structures ...
>
> (iii)(b) Newly created sites are designed solely for the above activities.

[46] Under 7(iv) (p 49) indicates:

> 7. ...
>
> (iv) Amenities
>
> ... an area that is remote from conventional residential development and business activity and has an open space character dominated by natural qualities ...

[47] When it comes to various activities permitted in the zone (ch 9 pp 15 and on) many of these are related to farming activities. At 10.2 the criteria for discretionary activities includes:

> 10.2 **Discretionary Activities**
>
> (a) All Discretionary Activities
>
> (i) The activity should have a need for a rural rather than urban location;
>
> (ii) The activity should not have a significant adverse effect on the rural charactar of the surrounding area ...;
>
> (iii) The activity and its buildings should not have a significant adverse impact on the amenities of neighbouring properties.

[48] Some of the activities for which provision is made requiring consent include clean-fill sites, commercial breeding and boarding establishments, intensive farming, wineries and the like, and mineral extraction activities.

[49] When it comes to "Subdivision Standards" at ch 11, pp 59 onwards:

11.1 **Sites for the protection of significant stands of native bush or significant natural features**

...

11.2 **Sites for rural residential dwellings**

...

11.2.2 Minimum and maximum site area

The minimum site area shall be 1 ha and the maximum 2 ha.

11.2.3 Design of Subdivision

(a) At least 50% of the rural-residential site shall either:

(i) be or more than 15° slope, or

(ii) have no potential for any productive use of the land.

...

(b) Subdivision shall not detrimentally affect the practical operation of any existing farm.

(c) No part of the rural residential site shall include any Class I, II or III soil ... *except that* up to 2000 m^2 of Class III soil may be included to provide for a building site.

[50] At 11.2.4 it provides that no subdivision is allowed for sites of less than 20 ha and the ability to subdivide only arises in relation to the appearance and site as it existed on 21st September 1988:

11.2.4 Number of sites allowed

(a) The ability to subdivide shall be determined from the certificate of title of the parent site as it existed on 21 September 1988.

(b) Sites less than 20 hectares in area

For sites consisting of less than 20 hectares, no subdivision shall be allowed under this Rule.

[51] At 11.3 – 11.8 it provides for other specific potentials for subdivision, none of which apply here. All of these examples are very limited. Overall it is clear from a viewing of these discretionary and limited discretionary opportunities for subdivision that they are limited and that the application of the various criteria would make the granting of consent under these provisions rare.

[52] Furthermore, it cannot be the intention of PC55 that non-complying applications which deviate even further from these provisions are intended to ignore the relatively strict criteria for discretionary consent. This would essentially create a hierarchy where non-complying applications could more easily obtain consent than discretionary or limited discretionary consents. That is neither the way in which the Act is set up to operate nor, in particular, PC55. In essence it is clear that the subdivision which occurred in 2001 exceeded those provided by the now operative PC55 (but which was only proposed in 2001).

The proposed district plan

[53] In the introduction of the rural section the plan says this about Omaha:

7.1 **Introduction**

...

The climate and soils are of variable quality for production, with the most versatile soils being located in the south around Kumeu/Huapai/Waimauku, and in the north, in a much smaller area

in the vicinity of Omaha ...

[54] On these versatile soils numerous types of horticulture are carried out including vineyards and related wineries. Later it says generally of the district:

> Traditionally the rural parts of the District have been where agriculture and primary production activities have taken place, but increasing[ly] the lifestyle opportunities in the District have become an increasingly major component of its character. Lifestyle development has occurred in the areas close to the metropolitan Auckland and increasingly, along the coastal fringe on both coasts, where access is off the main road transport links – State Highway 1 or State Highway 16.

[55] And later:

> As well as in the metropolitan fringe area the District continues to face growth pressures in coastal areas, particularly on the east coast north of Orewa. Once again the demand for lifestyle activities places significant pressure on the coastal landscapes, the beaches and harbours of the District. These coastal environments are of regional significance and require specific consideration with respect to the possible adverse effects of further subdivision and development.
>
> The rural area has a dynamic nature. Rural activity has rarely stood still for long. It is marked by constant change of varying degrees, brought about by the interaction of human activity with the rural land resource, and the natural features and landscapes forming part of that resource.

[56] Not surprisingly, the plan then goes on immediately to identify issue 7.2.1:

> Issue
> 7.2.1 **Rural character can be adversely affected by subdivision and land use activities**

[57] It goes on to describe rural character at 7.2, ch 7, p 3 the elements making up rural character as follows:

> Rural Character ...
>
> (a) The predominance of natural features over man-made features.
> (b) A very high ratio of space not built upon (open space) to built upon space on individual sites.
> (c) The presence of large areas of vegetation, in the form of grass, trees, crops and indigenous vegetation.
> (d) The presence of a large number of farmed animals and extensive areas of plant or fruit crops and plantation forests.
> (e) Noise, smells and visual effects associated with the use of land for a wide range of farming, horticultural, mineral extraction and forestry purposes.
> (f) A low density of building and structures because site sizes are in hectares rather than square metres.
> (g) Low population densities.
>
> [(h)(i)(j), relating to rural rather than urban roads infrastructure.]

[58] Chapter 7 goes on to say that agriculture and farming are important components of rural character and notes that part-time rather than full-time production now tends to dominate. It later notes that, particularly in the urban rural fringe around Auckland, properties in this area are often less than 10 ha with many 4 ha or less with people tending to work in Auckland and commuting each day by car. It goes on to state that subdivision is therefore the first step in a process which can ultimately result in changes to adverse effects on the rural character and states importantly (ch 7, p 4):

> Although individual subdivisions and resulting activities only have limited adverse effects on their own, the cumulative effects of several or many subdivisions and subsequent activities may be significant ... Subdivision therefore both individually and cumulatively can adversely affect rural character.
>
> ...
>
> Given the nature of rural character, it is the cumulative effects of the individual subdivisions and developments that are the basis of this issue ...
>
> ...
>
> One other element of this issue is the erosion or loss of the distinctive character of various parts of the District which provide it with a unique identity and which exhibit more fully than other areas, the general elements making up rural character ...

[59] This type of discussion continues through issue 7.2.2 which notes "rural amenity values can be adversely affected by subdivision and land use activities". Issue 7.2.3 identities that "rural productivity can be adversely affected by activities". There is discussion about subdivision and land use having effects on native plant and animal biodiversity at issue 7.2.4, riparian margins issue 7.2.5, and water quality issue 7.2.8. Of particular relevance is issue 7.2.6, relating to the versatility of rural land, and issue 7.2.7 degradation of soil resources.

