ORIGINAL

Decision No. W 067 /2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **J V & C M CAMPBELL**

(RMA 853/03)

Appellants

AND **NAPIER CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)
Environment Commissioner R M Dunlop
Environment Commissioner W R Howie

HEARING at **Napier** on 3, 4 and 5 May 2005

APPEARANCES

J P Matthews and A McEwan for appellants
M B Lawson and H Kyle for respondent
J H Turnbull for T Claudatos (3 May 2005) and subsequently Mr Claudatos for himself

INTERIM DECISION

Introduction

[1] This was an appeal by Mr and Mrs Campbell against a decision of the respondent refusing resource consent to subdivide their 2.3821 ha property at 37 Jervois Road, into 6 lots. The property adjoins the longstanding township of JervoisTown, and is under consideration by the respondent, in a way we shall describe, for urban zoning in the future.

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[2] The status of the activity being agreed as non-complying under the transitional district plan and restricted discretionary under the proposed district plan, the appellants set out to prove service capability, potential and cumulative adverse effects no more than minor, no unacceptable loss of versatile soils, proposal not contrary to the objectives and policies of the plans, and compliance with Part II of the Act.

[3] The respondent contended that adverse effects on the environment would be more than minor, difficulties with servicing for wastewater and stormwater, adverse effect on the low density rural settlement amenity of the JervoisTown area, lack of consistency with the objectives, policies and rules of both plans, and adverse roading issues.

[4] The appeal is of some age, and this is partly because considerable time has been spent in mediation. The last mediation session succeeded in narrowing the **issues** to the point where the parties agreed as follows:

(a) Stormwater to be disposed of to the Upper Pirimu Stream either in terms of the plan lodged with the application or by a new easement and pipe for this development only; subject to the upgrading of the existing pipe capacity to the satisfaction of the NCC Engineering Department.

Financial contributions for creation of the new lots to be based on urban infill as at the date of the application.

(b) A potable water supply must be provided to each lot in terms of the NCC Code of Practice.

(c) Other financial contributions to be in terms of NCC District Plan as at the time of application.

(d) That the wastewater from the proposed subdivision be treated and discharged on each individual lot in accordance with either Rule 37 of the Proposed Regional Plan (as amended by decisions in June 2001) or by way of resource consent.

(e) Issues for the Court therefore are confined to the issues raised in paras 5.2, 5.3, and 5.5 of the Reply to Appeal, and roading.

[5] We raised with the parties the question of whether resolution of the appeal should await the seeking of regional consents in relation to wastewater and stormwater. We were assured that the regional council had been represented at the mediation, and that no problems were foreseen in this regard by any of the parties.

[6] Despite the agreement about provision of services, the respondent called the evidence of its staff engineer Mr P W Scott. While purporting to focus on roading issues in his short evidence, Mr Scott extended his commentary to include mention of servicing problems for stormwater and sewage. We were surprised about this, but ultimately the whole of the evidence on these subjects confirmed the appropriateness, in our view, of the agreement reached by the parties concerning servicing, and also established for us that roading and road traffic safety were not going to be problems if consent was granted.

Applicable law – pre or post 2003 Amendment?

[7] We heard competing submissions from counsel as to whether the status of the proposal was governed by the transitional plan, or the proposed plan (in respect of which all relevant provisions are beyond challenge). They perceived differences of approach arising out of the application of s88A of the Act depending on whether the relevant wording was pre-Amendment or post-Amendment. They also perceived differences in assessment of jurisdictional "gateway" as between s105(2A) pre-Amendment, and s104D post-Amendment, if the status of the activity was held to be non-complying overall, deriving from the transitional plan.

[8] It is regrettable that difficulties of interpretation of s112 of the 2003 Amendment Act, are still consuming Court time. Nevertheless, counsel for the two principal parties insisted on addressing the Court on the two conflicting jurisprudential views of recent times, and sought to offer their own additional views.

