IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-003106
[2017] NZHC 1540

UNDER	the Judicature Amendment Act 1972
BETWEEN	MICHAEL JOHN DUGGAN AND JULIE ROGERS Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	IAN AND MICHELLE COSTELLO Second Defendants

Hearing: 7 April 2017

Appearances: R Enright for Plaintiffs
N Whittington and J Wilson for First Defendant
B Tree and A Theelan for Second Defendant

Judgment: 5 July 2017

JUDGMENT OF VENNING J

This judgment was delivered by me on 5 July 2017 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Crawford Law, Wellington
Meredith Connell, Auckland
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Copy to: R Enright, Auckland

[1] Ian and Michelle Costello (the Costellos) and Michael Duggan and Julie Rogers (the plaintiffs) own neighbouring properties at Titirangi. The properties share a common boundary. The plaintiffs' site sits above the Costellos' property.

[2] On 26 August 2016 Auckland Council (the Council) granted the Costellos resource consent for construction of a residential dwelling on their property. The consent was granted on a non-notified basis. The plaintiffs seek judicial review of the Council's decisions.

Background

[3] In July 2015 the Costellos obtained land use consent for the construction of a residential dwelling and associated earthworks at their property at 19-25 Rangiwai Road (the first consent). The Costellos did not action the first consent. Then in May 2016 the plaintiffs bought 15 Rangiwai Road.

[4] On 29 June 2016 the Costellos lodged an application for resource consent for a differently designed residential dwelling, together with associated earthworks (including the removal of protected trees). The proposal again required land use consent.

[5] On 19 July 2016 the Council sought further information in relation to the second application. The Costellos responded on 21 and 22 July 2016.

[6] On 19 August 2016 the Council notified its decisions on the recommendation of the Independent Hearings Panel. As a consequence the Proposed Auckland Unitary Plan decisions version (PAUP DV) took effect. It replaced the Proposed Auckland Unitary Plan notified version (PAUP NV). The Council granted the Costellos a second consent on 26 August 2016.

[7] The Costellos commenced their building project relying on the second consent. On 29 August and 1 September the plaintiffs complained to the Council about what they regarded as unlawful tree clearance. On 16 September 2016 the PAUP DV became operative in part.

[8] The plaintiffs issued these proceedings on 8 December 2016 having previously indicated they intended to challenge the second consent.

The decisions in issue

[9] On 26 August 2016 James Dowding, the Council's team leader, Resource Consents – West, made two decisions under delegated authority on behalf of the Council:

(a) a decision to deal with the consent application on a non notified basis (the notification decision); and

(b) a decision to grant the resource consent subject to conditions (the substantive decision).

Plaintiffs' challenge

[10] The plaintiffs challenge both the notification and substantive decisions. They raise the following arguments:

(a) scope – lack of jurisdiction;

(b) the Council had regard to irrelevant considerations, namely the PAUP NV;

(c) the Council had regard to irrelevant matters, failed to take into account relevant matters, applied the wrong legal test or otherwise acted unreasonably in relation to the notification decision; and

(d) the Council had regard to irrelevant matters, failed to take into account relevant matters, applied the wrong legal test or otherwise acted unreasonably in relation to the substantive decision.

The approach to judicial review

[11] The principles concerning judicial review in this area of the law are well established. In *Coro Mainstreet (Inc) v Thames-Coromandel District Council* Wylie J summarised them as:[1]

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

[12] *Coro Mainstreet (Inc)* went on appeal. The Court of Appeal did not take issue with the above summary.[2] Indeed, the Court suggested that in relation to notification, Parliament's apparent intention was to reduce the intensity of review to be applied to non-notification decisions.[3] The Court observed that given the amendments to s 95 Resource Management Act 1991 (RMA) in October 2009 it may be necessary at some time to review the approach of the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*.[4] The Court of Appeal said:[5]

> [41] … But we should not be taken to have accepted that the amendments made to the RMA since *Discount Brands* have had no effect on the non-notification process and on the analysis of the previous law in the Supreme Court's decision in *Discount Brands*. If the point had affected the outcome of the present case, we would have wanted to consider whether the 2009 amendments gave effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications, and to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands*.

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1 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 422 (footnote omitted).

2 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73.

3 At [41].

4 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

5 *Coro-Mainstreet (Inc) v Thames-Coromandel District Council*, above n 2.

Relevant plans and legislative instruments

[13] The proposed Auckland Unitary Plan was prepared under Part 4 of the Local Government (Auckland Transitional Provisions) Act 2010[6] and the RMA. The PAUP NV was notified on 30 September 2013.

[14] Sections 86A to 86G of the RMA provide when rules in plans have legal effect.[7] Section 86B of the RMA provides:

> **86B When rules in proposed plans have legal effect**
>
> (1) A rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1, except if—
>
> (a) subsection (3) applies; or
>
> …
>
> (3) A rule in a proposed plan has immediate legal effect if the rule—
>
> (a) protects or relates to water, air, or soil (for soil conservation); or
>
> (b) protects areas of significant indigenous vegetation; or
>
> (c) protects areas of significant habitats of indigenous fauna; or
>
> (d) protects historic heritage; or
>
> (e) provides for or relates to aquaculture activities.

[15] A number of rules in the PAUP NV that were relevant to the Costellos' application when lodged were identified in the decisions.

[16] From 19 August 2016, when the Council notified its decisions on the recommendations of the Independent Hearings Panel, the PAUP NV was replaced by the PAUP DV.

