Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council

[2019] NZHC 2844

High Court, Invercargill (CIV-2018-425-79)
Dunningham J

9 September;
4 November 2019

High Court — Appeal against Environment Court decision — Resource consent — Proposed rural subdivision — Appellant wanted to subdivide rural property into seven lifestyle lots, with a balance lot of nearly 41 ha — Environment Court granted modified consent permitting appellant to subdivide the site into five lots — Alleged errors of law — Environment Court's minute not prejudicial to appellant — Consent notice gave high degree of certainty to affected parties and public at large at time subdivision consent was granted — Environment Court's assumption consent notice could be altered "relatively easily" was neither a reasonable assumption, nor supported by evidence — Environment Court entitled to take factual evidence, review it, and come to its own conclusions on which combination of lots achieved most appropriate landscape outcome — Environment Court erred in law when it determined proposed consent condition (and the alternative restrictive covenant) was unsatisfactory because it did not lock up land against subdivision for 40 to 60 years — High Court rejected appellant's submissions in regard to nine other alleged errors of law supposedly made by Environment Court — Appeal successful.

The appellant, Ballantyne Barker Holdings Ltd (BBHL), owned a 48 ha rural site on the eastern side of the Cardrona River near Wanaka (the site), which it wanted to subdivide. The site was zoned Rural General. Much of the rural land around the site had already been subject to a considerable amount of subdivision.

The respondent, Queenstown Lakes District Council (the Council) declined the initial proposal to subdivide the site into nine lots (comprising eight lots of approximately one hectare each, and a balance lot of about 40 ha).

BBHL subsequently modified its application and, on appeal to the Environment Court, it sought subdivision consent to create: (i) seven lots of between 0.8 and 1.55 ha, each with a residential building platform; and; (ii) a balance lot of 40.87 ha, with a residential building platform.

Prior to the hearing in the Environment Court, agreement was reached with the original submitters in opposition to the proposal. The only immediate neighbours involved in the Environment Court hearing were the Le Bruns, who owned property adjoining the northern end of the site. Specific landscaping conditions to protect the amenity of the Le Bruns were proposed. The Le Bruns later changed their position and decided that they would prefer a restrictive covenant instead of the consent notice they had agreed to.

Under the original proposal, which had been agreed to by the site's immediate neighbours, a consent notice would be registered prohibiting further subdivision on the site, unless it was rezoned permitting such subdivision. On 5 July 2018, the Environment Court issued a minute suggesting that if BBHL was to volunteer a fuller covenant that would protect against "all subdivision regardless of zoning" for at least

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

three generations, then the Court might "find its decision easier". The Court later rejected the covenant offered by BBHL.

In a decision of 28 September 2018 (the EnvC decision), the Environment Court granted consent, permitting BBHL to subdivide the site into five lots only. A key issue before the Environment Court was how to prevent further subdivision beyond what was to be approved, in order to protect visual amenity values in the area, and avoid "over-domestication" of the landscape. The Environment Court also rejected the covenant offered by BBHL.

BBHL appealed against the EnvC decision. The two main issues on appeal were concerned with: (i) the Environment Court's rejection of the proposed consent notice and the covenant; and (ii) the Court's rejection of Lots 4, 5 and 7 of BBHL's proposed subdivision. BBHL also raised a number of other errors, relating to the Court's application of the Resource Management Act 1991 (the RMA) and the relevant planning documents, and to specific factual findings it made which the appellant submits were made on no, or insufficient, evidence.

Held, (1) the Environment Court correctly recognised that it did not have jurisdiction to impose a restrictive covenant, but that BBHL could volunteer one. The Environment Court's minute was not prejudicial to BBHL. Rather it gave BBHL the chance to offer conditions that the Court considered would mitigate a potential adverse environmental effect of its proposal. The Court made it clear it was not "punishing" BBHL if it chose not to offer a restrictive covenant in the terms it suggested. The fact the consent notice condition was agreed by BBHL and the s 274 party was irrelevant to the Court's decision. The Court was concerned with wider considerations, including avoiding over-domestication of the landscape and stemming "development creep". As the Court's concerns went beyond the effects on the immediate neighbours, there was no reason for it to accept the consent condition that had been agreed with those neighbours. The real issue was whether the Court was wrong to assume the consent notice proposed was insufficiently effective to preclude future subdivision, particularly of the large balance lot. (paras 33-35)

(2) Case law made it clear that because a consent notice gives a high degree of certainty both to the immediately affected parties at the time subdivision consent is granted, and to the public at large, it should only be altered when there is a material change in circumstances, such as a rezoning through a plan change process. This means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purposes of the RMA. In such circumstances, the ability to vary or cancel the consent notice condition can hardly be seen as objectionable. (para 45)

(3) The Court's assumption that a consent notice could be altered "relatively easily" was neither a reasonable assumption, nor supported by evidence. It was inconsistent with case law on the circumstances in which a consent notice can be varied. The Court was in error to limit the extent of the terms of the subdivision consent because it assumed that the proposed consent notice condition would be ineffective to prevent future inappropriate subdivision. The second aspect of this issue was whether the Court was wrong to reject the consent notice condition (or in the alternative, the proposed restrictive covenant). The Court's justification for this appears to be that as the site was on the eastern side of the Cardrona River and there was "no suggestion on the evidence that the boundaries of Wanaka township might jump the Cardrona River", it was appropriate to preclude subdivision in the area for several decades. It was difficult to see a logical basis for linking removal of the consent condition to a time period rather than to the outcome of a public plan change process. While the

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

Court may well be right that that will not happen in the foreseeable future, it was more logical to have the no-subdivision condition lapse at the point the planning regime changes, rather than at an arbitrarily chosen point in time in the future. This was also more in keeping with the RMA's purpose of sustainable management. The Court erred in law when it determined that the proposed consent condition (and the alternative restrictive covenant) was unsatisfactory because it did not lock up the land against subdivision for 40 to 60 years. Consequently, the appeal was allowed. The application was remitted back to the Environment Court for reconsideration in light of this decision. (paras 37, 45, 47, 49, 50, 53)

