**IN THE HIGH COURT OF NEW ZEALAND**
**INVERCARGILL REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**WAIHŌPAI ROHE**

**CIV-2021-425-000005**
**[2021] NZHC 1474**

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| UNDER | the Judicial Review Procedure Act 2016 |
| IN THE MATTER | of an application for review of the decision under the Resource Management Act 1991 |
| BETWEEN | MURRAY NEIL FROST<br>First Applicant |
| AND | WILLIAM ALAN NICHOLAS BROWN<br>Second Applicant |
| AND | JENNIFER DIXON MUNNS<br>Third Applicant |
| AND | QUEENSTOWN LAKES DISTRICT COUNCIL<br>First Respondent |
| AND | DAVID CLARKE AND PAULA CLARKE AND PKF GOLDSMITH FOX TRUSTEES #3 LIMITED<br>Second Respondents |

Hearing: 2 June 2021

Appearances: P J Page and R A Crawford for Applicants
L F de Latour and J S J Aimer for First Respondent
M R Walker and B B Gresson for Second Respondents

Judgment: 21 June 2021

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**JUDGMENT OF DUNNINGHAM J**

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*This judgment was delivered by me on 21 June 2021 at 4 pm, pursuant to r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*
*Date:*

[1] Penrith Park is an attractive suburb in the lakeside town of Wanaka. It is located on a peninsula to the north of the town centre, and is zoned Penrith Park Special Zone (the Zone) in the Queenstown Lakes District Council's Operative District Plan (ODP). The objectives of the Zone include to:

(a) enable the creation of a low density residential development in a rural setting which is relatively close to Wanaka town centre; and to

(b) conserve the visual amenity of the locality to a significant degree.

[2] The second respondents, David and Paula Clarke and PKF Goldsmith Fox Trustees # 3 Ltd (the Clarkes), own two adjacent sections in Penrith Park. At the relevant time, these comprised Lot 61 which had frontage on to Penrith Park Drive, and Lot 60 which had access from Briar Bank Drive.

[3] In October 2018, the Clarkes applied for resource consents to develop a substantial home in an elevated position on Lot 60. Specifically, they sought:

(a) land use consent to construct a residential dwelling at the site and to undertake related earthworks, landscaping and vegetation removal; and

(b) consent to cancel consent notice 982581.5 which was registered on the title to Lot 60;

(the application).

[4] In a decision issued on 10 December 2018, the Queenstown Lakes District Council (the Council) decided to process the application on a non-notified basis,[1] and to grant the requisite consents.

[5] The applicants all own properties in Penrith Park. None are directly adjacent to the Clarkes' property, but all have views of the house which is now under construction. They consider the Council erred in making the notification decision and

[1] Pursuant to ss 95A-95F of the Resource Management Act 1991 (RMA).

the substantive decision and the consents should be set aside and reconsidered following (at least) limited notification.

**Grounds of review**

[6] Section 104(3)(d) of the Resource Management Act 1991 (R MA) prohibits the granting of a resource consent if the application should have been notified and was not. The applicants submit the Council erred in assessing the application for public notification under s 95A and for limited notification under s 95B. Consequently the consent should not have been granted. Had it been assessed correctly it would have been notified.

[7] The specific errors which are alleged are:

(a) The Council failed to consider all relevant adverse effects, and in particular;

(i) adverse effects on the public environment within the Zone; and

(ii) adverse effects on the applicants and on other affected persons with views of the site from Briar Bank Drive and Penrith Park Drive.

(b) The Council failed to correctly assess the effects of removal of vegetation, and in particular:

(i) it determined that native vegetation removal at the subject site "could be expected" and failed to consider r 12.7.3.3(ii)[2] which provides that removal of vegetation in this area is a discretionary activity;

(ii) it failed to consider the assessment criteria in r 12.7.6(iii) relating to vegetation removal;

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[2] All rules in this judgment are rules from the Penrith Park Special Zone section of the Queenstown Lakes District Council's Operative Plan (ODP).

(iii) it failed to obtain adequate reliable information to make an assessment of the effects of removal of vegetation; and

(iv) it applied the wrong statutory test to conclude limited notification was not required.

(c) The Council failed to properly consider the height rule found at r 12.7.5.2(i), and treated the maximum building height for a controlled activity of seven metres as a baseline for assessing the effects of a non-complying building with a maximum height of 8.9 metres.

(d) The Council erred by assessing the proposed activity as if it was a discretionary activity using the r 12.7.6(ii) assessment matters, rather than as a non-complying activity where all adverse effects were relevant.

(e) The Council erred when it allowed the removal of the consent notice on the title to Lot 60, relying on a conclusion that r 12.7.5.1(ii) was sufficient to ensure effects on the environment would be equivalent to condition 2 of the consent notice, when condition 2 requires complete invisibility from the Lake Wanaka shoreline of any structure on the property, while r 12.7.5.1(ii) is simply a site standard, and can be departed from.

**The relevant ODP provisions**

[8] The application site falls within the Penrith Park Special Zone of the ODP. Furthermore, all of Lot 60, and part of Lot 61 are located within the Penrith Park Visual Amenity Area of the ODP, and parts of Lot 60 and Lot 61 are within Penrith Park Vegetation Area A in the ODP. These areas attract specific Zone rules relating to visibility of buildings, visual amenity and vegetation removal.

[9] As already stated, the first objective of the Zone is "to enable the creation of low density residential development in a rural setting which is relatively close to

Wanaka town centre".[3] The other Zone objectives focus on conserving visual amenity of the locality, encouraging a high standard of building design, appearance and landscape and avoiding adverse effects on the environment. The environmental results anticipated include provision "of an appropriate visual transition between the open space margins of Lake Wanaka and the more intensively developed Wanaka town centre",[4] and protection "of the natural amenity without preventing development."[5]

[10] The Zone rules do not allow construction of a building as a permitted activity. Instead, buildings are controlled activities if they "comply with all the relevant Site and Zone Standards".[6] The matters the Council has reserved control over, as listed in r 12.7.6.(i), are:

> (a) Whether the building breaks the line and form of the landscape with special regard to skylines, ridges, hills and prominent slopes when viewed from the shoreline.
>
> (b) Whether the building is visually obtrusive from any public road, recreation area or public place.
>
> (c) Whether the colours of the roofs and walls are of low reflectivity and derived from the landscape, with bright accent colours or highly reflective colours used only in small areas for visual interest.
>
> (d) The extent to which the proposed building reflects the alpine characteristic of the Wanaka area as represented by the pitched roofs with dormer windows.
>
> (e) Whether the road access and internal driveways are situated in the most appropriate position and avoid excessive cuts and fills, and do not compromise the visual amenity of the site.
>
> (f) Whether the exterior walls are built of materials commonly found in the environs of the site.
>
> (g) The extent to which the building preserves the existing mass of vegetation.