[9] As to the current jurisprudential situation, we can do no better than quote from a recent decision of another division of the Court ***Munro v Christchurch City Council***[1], before then examining the gloss that counsel here sought to bring to the issue. In ***Munro***, Judge Bollard's division recorded the following in a circumstance

[1] Decision C71/2005 (Judge Bollard).

similar to the present, where an application had been brought well before 1 August 2003 (the operative date of the 2003 Amendment), and the appeal brought after that date:

> Under a line of this Court's decisions stemming from ***Omokoroa Ratepayers Association Inc v Western Bay of Plenty District Council*** (Decision A17/2004, 13 February 2004), the implication has been drawn that an appeal lodged after 1 August 2003 is to be determined under the RMA as amended. To interpret the position otherwise would effectively mean that s.112(2) is otiose. Subsection (1) recognises that persons with a right of appeal under the principal Act (in its unamended form) retain that right to bring an appeal. But in the light of the implication that emerges on reading subs.(1) and subs.(2) together, an appeal such as the present, while lodged in accordance with the ambit of opportunity available under the pre-amending legislation, is determinable following such lodgement under the legislation as amended.
>
> That implication can be said to be reinforced by the way s.112(5) is expressed. Here again, the subsection does not expressly refer to the position applicable to appeals lodged after 1 August 2003. The clear implication, however, is that where a notice of appeal has been lodged after that date, a person wishing to become a party to the appeal must qualify and apply in accordance with the new s 274 as introduced by the amending Act in substitution of the former ss.271A and 274.
>
> We do not overlook that conflict exists in the case law stemming from a contrary interpretative approach in ***New Zealand Nut Producers Ltd v Otago Regional Council*** (C99/04, 19 July, 2004). Respectful though we are of the views there stated, we adopt the reasoning advanced in the ***Omokoroa Ratepayers*** case, supported by other decisions that have followed that case, including ***North Canterbury Estates Ltd v Waimakariri District Council*** (C26/04, 18 March 2004), ***Environmental Defence Society v Far North District Council*** (A112/04, 25 August 2004), and ***Carter Holt Harvey Ltd and ors v Bay of Plenty Regional Council*** (A160/04, 16 December 2004).

[10] Counsel for the appellants essentially supported the reasoning in the decisions underpinning the Court's decision in ***Munro***. Mr Lawson, for the respondent, however, supported the reasoning of another division of the Court in ***NZ Nut Producers Limited*** to the effect that a pre-August 2003 application and its subsequent post 1 August 2003 appeal would be determined under the Act pre-2003 Amendment. Mr Lawson went on to offer an argument that he considered had not been put in the decided cases, deriving from the provisions of s290 RMA, which provides as follows:

> 290. Powers of Court in Regard to Appeals and Inquiries
>
> (1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or of which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.

(2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.

(3) The Environment Court may recommend the confirmation, amendment, or cancellation of a decision to which an inquiry relates.

(4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or Regulation.

Mr Lawson submitted that it would be contrary to s290(1) for the Environment Court to have a different power, duty or discretion from those of the council.

[11] We do not think that s290 assists the view espoused by Mr Lawson. Subsection (4) expressly records that nothing in the section affects any specific power or duty the Court has under legislation. We consider that the correct interpretation of the **duty** of the Court set out in s112 of the Amendment Act, is to apply the amended Act to determination of the appeal. The apparent general obligations of the Court under subsection (1) and (2) of s290 are overlain by the particular duties concerning determination of appeals lodged post-Amendment, described in s112 of the Amendment.

Status of the proposal

[12] As already noted, it was agreed that the proposal is effectively a non-complying activity under the transitional plan and a restricted discretionary activity under the proposed plan.

[13] On this subject Mr Lawson submitted on behalf of the respondent that if we were to hold against his argument that ***NZ Nut Producers*** correctly stated the law, then we would employ the provisions of s88A, post-2003 Amendment. That section provides:

88A Description of type of activity to remain the same

(1) Subsection (1A) applies if-

(a) an application for a resource consent has been made under s88; and

(b) the type of activity (being controlled, restricted, discretionary, or non-complying) for which the application was made under s88, or for which the activity is treated under s77C, is altered after the application was first lodged as a result of-

(i) a proposed plan being notified; or

(ii) a decision being made under clause 10(3) of Schedule 1; or

(iii) otherwise.

(1A) The application continues to be processed, considered, and decided as an application for the type of activity that it was for, or was treated as being for, at the time the application was first lodged.

(2) Notwithstanding subsection (1), any plan or proposed plan which exists when the application is considered must be had regard to in accordance with s104(1)(b).

(3) This section applies subject to s150D.