(4) The expert evidence provided opinions on which number and combination of lots would best achieve the objectives and policies of the relevant plans in question. The Environment Court, as a specialist tribunal, was entitled to take the factual evidence on which those opinions were based, review it, and come to its own conclusions on which combination of lots achieved the most appropriate landscape outcome. The decision sought to limit the density of development so that it was appropriate for the zone and would achieve sensible clusters of dwellings. It then articulated its reasons for approving the particular lots identified in the decision. The Court was able to make this factual finding and no error of law arose. (paras 64-66)

(5) The High Court considered BBHL's submissions in respect to nine other alleged errors made by the Environment Court in its decision, and found no error of law had been made by the Environment Court in regard to any of them. (paras 68-103)

Cases referred to

Augier v Secretary of State for the Environment (1978) 38 P & CR 219 (QB)

Countdown Properties (Northlands) Ltd v Dunedin City Council (1994) 1B ELRNZ 150 (HC)

Criffel Deer Ltd v Queenstown Lakes District Council [2018] NZEnvC 104

Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 (HL)

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442

Foster v Rodney District Council [2010] NZRMA 159 (EnvC)

Frasers Papamoa Ltd v Tauranga City Council [2010] 2 NZLR 202, (2009) 15 ELRNZ 279 (HC)

Green v Auckland Council [2013] NZHC 2364, (2013) 17 ELRNZ 737

Hutchinson Bros Ltd v Auckland City Council (1988) 13 NZTPA 39 (HC)

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

New Zealand Suncern Construction Ltd v Auckland City Council (1997) 3 ELRNZ 230 (HC)

Pierau v Auckland Council [2017] NZEnvC 90

RJ Davidson Family Trust v Marlborough District Council [2018] NZCA 316, [2018] 3 NZLR 283, (2018) 20 ELRNZ 367

Smith v Takapuna City Council (1988) 13 NZTPA 156 (HC)

Upper Clutha Environmental Society Inc v Queenstown Lakes District Council EnvC Christchurch C47/2004, 15 April 2004

Appeal

This was a successful appeal against an Environment Court decision granting consent to the appellant to subdivide a property it owned near Wanaka, but not on the terms proposed by the appellant.

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

M Baker-Galloway and *S McArthur* for appellant
B Watts for respondent

Cur adv vult

DUNNINGHAM J

[1] The appellant, Ballantyne Barker Holdings Ltd, owns a 48 hectare rural site on the eastern side of the Cardrona River near the town of Wanaka (the site). It wishes to subdivide the site to create seven new rural lifestyle lots, and a balance lot of almost 41 hectares.

[2] In the Environment Court the application was granted consent but not on the terms proposed. Rather, the Court granted a modified subdivision consent which only permitted the appellant to subdivide the site into five lots.[1]

[3] The appellant considers the Environment Court made a number of errors of law which led to it permitting only a five lot subdivision.

[4] The issue on appeal is whether the Environment Court erred in law in any of the ways pleaded by the appellant and, if so, whether the error is sufficiently material to the Environment Court's decision to warrant the matter being referred back to the Environment Court to be reconsidered.

Legal principles applying to appeals against Environment Court decisions

[5] Section 299 of the Resource Management Act 1991 (the RMA) confines appeals against Environment Court decisions to questions of law only. There is no right of appeal on the factual findings of that Court. The onus is on the appellant to identify a question of law arising out of the Environment Court's decision and to demonstrate that the question of law has been erroneously determined by the Environment Court.[2]

[6] A question of law will arise where the Environment Court has:[3]

(a) Applied a wrong legal test;

(b) Come to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come;

(c) Took into account matters which it should not have taken into account; or

(d) Failed to take into account matters which it should have taken into account.

[7] Even where an error of law is identified, relief will not be granted unless the error has materially affected the Environment Court's decision.[4]

[8] I accept, as the respondent submitted, that this Court must be vigilant in resisting attempts by litigants who are disappointed by Environment Court decisions to use appeals to the High Court to re-litigate factual findings made by the Environment Court.[5] This Court can only intervene on factual findings where there is no evidence to support the Environment Court's decision or where the true and only reasonable conclusion on the evidence contradicts the Environment Court's decision.[6]

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1 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2018] NZEnvC 181.

2 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

3 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 157.

4 *Countdown Properties (Northlands) Ltd v Dunedin City Council*, above n 3, at 157.

5 *New Zealand Suncern Construction Ltd v Auckland City Council* (1997) 3 ELRNZ 230 (HC) at 240.

6 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 36.

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

[9] This Court, too, will have regard to the expertise of the Environment Court and will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.[7]

[10] Although the appeal is of an interim decision of the Court, there is no suggestion the appeal is premature. The Court has made a final determination that subdivision consent will be granted for five lots only and it is this determination which is being appealed.

The application

[11] The site lies on the eastern side of the Cardrona River and ascends two terraces that have been cut into glacial outwash gravels by the action of that river. Although the centre of Wanaka township is only about three kilometres away, it is separated from the site by the Cardrona River which "forms a robust edge to the eastern side of the town".[8] The site is on the east side of the river on land which is zoned Rural General. Much of the rural land around the site has already been subject to a considerable amount of subdivision.

[12] The Queenstown Lakes District Council (the respondent) declined the initial proposal to subdivide the site into nine lots (comprising eight lots of approximately one hectare each, and a balance lot of about 40 hectares).

[13] The application was modified and, on appeal to the Environment Court, the appellant sought subdivision consent to create:

(a) Seven lots of between 0.8 and 1.55 hectares, each with a residential building platform; and

(b) A balance lot of 40.87 hectares, with a residential building platform.

[14] Prior to the hearing in the Environment Court, agreement had been reached with the original submitters in opposition to the proposal. The only immediate neighbours involved in the Environment Court hearing were the Le Bruns who own property adjoining the northern end of the site.[9] Specific landscaping conditions to protect the amenity of the Le Bruns were proposed.

The Environment Court decision

[15] A key issue before the Environment Court was how to prevent further subdivision beyond what was to be approved, in order to protect visual amenity values in the area, and avoid "over-domestication" of the landscape.

