BEFORE THE CENTRAL HAWKES BAY DISTRICT COUNCIL
INDEPENDENT HEARINGS COMMISSIONER

UNDER	The Resource Management Act 1991
IN THE MATTER OF	A notified resource consent application by the SR & BJ Williams Charitable Trust Board (RM230016)

LEGAL SUBMISSIONS OF MANGAKURI BEACH MANAGEMENT SOCIETY INC

24 June 2024

Introduction and summary

1. Mangakuri Beach is a small remote coastal settlement, comprising around 25 dwellings, mostly baches or holiday homes. Most of the residents and property owners are members of the Mangakuri Beach Management Society Inc (**Society**).

2. The Society is strongly opposed to the application for a subdivision consent for the land on the hill overlooking Mangakuri Beach.

3. These legal submissions summarise the Society's position on the most fundamental flaws in the application, which in summary are:

   (a) The applicant has a poor history of appropriate engagement with processes under the Resource Management Act 1991 (**RMA**);

   (b) Significant weight needs to be given to the objectives and policies of the proposed district plan, which point strongly against fragmentation of rural land and subdivision in the manner proposed;

   (c) Granting the application will create undesirable precedent effects, and will be a slippery slope towards inappropriate subdivision of rural land across the district;

   (d) The applicant's suggested baseline for your assessment is legally flawed;

   (e) The assessment of the geotechnical effects of the proposal cannot be relied upon and has not factored in climate change;

   (f) The visual effects of the proposal will result in a loss of the rural character of Mangakuri Beach, in a manner that is significant and adverse; and

   (g) The applicant has only recently disclosed that it intends to amend its application to account for its recent discovery that it requires a further resource consent because of a wetland on the property.

4. The application for resource consent should be dismissed.

Significance of the previous subdivision consent

5. We have been here before. The applicant obtained a subdivision consent to create eight residential lots in 2018. That consent was granted on a non-notified basis. In applying for that consent, the applicant relied on geotechnical assessment by RDCL.

6. The Society challenged the grant of consent in High Court judicial review proceedings. The grounds for review included that the RDCL geotechnical assessment was flawed and inadequate.

7. The Council accepted on advice that consent had been granted in error and unlawfully. But the applicant maintained that the consent was granted lawfully. The applicant did nothing to progress the previous subdivision consent and it has now lapsed. The High Court proceeding has since been discontinued because the consent lapsed.

8. The previous subdivision consent should be given no weight in your decision making. That consent was granted on a flawed basis. It was also issued prior to the notification of the current proposed district plan, which has now reached the decisions version stage.

9. This is a new application and needs to be assessed afresh. The applicant's behaviour in previously applying for and obtaining a subdivision consent on an unlawful basis, then refusing to accept it was unlawful or surrender it, does not bode well for the present application. The applicant continues to rely on geotechnical advice from RDCL, who provided the flawed and inadequate advice the first time round.

Weight to be given to the proposed district plan

10. The Council currently has both an operative district plan and a proposed district plan. The relevant provisions of both plans are required to be considered in your evaluation under section 104 of the RMA.

11. The leading case on the relative weight to be given to a proposed plan versus an operative plan is *Keystone Ridge Ltd v Auckland City Council*.[1] In that case, the High Court held that the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process. The extent to which the provisions of the proposed

[1] *Keystone Ridge Ltd v Auckland City Council* HC Auckland AP24/01, 3 April 2001 at [16] and [36].

plan are relevant should be considered on a case by case basis and might include:

(a) The extent (if any) to which the proposed measure might have been exposed to testing and independent decision making;

(b) Circumstances of injustice;

(c) The extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan;

(d) Where there has been a significant shift in council policy and the new provisions are in accord with Part 2, the Court may give more weight to the proposed plan.

12. A recent example of this approach is *Todd v Queenstown Lakes District Council*,[2] where the Court gave significant weight to the policies and objectives in a proposed plan because those represented a strategic policy shift that had reached the decisions versions stage. The Court noted that if it were to have given greater weight to the operative provisions then that would potentially compromise the intention for a strategic policy shift.

