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 |

---

# SYNOPSIS OF OPENING SUBMISSIONS FOR THE APPLICANT

---

Telephone: 06 833 5012
Facsimile: 06 833 5014
PO Box 45 Napier 4140

Counsel: Matthew Lawson

**May please the Commissioner**

1. The SR & BJ Williams Charitable Trust Board (the applicant) apply for subdivision consent 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.

2. The proposal is fully described in the revised consent application and Assessment of Environmental Effects dated 15 August 2023. It is also well described in councils section 42A report and in the expert planning evidence of Mr McKay filed on behalf of the applicant.

3. With one exception, Mr McKay and Mr O'Leary are in agreement with the description of the proposed subdivision. That exception relates to Lot 13 and whether that is required to meet the minimum lot size and the operative District Plan. Mr McKay comprehensively deals with this issue at paragraph 25 of his evidence. In short, applying standard 9.10(i) of the operative District Plan exempts the creation of a lot for the purposes of a boundary adjustment from the minimum lot size of 4000 m².[1]

4. It should also be stated from the outset that while there are substantial areas of agreement between Mr McKay and Mr O'Leary, the applicant disagrees with the officers recommendation that this application be declined. The reasons for that disagreement are detailed later in these submissions and in the evidence called on behalf of the applicant .

5. In addition, it is submitted from the outset that this is not a contest between a subdivision occurring at Mangakuri Beach and a subdivision not occurring. The proposal has been put forward as an integrated package of subdivision, with lots and built development being placed sympathetically within the landscape and within an extensive landscape planting regime. The evidence of Mr Yule outlines the various development options open to the trust which can all be undertaken as of right or as controlled activities.[2]

---

[1] This appears to now be agreed by Mr O'Leary in his rebuttal evidence.

[2] It is noted that there is some contention that the controlled activity status may not apply in circumstances where part of the title is within the coastal area and that a subdivision would in fact be restricted discretionary. This is a matter that is dealt with by Mr McKay and his evidence.

6. The question could be asked, if that is a simpler and more easily consented form of development, why has the trust not pursued an easier route? The answer to that question is that the applicant trust and the SR & BJ Williams family have been custodians of this land for a significant period, significantly longer than any of the submitters have owned land holdings at Mangakuri beach. As detailed in the evidence of Mr Yule, the Trust does not consider that the controlled activity forms of development available to it, achieve an outcome that is as sympathetic with the existing environment as that proposed.

7. In short, the contest is not between there being a subdivision on one hand or there being no subdivision on the other. Rather the contest is between subdivision as an integrated package such as is proposed and more ad hoc and potentially intrusive subdivision using the existing development rights and development rights that are allowed as controlled activities under the proposed District Plan.

**Areas of Agreement.**

8. There is agreement on a substantial number of issues. These include:

   (a) It is agreed that the proposal is for a discretionary activity.[3]

   (b) It is agreed that the proposed development will not result in the loss of highly productive land, that the effects of the use of rural land (LUC 6 and 7) for the subdivision will be less than minor, and that the proposal is consistent with RLR -01 and RLR -03.[4]

   (c) That the proposal will not result in any unacceptable reverse sensitivity effects.[5]

   (d) That any adverse traffic effects of the proposal on the safe and efficient operation of the roading network will be acceptable and potential adverse effects can be appropriately mitigated by consent conditions.[6]

---

[3] see rebuttal evidence of Mr O'Leary at paragraph 1 and 2
[4] paragraph 4.43 of the section 42A report
[5] paragraph 4.47 of the section 42A report
[6] paragraph 4.82 of the section 42A report

(e) That the proposal will ensure that current and future buildings on the lots to be created will be adequately serviced and adverse effects on the environment in relation to infrastructure servicing will be acceptable.[7] in addition, it is accepted that, should a discharge of stormwater to the area now identified as a potential natural inland wetland not be possible, (either through being unable to obtain consent or otherwise being undesirable, that an alternative option to dispose of stormwater is a permitted activity exists.[8]