[14] This, Mr Lawson submitted, "puts the question of status beyond doubt", because by subsection (1A) the proposal must be judged as an application for non-complying activity consent. Mr Lawson went on however to refer to the apparently conflicting provisions of s19 of the Act, which effectively provides that **rules** in a proposed plan will have operative effect as soon as they are beyond challenge from submissions or appeals. Section 19 provides as follows:

19. **Certain rules in proposed plans to be operative**-(1) A rule in a proposed plan is to be treated as if it is operative and any previous rule is inoperative if the time for making submissions or lodging appeals on the rule has expired and-

(a) no submissions in opposition have been made or appeals have been lodged; or

(b) all submissions in opposition and appeals have been determined; or

(c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.

(2) Every reference in this Act or in regulations to a plan or an operative plan is to be treated as including a rule in a proposed plan that is operative in accordance with subsection (1).

[15] Mr Lawson raised s19 in order to make the point that if we were to be judging the application against the Act as amended in 2003, s104D provided in respect of the gateway concerning objectives and policies of district plans, that the proposal not be contrary to **all** of them. In contrast, he said, s19 gave only **rules** an operative effect.

[16] In contrast, Mr Matthews for the appellants submitted that *"it would be nonsense for the rules in the plan to be operative without the objectives and policies in which those rules are based being also operative"*. Nevertheless, the plain wording of s19 is that it applies only to rules, so we are bound to hold that the gateway test in s104D requires us to consider objectives and policies of a transitional plan, even if the rules they support have been overtaken by operation of s19.

[17] So far as concerns the apparent tension between s88A and s19 (both post-2003 Amendment), we hold that s88A(1A) is impliedly subject to s19 in the sense that the former proceeds upon an assumption that any rules setting the status of an activity have not yet been overtaken by new rules attaining operative effect and replacing them. Here, that situation has come about, and the transitional rule establishing non-complying activity for the proposal has been overtaken by the proposed plan rule becoming of operative effect and according restricted discretionary status.

[18] We note that the difficulties created by ambiguities in s88A (pre-2003 Amendment) were addressed in a careful and scholarly way by the Court in ***Canterbury Regional Council v Christchurch City Council***[2]. The changes made by Parliament to the section in 2003 not being material in our view for present purposes, the declaration then made by the Court remains apposite[3]:

> (1) That after submissions and references on provisions of the proposed plan relevant to an application for resource consent have been decided and those provisions are beyond challenge, then on any application for a resource consent lodged and processed before those provisions became beyond challenge, the consent authority (or on appeal, the Environment Court) when considering matters under sections 104 and 105 of the Act must:
>
> (a) Prior to the proposed plan becoming operative by public notification under clause 20, have regard to the proposed plan as amended by decisions on submissions or references; or
>
> (b) After the plan becomes operative, have regard to the newly operative plan-
>
> Both as to classification of the type of activity and as to the merits of granting or refusing resource consent.

[2] Decision C25/2001 followed by Decision C78/2001 (reported at (2001) 7 ELRNZ 113).
[3] At para [6] of C78/2001

(2) That, the consent authority or Environment Court must not apply the classification(s) of the activity under the transitional plan or proposed plan as at the date of application because they are irrelevant (unless they have not been altered).

Those declarations were recorded after lengthy consideration of such principles of interpretation as avoidance of retrospectivity, and use of extraneous material to aid interpretation (such as Hansard).

[19] Counsel were agreed about one thing, namely that very little weight should be accorded to the provisions of the transitional plan. Although they did not say so, we apprehend that the submission and their agreement related to the analysis required under s104.

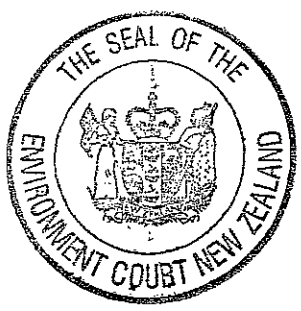
[20] Our summary of the position regarding these none-too-easy statutory provisions is that:

- the proposal is to be tested against the provisions of the 2003 Amendment Act;

- s88A(1A) makes sense and operates in relation to **rules** in previous district plans that have not yet ceased to have operative effect by reason of s19; the corollary is that subsection (1A) will cease to set the status of a proposal once replacement rules have attained operative effect by reason of s19 or at the very least are beyond challenge;

- s104D requires that the proposal, when viewed against the "district plan" gateway be not contrary to the provisions of the **objectives and policies** of all extant district plans, whether or not the **rules** that are supported by those objectives and policies have ceased to have operative effect;

- this proposal must be regarded as a **restricted discretionary activity**, because that is its status pursuant to the rules now deemed operative.



