BEFORE THE CENTRAL HAWKE'S BAY DISTRICT COUNCIL
INDEPENDENT HEARINGS COMMISSIONER

UNDER	**THE RESOURCE MANAGEMENT ACT 1991**
IN THE MATTER	**of a notified resource consent application for subdivision to create 11 lots (8 rural lifestyle lots, to balance lots, and a lot to be amalgamated as a boundary adjustment) at Mangakuri Road, Central Hawke's Bay (RM230016)**
BETWEEN	**SR & BJ WILLIAMS CHARITABLE TRUST BOARD**
	Applicant
A N D	**CENTRAL HAWKE'S BAY DISTRICT COUNCIL**
	Consent authority

SUBMISSIONS BY WAY OF RIGHT OF REPLY BY THE APPLICANT

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MAY IT PLEASE THE COMMISSIONER

1. These submissions are made by way of right of reply to the matters raised in the course of the hearing on 25 – 27 June 2024 before the h

2. Hearings Commissioner appointed by the Central Hawke's Bay District council.

3. **These submissions expand upon the matters raised in the brief oral** submissions made at the conclusion of the hearing.

Homework

4. In the course of the hearing the Commissioner sought submissions on three matters. The first matter related to the changing of conditions protected by consent notices registered on the title. The second related to a decision of Judge Bollard which provided guidance on the application of a permitted baseline approach and the third, raised at the conclusion of the hearing, related to section 106 and the threshold required for the Commissioner to be satisfied that section 106 of the RMA was not engaged.

Altering consent notice conditions.

5. Section 221(3) and (3A) of the RMA provide:

> (3) At any time after the deposit of the survey plan,—
>
> (a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:
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> (b) the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.
>
> (3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3).

6. Pursuant to section 221(3) and (3A), the variation, cancellation or review of a consent notice after deposit of a survey plan, is treated in the same way as any other variation, cancellation or review application.

7. When considering an application for a variation of a consent notice under s221(3) it is necessary to carry out an examination of the purpose

of the consent notice and then undertake an enquiry into whether some change of circumstances has rendered the consent notice of no further value. In *Green v Auckland Council*[1] the Court confirmed that the consent notice should only be altered when there is a material change in circumstances which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purpose of the Act.[2]

8. Section 221(3) makes it clear that consent notices can be varied or cancelled notwithstanding the fact that the subdivision consent has been given effect to by the depositing of the plan of subdivision. Such variation or cancellation is undertaken in accordance with the same process that would be used to vary the conditions of a consent that were still extant by virtue of the resource consent being "live". As noted in the hearing, counsel has experienced a situation where it was appropriate to vary a consent notice that limited further subdivision development of a piece of land which was subsequently rezoned to a more intensive residential zoning.

The Bollard decision

9. The decision of Judge Bollard referred to by the Commissioner was the decision in *Lyttelton Harbour Landscape Protection Association Incorporated v Christchurch City Council*[3]. In that decision, the judge set out a series of inquiries that may be useful in determining whether or not use of a permitted baseline approach may be of assistance. The court held:

> *[21] Drawing from different fact situations and findings in cases that have arisen before this Court, questions along the following lines (while by no means exhaustive) may be useful according to the circumstances:*
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> - *Does the plan provide for a permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?*

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1 [2013] NZHC 2364, [2014] NZRMA 1

2 See also *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844, (2019) 21 ELRNZ 428,

3 Environment Court Christchurch, C55/2006,

> • *Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked'"*
> • *If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement'"*
> • *Is the evidence regarding the proposal, and regarding any hypothetical (nonfanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?"*
> • *Is a permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not be invoked?*
> • *Might application of the baseline have the effect of overriding Part 2 of the RMA?*

10. While the *Lyttelton Landscape Protection* case predated the 2009 amendment to the RMA, the decision provides useful guidance for the consideration of the discretion to apply a permitted baseline under the notification provisions in sections 95A – 95E and section 104 in a principled and reasoned manner.

