

RESOURCE CONSENTS HEARINGS PANEL

MINUTES: of a meeting of the Resource Consents Hearings Panel which commenced at 2.00 p.m. in the Council Chamber, Centreway Road, Orewa on Tuesday, 11 August 2009.

PRESENT:

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| Chair | Les Simmons |
| Crs | John Kirikiri |
| | Grahame Powell |

IN ATTENDANCE:

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| Reporting Planner | Anne Hessell |
| Sally Carnachan | Associate, Simpson Grierson |
| Manager: Resource Consents | Ian Dobson |
| Democracy Services Officer | Raewyn Morrison |

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538/08/09 APOLOGIES**AGENDA ITEM NO. 1**

There were no apologies.

539/08/09 SECTION 93 AND 94 DETERMINATION

TO UNDERTAKE A SUBDIVISION WITH THE EXISTING SITE, LOT 9 D.P 92986, TO CREATE A BALANCE SITE OF 19.9879 HA (PROPOSED LOT 2) AND ONE NEW RURAL RESIDENTIAL SITE (PROPOSED LOT 1) OF 1.10 HA, BY UNDERTAKING THE FOLLOWING:

- 1. PROTECTING 2.53 HA OF YOUNG SHRUBLAND (SHOWN AS AREAS A, B AND C ON THE SCHEME PLAN) WHICH INCLUDES THE PROTECTION OF A COLONY OF PLANT (*POMADERRIS HAMILTONII*) LISTED AS 'SPARSE' BY THE AUCKLAND BOTANICAL SOCIETY AND THE HABITAT OF A NATIVE CENTIPEDE.**
- 2. RETIRING A 4,900 M² AREA OF THE SITE (SHOWN AS AREAS D & E ON THE SCHEME PLAN)**

Address: 271 Takatu Road, Omaha Flats

APPLICANTS: JUTLAND TRUST

FILE REF R 54547

WARD Northern

AGENDA ITEM NO. 2

Section 93/94 Determination. The purpose of the meeting was for the Panel to determine whether the application should be notified, limited notified or non notified.

2.00 p.m. The Chairperson opened the meeting and outlined the meeting procedure.

The applicants, Stephen Smythe and Claire Smythe and the applicants' representatives, Kitt Littlejohn (Counsel) and Karen Pegrume (Ecologist), present.

The Chairperson advised that the Panel had undertaken a site visit earlier in the day.

The Chairperson invited Mr Littlejohn to read his written submission.

Mr Littlejohn said that the decision to be made was whether the application should not be notified or served on any person. The status of the application was irrelevant to the notification and service decisions.

He noted that the singular reason why notification was recommended (under section 93(1)(b), 94(1) and (now) 94C(2) (special circumstances) was Ms Hessel's contention that the application did not provide sufficient ecological mitigation because it did not meet the District Plan expectations for bush quality and consequently an adverse effect on rural character and amenity would arise.

Mr Littlejohn said that the real issue was "why did the Council staff still want to disqualify the bush?" The real issue concerned the eligibility of the 2.53ha area of bush proposed for protection in terms of the bush-lot subdivision rules. The guidelines for assessment of bush in the District Plan did not specify a minimum "age of eligibility" for regenerating native bush. Under the guidelines relatively young stands of bush could achieve eligibility for subdivision.

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Mr Littlejohn said that Council staff did not approve of such an outcome from the application of their rules. Rather than recommend that the Plan be varied though, the officers had gone to quite extraordinary lengths to interpret the District Plan so as to give a basis for their disapproval and require the application to be notified (as if that process would somehow resolve the issue in their favour). He believed the Council staff interpretation ignored the clear wording of the District Plan and he referred to Rule 7.14.3.2 and Appendix 7B. He also referred to the definition of Native Bush (in Rural Zones) in Chapter 3. Disqualification of this bush was achieved by over-riding the assessment process under Appendix 7B by relying on the definition. Mr Littlejohn submitted that that interpretation was wrong. He said it was also contrary to the clear policy direction in the Plan as to the district wide natural character and biodiversity benefits to be achieved by the application of the bush lot subdivision rule.

In summary, Mr Littlejohn said that:

- The only assessment of the bush that had not been improperly influenced by a misinterpretation of the District Plan was that undertaken by Ms Pegrume.
- The bush was clearly eligible for protection under the bush lot subdivision rule and should be processed as provided for by the Plan (i.e. without notice).
- As such there would be no adverse effect on the environment of approving the application, no person adversely affected, nor any special circumstance to warrant notification.

