ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 391

IN THE MATTER	of an appeal pursuant to Section 120 of the Resource Management Act 1991
BETWEEN	OB HOLDINGS LIMITED (ENV-2008-AKL-000191) Appellant/Applicant
AND	WHANGAREI DISTRICT COUNCIL First Respondent KAIPARA DISTRICT COUNCIL Second Respondent NORTHLAND REGIONAL COUNCIL Third Respondent
AND	SECTION 274 PARTIES *(as scheduled below)*[1]

Hearing: In Whangarei, on 14, 16, & 17 December 2009, and 31 May – 3 June 2010; closing submissions filed on behalf of all parties on various dates up to 1 July 2010

Court: Environment Judge L J Newhook
Environment Commissioner P A Catchpole
Environment Commissioner R M Dunlop

[1] **J & C Hawley, J Sigalove, J Spyksma, and A Lee**

Counsel: R E Bartlett for appellant/applicant

J C Dawson and K M Smith for respondents

J E Williams for s 274 parties

Memorandum received from Environmental Defence Society Inc., (N Garvan, counsel), advising that its interest in the proceedings was limited to prevention if possible of future additional subdivision.[2]

INTERIM DECISION OF ENVIRONMENT COURT

A. Indication of consent possibly forthcoming in relation to some of the lots applied for, subject to suitable conditions being capable of being settled.

B. Costs reserved.

INTRODUCTION

[1] The Court conducted hearings of these strongly contested applications for subdivision and related activities, in two parts:

[a] in December 2009, until it became apparent that significant further information was required from the applicant; and

[b] in May and June 2010 after same was provided.

[2] The applications have a long history, which is perhaps not surprising given the circumstances and atmosphere surrounding them, as will become evident from some of the content of this decision.

[2] The applicant has volunteered such a condition.

[3] In mid 2008 hearings were conducted by the respondents, being essentially subdivision applications to the two District Councils, a land use consent application (earthworks) (NRC), and application for discharge permits (NRC). A joint hearings panel declined the applications, but offered certain commentary that indicated that in different circumstances, certain aspects of the applications could perhaps receive consent. The appellant/applicant brought this appeal.

[4] The proposal involves primarily bush-covered land on a prominent ridge comprising the lower foothills of the Brynderwyn Hills, behind Langs Beach on the east coast south of Whangarei.

[5] The applications to the three authorities were, in more detail, as follows:

(i) Whangarei District Council

RC 39201 PO42772.SL

- A three-stage subdivision development creating 44 lifestyle lots, four bush protection lots to be held in common by the lifestyle lots, a lot for community facilities (including a club house, tennis court, petanque court and heated plunge pool) to be held in common by the lifestyle lots, and four access lots. The subdivision will also be serviced by various rights of way and a number of amalgamation conditions are proposed to give effect to the development. Note: the access lot initially shown as servicing Stage 1 of the development is to be split into two access lots by a right of way that is proposed through the area of RC 38757.

- A boundary relocation between Lot 1 DP 207239 and Lot 3 DP 92832 as part of Stage 1; transferring 1,936m^2 to the area legally described as Lot 3 DP 92832. A public walkway easement that will become part of the Brynderwyn Walkway is also proposed over this area of land.

- A boundary relocation between Lot 1 DP 316176 and Lot 3 DP 92832 as part of Stage II; transferring 1,525m^2 from Lot 1 DP 316176 to Lot 3 DP 92832, and transferring 1,068m^2 from Lot 3 DP 92832 to Lot 1 DP 316176.

- A right of way over Allotment 534 Parish of Waipu is proposed in favour of Lots 2 to 17, 46.1, and 46 to 50 of Stage I (with the rights subsequently also transferring to the lifestyle lots created under Stages II and III and cancelling with respect to access Lots 31.1 and 45.1 as these lots are created).

- A 3-metre wide public walkway easement (to be referred to as the Brynderwyn Walkway) is proposed through the subdivision for future gazetting as scenic reserve under the Reserve Act 1977 for the

purpose of a walkway. The walkway easement will be formed as part of the development. It involves the construction of a 0.9m, wide path.

RC 38757 PO42772.SL

To vary the conditions of RC 38757 to reduce the area of proposed conservation covenants H and G within Lots 2 and 3. The consent holder proposed that the covenant areas would decrease from 1.18 hectares to 1.17 hectares on Lot 2 (covenant H), and from 1.71 hectares to 1.49 hectares on Lot 2 (covenant G).

(ii) Kaipara District Council

RM 050275

- To subdivide the area of Lot 1 DP 334474 creating Lot 3.1 of 610.7m^2 as road to vest (including a public car park) access Lot 3 of 5,165m^2 to service Lot 3 DP92832 (also includes a private boat parking facility), and lifestyle Lot 4 of 2,015 hectares.

  Lot 3 within the Kaipara District provides the only vehicle entrance servicing the subdivision within the Whangarei District, with all access to the subdivision being via this lot onto Cove Road.

- To part cancel an amalgamation condition requiring that Lot 1 DP 316176 to Lot 3 DP 92832, and transferring 1,068m^2 from Lot 3 DP 92832 to Lot 1 DP 316176.

(iii) Northland Regional Council

GON20041213701 – 05:

Land Use:

- To carry out approximately 120,000m^3 (solid volume) of earthworks for the construction of 4.5km of subdivision roading and access ways, bridges, walkway track, and house sites, including on erosion prone land and within Riparian Management Zones.

- To clear vegetation associated with the construction of subdivision roading and access ways, bridges, house sites and a walkway track, including on erosion prone land, and within Riparian Management Zones.

Discharge Permit:

- To discharge stormwater to land during the period of land disturbance activities.

- To discharge stormwater to water during the period of land disturbance activities.

Water Permit:

- To divert storm water from land disturbance activities.

[6] During the life of the subdivision applications (originally lodged in 2005), the now operative Whangarei District Plan was evolving through appeal processes. At that early time, there was a controlled activity standard for subdivision in the applicable Whangarei Plan's Countryside Environment (zone) providing for average 4ha lots, subject to certain minimum lot size criteria.

[7] The controls altered as a result of decisions by the Environment Court, such that Rule 73.3.1 concerning allotment areas now specifies that subdivision in the zone is a controlled activity where every proposed allotment has a minimum net site area of 20ha, and is a discretionary activity where the minimum average net site area is 4ha (with certain minima and maxima specified).

[8] The burden of the case before us concerned the Whangarei rules and other plan provisions, and to a lesser extent, the regional plan provisions. This was because the bulk of the land was within the Whangarei District. Draft consent conditions in relation to Kaipara matters were put to one side during the hearing, to be revisited if consent were to be forthcoming to any parts of the Whangarei and Northland Regional aspects.

[9] The Whangarei part was put to us by the applicant's counsel unequivocally as a bundle of applications collectively needing non-complying activity consent, not as he said because the 4ha average standard (and minimum lot standards) were unattainable in a design sense, but because the combination of small designated building sites in conjunction with a large covenanted common area was considered to produce a better environmental result. He submitted that it achieved the density standard, but not in the way contemplated by the rules, resulting in what he elegantly termed *"litigation risk"* for his client. Indeed, the Hearings Commissioners themselves commented in their decision that pursuing this course had the potential to produce a better environmental outcome.

[10] Perhaps as expected, the s 274 parties endeavoured to demonstrate that the set of proposals would not pass through the gateway tests of Section 104D of the Act. Indeed, they vigorously pursued many points of both a "macro" and "micro" nature during the course of the highly contentious hearing. Notably, this occurred despite extensive caucusing amongst the groups of planning consultants and landscape consultants being called on behalf of the parties.