The approach to section 106 of the RMA

11. At the conclusion of the hearing the Commissioner asked as to the extent to which he was required to be satisfied in relation to section 106 matters. Section 106 of the RMA provides a discretion to a decisionmaker to refuse consent or to grant consent subject to conditions in circumstances where there is "*a significant risk from natural hazards*".

12. As noted in response to this query, all of the expert witnesses were in agreement that the geotechnical and hazard issues had been appropriately addressed for the purposes of considering the subdivision consent and that section 106 was not engaged[4].

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4 see also councils' section 42A report at paragraph 4.165

13. It is further submitted that contrary to the stance advocated by Mr Smith in his submission, it is not necessary for an applicant to provide the consent authority with "perfect knowledge" at the time of subdivision consent. What the applicant is required to show is that, from a natural hazard perspective, the risks arising from natural hazards can be appropriately avoided remedied or mitigated in the implementation of the consent and the application of conditions of consent.

14. The application was supported by the evidence of Mr Bunny and the evidence of Mr Wentz in relation to geotechnical matters, the evidence of Mr Eivers in respect of transport engineering and the evidence of Mr Gabrielle in respect of civil engineering matters.

15. For the Council, the engineering evidence of Mr Patterson, Mr Rossiter and Mr Hodson agreed with the evidence lodged in support of the application. Mr Patterson referred to the fact that they had made Mr Bunny jump through a lot of hoops and that while he might be "kicked under the table by the council"[5], there was no geotechnical engineering basis for declining consent.

16. As already noted, all of the expert witnesses are in agreement that any natural hazards that arise (if any) are appropriately avoided remedied and mitigated through subdivision design and the proposed conditions of consent. Section 106 is not engaged.

The submitters

17. The submissions made by the submitters are all acknowledged. It is submitted that the submissions, while no doubt heartfelt, are misguided.

18. The submitters spoke of the sense of arrival as they came over the crest of the hill and into the settlement of Mangakuri beach. No doubt that sense of arrival and the apparent isolation all contribute to the amenity experienced by anyone visiting the beach settlement irrespective of whether they own a property at the beach or not.

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5 While this reference to the apparent expectations of council as a consent authority for expert witnesses to advocate for the Council's preferred position is disturbing, it was pleasing to note that all the engineering expert witnesses providing comment on behalf of Council resisted the pressure to become advocates for Councils' recommendation.

19. However coming over the hill to the beach does not mean that you are entering into some form of parallel universe, where the existing residents and the Mangakuri Beach Management Society usurp the authority of the Central Hawke's Bay District Council and where the application of the District Plan and Resource Management Act are secondary to the authority of those privileged few that own residences at the beach and seek to control what can and can't happen in their little part of paradise.

20. A few of the submitters referred to the fact that there were controls on such things as access to the beach and use of public areas. There was also referred to the fact that there was a ban on freedom camping. There are certainly signs at the beach seeking to control all of these aspects.

21. The reality is that these are controls which the society are seeking to impose. At the time of those statements, there was no bylaw or authority restricting freedom camping. Pursuant to section 10 of the Freedom Camping Act 2011, freedom camping is allowed unless restricted or prohibited by a Bylaw made by Council in accordance with section 11 of that Act or prohibited by other legislation.

22. At the time of the hearing of this application, the Central Hawke's Bay District Council did not have a freedom camping bylaw restricting or prohibiting freedom camping at Mangakuri beach, although it is noted that a freedom camping bylaw was adopted by the Council on the last day of the hearing of this application on 27 June 2024.

23. It is further submitted that the Resource Management Act is not a "no change" regime. The whole concept of sustainable management envisages *"use, development and protection of natural and physical resources."* While in certain circumstances, protection of natural and physical resources may require use of prohibited activity status, by making provision for subdivision in the proposed location as a discretionary activity, the District Plan makes provision for how and in what circumstances that use and development may occur.