[60] In respect of issue 7.2.6 the plan notes:

> Issue
> 7.2.6 **The versatility of rural land can be lost through inappropriate subdivision and land use**
>
> ...
>
> The continuing subdivision of land into smaller lots reduces the potential of the land to be used for a range of more traditional types of farming activities such as beef and dairy farming. Subdivision is generally irreversible because in most instances amalgamation of sites for a particular rural based purpose becomes too expensive ...
>
> ...
>
> Fragmentation, therefore, reduces the ability of the land to be used for activities requiring larger land areas should market or cultural conditions dictate such an approach.
>
> Retention of land of differing soil types in a range of site sizes is

> necessary to maintain the versatility of rural land in order to respond to the changing needs and aspirations of present and future populations.
>
> Loss of versatility can also occur through the physical location of activities that render the land unusable for primary production to all intents and purposes. This is of particular concern in relation to land which is highly suitable for food production, given the relatively small proportion of soils that have this characteristic within Rodney ...

[61] In respect of degradation of soil resources erosional processes are identified but they are also concerned with loss of soil structure and fertility.

[62] It is in this context that the plan then goes on to identify objectives and policies. The key objective 7.3 is "to maintain and enhance the rural character of the District". Of particular importance are other objectives:

> Objective
> 7.3.3 To maintain and protect the amenity values present in the rural parts of the District.
> Objective
> 7.3.4 To avoid or minimise conflict between different land uses which can result in adverse effects upon amenity values.
> Objective
> 7.3.5 To avoid or minimise conflict between land uses which can adversely affect the ability of other rural sites to be used for rural productive purposes and affect the viability of other rural production based activities.
> Objective
> 7.3.6 To maintain and enhance the land tenure pattern which enables the rural land resource to be used for a range of activities on a sustainable basis for present and future generations.

[63] Policies then follow at 7.4 and include:

> Policy
> 7.4.1 Intensive subdivisions and activities which are primarily rural residential based should be located close to metropolitan Auckland or along major routes where road access is able to accommodate increased traffic volumes.

[64] Policy 7.4.2 identifies that "rural subdivision and activities should be of nature, scale, intensity and location consistent with the existing rural character of the relevant part of the District" and identifies the criteria we earlier discussed. Importantly, the "Explanations and Reasons" state that "rural character is not constant throughout the District" and notes that "it varies from one locality to another".

[65] Policies 7.4.3, 7.4.4 and 7.4.5 all deal with subdivision and rural residential opportunities and raise various concerns that we have already identified through the earlier phases.

[66] Policy 7.4.7 reflects the requirement to "remain in a land tenure pattern that has a range of site sizes [for sale with] a wide range of

appropriate activities and different demands by present and future generations can be accommodated on the land". There follows a whole range of other policies relating to land rehabilitation and high-quality soils. One of particular interest is policy 7.4.12, which notes that "subdivision and land use not based upon the productive capability of the soil should avoid locating on the most versatile soil for food production (such as Class II soils) or not prevent the use for that purpose".

[67] Then it goes on at 7.5 to discuss the "Strategy". The proposed plan's primary strategy is to "protect and enhance rural character and rural amenity values" and to ensure that subdivision, development and activities ... occur without "adverse effects upon the rural character and amenity values in each part of the District". It goes on:

> (g) To allow rural residential subdivision opportunities in exchange for:
> (i) the protection of significant native vegetation and wildlife habitat;
> (ii) native enhancement planting ...;
> (iii) native or exotic restorative/enhancement planting ...;
> (iv) the provision of additional public reserve land;
> (v) the provision of additional esplanade reserve land;
> where the Subdivision itself does not create significant effects.

[68] Strategy 7.5(i) of the strategy also seeks "to enable a range of rural production activities" and the "Explanations and Reasons" go on to say particularly that it "looks at providing for general rural activities such as farming and forestry", which minimally affect "rural character and amenity values within the majority of the District".

[69] Policies 7.6 and onwards are the implementation of these regulatory methods, and the relevant zone in this case is the general rural zone. There are countryside living zones also identified but none apply within the Omaha Flats area. Policy 7.6.1.2 notes that "non-complying activities are those that the Council considers are not appropriate in the specific rural zone" and that "any application for a non-complying activities will be assessed against the relevant matters set out in s 104 of the Act".

[70] The "Anticipated Environmental Results" at ch 7.7 follow very much from the objectives and policies identified, particularly:

> (a) The maintenance and protection of the rural character of the rural area.
> ...
> (c) The maintenance and protection of amenity values.
> ...
> (e) The maintenance and versatility of the rural land resource, including soils.

[71] Policy 7.8.1.1 again reflects the "General Rural Zone Objectives". Policy 7.8.1.2.1 notes that "further subdivision and rural residential lifestyle opportunities should be limited in this zone".

[72] The proposed plan goes on at policy 7.8.1.2.2 to say:

> Policy
> 7.8.1.2.2 Rural residential development should not establish within the zone unless undertaken as part of protecting significant natural areas, enhancement planting or land rehabilitation meeting policies 7.4.10

and 7.4.11 or the vesting of additional areas of reserve land as appropriate.

[73] Policy 7.8.1.2.4 seeks:

Policy
7.8.1.2.4 The adverse cumulative effects of activities and subdivision upon the character and amenity values in the rural area should be avoided.

[74] Policy 7.8.1.2.6 notes that:

Policy
7.8.1.2.6 New non-residential activities should not result in any significant adverse effects upon existing amenity values.

[75] And policy 7.8.1.2.9 that:

Policy
7.8.1.2.9 Subdivision should result in a diversity of site sizes including the retention of land and large holdings in order to maximise the diversity of activities that can be undertaken on the rural land resource.

[76] Policy 7.8.1.2.11 repeats the discussion in relation to cumulative effects.
[77] The "Explanations and Reasons" notes that "the General Rural Zone is characterised by minimal subdivision and development".
[78] It notes that:

Further rural residential lifestyle opportunities can only be accommodated where the scale and intensity of settlement can avoid adverse effects, including cumulative effects, on the existing character and amenities of the environment ... *and* where they result in native habitats restoration and land rehabilitation or the protection of significant bush, scrub, wetlands and wildlife habitats. [Emphasis added.]

[79] The provisions themselves are restrictive, not allowing subdivision below 100 ha and giving only limited opportunities in respect of rehabilitation depending an whether existing wetlands, existing native vegetation or restoration enhancement is being achieved.
[80] Rule 7.14 sets out provisions for subdivision status, and subdivision for:

Rule
7.14.1.1 **Restricted Discretionary Activity**
...