[11] Meanwhile, the respondents, after negotiations and the caucusing came to the position that a modified form of the proposal should qualify for the granting of consent rather as seemed anticipated by the Hearing Commissioners. As Mr Dawson put it in opening, their assessment was based on a careful consideration of permitted baseline information (although we ultimately considered that the topic was not nearly as clear-cut as advanced by the appellant and respondents) and certain directions taken by the District Plan together with mitigating aspects of the proposal and some positive aspects.

[12] Mr Bartlett stressed that despite what he called *"lamentations"* by the Court in its decision-making on the District Plan appeals, the Plan provisions have not yet been made the subject of Plan Change proposals that would give any decent lead as to the creation of comprehensive development proposals for subdivision and building development within one consent package, based on good environmental outcomes. He identified, we think correctly, that the subdivisional standards contain minimum lot size and averaging requirements which do not encourage such outcomes, and indeed facilitate fencing off of titles in a crude way with resultant potential for lines of clearance through areas of bush. (He also correctly identified that the decision of the Environment Court on the review appeals had regrettably been limited in jurisdictional terms by the unsophisticated nature of the submissions and appeals themselves).

[13] Despite encouragement given by the Court in that earlier decision-making process, and despite some steps having been taken by WDC to undertake public consultation, little has occurred in terms of Schedule 1 processes under the Act.

[14] The applicant's comprehensive catchment management approach was illustrated in the extensive evidence of landscape architect Mr D J Scott depicting a proposal for 40 residential lots (reduced from an earlier 44), three proposed building types, and certain height controls, building platform locations, and other detailed controls.

[15] Significant factual background in the case is that the topography of the subject foothills is quite complex. This offered benefits of visual mitigation, but also challenges for the design of the present proposal.

[16] Regrettably, it became apparent to the Court during the first stage of the hearing late last year that those benefits and challenges could not be adequately tested and assessed (and even, if consent were to be forthcoming, made the subject of enforceable

conditions) in the absence of accurate detailed cross-section survey work. At that stage, faced with an application by the appellant for an adjournment, and an oral application on behalf of s 274 parties for a strike-out, we granted the former. That in itself was a fine call because the shortcomings in the application were quite fundamental. The appellant insisted that the correct information existed, and indeed offered to distribute it immediately, but we held that the process would not be at all fair to the other parties if that were to occur and the hearing continue then and there. In an interlocutory decision[3] we ordered an immediate payment of costs by the appellant to the s 274 parties.

[17] Perhaps given that most of the intended building sites were proposed on highground near the ridge-line of the foothills, and given comments from the Court after reading the evidence and conducting a detailed site inspection, some iterative changes were made by the appellant at this point. That is, not only were the missing cross-sections produced, but so too were modifications made to proposed building platforms, access arrangements, vegetative screening, and the like.

[18] At the time of the resumed hearing the appellant through its expert witnesses was asserting that it had modified (tightened) its proposed design criteria and building and location controls. The s 274 parties were asserting that the changes were of no real assistance and that the entire proposal should be declined consent. Despite that latter feature of their case, the second stage of the hearing saw a primary focus on the half dozen sites that had been of particular concern to the Court, and a handful of others. Further, despite the limitations on anyone being able to view any more than limited numbers of building sites at any time from any one point, (as we shall describe in more detail), the s 274 parties nevertheless asserted unacceptable major adverse (cumulative) effects as being at the heart of their case.

Effects on the Environment

[19] As will already be clear, the case was one largely about landscape effects.

[20] The essence of the case by the s 274 parties came from the evidence of the expert landscape architect that they called, Ms D J Lucas, both before and after the cross-sections and modifications were circulated by the applicant earlier this year. Her view was that the scale, intensity and location of the proposed residential activities would be

[3] [2010] NZEnvC164

inappropriate; that they would be significantly adverse due to the elevated locations on the important natural landscape of the Brynderwyn Range; and that the natural character, natural landscape and high amenity values of the locality would be adversely affected. She postulated the only way the proposal could be made consentable was if it were to be redesigned to draw all building activity down into the lower parts of the property.

[21] Ms Lucas provided us with a detailed description of the landscape context, including the volcanic origins of the Range, the coastline, and offshore islands, together with the largely indigenous forest clothing the subject foothills. She described nearby coastal settlements and some existing local rural residential lifestyle block developments, the latter being found at a lower elevation than that proposed for the subject property.

[22] Ms Lucas provided us with an analysis of slope, elevation, and microclimate. She described the subject property as being part of the coastal environment by definition at a "broad scale". In terms of her natural character assessment, she noted that the property was relatively unmodified, and the subject of legible physical land form and relief. Also that the landscape was relatively uncluttered by structures and/or obvious human influence. She noted the presence of water, and described the vegetation and other ecological patterns. She criticised the assessment in this area by the applicant's landscape witness Mr D J Scott, as "moderate to moderately high", and of his taking account of the presence and nature of existing development in the area. She considered that the site exhibited high natural character, and by the end of the hearing, our understanding was that this view had become generally accepted by the witnesses and parties.

[23] Ms Lucas opined that the "tweaking of the original proposal", and design changes made after the council hearing, had not addressed what she called the fundamental issues of environmental creep, natural landscape and natural character detraction, due to the excessively elevated locations proposed for the residences. She was concerned that development activity on this bush-clad site would exacerbate the existing incursions, noting present limited development and incursion of environmental weeds.

[24] Ms Lucas considered the landscape to be an Outstanding Natural Landscape, and a key landscape feature in Northland. She addressed natural science factors, aesthetic values, expressiveness (legibility), transient values, the issue of the values being shared and recognised, its value to Tangata Whenua and its historic associations. She analysed

the current amenity values, with some emphasis on the experience available now and prospectively for users of the scenic reserve and the Brynderwyn Hills walkway along the ridge, currently in her view one of wilderness and remoteness. She addressed as well the strictly intermittent nature of most agricultural activities in the area, the openness of landscapes and views, and the relatively low intensity of development particularly on and near the site. She particularly mentioned the potential for lights from houses and vehicles to detract from feelings of remoteness, particularly given the numbers of houses and potential numbers of vehicles.

[25] She was concerned that the character of the proposed development would emphasise high vehicle dependency for movement within and beyond the site, and that it would involve substantial earthworks. She considered that the development would be sprawling and sporadic, essentially being "strung" along the ridgeline. She considered that it would be entirely incompatible with the natural character, natural landscape and amenity of the Range. She was particularly critical of the proposed intensity and scale in this location.

[26] In addition she offered commentary on building height in relation to the three proposed building types on particular proposed sites. She was concerned that the proposed building finishes would not be recessive as suggested by the applicant's witnesses, but that some elements would be highly reflective in terms of hue and glint.

[27] She provided us with a detailed analysis of visual and landscape effects and was highly critical of Mr Scott's analysis in the same area, particularly as to their respective views on the absorptive capacity of the land and the bush.

[28] Ms Lucas provided us with her opinions on the views available from certain viewpoints in graphic exhibits, particularly those provided by Mr Scott, and views from the properties of some of the s 274 parties who are nearby residents.

[29] She considered that the quantity of earthworks necessary on the proposed roadways and driveways would produce unacceptably high visual effects, and disputed claims by the applicants' witnesses (for instance the applicant's planner Mr B J Kaye) that the roading aspects of the proposal had been designed to minimise impact. She referred to several engineering materials that had been made available by the applicant.

[30] Mr Scott, and Ms R A Skidmore, landscape expert called by the respondents, offered strongly different views from those of Ms Lucas on many matters, but of some importance, we noted that during the course of the hearing it came to be more or less common ground that the property is within the coastal landscape and offers high amenity, high quality natural character, and is a high quality natural landscape.