24. The other reality that needs to be faced by the submitters is that identified in opening submissions namely that this is not a contest

between there being further development at Mangakuri Beach on one hand or no further development on the other. Development is enabled outside of the coastal overlay area as a controlled activity. Development in that manner is not the applicants preference as it would be more prominent, less controlled and not as cohesive as the development that has been proposed. The applicants position is that the development proposed is an effective consolidation of coastal development around the existing coastal settlement and is more sympathetic to the existing environment. It is integrated into the existing environment and achieves a better environmental outcome than the form of development that could be undertaken as a controlled activity.

25. One of the submitters, Mr Smith, while acknowledging that you could never have perfect information, effectively demanded perfect knowledge of every aspect of the site and its surrounds before even considering whether a subdivision should be allowed. The Commissioner asked for submissions as to the weight to be given to Mr Smith's evidence. Mr Smith while apparently having some expertise in engineering matters and project management, was not an expert witness. He did not agree to be bound by the code of conduct for expert witnesses and instead advocated for a position that was not supported by any of the expert engineering evidence called by the applicant or by the experts engaged by the council.

26. His submission was not supported by any expert evidence and his advocacy in support of his submission should be seen as that of a person seeking to retain the control assumed by the Mangakuri Beach Management Society. He is also not objective as he is one of the residents who, having secured their own piece of paradise, is seeking to limit the ability of others to similarly enjoy owning a home at Mangakuri Beach.

The councils expert evidence.

27. It is submitted that the engineering experts engaged by the Central Hawke's Bay District council to review this application and provide expert evidence on its behalf were all supportive of the approach taken by the applicant. Mr Patterson (geotechnical evidence), Mr Rossiter

(traffic engineering) and Mr Hodson (three waters) all detailed the rigour with which the applicants evidence was analysed, challenged and ultimately supported. There evidence complies with the code of conduct expected of expert witnesses and provides a sound basis for the Commissioner to be satisfied that this proposed development can be undertaken to appropriate engineering standards. The proposed conditions of consent prepared by Mr Mackay in collaboration with Mr O'Leary are designed to ensure that those engineering standards are met and will be met on an ongoing basis.

The evidence of Ms Griffith

28. The evidence of Ms Griffith and the approach taken by her is in contrast to the approach taken by the expert engineering witnesses.

29. Ms Griffiths evidence essentially seized upon objective CE-02 and policies CE-P6 and CE-P7 of the Coastal Environment provisions in the District Plan in support of her argument for turning down this application. Those provisions provide:

> CE-O2 Protection of the natural character of the coastal environment of Central Hawke's Bay from inappropriate subdivision, use and development, and identify and promote opportunities for restoration or rehabilitation.
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> CE-P6 To require that proposed activities within the coastal environment area demonstrate that the activity is located appropriately, having regard to its effects and:
>
> 1. the particular natural character, ecological, historical or recreational values of the area;
> 2. the extent to which the values of the area are sensitive or vulnerable to change;
> 3. opportunities to restore or rehabilitate the particular values of the coastal environment of the area;
> 4. the presence of any natural hazards and whether the activity will exacerbate the hazard and/or be vulnerable to it;
> 5. the impacts of climate change;
> 6. appropriate opportunities for public access and recreation;
> 7. the extent to which any adverse effects are avoided, remedied or mitigated; and
> 8. consistency with underlying zoning and existing land use.

CE-P7 To require that proposed activities within the coastal environment area minimise any adverse effects by:

1. ensuring the scale, location and design of any built form or land modification is appropriate in the location;
2. integrating natural processes, landform and topography into the design of the activity, including the use of naturally occurring building platforms;
3. limiting the prominence or visibility of built form; and
4. limiting buildings and structures where the area is subject to the impacts of climate change and the related impacts of sea level rise, sea temperature rise and higher probability of extreme weather events; and
5. restoring or rehabilitating the landscape, including planting using local coastal plant communities.

30. References such as "inappropriate subdivision"[6] and "located appropriately"[7] and "appropriate in the location"[8] have been used to advocate a position that this proposal is not appropriate subdivision and it is not in the appropriate location.

31. It is submitted that the approach taken by Ms Griffith is not supported by the balance of the coastal environment provisions and that CE-O2 and CE-P6& 7 have been read out of context. When read in context, the provisions of the Coastal Environment, including those relied upon by Ms Griffith, provide strong support for this application.