[17] Under s 86F of the RMA those parts of the PAUP DV not subject to appeal were treated as operative (and the legacy plan as inoperative) from Friday, 16 September 2016, the last date for lodging appeals against the PAUP DV.

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6 Local Government (Auckland Transitional Provisions) Act 2010, s 121.

7 Local Government (Auckland Transitional Provisions) Act, s 153(1).

[18] Other relevant provisions of the PAUP DV became operative on resolution of the appeals, such as the yard rules for Titirangi Laingholm which were resolved following a later decision of the Environment Court.[8]

[19] In addition to the PAUP NV and PAUP DV the Waitakere Ranges Heritage Area Act 2008 (WRHA Act) is also relevant to this proceeding. The purpose of the WRHA Act is to recognise the national, regional and local significance of the Waitakere Ranges Heritage Area (WRHA) and to promote the protection and enhancement of its heritage features for present and future generations.[9] The Act identifies a range of features that contribute to the national significance of the WRHA and articulates the objectives of establishing and maintaining that area.

First cause of action – scope and jurisdiction

[20] The first cause of action is in essence a claim that the decisions of the Council were ultra vires. The plaintiffs say the Council had no jurisdiction to grant the second consent under the PAUP DV as the Costellos had not applied for consent under the PAUP DV. They say that in granting the consent the Council went beyond the scope of the Costellos' application.

[21] Mr Enright submitted that a consent authority cannot grant a consent to an application not applied for.[10] He argued that consent was required for breach of PAUP DV rules triggered from 19 August 2016 so that a fresh application was required. As no fresh application was sought the Costellos have unlawfully commenced construction and carried out unauthorised earthworks.

[22] Mr Enright submitted that there was an important shift in the planning framework between the date of the application for the resource consent on 29 June 2016 and the date of the decision of 26 August 2016. Prior to 19 August 2016 only four issues engaged the PAUP NV rules:

(a) earthworks exceeding permitted levels of 250 m^3 and 500 m^2 metres;

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8 *Lenihan v Auckland Council* [2017] NZEnvC 22 at [14].
9 Waitakere Ranges Heritage Area Act 2008, s 3.
10 *Wellington City Council v Milburn New Zealand Ltd* EnvC Wellington W118/98, 17 December 1998.

(b) earthworks within a defined significant ecological area;

(c) vegetation alteration and removal;

(d) impervious areas within a stormwater management area.

[23] However, from 19 August 2016, when the PAUP DV had interim legal effect, additional provisions (both in policies and rules) were triggered for:

(a) Ridgeline Protection Overlay; and

(b) Large Lot Zone.

[24] It is common ground that both the Costellos' and the plaintiffs' properties are subject to Ridgeline Protection Overlay under the PAUP DV and are subject to ss 7 and 8 of the WRHA Act. As a result the overall status of the application under the PAUP DV was non-complying.

[25] Mr Enright submitted that the Council's incorrect approach was reflected in an email to the applicant of 19 August 2016:

> Thank you for your email and sorry for the continued delay in issuing your consent. Unfortunately, when the consent was reviewed by the Team Leader he noticed that the application hadn't been sent to the Local Board, which it should have been. I sent it to them straight away and asked for their comments as soon as possible, so once I receive their comments I will be able to grant the consent. This may not be today, in which case the Unitary Plan will take legal effect tonight and I will then need to undertake a further assessment of your proposal against the rules of the new plan as well as the current plan, however it shouldn't be too much additional work.

[26] Mr Enright also relied upon the following passage from the Council's *Proposed Auckland Unitary Plan: FAQs – Development rights and resource consents*:[11]

> When a rule in a *proposed* plan has legal effect, this means you need to comply with that rule, or seek consent to breach / infringe it. Consent will also need to be obtained under any rule in a legacy *operative* plan.

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[11] *Proposed Auckland Unitary Plan: FAQs – Development rights and resource consents* (Auckland Council, 22 July 2016).

Later in the document under the heading "Resource Consents" the guidance note says:

> *If I lodge my resource consent application before 19 August 2016, will it only be assessed against the operative legacy plan rules?*
>
> The key factor is if your application is decided ***before*** **19 August 2016**. In that case, it will be assessed against legacy plan rules (and those rules in the PAUP Notified Version with immediate legal effect). Any resource consent that is decided on, and issued, ***after*** **19 August 2016** will need to be assessed against the provisions in legacy plans **and** any PAUP Decisions Version provisions relevant to the proposal.
>
> Legally, the Council, as consent authority, must have regard to relevant provisions of legacy plans and proposed plans, when making decisions on applications, in accordance with the RMA.
>
> *If I apply for a resource consent before the PAUP Decisions Version is released, but the consent hasn't been decided on and issued, will I need to apply for other consents?*
>
> You may do. As a result of certain provisions in the RMA, the Council is required to also have regard to any relevant provisions of a proposed plan when considering an application for resource consent. This may trigger a need to apply for consent under rules that form part of the PAUP Decisions Version, as they have legal effect from the date of their release.
>
> However, the 'activity status' of your consent is protected to what applied at the time of the application being accepted for processing. For example, if at the time of your application being lodged, the overall activity status was 'discretionary' and the PAUP Decisions Version introduced a relevant rule that the proposal was considered 'non-complying', the overall status would remain as 'discretionary'. You will still need to apply for the additional infringement / reason for consent, but the overall activity status would not be altered.