[11] There are then further matters listed at 12.7.6(ii) for consideration if the building is a discretionary activity, for example, if it exceeds the site standard of a maximum height of seven metres, and these focus on the visibility of the building and its effect on visual amenity.

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3 ODP r 12.6.3.
4 Rule 12.6.4.
5 ODP r 12.6.4.
6 Rule 12.7.3.2.

**The application**

[12] The application for land use consent sought to construct a large two storey, architect-designed residential dwelling and to undertake associated earthworks landscaping and vegetation clearance. It was assessed as a non-complying activity under the ODP. The particular elements which required resource consent were as follows:

(a) construction of a new residential dwelling – controlled activity;

(b) construction of a dwelling within Activity Area (1) that intrudes into the skyline – restricted discretionary activity;

(c) construction of a dwelling within Activity Area (1) that will be visible from any public place within 50 metres of the shoreline (excluding the surface of Lake Wanaka) – restricted discretionary activity;

(d) undertaking earthworks exceeding 100 $m^3$ in volume, 200 $m^2$ in area, with a maximum cut height exceeding 2.4 metres – restricted discretionary activity;

(e) removal of vegetation and the disturbance of land in Activity Area (1) – discretionary activity;

(f) exceeding the maximum height limit of seven metres – non-complying activity;

(g) retaining wall located within six metres of the site's eastern boundary – non-complying activity.

[13] The second aspect of the application was to seek the removal of a consent notice registered on the title to Lot 60. The relevant condition in the consent notice provided as follows:

> That the screening profiles proposed for Lot 60 be planted, maintained and enhanced if necessary to ensure that dwellings on those Lots cannot be seen from the landward 50 metre strip from the shoreline of Lake Wanaka. "Shoreline" being defined as the water/land boundary at RL 277.27 above MSL.

The consent notice also attached plans to demonstrate where the screening vegetation was intended to be located on the Lot, along with profile drawings to show how it would screen buildings from the shoreline area as defined.

[14] The conclusion to the application stated that "the relevant condition [in the consent notice] replicates Penrith Park site standard 12.7.5.1(ii)(d)". That site standard provides:

> No part of any building located in Activity Area (1) of the Penrith Park Zone Plan 'A' north of the visual amenity line shall intrude into the skyline when viewed from any public place, excluding Lake Wanaka and any road or walkway within the zone.
>
> "The Skyline" means the line at which the landforms within Activity Area (1) of the Penrith Park Zone Plan 'A' and the sky appear to meet, provided that landforms are inclusive of any existing vegetation to be retained, earthworks or landscaping, the purpose of which is to reduce the visibility of buildings on a site and which is the subject of or forms part of any resource consent granted in respect for the site by the Council.

The application also noted the consent condition "does not need to be recorded as a consent notice" and "would make it difficult to build upon this site".

**The decision**

[15] It is not necessary at this point to discuss the decision in detail, as the relevant aspects of it will be discussed in the following sections. However, the application was accompanied by a comprehensive AEE. That was reviewed and adopted by the Council in its decision, albeit with additional comments. The Council concluded that neither public nor limited notification was required for either consent. It granted the land use consent subject to conditions, and the application to remove the consent notice.

**Approach on judicial review**

[16] There was no dispute between the parties as to the applicable principles on an application for judicial review. It is sufficient to note the observations made in *Coro Mainstreet (Inc) v Thames Coromandel District Council* regarding the Court's function on review:[7]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of a resource consent application or the decision on notification. The enquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

**First ground of review – failure to consider all adverse effects**

*Submissions for the applicant*

[17] The applicants submit both the AEE, and the subsequent decision of the Council, failed to consider effects on properties to the north and west of the subject site, including the applicants' properties.

[18] All three applicants give affidavit evidence attaching photographs which show the dwelling which is now under construction is visible from their property. Mr Brown says it is the only house that breaks the skyline when viewed from his property. Similarly, Mr Frost attaches photographs showing the dwelling from certain rooms in his property and says these demonstrate the visual impact is clearly not less than minor. Ms Munns, too, says she can see the property from her front door and the construction of the dwelling is "very prominent". She also notes that when walking around the Penrith Park area using the road network and the lake-shore at Beacon Point, there is a "clear view of the house under construction from these public locations". She says

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[7] *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442 (footnote omitted); upheld on appeal; *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] 17 ELRNZ 427; and see *O'Keeffe v New Plymouth District Council* [2021] NZCA 55, (2021) 22 ELRNZ 506 at [59].

"[t]he house certainly appears to be much taller, and less well screened, than any of the existing houses within the Visual Amenity area of the Penrith Park Zone".

[19] All three applicants say if they had the opportunity to submit on the application, they would have sought to ensure the proposed dwelling complied with the Zone policies and rules, in particular, the maximum height for controlled activities of seven metres, and that the (then) existing protected kanuka on the site was retained so that screening vegetation could serve its intended purpose.

[20] The applicants say the application is completely silent as to effects on properties to the north and west of the subject site, including their properties. They say no reasons are given as to why they were not deemed to be affected. Instead, the Council had a "fixation" on properties to the east of the subject site. In particular, the Council refers to five properties sited to the east of, and above the proposed dwelling, and satisfies itself that their views, as shown in Drawing Sk 1.5 to the application, are not comprised. It then concludes "[n]o other persons are considered affected by the proposal".

[21] While s 4.3.3 of the AEE states profile poles were erected to indicate the maximum height of the house, and that visibility was assessed using these poles, the photos which are taken of the poles only show views from the east. Images of other views, including from Penrith Park Drive and Briar Bank Drive, do not form part of the application or the Council's subsequent assessment of the application.

[22] The applicants acknowledge that s 7.0 of the AEE says the house would be visible from the west, but that other houses in the foreground, and trees, will draw attention away from the house. However, the applicants rely on the evidence of Ms Steven, a landscape architect, to contradict that conclusion. She attaches photographs to her evidence which she says demonstrate the existing houses and trees do not diminish the visual effects of the proposed activity when viewed from the west, in the way asserted in the AEE.

[23] The applicants submit the failure to identify persons affected by the activity is a procedural fault which undermines the validity of the notification decision. They

point out that in *McMillan v Queenstown Lakes District Council*, Mander J observed that:[8]

> If the applicant fails to identify persons affected by the activity, or to sufficiently inform of consultation that has taken place, that may be reflected in the standard of the decision achieved. The resulting inadequacy in the decision will be able to be traced to that procedural fault.