[16] In order to address that issue, the appellant originally proposed that a consent notice be registered which included the following prohibition on further subdivision:

> (18) The following conditions of the consent shall be complied with in perpetuity and shall be registered on the relevant computer freehold registers by way of consent notice pursuant to section 221 of the Act.
>
> …
>
> (b) There shall be no further subdivision of Lot 10 shown on Land Transfer Plan [xxxxx] and no more than one residential unit.
>
> If at any time the site is rezoned from rural general to a zoning or a method that provides for rural lifestyle or rural residential or urban land uses then condition (b) shall be deemed to have expired and may be removed from the relevant computer freehold registers.

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7 *Hutchinson Bros Ltd v Auckland City Council* (1988) 13 NZTPA 39 (HC).

8 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, above n 1, at [24].

9 As parties under s 274 of the Resource Management Act 1991.

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

[17] This condition was agreed between the appellant and the Le Bruns. However, the Environment Court expressed a concern that amending or removing the proposed consent notice would be "relatively easy", and so would not provide sufficient protection against further subdivision.[10]

[18] The Environment Court issued a minute on 5 July 2018 following the hearing but before receiving final submissions from the parties. In it, the Court advised that it was "leaning towards granting a subdivision consent … for some lots. However, the number of lots depends on terms of the restrictive covenant". The Court said that the covenant proposed by the appellant was "rather unsatisfactory for similar reasons to the covenant discussed in *Criffel Deer Ltd v Queenstown Lakes District Council*".[11] The Court suggested that if the appellant was to volunteer a fuller covenant that would protect against "all subdivision regardless of zoning" for at least three generations, then the Court might "find its decision easier".

[19] Following issue of the Court's minute, the Le Bruns changed their position and decided that they would prefer a restrictive covenant instead of the consent notice they had agreed to.

[20] In response to the Court's minute, the appellant volunteered to provide a restrictive covenant against subdivision, in perpetuity, to be registered over the title of each lot created, but again with the proviso that it would not be binding in the event the site was rezoned in the future.

[21] The Environment Court, however, said that the covenant the appellant offered was for "too long a period and insufficiently robust" and so concluded that a "smaller subdivision is appropriate to allow for more flexibility in the remote but not inconceivable possibility of future urban growth jumping the Cardrona River".[12]

[22] In deciding how that smaller subdivision should be configured, the Court rejected the layout which the respondent's landscape expert supported, which was Lots 4, 5, 7 and 10 (plus Lot 6 if views were reinstated), in favour of Lots 1, 2, 6, 9 and 10, which the Court considered better achieved proper "clusters" of housing and would avoid "over-domestication" of the landscape.[13]

Errors of law

[23] In this case, the appellant raises two principal issues where the conclusions are said to arise from errors of law:

(a) The Environment Court's rejection of the appellant's proposed consent notice condition and its similarly worded restrictive covenant; and

(b) The Environment Court's rejection of Lots 4, 5 and 7 of the appellant's proposed subdivision.

[24] The appellant also raises a number of other errors, which relate to the Court's application of the RMA and the relevant planning documents, and to specific factual findings it made which the appellant submits were made on no, or insufficient, evidence.

Errors in the Court's decision to reject the proposed consent notice

Submissions for the appellant

[25] Ms Baker-Galloway, for the appellant, submits that the Environment Court applied the wrong legal test when it rejected, first, the consent notice condition, and

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10 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, above n 1, at [178].

11 *Criffel Deer Ltd v Queenstown Lakes District Council* [2018] NZEnvC 104.

12 At [187].

13 At [211].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

then the restrictive covenant, proposed by the appellant. The consent condition had been agreed by the appellant and the s 274 party to address concerns relating to future subdivision.

[26] The appellant then asserts that the Environment Court, through its minute of July 2018, inappropriately issued the appellant with an "ultimatum" to volunteer a covenant on terms that the Court thought appropriate. The Judge was aware that a consent authority cannot impose a condition requiring that a covenant be entered into.[14] The Court was wrong, therefore, to grant a subdivision for fewer lots on the grounds that a restrictive covenant on the terms thought appropriate by the Court was not volunteered by the appellant. Ms Baker-Galloway submits this approach was not based on environmental effects but, rather, on the Judge's preference for how development around Wanaka should occur.

[27] The appellant also submits that the restrictive covenant against further subdivision which the appellant did volunteer (being in perpetuity and with the proviso in relation to any future rezoning of the site), was wrongly found by the Court to be for too long a period and insufficiently robust. Ms Baker-Galloway points out this is contrary to numerous subdivision decisions which have similar consents. More importantly, the link to rezoning is entirely appropriate given the overall scheme of the RMA which is based on an adaptable approach to sustainable management. It is also normal to have both covenants and consent notices endure in perpetuity, and the time period proposed by the Court of 40 to 60 years is arbitrary and fails to take into account the ever changing environment that the RMA responds to.

[28] Furthermore, the Court's conclusion that a smaller subdivision is appropriate "to allow for more flexibility in the remote but not inconceivable possibility of future urban growth jumping the Cardrona River" is inconsistent with the Court's earlier reasoning, that the site should be protected against all subdivision for at least three generations regardless of rezoning.

Submissions for the respondent

[29] The respondent submits that there was no error in the Environment Court rejecting the consent notice condition which had been agreed between the appellant and the Le Bruns. Neither s 108 of the RMA, nor case law, support a requirement that the Environment Court is bound to impose a condition if it has been agreed.

[30] In response to the assertion that the Environment Court put undue pressure on the appellant to volunteer a fuller covenant, the respondent points out that it is not unusual for a party seeking a resource consent of one kind or another to offer up conditions on an *Augier* basis.[15] In the present case, the Environment Court's minute gave the appellant a chance to consider whether it would offer covenants of a particular nature on an *Augier* basis. While it was not obliged to give the appellant this opportunity, it did so essentially as a "kindness" to the appellant. It was offered an opportunity to improve its case in light of the Environment Court's tentative views, and the fact the appellant declined to do so did not prejudice it.

[31] More fundamentally, though, the respondent submits that the appellant has failed to identify any reliance on an incorrect legal test by the Environment Court in this regard. Although the appellant asserts that the Environment Court's approach was "not based on environmental effects", that submission is contradicted by reference to the decision which explains that the Environment Court's concern is that "urbanisation

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14 *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* EnvC Christchurch C47/2004, 15 April 2004.

