Decision No. [2012] NZEnvC 68

IN THE MATTER	of an appeal under of the Resource Management Act 1991 (**the Act**)
BETWEEN	RAYMOND KEITH AND CHERIE YVONNE SCHOFIELD (ENV-2010-AKL-000331) Appellants
AND	AUCKLAND COUNCIL (FORMERLY NORTH SHORE CITY COUNCIL) Respondent
AND	KEVIN BENDER NICOLA KELLY WIXI McDONALD ALAN McLEAN KEVIN RAWLINSON Section 274 parties

BEFORE THE ENVIRONMENT COURT

Hearing Dates:	7-9 November 2011
Held:	Auckland
Court:	Environment Judge M Harland Commissioner A Leijnen Commissioner A Sutherland
Participants:	Mr Bartlett for the Appellants Mr Loutit and Ms Reid for the Respondent Ms McDonald appearing on behalf of herself and all other s274 parties

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DECISION

A. The appeal is allowed. The applicants are granted resource consent to construct a new deck subject to the condition outlined in paragraph [109] of this decision and to further conditions to be submitted to the Court for approval.

B. Costs are reserved in accordance with paragraph [111]

Introduction

[1] Mr and Mrs Schofield ("**the appellants**") have appealed to this Court against the Council's decision to decline their application for resource consent to construct a new deck attached to the upper floor of their home, which fronts onto Takapuna Beach, on the North Shore of Auckland City. Since the Council's decision, the appellants have modified their proposal and now wish to construct a more modestly-sized deck. Resource consent is required, because among other things, the deck will protrude into the coastal conservation area within the 9 metre foreshore yard as defined in Auckland District Plan (North Shore Section) ("**the Plan**") and the deck exceeds the maximum building coverage rule. Despite the modified proposal, the Council and the s274 parties (who are all neighbours and co-cross-lessees) oppose the appeal.

Background

[2] The appellants' two-storied home at 5/15A William Street, which has been owned by them since 2006, is situated in a very desirable location given the popularity of Takapuna Beach as an urban North Shore beach. The property at 15A William Street is zoned Residential 2B under the Plan and is within the Plan's Coastal Conservation Overlay. The property is also subject to a cross-lease, which apart from the appellants' home[1] comprises four other units[2] built above their respective garage spaces behind the appellants' home. These are owned by the s274 parties.[3]

[3] The cross-lease agreement provides for common areas to be shared between all of the five households which are now parties to it, the most significant and contentious

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[1] Described as Flats 5 & 6

[2] Described as Flats 1-4, but referenced to in this decision as "Units" 1-4

[3] Unit 1 is owned by Ms McDonald, Unit 2 by Mr Rawlinson, Unit 3 by Mr Bender, Unit 4 by Ms Kelly and Mr Markby

of which is the area in front of the appellants' home that adjoins Takapuna Beach. Most of this area is grassed, but the sides of it are flanked by three beautiful and substantial pohutukawa trees, identified in the Plan as "notable trees."

[4] The upper floor of the appellants' home comprises their main living and bedroom areas, and already includes two decks either side of the main living area. One of the existing decks extends from the master bedroom, and the other accessed from the living room but extending in front of another bedroom, leads down to a paved area into the commonly owned area under one of the pohutukawa trees. The appellants have placed an outdoor table and chairs on the paved area for their use. The paved area was constructed by a previous owner. There is also a walkway (also commonly owned) leading from the paved area up the side of the appellants' home has been enclosed by gates at either end.

[5] The perception by the s274 parties that the common areas have been "*appropriated*" by the appellants for "*their own exclusive use*"[4] was a theme in these proceedings. We are not satisfied that the evidence supports this contention, which has probably arisen as a result of miscommunication.

[6] The new deck is proposed to as a cantilevered structure approximately 1.2m above ground level and with an area of 14.4m^2 (6m x 2.4m^2) extending out from the appellants' living area. A 1m high toughened but transparent glass balustrade surrounding the deck is also proposed. Consistent with the shape of the dwelling's floor plan, the proposed deck will project further than the existing decks, but it will not be linked to them.

[7] The s 274 parties oppose the appeal largely because they believe the deck, if constructed, will affect their ability to enjoy the commonly owned grassed area fronting on to the beach, thereby adversely affecting their amenity.

[8] The Council supports the s 274 parties' view that adverse amenity effects will be generated by the proposal. Despite not being a concern in its decision, the Council also extended this argument to include the potential adverse effects on the amenity of those enjoying Takapuna Beach. The Council also contended that the proposal is inconsistent with the provisions of the Plan, with the result that if the Court was to

[4] Ms McDonald, evidence-in-chief, paragraph 4

grant consent it would create a precedent and affect the Council's ability to consistently administer the Plan.

[9] Running hand-in-hand with the resource management issues is the vexed issue of whether or not the cross-lease permits the building of the deck in any event. The law is clear that disputes about private property rights are outside the Environment Court's jurisdiction and are not generally considered in determining a resource consent application.[5] In this case, the appellants accept that if they were to be successful in their appeal in this Court, it should be conditional upon the cross-lease permitting it, a topic to be determined in another forum, on another day.

The planning framework

[10] The planning witnesses all agreed[6] on the consents required and the applicable activity status relevant to each, which are most easily depicted in the following table:[7]

	District Plan Rule	Activity Status	Reason for Activity Status
A	Rule 8.4.1.1	Controlled activity	The deck is within the Coastal Conservation Area
B	Rule 8.4.6.2	Discretionary activity	Works within the rootzone of scheduled pohutukawa trees near to the proposed development
C	Rule 8.4.7.3 (Rule 16.6.1.11)	Discretionary activity	The maximum impervious area - exceeds the 70% threshold provided in the rule
D	Rule 16.6.1.5A	Restricted Discretionary activity	Foreshore Yard infringement
E	Rule 16.6.1.9	Restricted Discretionary activity or Non- Complying depending on site coverage	Maximum Building Coverage rule which provides for 35% net site area as a permitted activity with control flexibility rule up to 40% (Over this non-complying)

[5] ***Congreve v Big River Paradise Ltd***, HC AK, CIV-005-404-6809 Faire ACJ and ***Director-General of Conservation (Nelson-Marlborough Conservancy) v Marlborough District Council*** [2010] NZEnvC 403

[6] Planners' caucusing statement dated 11 July 2011

[7] Planners' caucusing statement dated 11 July 2011, p2 but amended albeit not as to substance.

[11] The main areas of dispute in this appeal concerned the rules relating to the foreshore yard and building coverage. The first three consents required and listed in the above table were not the subject of dispute. We accept that the evidence establishes that there is no impediment to the first three consents being granted with conditions attached.

[12] Much of the appeal focussed on the extent of the building coverage that would result from the addition of the deck, because if it exceeds 40% of the net site area then the proposal in its entirety would need to be assessed as a non-complying activity, but if not, the parties contended that it should be assessed as a restricted discretionary[8] activity. On the face of it this seems an easy enough factual matter to determine, but it was complicated by the various submissions made about what should or should not be included as part of the existing built environment.