[27] On Mr Enright's submission where, as in the present case, there was a change from requiring a consent for discretionary activities to requiring a consent for a non-complying activity the application would in all cases have to be declined or not dealt with and the applicants required to make a fresh application for resource consent.

[28] The fundamental flaw in the plaintiffs' argument is that it overlooks the nature of the consent applied for. Consents granted under the relevant provisions of the RMA authorise activities, in this case land use. They do not authorise breaches of rules.

[29] The Costellos' application for resource consent was for a land use consent. That did not change under the PAUP DV. The description of the proposed activity was:

> This new application is for the construction of a new residential dwelling and associated site works, vegetation removal and impermeable surfacing at 19 Rangiwai Road, Titirangi.

[30] The application was accompanied by detailed plans which included a proposal for a swimming pool amongst other site earth works and improvements.

[31] The consent granted by the Council was for land use consent for the construction of a new four bedroom residential dwelling with swimming pool and stormwater retention tank at a height of 176.40m RL, including earthworks and removal of protected trees from the site. The consent granted was consistent with the activity described in the application and supporting documents.

[32] The Costellos' application for land use consent was made under s 88 of the RMA. Section 88A(1A) applied. The effect of s 88A(1)(b) and s 88(1A) is that, as the Council's FAQs advised, the activity status of the consent was protected. The Council accepts that it was still obliged to have regard to relevant provisions of the PAUP DV. The issue is whether a further and different consent was required. In this case I am satisfied it was not. The consent applied for and granted remained a land use consent.

[33] To the extent that the plaintiffs seek to rely on *Wellington City Council v Milburn New Zealand Ltd*, *Sutton v Moule* and *Shell New Zealand Ltd v Porirua City Council* to support their argument the consent was granted without jurisdiction, they have misinterpreted the effect of those decisions.[12]

[34] In *Sutton v Moule* the Court of Appeal confirmed that:[13]

> … a council has no jurisdiction to grant a consent which extends beyond the ambit of an application.

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[12] *Wellington City Council v Milburn New Zealand Ltd*, above n 10; *Sutton v Moule* (1992) 2 NZRMA 41 (CA); and *Shell New Zealand Ltd v Porirua City Council* CA57/05, 19 May 2005.

[13] *Sutton v Moule*, above n 12, at 45.

In *Sutton v Moule* the ambit of the application was defined and determined by the terms of the application for consent. The Court of Appeal rejected the more restrictive view taken by Judge Treadwell in the Planning Tribunal, describing it as a strained interpretation. Judge Treadwell had found that the original consent related to land use while the subsequent application in issue was restricted to the modification of a structure on the land. He considered them different. The Court of Appeal took account of the practical situation facing the applicant at the time, considered the documents filed with the application and concluded that:[14]

> … [the application] related in substance and in effect to the use of the land and that the Council was entitled to deal with it on that basis. It follows from this conclusion that the Council's consent was not beyond the scope of the application. No question of the Council's decision in 1988 being *ultra vires* in this respect therefore arises.

[35] In *Shell New Zealand Ltd v Porirua City Council* the Court of Appeal dealt with an amendment to the application. The Court held:[15]

> [7] We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.

[36] The cases referred to by the plaintiffs do not support their argument the Council's decision was ultra vires or that the consent was somehow beyond the scope of the application. Rather they support the contrary conclusion that as the application remained an application for a land use consent to build a dwelling (with associated site works) and the consent granted was within the ambit of such an application, it was within scope.

[37] Mr Enright referred to the Council's FAQs information which differentiates between "simple" and "complex" applications. He noted that s 91 RMA does not distinguish between simple or complex applications and provides for the Council to require further resource consents where appropriate. But s 91 only applies to a

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14 *Sutton v Moule*, above n 12, at 48.

15 *Shell New Zealand Limited v Porirua City Council*, above n 12.

situation where other resource consents may be required. In the present case the resource consent required was a land use consent. That did not change. No further consents were required. As noted earlier, a resource consent authorises an activity. It does not authorise a breach of a particular rule.[16]

[38] I reject the suggestion that the Council did not have jurisdiction to determine the applications or that its decision to proceed with the application for land use consent after 19 August 2016 without requiring further consents was somehow ultra vires or outside scope.

Second cause of action – irrelevant considerations

[39] The plaintiffs challenge the Council's reference to the PAUP NV in its notification and substantive decisions and say that by doing so the Council took into account irrelevant considerations.

[40] Mr Enright submitted that from 19 August 2016 the PAUP NV was only relevant to determining the activity status under s 88A RMA but was otherwise irrelevant to the subsequent decisions on notification and approval. He then submitted that by referring to the PAUP NV the Council had regard to irrelevant considerations as there were material differences between the PAUP NV and the PAUP DV.

[41] Mr Enright pointed to passages from the consent decision which he argued suggested Mr Dowding wrongly had regard to the PAUP NV. Mr Enright submitted that Mr Dowding's evidence that the PAUP NV was only relied on to establish activity status under s 88A and not for any other purpose could be contrasted with the decision itself, which referred to the consents sought under the PAUP NV. He then submitted the error was compounded at para 6 of the substantive decision which stated:

> 6. Under the PAUP, district land use consent is required in respect of earthworks and regional land use consent is required in respect of earthworks within the SEA, vegetation removal within the SEA and creation of impermeable surfaces within a Stormwater Management

[16] *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.

> Area being a SMAF 2. … For these reasons the proposed development is acceptable in the context of the "emerging PAUP".