(a) ...
(i) Subdivision for Protection of Natural Areas.
(ii) Subdivision for the Creation of Esplanade Reserves.
(iii) Subdivision for the Creation of Additional Public Reserve Land.
(iv) Subdivision for Household Unit Sites on Maori Land.

All are restricted discretionary.
[81] Annexed and marked "D" are the assessment criteria for discretionary activities in r 7.13.1 of the plan. For example, the rural

character addresses whether the application will change or contribute to cumulative change in the character of an area. Criteria listed include:

> Rule
> 7.13.1 **General Assessment Criteria – All Discretionary Activity**
> ...
>
> (a) ...
> (i) ... ratio of open spaces to buildings ...;
> (iv) ... building sizes and densities of an urban nature;
> (v) the intensity of the activity ...

And later r 7.13.1:

> (r) ... cumulative effects.

Non-complying activities are to be judged against s 104 of the Act, and r 7.14.1.3, but it must still include relevant plan provisions.

[82] Overall the proposed plan provisions put in place stringent criteria and requirements for subdivision. Small lot subdivision while not prohibited stand in distinction to a district plan that is looking for significant gains in protected areas with smaller lots of 1 – 2 ha for every 6 ha of rehabilitated land. Even then, as discretionary activities, the overall objectives of the proposed plan must still be achieved.

Beneficial effects

[83] Clearly the application would enable the subdivider and owners to provide for their rural residential requirements on a further site. At the present time the current site has not been built upon. We are told that the area W is unappealing as a house site although there was some discussion that this may be situated on a small area of hard clay pan. This was not confirmed to us by any witnesses.

[84] Mr Cavanagh argues that the subdivision also gives the opportunity to impose a clearer condition requiring the ongoing productive farming on the balance of the site in each case. He has even offered a cooperative farming arrangement in respect of the parent lot. We are advised that the site is currently being used in part for strawberry growing by a neighbour and that this situation could be formalised. We have concluded that this is not in itself a beneficial effect given that the consent notice registered against the title already requires the land to be in productive use.

[85] We note in passing also that several of the other properties subject to the same condition do not appear to be used for productive use and include large areas of curtilage planting.

[86] Overall, we have a concern as to whether mandatory conditions of the sort registered on this title are capable of enforcement. It appears that the remedy of cancelling the subdivision consent (and thus requiring the removal of a house) are so draconian that it is unlikely any council would take such action. However we accept the council's proposition that it cannot be argued that the utilisation of an area smaller than the area currently required to be used for horticulture can be seen as a beneficial effect. It is at best an argument that the land will still be available for

productive use as envisaged by the objectives, policies and other provisions of the operative and proposed plan.

Visual effects

[87] Mr Putt, the planner called by the applicant, in his evidence identifies a number of potential effects but makes statements elsewhere that there are no adverse effects. For example, Mr Putt states that the proposed subdivision will not have an adverse visual effect on the amenity of the surrounding area. We take this to be an assertion that the effects are minimal and therefore should be disregarded for the purposes of our assessment.

[88] Mr Stephen Brown, an experienced landscape architect, agrees with Mr Putt in this regard noting that the proposed subdivision would have a minor, even de minimus impact on the rural landscape and amenity values of its Omaha Flats setting. His reasoning relates essentially to the ability to completely conceal the site behind the existing planting with limited views along the driveway into the site. Having said that Mr Brown then goes on to state that any particular subdivision or development proposal would have to he quite exceptional to single handedly make a significant mark on the wider landscape. This is due to the fact that the Omaha Flats is particularly compartmentalised with screening shelterbelts and other vegetation. He goes on to relate his view that once property sizes start to drop below 4 – 5 ha, related land uses start to shift from being focused upon rural production and have much more focus on residential activities.

[89] In this regard we consider that the proposed plan is very clear. It is not concerned only with visual impacts as experienced beyond the property but also with wider and more incremental changes. As we have already noted the proposed plan discusses the tendency towards smaller sites and multiple subdivisions. Its criteria raises issues such as ratio of open space to buildings, the use of the land whether it is used in primary production or housing and curtilage. We accept the evidence that the visual and amenity effects beyond the site will remain largely unchanged and can be regarded as minimal. However we have concluded that the effects, in terms of the operative and proposed plans, are concerned with a greater intensity of residential activity in relation to primary production.

Visual and amenity

[90] Exactly the same issues arise in respect of amenity values in that externally it is not possible to argue in a broad sense that there are any more than minimal effects on amenity values. Internally it is difficult for us to conclude that there are any additional effects beyond those we have identified as visual.

[91] Overall, we consider that the type of effects we have identified are both visual and amenity effects given the crossover between those. We are not able to separate out any additional amenity effects over those which relate to visual effects. Internally we consider that the area would at best retain a rural residential characteristic (similar to countryside living). If the owners of this property did not pursue productive use of the land then the resulting appearance would be urban. It would be fair to say that

at least one of the homes subject to the 2001 consent notice presents as countryside living, whereas the others would fit more into the rural horticultural frame at the current time. To some extent the overall outcome is dependent on the overall primary productive flavour of the block.

[92] In its broader context, next to a large council-owned site utilised for wastewater treatment, and the Gibbs mandarin orchard, the area appears clearly horticultural and rural and that would remain unchanged. Although there would be an increase in traffic from the site we do not consider it would be sufficient to change the general amenity characteristic.

[93] We have concluded that the emphasis of the Foster site if subdivided will inevitably change towards residential rather than productive uses. Whatever the intent might be of a replacement consent notice it could have no greater effect than the current mandatory requirement to utilise the land for farming purposes.

[94] There is a particular irony in an applicant seeking to vary the existing consent notice while saying that they can provide for greater productive use. There is no doubt that the existing consent notice was put in place in order to preserve the rural productive use of the land. Any variation which provides for a reduction in the amount of land required to be utilised would be a derogation of that provision. Accordingly the adverse effects of this change are more than minimal. We have concluded that in terms of their relationship to the consent notice that such effects are significant and that they represent a reduction of protection for the versatile use of the land provided by the original subdivision in 2001.

[95] In respect of the site as a whole such visual and amenity effects are more than minimal and we shall discuss whether they constitute a more than minor effect when we come to discuss the application of the threshold tests. Nevertheless they are effects that must be taken into account by the Court in assessing the appropriateness of the subdivision.