[31] For these two witnesses, the aspect of the case that was of more importance, was whether it would be possible to carry out development as proposed, with or without further modifications, in order to make it consentable in terms of Part 2 RMA. Their focus was therefore quite strongly on proposals for particular individual lots, and the extent to which those could potentially be seen from various viewing locations, both individually or collectively, particularly the latter. Ms Skidmore offered a particularly thoughtful and constructive analysis that acknowledged that the property is part of a sensitive and significant natural landscape resource, but that to a considerable extent, the proposed development proposals would not compromise it in terms of Part 2 issues, if made the subject of the proposed rigid consent conditions, including importantly a comprehensive table of lot-specific development controls.

[32] At various stages of the second part of the hearing we were provided with some quite extensive caucusing notes from the landscape architects. These indicated to us that they were slowly coming together in their views on many matters as we have already indicated, albeit that there were shades of difference about such matters as whether the site formed part of a landscape that could be called an ONL.

[33] The main areas of disagreement remained essentially as between Ms Lucas on the one hand and Mr Scott and Ms Skidmore on the other, as to whether the package of development controls should be seen as suitable and acceptable, or whether a more radical approach should be taken and any development instead confined to lower parts of the property.

[34] After receiving the long-sections and suggested additional modifications in controls in May, they agreed that these illustrated the topographical complexity of landform and terrain; offered scale reference between built elements and contextual terrain; and illustrated significant relationship between vegetation, topography and built elements. Ms Skidmore considered that the more detailed information contained in the long-sections demonstrated that the building envelopes could sit comfortably in their

context, and that at a more detailed level, the design of buildings and their curtilage (as required by the development controls and guidelines package) would play an important role integrating site development with its setting. Mr Scott agreed, adding that the cross-sections demonstrated the suitability of the proposed building locations within the upper ridgeline system. Ms Lucas recorded that the sections usefully indicated the relationship of the sample building sites and buildings to the landform context on various parts of the ridgelines, but that the more detailed sections did not alone adequately convey buildings positioned in context, although the long-sections assisted.

[35] As will be noted when we consider the planning evidence, the subject property is not mapped as an ONL in the District Plan, and therefore in strict terms the rules applying to ONLs in the plan would not be brought into play.

[36] Nevertheless, we consider that as a matter of fact, having analysed all relevant evidence, that the property would fall for consideration in the context of s6(b) RMA, requiring the Court as a consent authority to recognise and provide for, as a matter of national importance, *[its] protection ... from inappropriate subdivision, use and development.* The important exercise for us therefore has been to judge what might be appropriate, or more importantly *inappropriate.*

[37] As we have previously indicated, the topography and bush-cladding on the property presents benefits and challenges in terms of visual effects. Careful consideration of all the relevant evidence, particularly aspects of the extensive cross examination of the landscape witnesses, has led us to the conclusion that the challenges mainly relate to particular individual sites – 6 out of the 40, and interestingly the questioning of the witnesses tended very much to focus on those (not forgetting that Ms Lucas nevertheless clung resolutely – and we thought ultimately unrealistically and wrongly – to the view that cumulative effects of development would be wide-spread, notable, sporadic, and sprawling).

[38] Interestingly, the lots in respect of which we had particular concerns at the end of the first part of the hearing, remained the subject of our concern at the end of the hearing. They are lots 2, 18, 19, 25, 34 and 39. In essence, we were persuaded by the evidence of Ms Lucas that, taken individually, development of them would be inappropriate in terms of s6(b) RMA , and that the proposed suite of development controls would not work adequately in respect of them. Ultimately, in respect of each of those difficult lots, either

the long-sections demonstrated to us that the development would be too prominent when viewed from certain points, or that there would now and in the future be inadequate bush backdrop, or that there would now and in the future be inadequacies of bush screening or screening by folds in topography, or that buildings would be visible to an unacceptable extent on or close to a ridgeline; and often combinations of these factors. In all other cases, we considered that with further careful attention to the preparation of the development controls in conditions of consent, these and other elements would offer avoidance or sufficiently effective mitigation, to the point where consent could be granted. Of note, from the extensive cross-examination of the three relevant witnesses, Ms Lucas succeeded in persuading us of the difficulties in respect of the 6 lots mentioned, and Mr Scott and Ms Skidmore could not persuade us otherwise despite their "best efforts".

[39] In coming to these views, we have worked carefully through all the exhibits, particularly the long-sections and the civil engineering materials, information offered about fire management, extent of earthworks both during and after construction, and mitigation proposed, amongst many things.

[40] A further factor of note in making our findings about acceptable building locations, was the sheer distances of proposed buildings from viewpoints on the main highway (Cove Road) and the properties of certain of the s 274 parties. These distances were generally of approximately 1.5 kilometres, and greater. And considerably greater again would be views of the subject site from existing settlements like Lang's Beach, and further again from out on the coastal waters.

[41] The following are some examples of particular and largely irremediable problems with the critical lots, noted particularly after analysis of all the extensive cross examination of the three witnesses:

- Lot 34 would, on the acknowledgment of Mr Scott, require "extreme" depths of earth works and the insertion of a great deal of the house into the land form. Even after that it would in our view retain an unacceptable level of prominence.

- Similar difficulties would pertain in the case of lot 39.

- Acknowledgement by Mr Scott to the Court in questioning that proposed revegetation between the building platform lots on 38 and 39 would provide relatively limited mitigation; we infer that if both lots 38 and 39 were therefore to be developed, there would be undue adverse cumulative effects presented from relevant view points.

- As between lots 25 and 27, if both were to be developed, there would be unacceptably significant adverse visual effects deriving from the two in combination, particularly given the need for some quite significant retaining walls on either side (west and east) of the building on lot 25; the result of which is that we consider that lot 25 should be deleted. As stressed by Ms Lucas under cross examination by Mr Dawson, the opportunity for vegetative screening is not at all good at lot 25 on account of the very open landscape around the knoll at that location.

- Lots 18 and 19 are extremely steep and are presently clothed in some tall mature kanuka vegetation; our questions of Mr Scott were answered in such a way that we were not prepared to infer that adequate screening would be left after excavation and construction on the building platforms on those two lots, as any replacement vegetation would take unduly long to present any kind of adequate mitigation; further that the viewing distance from Cove Road is relatively short at 875 metres, all of which would produce the result that the visual effects would be very noticeable and quite severe.

- Similar issues of closeness to viewing points, steepness, and the requirement for clearance of vegetation affect the proposed building platform on lot 2, albeit that the vegetation is different and more varied than on lots 18 and 19.

- Building on the proposed platform on lot 39 would be uncomfortably within the area generally understood to be the crest of the ridgeline, even if it would not strictly be seen to "break" the skyline when viewed from available viewing points.

[42] On the broader front, strenuous efforts were made by Mr Williams to endeavour to have Mr Scott and Ms Skidmore accept certain of the views of his witnesses in painting a broad picture of cumulative, or sporadic, or sprawling effects. These included such issues as the 2 kilometre length of the main spine acccessway, the sheer volume overall of earthworks (approximately 120,000 $m^{3)}$ and the ratio in the cut to fill budget (with a significant surplus to be disposed of on lower parts of the property), as well as the suggestion that large numbers of buildings would be visible from viewpoints in a macro sense as we have already held would not occur. The difficulty with these aspects of the 274 parties' case, as was made clear by the robust answers from Mr Scott and Ms Skidmore, stemmed from factors such as staging of the works (so that the entirety of the accessways, driveways, and building sites would not be excavated all at once), the folding topography, the presence of bush for screening, prompt re-planting after the undertaking of works, and the establishment of new vegetative screening[4]. Needless to say, careful attention will be required to the development controls and conditions of consent, but frankly the task is not so daunting that we should contemplate refusing consent to the development in its entirety.

[43] At this point it should be recorded that while the thrust of the evidence in the case was about visual effects, there was occasional mention of adverse effects potentially arising from house and car lights, and domestic sounds like voices and lawnmowers. We consider that such effects would be no more than minor, the acoustic ones being mitigated by the folding topography and distances to listeners, and the lights by topography and screening by vegetation; added to which car lights would be transitory and usually seen but fleetingly.