15 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QB); *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202, (2009) 15 ELRNZ 279 (HC).

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

of rural land should not happen by creeping stages" as that "usually results in very inadequate urban design".[16] This demonstrates that the Environment Court's root concern was with the effect of the proposal on the future environment.

[32] Finally, the respondent says that the Court's reasons for rejecting the covenant offered by the appellant were "appropriate questions for the Environment Court to have asked".

Discussion

[33] The appellant's concerns about the appropriateness of the Court issuing a minute suggesting the appellant may wish to volunteer a restrictive covenant does not raise a question of applying a wrong legal test. The Court correctly recognised that it had no jurisdiction to impose a restrictive covenant, but that the appellant could volunteer one. As the respondent submitted, the Environment Court's minute was not prejudicial to the appellant, rather it gave the appellant the chance to offer conditions that the Court considered would mitigate a potential adverse environmental effect of its proposal. The Court made it clear it was not "punishing" the appellant if it chose not to offer a restrictive covenant in the terms it suggested.

[34] I also agree that the fact the consent notice condition was agreed by the appellant and the s 274 party was irrelevant to the Court's decision. The Court was concerned with wider considerations, including avoiding over-domestication of the landscape and stemming "development creep". As the Court's concerns went beyond the effects on the immediate neighbours, there was no reason for it to accept the consent condition that had been agreed with those neighbours.

[35] The real issue is whether the Court was wrong to assume the consent notice proposed was insufficiently effective to preclude future subdivision, particularly of the large balance lot.

[36] The appellant had proposed a consent notice to prohibit future subdivision of the larger balance lot, but with the condition to expire if the site was "rezoned from rural general to a zoning or method that provides for rural lifestyle or rural residential or urban land uses". The consent notice was proposed pursuant to s 221 of the RMA which provides that a consent notice is deemed:

(a) To be an instrument creating an interest in land and may be registered accordingly; and

(b) To be a covenant running with the land when registered and bind all subsequent owners of the land.

[37] In the Court's minute it suggested the appellant "volunteer a fuller covenant (for at least three generations) against all subdivision regardless of zoning" as "the number of lots depends on terms of the restrictive covenant". The rationale for this appears to be that the Court considered that a consent notice was easily amended because it was a discretionary activity.

[38] The appellant's primary criticism of this statement is that it was unreasonable for the Court to conclude that the proposed consent notice could be relinquished relatively easily when there was no evidence to support this and where such a conclusion was an irrelevant consideration.

[39] Consent notices are changed or removed through the same process that applies to applications for variation of resource consents under s 127 of the RMA. An application to change or remove a consent notice is considered to be a discretionary activity and will be considered in accordance with s 104(1) of the RMA.

16 At [178].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

[40] The Court appears to have concluded that amending a consent notice is relatively easy. No evidence to support this conclusion was identified, other than its status as a discretionary activity.

[41] In my view, there was insufficient evidence to support such a bald conclusion. Furthermore, it contradicts the reliance that the Environment Court has repeatedly placed on the use of consent notices. For example, the Court in *McKinlay Family Trust v Tauranga City Council* stated:[17]

> … we have concluded that the ability of people and communities to rely on conditions of consent proffered by applicants and imposed by agreement by consent authorities or the Court when making significant investment decisions is central to the enabling purpose of the Act. Such conditions should only be set aside when there are clear benefits to the environment and to the persons who have acted in reliance on them.

[42] In *Foster v Rodney District Council*, the Environment Court noted that the following criteria may have some relevance in considering whether to vary or cancel a consent notice:[18]

> (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 sections 5-8.

[43] Ironically in *Foster*, the application to vary a consent notice which was required for the proposal to proceed was declined, with the Court recording that the purpose for which the consent notice was imposed "remains as pertinent today as it did in 2001".[19] The Court went on to say:

> [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 …
>
> [130] … 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.

[44] In considering such applications this Court has emphasised that "good planning practice should require an examination of the purpose of the consent notice and an inquiry into whether some change of circumstances has rendered the consent notice of no further value".[20]

[45] The case law makes it clear that because a consent notice gives a high degree of certainty both to the immediately affected parties at the time subdivision consent is granted, and to the public at large, it should only be altered when there is a material change in circumstances (such as a rezoning through a plan change process), which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purposes of the RMA. In such circumstances, the ability to vary or cancel the consent notice condition can hardly be seen as objectionable.

[46] Accordingly, I concur with the appellant's submission that the Court's assumption that a consent notice could be altered "relatively easily" was not a reasonable assumption. It was not supported by evidence and was inconsistent with decided cases on the circumstances in which a consent notice can be varied. To the

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17 *McKinlay Family Trust v Tauranga City Council* EnvC Auckland A119/08, 29 October 2008 at [52].

18 *Foster v Rodney District Council* [2010] NZRMA 159 (EnvC) at [9].

19 At [128].

20 *Green v Auckland Council* [2013] NZHC 2364, (2013) 17 ELRNZ 737 at [129].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

extent the Court limited the terms of the subdivision consent because it assumed that the proposed consent notice condition would be ineffective to prevent future inappropriate subdivision, the Court was in error to do so.

[47] The second aspect of this issue is whether the Court was wrong to reject the consent notice condition (or in the alternative, the proposed restrictive covenant) because it was stated to lapse on the land being rezoned for more intensive subdivision rather than, as the Court sought, in a 40 to 60 year timeframe. The Court's justification for this appears to be that as the site was on the eastern side of the Cardrona River and there was "no suggestion on the evidence that the boundaries of Wanaka township might jump the Cardrona River", it was appropriate to preclude subdivision in the area for several decades.

[48] The Environment Court's reasoning on this appears circular. Effectively it is saying because it does not consider more intensive subdivision is likely to occur in this area for several decades, it is appropriate to prevent further subdivision for such a period of time. If it is correct, then no worse an outcome will occur if the consent notice condition lapsed when the land was in fact rezoned. However, it also admits of the possibility that in the future, urban growth might jump the Cardrona River, saying that limiting further subdivision now would better facilitate the site being developed comprehensively in that scenario. If rezoning was to occur within the 40-60 year timeframe in which further subdivision was prohibited, then the condition would prevent the comprehensive development the Court envisages would be appropriate by locking up this site until the expiry of that period.