Reverse sensitivity effects

[96] Mr Gibbs is particularly concerned at the potential effect on his mandarin orchard. He operates a large mandarin orchard involving harvesting mandarins in season both day and night. There is a need for machinery to operate sometimes during the day and night, a large packing shed, spray machinery and the like. We accept the prospects of conflict and complaint are directly relevant to the number of neighbouring homes. The subdivision of this property in 2001 into four lots already has created the potential for conflict and the Council's permission to a further subdivision of one of those lots has created the potential for up to five houses. We agree entirely with Mr Gibbs that the potential subdivision of the Foster site can only compound and increase the prospects of complaints and conflict. It was intended that these sites be used for primary productive purposes and this Court remains concerned, given what has eventuated on the nearby sites to date, that there is a strong prospect of this site being utilised for residential purposes only. If so then complaints could be made as to the primary productive activities in the area.

[97] It was suggested that there were some several hundred metres between the sites. We do not consider that this would prevent complaints. We also note that there is other horticultural activity to the north of the site and there are prospects of conflicts in that regard also.

Traffic effects

[98] There was agreement on this issue and we concur that the additional traffic effects from one household are not likely to be significant or measurable in this area. We also understand that infrastructural issues are not of particular moment and cumulative effect on the rural character of the locality.

Rural character effects

[99] Mr Scott, the planner called for the District Council, was of the view that the most significant adverse effect of the proposal was its cumulative effect on rural character of the locality. His reference to cumulative effect was an effect on the environment that will arise immediately as a result of the proposal in combination with other existing effects. In this regard Mr Cavanagh says that cumulative effects do not arise in this case.

[100] In his opening submissions Mr Cavanagh stated that the council witnesses were confusing cumulative effect with what is essentially an argument about plan integrity and precedent. We do not agree. Mr Scott's evidence in this regard clearly differentiates between cumulative effect and precedent/integrity matters. The issue is what additional effect will be created by this subdivision on those effects on rural character already created by previous subdivisions.

[101] The Court has had regard to the planning documents, the evidence of the parties, and plan showing the lot sizes in the vicinity of this site. Together with our site visit we can reach the following factual conclusions:

(a) The area has been subject to subdivisional pressure in the past.
(b) Some of that is related to coastal subdivision in areas of lower quality land on the periphery of Omaha Flats.
(c) Omaha Flats has been subject to intensive horticultural use over a period of time.
(d) The effect of this has been a gradual change in the rural character of this area. Firstly towards intensive horticulture and more recently towards greater built coverage, particularly for residences and again particularly on Omaha Flats Road.
(e) In some places, for example, on Omaha Flats Road, to the north of this site, the particular sites or lots come close to a countryside living rural character rather than a general rural character. However viewed in the context of the wider area; that is, set against the larger lots around them, the context is still one of rural activity. Nevertheless each subdivision further compromises that rural character.

[102] In respect of the subject site we acknowledge Mr Scott's evidence that:

> The proposal will therefore result in a higher density of occupation and a lower ratio of open space to built structures compared with much of the surrounding rural land. This degree of fragmentation, in my view, will erode the existing rural character of the area, particularly the sense of open rural space and the predominance of horticultural activities over rural residential activities within the locality.

[103] We look at this statement firstly in the context of the 2001 subdivision. There is a clear sense of compartmentalisation in respect of the Omaha Flats and the four lots created in 2001 do not read as a single 20 ha lot. The domestication on the two subdivided properties in south of the right of way and the different treatments of those properties compared with the more traditional horticultural properties to the north of the right of way (including the subject site) mark this out as having a higher level of domestication, One of the four sites (close to Jones Road) reads as a large-scale residential site. The other southern site has been subject to a further subdivision down to 2 ha. At this stage that subdivision does not appear to have been acted upon by the construction of another dwelling. Nevertheless there is a sense in which that site appears to be in the process of change and appears to be a large residential site with attached horticulture as a secondary or hobby activity. This compares markedly with the larger council property to the south or the Gibbs property or other horticultural properties to the immediate north. The strong copse of trees and narrow road leading to the sites means that it is not possible to read immediately whether it is residential buildings or other activities undertaken.

[104] We agree in the end with Mr Scott that an additional title will result in an intensification of residential activities and thus further erode the rural character of this area. Although we do not think it is necessary for the Court to examine the question of whether the area has reached any tipping point we do consider this area is more sensitive to rural character change because of the level of ad hoc change intensification that has occurred in the past.

[105] In this regard Mr S K Brown, the landscape architect called for the Council, discussed his experience of the relationship between average lot size and change in rural character. His evidence was that below an average lot size for an area of 4 – 5 ha (on relatively versatile soils) related land uses start to shift from being focused upon rural production and management to having much more of a focus on residential activities and the maintenance of attractive residential gardens and curtilage.

[106] In this regard we understand that the number of lots within this area is currently in the order of 130 parcels over 560 ha yielding something in the order of 4 ha average. Some of the parcels have not been built on. The Court's own experience over a range of districts is that there is a correlation between a decreasing average lot size and changes in rural character. In that regard we do consider that this area is more susceptible to minor individual changes giving rise to greater changes in rural character.

[107] Accordingly we accept that there is a cumulative effect which is more than minimal. The degree and influence of that is a matter we will discuss in due course.

Section 104(1)(c) – other matters

[108] Although s 104(1)(c) of the Act is not a matter which bears upon any of the threshold tests under s 104D, it is appropriate that we deal with this issue now before moving to the threshold tests of the Act. Two additional matters were raised of relevance in this case. The first is:

(a) Issues of integrity/precedent. We also discuss the true exception test.
(b) The issue of the sustainable development plan for Omaha and Point Wells.

Integrity and precedent

[109] The Rodney district plans have taken a significant period to reach finality. There have been changes to the rural section through PC55 which took many years to become operative. At the same time the Council was proceeding with its proposed plan and subsequently engaged in a non-statutory process known as Vision Rodney. As a result there was confusion and the lack of any operative plan to provide direction. During this period many consents were granted on an ad hoc basis for non-complying activities given the lack of clear direction from the plan. An example of this is the decision in *Whistler v Rodney District Council*,[6] which granted a consent for a subdivision of some 20 ha at Omaha Flats. This led to the Council conceding on appeal by consent order the subdivision of this 20 ha site. The *Whistler* decision was made at a time prior to the decision of the High Court in *Rodney District Council v Gould* [2006] NZRMA 217[7] and the line of decisions which followed. Issues of integrity, plan integrity and precedent have always been relevant where they arise. Where there is an operative plan this can be a significant issue (depending on the application).