[44] Further mention should also be made of construction effects. These types of effects can readily inflame passions, but for reasons already discussed, and subject to careful staging and detailing of controls, the effects will be no more than minor as well as temporary. As Mr Dawson said in his closing submissions "*you can't make an omelette without breaking eggs*", nevertheless the "breaking" must be rigidly controlled.

[4] As discussed in some of the evidence, and mentioned in discussion between the Bench and Mr Williams, comparison of such things as growth rates between different application sites can be difficult. Nevertheless, and while this site might not be the most difficult we and the witnesses have encountered in this regard, we have been persuaded to take a conservative approach given that much of the ridge and principal spur are high ground away from regular sources of flowing or static water.

[45] Some existing buildings in the landscape, visible from a number of the view points, provided us with considerable assistance in understanding some of the issues about the proposed development controls (for instance use of recessive colours and screening), steepness of land form, and viewing distances. In particular one house on a moderately steep bushy slope to the southeast of the property, and not being of particularly great size, presented as quite prominent in the landscape. In contrast, an existing "accommodation lodge" on proposed lot 29, was relatively difficult to see and identify in the landscape from all viewpoints, particularly on account of not being on very steep ground, being of limited height, quite well screened by vegetation, and finished in recessive colours. While obviously any opinions that we form about potential effects of proposed structures were not confined to the factors exhibited by the existing buildings observed, the latter did assist considerably by providing practical benchmarks that helped with some illustration of potential effects, mitigation and in places avoidance, available from the landscape and the proposed development controls.

Statutory Instruments

[46] We reiterate that as between the two districts within which the property is located, the focus in the case was on the Whangarei District Plan, because that is where the bulk of the property is located. This was the approach taken by all planning witnesses, and we infer that there is no fundamental impediment to consent presented by the Kaipara provisions, if consent were to be granted under the Whangarei plan provisions.

[47] We reiterate too that the application is holistically one for non-complying activity consent. In the Countryside Environment Zone of the Whangarei plan, the basket of activities, if they have had fallen to be assessed individually, would vary from controlled to non-complying, through the full range, with one notable exception that the use of the proposed walkway would constitute a permitted activity (as distinct from the several consents needed for its formation).

[48] Chapters of the Northland Regional Policy Statement that we have included in our consideration, are 19 (outstanding natural features and outstanding landscapes), 23 (ecosystems and bio-diversity), and 29 (transport). We agree with the planning witness called by the respondents, Mr A J Hartstone, that, as anticipated by the Act, the provisions of the RPS are echoed in the District Plan provisions with of course greater

detail and specificity. Like the witnesses, therefore, our focus tended to be very much on the provisions of the Operative Whangarei District Plan.

[49] There are certain themes running through the various chains of relevant objectives and policies, and we will not slavishly copy the provisions into the decision. We have considered them all, but in this decision will focus on those where there were differences of interpretation, as exemplified by certain topics in the cross examination of the three planning witnesses.

[50] Important objectives 5.3.1 and 5.3.5, taken together, are to the effect that any development is to be designed and located in such a manner as to maintain the existing amenity values and where appropriate enhance them. These are underpinned by policies 5.4.1, 5.4.5, and 5.4.7, which require consideration of compatibility of effects on amenity as between a proposal and existing values, and avoiding sporadic or otherwise inappropriate subdivision use or development.

[51] As already indicated, some of the controversy in the case surrounded the term "sporadic". Relying on the evidence of Mr Scott and Ms Skidmore, the two planners supporting the proposal, Mr B J Kaye for the applicant, and Mr Hartstone, were of the view that these objectives and policies had been met by extensive and rigorous review and modification of the proposal through the iterative process over the several years, with particular emphasis being given to matters of intensity and design, and the developing of a set of development guidelines to a high level of detail, providing much certainty concerning outcomes of resulting built development. They stressed that some of the originally proposed lots had been deleted, but as already indicated, we consider that further lots should be deleted. However for reasons that will also already be apparent, we are of the interim view that it would not be necessary to reject the proposal out of hand on account of the issues raised by these provisions.

[52] Objectives found in chapter 8 of the plan concerning subdivision and development, include particularly objectives 8.3.2, 8.3.3, and 8.3.4, where we are required to investigate issues of character, compatibility of land uses, the avoidance of sprawling and sporadic development, and the protection or enhancement of a number of natural and physical resources. We have taken account of objectives 8.3.7 and 8.3.9, amongst others, as well, where there is some indication of lack of a need for an inflexible approach.

[53] The policies deriving from those objectives, as one might expect, have taken matters to a slighter greater degree of specificity. Amongst others, we have looked particularly at policies 8.4.2 (consolidated development) 8.4.3 (density of development) 8.4.7 (design and location) and 8.4.18 (consolidated rural-residential development).

[54] Density of itself on some kind of theoretical basis, is not the issue. For instance, the provisions do not demand examination in a mere mapping sense to ascertain particular levels of density. The exercise is rather to examine what would be perceived from relevant locations on the ground or at sea if the development were carried out as proposed or with further modifications.

[55] Except in relation to the 6 particular lots that we have already discussed, we cannot agree with the s 274 parties and their witnesses that the proposal, further modified, would transgress the amenity value objective 5.3.5. That provision is rather neutrally worded. Neither however do we subscribe to Mr Kaye's theory that objective 5.3.5 could be seen to be a particular "driver" for assessment of the application. Rather, we think that the proposal is quite neutral when assessed against this very general provision.

[56] In relation to those objectives and policies that address the issue of sporadic or sprawling development, we comment further as follows. An example of such provisions is policy 8.4.18 which reads:

> To direct rural lifestyle and rural residential development to appropriate locations adjacent to existing settlements, rather than allowing sporadic development throughout rural and coastal areas.

[57] Mr Kaye was inclined to think that because the rules in the Countryside Environment Zone (which covers the greater part of the district) do not drive subdivision and development in the way suggested by the relevant objectives and policies, that the latter were in some way toothless (our inference from his very much longer answers). While s 104(1)(b)(vi) requires us to look at all relevant provisions of the District Plan, s104D requires us, when assessing an application for a non-complying activity, to be satisfied about either [adverse effects ...will be minor...] or that the proposed activity will not be contrary to the objectives and policies of the relevant plan. Later in this decision we will come to the gateway tests in s104D, but for present purposes we record that we cannot effectively put the objectives and policies to one side. We must have regard to them. Nevertheless, as has been recorded often enough in decisions of the Court,

planning direction in a district can become difficult of administration where rules do not carry objectives and policies into methodological effect.

[58] We need not take the point further at this time, because our findings of fact and our assessment of the relevant expert opinions are that because so little of the development will be visible from any one point at any one time, and also because the site is relatively close to the existing Langs Beach and Langs Cove settlements, that there is no difficulty in relation to these provisions. For clarity we record that the proposal, further modified as we require, would meet the provisions for either of those reasons.

[59] The emphasis in the objectives and policies keeps coming back to the sorts of issues that ultimately derive from s6(a)and (b) RMA, and the analysis of the proposal then becomes a matter of fact and expert view. By way of example policy 8.4.21 is:

> To maintain, and where appropriate, restore or rehabilitate, the natural character of the coastal environment by avoiding inappropriate building development:
>
> - Adjoining mean high-water springs;
>
> - On notable ridge lines;
>
> Or
>
> That which is incompatible in scale and character with the surrounding coastal landscape values.

These are not themes that go further than those found in Part 2 of the Act (and nor could they).

[60] We have considered as well the relevant provisions of the New Zealand Coastal Policy statement, in particular policies 1.1.1 and 1.1.3. These of course sit between the provisions of Part 2 of the Act, and the Northland Regional Policy statement, and call for no further or separate analysis of the proposal on their own account.