32. Pursuant to section 76 of the RMA, rules in the District Plan have the force and effect of a regulation. As a matter of statutory interpretation and as required by section 5 of the Interpretation Act 1999, the meaning of legislation, including regulations must be ascertained from its text and in light of its purpose having regard to the indications provided in the enactment. In other words, they must be read in context.

33. When read in context, the provisions of the coastal environment support this application. It is to that context that I now turn.

34. The starting point for considering the context of any plan provision is to look at the environmental issues identified by the District Plan. In terms of s5 of the Interpretation Act, the identification of the environmental

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6 CE-O2
7 CE-P6
8 CE-P7

issue to be addressed provides the "purpose" of the regulation which in turn provides the context for the interpretation and application of the Objectives and policies, the rules and other methods and the outcome against which the plan provisions are intended to achieve.

35. The only issue identified in the coastal environment is issue CE-I1 which provides:

> *CE-I1 Preservation of the Natural Character of the Coastal Environment*
>
> *Inappropriate subdivision, use, and development can adversely affect the natural character of the coastal environment, particularly in those areas identified as having high natural character.*

36. The explanation around this issue and the provisions flowing from the issue (which are required to be considered as part of the contextual framework) provide numerous references that support the approach taken in this application. For example, the explanation identifies that:

- *"The highest degree of natural character (greatest naturalness occurs where there is least modification."*
- *The coastal settlements are considered to have moderate or low natural character (albeit they have their own 'special character)*[9]
- *the natural character of the coastal environment can be adversely affected through the effects of coastal subdivision, use and development.*
- *The preservation of the natural character of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits.*
- *In preserving the natural character of the coastal environment, subdivision, use and development activities that restore or rehabilitate natural character should be promoted where practicable, particularly in areas where the coastal environment is degraded."*

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[9] The "Special character" of the coastal settlements is not otherwise mentioned or the subject of regulation or protection in the Proposed Plan

37. Throughout the coastal environment chapter there are numerous references to the natural character of the Coastal Environment. In order to identify the natural character of the Coastal Environment, Council has, in preparing its District Plan, quite properly commissioned a report entitled *"Natural Character Assessment of the Central Hawkes Bay Coastal Environment"*.[10] This report assesses the natural character of the entire Central Hawkes Bay coastline. For the Coastal Settlement areas, the natural character is assessed as being *"Moderate - Low."*

38. The report also provides the basis for the identification of areas of high natural character, outstanding natural landscapes and significant natural areas which are all protected in the District Plan provisions by Natural Environment Overlays covering a significant proportion of the coastal environment and the Central Hawke's Bay District. It is by these overlays that the plan seeks to manage the adverse effects on the natural character of the Coastal Environment in areas where that natural character is considered to be high. Importantly, the overlays do not apply to the land surrounding Coastal Settlement areas including the coastal settlement at Mangakuri Beach.

39. So when read in context, references to inappropriate subdivision or inappropriate locations within the District Plan, are references to areas where there are high natural character values as identified in the *Natural Character Assessment of the Central Hawkes Bay Coastal Environment.* In areas where those high natural character values do not exist then the objectives and policies seeking to preserve the natural character are not engaged.

40. In fact, objective CE-O1 actually acknowledges that *"small settlements, recessed into bays, adjoining the number of sheltered beaches*" forms part of the distinctive landforms that comprise the natural character of the coastal environment. This is reflected in:

    - Policy CE-P2 which requires the avoidance, remediation or mitigation of adverse effects on the natural character of the coastal environment particularly in areas of high natural

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10 This report can be accessed via a hypertext link under assessment matter CE-AM1 of the District Plan

character identified on the planning maps and in schedule CE-Sched 7[11],

- Policy CE-P3 which seeks to avoid sprawling or sporadic subdivision and development in the coastal environment area'
- Policy CE-P4 which seeks to manage (not avoid) activities that can occur in the coastal environment including the expansion and consolidation of existing coastal settlements,
- Policy CE-P6 which requires proposed activities to demonstrate that the activity is located appropriately having regard to its effects (of which there are none that are more than minor) and the particular natural character, ecological, historical or recreational values of the area and appropriate opportunities for public access and recreation.