[24] Finally, the applicants are critical of the Council filing evidence from Ms Stagg, the Council planner who reviewed the application and made the decision, who says she did consider the actual or potential effects of the proposal on the applicants. The applicants suggest that evidence is self-serving and not credible in light of the Council's obligation to give reasons for its decisions.[9]

*Submissions for the Council*

[25] The Council does not accept that effects of the building on persons in the environment to the north and west were overlooked or not assessed. Ms de Latour says the decision expressly adopted the assessment in the AEE. This covered effects under three headings: neighbourhood character, visibility, and views and outlook.

[26] The effects of the proposal were considered in the context of the neighbourhood and, having regard to matters such as the character of the environment and the design of the particular dwelling, and concluded that effects on neighbourhood character would be less than minor. In terms of visibility, the AEE acknowledged that the building was visible from various locations to the west of the site, but considered that those effects would be partially mitigated by the surrounding existing development. The AEE concluded the design of the dwelling and its location within existing and proposed vegetation would reduce the visual amenity effects of the building and its visibility effects would be less than minor.

[27] The Council says it had adequate information to assess the visual effect of the dwelling. The AEE addressed the visibility of the application from various aspects including from the north and west of the site, and plans showed the height of the

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8 *McMillan v Queenstown Lakes District Council* [2017] NZHC 3148, [2019] NZRMA 256 at [34].
9 *Lewis v Wilson & Houghton Ltd* [2000] 3 NZLR 546 (CA) at [54].

building from all aspects. Together, the application and the decision contain an assessment of the effects of the building from:

(a) Beacon Point Road;

(b) public roads, recreation areas and public places in the Zone; and

(c) public and private properties to the west of the site.

Furthermore, Ms Stagg confirms both she, and the consultant planner assigned to process the application, visited the site, and the site was viewed from various points including Penrith Park Drive, Briar Bank Drive and Beacon Point Road which is close to the shoreline of the lake.

[28] While Council officers say they considered adverse effects from all sides of the site, it considered those who were located to the east of the site were likely to be most directly affected because the dwelling had the potential to affect views towards Lake Wanaka for those properties. That is why they gave greater attention to the viewpoints from those dwellings, where there would be a view of the new dwelling when looking out towards the lake.

[29] Ms de Latour says the Council did not need to then go on and specify there were less than minor effects on each person who could potentially see the proposed building. It was clear from the context of the decision that the effect of the building on persons who could potentially see it, was assessed to be less than minor. She points out the Council is not required to expressly refer to every relevant consideration that has been taken into account as this would be an impossible burden.[10]

*Submissions for the Clarkes*

[30] The Clarkes endorse the Council's submission, saying the AEE contains an assessment of the proposal on visual amenity from various locations to the west of the

[10] *Duggan v Auckland Council* [2017] NZHC 1540, (2017) 20 ELRNZ 31 at [79].

subject site and concludes those effects would be less than minor, and this conclusion was adopted in the decision.

[31] While the applicants, and their expert planner may have different views as to the merits of the conclusion reached, it was made in accordance with the law and was not unreasonable.

*Discussion*

[32] I accept the AEE provided an assessment of effects on neighbouring properties. This is particularly evident in the section assessing effects on neighbourhood character. That section concludes that:

> The proposed scale and design of the dwelling is consistent with that of other dwellings throughout the Zone. The dwelling has been designed to a high standard and recessive materials with low reflectivity have been selected to allow the dwelling to be absorbed by the surrounding landscape. A landscaping plan is also proposed to mitigate any potential effects the built form may have on the surrounding environment.

[33] Similarly, the AEE discusses the visibility of the house saying it will be "visible from various locations to the west of the site", but that the effect:

> Will be partially mitigated by the presence of dominant dwellings in the foreground adjacent to and [to] the west of, Penrith Park Drive that will attract attention to the foreground, rather than the proposed house in the background.

Having regard to the photographs provided in evidence, that conclusion is understandable.

[34] I also consider the evidence of Ms Stagg, which attaches photographs taken by both the consultant planner and herself, supports the view that a range of views were considered. I do not consider such evidence to be objectionable where it simply reports the range of enquiries undertaken, to counter a suggestion they were not undertaken, rather than to retrospectively justify a decision made.

[35] I do not consider the Council failed to consider public and private views from the west and north as alleged and this ground of review is not made out.

**Second ground of review – failures in assessing effects of vegetation removal**

*Submissions for the applicants*

[36] The applicants raise several issues in respect of the Council's assessment of the effects of vegetation removal.

[37] First, they say the Council did not have the information required to reach its conclusion that effects relating to vegetation removal would be temporary in nature, and would be mitigated by conditions of consent. The applicants say that, at a minimum, the Council needed to have the following information to fully assess the adverse effects of vegetation removal:

(a) the existing plantings, their ecological value and what screening they provide;

(b) the proposed removal, its ecological cost, the effects associated with the removal and the duration of those effects; and

(c) any proposed mitigation of the effects of removal, its ecological value and how long the mitigation will need to ameliorate the removal effects.

[38] The applicants say that the effects of removing existing plantings cannot be restricted to the construction period when like for like replacement of the removed kanuka vegetation is not proposed, and there is no assessment of the temporary adverse effects while the replacement vegetation takes effect. In short, it said the Council does not appear to have a clear understanding of the duration or nature of the effects of vegetation removal. Furthermore, it operated from an erroneous premise that some vegetation removal "could be expected".

[39] The applicants provide their own evidence from Ms Steven who discusses the relevant provisions in the ODP in regard to vegetation and then provides her own assessment of the effects of vegetation removal, noting in particular, that the dwelling under construction is "uniquely prominent" on the skyline, from both public and private aspects. She is critical of there being no expert landscape evidence included in the application or sought by the Council, and no alternatives offered to protect the skyline, which was previously defined by kanuka.

[40] Finally, the applicants submit that the assessment of effects on persons of vegetation removal for the purpose of limited notification uses the wrong statutory test. The Council concludes that the effects of vegetation removal are "not considered to be more than minor", when the test for affected persons under s 95E(1) of the RMA requires any effects on them to be less than minor. Accordingly, the Council could not lawfully conclude there were no affected persons in relation to the proposed activity because it had not established that effects were less than minor on anyone.

*Submissions for the Council*

[41] The Council rejects the suggestion it had inadequate information to assess the effects of vegetation removal. It points out that an application for resource consent must include an assessment of the activity's effects on the environment that:[11]

> [I]nclude[s] such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

The information provided does not need to be all encompassing,[12] and must be proportional to the scale and significance of the proposal.[13]

[42] The Council points out the application proposed the removal of approximately 640 m² of kanuka and, following completion of the construction of the dwelling, would provide 428 m² of structural planting, including kanuka and other native plants. The kanuka coverage across the application site was approximately 6,500 m² and so only 10 per cent of the existing kanuka on the site was proposed to be cleared.