[61] Other objectives and policies in the plan raise the question of whether or not there will be more than minor adverse effects, and likewise raise nothing new in terms of our analysis. But one of several examples is policy 10.4.7 (future development).

[62] One policy that came in for particular mention in evidence from the s 274 parties' planner Ms O'Connor, and was the subject of fairly significant cross examination of all planners, was policy 16.4.7 (ridgelines). That reads:

> To ensure that buildings and structures within Outstanding and Notable Landscapes avoid locating upon, or intruding above, ridgelines where this results in adverse visual effects which cannot be mitigated or remedied, or unless there is a functional need for location on the ridgeline.

[63] The approach by the s 274 parties was to endeavor to draw upon this provision (amongst others) as a basis for rejection of the development overall, on the basis that the majority of the proposed building platforms and much of the main accessway are near the top edge of the principal ridge and spur. For reasons that we have already gone into, that is far too simplistic. Nevertheless this provision has played quite an influential role in our coming to our view that some lots should not be included if consent overall is ultimately to be forthcoming. Careful analysis of many factors including existing bush backdrops, position near the skyline when viewed from certain view points, ability to screen, the folding nature of topography, and proposed design and building controls, have, as we have indicated, all been brought to play in this analysis.

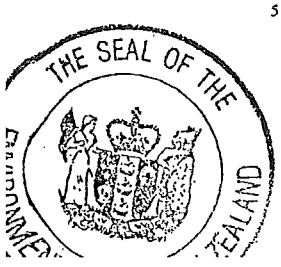
[64] While on this topic, we are reminded that our Division (one member different) discussed this policy when it was part of the then proposed district plan (but identically worded), in ***Dudin v Whangarei District Council.***[5] There we held that the term "ridgeline" as employed in the policy encompasses a broader area than just the crest in a "skyline" sense, noting a dictionary definition. We confirm that we remain of the same view, noting however that the wording of the policy is designed to refer to development proposed near the crest, a matter of fact and degree on a case by case basis, in respect of which there needs to be an exercise of sensible professional judgment.

S104D – the "gateway tests"

[65] The relevant part of s104D for purposes of this case provides as follows:

> 104D Particular restrictions for non-complying activities
>
> 1. despite any decision made for the purpose of section 95A(2)(a) in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either –

[5] Decision No. A 22/ 2007



(a) the adverse effects of the activity in the environment (other than any effect to which s104(3)(a)(ii) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of –

(i) the relevant plan...

We have quoted the most recent version of this section as amended in 2009, for convenience. An earlier version of this much amended section will apply on a transitional basis to this long-running application, but the thrust of the provision for present purposes remains the same.

[66] Our assessment is that the proposal, if modified in the way that we require, and subject to setting satisfactory conditions (further amendments being required over and above those arrived at amongst the parties on an iterative basis to date), the proposal can pass both gateways. This assessment derives from earlier findings in this decision, and in the interests of avoidance of repetition we will not repeat them.

[67] There is however one matter particularly urged by Mr Williams which separately arises here. He sought to emphasise or even elevate the importance of the ridgeline policy discussed above, 16.4.7, (together with another policy 8.4.21 dealing with both ridgelines and coastal landscape situations), referring to a recent South Island decision of this Court in ***Akaroa Civic Trust v Christchurch City Council.***[6] In that case a key finding about the "second gateway" was that, to be stopped there, a proposal would need to be contrary to relevant objectives and policies as a whole, it being recognised that a proposal could for instance be consistent with all bar say one such provision. However, it was held that a proposal could be stopped at the second gateway by being contrary to a policy which is, when the plan is read as a whole, very important and central to the proposal. The Court then noted that such a situation would be rare, but in the case before it, the proposal was contrary to an objective in a transitional plan that was "central" on relevant matters. Of some note, the applicant in that case had offered no evidence at all that analysed the proposal against the objective.

[6] [2010] NZ Env C 110 at para [74]

[68] In the present case, the first point is that the provisions stressed by Mr Williams and the witnesses he called (principally, on this issue, Ms O'Connor), are policies, not objectives. Next, our consideration of the objectives and policies in these chapters (8 and 16) is that, to put it colloquially, they "go every which-way", and that it is not possible to spell out from reading them as a whole (or even by seeking guidance from the plan as a whole), that any of them are given any more importance than others. That may be a failing of the plan in the face of the tenets of Part 2 of the Act, but this is not a plan review appeal.

[69] In any event, Mr Williams's point is also answered by our findings about effects on the environment, which are not as he strenuously urged them to be.

Precedent and Integrity

[70] The applicant and respondents argued that no problem would arise in this case concerning precedent, or attack on the integrity of the District Plan, because there were several features of the application that exhibited an "evident unusual quality", or took it "outside the generality of cases"[7]. Hence, having such exceptional quality, it could not be said that the proposal was contrary to the objectives and policies of the District Plan and hence it would not be necessary to consider and make findings on the issues of public confidence in the administration of the plan and district plan integrity.[8] Principally through the evidence in chief of Mr Hartstone, evidence was led about three potential distinguishing factors. The first was the provision of public car parking and a walking track in a legal and physical sense as part of the first stage of the development (at a cost described by the principal of the applicant company, Mr Oborne in supplementary evidence, of approximately $650,000) in order to provide a strategic link in a proposed national walkway system called Te Araroa. Mr Hartstone said that there were few properties in the district that would afford such a strategic and beneficial amenity. Secondly, he considered that the design of the subdivision itself was an evident unusual feature, bearing in mind the scope and depth of investigation and resultant detail in terms of specific building envelopes, which was more extensive and explicit than any application he had seen to that point in time. Thirdly he considered that an unusual feature was the approach taken by the applicant to design the proposal so as to do better

[7] Employing the language of the High Court in ***Rodney District Council v Gould*** [2006] NZRMA 217 at paras 102 and 103

[8] Again, employing the language of paras 102 and 103 of HC decision in ***Gould***

in terms of meeting environmental outcomes than simply matching the discretionary activity provisions of the district plan.

[71] The s 274 parties argued strongly that these either were not evident unusual features, or alternatively should not be seen to qualify separately or collectively to overcome concerns about district plan integrity.

[72] We do not agree with those views. First, while the application is one for a non-complying activity (meaning, in trite terms, that it does not meet the rules of the district plan in terms of other activity types), we have found in relation to the objectives and policies of the district plan that the proposal if modified will not be contrary to them.

[73] Next, in relation to the proposed walkway, it was Mr Williams's submission that the proposed walkway would not provide "mitigation" (that is lessen the severity of effects on the environment in visual amenity terms), but instead should be seen as some sort of "environmental compensation" for any effects that are not avoided, suggesting that the latter would not qualify in some way.

[74] First, he submitted that the walkway had been approved under an earlier stage of the development, however Mr Hartstone in rebuttal evidence confirmed that the earlier consent for it had lapsed. We therefore put that to one side.

[75] Next, an important plank of the submission was that there would be substantial and irreversible environmental cost if the development went ahead, but we have already held in the relevant section of this decision that effects on the environment will not have that character.

[76] Next, we consider that the offer to place a protective covenant over the bush on the large balance of the property and undertake future weed and pest control (not of themselves unusual qualities in subdivisions in an area such as this), should not be seen in isolation, but should be considered as part of a bigger package that includes the walkway.[9] Formation of the walkway is not merely something offered by way of environmental compensation, but is part of the package of activities applied for, and is of itself a reasonably costly part of that package. So, not only does the applicant propose to

[9] While operation of the walkway does not require resource consent, formation of it does.

protect bush, but proposes also as part of the application to bring people into the bush to enjoy the experience.