[42] Mr Enright argued that the reference in para 6 to the PAUP was a reference to the PAUP NV.

[43] Mr Enright's submission that Mr Dowding wrongly had regard to the PAUP NV, instead of the PAUP DV, is inconsistent with the text of the decisions and the context in which they were delivered.

[44] In the notification decision, Mr Dowding said:

> Since the application was lodged, the council notified the PAUP DV on 19 August 2016. This replaces the PAUP Notified Version (PAUP NV). While this application is afforded the same activity status as when it was lodged (see s88A), resource consent(s) are required under the PAUP DV for the following reasons: …

[45] Given that express statement it is not arguable that Mr Dowding was other than fully aware when he made the notification decision that the PAUP DV had replaced the PAUP NV.

[46] The substantive decision was made on the same day as the notification decision. It strains credibility to suggest that Mr Dowding was not aware when making the substantive decision that the provisions of the PAUP NV had been replaced by the PAUP DV given the clear statement in the notification decision.

[47] Further, para 6 of the substantive decision is readily open to the interpretation that it referred to the PAUP DV. Having regard to the preceding parts of the decision which identified the district land use under the PAUP DV and the regional land use required, it is entirely consistent for the decision-maker to consider the effects of the earthworks, vegetation removal and creation of the impermeable surfaces in relation to the requirements of the PAUP DV. While the concept of an "emerging PAUP" as referred to in para 6 has no particular legal status, given the stage the process was at with the PAUP DV applicable but the plan not entirely operative at the time the reference to the "emerging" PAUP is understandable.

[48] Next, the text of the substantive decision demonstrates that Mr Dowding had regard to particularly relevant new rules under the PAUP DV relating to the Ridgeline Protection Overlay and Large Lot Zone rules. There are references in the substantive decision which confirm consideration was given to the effect of both. It is sufficient to refer to the following comments about the ridgelines:

> The proposed development, which is located on a designated sensitive ridge, will not compromise the inherent visual landscape qualities of the area, by reason of the development's sensitive design and siting; existing vegetation to act as screening; lack of potential viewpoints where clear views of the site can be achieved; and the greater dominance of other existing buildings within the locality that would be more prominent than the proposed dwelling.

[49] As to the Large Lot Zone rules:

> The effects relating to building coverage will be acceptable, by reason that the proposed dwelling will be less visually dominant than that previously proved by virtue of its sensitive design and appropriate use of materials of differing textures and colours. In addition, the retention of the majority of the quality vegetation on the site, and appropriate replanting, will ensure that an appropriate balance is struck between the built form and vegetation.

And:

> There are no concerns relating to the height in relation to boundary infringement, given that the two storey element of the proposed dwelling will be sited approximately 6.5m from the southern site boundary and the existing dwelling at 17 Rangiwai Road is also set well back from the boundary by approximately 14.5m. In addition, there is a strip of land approximately 3m width that is within the ownership of 15 Rangiwai Road, which provides further separation between site and the property at 17 Rangiwai Road. Daylight access to the proposed dwelling or adjoining sites will not be compromised by the proposal. In addition, when viewed from outside the site, an appropriate separation will be maintained between the proposed dwelling and the existing dwelling on the adjacent site to ensure that the built form within the locality will not be unduly dominant.

[50] Finally there is in any event the point Mr Whittington made that the objectives and policies of the PAUP NV, while overtaken by those in the PAUP DV, were not irrelevant in the sense of being an impermissible consideration. They may well assist a planner to understand how a specific objective or policy evolved from one version of a plan to another, or to inform the consideration of why the Council accepted or rejected a particular submission.

[51] The challenge to the decisions on the basis they took into account irrelevant considerations, namely the provisions of the PAUP NV, cannot succeed.

The third and fourth causes of action – relevant and irrelevant considerations, wrong legal test and unreasonableness in relation to both notification and substantive decisions

[52] The plaintiffs challenge both the notification and substantive decisions on the basis that the:

> Council had regard to irrelevant matters, failed to consider relevant matters, applied wrong legal test or otherwise acted unreasonably.
>
> Particulars
>
> (a) Adverse effects to the environment will be or are likely to be more than minor and adverse effects to adjacent properties are minor or more than minor …;
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> (b) Council failed to assess the relevant planning framework under the decisions version … which impacted the effects assessment;
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> (c) Council failed to consider relevant heritage effects, including impacts on s6(f) RMA;
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> (d) Council failed to have "particular regard" to the purpose and relevant objectives of the Waitakere Ranges Heritage Area Act;
>
> (e) The existing resource consent should have been disregarded as irrelevant consideration.

[53] In addition, in relation to the substantive decision, the plaintiffs also allege the Council failed to consider and assess the PAUP DV provisions relating to the protected ridgeline, large lot rules, heritage protection and WRHA Act.

Background - legal principles relating to notification

[54] Section 95A RMA provides for public notification of the consent application to be at the consent authority's discretion. The application must, however, be notified in two circumstances:

(a) If the Council decides (under s 95D) that the proposed activity will have or is likely to have adverse effects on the environment that are more than minor then the application must be publicly notified.

Importantly for present purposes, s 95D provides that in determining whether an activity will have or is likely to have adverse effects that are more than minor the Council must disregard any effects on persons who own or occupy any land adjacent to that land. The plaintiffs and owners of other neighbouring properties fall into that category.

(b) If the Council decides (under s 95B) that there is an affected person in relation to the proposed activity then the consent authority must give limited notification of the application to any affected person.[17] Section 95E confirms that a person is an affected person if the adverse effects on them are minor or more than minor, but are not less than minor.