[43] The application was accompanied by a series of plans, including a building plan and a landscape plan. The landscape plan showed:

(a) the location and extent of kanuka proposed to be retained;

(b) the location and extent of kanuka to be removed;

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11 RMA sch 4 cl 2(3)(c).
12 *Palmer v Tasman District Council* HC Nelson CIV-2009-442-331 at [105].
13 *Mawhinney v Auckland Council* [2017] NZEnvC 162 at [53].

(c) the additional landscaping proposed once construction of the building was completed; and

(d) the existing and proposed contouring at the site.

[44] The application also contained a full assessment of the effects of the removal of vegetation, which included a consideration of it against the assessment matters in r 12.7.6(iii). In addition, the site was visited by both the consultant planner and by the decision maker.

[45] The Council considers the key effect caused by the removal of vegetation is visual amenity effects. The screening effect of the vegetation and its impact on visual amenity was clearly set out in the application and (as Ms Stagg stated in her affidavit), those effects were capable of being competently assessed by the planners in this case. The Council points out that this Court has previously accepted that expert landscape input is not required in similar situations.[14] The information provided here was sufficient for the Council to understand the effects of the activity and it was entitled to rely on it in this case.

[46] Both the application and the decision acknowledged the dwelling would not be entirely screened by vegetation and would be seen from various locations within the Zone. However, the Council (through adopting the AEE in its decision) assessed that, given:

(a) the limited extent of kanuka proposed to be removed from the western, more visible site of the dwelling;

(b) the fact that only 10 per cent of the existing kanuka on the site was to be cleared;

(c) the combination of house design, vegetation to remain and vegetation to be replaced; and

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14 *Duggan v Auckland Council*, above n 10 at [64].

(d) the residential context within which the dwelling was composed

the effect of vegetation removal would be less than minor.

[47] The Council also relies on my observation in *Trilane Industries Ltd v Queenstown Lakes District Council* to respond to the evidence given by the applicants' landscape architect on the magnitude of effects:[15]

> [53] In addressing the question of whether the adverse effects of the proposal were all minor or less than minor, I take no account of the expert evidence subsequently filed to suggest that the landscape and visual effects were either more, or less severe than were outlined in Ms Mellsop's report which the Council accepted. It is not appropriate, on an application for judicial review of a notification decision under the RMA, to produce further expert evidence to support or reject the evidence relied on by the relevant consent authority. If the Council relied on evidence which was prepared by someone with appropriate expertise, and expressed a view that was reasonably available to that person on the proposal before them, the Council will not have erred.

[48] The Council says that Ms Stevens' evidence of the adverse effects of the removal of vegetation, where she reaches a different view, should be discounted for the same reasons. In effect, the applicants are seeking to challenge the merits of the decision which is inappropriate on judicial review.

[49] The Council also rejects the allegation it failed to have regard to temporary effects. It says these were addressed in the decision where it discussed the temporary nature of the vegetation removal and the mitigation proposed. While the applicants rely on the decision in *Trilane Industries Ltd v Queenstown Lakes District Council*, it can be distinguished. In *Trilane* the Council accepted there would be moderate temporary effects, but then ignored that for the purposes of notification on the grounds that they would be mitigated in due course.[16] Here, the application concluded that all the effects of the removal of vegetation would be less than minor.

[50] The Council also notes the applicants criticise the Council for not expressly addressing the assessment matters in r 12.7.6(iii). The Council rejects this claim (and

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15 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647, (2020) 21 ELRNZ 956.

16 At [59].

notes this is inconsistent with the separate alleged error that the Council wrongly considered the discretionary assessment criteria in relation to height breaches), saying s 4.3.3 of the AEE contained an assessment of the removal of vegetation against the criteria in r 12.7.6(iii). While those criteria were not expressly mentioned in the decision, the decision expressly adopted the AEE and the effects of the removal of vegetation were considered at s 3.3.3 of the decision.

[51] Finally, the Council responds to the (belated) argument that the assessment of effects on persons failed to establish that the effects of vegetation removal are less than minor as required under s 95E(1) of the RMA.[17] This argument relies on the sentence used in the limited notification assessment at s 4.3.2 of the decision where it is said that "[r]esultant effects [of vegetation removal] are therefore not considered to be more than minor".

[52] While the Council acknowledges that the language used in its limited notification assessment, is not the language used by s 95E, it says it is important to read the decision as a whole. In that regard, it relies on *Millar v Ashburton District Council*, where the Court found that although the application wrongly referred to the test for avoiding notification as met because the adverse effects were minor or no more than minor, it was clear when the supporting evidence to the application and the decision were read as a whole, that the effects had been assessed as less than minor.[18]

[53] In this case, s 7.0 of the AEE concludes that the effects of the removal of vegetation are less than minor and the AEE was expressly relied on and adopted by the Council. The decision also provides clear reasoning regarding the effects of the activity and these reasons flow into the limited notification assessment where the Council concluded that no persons would be affected by the proposal. Accordingly, although the limited notification section of the decision wrongly refers to the test for public notification, it is clear from the decision when considered as a whole, that the Council considered the effects of removal of vegetation were less than minor and, so concluded there were no affected persons.

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17 This ground of review was not pleaded in the application for judicial review, but was traversed in submissions.

18 *Millar v Ashburton District Council* [2016] NZHC 3015 at [62]-[66].

*Submissions for the Clarkes*

[54] Again, the Clarkes support the submissions of the Council. In particular, they say the information before the Council was adequate for it to conclude the effects associated with removal of vegetation would be less than minor. The Council's adoption of the AEE, which concluded that effects on persons from vegetation removal would be less than minor, must be taken as informing the Council's conclusion that there were no adversely affected persons for the purpose of limited notification, despite the incorrect reference to the test of "no more than minor".

*Discussion*

[55] Although the applicants have raised a number of criticisms regarding the Council's assessment of the effects of vegetation removal, in the end, they focus most squarely on the Council's assessment that the effects of vegetation removal were "no more than minor", when the test for deciding who is an affected person for the purposes of limited notification is that the effects on that person are "less than minor". As Mr Page submits, this is not "simply some linguistic peccadillo; it is the legal standard required by the Act."

[56] As already outlined, the Council explains this by saying the decision is in error when it refers to the test for avoiding public notification, and I should look instead to the AEE and the conclusion. However, that is difficult to square with the actual wording of the decision. At s 4.3.2 of the decision, the decision maker draws different conclusions on the effects of the height breach and on the effects of vegetation removal and earthworks. The former is considered to be "less than minor" on owners and occupiers of neighbouring properties. The latter are considered to be "not to be more than minor". That conclusion reflects the earlier conclusion in the decision on the effects of vegetation removal when considering whether public notification set out at s 3.3.3 of the decision.