Effects on the environment

Infrastructure

[21] In paragraph [4] of this decision we set out an agreement reached between the parties after extensive mediation. Stormwater, wastewater, and potable water issues were said to have been settled. Financial contributions relating to other matters, in terms of the district plan, were agreed to be available.

[22] In paragraph [6] we described the unusual tack taken by the respondent in calling a staff engineer to express concerns about matters of infrastructure as well as the roading issues. Nothing arose out of the written or oral evidence from Mr Scott that left us with any cause for concern at all about effects on the environment of this sort. Stormwater matters, it seemed, on Mr Scott's evidence under cross-examination, arose out of the need for provision of footpaths. That is a separate matter that we shall address under "effects on roading".

[23] In some rather unsatisfactory way Mr Scott seemed to be expressing a concern on behalf of the council about the long-term planning that it would need to do for infrastructure in this rural settlement. Those are matters for the council to consider over time under separate legislation. So far as concerns this case, Mr Scott raised no matters that would cause us to consider that there would be infrastructure effects on the environment from this proposal, whether potential or cumulative, that would be anything other than minuscule. The evidence in its totality, supported in any event by the sensible agreement reached between the parties, was to the effect that the new lots created by the appellant could be serviced in the same way that existing lots within the Jervois Town settlement have been self servicing for over a hundred years. We heard no evidence to cause us to think that there had been any health problems, water shortages, or anything else.

Effects on roading

[24] In his two-page statement of evidence, Mr Scott, who holds a NZ Certificate of Engineering (Civil), but is not a specialist traffic engineer, asserted that additional residential use in the area would place pressure on roads which are not designed or intended to take additional traffic or cater for additional pedestrian use. Under cross-examination, this boiled down to a concern about additional pedestrian use.

[25] Mr Scott (and indeed no one else on behalf of the council) had taken any traffic counts on the semi-urban unkerbed streets with their attractive mown grass berms. No evidence was given of safety concern having arisen, and our own inspection of the area after schools had finished for the day, gave us a level of comfort in the evidence of the appellant's witnesses, not controverted by Mr Scott or any other council witness, that the existing configuration is entirely satisfactory and this position would not be altered by the proposal.

[26] Indeed, a neighbour Mr T M Claudatos, a party opposing grant of consent, gave answers in cross-examination that confirmed these views. Mr Claudatos's wife conducts a beauty therapy business on their adjoining lifestyle block, and it is clear that there are a number of traffic movements to and from their property on Thursday, Friday and Saturday afternoons, with no evidence of problems occurring. Indeed, the evidence of the appellant Mr Campbell about a former roadside fruit selling operation, tended to indicate that traffic movements on his street, Jervois Road, had been considerably greater during that time than they would be if the subdivision proceeded, again without anyone having reported safety issues of any kind. We feel no surprise about that.

[27] There were a number of aspects of Mr Scott's evidence that we found unsatisfactory, not the least of which included that there had been no traffic counts or other studies to support his assertions, his lack of familiarity with detailed provisions of the district plan that we would have expected from him to know when making his assertions, and his unsubstantiated view that the adding of a few more pedestrians onto these streets would somehow create a need for footpaths in Jervois Town. Even more unusual was Mr Scott's suggestion that the "pedestrian issue" was something that would create a need for full development of the road, because, he asserted, "roadside drains would have to be piped and in order to do that the road crown would have to be lowered, at which point economics would dictate that a full residential standard of roading would have to be developed".

Amenity effects

[28] No issue about any outstanding landscape emerged, whether on account of the provisions of the district plan or otherwise.

[29] Bearing in mind that the subject property is "tucked into" the existing minor settlement of Jervois Town, we listened with interest to evidence about amenity, that being a notable plank of opposition from the respondent. It was clear from the evidence of Mr M P Holder, a planning consultant called by the appellant, that residential densities in Jervois Town vary, with lot sizes tending to be in a band from 1000m^2 to 5000m^2.

[30] Mr Holder gave evidence that each of the proposed lots would be larger than the minimum site area required by that plan for the Rural Settlement zone (1500m^2 site area). (The appellant is proposing one lot of 1.0590 hectares, and 5 lots each of 2645m$^{2)}$. Mr Claudatos' lot immediately to the west of the appellant, is a relatively small lifestyle block described by Mr Claudatos as being of 5 acres.