41. It is only when the District Plan provisions are read in context and the objectives and policies applied in that context that you achieve the anticipated environmental results identified in the plan which provide:

> *CE-AER1 The distinctive eroding mudstone cliffs, limestone outcrops, dunelands and interdunal wetlands and lakes within the District's coastal environment are maintained and enhanced.*
>
> *CE-AER2 The natural character of the District's coastal environment is preserved through consolidation of existing coastal settlements, and through controls on subdivision and development.*
>
> *CE-AER3 Identified sites, landscapes, features and areas of natural, cultural and historical heritage significance within the coastal environment are protected.*

42. The proposal does not affect the distinctive eroding mudstone cliffs, the limestone outcrops, the dunelands or the interdunal wetlands of the coastal environment. The proposal preserves the district's coastal environment through consolidation of existing coastal settlement. The proposal does not affect and therefore protects identified sites, landscapes, features and areas of significance within the coastal environment by providing for development away from the identified sites, landscapes, features and areas of significance.

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11 Mangakuri Beach is not included in schedule CE-SCHED 7

43. It is submitted that the proposal is entirely consistent with the provisions of the coastal environment when those provisions are read in the context of the identified environmental issue, the objectives and policies and the anticipated outcomes in the coastal environment.

44. It is in the context of the coastal environment provisions read in context that the design led proposed subdivision has been formulated in a manner that seeks to consolidate on an existing coastal settlement, fitting the development within the landscape rather than imposing itself upon the landscape. This is a proposal that is assessed by Mr Bray in his evidence as having low landscape effects, low visual effects and very low natural character defects[12]. Ultimately, this proposal and the evidence of Mr Bray is consistent with how the District Plan has identified this land as not requiring any of the environmental overlays aimed at protecting natural character.

The evidence of Mr O'Leary

45. In a similar fashion, the evidence of Mr O'Leary fails to look at the provisions of the District Plan in context.

46. Mr O'Leary's approach to this application applies a very limited focus to selected provisions in the Rural Land Resource strategy and the provisions of the General Rural Zone and as a result fails to read those provisions in context. This has led to the situation, identified in opening submissions whereby the council has, of necessity, agreed

- that the proposal will not result in a loss of highly productive land,
- that the effects of the use of rural land for the subdivision will be less than minor,
- that the proposal is consistent with RLR-O1 and RLR-O3[13], and
- that the proposal will be consistent with the overarching objective and the relevant policies of the national policy statement for highly productive land[14]

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12 see evidence of Shannon Bray at paragraph 13
13 paragraph 4.43 of the section 42A a report
14 paragraph 4.140 of the section 42A report

but is somehow contrary to the provisions of the proposed District Plan.[15]

47. The illogicality of this conclusion is demonstrated by reading the plan as a coherent whole and looking at the provisions in context.

48. Turning first to the Rural Land Resource strategy, the sole issue to be addressed by the Rural Land Resource strategy is contained in RLR-I1 which provides:

RLR-I1 Incremental Loss of Highly Productive Land

Land fragmentation and development that leads to the incremental and irreversible loss of highly productive land for primary production.

49. The subject site does not contain highly productive land, so the identified issue does not arise.

50. Unsurprisingly, the objectives RLR-O1 to RLR-O4 which are intended to address the identified issue, focus on the productive capacity of highly productive land and primary production. Again the objectives are not engaged. Those objectives provide:

RLR-O1 The productive capacity of the District's Rural Land Resource, particularly the District's highly productive land, is maintained.

RLR-O2 The primary production role and associated amenity of the District's Rural Land Resource is retained, and is protected from inappropriate subdivision, use and development.

RLR-O3 The District's highly productive land is protected from further fragmentation.

RLR-O4 Residential and other activities that are unrelated to primary production are directed to locations zoned for those purposes and that are not situated on highly productive land.