[110] The starting point for a consideration is *Batchelor v Tauranga District Council*:[8]

> In our view, those provisions envisage consideration of the integrity of the plan. The weight to be given to any effect on that integrity must be a matter of judgment for the consent authority or the Tribunal.

This discussion was in the context of discussion under s 104 of the Act rather than the threshold tests then contained in s 105.
In *Gould*, Cooper J noted:

> [99] The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a

6 *Whistler v Rodney District Council* EnvC Auckland A228/02, 19 November 2002.
7 *Rodney District Council v Gould* [2006] NZRMA 217.
8 *Batchelor v Tauranga District Council* (1992) 2 NZRMA 137 at 141.

> principled approach to the consideration of district plan objectives and policies whether under s 104(1)(d) or s 105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, a reasoned decision which held that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent. Consequently, I am not prepared to hold that the Environment Court erred in any way by "fusing its consideration of plan integrity and precedent (failing to separately consider each doctrine)" as the council alleges. Neither do I think that it was obliged to make a specific finding on plan integrity, or as to whether public confidence in the administration of the relevant planning instruments would be shaken or challenged, which are the subject of separate questions raised by the appeal under this heading.
>
> [100] No doubt the Environment Court will continue to advert in appropriate cases to the concepts of the integrity and coherence of the district plan, public confidence in its consistent administration, and precedent. I do not suggest that there is any error in taking that course. I do not think, however, that the statute requires those matters to be referred to and the present case is one in which that course did not need to be followed.

[111] For the purposes of this case we acknowledge that the question of integrity, precedent and coherence are matters that we can take into account. We have concluded that we should appropriately have regard to them in this case because the proposed plan has reached an advanced stage where the majority is now operative and plan change 55 is fully operative. This compares markedly with the situation at the time of both the *Whistler* decision and the High Court decision in *Gould*.

[112] In relation to the submission that this is a matter that should be had regard to as part of the threshold test and as to whether the application is contrary to the district plan objectives and policies I consider the decision of the Court of Appeal in *Dye v Auckland Regional Council*.[9] This case related to a subdivision of a 16 ha property into five lots. It is clear that a precedent effect is not an effect on the environment. Nevertheless the Court noted:

> [49] ... The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s 105(2A)(b) and s 104(1)(d). Cumulative effects properly understood should also be taken into account pursuant to s 105(2A)(a) and s 104(1)(a). But in taking those matters into account, the consent authority has no mandatory obligation to conduct an area-wide investigation involving a consideration of what others may seek to do in the future in unspecified places and unspecified ways in reliance on the granting of the application before it.

[113] In short, we understand the position to be that cumulative effects can properly be taken into consideration as to whether the

---

9 *Dye v Auckland Regional Council* [2001] NZRMA 513 (CA) at [49].

threshold test in relation to minor effects is met, now under s l04B. It is also a matter directly relevant to the substantive evaluation required under s 104(1). Similarly objectives and policies are relevant to precedent and integrity issues under s 104D. However all provisions of the plan are relevant to precedent and integrity issues under s 104(1).

[114] Having identified the difference between cumulative effects and integrity/precedent effects we have concluded that there are effects on the integrity and consistent administration of the proposed plan and PC55, and the potential for other parties particularly in Omaha Flats to seek similar subdivision of their properties. In this regard we note that there are a significant number of properties which would be in the range of 4 – 6 ha, including:

(a) lots 1, 2, 3 and 6 of DP149412 ranging around 4 – 5 ha to the northeast of the subject property;
(b) lots 2 DP145578 being just under 7 ha and a series of properties accessed from Omaha Flats Road, a number of which are between 4 and 6 ha; and
(c) within the wider area there are a significant number of other properties.

[115] All are likely to be similarly identified as horticultural blocks surrounded by shelterbelts with limited access to water. It appears likely that most or all could proffer similar conditions to retain productive use of land.

[116] Looked at in totality the proposed plan and PC55 has taken a very strong position in respect of subdivision with at least discretionary activity status for most subdivisions certainly less than 40 or 50 ha. We have concluded as a fact that the proposed plan, which is nearly finalised, would be subject to arguments for further subdivision not only in Omaha Flats but in Rodney general based on precedent. Accordingly the integrity and consistent administration of the proposed plan and PC55 would be undermined.

The Omaha Flats development plan

[117] The Omaha Flats development plan (the development plan) is a non-statutory document. Although we can take it into account we note that at this stage it has not gone through any process for finalisation or incorporation within the plan. The development plan does not envisage the subject site as being part of any residential area. It does however provide for some limited subdivision opportunities for lots that are over 5 ha in area.

[118] Since the hearing of submissions on the sustainable development plan the Council has resolved to proceed with a plan variation allowing one new lot of 4000 m for every existing title of more than 5 ha. To our knowledge no such variation has yet been introduced nor can we assume that it will necessarily be incorporated into the soon to be operative proposed plan.

[119] Moreover we note that this application does not conform to the approach of that sustainable development plan. Although the Foster

site is over 5 ha the application does not seek one 4000 m^2 section but rather that there would be two 2.7 ha lots.

[120] We consider that we cannot properly give any weight to the development plan and in any event we do not consider that it would relevantly bear upon this application.

Section 104(1) evaluation of the subdivision

[121] The threshold test under s 104D can be either applied as an entry or exit test. Given that the Court has already addressed all of the various criteria applying to the application, we have concluded that we should properly address the substantive test under s 104(1) in the first instance. Given that this is a non-complying application we consider that there must be some unusual quality to it to justify a departure from the proposed plan's provisions. Subdivision is a matter which has been exhaustively considered and discussed within the proposed plan. It is a primary concern of the District Council. Now that these provisions are nearly operative and PC55 is operative it is difficult to see that the granting of a subdivision in this case could be justified without a modification and undermining of the district plan provisions for both PC55 and the proposed plan.

[122] In this case it is argued that the unusual quality is the fact that the soils of Omaha Flats are versatile compared with the balance of the district and the existing subdivisional pattern. We agree entirely that the area that is of relevance in this case is Omaha Flats. The question for this Court is: How does this application represent unusual qualities or a true exception within its comparative area? In our view there is nothing that marks this property out particularly. Although it has problems with the supply of water in relation to horticultural activities we were told that this is a widespread problem given difficulties with groundwater availability.

[123] Furthermore, the water consent that was originally attached to the entire 20 ha property was not conveyed on to individual properties when it clearly should have been. We particularly have regard to the fact that the consent notice put in place to protect ongoing productivity and limit the area utilised for residential and other buildings is sought to be varied or cancelled by this application.