[31] There is quite some history to the origins of Jervois Town. It was established about 100 years ago, essentially as an area to house agricultural and horticultural workers. Mr Holder described the scene more than adequately when he said:

> Jervois Town's amenity values are characterised by wide open drains, relatively narrow sealed roads, wide grass berms, established housing, and a mixture of small rural land holdings.

[32] He was of the opinion that any new dwellings would create visual effects that would be no more than minor, that is they would fit into the "scene" as we have called it. Mr Holder brought a "permitted baseline" aspect into this analysis, and while not compulsory for us to take account of it, especially on a restricted discretionary activity application, we found his evidence helpful. It appeared that permitted activities could include commercial forestry; rural processing activities (industrial activities processing agricultural, horticultural or viticultural produce) in buildings of up to 2500m^2 in total gross floor area or 10% of net site area whichever is the lesser; a landfill processing up to 100m^3 of fill in any 12 month period; travellers' accommodation for up to 5 persons (excluding staff); educational facilities; and residential care and day care facilities. We consider none of these to be fanciful in Jervois Town situation, except perhaps commercial forestry and small landfills. The effects from such activities would in our view have a far greater impact on the amenity of the locality, than the appellant's subdivision and its attendant buildings.

[33] The proposal would fit well into the rural village atmosphere.

[34] There would be no reverse sensitivity effects from establishment of the subdivision and its associated housing. (In contrast, horticultural activities, to which the respondent asserted the land was better suited, could well do so. We shall discuss that issue in more detail when we deal with the district plan provisions).

[35] As to effect on amenity from a few more cars being attracted to the immediate neighbourhood, the evidence under cross-examination of Mr Claudatos was interesting. He said that the impact of the additional traffic movements to his wife's beauty therapy business had only changed the rural feeling of Jervois Town *"perhaps ever so slightly"*.

Protection of productive and versatile soil resources

[36] This is substantially a matter driven by the district plan, but as with so many district plan provisions, it is also concerned with effects on the environment. We will address it here, because a significant part of the evidence called on behalf of each of the main parties, focussed on this issue.

[37] Mr Campbell gave evidence about previously having conducted flower growing and orcharding (plums) on the land, and gate sales of the latter. Each, he said, had become uneconomic because of vagaries of the respective markets, and the small size of the land.

[38] The appellant called Mr W J W Wilton, an experienced horticultural consultant, who essentially confirmed that Mr Campbell's feelings about the economics of rural use of the land, were reasonably held. He said that after deducting land area covered by buildings, shelterbelts and accessways, there would be only about 1.6 hectares of cropable area. He described the soil as "Heretaunga Silt Loam on Sandy Loam", from the local soils map, having less than 30cm of silt loam over sandy loam with imperfect drainage and water table as high as 30-60cm after wet periods. He also described the soils as slightly saline, which still have adverse effects on intensive protected cropping, and build up of soluble salts from intensive fertiliser use. On a scale of 1:6 versatility classification from a 1996 report prepared for Napier City Council (1 being the classification of least limitations and 6 being very limited), the present soils were class 4. Mr Wilton said that there were more valuable and versatile soils elsewhere on the Heretaunga Plains. He also said that the small size of the property was a severe limitation, noting by comparison some sensible guidelines from the transitional district plan indicating the sizes of

viable economic units for market gardening and orchards as 8 hectares, vineyards 10 hectares, process cropping 30 hectares, and dairy and pastoral farming 40 hectares. Mr Wilton indicated that factory farming could be conducted, involving such activities as mushrooms or chicken farming, however the close proximity of residential housing would rule those out.

[39] The respondent called Mr R S Mills, a horticultural management consultant with experience as an orchard manager. He endeavoured to persuade us that the property could be used productively, particularly if it had some drainage carried out. He suggested the establishment of process crops such as corn, peas and other cannery crops, a standalone or a run-off orchard, and in particular suggested a boysenberry operation. Information that he had been given by a cannery production company suggested that there was a shortage of boysenberry crops, and that there would be a demand.

[40] Each of these witnesses was extensively cross-examined. Improvement of the land through drainage so as to increase its versatility rating, was the subject of some focus. This would apparently have particular benefit for a glass house operation, and we agree that that would theoretically be possible. However, after listening to quite considerable evidence on the subject, we believe that we must take note of the small size of the property, and the relatively high costs of carrying out drainage and doing things like building glasshouses. While this might increase the versatility of the **soil**, it fails to take account of the point that the soil has to be used for something worthwhile and sustainable. We accept from the moderately detailed evidence on the point that the economics would be likely to be quite questionable.