[13] It occurs to us that there is an argument that the proposal should be assessed overall as a discretionary activity if the building coverage is found by us to be 40% (or less) of the net site area, given the provisions of Rule 8.4.6.2 of the Plan relating to works potentially being within the root zone of at least one of the pohutukawa trees. Mr Beattie (the planner for the Council) viewed this as a technical infringement that could be addressed through conditions if consent was granted, and we are satisfied that this is the case. We will elaborate on this further after we have determined whether the activity status should be non-complying or not.

The Council's decision at first instance

[14] Under s 290A of the Resource Management Act 1991 ("**the RMA**"), we must have regard to the Council's decision at first instance and where we differ from it to express our reasons why.

[15] The proposal before the Council was to construct a larger deck of 28.8m^2 and was clearly a non-complying activity. Accordingly the building coverage issue traversed before us did not arise. That proposal was supported by Council officers at the time, but the s 274 parties opposed it.

[8] Described as "limited discretionary" in the Plan, but legally this nomenclature does not exist in the RMA.

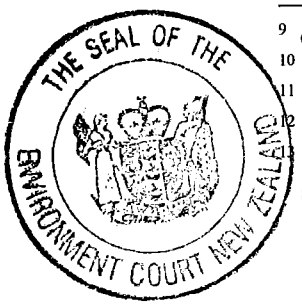
[16] The Council's decision was made by two commissioners[9] on 3 November 2010 who declined to grant resource consent. The commissioners determined that the proposal did not pass either the threshold test under s 104D of the RMA or the general merit tests contained within s 104.[10] In relation to on-site amenity they held:

> "...the submitters' who enjoy the common area over which the deck would be built would be significantly adversely affected by the proposal. This is particularly so given that the deck would occupy a large percentage of the level, more usable common area adjacent to the beach. The contribution that this area makes to the submitters' appreciation of the site's pleasantness, aesthetic coherence and recreational attributes also needs to be recognised. Accordingly, the commissioners consider that the adverse effects on the environment would be more than minor and that it would be contrary to the objectives and policies of the Plan that require the protection of amenity values."[11]

[17] The commissioners did not however consider that the deck would have an adverse impact on the coastal environment stating:

> "... (We) note the conflicting views of the applicant and submitters with respect to the impact of the deck on the coastal environment. In this instance, given that the deck would be within the limits of control flexibility relating to the foreshore yard development and would be a form of small scale development that is anticipated by criterion b) of section 16.7.5.1, the commissioners consider that the deck would not have an adverse effect on the coastal environment."[12]

[18] For the reasons we express later in this decision we have decided to allow the appeal. It must be remembered that the proposal we had before us was different from the proposal before the commissioners. We were asked to assess a deck reduced by almost half in its area and cantilevered above the ground and located entirely within the exclusive cross-lease area (i.e. outside the common area).[13] We will set out in our decision our reasons for specifically departing from the commissioners determinations as they logically arise.



[9] Councillor O'Connor and Community Board Member Sheehy
[10] Council decision page 6
[11] Council decision page 5
[12] Council decision page 5
[13] It was accepted that this was an issue yet to be determined, and the condition proposed by the appellant and the Council safeguards this

What are the issues on appeal?

[19] We agree with counsel for the Council[14] that there are four central issues in this case:

(a) The activity status of the proposal; is it non-complying, restricted discretionary or (we would add) discretionary?

(b) Will the proposal generate adverse amenity effects on the other landowners of the property and/or (as now raised in Council evidence) the coastal environment?

(c) Is the proposal consistent with the objectives and policies of the Plan?

(d) Would the grant of consent create a precedent and affect the Council's ability to consistently administer its Plan?

[20] The activity status of the proposal is a discrete issue. It makes sense to deal with that issue first and then consider the effects on amenity together with the objectives and policies dealing with the same subject. We will deal with the last issue relating to precedent effect thereafter.

Should the proposal be assessed as a non-complying, restricted discretionary or discretionary activity?

[21] The planners for the Council and the s 274 parties argued that the proposal should be assessed as a non-complying activity, but the planner for the appellants disagreed. He argued that the proposal should be assessed as a restricted discretionary activity. As we have earlier signalled, this difference of opinion arises because of what the planners contend should be either included in or excluded from the existing building coverage due to what buildings or structures may or may not have been lawfully established on the site.

[22] As outlined in the Table above, Rule 16.6.1.9 provides for up to 35% building coverage as a permitted activity in the Residential 2B zone, with control flexibility there is additional scope for building coverage "*up to an additional 5% in all zones... by means of a limited discretionary activity application.*"[15]

[14] Counsel for the Council's legal submissions, paragraph 2.1
[15] Agreed Bundle of Documents, p127

What is the building coverage on the site?

[23] Through Mr Bartlett, the appellants accepted the surveyed plan of the site and its buildings[16] (**"the Yeoman's plan"**) as the basis for calculating building coverage on the site. This plan shows the net site area as 1192m^2; with the result that the maximum building coverage for a permitted activity would be 417.2m^2, and for a restricted discretionary activity[17] it would be 476.8m^2.[18]

[24] The Yeoman's plan assessed the total existing building coverage on the site to be 467m^2 and all of the parties accepted this figure as accurate. In his closing submission Mr Bartlett accepted that the total area of the deck was limited to 14.4m^2 because the appellants had conceded during the hearing that their application was limited to areas within the dotted orange line on the Fluker plan[19] being the exclusive cross lease area. The building coverage with the deck of 14.4m^2 would, become 481.4m^2, thereby exceeding the 40% threshold. However this calculation is complicated by the undisputed fact that some features of the existing development on the site have been established without resource consent, and are thus unlawful. Accordingly, what should and should not be included in the assessment of building coverage on the site was a topic of much debate.

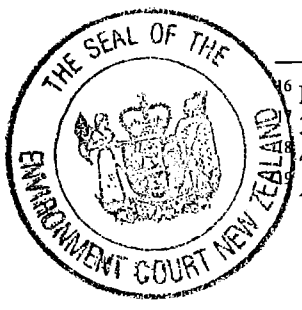
The arguments about what should be excluded from and included in the assessment of building coverage

[25] While Mr Beattie queried the lawfulness of other parts of the development, in the end there were three different areas which we were asked to either exclude or include in the assessment of what comprises the existing building coverage on the site. We were asked to:

(a) exclude unconsented decks attached to Units 2 and 4;

(b) include two purportedly unconsented canopies attached to the appellants' home; and

(c) exclude the area of the proposed deck under the eaves.



[16] Mr Taylor, evidence-in-chief Attachment 1(a)
[17] 35% of 1,192m^2
[18] 40% of 1,192m^2
[19] Appellants' closing submission, paragraph [5]

Should unconsented decks be excluded from the building coverage figure?

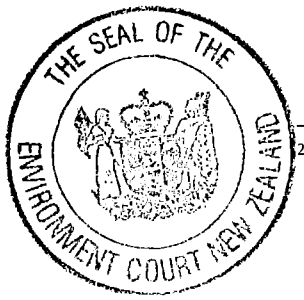
[26] The decks in issue are attached to Units 2 and 4. These units are part of the building owned by the s274 parties. The parties agreed that one deck (Unit 2) and at least part of the other had been erected without resource consent. The appellants contended that the area of these decks should be excluded from the calculation of building coverage, relying on the well-known common law proposition that no one may take advantage of his own wrong. Mr Bartlett submitted that this principle had been applied in the resource management context and should be applied by us in the context of this case.[20]

[27] Mr Bartlett submitted that it was particularly important to apply the principle in this case, because the appellants had been accused of unlawfully encroaching on the common areas owned by all of the cross-lessees. We do not give this part of the argument any weight, because the cross-lease debate is not for us to determine and it is likely that it will be litigated elsewhere.