[77] Mr Williams endeavoured to argue, drawing on a decision of the Environment Court ***J V Investments Limited v Queenstown Lakes District Council,***[10] that there was some importance in the alleged distinction between mitigation on the one hand and environmental compensation on the other. Leaving aside that that case was about the issue of whether a proposal to clear wilding pines, largely found on an adjoining property, could be considered relevant for the purposes of "other matters" to be had regard to under s 104(1)(c) RMA, we think that the submission rather misses the point. The relevant part of the purpose of the Act in s 5 RMA is not just about avoiding or mitigating adverse effects of activities of the environment; it includes reference to remedying them. Bringing access to the bush and to views from high ground, by allowing people into an area from which they are presently excluded because the land is privately held, is in one sense to remedy adverse effects on the environment.[11] So too is the applicant's proposal to provide car parking for walkers on the same side of the highway as the track, with obvious safety benefits. Ditto the proposal to accommodate a greater number of cars in a much better configuration than the present cramped area provided by the Department of Conservation. Yet another remedy will be provided by avoidance of the need for some cars to reverse onto Cove Road when leaving the car park, an unfortunate and potentially unsafe feature of current arrangements.

[78] As to the issues about the scope and depth of investigation into design of the subdivision and building controls, and the provision of significantly better outcomes than could occur utilising the discretionary activity provisions of the plan, care must be taken to avoid some kind of wrongful extension of the permitted baseline approach. Nevertheless, after deletion of some building lots in respect of which the applicant was having to "try too hard", it has to be said that the applicant has, after an iterative process, produced a proposal offering an extremely high level of design, with consequent quality of environmental outcomes. We are not, in this assessment, required to identify qualities about a proposal that are "unique", as Mr Williams appeared to be suggesting during

[10] Decision Number C48/2006

[11] As to this we heard some succinct but quite powerful evidence from a keen tramper who organises a local walking group, Ms M J Goldsmidt. She was unshaken on the values and qualities of the proposed track compared to the existing steep rough alignment, and the need to plug a gap in terms of legal access at present.

some of his questioning of witnesses. We are required to identify evident unusual qualities, and we are prepared to include these in that category.

Permitted Baseline

[79] At an early stage in the case, and in particular in the evidence in chief of Mr Hartstone, parties in support of the application appeared to postulate that on a permitted activity basis, it would be possible to construct nine residential units and one minor residential unit, and make provision for internal access, subject to certain bulk and location requirements for instance building heights no greater than 10 metres. We will not analyse the postulation in detail, because the picture quickly became quite murky, to the point where we do not feel able to rely on the identification of a permitted baseline as providing any kind of support for the application.

[80] In particular, after we had had the planners caucus and provide a joint statement, while it appeared that as a permitted activity a dwelling (say as part of a lodge) could be constructed per 20 hectares of land, permitted activity clearance of vegetation at 500 m^2 per site (there being two titles, hence 1,000 m^2 maximum), and Rule 47.2.9 requiring a 5.5 metre formed width for shared access ways, introduce uncertainties. Certainly, there is a reasonably substantial existing track up to and along the ridgeline, close to the alignment of the proposed shared accessway, but there was no evidence before us about whether or not further vegetation clearance would be required to achieve the 5.5 metre permitted standard. In addition, further bush clearance would seem to be necessary on some building platforms and in areas where excavations would be needed. To suggest that further bush clearance for 9 houses plus accessways could be confined to 1,000m2 was not made out on the evidence, and would seem from what we do know to be very optimistic. We take no account of any alleged permitted baseline.

Alternatives

[81] In his closing submissions Mr Williams submitted that alternatives are "*relevant where section 6 matters of national importance arise as they clearly do in this case*", citing ***TV 3 Network Services v Waikato District Council.***[12] He was critical that both the applicant and the council had essentially taken elevated development largely as a "given", utilising previously cleared sites, with no broader assessment of alternatives for

[12] [1997] NZRMA 539

development of the site, including at a lower elevation as put forward by Ms Lucas. He submitted that "*such a heavy price*" should not be paid in landscape and amenity terms.

[82] The *TV 3* case was one in which the High Court held in the course of a very brief consideration, that the Environment Court had not been wrong to criticise an applicant for failing to consider alternative sites for a television translator where a matter of national importance under s6 RMA (there, issues of waahi tapu) were relevant. Indeed, and with respect, the learned Judge effectively said no more than that he could see nothing in the Act which precluded the course taken by the Environment Court.

[83] Since the conclusion of the hearing, the High Court has released a further and more detailed decision on the point. The decision is that of a full bench of that Court, ***Meridian Energy Limited v Central Otago District Council & Ors.***[13] We briefly considered whether we should seek submissions from the parties in relation to its findings, but because for present purposes it does not differ from *TV 3,* and because of our findings of fact about effects on the environment, we decided that that would not be necessary.

[84] In paragraphs [65] and [66] of ***Meridian*** the High Court held that consideration of alternative locations was, in the circumstances of that case "relevant and reasonably necessary to determine the application" in terms of s104(1)(c). In the course of prepared its application and bringing it to hearing, Meridian had resisted certain requests by the council to provide further information about possible alternative locations for undertaking the activity. The High Court held that the council was entitled to proceed on the basis that for the purposes of clause 1(b) of the Fourth Schedule RMA it was likely that the wind farm there proposed would result in a significant adverse effect on the environment and that under those circumstances the AEE should have included a description of any possible alternative locations for undertaking the activity. (We note that in paragraph [68] the High Court expressly added a qualification that clause 1(b) of the Fourth Schedule, in conjunction with s 104(1)(c), only permitted the seeking from Meridian of a description of any possible alternative locations).

[85] For the purposes of the present case, two things emerge. First, our findings about effects on the environment place this case in a different category from that of the proposed Meridian wind farm. Secondly, even if we had found that there were

[13] High Court Dunedin CIV2009 412 000980 16 August 2010

significant adverse effects on the environment here, we were ultimately provided with a brief description of possible alternative locations, albeit raised by the opposing parties and commented on in negative terms by witnesses for the other parties. We also had Mr Kaye's evidence on alternative ways of subdividing the property under different plan subdivision controls.

[86] There is no basis under this head for refusing consent.

Part 2 RMA

[87] Part 2 RMA is the ultimate touch-stone or lodestar, and the finishing point to be considered in the overall exercise of our judgement. Section 5 sets the over-arching purpose of sustainable management and directs decision makers to manage resources sustainably so that reasonably foreseeable needs for future generations can be met. Section 5 is informed by sections 6, 7 and 8. Sub-sections (a) and (b) of section 6 were raised in this case, and have been the subject of express discussion and findings in the course of this decision. And to the extent that issues under section 7(c) (the maintenance and enhancement of amenity values) and 7(f) (maintenance and enhancement of the quality of the environment) have been raised, evidence about section 6 matters has adequately encompassed them.

[88] It would be needlessly repetitive to reiterate our particular findings under these provisions. It will by now be clear that, subject to the further consideration required (as earlier described), and with the modifications we have called for, and tightening of the proposed conditions of consent, that consent overall may be forthcoming.

[89] We attach a schedule of matters requiring attention concerning the draft conditions placed before us. We would prefer that this be undertaken in a consultative fashion amongst counsel and the experts with the object that a fully agreed set of conditions of consent be lodged with the Court for our consideration by 17 December 2010, not forgetting that the KDC draft conditions will need to be examined and brought into line. Any matters not agreed may be the subject of succinct submissions filed by any party at the same time.

[90] Cost are reserved, but in the circumstances in which we have called for fairly substantial modifications to the application, are not encouraged.

DATED at Auckland this 12th day of November 2010

for the Court

L J Newhook
Environment Judge

COMMENT ON PROPOSED CONDITIONS OF CONSENT (26 February 2010 Version).

1. Amend introductory section to include a list of all the documents and plans that comprise the application and which the consent is to be exercised in compliance with (in a similar manner to the NRC consent).