[57] I do not think this can be overcome by saying the Council also expressly adopted and relied on the AEE supplied by the applicants. It did so, but with the proviso that it made "additional comments" and it is in these comments that its conclusion on the effects of vegetation removal are reached. While it is possible that

was in error, that would seem surprising, particularly when at the start of s 4.3.2, the decisionmaker expressly addresses the requisite test for limited notification.

[58] In my view, the decision maker intended to reach her own conclusion on the effects of vegetation removal, which was that they were "no more than minor", and simply did not explain why no owners or occupiers of neighbouring properties were therefore considered to be unaffected by the proposal.

[59] Accordingly, this ground of review is upheld.

[60] As a consequence, I do not need to discuss in detail the other criticisms of the Council's decision on vegetation removal. It is sufficient to say that I accept the Council's submissions on these points and do not consider that the applicants raise any other error that is amenable to judicial review.

**Third ground of review - incorrect use of building height rule**

[61] The applicants point out that the Zone is unusual in that all buildings require resource consent. There are no permitted effects which can be disregarded under s 95E(2) RMA. In the present case, the proposed building would have a maximum height of 8.9 metres in one corner of the building which breached the maximum building height for controlled activities by 1.9 metres.

[62] The applicants acknowledge the decision states: "in this case, there was no permitted baseline relating to buildings, given that all buildings within [the Zone] … require a resource consent …". However, they say that the Council effectively treated the seven metre height limit as a permitted activity, the effects of which could be disregarded for the purposes of notification.[19] This was borne out by:

(a) the Council adopting what was said at s 7.0 of the AEE: that a "complying" house could be built more visibly on the site; and

[19] Under Resource Management Act, ss 95D(b) and 95E(2)(a)

(b) drawing SK 1.6 in the AEE containing sightline section drawings that show effects on views from the east and compare these to effects of a seven metre building which is labelled as "complying".

[63] The applicants say because all buildings in the Zone require resource consent, it is misleading to describe a building as "complying", in the sense of being permitted without the need for resource consent. Furthermore, even if a building complies with the maximum height standard, it must still be assessed against the objectives and policies of the Zone, including that it be "sited on the property in an unobtrusive manner in harmony with the natural forms and features of the landscape".[20] Thus, despite acknowledging there is no permitted baseline for buildings in the Zone, the applicants submit that by adopting the "seven metres as complying" reasoning, the Council either benchmarked the proposed activity to an unrealistic scenario (for example, a seven metre tall house further up the slope), or otherwise treated a seven metre building as representing a de facto permitted baseline and therefore wrongly disregarded the effects of such a building.

*Submissions for the Council*

[64] The Council rejects these allegations. Not only did the decision expressly acknowledge there was no permitted baseline, s 4.3 of the AEE contained a detailed consideration of the effects of the building against the controlled and discretionary assessment matters for building. Furthermore, s 7.0 of the AEE and s 3.3.3 of the decision, contained a full assessment of the visual effects of the building. There was nothing in the AEE or the decision that limited the buildings effects solely to the parts of the building above seven metres.

[65] The Council acknowledges that, at s 4.3.2 of the decision, it says "… the effects of the proposed height breach are less than what would otherwise be permitted by a compliant building located closer to the eastern boundary", and says it would have been better to use the word "anticipated", rather than "permitted". However, the Council submits, when read in context, it is clear that neither the application, nor the decision implied that the development could concur as of right, or that the seven metre

[20] ODP 12.6.3(4).

height limit could be relied upon as a type of permitted baseline. That said, the application had to be assessed in the context of a zone which sought to enable creation of low density residential development, subject to controls on the effects of that development. It was not an error to consider the effects in the context of what was anticipated in the Zone.

*Submissions for the Clarkes*

[66] The Clarkes make similar submissions to the Council. In particular, they reject the suggestion that the word "complying" used in both the AEE and in the decision when assessing the effects of the building height, was misleading. They say "complying" in this context means complying with the standards of the Zone. It does not mean permitted under the ODP. Thus, a seven metre high building is not a permitted baseline, but is a relevant consideration in terms of establishing the effects of buildings and whether such buildings should be declined consent or notified on the basis of their height.

*Discussion*

[67] The RMA provides that when considering the actual and potential effects on the environment of allowing an activity, the consent authority may "disregard an adverse effect of the activity on the environment if … the plan permits an activity with that effect".[21] Similar provisions apply in ss 95D and 95E when deciding whether a person is an affected person because of the activity's adverse effects on the person.[22] While it is common ground that the Council understood there was no permitted baseline relating to buildings, the applicants criticise it for allegedly treating site standards such as the height limitation as a baseline for assessing the effects of the proposed dwelling.

[68] I do not consider the Council treated the site standard as a permitted baseline and ignored its effects. What it has done is used the Zone objectives, and the site standards to give some context to the assessment of effects. In my view, this is sensible. Effects must be assessed in context, and in light of what exists, and is

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21 Resource Management Act, s 104(2).
22 Sections 95D(b) and 95E(2)(a).

anticipated in the zone. For example, leaving aside any permitted baseline considerations, the erection of a concrete tilt slab building would have different effects in a commercial zone from what it would have in a low density residential area, or in an outstanding natural landscape. It would be entirely artificial to assess effects without considering what exists and what is anticipated in the zone. In my view, that is all the Council has done here.

[69] Consequently, this ground of review is not upheld.

**Fourth ground of review – using irrelevant assessment criteria**

*Submissions for the applicants*

[70] The applicants criticise the Council for assessing the proposed activity with reference to the assessment criteria for controlled activities in r 12.7.6(i), and for discretionary activities in r 12.7.6(ii), when the proposed activity was non-complying. Although the planning evidence for both the Council and the Clarkes claim these matters are relevant considerations, the applicants say that r 12.7.6 does not set any matters for the Council to have regard to when assessing a non-complying activity, and accordingly, the Council is required to consider all adverse effects on the environment of the activity.

[71] Because controlled and discretionary activities are less restrictive activity statuses than non-complying activities, they have less stringent assessment criteria and the assessment of them can be properly limited in scope. Where activities do not comply with standards in the ODP, as here, there is no basis for assuming that policies are being implemented by using assessment criteria for controlled or discretionary activities, and the Council must apply greater scrutiny to all adverse effects of the activity.