[28] Mr Loutit (for the Council) submitted that regardless of the legal status of the decks, the Court should take them into account as part of the existing on-site environment, with the result that no deduction should be allowed for them from the building coverage figure. No case authority was provided to support this proposition.

[29] We do not agree with Mr Loutit that unconsented structures should be taken into account as part of the existing on-site environment. What comprises the existing on-site environment is often an important part of an argument which seeks to include a permitted baseline under s104 (2) of the RMA, but even then, it is lawfully existing activities that are to be taken into account.

[30] We appreciate that this conclusion may result in some difficulties for the Council in terms of how it might assess these unlawful structures in the future should there be a requirement to apply for retrospective consent for them. At that point, the calculation of the building coverage over the site will in all likelihood exceed the threshold, and any application for retrospective consent would thereby need to be, we imagine, dealt with as a non-complying activity. Be that as it may, we do not think there is any justification at law for unlawfully erected structures to be considered as part of a calculation of building coverage in this case.



[20] ***Progressive Enterprises Limited v North Shore DC*** [2006] NZRMA 72

[31] The area of the unconsented decks should be excluded from the calculation of what comprises the building coverage.

What figure should be deducted for the unconsented decks?

[32] We were given three different calculations of the area said to comprise the unconsented decks:

(a) Mr Taylor (for the s274 parties) initially relied on the Yeoman's plan, which estimated "deck overhangs" to comprise $7m^2$;[21]

(b) Mr Beattie (for the Council) checked the Council's historic plans and estimated the figure to be $6m^2$;

(c) Mr Bender (an s274 party who resides in Unit 3, who is also a registered valuer) measured the area and calculated it to comprise $4.97m^2$.

[33] During the hearing it became apparent that there were difficulties with all of the calculations relied upon by the various witnesses. The figure of $7m^2$ is not particularly satisfactory given that the Yeoman's plan makes no reference to whether or not the decks are consented. Given that we know that parts of them were not, it is difficult to differentiate between the areas which may be consented and those which are not. Mr Beattie's evidence was not particularly persuasive either, because in answer to questions from Commissioner Sutherland he accepted the Yeoman's plan calculations in all other respects, apart from in relation to the decks. Lastly, the evidence by Mr Bender was problematic because it was provided during the hearing, thereby catching the appellants by surprise.

[34] Mr Bartlett objected to the evidence of Mr Bender being admitted. He submitted that it was unfair to the appellants to have to meet this evidence during a hearing, when the issue had been alive on the papers for some time, and could easily have been independently verified had the evidence been included in Mr Bender's written brief. Mr Bartlett did not move for an adjournment, and the evidence was provisionally admitted on the understanding that it would be dealt with by us in our reserved decision. In his reply Mr Bartlett did not push this issue, given that the concession by the appellants during the hearing that the area of the decks comprised $14.4m^2$ results in any of the above figures bringing the activity within the 40% restricted discretionary threshold.

[21] Mr Taylor, evidence-in-chief, Attachment 1(a) , but in his viva voce evidence Mr Taylor sought to adopt Mr Bender's calculation of $4.97m^2$

[35] Accordingly whilst legal arguments exist which both favour and reject the admission of Mr. Bender's evidence on this topic, as the practical effect of the outcome is irrelevant, we waste no further time on it.

Should anything else be excluded from or included in the building coverage figure?

[36] The appellants contended that the area of the deck under the eaves should be excluded from the building coverage figure (and therefore should be deducted to the benefit of the appellants). The planner for the appellants attempted to argue that only the area under the eaves, which extends beyond the area exempt from coverage, should be included as part of the calculation of building coverage. This argument was effectively abandoned given the area in contention when measured against the definition we have cited.

[37] Mr Beattie (for the Council) contended that the area comprising the two glass canopies[22] should be included in the building coverage calculation as they had increased the appellants' dwelling coverage by approximately 7.2m^2.[23] Mr Beattie argued that the canopies were not consented,[24] despite attaching a copy of the consent including them as Attachment 12. This issue was not seriously advanced by Mr Loutit, and it is clear from the Yeoman's plan that the glass canopies were included in the building coverage calculations.

Result

[38] Because the building coverage on the site is under 40%, the activity status is within the restricted discretionary threshold and does not trigger non-complying status. Accordingly the proposal before us must be considered on a different basis than that which was before the commissioners.

Should the proposal nonetheless be considered as a discretionary as opposed to a restricted discretionary activity?

[39] The question for us is whether we should bundle the consents required, with the result that we assess the whole of the proposal as a discretionary activity. We have decided that it is not necessary to bundle the consents, because the considerations that

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[22] One over the main entrance and another over the external access to the study
[23] Mr Beattie, evidence-in-chief, paragraphs [33]-[37]
[24] Mr Beattie, evidence-in-chief, paragraph [38]

relate to the consent required for the trees are quite separate from those that relate to building coverage and the foreshore yard. The uses are not closely related and do not overlap. A single joint classification of activity status would therefore not represent the reality of the situation. We have therefore decided to assess the building coverage and foreshore yard consents as restricted discretionary activities. By way of completeness we note that none of the parties suggested otherwise.

[40] We record our view, however, that the assessment of the proposal as either a restricted discretionary activity or a discretionary activity is a distinction without a difference given the facts of this case. This is because the actual and potential effects of the activity and the provisions of the planning instruments to which we would need to refer, given the issues in this case, are the same whether or not we assess the proposal as either restricted discretionary or discretionary.

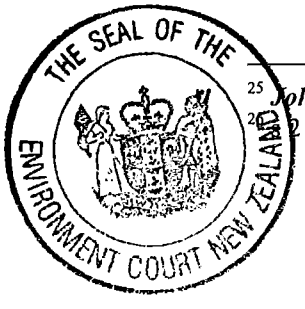
[41] Because we have decided to assess the proposal as a restricted discretionary activity, the provisions of s 104C of the RMA would apply. The Resource Management (Streamlining and Simplifying) Amendment Act 2009 ("**the 2009 Amendment Act**") has changed the scope of what is able to be considered by this Court in relation to a restricted discretionary activity, but as the application in this case was filed prior to the 2009 Amendment Act , the provisions of it do not apply. In our view, on a restricted discretionary activity we are still able to consider the provisions of s 104(1), but we are limited[25] to those matters in s104(1), and indeed in Part 2, which relate to criteria over which the Plan has restricted its discretion. Following the ***John Woolley Trust*** decision the Court is only able to use Part 2 as a reason to grant rather than to refuse consent.

Will the proposal generate adverse amenity effects on the s 274 parties and/or the coastal environment?