(f) The potential adverse effects relating to geotechnical and natural hazards are acceptable and can be sufficiently mitigated through appropriate consent conditions[9]

(g) That potential construction effects will be localised and are considered to be no more than minor on the environment or on any person.[10]

(h) That the proposal is consistent with AM-13 and the proposed District Plan as it will avoid adverse effects on archaeological sites and the potential for accidental discovery or disturbance will be covered by appropriate consent conditions.[11]

(i) That the proposal is generally consistent with the relevant provisions of the operative District Plan and the proposed District Plan relating to cultural matters and tangata whenua values[12]

(j) That the effects of the proposal on Coastal Processes will be acceptable. [13]

(k) That the proposal will be consistent with the overarching objective and the relevant policies in the National Policy Statement for Highly Productive Land.[14]

---

7 paragraph 4.97 of the section 42A report
8 see rebuttal evidence of Mr O'Leary at paragraph 3 – 5
9 paragraph 4.111 of the section 42A report
10 paragraph 4.116-117 of the section 42A report
11 paragraph 4.122 of the section 42A report
12 paragraph 4.126 of the section 42A report
13 paragraph 4.127 of the section 42A report
14 paragraph 4.140 of the section 42A report

(l) That the proposal is generally consistent with the objectives and policies of the operative District Plan.[15]

(m) That the proposal meets the requirements of section 106 of the RMA.[16]

**The discretionary activity status**

9. It is submitted that this high level of agreement reflects the fact that the proposal is a discretionary activity under both the Operative District Plan and the Proposed District Plan.

10. In *Doherty v Dunedin City Council*[17] The environment Court held;

> *[36] The distinction in this case, as it was in Plain Sense, is that in providing for the activity as a discretionary activity in the zone it cannot, by definition, be contrary to the objectives and policies of the Plan. As a discretionary activity it is accepted as being generally appropriate within the zone but not on every site. The exhaustive assessment criteria in 6.7 can act as a checklist or guide to the issues that the Council sees as being particularly relevant in considering such applications. This is overlain by the provisions of the Act and Part II in particular.*

11. Similarly, in MacLachlan v Hutt City Council EnvC W062/08 the Environment Court held:

> **Plan integrity**
>
> *[20] Be that as it may the core question about the plan provisions is whether, viewed overall, this proposal is compatible with the provisions of the Plan. It is important to bear in mind that this is not a non-complying activity, and one thus needs to be careful about not imposing upon it tests or thresholds which do not really exist. Given that this is a discretionary activity, it can be taken that it will not, per se, be contrary to (in the sense of ...in conflict with) the Plan. But there can of course be degrees of inability to*

---

[15] paragraph 4.147 of the section 42A report
[16] paragraph 4.165 of the section 42A report
[17] Environment Court, 10 September 2003 C6/2004

> *comply with standards, and that is what Assessment Matter 4A2.4.1 (b) (see para [10]) is about.*

12. The proposal is for a discretionary activity under both the Operative and the Proposed District Plans. As a discretionary activity it sits "in the middle" of the spectrum between permitted activities and prohibited activities. The fact that the activity status has not changed in the proposed District Plan does not support the quantum change in policy direction or approach claimed in Mr O'Leary's section 42A a report.

13. The reality is that as a discretionary activity, it cannot really be contrary to the objectives and policies of the plan. If it was, it would be a noncomplying activity.

14. That is not to say, that discretionary activities should be allowed to be undertaken on every site[18] within the zone. The Proposed District Plan has this aspect covered through the provisions relating to significant natural areas, outstanding natural landscapes, or high natural character areas. In fact, looking at the coastal boundary of the Central Hawke's Bay District, the vast majority of the coastline is covered by one or more of the District Plan's Natural Environment overlays. The subject site is not subject to such an overlay and this is an immediate distinguishing feature of this property. I make further submissions on this aspect in relation to plan integrity below.

**Areas of disagreement**

*Land Fragmentation effects*

15. At para 4.36 of his section 42A report Mr O'Leary considers that the scale and intensity of subdivision weigh against the subdivision proposal..