[55] In this case for the Council to form the view that the application did not need to be notified the Council had to be satisfied that the adverse effects of the proposed land use on the environment were not more than minor. In relation to the limited notification decision the Council had to be satisfied that the adverse effects on the plaintiffs (or any other person) were less than minor. In the event the Council, through Mr Dowding concluded that the effects were less than minor in both cases.

Particular (a) – error in assessing adverse effects generally

[56] Mr Enright submitted that the landscape and natural character effects on the sensitive ridgeline were the central issue in relation to public notification and the grant of consent. He criticised the Council for failing to obtain expert landscape input and failing to obtain a cross-sectional survey to indicate the level of impact on affected persons at 15 Rangiwai Road and other neighbours. He also submitted that the Council had failed to consider the relevant objectives and policies under the PAUP DV and therefore failed to correctly evaluate the receiving environment.

[57] The last point can be dealt with briefly. As noted above, in his notification decision Mr Dowding recorded at the outset the relevant zoning and precinct and special features and overlays that were engaged by the PAUP DV. Mr Dowding then

[17] Unless a rule or national environmental standard precludes limited notification of the application: Resource Management Act 1991, s 95B(2).

went on to expressly record that under the PAUP DV the land use consent was non-complying pursuant to the Ridgeline Protection rules. It is apparent that Mr Dowding was fully aware when he made both the notification and substantive decisions that the PAUP DV had replaced the PAUP NV. He properly considered the relevant objectives and policies under the PAUP DV.

[58] In coming to the view that the adverse effects on the environment were less than minor Mr Dowding had regard to an assessment report provided in accordance with sch 4 of the RMA, which concluded that:

- The trees proposed to be removed were not significant specimens and the effects of removal would be mitigated.

- Appropriate measures were proposed by the Costellos' arborist in respect of works within the dripline to ensure the continued health of protected vegetation.

- The level of earthworks proposed was reasonable given the topography of the site. Appropriate measures were to be adopted to ensure the erosion and sediment effects would be less than minor.

- The site was not known to provide habitat for threatened, endangered or otherwise unique species of fauna. Works within the defined significant ecological areas (SEA) were to be restricted.

- Local iwi had confirmed that a cultural impact assessment was not necessary.

- The proposed sensitive design of the dwelling was to be seen in the context of more prominent dwellings at 27 and 29 Rangiwai Road. Any distance views of the site were a significant distance away, and importantly, in addition, the ridge of the existing dwelling at 15 Rangiwai Road was higher than that proposed at the application site. Views of the dwelling would be partially obscured by mature

vegetation on the site within the wider area. The effects relating to the sensitive ridgeline would be less than minor.

- Public effects associated with the height in relation to boundary infringement at the southern side boundary would be less than minor because when viewed from public viewpoints there was sufficient separation between the proposed dwelling and the existing dwelling on the adjacent site.

- The effects relating to building coverage would be less than minor as the proposed dwelling would be less visually dominant than that previously approved. In addition the retention of the majority of the quality of vegetation on site would ensure the appropriate balance was struck between the built form and vegetation.

- Construction management plans would be provided to manage effects relating to development.

- Proposed detention tank would manage effects relating to stormwater and proposed driveway. A new connection to the public stormwater was also to be constructed.

[59] Taking these matters into account, Mr Dowding concluded that the adverse effects of the proposed land use on the environment would be less than minor and therefore public notification of the application was not required.

[60] In coming to the view that the effects on the plaintiffs were less than minor Mr Dowding accepted the applicants' consultants' opinion that:

> - The significant levels of vegetation to be retained and replanted will suitably mitigate the loss of the [relevant protected trees], none of which are of notable quality from an arboricultural perspective.
>
> - Silt runoff will be minimised by the use of appropriate sediment and erosion control measures;
>
> - Compliance with geotechnical recommendations will ensure that land stability will not cause adverse effects;

- The proposed development will not adversely affect 15 Rangiwai Road, which is a designed heritage item, by reason of the distance between the existing dwelling at 15 Rangiwai Road and the proposed dwelling on the subject site and the topography of the area which will screen much of the proposed dwelling when viewed from 15 Rangiwai Road;

  …

- The natural qualities of the designated sensitive ridgeline will be protected, by reason of the dwelling's sensitive design, siting and the presence of natural onsite screening and background vegetation.

- Construction nuisance will be mitigated by restrictions in relation to working hours and a construction management plan. In addition, any effects will be temporary and will endure only for the duration of the construction phase.

- The proposed detention tank will effectively control stormwater discharge, thereby mitigating any effects from the impermeable surfaces.

- Connections will be made from the site to all necessary reticulated services, thereby avoiding all adverse effects in relation to wastewater, stormwater, water, power and telecommunications.

[61] As Ms Tree noted the application contained cross-sectional plans in building design and the geo-technical report. In addition, from the information Mr Dowding had before him, it was apparent that:

- the height of the top of the designated ridgeline was approximately 178 metres RL;

- the maximum height control of eight metres which applied to the property would allow a dwelling in the property that was 177.269 metres RL;

- the maximum height of the dwelling on the property authorised by the consent was 176.420 metres RL (1.58 metres below the ridgeline and 0.849 metres below the height that would be permitted under the direct decisions, under the PAUP DV); and

- the height of the single storey part of the consented dwelling closest to the right of way and dwellings on 15 and 17 Rangiwai Road was

approximately 173.020 metres RL (more than four metres lower than the eight metre permitted height).