[42] The term "*amenity values*" is defined in the Act as

> "... those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreation attributes."[26]

Accordingly, it is best to start with the parties' views about what they understand their amenity to be. We will then consider the provisions of the Plan which relate to this



[25] *John Woolley Trust v Auckland CC* (2007) 3 ELRNZ
[26] 2 RMA

topic and the specific issues relating to building coverage and the foreshore yard, both of which the Plan identifies as relating to the overall issue of on-site amenity.

What are the arguments about on-site amenity?

[43] The s 274 parties contended that their on-site amenity will be significantly reduced by the proposal. They are concerned that their ability to enjoy the grassed area on the commonly owned grassed space in front of the appellants' property will be reduced by the presence of the deck.

[44] Ms McDonald expressed the views of the other s 274 parties. She referred to the beauty of Takapuna beach and the ability of the s 274 parties to enjoy it. She expressed the view that the collective ownership of the site enabled the s 274 parties to "own a piece of paradise on earth."[27] In her view, the most valuable piece of that paradise was the grassed beach frontage. She said that

> It is invaluable to us as an amenity. In its present state it can be enjoyed by everyone for a range of activities. It can be used to rig up *wind-surfers and kite-boards. I* will use it to practice Taiji, a daily activity. It has been used to play petanque and enjoy sand-free picnics. It is used to sunbathe, to dry off after a swim, to sit and enjoy the view of Rangitoto and the extraordinary beauty of the beach.[28]

[45] Ms McDonald referred to the fact that other parts of common area on the site were unable to be enjoyed because of the use to which they had been put, allegedly by the appellants. In relation to the rear of the site, Ms McDonald referred to the paved area on the grassed frontage where the appellants have placed a table and chairs and often stored a small sailboat.[29]

[46] Both the appellants and Ms McDonald talked about privacy. Ms McDonald referred to an attempt by some of the s 274 parties to place a picnic table on the front lawn in early summer 2010. She said that the placement of the table evoked a reaction from the appellants, with the result that the table was moved to the opposite side of the commonly owned space from the paved area where the appellants have their table and chairs.

[27] Ms McDonald, evidence-in-chief, paragraph [4]
[28] Ms McDonald, evidence-in-chief, paragraph [7]
[29] Ms McDonald, evidence-in-chief, paragraph [15 (i)]

[47] Ms McDonald expressed the view that if the proposed deck were to be built, the privacy of the s 274 parties would be adversely affected because :

> the zone in which we could comfortably sit would be seriously reduced. Please imagine how it would feel on the remaining patch of grass if Mr and Mrs Schofield and their friends were on a deck just shoulder-height above, it's a very uncomfortable prospect. Because of the shape of the proposed deck, the area of discomfort would be extended, not just along the front but along the two sides. The south side, which is presently unavailable to us, would be completely excluded. The portion of the lawn that remains on the north side would be severely restricted. The area where the table is would be entirely surrounded by decks.[30]

To illustrate this point, Ms McDonald attached[31] a Photoshop simulation of the proposed deck in situ. Ms McDonald explained the authorship of this illustration and its accuracy was not challenged and in addition to our site visit, it proved a useful aid.

[48] Mr Bender also gave evidence for the s 274 parties. He has lived in Unit 3 since September 2010. Mr Bender told us that he used the front lawn to "*sunbathe and entertain friends*"[32] and he referred to the shared front lawn as a "*vital amenity.*"[33] He referred to a natural buffer that he believed surrounded the appellants' house where other owners did not feel comfortable. He expressed the view that the deck would extend this buffer zone so that other owners would feel too uncomfortable using the front lawn and "*leave this area for the Schofields' exclusive use.*" [34]

[49] Mr Schofield gave evidence-in-reply, which provided a balance to the contentions of the s274 parties. It became apparent from his evidence that much of the disagreement between the appellants and the s274 parties relates to the cross-lease and the extent of the obligations that arise under it. As we have already outlined these matters are not for us to determine as we have no jurisdiction to interpret private property agreements.

[50] So far as the commonly owned area was concerned Mr Schofield said:

> "Well I think the common area is there to be enjoyed by everyone; we've never had a different view to that. I guess our only concern is people being within one or two metres of the front of the house and obviously invading our immediate privacy, to the point where our

[30] Ms McDonald, evidence-in-chief, paragraph [20]
[31] Ms McDonald, evidence-in-chief, attachment 17
[32] Mr Bender, evidence-in-chief, paragraph [2]
[33] Mr Bender, evidence-in-chief, paragraph [3]
[34] Mr Bender, evidence-in-chief, paragraph [4]

> son and his partner feel quite uncomfortable and often in fact made those comments to us they can't move freely around the basement area. And young people being what they are they perhaps like certain levels of freedom and quite frankly they don't feel they have it."[35]

[51] The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s 7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself provides some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activities they undertake there, and the emotions they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in the space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of the subjective, it must be able to be tested objectively.

[52] In this case, the critical factor is that the grass frontage is commonly owned. Because it is commonly owned, it is commonly used. The parties' expectations of privacy, therefore, must be viewed in this context. In our view, the privacy experienced by the owners of the common areas is more limited than they perceive. The fact of the matter is that the grassed frontage is able to be viewed very clearly from the public beach, and the beach is an extensively used urban beach. In our view there is also little privacy afforded to each of the co-owners if they are present on the grassed frontage. The appellants' house directly abuts the grassed area, and as one might expect, has extensive windows along its frontage as well as glass ranch sliders. On our visit and in the photographs, these windows were curtained to prevent those outside looking in, but somewhat obviously there is no restriction on those within, looking out. Because of this, anyone on the front grassed area must expect that they can be seen from inside the appellants' house. Likewise, anyone within the house must expect other co-owners to be near their living areas.

[35] Transcript p226 lines 26-33

[53] There is nothing currently preventing any of the common owners using any of their commonly owned grassed area for any reason. Accordingly, the amenity potentially enjoyed by any of the co-owners is able to be affected by the actions of other co-owners, who may also wish to use the space. We therefore find that the on-site amenity experienced by the s274 parties and the appellants is limited in terms of privacy. This must be the starting point for any further findings we make about the effect the proposed deck will have on the on-site amenity of the s274 parties.

Will the proposal generate adverse amenity effects off-site?

[54] Both the Council and Mr Taylor for the s 274 parties contended that to some degree there would be adverse effects generated in relation to the coastal environment. Mr Taylor's concerns were confined to the use of the beach directly in front of the site, whereas Mr Beattie captured a wider concern. Ms Skidmore (for the appellants) was the only qualified landscape architect and urban design expert who gave evidence. Her assessment addressed the existing character and context and the impact of the proposed structure. She noted the *distinctly urban edge* to the landward side of Takapuna Beach and the eclectic mix of building forms, boundary, and garden treatments. In her view, "*A unifying feature is the location of mature pohutukawa trees dispersed along the coastal edge*[36] and characteristic of this site. She did not agree with Mr Beattie that the appellants' house occupies a unique and prominent position in the Takapuna beach scene. Our own observation confirms Ms Skidmore's evidence and we agree with it.[37]

[55] Ms Skidmore's opinion was that when viewed from the marine environment the deck would not be clearly discernible or distinguishable from other elements of the building, and would be compatible with the broader pattern of development evident along the beach. However, she considered this would not be the case from the beach in the immediate vicinity. Even so, in the context of the urban beach edge, she considered the deck would not be viewed as a dominant or obtrusive feature and she said:

> In the context of sea walls, boat sheds and lockers that create the urban edge to the beach, I do not consider the deck will diminish the amenity and enjoyment of the beach environment.[38]

[36] Ms Skidmore, evidence-in-chief, paragraphs [3.4]
[37] Ms Skidmore, evidence-in-chief, paragraphs [3.6]
[38] Ms Skidmore evidence-in-chief, paragraph [4.2]

[56] Our own site observations confirm Ms Skidmore's evidence, and we note that the grassed common area between the deck and the beach boundary, as well as the significant pohutukawa trees will not be diminished in any significant way should the proposal be granted. We agree that any adverse off-site amenity effects, generated by the proposal, are likely to be negligible.