[124] To permit the application where there is no clear exception would in our view be to undermine the effectiveness of such consent notices. The consent notice itself was put in place for the purpose of retaining productive use of all land but the area W. This application would at best substitute a similar requirement for a slightly smaller area of land. We consider it is less likely, whatever the consent notice may say, that productive use would be made of the land with the smaller lots. We have concerns about the enforceability of such consent notices particularly as the lot sizes fall below 4 ha. As the lot sizes fall below 4 ha we agree with Mr Brown that there is a tendency for a movement towards residential activity as the predominant activity rather than a productive use of the land (even as a secondary activity). Although the effects in terms of intensification of use are small they are cumulative on existing effects which show this area as particularly sensitive to further intensification.

[125] Finally, we consider that if the Council had considered this area merited a particular treatment it could have provided for it explicitly in either PC55 or the proposed plan. To date, it has not signalled out this area for particular treatment. Even though it may do so in the future the appropriate time at which the issue could be examined is either as part of that process or subsequent to that.

[126] Our view is that the sustainable management purpose of the Act is best met by enabling the communities' interpretations of the appropriate balance of development and primary productivity as stated in the proposed plan and which is in fact consistent with the operative provisions in PC55. The enabling purpose of the Act is best met by ensuring the consistency of applications with the proposed plan in terms of the settled terms and the PC55 in respect of outstanding provisions.

[127] Given the consistency between the two plans our conclusion is that consent to the application for subdivision under both PC55 and the proposed plan should be refused.

Consent notice evaluation under s 104(1)

[128] In respect of the application to vary or cancel the consent notice the purpose for which it was imposed remains as pertinent today as it did in 2001. In particular retaining versatile lands for primary production is a key purpose. The application in fact seeks to at best retain the consent notice with minor derogation of the area. Given that we are not satisfied as to the enforceability of a consent notice on 2.7 ha allotments we consider that only areas of land over 4 ha should be subject to such consent notices.

[129] Accordingly, we consider that the purpose of the existing consent notice is to provide a high level of certainty to public and owners as to the obligations contained within that notice. It is intended to protect the environmental values of the soil reserve and the Act's purposes including s 5(2)(a) and (b) and s 7(b), (d) and (g).

[130] We do not consider that they should be subject to the same possibilities for variation and change as, for example, consent conditions. In our view nothing has changed which justifies changing the original consent notice and there is no proper basis for a variation of it at this stage. Accordingly, we would in any event refuse the variation or cancellation of the consent notice which would make the grant of any consent to subdivision of limited usefulness to the applicant given that it would not enable the construction of a further dwelling.

Threshold tests

[131] Given our substantive conclusion it is not necessary for us to address the threshold tests. We would only briefly mention that in cases such as the questions of degree (whether the effects are more or less than minor and whether the application is contrary) are difficult of measurement. This is reflected in the fact that party witnesses will reach directly contrary views on each of these issues.

[132] For our part we would consider that the cumulative effects and the sensitivity of Omaha Flats to further subdivision is such that the effects would in their context be more than minor. Similarly, given the

clear direction of this plan and the various provisions relating to subdivision as a discretionary activity we conclude that the grant of a consent would be contrary to the objectives and policies of the proposed plan and PC55 taken as a whole and would undermine the administration of the proposed plan and PC55 also. We express these views for the sake of completeness only given our primary conclusion that consent would not be granted in any event.

Council decision

[133] Section 290A of the Act requires the Court to have regard to the council decision. In this case the council refused consent and our conclusion is consistent. The council decision itself is comprehensive and involved two independent commissioners. Consistent administration of the district plan was a key concern of the commissioners and they consider the circumstances described could be easily replicated in Omaha Flats. This is entirely consistent with a key conclusion of the Court.

Outcome

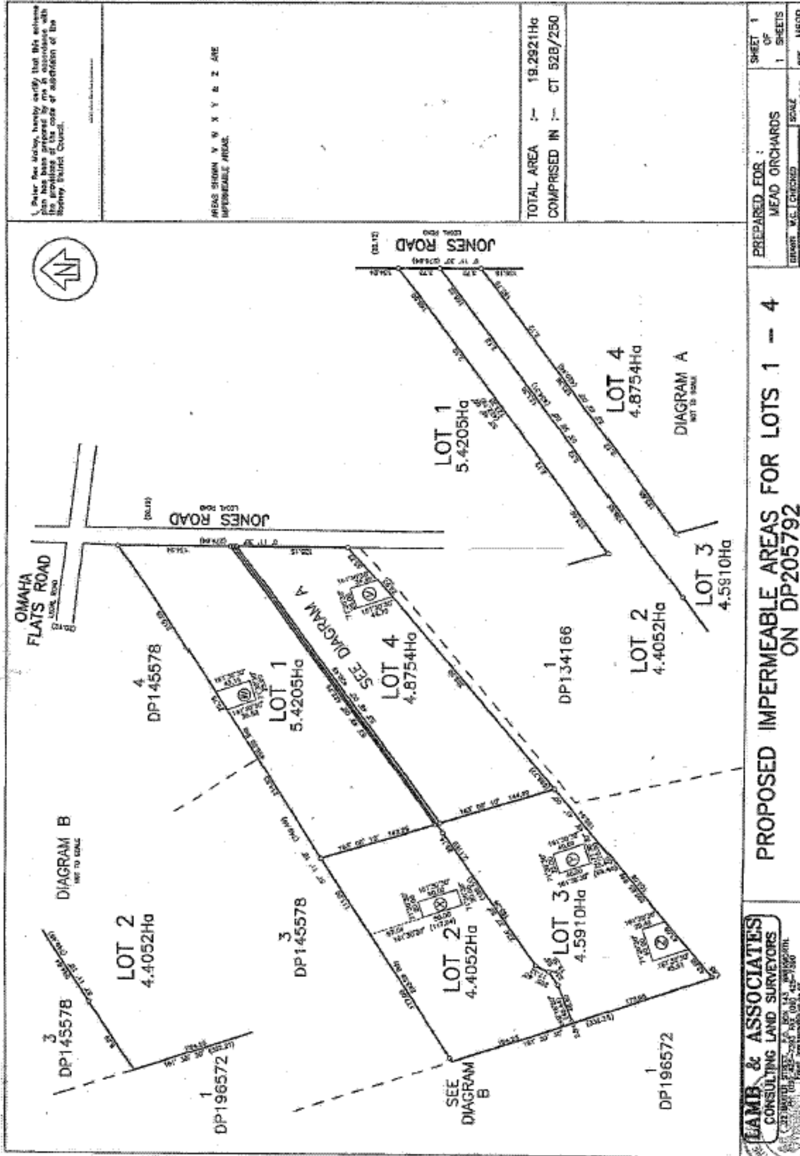
[134] Accordingly, the appeal is refused and the Court has confirmed the outcome reached by the Commissioners for the Rodney District Council on largely the same grounds, although the Hearing Commissioners did not specifically address the consent notice.