51. These objectives are implemented through policies which are again focused on effects on highly productive land by firstly identifying the highly productive land[16], avoiding unplanned Urban expansion onto the

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15 paragraph 4.147 of the section 42A report
16 Policy RLR-P1

districts highly productive land[17] and only "limiting" (not prohibiting) subdivision in the General Rural Zone.[18]

52. The Rural Land Resource strategy envisages the use of zoning as the primary method of implementation. In respect of the General Rural Zone, it includes the following:

RLR-M1 Area-Specific Provisions

The use of zoning to direct activities to appropriate locations:

GRUZ – General Rural Zone:
The General Rural Zone encompasses the bulk of the District's rural land. This area is suitable for a wide range of primary production activities (including intensive primary production and related post-harvest facilities) to occur, that can require exclusive areas of land and establishes the flexibility for landowners to identify opportunities to innovatively utilise the resources of the area. Controls in this Zone are tailored to provide flexibility for landowners.

53. Hence while the Rural Land Resource strategy envisages that highly productive land will be used for primary production activities, the opportunity exists to *"innovatively utilise"* the land resource and the zone controls are tailored to provide that flexibility for landowners.

54. Similarly, the General Rural Zone identifies the issue of protecting the life-supporting capacity of the district soil resource[19] however GRUZ-I2 illustrates that the issues within the zone must be seen in a wider context. That issue provides:

GRUZ-I2 Protecting Rural Amenity and the Quality of the Rural Environment and Primary Production Capability

Primary production, (including intensive primary production), and other complementary rural, residential, and recreation-based activities, underpin the social, economic, and cultural wellbeing of the District (particularly for the District's rural communities), but they can also adversely affect rural environmental, cultural, and amenity values or result in conflict that affects primary production capability.

The establishment of incompatible activities within rural areas can:

1. *result in the loss of productive land;*
2. *conflict with existing rural activities, including through reverse sensitivity; and*

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17 Policy RLR-P2
18 Policy RLR-P3
19 GRUZ-I1

3. *detract from rural character and amenity.*

55. GRUZ-I2 recognises that residential and recreation-based activities (such as going to the beach) underpin the social, economic and cultural well-being of the district and acknowledges the issue of managing any adverse effect of those activities on the rural environment. The proposed subdivision is not an incompatible activity when viewed in the context of the coastal environment provisions encouraging consolidation of residential and lifestyle development around existing settlements. Even if it was considered an incompatible activity, it does not result in the loss of productive land, it does not conflict with existing rural activities through reverse sensitivity and it does not detract from the rural character and amenity.

56. As would be expected, the objectives envisage the predominant use of land within the zone for primary production activities[20] and that other activities are managed to ensure the rural character and amenity and where applicable the natural character and amenity values present with the coastal environment are maintained.[21] In this latter regard and as noted by the Commissioner in the course of the hearing, the amenity of this location is not so much a rural farming amenity. It is an amenity that is dominated by the coastal environment and the use of that environment for recreation purposes.

57. Policy GRUZ-P2 envisages and provides for non-primary production related activities that support the function and well-being of rural communities and/or the enjoyment of the rural environment. That policy provides:

GRUZ-P2 To provide for non-primary production related activities that have a functional or operational need for a rural location, and/or that support the function and wellbeing of rural communities and/or the enjoyment of the rural environment, and contribute to the vitality and resilience of the District's economy, and where they are managed to ensure that:

1. *their scale, intensity and built form are in keeping with the rural character of the General Rural Zone;*

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20 GRUZ-O1
21 GRUZ-04

2. *they maintain a level of amenity in keeping with the rural character of the General Rural Zone;*
3. *they minimise reverse sensitivity effects on activities otherwise anticipated within the General Rural Zone; and*
4. *adverse effects are avoided, remedied or mitigated.*

58. Policy GRUZ-P4 envisages managing building to maintain the character and amenity of the rural area and where applicable the natural character of the coastal environment. That policy provides:

GRUZ-P4 To manage the bulk, scale and location of buildings to maintain the character and amenity of the rural area and, where applicable, to protect the natural character and amenity of the coastal environment.