2. Conditions 3 and 4 – amend to describe the areas of existing vegetation to be covenanted by reference to the Development Controls and Guideline Package, February 2010 (Rev 4) Map Series B and in particular the green dotted "covenant boundaries" notation at Tab 6 key.

3. Condition 4 – it is not clear from the Langsview Private Retreat Estate Stage 2: Revision J subdivision plan (Scott EIC Folder 3 of 3: Sheet 03) where lots 50 – 58 are located. However Mr Hartstone's Attachment A contains subdivision plans (3) for "Stage 2 Resource Consent Application First Stage", "Second Stage" and "Third Stage," which show all or some of lots 50 – 58 being balance areas for progressive subdivision into residential lots. That being the case, it is unclear why lots 50 – 58 should be subject to conservation covenants. The relevance of the second sentence in Condition 4 is unclear given lots 46 – 49 are not to be built on and for this reason do not have "*defined buildable areas and access*".

4. Condition 5 – the Court seeks clarification of which proposed lots are not to be protected by covenant *"against future subdivision in perpetuity"*.

5. Condition 6(d): Landscape and Ecology

   i) Amend introduction to align *"shall be consistent with"* to the amended compliance regime set out below for the Development Controls and Guideline Package (DCGP).

   ii) Delete the first bracket after *"all areas"* so it is clear the LMP is to detail both the areas to be planted and the type of planting.

   iii) Clarify who is to undertake the monitoring. Presumably it is the council?

   iv) The LMP is to be prepared by a suitably qualified and experienced landscape architect approved by council. The same change is to be made to all like provisions in other conditions.

   v) Amend sub-paragraph (xi) to allow for the removal of vegetation for fire management purposes only and pruning for other purposes.

6. Conditions 6(e) and (f) – delete the requirement that the plans be approved by council as the wording duplicates the introduction to Condition 6. Alternatively, Condition 6(d) should be amended to expressly require council approval of the Landscape Management Plan (LMP).

7. Condition 6(e)(ii) – create a separate sub-paragraph for managing potential adverse effects on frogs. Substitute "shall" for "should" where setting the minimum distance for use of herbicides relative to waterways. Amend the condition so that the WPMMP is required to contain suitable controls on the use of all contaminants that pose a potential threat to the natural environment.

8. Condition 6(e)(iii) – requires amendment to clarify who is to monitor operators and against what standard and/or criteria? We question whether it is practical for a WPMMP to ensure that a species of ant is excluded from the development.

9. Condition 6(e)(iv) – insert the name and date of the applicable protocols and allow for compliance with any updated versions. Clarify what types of "incursions" are to be controlled. Presumably it is pest and plant species named in the plan?

10. Condition 6(e)(v) –is uncertain and imprecise in a number of places. When is the *"post-development"* phase deemed to occur? What relevance do *"restoration activities"* have in the context of the WPMMP and what does the term cover? What is the *"wider geographic area"* referred to? Reference to any *"far reaching"* implications the consent may have is superfluous in the condition. If there is to be a residents' code of conduct as part of the WPMMP it warrants a separate sub-paragraph. Similarly, peer review of the WPMMP warrants a separate sub-paragraph. The peer reviewer should be approved by the council and the peer

review should be provided with the WPMMP when it is submitted for council approval.

11. Condition 6(f) – amend to require the results of consent holder consultation with NZ Fire Service to be reported by the consent holder to council when seeking its approval for the communal Fire Management Strategy.

12. Further design detail is to be added to Map Series B Sheet 62 and Map Series C Sheets 176 – 179 demonstrating that the water tank and other fire fighting facilities described in DCGP: 4F.1 and 2 can be provided without having a significant adverse landscape/visual effect on the ridgeline south of lot 32. This may require express provision for placing the tank into the ground.

13. Heading before condition 7 to have words added, "in relation to Stage 1".

14. Condition 12 which deals with the car park to be formed on road reserve should be amended to refer to DCGP February 2010 (Rev 4) drawing 4D.3 and clearly state what part of those works the consent holder is responsible for implementing. The word "It" at the beginning of the second sentence is to be deleted and replaced by "The walking track". Care is required to ensure that the Frame Group report is attached to the consent.

15. Condition 13(a)(i) – delete comma between *"stormwater"* and *" drainage"* otherwise it reads as two utilities when one is presumably intended? Add a sub-paragraph (ix) requiring the body to also be responsible for the implementation of Condition 13(c)(iv) [no cats/dogs/mustelids].

16. Condition 13(b) [covenants prior to s.224(c)] requires amendment to expressly include the access repair planting required by Condition 6(d) and DCGP provision 4A.2(3).

17. In the first line of Condition 13(b) there should be some assistance with defining the covenant areas, probably by cross-referencing to the green dotted line in Map Series B

18. Condition 13(c)

    (i) Amend the introductory sentence to read "..... registered against the relevant lots specifying compliance on a continuing basis with the following conditions:"

    (ii) Amend paragraph (i) to make it clear that all above and below ground development works on each lot are to be contained within the identified Buildable Area in the manner described by Mr Kaye (TOP p468).

(iii) Sub-paragraph (ii) requires a consent notice on individual lots requiring the re-vegetation shown on Map Series B be established and maintained in perpetuity. Re-vegetation planting is also required to be established for Stage 1 prior to the s.224(c) certificate issuing [Condition 9].

(iv) Insert a control requiring the construction of access to any individual lot not addressed in Condition 6(b)(iii) documentation to be in accordance with the DCGP; or words to like effect.

(v) Insert text to sub-paragraph (iii) stating what Forms B and C comprise and are part of. Include a reference to Riley Consultants "Geotechnical Investigation Report: Proposed 45 Lot Subdivision: Langsview, Mangawhai Heads : 6 September 2007" engineering report updated, as necessary, to the satisfaction of the relevant council delegate for building footprints and buildable areas amended since September 2007. The council delegate is also to be satisfied as to any further s.220(1)(d) matters (erosion/subsidence/slippage) that may arise for lots with building footprints/buildable areas amended post September 2007.

19. If not addressed through another condition, include a Condition 13(d) requiring a Private Amenity and Site Repair Planting plan for individual lots to be approved by Council in accordance with DCGP 4C.2.

20. Include a s.128 review condition for Stage 1 similar to that for subsequent stages (refer for example Condition 30).

21. Include a s.128 review condition for Stage 1 similar to that for subsequent stages (refer for example Condition 30 Development Controls and Guidelines Package: February 2010 (Rev 4))

22. **Introduction**

i) Insert the word *"and"* after "Development Controls and Standards" and before "Landscape Management and Implementation Standards".

ii) Delete 2nd and last sentences of the 1st paragraph, which are redundant in resource consent documentation.

iii) It would assist the reader if the words *"[Lot specific] Development Controls and Standards"* and *"Landscape Management and Implementation Standards"* were used consistently in the table of contents and subsequent section headings.

iv) Section 3 would more accurately read *"Lot specific Development Controls and Standards: Table 1"*. The section commences at p13 and the Table is at p15 (not p5).

v) Section 4 would more accurately read *"Landscape Management and Implementation Standards"*. Page numbers should be added for each of the sub-sections. Table 1 should read Table 2.

23. Building Design Approval p7: delete opening words *"It is anticipated that"* and commence *"For all lots ..... "*. See requirements below re changes required around the words *"complies with"* and *"consistent with"*.

24. Lot Specific Development Controls and Standards: Table 1 – it needs to be made clear how the "Building Footprint Area" equates, if at all, to maximum floor area. Is any control on the latter proposed other than indirectly through the former and nominated building typologies? The Court is minded to impose a maximum floor area control and tentatively considers that in the subject environment a figure of $350m^2$ may be appropriate. Submissions are invited from the parties.

25. Section 4: Table 2 Information Notes – what do the words *"locally appropriate"* mean or add in this context? The words are to be deleted or given some enforceable meaning.