16. Mr McKay disagrees with that proposition and sets out his position in the response from Mitchell Daysh to the section 92 request dated 21 December 2023 and in his evidence.[19]

---

[18] Doherty

[19] see evidence of Phillip McKay at paragraph 42.

17. It is submitted that the "cascade of provisions under the PDP" do not limit subdivision within the General Rural Zone to the extent contended by Mr O'Leary which would mean that subdivisions are effectively prohibited or at the very least, noncomplying activities.

18. It is further submitted that Mr O'Leary is selectively relying on only parts of the Proposed District Plan provisions to support his restrictive cascade of provisions and recommendation to decline, while ignoring those parts which do not suit the position that he is advocating.

19. For example, at paragraph 4.18 Mr O'Leary identifies what he sees as the key objectives and policies underpinning the Rural Land Resource Strategic Direction. However he fails to identify the issue at which these objectives and policies are aimed identified 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.*

20. The following explanation concludes with the statement:

> *The District Plan therefore seeks to limit the amount of fragmentation of the districts highly productive land over time and manage land use change and development of highly productive land to maintain the productive capacity of the scarce and valuable resource for current and future generations.*

21. The objectives,RLR-01 to RLR-04 either exclusively or predominantly relate to the protection of highly productive land.

22. Similarly, the policies flowing from these objectives are aimed at minimising fragmentation of highly productive land and only refer to "limiting" lifestyle subdivision in the general rural zone. The methods adopted by the plan in RLR-M1 envisage the use of zoning and refers to establishing flexibility for landowners to innovatively use the resources of the area with controls in the zone being tailored to provide flexibility for landowners.

23. It is only when the provisions of the Rural Land Resource Strategic Direction are viewed in full, that sense can be made of the fact that the District Plan provides for subdivision of land within the general rural zone at the rate of one lifestyle site every 3 years, but does not allow for such a subdivision process in the rural production zone comprising the highly productive land within the district.

24. Further, it is only when the Rural Land Resource Strategic direction is read in full that sense can be made of a situation where a proposal such as the one currently under consideration are considered to be consistent with the provisions of the National Policy Statement for Highly Productive Land[20]. The reality is that it is not only consistent with the National Policy Statement. It is consistent with the Rural Land Resource Strategy. It is only Mr O'Leary's limited interpretation of those provisions that creates the inconsistency.

25. Similarly, Mr O'Leary selectively refers to the provisions of the general rural zone but ignores provisions such as GRUZ-03 and GRUZ-04 which provide the objectives that:

> *Activities are managed to ensure rural character and amenity and, where applicable, the natural character and amenity values present within the coastal environment are maintained.*
>
> *And*
>
> *The primary productive purpose and predominant character of the general rural zone are not compromised by the establishment of potentially incompatible activities.*

26. Both of these objectives envisage the management (not prohibition) of activities to ensure that effects on rural character and amenity are not affected or that activities are not compromised by reverse sensitivity effects. In other words, these objectives relate to the effects of activities which are not considered to be an issue with this proposal. This flows through to policies such as GRUZ-P1 and GRUZ-P2, and the limitation (not prohibition) in GRUZ-P8 of residential and rural lifestyle subdivision

[20] paragraph 4.140 of the section 42A report

that results in fragmentation and/or restricts the use of land for rural properties.

27. It is submitted that the provisions of Rule SUB -R5 which provide for controlled activity subdivision of a lifestyle site every 3 years are not consistent with Mr O'Leary's interpretation of the cascade of provisions and his understanding of the strategic direction of the District Plan.

28. The rhetorical question is asked, why would a plan that is seeking to limit subdivision to the point of apparent prohibition as appears to be contended, allow for a controlled activity subdivision once every three years. Further, why would a plan of subdivision with fairly restricted controls be preferred over an integrated and sustainable approach to development such as that proposed in this application.

29. The answer is that the PDP, in providing for subdivisions such as the proposed subdivision as discretionary activities and more generally for controlled activity subdivisions within the General Rural Zone is not as restrictive as Mr O'Leary contends and is actually quite empowering of development. This is in contrast with the far more restrictive subdivision provisions of the Rural Production Zone containing the highly productive land which is the predominant focus of the Plans Rural Land Resource Strategy.