13. The Society submits that you should give substantial weight to the proposed plan, compared with the operative plan, because:

(a) The proposed plan has been tested through an independent hearings process and a decisions version has been issued;

(b) It would be unjust to place significant weight on the operative plan when the applicant had a consent issued under the operative plan but obtained it unlawfully and failed to implement it; and

(c) The proposed plan implements a coherent shift in the objectives and policies for the district with regard to rural land. As the Council's planner Mr O'Leary explains, it represents a significant policy shift away from the ad-hoc approach to rural lifestyle provided for under the operative plan.[3]

14. The applicant's own planner, Mr McKay, appears to accept that the greatest weight should be placed on the policy direction of the proposed plan.[4]

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[2] *Todd v Queenstown Lakes District Council* [2020] NZEnvC 205 at [37]–[40].
[3] Section 42A report at [3].
[4] Evidence of Phillip McKay at [83(b)].

15. The Society supports with Mr O'Leary's view that the proposal is inconsistent with the objectives and policies of the proposed plan. It will result in further fragmentation of the rural land resource, and will bring residential development to land earmarked for farming and primary production. Residential subdivision should be directed to appropriate zones, not to the general rural zone.

Precedent effects

16. As this consent application falls to be assessed on a discretionary basis, you should consider the precedent effects of granting the application.[5]

17. Granting this application would set a bad precedent and undermine the implementation of the new policy direction in the proposed district plan.[6] This is particularly concerning when the proposed district plan is still in the early stages of its lifespan.

18. The applicant's evidence is that its application is unique and so will not result in precedent effects. This is hard to accept. The Central Hawke's Bay district has a large area of rural land in respect of which the policies of minimising fragmentation and retaining primary production ought to be applied. If those policies are not given their due weight here then it will be a slippery slope towards further fragmentation and inappropriate subdivision of the district's rural land and its important role in primary production.

Baseline for assessment

19. The applicant suggests you should consider a baseline of two dwellings on the subdivision site plus one or two separate visitor accommodation units, and that such a scenario is not fanciful.[7]

20. The distinction between fanciful and non-fanciful permitted activities may have a bearing on the overall exercise of discretion under section 104.[8]

21. The Society submits that the applicant's proposed scenario is fanciful and ought not to be considered. Mr Yule, one of the trustees, gives evidence about possibly investing in "tourism accommodation" on the land.[9] As far

[5] *Kirton v Napier City Council* [2013] NZEnvC 66 at [77].
[6] Section 42A report at [4.152]
[7] Evidence of Phillip McKay at [37].
[8] *Rodney District Council v Eyres Eco-Park Ltd* [2007] NZRMA 1 (HC) at [37].
[9] Evidence of Lawrence Yule at [7(g)].

as I can recall, this is the first time the applicant has said anything about a proposal for tourism accommodation, and there is no evidence that the applicant has undertaken any consideration of whether tourism accommodation would be viable or feasible in such a remote area.

Geotechnical effects

22. The geotechnical effects of the proposal are a major concern for submitters.

23. The Society has very little trust in the geotechnical advice provided by RDCL. The experts from RDCL have had to change their view about the best way of managing the geotechnical risk from the development as the applicant has constantly amended its proposal over the years. This does not engineer confidence in the quality of the expert advice.

24. What the experts do seem to be able to agree on is that the proposed subdivision sits within a "severe earthflow" risk zone where there is a high risk of land instability as evidenced by recent rotational or transitional landslides. There are rainfall-induced landslides and seismically induced landslides, and landslide risk is considered to be high in many parts. The local geology comprises Smectite which are susceptible to expansion and contraction resulting in slope instability and rapid erosion. It is a nonsense to suggest that a subdivision of the type envisaged can safely be established on such slopes.