59. While policy GRUZ-P8 envisages the limitation (not prohibition) of residential and rural lifestyle subdivision that results in fragmentation and/or that restricts the use of rural land for productive purposes. Care must be taken to not misinterpret this policy. Subdivision by definition involves fragmentation of land holdings. It is not fragmentation per se that is controlled by Policy GRUZ-P4. It is only fragmentation that restricts the use of land for productive purposes. This in turn must be seen in the context of an activity which is consistent with the national policy statement for highly productive land and on which it is agreed will have no effect on highly productive land or the rural land resource.

60. All of this must be seen in the context of a District Plan that provides for subdivision of a lifestyle site in the general rural zoning and outside of the coastal environment as a controlled activity at the rate of one such subdivision every 3 years.[22]

61. Even that is a discretionary activity in the Coastal Environment, this activity must be seen in the context of what the plan says as a coherent document. In opening submissions, we referred to the fact that the activity was for a discretionary activity, and we referred to the decision of the Environment Court in *Doherty v Dunedin City Council.* Lifestyle subdivision could be undertaken on much of the applicants land as a controlled activity and in the coastal overlay area as a discretionary activity.

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22 SUB-R5

62. We refer to the passage from *Doherty* cited in opening submissions[23] to the effect that as a discretionary activity, it is accepted as being generally appropriate within the zone but not on every site. It is not the case that the applicant is saying that all land within the General Rural Zone should be able to be subdivided for lifestyle purposes.

63. It is the applicant's position that land adjacent to existing coastal settlements, in areas outside of the environmental overlays provided for in the District Plan, of limited productive capacity (class 6 and 7 soils), which has no effect on the environment that is more than minor, is a very land that should be considered for subdivision development.

64. Further, where the proposed site provides the ability for people to live in a beautiful coastal environment, which supports the function and well-being of the rural community and/or the enjoyment of the rural environment and which contribute to the vitality and resilience of the district's economy, that is the obvious location where development should occur as envisaged by the provisions of the Coastal Environment section of the District Plan.

District plan integrity/precedent

65. In his presentation to the hearing Mr O'Leary focused on the issue of an integrity and precedent and expressed the concern that there will be other subdivisions that follow a similar pattern. In this regard, we refer to the case law cited in opening submissions regarding the overuse of this "floodgates" argument.

66. Mr O'Leary referred to the decision to decline an application for a 48 lot subdivision at Punawaitai Road. Without wanting to "enter the fray" of a decision that is subject to appeal, it is readily apparent that that application is for a substantially larger subdivision on land identified as being highly productive land and which is therefore contrary to the objectives of the national policy statement for highly productive land and the objectives and policies aimed at protecting the highly productive land in the proposed District plan. It is a different beast from that before the Commissioner.

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23 opening submissions at [10]

67. As noted in the decisions referred to in opening submissions, if an application with attributes similar to that currently before the Commissioner were to come before the council in circumstances where it was consistent with the consolidation of development on current existing coastal settlements, consistent with the objectives and policies of the Coastal Environment and the General Rural Zone, and avoids development on Highly Productive Land then that application may well be worthy of consent, not because this consent has been granted but because it meets the tests under the RMA and is consistent with the provisions of the district plan.

68. The fear of setting a precedent cannot be used as an excuse for the proper application of the RMA to the District Plan provisions.

Consent conditions

69. Mr McKay has worked with Mr O'Leary on the running draft of the consent conditions. The intent of the consent conditions is to achieve the purpose of ensuring that the consent holder does what it says it is going to do in its application. . As detailed below, there are two relatively minor areas of disagreement on the conditions of consent.

70. The first area of disagreement is the change proposed by Ms Griffith reducing the maximum height of dwellings from 6.5m to 5m in condition 59(e). It is submitted that the condition already includes the restriction of buildings to single story dwellings. It is accepted that a 5m maximum height would allow a single story dwelling but would effectively mean that all of the houses would have to have a flat or near flat roof line. The maximum height of 6.5 m allows for some design flexibility in housing style and avoids the situation where there is a uniformity arising from flat roofed or very low gable buildings dominating the built form within the development.