**Landscape character and natural character effects**.

30. The application is supported by an assessment of landscape and visual effects undertaken by Mr Bray who will present evidence speaking to that assessment.

31. A landscape assessment has been undertaken by Ms Griffith for the Council who has also provided "rebuttal" evidence. Ms Griffiths rebuttal evidence demonstrates a substantial convergence between the landscape experts.[21]

32. Where areas of disagreement remain between Mr Bray and Ms Griffith, that is substantially as a result of Ms Griffiths comparison of the proposal

---

[21] See for example Ms Griffiths Rebuttal statement at paragraphs 13, 14, 23, 25, 26

to the existing visual and amenity experience, not a comparison to the environment as it may exist as modified by permitted and consented levels of development.

33. Ms Griffith does however undertake a comparison with the likely potential landscape effects of 4 dwellings clustered within the site[22] but not in respect of other controlled subdivision activity that could occur outside of the coastal overlay on the more prominent ridgeline adjacent to Lot 9.

34. It is submitted that the proposal is a far more sympathetic and integrated development in all respects including landscape and visual effects and it is noted that Ms Griffith concludes with the statement:[23]

> *I support the outcomes of land stability, protection of hydrology, and habitat creation. I also support ensuring that in the mid-to long-term, the subdivision will achieve greater affinity with what the PDP and NZCPS aims to achieve. Screening, visual buffering, and applying the restoration rationale to greater proportions of the proposal is more likely to result in a framework that can achieve a subdivision that is subservient and complimentary to its unique coastal rural location.*

35. That is precisely what this proposal is attempting to achieve, a better outcome, a more sustainable outcome, and a more integrated outcome than that which could be achieved through the piecemeal application of the proposed District Plan provisions.

**The submissions**

36. The submissions made by the residents are all acknowledged. Noting that none of the submissions are supported by expert evidence, the sentiments contained in the submissions are all understood. People are naturally wary of development in what they consider to be their backyard which results in resistance to change and perception fears as to what might happen.

---

22 at paragraph 11 of her rebuttal evidence
23 at paragraph 30 of her rebuttal evidence

37. This application not only addresses the adverse effects of the proposal but ensures that there are substantial benefits arising from this proposal for adjacent neighbours particularly in regards to land stability and stormwater control.

38. The planting regime proposed by Mr Bray will significantly enhance the visual and amenity aspects of the environment.

39. So while the concerns of the residents who all enjoy their own little slice of paradise are acknowledged, none of those concerns create any difficulty in granting consent to this proposal.

**The RMA**

40. As a discretionary activity the application falls to be considered under section 104 and 104B of the RMA. As provided in section 104B, the council has a discretion to grant or refuse the application. As with all discretions, that decision-making power must be exercised in a principled and reasonable way.

41. With regard to section 104, regard must be had to the actual and potential effects on the environment of the proposal and to the positive effects on the environment that offset or compensate for adverse effects.

42. With regard to the relevant provisions of the higher order statutory documents, as already noted, there is agreement that the proposal is consistent with the overarching objective and the relevant policies in the National Policy Statement for Highly Productive Land.[24]

43. With regard to the New Zealand coastal policy statement, there is agreement that the effects of the proposal on Coastal Processes will be acceptable. [25]

44. Where there was disagreement was with Mr O'Leary's conclusion, while acknowledging the proposal's consistency with most of the objectives and policies of the NZCPS, that the proposed subdivision is in conflict with Objective 2 and Policies 13, 14 and 15 of the NZCPS.

---

24 paragraph 4.140 of the section 42A report
25 paragraph 4.127 of the section 42A report

45. Objective to of the NZCPS provides:

> *Objective 2 To preserve the natural character of the coastal environment and protect natural features and landscape values through:*
>
> *• recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;*
>
> *• identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and*
>
> *• encouraging restoration of the coastal environment.*

46. The Proposed District Plan has given effect to the NZCPS including objective 2 and the policies associated with it. The PDP provides for subdivision within the coastal environment of the general rural zone as a discretionary activity and in the wider general rural zone as a controlled activity[26]. The PDP has given effect to the Objective 2 by providing overlays protecting significant natural areas, outstanding natural landscapes, or high natural character areas.. The subject site is not in one of those areas with an environmental overlay.