25. We are all living in a rapidly changing environment due to the effects of climate change. Severe weather events are becoming more extreme and frequent and difficult to predict. This is a matter that should have been front and centre of this application, in light of:

    (a) The national importance of managing significant risks from natural hazards (s 6(h)); and

    (b) The need to have particular regard to the effects of climate change (s 7(i)).

26. The latest RDCL assessment is dated 7 August 2023; revision 4 of a document first prepared in 2021. Alarmingly, it does not mention climate change even once. Nor do any of the geotechnical statements of evidence of Mr Bunny, the peer reviewer Mr Wentz, or the Council's reviewer Mr Paterson.

27. The geotechnical evidence has not had due regard to the effects of climate change in the manner required by the RMA. Nor has it considered how climate change will inevitably increase geotechnical risk. So you should place very little weight on the geotechnical evidence.

28. Section 106 of the RMA is engaged. There is a significant risk from natural hazards. It is unrealistic to claim that potential land instability and flooding inundation risks are able to be appropriately mitigated. The same claims have been made in the past and then have required significant change and amendment. What is proposed will undoubtedly create additional natural hazard risk which cannot be avoided, remedied or mitigated.

Visual effects

29. Mangakuri Beach currently has an open, natural and spacious landform. This gives it its rural character, which is prized by the residents and members of the Society.

30. The visual materials provided by Mr Bray show a significant change to that rural character. Ms Griffith explains the change as a shift in the experiential quality "from one where natural and rural processes dominate to one that is highly managed, supports built form … and is prominently located in the landscape".[10] Some of the new dwellings will be on prominent spurs and ridges overlooking the beach.

31. The Society agrees with her opinion that this is a loss of rural character. In non-technical terms, the subdivision would result in a significant change from:

    (a) *The current situation*: a narrow row of houses along the beach, set against a rugged and rural natural backdrop that creates a feeling of remoteness; to

    (b) *The applicant's proposal*: houses scattered across the hillside in an imposing manner on ridges and spurs, with a complete change from the rugged and remote character that the residents currently enjoy.

[10] Memorandum of Erin Grifiths at [8.20].

Wetlands

32. Mr McKay, for the applicant, discloses in his evidence that the applicant has only assessed whether the subdivision land includes natural inland wetlands after it received the s 42A report earlier this month.

33. Mr McKay notes that the applicant has now approached the Hawke's Bay Regional Council, who has advised that there appears to be a natural inland wetland and a resource consent will be required under the NES-FW. The applicant is now engaging an ecologist to consider this further.

34. The Society is, sadly, unsurprised that the applicant has only considered this matter at such a late stage. The applicant has had years to develop this subdivision proposal. It has presented numerous iterations of its plans as it has sought to address gaps and fix errors. The Society has had to come to terms each movement of the goalposts.

35. The applicant's approach is contrary to good resource management practice. In general, all the resource consents for a project should be carefully identified from the outset, and applications for them all should generally be made so that they can be considered together or jointly.[11]

36. It now seems that there is likely to be a further change to the applicant's subdivision plans so that it can obtain the necessary approvals under the NES-FW. Mr Gabrielle outlines two alternatives which involve either rearranging the Lot 3 parcel or relocating the proposed dry pond. These are very much "back of the envelope" ideas. Mr Gabrielle notes that further options could be explored.[12]

37. The likely amendments to the subdivision plans will inevitably have downstream impacts on the geotechnical, stormwater and landscape effects. This makes it very difficult for the Society to properly understand the proposal. It would be unfair for the Society to have to engage with the present hearing, only to be later expected to respond to amendments to address the wetlands issue.

38. The Society requests that the hearing be adjourned under section 91(a) of the RMA in light of the applicant's recent disclosure that it requires an additional resource consent and is likely to change its proposal.

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[11] *AFFCO NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224 (PT)
[12] Evidence of Simon Gabrielle at [34].

Conclusion

39. The application for resource consent should be dismissed. Alternatively, the hearing should be adjourned under section 91(a).

M F McClelland KC

Counsel for the Mangakuri Beach Management Society Inc

Dated 24 June 2024