[62] Mr Dowding recorded in the decision:

> There is a height in relation to boundary infringement at the southern site boundary measuring 0.42m in height and 0.7m width in relation to the single storey part of the proposed dwelling and 1.625m in height and 2.7m width in relation to the two storey part of the proposed dwelling. The effects associated with this infringement will be less than minor, by reason that the two storey element of the proposed dwelling is sited approximately 6.5m from the site boundary and the existing dwelling at 17 Rangiwai Road is also set well back from the boundary. There is also a strip of land of approximately 3m width that is within the ownership of 15 Rangiwai Road, which provides further separation between site and the property at 17 Rangiwai Road. These factors will ensure that daylight access to the proposed dwelling or adjoining sites is not compromised and that the attractive local vernacular will be maintained.

[63] Taking these matters into account, Mr Dowding concluded that the adverse effects of the proposed land use on other persons, including the plaintiffs, would be less than minor and therefore limited notification of the application was not required.

[64] There is no requirement for a Council officer making a notification decision to physically inspect the visibility of the proposed dwelling from a neighbour's site as was suggested in the submissions for the plaintiffs. The application was accompanied by a full set of plans and description of the proposal and subject site that was acceptable to the Council. The assessment of adverse effects provided sufficient detail corresponding with the scale and effects the activity might have on the environment. While the experts called for the plaintiffs, Ms Lucas and Mr Putt, suggest that further reports could have been obtained the Council was not obliged to obtain expert landscape input or to obtain a cross-sectional survey.

[65] I am satisfied that in making his assessment of the adverse affects on the environment and on the plaintiffs, Mr Dowding had regard to the relevant considerations and did not have regard to irrelevant considerations. There is no evidence that he applied the wrong legal test and his final decision was not unreasonable. The plaintiffs' challenge is essentially to the merits of his decision which is not reviewable. As this Court confirmed in the *Tasti Products Ltd v*

Auckland Council case it is not part of the Court's function on an application for review to consider the merits of the Council's decision on notification.[18]

Particular (b) – failure to assess the relevant planning framework under the PAUP DV

[66] For the reasons given above at [39]–[51] I reject the submission for the plaintiffs that Mr Dowding failed to assess the relevant planning framework under the PAUP DV.

Particular (c) – failure to consider heritage effects

[67] Mr Enright next argued that the Council failed to consider relevant heritage effects, including under s 6(f) RMA the need to recognise and provide for the protection of historic heritage from inappropriate use and development.

[68] Mr Enright did not direct any written submissions at this aspect of the pleading but in the affidavits of Ms Lucas and Mr Duggan it is suggested that 15 Rangiwai Road has heritage values because of the location of a 19th century flagpole and caves of Maori origin overlooking the Maori crossing between the Waitemata and Manukau Harbours. Ms Lucas suggests there is a "grand outlook" from 15 Rangiwai Road.

[69] Given the content of the PAUP DV, the development of the plaintiffs' residential dwelling on an adjacent property in the circumstances of this case does not infringe the requirement to provide for the protection of historic heritage from inappropriate subdivision use and development. The PAUP DV does not provide for a viewshaft or other protection of the view from 15 Rangiwai Road. As Ms Tree submitted, normal height controls for the surrounding area apply to the properties that can be seen from Rangiwai Road. There is no legal right to a view.[19]

[70] Although not directly addressed in Mr Enright's submissions I note the notification decision expressly referred to the special features of the PAUP DV as Natural Heritage: Waitakere Ranges Heritage Area Overlay – Extent of Overlay and

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18 *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [52].
19 *Re Meridian Energy Ltd* [2013] NZEnvC 59 at [112].

other natural heritage issues. The decision recorded that the Waitakere Ranges Local Board had been notified of the application and had not responded. Next, it was also noted the Costellos had consulted with local iwi. The iwi confirmed a cultural impact assessment was not necessary.

[71] In light of that the pleading that the Council failed to consider heritage effects cannot be maintained.

Particular (d) – failure to have "particular" regard to the Waitakere Ranges Heritage Area Act

[72] Mr Enright referred to s 13(1) WRHA Act which required the Council to have particular regard to the purposes of the Act and its relevant objectives and to consider the objectives, having regard to any relevant policies in the regional and district plans. He submitted that the level of consideration required for a non-complying activity was "onerous".

[73] Mr Enright noted that the notification and substantive decisions did not refer expressly to ss 7 and 8 of the WRHA Act. He submitted the decisions failed to relate those provisions to the relevant objectives and policies of the PAUP DV. In his submission the reference in the decision to the WRHA was insufficient as it failed to have particular regard to ss 7 and 8 WRHA Act.

[74] The purpose of the WRHA Act is to:[20]

(a) recognise the national, regional and local significance of the WRHA; and

(b) promote the protection and enhancement of its heritage features for present and future generations.

[75] The objectives of the WRHA Act are set out at s 8. They are consistent with the objective of giving effect to the above purposes.

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[20] Waitakere Ranges Heritage Area Act, s 3.

[76] It is apparent from the notification and substantive decisions that Mr Dowding was aware of the WRHA Act and its impact on the relevant policies in the PAUP DV. The first page of the notification decision records the special features, overlays etc of both the PAUP NV and the PAUP DV including the WRHA. The site is recorded as subject to Natural Heritage: Waitakere Ranges Heritage Area Overlay. In the notification decision Mr Dowding expressly referred to the WRHA:

> **Waitakere Ranges Heritage Area**
>
> The proposed development will preserve the character and appearance of the Waitakere Ranges Heritage Area, by reason of the dwelling's sensitive design, use of appropriate materials, and retention of significant vegetation and replanting of further native specimens. As such, effects in this regard will be less than minor.