[41] Of more importance, is that there is urban development on three of the four sides of the property, and any intensive cropping or similar activity is likely to create problems of spray drift, noise from bird scaring devices, and the like. The suggestion by the respondent that to let the land go for residential activity would simply be to shift the problem sideways, ignores the fact that the new interface would involve only one property boundary, not three, and be only $^1/_3$ or ½ as extensive as the present interface.

[42] As regards the returns available from horticulture conducted on soils of average to better than average versatility, the evidence indicated wild seasonal fluctuations. The sorts of figures offered (which we need not dwell on in detail) indicated potential returns in good years of considerably less than an average or even

minimum liveable wage. This does not of itself answer the question of whether there are versatile soils here worth protecting, but it does indicate that the property is already reduced to a size, where the usefulness of even versatile soil has been marginalised.

[43] There were a number of other more minor skirmishes on this issue, including the cost of removing the existing internal shelterbelts that cause excessive shading (not a high cost), and whether or not there would be adequate labour available for seasonal picking and the like (questionable in some years, but certainly not a factor supporting an abandonment of rural activity on the land).

[44] Overall, our assessment on this issue is that effects will be no more than minor, and reverse sensitivity problems of intensive horticultural use of a property surrounded by urban development on three sides, militate against the taking of steps to ensure that the property continues to be available for rural activities.

The provisions of the district plans

[45] Mr Holder, and the respondent's planning manager Mr A L B Thompson, both gave detailed evidence.

[46] We have already covered the issue of rules governing the status of the proposed activity.

[47] It was common ground that the status of the proposed activity is restricted discretionary, although reading the extensive list of matters to which the council says it has "restricted" its discretion, one is left wondering exactly what is meant by the term "restricted"!

[48] Both witnesses referred us to the following objective and policies from the transitional district plan:

> Objective 5.2
>
> To ensure that the most fertile land of the County will be available for primary production and to encourage intensive farming and horticultural usage by every available means.
>
> Policy 5.3.2
>
> 'To encourage the best use of the resource by permitting as of right only the most intensive farming and horticultural uses.

Policy 5.3. and 4

To ensure that dwelling houses and other accessory buildings are erected only where they are essential to the proper management of the property.

Policy 5.3.6

To encourage the productive use of non-conforming (small) lots for intensive farming or horticultural uses or for residential and/or storage purposes by rural workers or contractors.

[49] Mr Thompson considered that the proposal was contrary to that objective and its policies. At first reading of them, that appears to be so, but we are troubled about the rather extravagant phrase in the objective: *"by every available means"*, because by implication it seems to suggest a requirement for people to do things that might be unsustainable. That would fly in the face of Part II of the Act. We have also indicated that the statements of the sort found in these provisions are unrealistic in respect of the subject land, so while the proposal is contrary to them on their faces, that is not regarded by us to a matter of importance when we come to weigh the many factors that we have to in this case. In any event the provisions come from the transitional plan (Hawkes Bay County Section) and were proposed under the repealed Town and Country Planning Act 1977.

The proposed district plan

[50] The provisions of the proposed district plan that the witnesses said were relevant for our consideration, are quite extensive. We have considered them in detail, but will simply summarise them here.

[51] The objectives and policies relate to protection, maintenance, enhancement, encouragement, and enablement (variously) of such things as outstanding natural features, significant landscapes, productive and versatile soil resources, character and amenity values of the rural environment, capacity of infrastructure, and restriction of residential development.

[52] Also in summary, because we have dealt with the issues extensively under the heading "effects on the environment", we find that the proposal is not contrary to the objectives and policies. This includes the objective about ensuring that the cumulative adverse effects of subdivision, use and development of land on rural resources are recognised, and avoided, remedied or mitigated, because we have

addressed effects on both a potential and a cumulative basis, and also dealt with rural resources on a broader basis than just soils.

[53] We are driven to comment on a rather unusual *"anticipated environmental result"*, which reads as follows:

> (3.) To maintain a level of amenity in the rural environment that is consistent with the expectations of residents in Napier City, as measured by a "satisfaction" survey completed every 5 years.

That provision cannot be valid, because it anticipates, at least by implication, new provisions (results of surveyed expectations) being included in the district plan without following the formalities of the First Schedule to the Act.