The relevant planning instruments

[57] The on-site amenity the parties claim to enjoy must be tested against the provisions of any planning instruments, to which we now turn. The planning instruments provide a bottom line against which the subjective views of those involved can be measured.

[58] While assessment of this proposal is confined by its status, we were apprised of the full context of the District Plan provisions by reference to higher order documents. In this context we refer to the New Zealand Coastal Policy Statement ("**the NZCPS**"), and in particular Objective 2 and Policy 15, which seek to protect and preserve the natural character of the coastal environment from inappropriate subdivision, use and development. It was accepted, and we agree, that this does not, of course, prevent the use and development of the coastal environment, and we accept Mr Beattie's evidence that the site coverage and foreshore yard controls are seeking to achieve the same planning outcome as identified in the NZCPS by controlling the location and bulk and massing of the built form in the coastal location.

[59] We accept Mr Beattie's evidence that the strategic policy direction of the Plan is to protect and enhance the high quality natural environment. We also agree with his evidence that Takapuna Beach is one of the City's greatest natural assets. We heard evidence and accept that the emphasis on the objectives and policies relating to coastal conservation (remembering that the site is zoned Residential 2B and within the Plan's Coastal Conservation Overlay) seeks to apply a building setback or foreshore yard as a buffer between the coastline and development to ensure protection of the natural character and amenity values of the beach. We also accept that the Plan tries to achieve appropriate on-site amenity through amongst other things, the building coverage controls.

[60] We recognise that the Plan's provisions relating to on-site amenity are in the main generic and the expectations of the Plan in relation to a new development are not relevant to this site. In this regard whilst Mr Taylor's attempt for the s274 parties to outline what might apply in terms of on-site amenity were the site to be developed

today were interesting, they were not relevant because we are dealing with a site that has its "bottom line" for on-site amenity determined by the nature of the cross-lease. Having said this, we were not impressed by Mr Parfitt's reply to this evidence,[39] which did not display the degree of objectivity, nor appropriate language, we expect from an expert witness.

Assessment methods

[61] We now turn to examine the relevant objectives and policies that might assist us decide whether or not control flexibility is appropriate in this case.

[62] The planner for the appellants did not direct us to the more general objectives and policies within the Residential Section of the Plan, but we have reviewed these and find that they provide a useful context to the more specific objectives and policies contained in the relevant zone provisions. We were referred to section 16.3 of the Plan, "*Residential Objectives and Policies*" and in particular section 16.3.3 entitled "*Development Controls*",[40] section 16.3.4 entitled "*Protection of the Natural* Environment" and section 16.4.2.2 entitled "*Residential 2B Zone: Amenity Areas.*"[41] We will deal first with the relevant more general residential objectives and policies before considering those specific to the Residential 2B zone.

Development Controls (Section 16.3.3)

[63] Mr Beattie drew our attention to the expected environmental results from the application of the objective and relevant policies found at Clause16.3.3. These include the *protection of coastal amenity* and *sufficient on-site open space to contribute to the open character of the neighbourhoods and provide an area of amenity for occupants.*[42] Mr Beattie's opinion was that this second point is *critical* as the Plan seeks to "*provide for the on-site amenity needs of all the occupants on this site.*"[43] This aspect was not in dispute.

[39] Mr Parfitt, evidence-in-reply, paragraph [6.8]. We also note that paragraphs [6.7] and [6.11] also contain comments that reflect a lack of objectivity.
[40] Agreed Bundle of Documents p118
[41] Agreed Bundle of Documents p122
[42] Mr Beattie evidence-in-chief, paragraphs [82]
[43] Mr Beattie evidence-in-chief, paragraph [83]

Protection of the Natural Environment

[64] Clause 16.3.4 contains the other relevant general residential objective which is "*to conserve those features of the natural environment which enhance the qualities of residential areas, are important components of natural ecosystems or are associated with cultural values.*" Policy 1 is relevant and seeks to achieve the objective outlined in the previous paragraph "*By recognising and protecting those parts of the residential area which have special amenity or environmental values by the use of special zones and associated development controls.*"

[65] Mr Beattie noted that these provisions seek to "*conserve and protect the relevant natural features within the individual residential environment, which contribute to both their environment and amenity values.*"[44] We agree.

Residential 2B zone: Amenity Areas (Section 16.4.2.2)

[66] In relation to the Residential 2B zone itself, we were told that it applies to "*small parts of the former North Shore City which enjoy a high standard of natural amenity and therefore has been applied to all the residential properties abutting Takapuna Beach.*"[45]

[67] The single objective of the *Residential 2B zone: Amenity Areas* is outlined in clause 16.4.2.2, which is "*to ensure that those areas which enjoy a particular natural character and amenity due to factors such as ... significant numbers of mature trees... or a coastal setting, retain these values.*"

[68] There are four policies to implement the above objective and Mr Parfitt's view (for the appellants) was that the policies identify two forms of development which are considered to be inappropriate *namely substantial earthworks or the removal of significant trees.* On this basis Mr Parfitt concluded that given the size of the deck, the fact that there are *existing decks either side,* the deck is *cantilevered,* it *will look as if it has always been part of the house,* it will be *visually unobtrusive* and *no excavation, vegetation or trees will be removed or altered,* the proposal fully accords with the Residential 2B objective and policies.[46]

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[44] Mr Beattie evidence-in-chief, paragraphs [84]
[45] Mr Beattie evidence-in-chief, paragraph [86]
[46] Mr Parfitt evidence-in-chief, paragraph [5.4.2]

[69] We do not agree with the confined scope of the policies as set out by Mr Parfitt. For instance, Policies 1 and 2 in clause 16.4.2.2 set out the expectation of larger lot sizes to *accommodate trees and maintain a more spacious environment* as well as limiting amongst other things, more intensive forms of residential development in recognition of their impact upon amenity.

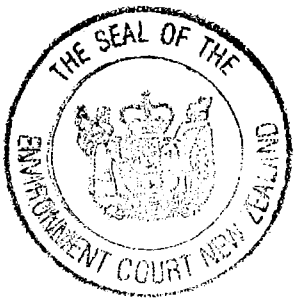
[70] We now turn to specifically consider the Plan provisions relating to the building coverage and the foreshore yard. As both are subject to what is referred to in the Plan as "*control flexibility,*" there is a general rule at 3.10.6 that applies entitled *Site and Design Characteristics for Control Flexibility.* This rule directs us to consider certain matters which form the *basis for determining whether there are any particular characteristics of the site or its environs that warrant granting consent.* These include amongst other matters, inherent site considerations, site development and layout characteristics which are clearly germane to this proposal. Then Rule 16.7.5 applies generally to instances in residential zones where control flexibility is sought. This requires among other things and relevantly here, that the proposal must meet either the intent of the control as contained in its associated explanation or it is unreasonable or impracticable to enforce the control and one or more of the site characteristics specified in Section 3.10.6 apply and any relevant criteria listed below shall apply. In this case it is the first alternative that is relevant.