In response to questions, Mr Littlejohn said that currently there was nothing to stop the bush on the property from being cleared; if it was considered the bush should be protected it must therefore meet the definition.

In regard to special circumstances, Mr Littlejohn said that what constituted special circumstances was not definitely defined; this occurred at notification stage. He noted two relevant cases of case law: *Murray vs Whakatane District Council* and *North Holdings vs Rodney District Council*. However, he believed there was no clear case law on what constituted special circumstance or not.

Ms Pegrume said that if there were concerns about the position of a house it was normally dealt with at the section 92 assessment stage; it was not unusual for house sites to move, and the applicant did look at two or three options. Ms Pegrume said that she had done approximately 100 bush and wetland assessments. When she had worked for the Council she had done peer reviews. In her opinion this application fell into the criteria of second stage scoring which she believed allowed those features to be considered. This bush had the ability to score 10 points on the second scale without doubt because of the species present and the expanding colony of *Pomaderris hamiltonii*. She noted that it was generally more likely to find rare plants in wetlands, such a swamp Maire. She was surprised by the stance of the Council and believed they had just used Appendix 7B as guidelines. What had changed was the diversion to the set of definitions which were out of the Oxford dictionary and various other publications and in this case had led to a different interpretation.

Mr Smythe said that his background was in architecture. In regard to possible house sites, several possibilities were considered. If there were concerns about visual impacts on the skyline the house could be located away from the ridgeline. When the site was first assessed by an engineer the first draft for the inground retaining wall had ended up in the bush. The inground retaining wall had been moved so it was no longer in the bush area and it was now up the slope. He anticipated earthworks to create a house site, but they were not essential; for instance there could be a pole platform type house, the slope was significant enough. He anticipated the house would be single level.

In regard to a question from the Panel as to who might be adversely affected by the proposal, Mr Littlejohn said that he would submit no-one would be adversely affected. It would come down to a matter of visibility of the building platform. Mr Littlejohn said that the applicant had thus far not sought written approvals.

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Council Officers:

Ms Hessell addressed the meeting. The following was noted:

Ms Hessell said that she stood by her report and her recommendation. She accepted the main issue was the eligibility of the area of bush. The issue was she felt that the natural area didn't meet the guidelines in the District Plan, this had nothing to do with the age of the bush, rather, she was not satisfied with the mitigation put forward. In regard to the definitions, Ms Hessell said that she stood by the opinions of Mr Goldsbury and Council's peer reviewer, Amy Bazeley.

Referring to special circumstances, Ms Hessell said that she hadn't come across an application where subdivision which was sought on protection of significant native bush and Council's peer reviewer had an issue; the real question was whether the bush actually did meet the definition. The application centred on protection of significant native bush and also a significant natural feature (the *Pomaderris hamiltonii*) which gave an unusual aspect to the application. Ms Hessell reiterated that at her time at the Council she had not come across a proposal comparable to this one with the concerns raised by the Council's peer reviewer.

In response to questions from the Panel in regard to who she thought might be affected by the proposal, Ms Hessell said if the application was notified the Council usually took a 360 degree view and would contact immediately adjoining properties and the property directly across the road. If the proposal was considered to meet the guidelines, in her opinion the only directly affected person would be the Council (who owned the adjoining land). She considered the proposal, situated in the General Rural zone, would have effects on rural character and amenity based on the lack of environmental mitigation.

Ms Carnachan said that she agreed with Mr Littlejohn in regard to what the tests were before the Panel.

Mr Littlejohn addressed the Panel:

Referring to Mr Goldsbury's opinion (Council's Chief Legal Officer) as stated in his letter at page 61 of the agenda, Mr Littlejohn said that what Mr Goldsbury didn't address was the proviso to the definition; it needed to be read as being subject to the definition having a proviso which says that if the 7B assessment is appropriate and acceptable, then that was the end of the matter.

With regard to the definition of tree removal, Mr Littlejohn said that the Proposed District Plan referred back to the definition of tree removal in Plan Change 55; the definition was not so clear in the Proposed District Plan. He considered that there were conflicts within conflicts in the documents.

Mr Littlejohn said that it didn't matter that there were two conflicting provisions as the Panel had the tools to resolve the conflict. Mr Littlejohn also said that he thought Ms Bazeley's definition was wrong and that it played no part in the section 7B process.

With regard to comments made by Ms Hessell about the unusual peer review and that the peer review was not in agreement with the applicant's proposal, Mr Littlejohn said that he thought there must have been many such cases. These were resolved by way of section 92; notification didn't resolve the issue. What would resolve this case would be a clear and concise interpretation in regard to the District Plan requirements. In this instance the two ecologists were "coming at it from different interpretations"; if there was a level playing field the issues of dispute would probably fall away.