[77] Mr Dowding repeated the same passage in the substantive decision, replacing the reference to the effects being less than minor with the statement that "[a]s such, effects in this regard will be acceptable".

[78] I agree with the submission by Mr Whittington that Mr Enright's criticisms are essentially an argument that the Council failed to give adequate reasons for its decision in dealing with the WHRA Act.

[79] The requirement to "have particular regard to" some criterion requires the consent authority to consider the relevant provisions and weigh them as part of the overall decision.[21] However, a consent authority is not required to expressly refer to every relevant consideration and decision on every application. To do so would be to impose an impossible burden on the consent authority.[22] Where the provisions are not expressly referred to in the relevant decision it is for this Court to determine on the facts of the case before it whether it can be said the consent authority has considered the relevant provisions and weighed them as part of its decision.

[80] The requirement under s 13 WRHA Act was to have particular regard to the purposes of the Act and the relevant objectives under s 8. The first objective under s 8(a) is to protect, restore and enhance the area. The reference in the decisions to

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21 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 (PT).

22 *Fair Investments Ltd v Palmerston North City Council* HC Palmerston North CIV-2010-454-653, 15 December 2010 at [46]–[47].

the development preserving the character and appearance of the WRHA supports the view the Council considered that objective. The second objective under s 8(b) is to ensure that impacts on the area as a whole are considered when decisions are made affecting any part of it. Again the reference in the decision to the proposed dwelling's sensitive design, use of appropriate materials and retention and replanting supports the conclusion the decision-maker considered the impacts of the application on the WRHA. It was not necessary to expressly refer to particular sections of the WRHA Act.

[81] If I am wrong in that conclusion, I note that when preparing aspects of the PAUP that affected the WRHA the Council was also required to give effect to the purpose of and objectives in the WRHA Act.[23] It follows that the PAUP DV gives effect to the purpose of objectives in the WRHA by the Waitakere Ranges Heritage Area Overlay and the Natural Heritage: Ridgeline Protection Overlay. There is no suggestion that the relevant provisions in the PAUP DV are invalid or uncertain. Nor can it be said the PAUP NV failed to address the purpose and objectives of the WRHA Act. At D1 Waitakere Ranges Heritage Area Overlay, the PAUP DV says it gives effect to the purpose and objectives of the WRHA Act. At various parts the PAUP DV refers to the relevant objectives of the WRHA Act and specifically to ss 7 and 8. So in considering the application for resource consent for a non-complying activity such as the present in the Waitakere Ranges the Council can be said to have complied with its obligations under s 13 of the WRHA Act by having regard to the relevant provisions of the PAUP DV.[24] I note that in *RJ Davidson Family Trust v Marlborough District Council* the Court applied the reasoning in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* to an application under s 104(1) RMA.[25]

[82] Finally, I accept Ms Tree's submission for the Costellos that even if it could be said the Council failed to give sufficient specific consideration to the purposes and objectives in the WRHA Act when making the notification decision (which I do not accept) this is not an appropriate case to grant relief. It is apparent from the

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23 Waitakere Ranges Heritage Area Act, s 11.

24 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

25 *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

notification and substantive decisions that the Council did consider the fact the property and adjoining properties were within the WRHA when making the notification decision, sought to give effect to the considerations and expressly considered the effects of the proposed development on the point of significance in this case, namely the protected ridgeline. Further, the Waitakere Ranges Local Board was given an opportunity to comment on the consent application and made no comment.

[83] There is no evidence to suggest that if the Council had undertaken the specific analysis suggested by the plaintiffs it would have reached a different decision when considering the application.

Particular (e) – reference to existing resource consent as a base line

[84] Mr Enright submitted that by referring to the existing consent granted in July 2015 the Council fell into error.

[85] While accepting that a decision-maker may have regard to an existing and unexercised resource consent as part of the existing environment,[26] Mr Enright nevertheless submitted that once the second consent was granted the Costellos needed to make an election and by December 2016 the Costellos had made their election by commencing the construction of the approved dwelling under the second consent. He argued that the first consent was therefore fanciful.

[86] Mr Enright noted that in their application for the second consent the Costellos themselves had noted there were no known approved but as yet unimplemented resource consents. He suggested that would amount to a "waiver" of rights under the first consent. Mr Enright submitted the Council fell into error by effectively deducting the effects of the existing consent when considering the second application. He submitted it was effectively an irrelevant consideration or, more accurately described, a wrong legal test.

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[26] *Queenstown Lakes District Council v Hawthorn Estates Ltd* [2006] NZRMA 424 (CA).