[71] We propose to deal separately with the topics of building coverage and the foreshore yard.

Can the proposal comply with the criteria relative to building coverage flexibility?

[72] As we have already mentioned, Rule 16.6.1.9 signals that an increase in the building coverage from 35% (permitted) to 40% (with control flexibility) can occur. There is commentary provided in relation to the rule by way of "Explanations and Reasons," two of which are relevant: one entitled "General," and another specifically relating to the Residential 2 zone :

> **Explanation and reasons**
>
> General: The maximum net site coverage control ensures that the intensity of development is in character with that of surrounding residential areas. Importantly, it provides opportunities for the establishment/maintenance of trees and landscaping of comparable character to the existing neighbourhood. It ensures that there is adequate open space on each site to accommodate parking, access and outdoor living areas, and to enable drainage to occur through ground seepage in recognition of the limited capacity of disposal systems...



> In the Residential 2B and 2C zone, the maximum permitted coverage is the same as in the Main Residential Area (Residential 4 zone). A higher coverage would be incompatible with the natural amenity values in these zones and therefore only in very exceptional circumstances will a higher coverage be permitted.
>
> (Emphasis added)

[73] In summary, there are two reasons for the coverage requirement that are relevant here; ensuring firstly that the intensity of development is in character with that of surrounding residential areas and secondly, that there is adequate open space to accommodate outdoor living areas. Both these reasons can be broadly said to deal with amenity. More specifically, in the Residential 2B zone, an additional reason why the coverage requirements exist is to ensure compatibility with the natural amenity values in the zone.

[74] The objectives and policies that apply all point to the importance of inherent amenity values and retaining them. With this there can be no disagreement. The real issue, Mr Loutit submitted for the Council, was that it is only in very exceptional circumstances that coverage higher than 35% will be allowed. This is because Rule 16.6.1.9 provides in its explanation and reasons that in the Residential 2B zone, a higher coverage would be incompatible with the natural amenity values in these zones. Mr Loutit submitted and Mr Parfitt agreed with him in cross-examination, that there was nothing exceptional about the site, Takapuna Beach, or this application. Given that concession, Mr Loutit submitted that the increase in building coverage that would result from the deck should not be allowed, because it was not exceptional.

[75] We agree with Mr Loutit that "*very exceptional circumstances*" is a high threshold, but this is of course dependant on the facts of the case, which require consideration of whether or not in fact a higher coverage would be incompatible with the natural amenity values in the zone. The question here is whether or not natural amenity values relate to those more specifically directed at the coastal environment, or whether they also include on-site amenity, which is at the heart of the s 274 parties' concerns.

[76] We find that the natural amenity values of the site relate more to the coastal environment and the zone as a whole, rather than to on-site amenity, however, we accept that in certain circumstances there will be some connection between the two.

[77] In this case the proposal does not alter anything in the natural environment of significant value; it does not impinge on the coastal environment or the trees to any

great degree, neither does it affect public amenity values. The best that can be said is that it impinges slightly into an area adjacent to the grassed common area, which is part of the natural environment, but only that part which affects the appellants and the parties, and then only slightly. Accordingly in our view the restriction relating to the natural amenity values in the explanation and reasons outlined in clause 16.6.1.9 does not apply on the facts of this case.

[78] In respect of on-site amenity, that is defined by the existing development (which as we have noted, is not of a character which is expected in the Residential 2B zone) and its setting. This development is higher in density and brings with that greater demand for on-site amenity. However, the setting of the site and the position of the common area defines for the occupants of this site an existing level of amenity. As the appellants have agreed, the proposal should only proceed if in fact the deck is within the footprint of their unit and therefore does not impinge on the commonly owned area.

[79] For the above reasons, we are satisfied that the proposal does not offend the purpose of the building coverage rule.

Can the proposal comply with criteria in respect of the foreshore yard?

[80] Before we consider the specific assessment criteria relating to the foreshore yard, it is important to understand the background objective and policies relating to coastal conservation, because the deck is within the coastal conservation area and the foreshore yard provisions are an important tool in relation to development in this area.

What additional objective and policies are relevant to the foreshore yard?

[81] Section 8.3.1 provides:

> **8.3.1 Coastal Conservation**
>
> ***Objective***
>
> To protect the natural character, public access, cultural heritage values, ecology and landforms of the coastal environment.
>
> ***Policies***
>
> 1. By defining the Coastal Conservation Area.
> 2. By applying a building set back or foreshore yard as a buffer between the coastline and development to the extent necessary to:
>
> - protect the natural character of the coastal environment, including its soft green edge, the physical landform, natural features, vegetation and ecological systems

- protect the water quality of the coastal environment and the habitats that it sustains
- provide for the operation of naturally occurring processes
- keep open the existing and foreseeable opportunities for future esplanade reserves and strips
- maintain and enhance landscape and amenity values
- protect the value the coastline has to tangata whenua
- reduce potential hazards resulting from natural processes and subsequent changes in landform
- manage the cumulative effects of the activities of property owners in the coastal environment.

(Emphasis added)

[82] Mr Taylor referred us to the explanation and reasons[47] contained in the Plan for this objective and its policies. In summary the following relevant points are made:

- Preservation of the natural character of the coastal environment is a matter of national importance;
- The remaining natural character of the coastal environment largely involves the 'soft green' edge to the city's coastline where buildings are set back from the coast and there are pohutukawa and other trees and landscaping between the buildings and the coast;
- The Foreshore Yard defines that part of the coastal edge which is most sensitive to development;
- The width of the Foreshore Yard varies around the coastline, depending upon the specific environmental conditions:
    - The following factors were taken into account in determining the width of the yard:
        - conservation values, including areas of coastal habitat and vegetation
        - landscape values
        - landform, e.g. cliff top, beach or estuarine edge
        - coastal hazards
        - existing development.

[83] The planning evidence presented to us used terms which we found described the existing environment well. We were referred to the *highly urbanised* beachfront at Takapuna where a *relatively small yard setback from a consistent and precisely defined line* is evident. Further, and as we observed on our site visit, that due to *strict adherence to the yard rule over many decades* the development form which now exists *has produced the pattern of built coherence relative to the beach.*[48] By this we

[47] Mr Taylor evidence-in-chief, paragraph [7.5]
[48] Mr Beattie evidence-in-chief, paragraph [119]

understand that the spatial relationship of development to the beach is now established and relatively consistent.