[72] In short, it is an error of law to evaluate a non-complying activity by applying assessment criteria that guide decisions on controlled or discretionary activities. By way of example, the applicants say that using the assessment matters led to the Council's failure to observe that residents of Penrith Park, such as themselves, may be potentially affected parties. This is because the Council wrongly limited assessment

to public views from the lake shoreline. As a result, the Council failed to correctly determine the notification decision.

*Submissions for the Council*

[73] The Council, however, says it was both lawful and appropriate to consider the assessment matters in rr 12.7.6(i) and (ii), but that it did not limit its consideration to these matters. Furthermore, it is unclear exactly what effects the applicants say had not been assessed by the Council, save for the allegation it limited assessment of visual effects to views from the east and the shoreline, which has already been addressed under the first ground of review.

[74] The Council says the relevant rules for the Zone, such as the assessment matters in rr 12.7.6(i) and (ii), provide the Council with legitimate guidance to the approach to take in assessing the effects of the proposed building. It is through these rules that the objectives and policies of the ODP are implemented. More importantly, though, the Council says it did not limit the scope of its assessment matters contained in the ODP, nor did it fail to consider any relevant effects. As can be seen, the full effects of the building were considered in both the application and the decision.

[75] The reality is, when stripped back, the applicants' submission is that the Council did not put enough weight on certain effects when it assessed the visibility of the building, but that is inviting the Court to embark on a merits-based decision which is not appropriate on judicial review.

*Submissions for the Clarkes*

[76] The Clarkes reject the suggestion the use of the assessment matters for discretionary activities in the Zone materially narrowed the Council's assessment, saying there is no difference between non-complying and discretionary matters in terms of the degree of effects the Council may consider. The only difference between discretionary and non-complying activities is the latter must go through an additional statutory hurdle under s 104D of the RMA to be granted consent. It was lawful for the processing planner to treat the discretionary activity assessment matters as relevant considerations when assessing the proposal.

*Discussion*

[77] This ground of review can be addressed quickly. It was clearly both lawful and appropriate to consider the assessment matters in rr 12.7.6(i) and (ii). As the Council says, these provide the Council with legitimate guidance to the matters which are most relevant in assessing the effects of the proposed building in light of the objectives and policies of the ODP. However, the Council did not limit its consideration to these matters. For example, as already discussed, it did consider views from neighbouring properties. I accept too, that apart from the allegation that views from neighbouring properties were not considered, the applicants do not raise any other relevant consideration which it says was ignored.

[78] In conclusion, the assessment criteria the Council used were relevant, but the Council did not confine itself to these. This ground of review is not made out.

**Fifth ground of review – removal of consent notice**

*Submissions for the applicants*

[79] The applicants submit the Council failed to identify the distinction between the consent notice and r 12.7.5.1(iii)(b).[23] The consent notice is a mandatory legal obligation. While in force, it requires the dwelling on Lot 60 to be screened from the defined area of shoreline in perpetuity. Compliance cannot be excused because it is difficult, or because it might disappoint the land owner's development aspirations.

[80] The applicants say the Council decision maker wrongly characterised the obligations under the consent notice (to comply) and the rule (which triggers the need for consent) as equivalent mechanisms. Without enquiring into what development of the site that complied with the consent notice might entail and what its relevant effects on the public and affected persons might be, she could not make an appropriate assessment of the effects of removing it.

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[23] This is another site standard from r 12.7.5 of the ODP which states: "no building on any allotment affected by the building line shall be visible when viewed from any public place within 50 m of The Shoreline, excluding the lake surface, and referred to on Penrith Park Zone Plan 'A' as the Beach". This rule was not referred to in the AEE or the decision.

*Submissions for the Council*

[81] The Council says it set out its understanding of the legal nature of the consent notice in the decision saying: "this consent notice was imposed so that future lot owners were aware of their obligations." The Council says there is no error in its understanding of the legal nature of the consent notice and it is consistent with descriptions of the purpose of a consent notice in similar cases.[24]

[82] The Council then goes on to say the effects of removing the consent notice were considered in s 3.3.3 of the decision under the subheading "Visual Amenity". Although the consent notice was not referenced directly, the decision maker concluded the level of visibility of the proposed building would be mitigated by the use of recessive materials and existing and proposed vegetation such that the adverse effects would be not more than minor. In any event, the Council says that given the effects of the consent notice and the rules both fall to be considered as discretionary activities, there was no error in its approach.

*Submissions for the Clarkes*

[83] The Clarkes also do not agree that the Council erred in its assessment of the application to cancel the consent notice. It says in the circumstances, and given the relevant matters Council had to consider, it was reasonably open to it to deem that if the effects of the breach of the site standard were acceptable, so too, were the effects of cancellation of the consent notice.

*Discussion*

[84] The Clarkes' application sought the cancellation of the consent notice registered on the title to Lot 60 which required screening planting to be planted, maintained and enhanced if necessary, to ensure that the dwellings on Lot 60 could not be seen from the landward 50 metre strip from the shoreline of Lake Wanaka.

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[24] *Foster v Rodney District Council* [2010] NZRMA 159 at [129]; *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009, (2018) 20 ELRNZ 645 at [67].

[85] Consent notices must be imposed by a territorial authority when granting a subdivision consent where there is a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners.[25] The consent notice creates an interest in the land, can be registered under the Land Transfer Act 2017 and will bind subsequent owners. The purpose of a consent notice is to ensure future land owners have notice of, and are bound by, subdivision consent conditions that have ongoing effect.

[86] Section 221(3) of the RMA allows an owner to apply to a territorial authority to vary or cancel any conditions specified in a consent notice. Any such application is subject to the same process that applies to applications for variation of resource consents under s 127 RMA. An application to change or remove a consent notice is a discretionary activity and will be considered in accordance with s 104(1) of the RMA.

[87] In *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, I discussed relevant case law on the purpose of consent notices and the approach to be taken in respect of their removal.[26] For example, in *McKinlay Family Trust v Tauranga City Council* the Environment Court stated:[27]

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

[88] I also cited *Foster v Rodney District Council*, where the Court said:[28]

> [129] Accordingly, we consider that the purpose of the existing consent notice is to provide a high level of certainty to public and owners as to the obligations contained within that notice. It is intended to protect the environmental values of the soil reserve …
>
> [130] … In our view nothing has changed which justifies changing the original consent notice and there is no proper basis for a Variation of it at this

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25 Resource Management Act, s 221(1).

26 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844, (2019) 21 ELRNZ 428 at [41]-[45].

27 *McKinlay Family Trust v Tauranga City Council* 6 EnvC Auckland A119/08, 29 October 2008 at [52].

28 *Foster v Rodney District Council*, above n 24.