In regard to a question from the Panel as to why the applicant did not proceed directly to notification, Mr Smythe replied that it was a costly and time consuming process. He said that he thought Ms Pegrume's bush assessment to be fair. Mr Smythe said that the land had formerly been covered in pines and gums and he had fenced and planted the area, about 5 years ago, at considerable costs. He noticed that more birds were now visiting the property. He didn't realise until recently how valued the *Pomaderris hamiltonii* (kumarahou) was.

Ms Hessell said that she did not think the vegetation would be protected because she accepted that it did not meet the definition of native bush.

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3.13 p.m. The Chairperson closed the meeting.

The Panel subsequently resolved:

Simmons/Powell

DECISION OF THE HEARINGS PANEL

PREAMBLE

This decision relates to the notification determination for an application to create an additional rural residential site on a rural property at 271 Takatu Road, Omaha Flats.

Hearing:

The Hearings Panel visited the site and the surrounding area prior to the hearing. At the hearing the Panel heard from Mr Kitt Littlejohn, the applicant's Barrister, who spoke to written submissions. The applicants, Mr and Mrs Smythe, together with their Ecologist, Karen Pegrume, were present and answered questions. After hearing the response from the reporting planner, Anne Hessell, and the Council's legal adviser, Sally Carnachan, Mr Littlejohn presented an oral reply.

In addition, the Panel had been provided with the agenda material which included reports dated 3 and 11 August prepared by Anne Hessell, seven attachments that included a peer review by Amy Bazeley dated 8 October 2008, correspondence from Mr Littlejohn dated 15 May and 20 July 2009, RDC Guidelines for the Field Assessment of Forest Quality in Rodney District, correspondence from the Council's Chief Legal Adviser dated 8 December 2008, correspondence from Rue Statham, the Council's Ecology Adviser dated 31 March and 20 May 2009 and a report dated 27 July 2009 from Ross Green, the Council's Development Engineer. The Panel had also been provided with a copy of the application as lodged with the Council date stamped as being received on 9 September 2008, together with the Bush Assessment prepared by Ms Pegrume in support of the application.

An aerial photograph of the site and the surrounding locality had also been provided from the Council's records.

Applicants request on notification

This application has been promoted by the applicant as one consistent with the subdivision rules in the two planning documents that enable additional sites to be created, where significant stands of native bush or significant natural features are protected. The applicant has assessed the proposal as being a restricted discretionary activity (under PDP2000 and a limited discretionary activity under the Operative District Plan).

The applicant has requested the application be processed in the normal manner the Council processes 'complying' bush lot applications on a non-notified basis.

Council's request on notification

The Council's reporting planner, supported by specialist reports, has determined that the proposal does not qualify as native bush and does not therefore have restricted/limited discretionary status. Instead the Council has assessed the application as being discretionary under the Operative District Plan and non-complying under PDP2000.

The reporting planners recommendation to the Hearings Panel was that application should be processed on a fully notified basis. The primary reason in support of full notification was given the "lack of adequate environmental mitigation" there would be a more than minor effect on rural character and amenity. In addition to this assessment under section 93 of the Act, special circumstances under section 94C of the Act were claimed to further warrant the full notification of the application. The special circumstances identified essentially related to the determination that the proposal does not qualify for an additional site to be created. The consequence of this, in the Council's opinion, is that a further site, including an additional dwelling on this site, is not contemplated by either District Plan.

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DETERMINATION**Written approvals provided**

Written approval had been obtained from the abutting landowner (Rodney District Council in relation to Lot 1 DP 134166) to the immediate north of the applicant's property. Pursuant to section 94A(3) any effects on the Council as owner of this land must be disregarded and we have therefore not taken into account any effects in relation to the Council as the adjoining landowner.

Section 93

The only adverse effect identified by the reporting planner that was of concern related to the effect on rural character and amenity values. In relation to the building site on the proposed additional lot it was Ms Hessel's opinion that it "will have a less than minor effect on the rural character and amenity values on the Takatu Road rural environment." She went on to state that "there is a reasonable level of rural-residential activity in the area, particularly on the northern side of Takatu Road. There are other lots in the locality that have building sites in reasonable proximity to the road as is proposed under this application."

It is noted that Takatu Road in this locality provides the zone boundary between the General Rural zone and the Tawharanui Special Character Activity Area under the Operative District Plan and the East Coast Rural zone under PDP2000. As Ms Hessel indicated on page 10 of her report these zonings are "more development sensitive" zones.