[84] The Plan provides for some building within the foreshore yard subject to specific assessment criteria being met, but the Plan also outlines in reference to Coastal Conservation that the foreshore yard setback is an important tool for managing development in the coastal area and that :

> The well established nature of coastal development along substantial parts of the foreshore and the reliance that property owners have placed upon the certainty provided by a building setback, which has been applied as a specified distance for many years, ensures that new buildings do not undermine the level of amenity coastal landowners have come to expect.[49]

[85] In order to achieve the Plan objective, a balance must be struck between the certainty provided by the building setback and the overall objectives for development in the coastal environment. It is a balancing which relies on consistency of approach, or the effectiveness of the foreshore yard will be compromised. We accept that coherence has been achieved through consistent application of the yard setback.

What are the specific foreshore yard provisions?

[86] Rule 16.6.1.5A[50] outlines the foreshore yard provisions that apply to the Residential zone. The foreshore yard is the setback distance identified in Appendix 21E of the Plan. Subject to certain provisos which are not relevant here, activities permitted in the zone are to observe a 9m setback from the boundary common to the beach. In this case, the proposed deck does not comply and falls within the foreshore yard for its entire length (6m) and from between approximately half its depth at one end to approximately one quarter of its depth at the other end.[51]

[87] In the context of this case, the control flexibility rule allows an application to be made for a building in the foreshore yard as a restricted discretionary activity, "*provided that the foreshore yard is reduced by no more than 33.3 percent of the width specified in Appendix 21E.*"[52] All of the parties agree that the proposal qualifies

[49] Clause 8.3.1 *Explanation and Reasons*
[50] Agreed Bundle of Documents p 124
[51] While we were provided with a scale plan it was not dimensioned in respect of the actual depth of deck which would overhang the foreshore yard
[52] Agreed Bundle of Documents p 124

for an application to be made under the control flexibility rule. The relevant assessment criteria are found at Clauses 16.7.5(generally) and 16.7.5.1(specifically).

[88] The general assessment criteria (16.7.5) require amongst other things that either:

> The proposal meets the intent of the control as contained in its associated explanation;
>
> Or
>
> It is unreasonable or impractical to enforce the control, and one or more of the site characteristics specified in Section 3.10.6 apply and any relevant criteria listed below shall apply.

[89] We refer back to the criteria 3.10.6 dealing with the site and design characteristics that apply to matters that invoke the control flexibility criteria. We highlight the need to consider existing inherent site and development characteristics which are specific to the site. In this case, the placement of the dwelling and its exclusive use of the site are within the foreshore yard by virtue of the northern existing deck. If a useful deck is sought directly off the living room of the existing dwelling, it is likely to infringe the yard requirement, because the house site is very close to the yard. We anticipate, based on Mr Beattie's account of the history of the development, the yard rule arrived later than the development on this site. Thus there are inherent features relating to the existing development which led to the location chosen for this deck. The question is therefore whether the proposal can meet the intent of the control and whether any potential adverse effects of the activity can be avoided, remedied or mitigated.

[90] The following relevant extract from the explanation of the foreshore yard control is helpful:

> **Explanation**
>
> The foreshore yard is required to protect the natural character of the coastal environment. The foreshore yard ensures that buildings are set back from the coastline, do not dominate the coastal landscape, adversely affect coastal ecological features, or are likely to contribute to coastal erosion. Assessment criteria have been set to ensure that where limited development is provided for within the foreshore yard, it does not affect the environmental qualities of the coast. Greater restriction is placed on certain beach areas and walkways because of the importance of retaining the natural character and landform of these areas, and the pressure they are under from coastal development. This approach reflects the emphasis of the RMA on protecting the coastal environment and

> generally held public opinions that beaches should be free of structures. Foreshore yard controls are not limited to those structures above ground but include underground structures because they may become exposed in the future due to erosion processes. [53]

(Emphasis added)

[91] As can be seen, the foreshore yard restriction is designed to ensure that buildings are set back from the coastline; do not dominate the coastal landscape; do not adversely affect coastal ecological features, are not likely to contribute to coastal erosion, and do not affect the environmental qualities of the coast.

[92] There are also specific criteria that apply when considering flexibility relating to the foreshore yard control. Rule 16.7.5.1 provides the following (relevant to this proposal):

> In assessing an application for a building in the foreshore yard account shall be taken of:
>
> a) Whether the site has exceptional characteristics where the foreshore yard affects a greater than usual proportion of the site such as: where the site has a triangular shape, more than one boundary is affected by the foreshore yard, or it is a narrow site orientated along the coast; or the site has significant specimen trees or other features which mean it is not possible to achieve reasonable development outside the foreshore yard;
>
> OR
>
> b) The proposed development is for: small-scale development such as accessory buildings, swimming pools, decks or terraces or above ground stormwater infrastructure.
>
> AND
>
> c) The proposed reduction in yard would be consistent with the existing pattern of development;
>
> ...
>
> e) There would be no more than minor adverse effects on the natural character of the coastal environment, landscape, vegetation cover, open space, water quality, cultural heritage values or ecological values;

[53] Agreed Bundle of Documents p125

> f) Development does not increase the natural rate of erosion or create significant risk of accelerated erosion and/or instability of the site or adjoining land; and
>
> g) There would be no more than minor effect on the amenity of the area.[54]
>
> (emphasis added)

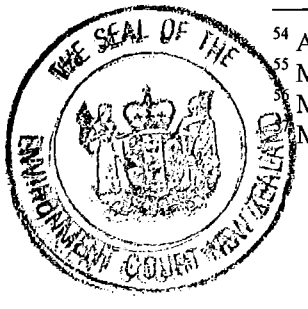
Evaluation

[93] Mr Parfitt's opinion was that the proposed deck could meet the assessment criteria contained in the Plan which provides for intrusions into the foreshore yard. "*Due to the limited size of the deck on a house that is small in size being only one and a half levels as viewed from Takapuna Beach with two large pohutukawa trees on either side*" the deck would have in Mr Parfitt's opinion, "*one of the lowest visual impacts*" and "*be the least overbearing... of any dwelling on Takapuna Beach.*"[55]

[94] Mr Beattie had a different opinion. His view was that the proposed deck would "*bring an elevated structure closer to the beach edge... this will impact upon the natural values of the beach and its green backdrop.*"[56]

[95] Mr Taylor's opinion was somewhere in between the two, in that he considered that potential adverse effects from the deck related to *on-site amenity* and the beach area *directly adjacent* to the site. Mr Taylor's opinion in respect of the impact upon the beach appeared to be based upon *the very well defined space with a fine texture in terms of the pohutukawa and lawn which make up this part of the environment* which, in his opinion, resulted in a greater impact from the proposed structure *in terms of scale than many of the other situations along Takapuna Beach, where, from a wider perspective the effect of scale will be minor.* [57]

[96] We have determined that this site has inherent characteristics peculiar to it relating to its historic development and that the cross-lease has defined the development and use of the site. This situation (by reference to Clause 3.10.6 of the Plan) clearly sets up a situation where consideration of control flexibility is appropriate. However, in relation to the specific foreshore yard criteria (clause 16.7.5.1), we must ask ourselves whether or not the site has *exceptional*



[54] Agreed Bundle of Documents p135
[55] Mr Parfitt, evidence-in-chief, paragraph [5.6.5]
[56] Mr Beattie, evidence-in-chief, paragraph [99]
[57] Mr Taylor, evidence-in-chief, paragraph [7.10]

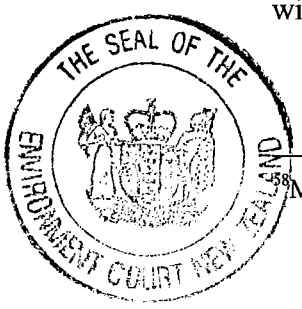
characteristics. We suspect not, because non-conformity with current planning rules would not of itself be exceptional and the development on the site and the dwelling in question enjoy a high degree of amenity. However, we consider that the proposal can fulfil the alternate circumstance that the deck is a small scale development

[97] In relation to the remaining relevant criteria we have come to much the same conclusion as the commissioners, who were dealing with a larger proposed deck, that the deck will not have an adverse impact upon the coastal environment.