Costs

[135] Any application for costs is to be filed within 20 working days, reply 10 working days later and final reply five working days thereafter.

APPENDIX

Annexure A



Annexure B

DS74002.3

IN THE MATTER of a Plan lodged for Deposit under Number 205792

Pursuant to Section 221 of the Resource Management Act 1991 THE RODNEY DISTRICT COUNCIL HEREBY GIVES NOTICE that its subdivision consent given in respect of the land in the Second Schedule as shown on Land Transfer Plan 205792 is conditional inter alia upon the compliance on a continuing basis by the Subdivider and the subsequent owners of the land in the Third Schedule hereto with the conditions set forth in the First Schedule hereto.

FIRST SCHEDULE

(access restriction) ACCESS TO LOTS 1 AND 4 SHALL ONLY BE FROM THE FORMED PRIVATE WAY AND THERE SHALL BE NO LEGAL ACCESS FROM THESE LOTS DIRECTLY TO JONES ROAD.

(building restrictions) BUILDINGS ON LOTS 1 - 4 SHALL ONLY BE CONSTRUCTED WITHIN THE AREAS IDENTIFIED ON THE PLAN ENTITLED "PROPOSED IMPERMEABLE AREAS FOR LOTS 1- 4 ON DP205792" FROM LAMB & ASSOCIATES, DATED 22 NOVEMBER 2000, REFERENCE M699, AS IMPERMEABLE AREAS. THE BALANCE AREA ON EACH LOT, OUTSIDE THE IMPERMEABLE AREAS AS DEFINED, SHALL BE UTILISED FOR A RURAL PRODUCTIVE USE AS DEFINED BY THE DISTRICT PLAN AS HORTICULTURE AND PASTORAL FARMING (STATED BELOW), AND ONLY AS PROVIDED FOR AS A PERMITTED ACTIVITY IN THE ZONE, INCLUDING ANY NECESSARY SHELTER BELT PLANTING.

HORTICULTURE MEANS INTENSIVE GROWING OF PLANTS, FLOWERS, FRUIT OR VEGETABLES OUTDOORS (AS IN MARKET GARDENS); IN ARTIFICIAL SHELTERS (AS IN SHADE HOUSES); OR INDOORS (AS IN GREENHOUSES); AND INCLUDES ORCHARDING AND VINE GROWING.

PASTORAL FARMING MEANS FARMING BASED ON THE USE OF PASTURE FOR RAISING AND SUSTAINING HERDS OF DOMESTICATED ANIMALS SUCH AS, BUT NOT LIMITED TO, CATTLE, SHEEP, DEER AND HORSES, AND INCLUDES SPECIALIST BREEDING AND STUD FARMING.

SECOND SCHEDULE

An estate in fee simple in 19.2921 hectares more or less being Allotment 138 Parish of Matakana comprised in Certificate of Title 52B/250 North Auckland Land Registry.

THIRD SCHEDULE

Lots 1, 2, 3 and 4 DP 205792 totalling 19.2921 hectares in area.

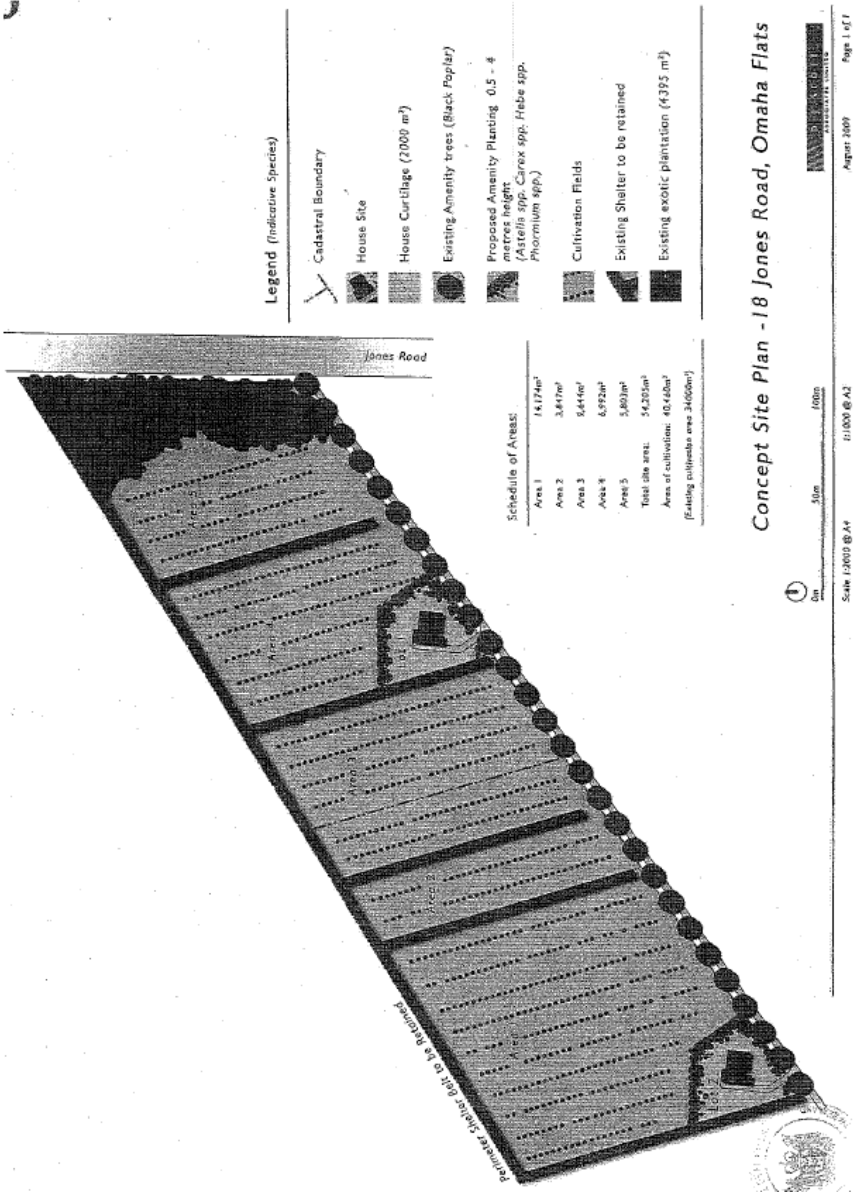
DATED this 10th day of January 2001.