[49] It is difficult to see a logical basis for linking removal of the consent condition to a time period rather than to the outcome of a public plan change process. While the reasons for seeking to preclude further subdivision under the current planning regime and in light of the objectives and policies applicable are clear, there is no reason given for the Court seeking to preclude further subdivision should the planning regime change. While the Court may well be right that that will not happen in the foreseeable future, it is more logical to have the no-subdivision condition lapse at the point the planning regime changes rather than at an arbitrarily chosen point in time in the future.

[50] In my view, that is also more in keeping with the RMA's purpose of sustainable management. The RMA recognises that plans must evolve to meet the community's needs, which is why district plans are reviewed approximately every 10 years. It is difficult to see why a condition should preclude subdivision notwithstanding a plan change becoming operative that determines such subdivision would meet the RMA's sustainable management purpose. In effect, it would preclude use and development of the land in a way deemed appropriate under the RMA. I consider it is good planning practice to avoid foreclosing future options if they are determined to be appropriate through a plan change process, rather than the more ad hoc process of individual applications for resource consent.

[51] In conclusion, there is no rational basis identified in the decision for the Court to reject the consent condition (or the restrictive covenant) against further subdivision lapsing on rezoning rather than for a specified time period. For this reason, I am satisfied the Court erred in law when it determined that the proposed consent condition (and the alternative restrictive covenant) was unsatisfactory because it did not lock up the land against subdivision for 40 to 60 years.

[52] I am also satisfied that this error of law was material to the Court's decision. Although the respondent submits that there is no indication in the decision that the Environment Court would have granted more lots had the desired covenant been offered, that must be a possibility given the statement in the Environment Court's

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

minute that a "smaller subdivision" was appropriate in the absence of the covenants suggested by the Court. Although I accept that the Environment Court also provides other reasons for the end result, I cannot rule out that the Court's view that the proposed consent notice (or similar covenant) was inadequate to protect the site from future subdivision was relevant to its decision to grant subdivision consent for only five lots.

[53] As the Court was in error to conclude that the consent notice and the volunteered covenant were both insufficiently robust to protect against further inappropriate subdivision, and this is likely to have been material to the Court's decision, it is appropriate that the appeal is allowed on this ground and I do.

Did the Court err in law in rejecting the subdivision of Lots 4, 5 and 7, which both the Council and the appellant's experts supported?

[54] By the time of the appeal hearing, the appellant sought to subdivide the site into eight lots, being seven smaller lots (Lots 1, 2, 4, 5, 6, 7 and 9) and one balance lot, Lot 10.[21]

[55] The Council's expert was of the view that four dwellings (on Lots 4, 5, 7 and 10) could be absorbed, or five dwellings (with Lot 6 as the additional dwelling) if a full view of the landscape from Ballantyne Road was ensured, while the appellant maintained that the landscape could absorb the eight dwellings proposed. Despite the agreed evidence on Lots 4, 5, 6, 7 and 10, the Environment Court determined the appropriate lots to be Lots 1, 2, 6, 9 and 10.

Appellant's submissions

[56] In this regard, the appellant submits that the Environment Court came to conclusions without evidence or which, on the evidence, it could not reasonably have come to, and has "put its opinions before those of duly qualified experts". The Court's rationale for approving the lots was based on its view in relation to how the lots form "a proper cluster or hamlet in a place in the landscape where it might be expected",[22] but the appellant argues that the Court refused consent to Lots 4, 5 and 7 based on an insufficient evidential foundation.

[57] Ms Baker-Galloway pointed to the expert evidence, summarised in the judgment, that all the houses would be mostly or fully screened from Ballantyne Road, and that the development would not result in any significant adverse effect to the natural character of the Cardrona River and its margins.[23] Furthermore, the landscape architects agreed that effective screening of the houses would generally be achieved at around 10 years from the time of planting and that most of the lots are on a lower terrace so they would barely impinge on the views from the road at all.[24] Given these conclusions, Ms Baker-Galloway queries the Court's conclusion that:[25]

> … five lots (including a balance lot) would strike the right balance under [the policy protecting landscape character and visual amenity values] and that any further lots would degrade the visual amenity values.

[58] The appellant is critical of the Court for:

(a) Finding, on balance, a five lot subdivision was appropriate as not being over-domestication of the site and of the area;

21 Lots 3 and 8 having been deleted from the proposal.

22 At [212].

23 At [72].

24 At [96].

25 At [153].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

(b) Finding that proposed Lots 1, 2, 6, 9 and 10 would be the most appropriate lots in preference to the inclusion of Lots 4, 5 and 7, despite the latter not being opposed by the Council's landscape expert; and

(c) Finding that reducing the number of dwellings on the site to five or less "would reduce the access from Ballantyne Road to 2.5 metres … [and] … would reduce the most direct signs of domestication on the side of Ballantyne Road", despite the Council's landscape architect finding that accessways are unlikely to have more than a low level of adverse effect on the perceived naturalness of the landscape.[26]

[59] In the appellant's submission, the Environment Court has "put its opinion before those of duly qualified experts" and there was no proper basis for it to refuse consent for Lots 4, 5 and 7.

Respondent's submissions

[60] The respondent submits that this issue is not genuinely amenable to being reduced to particular lot numbers in the way that it has been framed by the appellant. The key issues in the case arose out of concerns to protect landscape values from the cumulative effects of development, or over-domestication, as required by the relevant district plans. The location of particular lots was not being considered in isolation: it was being considered in the context of the other lots proposed on the site and the other lots within the vicinity, and to isolate individual lots in the way the appellant has, is inconsistent with the exercise with which the Environment Court was tasked.

[61] The Environment Court recognised this, saying:[27]

> The argument in [the appellant's] eyes was over Lots 2 and 9. However, we are not bound to accept any of that evidence, especially since we accept Ms Picard's evidence that the issue of cumulative effects is important here, given the level of development in the vicinity.