26. Section 4: Table 2 Information Notes is possibly the first place where the word *"should"* is employed. Table 1 is to be complied with being an integral part of the subdivision consent and wording to this effect in the DCGP is confirmed. The parties are to review the 26 February 2010 proposed consent conditions and the DCGP where the word *"should"*, or similar, are used and propose for the Court's consideration (with reasons) where *"should"* (or similar) is to be changed to *"shall"* and where it can appropriately be retained to accommodate a design led approach.

27. Section 4: Table 2 Development Standards: selecting a *"majority of the species"* from Table 2 may mean as few as 51%. A more suitable basis is required for ensuring only natives from the Ecological District are planted. The last sentence begs the question: "considered by whom" (council, consent holder, body corporate, adjoining lot owner)? Definitions are required for the words *"environmental weed"* and *"pest plants.* This may be done by an amendment to the DCGP Glossary or in some other suitable manner (the terms do not appear to be in the Interpretations section of the Biosecurity Act 1993).

28. Section 4A.1: Access Repair. Amend 2nd paragraph to make it clear the consent holder is responsible for Access Repair work (Conditions 6(d) and 9). Amend 3rd paragraph by deleting *"it is anticipated"* and inserting *"the consent holder shall ....."*. Where tree planting is required as a remedial option on benched batter cuts

(refer Information illustration) an appropriate growing medium is to be provided by the consent holder.

29. Section 4A.2(5): Development Standards is to be changed to require hydroseeding (or other approved method) "*as soon as practical and not later than the following winter.....*".

30. Section 4A.2(7) is to be amended to provide for the access repair and re-vegetation planting shown in Map Series C for lots 24, 25 and 29 adjoining Lot 1 DP 316176 . (The Court recollects being told that the "Lawson Agreement" limiting planting on boundary to 1m wasn't "robust").

31. Section 4B.2(3): Development Standards should be aligned with Consent Conditions 6(d) and 9, ie require that the work be done by the consent holder prior to the s.224(c) certificate issuing.

32. Section 4C.2(2)(6th bullet): Development Standards should be changed to allow 60% of private amenity and site repair planting to be grass or "*..... a maximum area of 350m^2, whichever is the lesser*".

33. Section 4D Entryway: amend to read "Site Entrance from Cove Road".

34. Section 4D.1: Information Notes – 3rd paragraph – provide terminology that is more directive than "*recommended*".

35. Section 4D.2(2): Development Standards – the wording around financial responsibility for implementing the works needs to be made consistent with Condition 12.

36. Section 4D.2(4) should be re-worded to make sight distances subject to council approval; preferably in accordance with a formally adopted council traffic engineering standard.

37. Section 4F.1: Fire Management – 3rd paragraph "recommendation" to be made consistent with the (Court endorsed) 4F.2(5) requirement for a fire prevention strategy for individual lots.

38. Section 4F.2(8): a check is to be made that all lots can comply with the 20m minimum down slope "green break" requirement and the results reported to the Court, together with any necessary amendments.

39. Sections 4F.2(12) and (14) require amendment to enable effective administration and enforcement. This may require a plan of "*existing vegetation to be retained*" being lodged with council for its approval before development work of any kind commences on individual lots. The council and applicant are to give consideration

to whether the Private Amenity and Site Repair Planting plan (4C.2(1)) and the Fire Management Strategy (Condition 13(c)(viii)) should comprise one document; and report to the Court on same.

40. Section 4F.2(15) – should be cross referenced to 4G.2(2).

41. Section 4F.2(17) – needs clarification of the linkage, if any, between the storage volume required and the *"application"* system; and whether the latter applies both indoors and outdoors.

42. Section 4G.1: Built Form Typologies – why is it likely that dwellings would be designed by a registered architect? If such is not to be required, it may be appropriate to "encourage" the involvement of a registered architect?

43. Section 4G.3(E1.2(2) and (3)): separation rules - there is a high probability that trees planted with a minimum trunk height of 2m would not survive drought conditions at the subject site. The parties are to confer and recommend to the Court a lesser height with better survival prospects. The same approach is to be taken to reviewing the merits of planting specimen native trees in a 2m space between building modules. Many species would outgrow the space available?

44. Section 4H.1: Information Notes – last sentence. The purpose and effect of *"building setbacks"* requires explanation and prescription in the DCGP.

45. Insert into Section 41.2.1(4) a control requiring that all surfaces be limited to a maximum of 20% BS5252 colour chart reflectivity.

46. The Section 4I.2.1(7) reference to roof material reflectivity complying with the district plan is to either be deleted or a specific plan provision inserted. Should there be a relevant plan reference and should it be inconsistent with amended 41.2.1(4) above, the plan reference is to be deleted. Any inconsistency between the requirement that roof materials not have *"applied finishes"* and the materials given as acceptable examples, is to be eliminated.

47. It is not clear why 4K.2(3)(3rd bullet): Screening Walls and Fences requires that council approve colours and finishes when there is no corresponding requirement for hard landscape, buildings or roads. Section 4I should either be made internally consistent or the approval required in 4K.2(3) deleted; and Condition 13(c)(i) relied on.

48. The DCGP, February 2010 (Rev 4) Table 1 is to be amended by inserting the word "Maximum" in the column headings "Buildable Area", "Building Footprint Area" and "Vegetation Clearance".

Other Matters

49. The accuracy of the batter slopes shown on the engineering drawings that form part of Langsview Private Retreat Estate Stage 2: Revision J (Scott EIC Folder 3 of 3) require review and correction where necessary. For example, the Sheet 26 chainage 150 1:1 slope.

50. It would be appropriate if the location of the DCGP Map Series C building cross-sections for individual lots were shown on the corresponding Development Controls sheet; especially where there is only one height control point.

51. A condition is to be added requiring each stage to be completed to s.224(c) before work is commenced on subsequent stages to avoid the potential effect of unfinished site works. By way of just one example, a worst case scenario might be if OB Holdings were to do extensive earthworks but not complete the project.

52. A condition is to be added that expressly limits engineering and built structures and related construction work on individual lots to their "buildable area".

53. A condition is to be added requiring that prior to a s.224(c) certificate issuing it is to be demonstrated to council's satisfaction that each proposed residential lot has an area suitable for the land disposal of treated wastewater, that complies with the proviso's and recommendations in Riley's Report on Wastewater Land Application [2007](p31).

54. An Advice Note is to be added to the NRC consent alerting interested persons to the potential requirement for earthworks and effluent disposal resource consents for individual lots (refer Mr Heaps EIC para's 50 and 59).

55. Page 483 of the transcript reveals an issue about vesting and formation of the walkway which needs tightening up. While the subdivision plans show easements in gross, the easement panel doesn't reveal what is to happen regarding the easement where it passes over the common access lots.

54. Pages 484 – 488 of the transcript record a partially inconclusive series of answers to questions from the Court about how existing vegetation outside the buildable area of lots (denoted by a green dotted line in Map Series B) is to be permanently protected and, importantly, the timing of such relative to all stages. Condition 13(b) requires covenants for Stage 1 prior to s.224. The same condition is repeated for subsequent stages (see for example # 27) but this doesn't address the Court's concern about how existing "green dot" vegetation in Stages 2 – 4 would be protected in the interim. OB should be required to revert to the Court on this as undertaken by Mr Bartlett (p487 line 35).

55. Page 516 of the transcript concerns the consent notices required prior to s.224 for a fire management strategy for private lots to be approved by council prior to building consent issuing. The issue is that the strategy as described in DCGP 4F.2 (12) and (14) allows for the clearance of a percentage of existing vegetation, possibly over time, but there is no express requirement for a plan showing what vegetation exists, what is to be added and what may be progressively cleared. Mr Kaye accepted the need for such (TOP p516 line 44), including for monitoring purposes, and OB is required to submit proposed amendments to DCGP 4F.2 and the proposed conditions to deal with the matter.