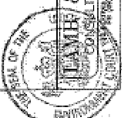
SIGNED for and on behalf of the RODNEY DISTRICT COUNCIL)

Authorised Officer

SCHEME PLAN: R25294
17/01/02

Annexure C




JONES ROAD
LOT 1
2.7102Ha
LOT 2
2.7103Ha
CURTILAGE AREA & HOUSE SITE 2000m²
PERIMETER SHELTER BELT
4
DP145578
3
DP145578
4
DP205792
2
DP210855
1
DP210855
PROPOSED SUBDIVISION LOT 1 DP205792
JONES ROAD, OMAHA
PREPARED FOR :
HATTAWAY & POUNAMU TRUSTS
SCALE 1:1250
SHEET 1 OF 1 SHEETS
REF 1349
LAMB & MOLLOY LTD
CONSULTING LAND SURVEYORS

Annexure D

7.13 ASSESSMENT CRITERIA FOR DISCRETIONARY ACTIVITIES

7.13.1 General Assessment Criteria - All Discretionary Activities

Without limiting the exercise of its discretion for all Discretionary Activity resource consent applications in the Rural Zones, the Council will have regard to the following Assessment Criteria, and any relevant Discretionary Activity Assessment Criteria in any other chapter of this Plan, and the relevant matters set out in section 104 of the Act:

Rural character

(a) Whether the activity can be established and operated without changing or contributing to a cumulative change in the character of the area from rural to some other character because the predominance of natural features (sometimes modified by human processes) over manmade features is removed or reduced, and in particular, whether:

(i) the activity removes or reduces a high ratio of open space to buildings, where such a ratio existed previously;
(ii) the activity requires infrastructure of a nature and scale (such as footpaths, streetlights, kerb and channelling) that dominates natural features;
(iii) the buildings associated with an activity (excluding household units) are of a design, scale, and quality of finish which evokes an urban character rather than a rural character;
(iv) the activity introduces building sizes and densities of an urban nature and scale;
(v) the intensity of the activity, including numbers of people using the site, the hours of operation and the number of vehicle trips generated, is significantly different from activities predominantly based on primary productive use of large landholdings or countryside living.
(vi) the activity is of a nature and scale that serves the local community and/or enables it to provide for its social, economic and cultural wellbeing and for its health and safety. [Amendment 69 Decision Report 2099] [subject to appeal ENV-2007-AKL-000181] [subject to appeal ENV-2007-AKL-000168]

Sustainable resource use

(b) Whether the activity utilises the natural and physical resources of the rural area in a manner sustaining the potential of those resources (excluding minerals) to meet the reasonably foreseeable needs of future generations.

Natural character of the coast and water margins

(c) Whether the activity will have an adverse effect on the natural character of the coastal environment and on public access to the coast and on the natural character of the margins of lakes, rivers and streams. [Subject to appeal ENV-2007-AKL-000213]

Amenity values

(d) Whether the activity will have an adverse effect on the amenity values (including visual and aural privacy) of neighbouring properties.

Water quality

(e) Whether the activity will have an adverse effect on water quality and quantity. [Amendment 68 Decision Report 2161]

Trees or bush	(f) Whether the activity will adversely affect the natural quality of any area of native trees or bush.
Landscape	(g) Whether the activity will adversely affect the visual and landscape values of the surrounding area.
Natural features	(h) Whether the activity will have an adverse effect on outstanding natural features and landscapes and on significant natural areas.
Cultural heritage	(i) Whether the activity will have an adverse effect on any cultural heritage resources on the site or on neighbouring sites.
Roading	(j) Whether the activity, including the provision of access and parking, will have an adverse effect on the safe and efficient operation of a public road.
Infrastructure/Utilities	(k) Whether the proposal includes the provision of all services, infrastructure and utilities necessary to manage the environmental effects, or alternatively whether it demonstrates how the necessary services, infrastructure and utilities are able to be provided in time to manage the environmental effects.
Health and safety	(l) Whether the activity will adversely affect the health and safety of people in the vicinity of the site(s).
Mineral extraction	(m) Whether the activity will unduly limit the operation of an existing mineral extraction site or compromise the ability to extract or provide access to mineral deposits which will provide for future needs. See the Planning Maps for Significant Mineral Extraction Resource sites. The desirable buffer distance between a mineral extraction and processing site and an activity that could potentially conflict with extraction and processing activities is 500 metres for rock extraction using blasting and 200 metres for other extraction. Exceptions to this desirable buffer distance from the mineral extraction and processing site are shown in the Planning Maps where the "Quarry Effects Management Area" on the map may vary to reflect different local circumstances. [Consent Order ENV-2007-AKL-237]
Maori	(n) Whether the activity will adversely affect the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.
Pollutants	(o) Whether the activity will generate adverse effects which cannot be contained within the site, including objectionable odours, dust, noise, glare, vibrations and lighting. [Amendment 68 Decision Report 2161]
Significant Natural Areas	(p) Whether the works proposed in an area identified as a Significant Natural Area defined on the Planning Maps are undertaken in such a manner and at such times as to have no adverse effect, or minimum adverse effect on the ecology and wildlife of the area and in particular, where relevant: [subject to appeal ENV-2007-AKL-000237] (i) nesting, feeding and breeding of species; (ii) biological processes; (iii) connections between ecosystems; (iv) the diversity of species; (v) the habitat of threatened or protected species; (vi) cumulative effects

Vegetation removal, earthworks and wetland modification

(q) For assessment criteria on vegetation removal, earthworks and wetland modification see Rule 7.12.12. [Amendment 68 Decision Report 2161]

Cumulative effects

(r) Whether the activity will have cumulative effects. In considering any actual and cumulative effects, whether:

(i) the effects of the proposed activity add to or act together with the effects of the existing activities located in the area;
(ii) the effects of new activities that may establish in the future which will add to, or act together with the proposed activity.

In considering the likelihood that activities resulting in cumulative effects may establish in the future, the Council will consider (but will not be limited to) the following:

(i) the nature of the land in the vicinity of the subject site;
(ii) the attractiveness of the land in the vicinity of the site for being used for similar, complementary, or competitive purposes;
(iii) the historic pattern of the establishment of activities in the area;
(iv) the provision of infrastructure in the area, including roading and in ground services;
(v) the proximity of highly valued natural resources, including significant natural areas;
(vi) the landscape values.

Reported by: Rachel Marr, *Barrister and Solicitor*