Her assessment that any adverse effects will be less than minor was qualified however. In her words, "Because the new rural-residential site under this proposal will be created without protecting significant native bush or a benefit commensurate with this, the proposal is considered to represent an adhoc subdivision that serves little worthwhile purpose in the rural zone and therefore on the basis of these circumstances, there is considered to be a more than minor effect on the rural character and amenity from the creation of the lot."

Mr Littlejohn urged us to conclude that the Council staff's interpretation of the planning documents was incorrect. He correctly, in our view, identified the fact that the status of the application is irrelevant to the notification decision we need to determine.

In summary, Mr Littlejohn submitted the bush on the subject site is clearly eligible for protection under the bush lot subdivision rules and should be processed on a non-notified basis as provided for by the District Plans. He stated that there will be no adverse effect on the environment of approving the application, no person adversely affected, nor any special circumstances to warrant notification. The evidence on behalf of the applicant on these specific matters was the assessment of effects dated August 2008 prepared by the applicant's surveyor which forms part of the application as lodged. The surveyor, Mr Ian Smith, had undertaken this assessment on the basis the proposal is one that can be expected under the Council's District Plan and was described as being "subdivision based upon protection of over 2 hectares of native bush." Ms Pegrume's bush assessment report also formed part of the application as lodged, but her assessment was limited to the quality of the bush rather than any assessment in terms of sections 93 and 94 of the Act.

The Commissioners primary focus for the current determination has been the questions of process rather than the merits of the proposal. To that extent we have not closely explored the difference in interpretation between the Council's interpretation of the relevant plan provisions and the interpretation of Ms Pegrume.

It was noted that Ms Pegrume had previously been employed by the Council and part of her work had involved the peer review of similar subdivision applications. The Commissioners have noted that Ms Bazeley's peer review included a full assessment in terms of the District Plan criteria used by Ms Pegrume. Ms Bazeley raised concerns over the scores that had been determined by Ms Pegrume. The Commissioners also note that the Council's peer reviewer in this case, Amy Bazeley of AB Ecology Limited, is a very experienced ecologist and undertakes work regularly for the Rodney District Council, as well as other councils, on subdivision proposals such as this.

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Based on the evidence presented, the Commissioners only planning evidence in relation to section 93 matters, is the evidence of Ms Hessell, the reporting planner. Ms Hessell is an experienced planner who has been employed by the Council for six years.

In response to questions from the Commissioners, neither the applicant nor Ms Hessell could produce an example where vegetation similar to that currently existing on this site had been accepted for a subdivision consent as contemplated by this application. What Ms Hessell could confirm was that where subdivision applications did not meet the District Plan requirements and had been determined to be non-complying activities, these applications had consistently been fully notified essentially for the reason that the additional lot(s) would not have been expected to occur and that the effects of the additional lot were considered to be more than minor.

Section 93 of the Act requires that the Council must notify an application for resource consent unless satisfied that the adverse effects of the activity on the environment will be minor.

The Commissioners have determined that they cannot be certain that the adverse effects on rural character and amenity values will be minor in this case. There is sufficient doubt over the interpretation of the subdivision rules as to whether the quality of the vegetation put forward for protection qualifies for the creation of the additional lot sought. The fact the subject site abuts the zone boundary between the General Rural zone and the "more development sensitive" zoning that applies to the land to the south and west, heightens the need to be cautious with respect to how this application is processed.

Based on the evidence placed before the Commissioners, the application cannot be considered to be a routine one that is consistent with the subdivision outcomes contemplated by the operative or the proposed District Plans. As stated earlier, neither the applicant nor the Council, could identify any other similar application that had been granted consent on the basis put forward by the applicant.

The Commissioners have therefore concluded that if there is doubt as to whether any adverse effects will be minor, the Act contemplates full notification to enable the widest public participation possible in the determination of an application on its merits.

Section 94

Given our finding under section 93 of the Act we have not gone on to determine who should be served notice of the application in terms of section 94.

Section 94C

It is noted that the question of special circumstances is one that is not a mandatory consideration under the Act. Given our findings under section 93 of the Act we have not gone on to consider if special circumstances do in fact exist in this case.

DECISION

For all the reasons set out above that the application be fully notified.

Carried

The meeting closed at 3.13 p.m.

Note: Cr Kirikiri requested that his vote be recorded against the above decision.

CONFIRMED AS A TRUE AND CORRECT RECORD THIS 24TH DAY OF SEPTEMBER 2009

MAYOR

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