[54] We have already commented that the assessment criteria for restricted discretionary activities relating to subdivision in the main rural zone of the PDP, are extensive. Again, we describe them here in summary form. They are, from clause 39.3(3) of the district plan, criteria (a), (b), (c), (d), (i), (k), (o), (p), (q) (u), (v), and (aa). Consideration of alternative sites, locations or zones seems to us to be of limited relevance in relation to a fixed activity like subdivision of a given piece of land, and also seems to suffer from the criticism that it purports to elevate what is usually a non-complying activity consideration, to one concerning (restricted) discretionary activities.

[55] As to whether the "land use" would contribute to the efficient use and/or development of natural and physical resources within the City, we have effectively dealt with the issue and found no difficulty, in relation to rural, visual, infrastructural, and roading resources. The same may be said of assessment of "positive effects to the surrounding environment and wider community", and "enhancement of amenity values", which in any event are somewhat vague. We have found that the proposal will be compatible with surrounding land uses, and will not have an effect on the outstanding natural features, significant landscapes, rural character and local amenity. The proposal likewise passes criteria concerning volumes and safety of traffic and people, efficient circulation of vehicles, the volume of congestion, disposal of waste and effluent, avoidance of adverse effects on infrastructural services, and avoidance of adverse cumulative effects on the surrounding area. The proposal is either neutral or may not contribute to social and economic wellbeing of the community including for the purposes of diversifying land uses complementing primary production such as agricultural, horticultural and/or viticultural activities. If it registers against that criterion in a slightly negative

way, that would not be such as would result in our view in consent being refused to the proposal.

Napier urban growth strategies

[56] In 1992 and 1999, the respondent published urban growth strategy documents in consultation with the community, in which the Jervois Town area was identified as an area of potential urban consolidation but which should remain subject to the status quo in the short term because of "servicing issues".

[57] We can place little weight on these documents for two reasons. First, they cannot be a substitute for statutory documents produced under the processes of Schedule 1 of the Act by which the public are entitled to comment through formal processes of submission and appeal. We make reference to the recent decision of the Environment Court in ***Infinity Group Limited v Queenstown Lakes District Council***[4], in particular paragraphs [80] to [87] of that decision where for detailed reasons recorded (with which we agree) the Court considered that the results of an informal process, something called the Wanaka 2020 Workshop, should have little weight placed upon them. Secondly, matters of infrastructure are agreed between the parties not to be an impediment to consent on this standalone proposal.

Precedent

[58] Counsel for the respondent, and Mr Thompson, advised that in their view there were a number of other properties in the area which would be "indistinguishable from the applicant's property and which would be difficult to decline consent if the present proposal were consented to".

[59] We struggle with the introduction of the concept of precedent to cases involving applications for (restricted) discretionary activity consents. That concept, together with other concepts that are occasionally described as related, namely integrity of planning instruments, coherence, and public confidence in the administration of plans, have caused enough difficulty in relation to non-complying activity applications. It is salutary to quote from a recent decision of the High Court ***Rodney District Council v Gould***[5]:

[4] Decision No. C10/2005.
[5] (2005) 11 ELRNZ 165, at para 99.

> The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s104(1)(d) or s105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the Statutes strongly suggests that their application in any given case is not mandatory.

[60] The issue of whether the concept of precedent has relevance in connection with discretionary activities, has arisen occasionally in past cases. The most recent discussion of that we are aware of is in the decision of the Environment Court ***Scurr v Queenstown Lakes District Council***[6]. There, the Court was concerned about potential development pressures in the iconic Cardrona Valley near Wanaka. The case concerned a small residential development and subdivision proposal. The Court discussed certain findings of the Court of Appeal and the High Court, which it is also relevant for us to record. The Court of Appeal in ***Dye v Auckland Regional Council***[7] said:

> The precedent effect of granting resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s105(2A)(b) and s104(1)(d).

The Environment Court in ***Scurr*** recorded its understanding of the law concerning precedent in non-complying situations, that lack of evident unusual quality in an activity receiving consent risks impact on the present state of a district plan.

[61] More expressly concerning the issue in relation to discretionary activities, the Court cited decisions of the High Court and the Court of Appeal in ***Manos v Waitakere City Council***[8]. In the High Court, Blanchard J said:

> ...the consent authority is in terms of s104(4) required to have regard to the rules, policies and objectives of district and regional plans and is fully entitled to consider the precedent effect of granting an application for a discretionary activity when doing so.