[62] The respondent submits the Environment Court was correct when it stated that it was obliged to consider the expert evidence but not to accept it. More importantly, the Environment Court gave reasons for departing from the expert evidence, saying:

> [210] On balance we consider a five-lot subdivision is appropriate as not being over-domestication of the site and of the area, and while Ms Mellsop contemplated consent to Lots 4, 5, 7 and 10 (plus Lot 6 if views are reinstated) we consider there is a better subdivision layout.
>
> [211] We judge that the appropriate lots are Lots 1, 2, 6, 9 and 10 (i.e. excluding Lots 5 and 7). The rationale behind this distribution of lots is that 1 and 2 will form a relatively tight cluster with the two Bagley lots by the bridge, and one further lot on the lower terrace (Lot 6) and one (Lot 9) on the higher are not over-domestication and should not create a precedent even if the median lot size would remain uncomfortably close to a "Rural Lifestyle" or "Rural Residential" density. By joining the two Bagley houses this makes a four-house cluster which has the advantage that it does not make and therefore endorse a two-lot cluster which — as we have said — we regard as a near travesty of the concept.
>
> [212] The placement of Lots 1 and 2 should not be regarded as a precedent for placing houses close to the river. We consider the objectives and policies of both the ODP and the PDP generally discourage that. The reasons for allowing these two lots here is that Lots 1 and 2 are close to both the bridge and the Bagley properties with its two residences, and will form a proper cluster or hamlet in a place in the landscape where it might be expected.

26 At [145].

27 At [199].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

[63] The respondent submits the Environment Court gave coherent and relevant reasons for departing from the combination of lots favoured by the two experts. The Environment Court endorsed the total number of lots that the respondent's expert witness recommended and differed only on the combination of lots which would result in the most appropriate landscape outcome. Its reasons for doing so were based on relevant considerations regarding the cumulative effects of development on landscape values.

Discussion

[64] I accept the respondent's submissions on the ability of the Court to depart from the combination of lots favoured by the two experts. The expert evidence provided opinions on which number and combination of lots would best achieve the objectives and policies of the relevant plans in question. These opinions were based on other factual evidence presented during the hearing including on the topography and landscape of the area and the layout of the proposed subdivision.

[65] The Environment Court, as a specialist tribunal, was entitled to take the factual evidence on which those opinions were based, review it, and come to its own conclusions on which combination of lots achieved the most appropriate landscape outcome. As long as the decision it makes is coherent and reasonably available on the evidence, it is not restricted to picking and choosing from the opinions proffered by the experts.

[66] The decision sought to limit the density of development so that it was appropriate for the zone and would achieve sensible clusters of dwellings. It clearly drew on Ms Mellsop's evidence that "four building platforms … could be absorbed without over-domestication of the landscape, as long as the remainder of the site was maintained as open pastoral land with no further subdivision or development" to justify limiting the total number of lots.[28] It then articulated its reasons for approving the particular lots identified in the decision. The Court was able to make this factual finding and no error of law arises.

Other errors of law

[67] The appellant then identifies nine further alleged errors of law in its written submissions, although not all were elaborated on in oral submissions. However, for completeness, I address them all.

Did the Environment Court adopt an approach that was inconsistent with the Court of Appeal's decision in RJ Davidson Family Trust v Marlborough District Council?[29]

[68] The appellant complains that, although the Environment Court concluded that the operative district plan (ODP) and proposed district plan (PDP) were sufficiently competently prepared under the RMA that there was no need to refer to pt 2 of the RMA except for two topics (efficient use of resources and natural hazards), the Court then went on to apply the ODP and PDP and Part 2 of the Act other than in accordance with the approach adopted by the Court of Appeal in the *RJ Davidson Family Trust* case.

[69] However, as the respondent notes, the appellant does not explain what the alleged inconsistency is. In *RJ Davidson Family Trust*, the Court of Appeal considered whether the principle articulated in *Environmental Defence Society Inc v New Zealand*

28 At [117].

29 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283, (2018) 20 ELRNZ 367.

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

King Salmon Co Ltd applied in the context of resource consent applications.[30] That is, should the consent authority assume the plan it administers gives effect to pt 2 of the RMA and therefore there is no need to refer back to pt 2, except in cases of "invalidity, incomplete coverage or uncertainty" of the relevant planning document?[31]

[70] The Court of Appeal held that where a plan had been competently prepared under the Act, the consent authority may take the view that there is no need to refer to pt 2, because doing so would not add anything to the evaluative exercise. However, it rejected the idea that consent authorities were not permitted to consider the provisions of pt 2 in evaluating resource consent applications unless the plan was deficient in some respect. However, it did note that "genuine consideration and application of relevant plan considerations may leave little room for pt 2 to influence the outcome".[32]

[71] In the present case, the Environment Court expressly averted to the *RJ Davidson Family Trust* case. It concluded that there were only two topics on which it was necessary to evaluate the proposal under pt 2 of the Act, being the efficient use of resources and natural hazards. Thus, the Environment Court effectively concluded that genuine consideration and application of the ODP and PDP left little room for pt 2 to influence the outcome, except in respect of the two topics identified. It then limited its consideration of pt 2 to these two topics.

[72] In my view, that was consistent with the approach articulated in the *RJ Davidson Family Trust* case, and there was no error of law.

Did the Court err in its application of s 88A of the RMA?

[73] Section 88A of the RMA prescribes how to deal with a resource consent application that is still being processed when a new rule is introduced that would alter the acting status of the proposal. It provides that the application "continues to be processed, considered and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged".

[74] In *Pierau v Auckland Council*, which is cited by the appellant, the role of s 88A was described as a "shield" against a more stringent activity status applying to a consent which had been applied for before the introduction of those provisions but that an applicant would not be penalised should a more enabling activity status apply at the conclusion of a planning process.[33] However, the appellant makes no attempt to say why this principle applies in the present case where, as the respondent notes, the proposed subdivision had discretionary activity status under both the ODP and the PDP and therefore s 88A was not engaged.

[75] The Environment Court expressly recorded that "issues as to the status of the proposal under s 88A RMA do not arise because it is discretionary under both relevant plans".[34] In the circumstances, no error of law arises in the application of s 88A of the RMA as it does not apply.