> stage. Accordingly, we would in any event refuse the Variation or cancellation of the consent notice …

[89] In *Ballantyne Barker Holdings Ltd*, I reached the following conclusion:[29]

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

[90] In the present case, the application was made on the basis the consent notice condition was "essentially a repeat of the District Plan rule [12.7.5.1(ii)(d)] and so does not need to be recorded as a consent notice". It then goes on to say that "due to the topography of the site this rule would make it difficult to build upon the site".

[91] These statements are contradictory. The first suggests that the rule provides the same protection as the consent notice by referring to the equivalence of the consent notice and the rule. That is, not correct. First, the rule referred to relates to intrusions into the skyline whereas r 12.7.5(ii)(e) seems more relevant as it addresses visibility of the building from the shoreline. A building could be sited below the skyline but still be visible from the shoreline. In any event, whichever rule is intended, they are site standards. Unlike the condition in the consent notice, there is no obligation to comply with a site standard. A departure from a site standard, and the degree of adverse effects flowing from that departure, is simply a matter to be considered in deciding whether it is appropriate to grant a resource consent.

[92] The second statement says it would be difficult to develop the site while still complying with the consent condition. That suggests the purpose of removal is to give the land owner flexibility to adopt less stringent screening than is required by the condition, which means an equivalent environmental outcome is not intended to be achieved.

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[29] *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*, above n 26.

[93] However, the real issue is not what the application said but whether the decision maker correctly assessed the effects of removal. In this regard, I consider the error in the AEE was perpetuated by the decision maker assuming that r 12.7.5.1(ii)(d) was equivalent to the condition. As already pointed out, r 12.7.5.1(ii)(e) most closely relates to the effects addressed by the consent notice. More importantly, the consent notice does not, as the decision maker assumes, simply require an assessment of the visibility of the development from within 50 metre landward of the shoreline of Lake Wanaka. It is a positive requirement to plant and maintain vegetation so a dwelling would not be visible from the defined area of the shoreline.

[94] The Council's decision wrongly assumes that the "existing provisions of the District Plan are sufficient to ensure compliance with [this rule]", but then goes on to say "or any effects from non-compliance are assessed". There is no appreciation that removal of the consent notice removes the certainty the general public have that the requisite vegetation screening will be in place. Instead, it makes the level of screening a matter of assessment on a case by case basis, where residents may or may not have a say. That is, in itself, an effect on the environment and there is no assessment of its magnitude.

[95] Given the failure to appreciate the distinction between the mandatory nature of a consent notice, and the discretion to depart from a site standard such as found in r 12.7.5.1(ii)(d) or (e), I consider the Council made its decision as to notification on an incorrect factual and legal basis.

[96] Accordingly, its conclusion that no persons are considered affected by the proposal to remove the consent notice was reached in error and this ground of review is also upheld.

**Discretion to grant relief**

[97] Having found that there was an error in the decision not to notify the land use consent and in the decision not to notify the application to cancel the consent notice on Lot 60, I go on to consider the discretion to grant relief.

[98] Although I have a discretion whether to grant relief where an error of law has been made out, the starting point is that relief should be granted and there must be "extremely strong reasons" not to do so.[30] A range of factors are relevant to whether relief should be denied, including whether an applicant has delayed issuing proceedings,[31] whether innocent third parties would be unduly prejudiced, or whether other remedies are available. However, each case needs to be looked at on its own facts, and the starting point is that relief should follow unless there are good reasons to decline it.

*Submissions for the applicants*

[99] The applicants say they have acted promptly to challenge the decisions. Mr Frost says he was unaware consent had been granted on a non-notified basis on 10 December 2018. He only became aware of it when construction started in mid-September 2020, pre-fabricated concrete wall panels were installed, and he reviewed the Council's consenting records for the site. In late October 2020, he obtained legal advice that satisfied him he and his neighbours could reasonably have expected to be notified of the Clarkes' resource consent application. His lawyers were instructed to write to the Clarkes asking them to cease construction so that "a resolution might be found before matters progressed too far" and they did so in a letter dated 10 November 2020.

[100] On 10 December 2020, Mr Frost's lawyers wrote to the Council and the Clarkes' lawyers identifying the errors they considered were made in processing the Clarkes' application. While construction paused over the Christmas break, it commenced again in January 2021. Mr Frost says:

> I have, along with the other two applicants in this proceeding, moved as quickly as I possibly could to alert Mr and Mrs Clarke to our concerns when it became apparent what the scale of the building that they were proposing to build was. I asked Mr and Mrs Clarke to stop construction, but they have continued on despite knowing that we considered their resource consent to be flawed and that we proposed to ask that the High Court quash it.

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30 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]-[61].
31 At [66].

[101] The applicants point out that the respondents were on notice of the applicants challenge from at least 10 November 2020. By continuing construction, they accepted the financial risks associated with their choice.

[102] The applicants also point out they were under no obligation to seek interim relief. In *Murray v Whakatane District Council*, Tipping J approved the High Court's conclusions that there was no obligation on the plaintiffs to seek interim relief, noting that the affected party "made a commercial decision to carry on with the subdivision knowing that it was under challenge".[32] While the applicants accept the second respondents have spent almost $1,500,000 on construction, they say it is not clear how much of that was incurred after being put on notice of the challenge. In any event, the extent and nature of the Council's non-notification breach weighs in favour of granting relief.

[103] Mr Page points out that the applicants have not sat on their rights. They pro-actively engaged with the Council and the Clarkes as soon as they became aware of the decisions and they initiated this proceeding when it became apparent the matter could not be resolved. Nothing has occurred to displace the presumption that relief should be granted.

*Submissions for the Council*

[104] The Council does not specifically comment on the discretion to grant relief except to point out that since the consent was granted, a further resource consent was granted on 12 November 2019, authorising a boundary adjustment between the two land parcels that make up the subject site. New certificates of title have been issued in reliance on that resource consent. The consent notice was registered on the title to Lot 60 DP 27493. However, as the result of the implementation of the boundary adjustment consent and the issue of new certificates of title, Lot 60 DP 27493 no longer exists. Instead, the property at 28 Briar Bank Drive is now contained within Lot 2 DP 547764. The Council therefore queries whether there is any practical ability to reinstate the consent notice which applied to the title of Lot 60 DP 27493.

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[32] *Murray v Whakatane District Council* [1999] 3 NZLR 276 (CA) at [22].

*Submissions for the Clarkes*

[105] If grounds of review have been made out, the Clarkes submit this Court should exercise its discretion to decline relief. Mr Gresson points out the Clarkes are an innocent party who will be substantially prejudiced if the Court grants the relief sought by the applicants.