[98] Mr Beattie was concerned to ensure strict adherence to this rule to prevent it being undermined.[58] In his opinion, any reduction in the foreshore yard would be inconsistent with the established pattern of building development fronting onto Takapuna Beach. We disagree. In our view, the proposal relates to a well-established development which is close to the yard margin. The yard includes trees that will be unaffected by the proposal and the green space will largely be retained consistent with the expectation of the rule. We prefer Ms Skidmore's assessment to which we have previously referred.

[99] The cantilevered nature of the structure does not interfere with the natural features of the site and the deck intrusion is relatively small. The remaining issue relates to assessment criteria (g) and we note the view expressed by Mr Taylor that the amenity referred to here is that of the wider Takapuna beach whereupon in his view any potential adverse effect will be minor. His remaining concern relevant to this discussion was the beach area adjacent to the common area on the site. We do not consider that the deck per-se will negatively contribute to the use of the beach adjoining the site. The common area intervenes between the deck and the beach. It is more likely to be the activities of persons enjoying the grass lawn of the common area proximate to the beach which might impose on the amenity of the immediate beach area.

[100] In summary, the proposed deck is set back from the coastline and generally consistent with existing development on this site. In our view, the deck will not dominate the landscape, there will be no adverse effects on coastal ecology or erosion, and there will be no adverse impact upon the environmental qualities of the coast. We find that the proposal adheres to the assessment criteria. This finding is consistent with that of the commissioners.



[58] Mr Beattie, evidence-in-chief, paragraph [119]

Conclusion in relation to the s274 parties' primary concern: on-site amenity

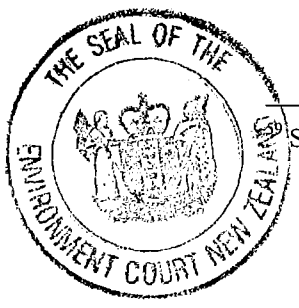
[101] The degree to which on-site amenity might be affected by the proposal is dependent on whether or not the deck is within the common area. As we have been at pains to express, the interpretation of the cross-lease is not for us. Nonetheless, whether or not the proposed deck encroaches into the common area provides a factual bottom-line against which on-site amenity must be assessed. If the proposed deck does not encroach into the commonly owned grass area, then the s274 parties cannot complain that their on-site amenity has been affected by it. Correspondingly if it does, then it becomes a question of degree.

[102] As we have found, there can be little expectation of privacy afforded to the appellants or the s 274 parties because the front grassed area is jointly owned. Because of this, the parties must expect that the use of this common area could be problematic if any of the parties wish to use it for competing purposes at the same time. Whether the proposed deck is there or not would make no difference to this possibility.

[103] We have found that the proposal can meet the purpose of the building coverage and foreshore yard provisions in the Plan. Overall we find that the s274 parties' on-site amenity will not be adversely affected by the proposal. In this regard we have reached a different view from the commissioners, but as we have said the proposal we have before us is very different in terms of its scale. We also understand the commissioners to have thought the deck was not to be sited within the common area[59] and Mr Bartlett was at pains to ensure us that was not the case and offered a condition to the consent to ensure that situation would not occur.

[104] We observe that there is an existing issue relative to privacy between Unit 5 and the common area. This is an inherent feature of the development of this site, but is something that might be addressed in the context of this consent, and if addressed could potentially enhance the on-site amenity for all the parties. There was some discussion with Ms Skidmore about this issue:

> I think if you were trying to achieve a greater level of privacy, if that was the aim, you could do something that's still quite a lightweight structure, so it's not a very heavy domineering, so perhaps a perforated metal. These days you can create screens with all sorts of patterns in the perforations so that it would give a relatively lightweight appearance



[59] Specifically the opening paragraph of decision Page 074 of bundle and elsewhere in their discussions

> structure, or a vertical timber slatted, again which has sort of some level of openness but would create more of a screen.[60]

[105] Thus in meeting the purpose of the RMA and in particular reference to not only maintaining but in this case having the opportunity to enhance amenity values by at least in part addressing this privacy issue, we consider a condition of consent which requires an opaque balustrade is required. Bearing in mind Ms Skidmore's reference to lightweight appearance of the proposal as currently designed we anticipate that the solution might be simply an opaque treatment of a glass balustrade. We would however, encourage the parties to consult on this design and require a suitable design to be put to us with evidence of the consultation which has taken place so that we may include that plan as authorised by this decision.

[106] We record that we have had regard to s7(c) in reaching this decision. In our view the proposal will maintain the amenity values that currently exist on the site. So far as enhancing amenity values is concerned, the requirement for an opaque balustrade would ensure that some screening effect is achieved between the occupants of the dwelling and those using the common area. This, in our view, would be an improvement from the situation that currently exists. Whilst other parts of s7 were referred to us, they are not really relevant to the restricted discretionary criteria we are required to consider.

[107] We are satisfied that overall the proposal will meet the purpose of the RMA as outlined in s5.

Will granting approval create a precedent effect?

[108] Given that the central issues to be decided in this case are matters which would be considered as restricted discretionary activities, development of the nature contemplated is to be expected provided certain criteria are met. On that basis we do not agree that matters of precedent are relevant, because each proposal must be considered on its merits and measured against the assessment criteria. Whilst we appreciate the cumulative effect that may result from relaxing the foreshore yard rule, in our view the options for relaxing it are tightly controlled by the assessment criteria. Further, the unique circumstances relating to the existing development on this site is a relevant factor. In our view, these circumstances would not be common to many of the residential developments along Takapuna Beach.

[60] Transcript, page 29, lines 20-25

Result

[109] The appeal is allowed. Resource consent is granted to construct a 6m x 2.4m deck cantilevered at least 1.2m above ground level. The consent holder shall only construct the deck (or any part thereof) authorised by this consent on or above the area established to be within 'Flat 5' and 'Flat 6' as described on Composite Computer register 153829 and 153830.

[110] Within one month of this decision the parties are to submit to the Court for approval:

- Agreed further conditions relating to the matters not in dispute (e.g. tree protection and construction matters), and

- A revised plan and specifications for the balustrade prepared by the applicant in consultation with the s274 parties together with a record of the consultation.

Costs

[111] Costs are reserved. Any party wishing to apply for costs must do so by written memorandum within 20 working days from the date of this decision, with the right of reply to be provided within a further 20 working days.

SIGNED at AUCKLAND this 12th day of April 2011

For the Court

M Harland
Environment Judge