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30 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, (2014) 17 ELRNZ 442.

31 At [15].

32 At [82].

33 *Pierau v Auckland Council* [2017] NZEnvC 90 at [18].

34 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, above n 1, at [43].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

Did the Environment Court wrongly conclude that a selection of objectives and policies from the Proposed Otago Regional Policy Statement (PORPS) should be "taken into account"?

[76] This issue again refers to the approach adopted by the Court of Appeal in *RJ Davidson Family Trust* and suggests the Environment Court's approach is contrary to that decision.

[77] However, as the respondent says, the Environment Court was doing as it was legally required under s 104(1)(b)(v), which provides that a consent authority must "have regard" to a proposed regional policy statement when determining a resource consent application. The appellant has not identified the Environment Court's error, nor, if there was an error, how its consideration of PORPS was material to the decision.

[78] This does not constitute an error of law, let alone one warranting remitting the matter back to the Environment Court.

Did the Environment Court wrongly give too much weight to the PDP?

[79] The appellant's concern about the weight placed on the PDP clearly arises out of the fact the Court said:[35]

> We judge that if we were considering the BBHL application only under the ODP we might have approved six of the eight lots sought. However, while we accept the parties' position that the objectives and policies under the ODP should be given more weight, that does not mean no weight should be attributed to the PDP.

[80] The issue arose because, at the time of the Environment Court hearing, the PDP was well advanced, but not operative. It had been publicly notified, public submissions had been received and heard and the Council's decision on those submissions had been publicly notified. Appeals against many parts of those decisions had then been lodged with the Environment Court. That meant that although the PDP was well advanced, it still could undergo significant changes through the appeal process. The question was what weight the Court was to place on the respective plans.

[81] On this issue the Court said:[36]

> We accept Mr Watts' submission that as the PDP objectives and policies have progressed to the decision stage they are entitled to some weight, subject to two weakening provisos:
>
> (a) the relevant PDP objectives and policies are subject to fairly comprehensive appeals; and
>
> (b) the relevant PDP objectives and policies do not mark a radical change in direction mandated by a superior planning document such as a regional or national policy statement. If that were the case there would be a reason to favour the PDP over the ODP despite the appeals.
>
> To those we add a third: that the PDP does not obviously implement the policy of the PORPS as to the role of introduced trees in the region's landscapes.

[82] The appellant submits that very limited weight should have been given to the PDP objectives and policies given the Court's acknowledgement that:

(a) There are comprehensive appeals on those provisions;

(b) The relevant PDP objectives and policies do not make a radical change in direction mandated by a superior planning document; and

(c) The PDP does not implement the policy of PORPS in relation to the role of introduced trees in the region's landscape.

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35 At [209].

36 At [209].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

[83] However, as the respondent points out, the appellant has not submitted that the Environment Court was wrong to give any weight at all to the PDP. The real issue is whether, as the appellant submits, it should have been given "very limited weight" rather than "some weight" as determined by the Court.[37] In that regard, the Court correctly identified the principles which arise from various cases as to the weight to be put on a proposed plan, before deciding to put some weight on it.

[84] I therefore accept the respondent's submission that no error of law is identified in the way the Court approached the question of weight, nor can the Court's decision said to be so unsupportable that it falls into an error of law.

Did the Environment Court fail to take into account the need for a consistency of approach with other comparable applications, including, but not limited to, the Orchard Road subdivision?

[85] The appellant argued, both in the Environment Court and this Court, that it was entitled to be treated in a consistent manner with comparable subdivision applications within close vicinity, both in terms of the restrictions imposed on future subdivision and on the issue of lot numbers and density.

[86] The appellant provided the Environment Court with examples of comparable subdivision consents issued by the respondent. Some of these included restrictions on further subdivision in perpetuity (with no fixed time period on them), and others were linked to rezoning. For example, the subdivision consent granted to Orchard Road Holdings Ltd included covenants preserving a large balance lot and restricting future subdivision of it. The appellants noted that the Commissioners added a proviso to the covenants so that they would be removed if the land was rezoned to enable subdivision as a permitted or controlled activity, and they also observed that "it is good planning practice to avoid foreclosing future options".[38]

[87] The argument on appeal focuses more on consistency in the terms of restriction on future subdivision rather than the more general submission that the same density of subdivision should be granted. Clearly the latter could not be expected because, as the Court pointed out, adopting a "like-for-like" density approach to each subdivision application would potentially lead to "development creep and ongoing intensification of rural living".[39] Furthermore, the Orchard Road subdivision which the appellant relies on as a precedent was located on the west side of the Cardrona River, near Wanaka township. The present application could be differentiated given it was on the eastern side of the river. Each application must be considered in its particular location and in light of the environment as it exists at that point, and there can be no expectation of a similar outcome in terms of lot numbers and density in subsequent applications.

[88] However, as I said, this ground of appeal is focused more on the terms of the non-subdivision condition and the appellant's expectation that it should be treated in a way that is both "appropriate and consistent with the local authority's treatment of directly comparable applications".

[89] I accept, as the respondent points out, that the Environment Court is not bound to follow the Council's decision and it is not the role of the Environment Court, as an appellate Court, to ensure that its outcomes are consistent with unappealed first instance decisions. I also accept that the Environment Court is not bound to approve subdivision on conditions resembling those upon which other subdivisions have

37 At [209].

38 Queenstown Lakes District Council *Orchard Road* decision dated 19 November 2013 at [96].

39 At [198].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

approved. The real issue, therefore, is whether the condition imposed is correct in law and is imposed after taking into account only relevant considerations, not irrelevant considerations, and is not unreasonable.

[90] I have already found that the Court's decision to reject the proposed consent notice condition appears to have been based on a mistaken assumption that simply as a consequence of its discretionary status, it could be "easily" removed, even if it was still serving a useful function. I consider this view is erroneous for the reasons already explained. However, I do not consider the fact it is inconsistent with the conditions imposed on other subdivision consent applications issued by the respondent would on its own, be sufficient, to constitute an error of law.