[106] The facts relied on to support this submission are set out in Mr Clarke's affidavit. He says when they received notice of the challenge to the consent in November 2020, approximately 33 per cent of construction had been completed and $1,365,000 spent. If the building had to be taken down, the cost which would be incurred would be over $2,000,000. In addition, he says his contractors had not taken on any new jobs on the basis they would dedicate their time to this project. If work was to cease, this would have a direct financial impact on them.

[107] Finally, the Clarkes obtained expert engineering advice in November 2020, which is before the Court, which says if the Clarkes ceased work in November, there would have been potential structural, financial and environmental impacts. The Clarkes say if any error is established, the gravity of it would be slight in comparison to the financial impact on them if the consent was set aside and the dwelling declared unlawful. They also point out the correspondence they received in November 2020 related to just two of the now five grounds under review. For the applicants to succeed in their submission that the Clarkes were on notice from that point, logically one or both of those grounds would need to be successful.

[108] The Clarkes also point out the circumstances here are very different from those in the cases relied on by the applicants. In *Ririnui v Landcorp Farming Ltd*, the purchaser of the farm was on notice of the potential challenge at the time it entered into the sale and purchase agreement and indeed the terms of the agreement recognised and provided for the risk of such a challenge.[33] In *Murray v Whakatane District Council*, the High Court found the owner "was not in a position to act upon the consent" until three months before the proceedings were filed and there was no

[33] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

suggestion it "altered its position in any way to its detriment" in that time.[34] In *Green v Auckland Council*, the financial cost to the landowner as a result of the relief was $187,000.[35] In *Beach Road Preservation Society Inc v Whangarei District Council*, building work had only just begun and the associated costs were only "in the thousands".[36] Mr Gresson points out that unlike those cases, the Clarkes had incurred significant costs before a challenge was received. He points to cases where the Court has declined relief where there has been real prejudice to the Council or the parties.[37]

[109] In conclusion, Mr Gresson submits that the applicants will suffer a degree of prejudice from not having been able to participate in the consent process. However, when that is measured against the significant impact on the Clarkes, a decision to decline relief should be made.

*Discussion*

[110] As I indicated to the parties during the hearing, both the Clarkes and the applicants have acted in good faith, and neither has done anything which would have a particular bearing on the exercise of the discretion. I consider the applicants have genuine concerns about the visual impact of the building and acted promptly once aware of what had been authorised by the resource consent. Equally, I do not consider there are grounds to criticise the Clarkes. They acted in good faith in relation to their application for resource consent and had expended approximately $1,300,000 by the time the Clarkes' concerns were raised. Significantly, the issues raised in the 10 November 2020 letter, were not the issues which were subsequently introduced in the litigation and where I have found there was an error.

[111] The Clarkes are well advanced in constructing the building, having now spent $1,500,000 on it, and there would be considerable detriment to them, both in cost and delay, if the Court were to grant the relief sought by the applicants and require the consent to be reconsidered. I do not accept that the lack of evidence on the overall

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34 *Murray v Whakatane District Council*, above n 32, at 321.
35 *Green v Auckland Council* [2013] NZHC 2364, (2013) 17 ELRNZ 737 at [147].
36 *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176 at [56].
37 *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at [71]; and *John Curtis Developments Ltd v Christchurch City Council* HC Christchurch CP45/01, 26 November 2001 at [25].

financial position of the Clarkes undermines their case. There are inevitable adverse effects flowing from the land use consent being quashed even if the consent is subsequently confirmed on the same or similar terms.

[112] A further consideration is that the primary effects raised are impacts on visual amenity. The house is visible from the applicants' properties, and that is obvious in the photographs produced in evidence, albeit that its visibility is amplified by the significant level of scaffolding erected around the building. Its visibility, and hence its impact on visual amenity, is dependent on the degree of vegetation screening that is required around the property. Had the consent notice requirement been adhered to, requiring vegetation screening to be planted and maintained to prevent the house being visible from the landward 50 metres of the lake's shoreline, it seems inevitable that the visual prominence of the building would be reduced from locations to the west and the north of the building, including the applicants' properties.

[113] In my view, in the particular circumstances of this case, most of the applicants' concerns can be addressed if I limit relief to setting aside the decision cancelling the consent notice. That can then be reconsidered, on the correct basis, which is that it is not the equivalent of site standard r 12.7.5.1(ii)(d).

[114] I do not consider the subsequent boundary adjustment is an impediment to the consent notice being reinstated, and its removal reconsidered. The boundary adjustment simply enlarged what was Lot 60 and reduced what was Lot 61. The obligation to maintain screening for the building on what was Lot 60, but now Lot 2, can still apply, notwithstanding the slight increase in area which has been achieved by the boundary adjustment.

[115] It may well be that the consent notice is cancelled, whether on a notified or non-notified basis, in light of the change of circumstances which has been created by the construction of the Clarkes' residence. However, in that process, consideration can be given to the extent that any alternative proposed (whether through variation of the land use consent condition or implementation of an alternative consent notice) achieves the objectives of the original consent notice condition.

[116] In any event, I reserve leave for the parties to return to the Court should any practical difficulties arise in implementing this aspect of the relief.

**Result**

[117] In respect of the decision to grant land use consent on a non-notified basis, I make the following declaration:

(a) The limited notification decision on the application for land use consent was made on the wrong legal basis, being that effects of vegetation removal were minor when the requisite statutory test was that the effects were less than minor.

(b) However, in the special circumstances of that case, I decline to grant relief as sought.

[118] In respect of the decision to cancel consent notice 982581.5 on Lot 60 DP 27493:

(a) the notification decision on the cancellation of consent notice 982581.5 on Lot 60 DP 27493 was made in error by assuming the consent notice condition and site standard 12.7.5.1(ii)(d) in the ODP were equivalent provisions;

(b) the notification and substantive decisions on the application to cancel consent notice 982581.5 are quashed;

(c) consent notice 982581.5 is reinstated on the record of title for 28 Briar Bank Drive, being Lot 2 DP 547764;

(d) I reserve leave for the parties to revert to the Court should practical issues arise in implementation of the above decisions.

**Costs**

[119] I have not heard from counsel on the issue of costs and I reserve the issue of costs.

[120] I record that the applicants have been successful, albeit not on issues that they raised in advance of the litigation with the Clarkes and counsel, and they have been partially successful in obtaining relief. My preliminary view is that they are entitled to costs on a 2B basis. If costs cannot be resolved by agreement, the following timetable will apply:

(a) any memoranda seeking costs is to be filed and served on or before 2 July 2021;

(b) any memorandum opposing costs is to be filed and served on or before 9 July 2021;

(c) any memorandum in reply is to be filed and served on or before 16 July 2021.

[121] Costs will be determined on the papers unless I request to hear from the parties.

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