The Court of Appeal, by way of obiter, held that statement to be correct when refusing leave to appeal to that Court.

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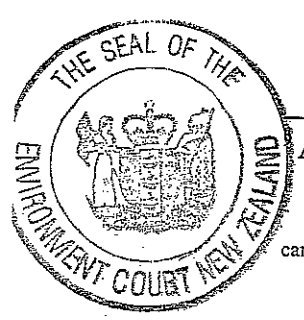
[6] Decision No C60/2005 (Judge McElrea's division).
[7] [2002] 1 NZLR 337 at para [49].
[8] [1994] NZRMA 353 at 356 (HC); [1996] NZRMA 145 at 148, per Gault J (CA).

[62] The Court in ***Scurr*** records[9] that a grant of consent to a discretionary activity as a precedent in the sense of creating an expectation that a like application will be treated in a like manner, may not be as important as in the case of a non-complying activity, because most district plans assume that a discretionary activity will be acceptable on a variety of sites within a zone, and each must be assessed on a case by case basis. The Court proceeded to analyse certain provisions of the district plan there relevant, in particular a provision recording that discretionary activity status had been applied to certain activities *"because in or on outstanding landscapes or features the relevant activities are inappropriate in almost all locations...."* and *"in visual amenity landscapes the relevant activities are inappropriate in many locations...."*. The Court recorded its view that such explanation worked against any assumption that the plan envisaged that discretionary activities will occur on most sites in either type of landscape – an assumption that would leave little room for precedent arguments.

[63] Our own considered view of the statement of the High Court in ***Manos*** and the statements of this Court in ***Scurr***, is that we generally do not disagree with them, but we think it appropriate to record our own understanding of what Blanchard J was saying. We consider that the answer is that essentially it is all about having due regard to any relevant provisions of a plan or a proposed plan pursuant to s104(1)(b)(iv). Therefore, it is probably not now good law as it was under previous legislation, that discretionary activity is "presumed to be appropriate in a zone subject to being approved for a particular site". Instead, it is about what the objectives, policies, and other relevant provisions of the district plan provide. In the ***Scurr*** case, the relevant provisions of the district plan made it clear that particular kinds of activities were inappropriate in almost all locations, so it could be said that something approaching the treatment of precedent in non-complying activity cases, might be at play.

[64] An examination of the relevant provisions of the district plans in the present case, reveals a rather different picture. The closest that any of them appear to us to come to raising the issue of precedent, is assessment criterion (a) in clause 39.3(3), previously mentioned, which we record in full here:

> (a) Whether the land use will contribute to the efficient use and/or development of natural and physical resources within the City and whether any alternative sites, locations or zones have been considered.



[9] At para [43].

The last few words concerning alternatives are the ones we identify in this connection. However, we consider that they do no more than faintly raise the issue of precedent, a quite different situation from that found in ***Scurr.*** The situation might have been similar to ***Scurr*** if something more might have been required to be described by an applicant, for instance, that alternative sites, locations or zones were **available**, but that is not the approach taken by the provision.

[65] Our finding is that "precedent" or "district plan integrity" or "consistent administration of the district plans" are not raised by the relevant provisions of the district plans.

Decision

[66] We have decided that consent should be granted, subject to suitable conditions being imposed. Mr Matthews provided us with a draft towards the end of the hearing, and some comment is called for on aspects of the draft.

[67] The conditions agree that mediation are largely appropriate. The first of them should be slightly amended to make it clear that it relates to stormwater, to avoid possible ambiguity with condition (c).

[68] We comment in turn on various parts of the draft conditions, and make some other comments:

Number 1: We doubt that a "no complaints' covenant is appropriate. The provisions of the Act and the district plans should simply be relied upon.

Number 2: We do not think it appropriate to limit future owners in this way. If a future district plan allow further subdivision, why should that be denied? People should then be able to bring an application, and there should be no pre-emption of that right.

Number 3: Again, we do not think it appropriate to limit the consent in the manner suggested.

Further suggestions

(a) The matter covered by paragraph 4(c) of this decision above, should be addressed if it needs to be.

(b) There should be provision for screen planting on the applicant's land along the Claudatos boundary to the satisfaction of the appropriate council officer.

[69] The issue of costs is reserved. If any application is to be made, it must be filed and served within 15 working days of the date of this decision.

DATED at **AUCKLAND** this 8th day of August 2005.

For the Court:

L J Newhook
Environment Judge