[87] The first point is that in the notification decision Mr Dowding expressly noted there was no permitted baseline relating to the site. He did then go on to note that a consent had been granted in July 2015 for a similar development so that it was therefore reasonable to only consider the effects over and above those that were consented to by the previous approval. Such an approach was consistent with the authorities. In *Queenstown Lakes District Council v Hawthorne Estates Ltd* the Court of Appeal said, citing *Arrigato Investments Ltd v Auckland Regional Council*:[27]

> [78] …
>
> > [35] Resource consents are capable of being granted on a non-notified as well as a notified basis. Furthermore, they relate to activities of differing kinds. There may be circumstances when it would be appropriate to regard the activity involved in an unimplemented resource consent as being part of the permitted baseline, but equally there may be circumstances in which it would not be appropriate to do so. For example, implementation of an earlier resource consent may on the one hand be an inevitable or necessary precursor of the activity envisaged by the new proposal. On the other hand the unimplemented consent may be inconsistent with the new proposal and thus be superseded by it. We do not think it would be in accordance with the policy and purposes of the Act for this topic to be the subject of a prescriptive rule one way or the other. Flexibility should be preserved so as to allow the consent authority to exercise its judgment as to what bearing the unimplemented resource consent should have on the question of the effects of the instant proposal on the environment.
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> [79] The Environment Court dealt with the implications of the existing resource consents in the present case in a manner that was consistent with that approach. It will always be a question of fact as to whether or not an existing resource consent is going to be implemented. If it appeared that a developer was simply seeking successively more intensive resource consents for the same site there would inevitably come a point when a particular proposal was properly to be viewed as replacing previous proposals. That would have the consequence that all of the adverse effects of the later proposal should be taken into account, with no "discount" given for consents previously granted. We are not persuaded that the prospect of "creep" should lead to the conclusion that the consequences of the subsequent implementation of existing resource consents cannot be considered as part of the future environment.

[88] The unimplemented first consent is strictly inconsistent with the second consent to the extent that both are to build a dwelling on the same site. Both cannot

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[27] *Queenstown Lakes District Council v Hawthorne Estates Limited*, above n 26, at [78] citing *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

be implemented. The second application supersedes the existing consent. But when considering the effects on the receiving environment, as Clifford J observed in *Nash v Queenstown Lakes District Council* the relevant assessment is essentially factual. It is relevant that at the time the Council was considering the second application the Costellos were entitled to rely on the first consent.[28]

[89] There was no waiver by the Costellos of their rights under the first consent by their application for the second consent. If for any reason the second application had been declined it would have been open to the Costellos (or a purchaser from them) to implement the first consent within five years of it being granted. As the Court of Appeal observed in *Arrigato*, flexibility is required in this area.[29] In the substantive decision the focus was properly on the effects of the particular application before it.

[90] I conclude it was open to Mr Dowding to take account of the first consent in the limited way he did.

Further particular – failure to assess the relevant provisions of the PAUP DV (substantive decision)

[91] The plaintiffs' last argument is that in its substantive decision the Council failed to consider and assess the relevant provisions of the PAUP DV in relation to:

(a) protected ridgeline;

(b) residential large lots;

(c) heritage protection; and

(d) WRHA Act provisions.

[92] Mr Enright submitted that the substantive decision failed to discuss the relevant PAUP DV rules, particularly the Protected Ridgeline Overlay and the Large Lot Zone. He submitted that the Council had failed to take them into account.

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28 *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [64].

29 *Arrigato Investments Ltd v Auckland Regional Council*, above n 27, at [35].

[93] When the substantive decision is read as a whole and particularly when considered with the notification decision I am unable to accept Mr Enright's submission that the Council failed to take account of the relevant PAUP DV provisions.

[94] As noted it is relevant that the substantive decision was issued at the same time as the notification decision. In the notification decision Mr Dowding acknowledged that resource consent was required under the PAUP DV for a variety of district land uses and regional land uses. Significantly the notification decision recorded that land use consent was sought, for example, for a non-complying activity pursuant to r D15 and Table D15.4.1 of the Ridgeline Protection Overlay rules, by reason that the proposed dwelling would have a sky backdrop above the natural ridgeline when viewed from a public place (Rangiwai Road). That was repeated in the substantive decision.

[95] Both the notification and substantive decisions also identified the need for land use consent for a restricted discretionary activity pursuant to r H1.6.4 and Table H1.6.5.1 of the Large Lot Zone rules, by reason of the setback requirements. Further the notification decision identified as special features or overlays of the PAUP DV Natural Heritage: Waitakere Ranges Heritage Overlay WRHA 05 and Natural Heritage: Waitakere Ranges Heritage Area Overlay – Extent of Overlay.

[96] Under the PAUP NV the land use consent was a restricted or discretionary activity. It was only under the PAUP DV that it was non-complying. At the outset of the reasons section of the substantive decision Mr Dowding stated:

> An assessment of the gateway test for non-complying activities has been undertaken under s104D and demonstrates that the proposal passes both tests, by reason that the effects created by the development will be less than minor and that the proposal is consistent with the policies and objectives of both the operative and proposed lands.

[97] The substantive decision went on to state:

> In accordance with an assessment under s104(1)(b) of the [RMA] the proposal will be consistent with the relevant statutory documents. In particular, the development will … maintain the form, integrity and extent of the City's outstanding natural features; … will protect the City's valued

> heritage; … and will maintain the amenity values that contribute to the wellbeing of residents, as required by Part 5 of the District Plan titled 'Objectives, Policies and Methods'.

[98] In context I take the reference to relevant statutory documents to include the reference to the WRHA Act.

[99] It is plain from the above and from the preceding discussion that Mr Dowding had regard to the relevant requirements of the PAUP DV and the WRHA Act.

Result

[100] The plaintiffs' challenge to both the notification and substantive decisions of the Council fails.

Costs

[101] The Council and the Costellos are entitled to costs against the plaintiffs. In each case they are to have costs on a 2B basis together with disbursements as fixed by the Registrar.

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Venning J