Did the Environment Court fail to take into account the "transition provisions" of the Act dealing with the ODP and PDP?

[91] This alleged error of law appears to relate to the error of law raising the application of s 88A and the decision in *Pierau* which is discussed at [73]-[75] above.[40] However, the appellant does not indicate what "transition provisions" in the Act other than s 88A should have applied. I have already held that the Court correctly understood the law relating to the weighting of the two plans and could not be considered to be in error for placing "some weight" on the PDP.

[92] In the absence of an identified error, this ground of appeal is not upheld.

Did the Environment Court erroneously take into account and rely on landscape evidence which was not given at the Environment Court hearing?

[93] The appellant argues that the Environment Court took into account and relied on the opinions of Dr Read, a landscape architect whose evidence was presented to the hearing Commissioners, but who did not present evidence in the Environment Court hearing.

[94] In the decision, the Court refers to Dr Read's opinion that "the existing trees have a highly domesticating effect that is diminishing the pastoral character of the site".[41] The Court notes that the Commissioners accepted her opinion. However, the Environment Court goes on to say that they prefer the evidence of Ms Steven and consequently did not accept that the proposed landscaping would over-domesticate the landscape, but rather, would enhance it.[42]

[95] It is unclear why the appellant has raised this point. The Environment Court was expressly required, by s 290A of the RMA, to "have regard to the decision that is the subject of the appeal or inquiry" when determining an appeal. Clearly Dr Read's evidence was one reason for the Commissioners declining the appeal at first instance. It was entirely proper for the Court to address this evidence and say why it rejected it in favour of the evidence presented in the Environment Court hearing. This ground of appeal is not upheld.

Did the Environment Court erroneously give weight to noise being experienced by people "enjoying the river" in proximity to Lots 1 and 2?

[96] The appellant considers the Environment Court erroneously gave weight to noise as being relevant to visibility issues under the district wide ODP objectives and policies. This is because under the heading "visibility issues", the Court discussed the proximity of Lots 1 and 2 to the east bank of the Cardrona River, noting that

40 *Pierau v Auckland Council*, above n 33.

41 At [114].

42 At [116].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

the screening planting proposed would not work fully for some five to 10 years, and then added the additional comment that "it does not prevent noise from being experienced by people enjoying the river".[43]

[97] I do not accept that the Court considered that noise was a "visibility issue". Rather, it was simply another environmental effect that may arise notwithstanding the issue of visibility being addressed. There was therefore no error. Furthermore, even if it was, it was not material to the outcome, as the Court granted consent to Lots 1 and 2.

Did the Court come to conclusions on the evidence it could not reasonably have come to?

[98] The appellant considers that two findings were made without evidence to support those conclusions. These were:

(a) Finding that "the land on the south of Ballantyne Road within about 1 kilometre of the bridge — all part of the local environment of the site — must be at or close to the limit of its capacity to absorb development if it is to remain rural".[44]

(b) Finding the medium density proposed by the applicant of approximately 0.97 hectares "may have been appropriate west of the Cardrona River, but it is not on the eastern side",[45] and applying domestication considerations based upon median lot size rather than average (mean) lot size, which is closer to six hectares.

[99] Again, these assertions were not elaborated on. However, I accept the respondent's submission that there was ample evidence upon which the Environment Court could base its conclusion as to the capacity of the land to absorb further development. It had in evidence maps showing existing land use and subdivisions in the area. There were also maps which showed:

(a) The relative distances between dwellings in the area surrounding the site;

(b) A dwelling density analysis in the area surrounding the site; and

(c) An analysis of property sizes in the relevant area.

[100] The Environment Court made a site visit to the area as part of the hearing and would have seen the level of development first-hand. Furthermore, the expert evidence of Ms Mellsop, a landscape architect, was that the scale and extent of existing development east of the area meant that "the area is close to the threshold of its ability to absorb change".

[101] A determination that the area was close to the limit of its capacity to absorb further development was clearly a factual finding which the Court was able to make based on the evidence before it. No error of law arises.

[102] Similarly, the Court's conclusion on the appropriateness of the median density in this area was also open to it based on the evidence available. Again, the maps showing a dwelling density analysis and an analysis of property sizes in the area surrounding the site were available and this evidence would have been supplemented by the observations the Environment Court made on its site visit. Furthermore, Ms Mellsop's expert evidence differentiated the character of the area to the west of the Cardrona River from that on the east.

43 At [132].

44 At [105].

45 At [198].

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025

[103] Again, I concur with the respondent that this ground of appeal must fail because the Environment Court had evidence upon which it could reasonably reach its conclusion on the appropriateness of the median density achieved by the subdivision.

Conclusion

[104] In conclusion, I have found that the Environment Court was wrong in law to reject the proposed consent notice (and the subsequently proffered covenant in similar terms). The consent notice should not have been assumed to be ineffective to stop future inappropriate subdivision merely because an application to amend or remove it would have discretionary activity status. There was no evidence to support that assumption and it is contrary to case law which indicates there must be a material change in circumstances which renders the consent notice of no further value or, in fact, obstructs the sustainable management purpose of the RMA, before the consent notice can be removed.

[105] Furthermore, the Court has not identified why the lapsing of the consent notice condition (or the proffered covenant) should occur in a 40-60 year timeframe rather than at a point where the planning regime for the area enables more intensive subdivision. The Court's decision to reject either proposed no-subdivision condition because of this, was in error.

[106] The Court's minute of 5 July 2018 made it clear that the extent of subdivision was likely to be limited as a consequence of the Court's concerns about the adequacy of the no-subdivision condition to prevent inappropriate further subdivision. As a result, I accept that these errors were material to the decision and the appeal is allowed. The application is remitted back to the Environment Court for reconsideration in light of this decision.

Costs

[107] Costs are reserved.

[108] If costs cannot be agreed, any application for costs must be filed within 20 working days of the date of this decision, with any memorandum in response filed within a further 10 working days.

[109] Costs will be determined on the papers unless I need to hear from counsel.

Appeal allowed; application remitted back to the Environment Court for reconsideration in light of this decision

Reported by P. A. Ruffell

Document Set ID: 9593578
Version: 1, Version Date: 02/10/2025