71. It is also noted that in the Proposed District Plan, the General Rural Zone provides for a maximum building height of 10m and the Large Lot Residential Zone (Coastal) Zone provides for a maximum building height of 8m. Given the stated desire for the buildings to be consistent with and sit in existing development, the proposed 6.5 m height restriction

and the limitation to single story dwellings is appropriate. For these reasons, the proposed maximum height of 6.5m is preferred.

72. The second area where there is minor disagreement is in relation to the amendment proposed by Mr Hodson in relation to condition 58(b). Mr Hodson has proposed that the exception applying to hydraulic neutrality contained for the discharge of stormwater to the north of Williams Road contained in condition 58(b) as drafted be removed. As detailed in the report by Strata Group filed in support of the application,[24] there is a small increase in two-year discharge to the north of Williams Road. As this discharge is a way from the coastline to the west and onto the applicants farm land there are no other parties affected by this relatively minor increase in the rate of stormwater discharge to what is farmland.

73. Mr Gabrielle has advised that it would be possible to design this discharge with multiple orifices or complex outlet structures so as to achieve hydraulic neutrality in a two year event. However the question has to be posed as to the purpose of this added complexity and potential cost. The discharge is a relatively minor increase in stormwater discharge in a 2 year event. The increased discharge is to the west, away from any other party and onto land that is owned by the applicant. It is implicit in the way the application has been framed that the applicant consents to that discharge. It is also noted that, as detailed in the Strata Report,[25] in the larger 100 year events, the post development discharge in this catchment is substantially reduced. Apart from those 2 exceptions, there is substantial agreement on the conditions to be imposed.

74. Contrary to the fears expressed by some of the lay submitters, it cannot be assumed that a consent holder will fail to comply with conditions and/or that the council will not undertake its statutory and regulatory functions of ensuring that conditions of consent are met on an ongoing basis.

75. In this latter regard, the question was raised as to why some form of body corporate or management committee was not being required.

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Again, from many years of experience, setting up some form of body corporate and purporting to impose ongoing consent obligations on that body corporate is fraught with difficulty. Firstly, in some circumstances management structures have a tendency to become captured by an individual or group of individuals seeking to impose their will on others within the organisation. Secondly, and unlike unit title subdivisions where the owners of a title are deemed by statute to be part of a body corporate, there can be no requirement imposed for a landowner to be a member of a corporate entity. Corporate entities have the potential to "fall over" due to oversights as simple as failing to file an annual return. They provide no guarantee of ongoing existence or ability to undertake the tasks that are imposed upon them. If the continued obligations imposed by conditions are imposed on an entity that no longer exists then there are serious ramifications.

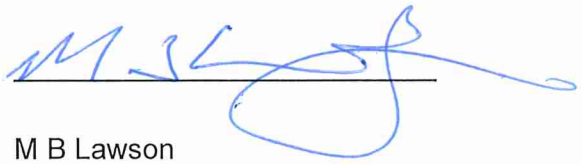
76. It is submitted that by far the better approach is the approach taken in the proposed consent conditions and that is to impose the ongoing obligations for compliance with consent conditions and for maintenance and repair of such things as stormwater facilities, on the individual landowners that own or depend upon those facilities. They may, together with their neighbours, choose to have some form of management structure but that is a matter of agreement between the owners for the time being. Even if they fail to agree at some stage in the future, Council has the ability to enforce the regulatory obligations on the owners of the land.

Conclusion

77. It is submitted that for the reasons outlined in opening submissions and in this right of reply, the officers recommendation to decline this application does not withstand scrutiny.

78. This application is consistent with the relevant provisions of the proposed District plan and in particular is precisely the form of development envisaged by the provisions applying in the coastal environment. This application readily meets the test of section 104 of the RMA and should be granted accordingly.

79. If there are any further matters with which we can be of assistance then we are happy to provide that assistance.



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