47. Mr McKay considers[27] that the proposed subdivision is appropriate as, over time, the proposed plantings will enhance the natural character of the coastal environment and will not significantly adversely affect any natural features or landscapes associated with coastal environment. He concludes that the proposed subdivision can achieve general consistency with the objectives and policies of the NZCPS.

48. Mr McKay's evidence in chief is consistent with the position now reached by Ms Griffith in her rebuttal evidence namely that the subdivision will achieve a greater affinity with what the proposed District Plan and NZCPS aims to achieve.

---

26 At the rate of one lifestyle site every 3 years.
27 At paragraph 79 of his EIC

49. With regard to the operative plan, it is agreed that the proposal is generally consistent with the objectives and policies of the operative District Plan.[28]

**Plan integrity**

50. The plan integrity argument centres on the proposition that the granting of this consent will make the application and administration of the District Plan in respect of other consent applications difficult. This, it is contended endangers the integrity of the proposed District Plan which is a matter to be considered under section 104(1)(c) of the RMA.

51. In Dye v Auckland Regional Council[29] the Court of Appeal held:[30]

> *"The granting of a resource consent has no precedent effect in a strict sense. It is obviously necessary to have consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that granting one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities."*

52. As noted by the Court in Beacham v Hastings District Council[31]

> *[24] We have said before, and must say again, that the floodgates argument does tend to be somewhat overused, and needs to be treated with some reserve. The short and inescapable point is that each proposal has to be considered on its own merits. If a proposal can pass one or other of the s104D*

---

28 paragraph 4.147 of the section 42A report
29 [2002] 1 NZLR 337
30 At para 32
31 Environment Court, Wellington, 5/10/2009, W075/09, Judge Thompson

> *thresholds, then its proponent should be able to have it considered against the s104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides for it as a true exception to what the District Plan generally provides for. Decision-makers need to be conscious of the views expressed in cases such as Dye v Auckland RC [2001] NZRMA 513 that there is no true concept of precedent in this area of the law. Cases such as Rodney DC v Gould [2006] NZRMA 217 also make it clear that it is not necessary for a site being considered for a non-complying activity to be truly unique before Plan integrity ceases to be a potentially important factor. Nevertheless, as the Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.*
>
> *[25] Only in the clearest of cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined.*

53. The proposal is for a discretionary activity, not a noncomplying activity. There are no irreconcilable clashes with provisions of the District Plan, which District Plan makes provision for controlled activity subdivision once every 3 years and which provides for a more integrated approach, such as the proposal, as a discretionary activity.

54. It is not necessary for an applicant to establish that its proposal is unique before plan integrity issues cease to arise. This application does have distinguishing features from the perceived flood of applications that the council appears to fear. First and foremost, this was an application that was lodged under the Operative Plan, before the proposed District Plan provisions had any effect. We are not aware of any other application for subdivision similar to the current one that has that feature.

55. Secondly, as already noted, this area of land adjacent to the coast is one of the few areas where the underlying zoning is not overlaid by one of the outstanding natural feature or significant natural area environmental overlays contained in the District Plan.

56. Thirdly, as detailed in Mr Yule's evidence, by providing for protection of significant natural areas and providing for sites of significance to Maori, significant additional development rights over and above those envisaged by the zoning provisions plan are provided for. The trust is committed to protecting these areas and is actively working with Tangata Whenua to achieve that.

57. While it is submitted that issues of plan integrity and precedent do not arise with this application, all of these are distinguishing features that set this application apart such that issues of plan integrity and precedent do not arise.

58. As noted by Mr McKay,[32] issues of precedent and District Plan integrity do not arise in granting consent to a discretionary activity that is generally consistent with the objectives and policies of the relevant District Plan. Mr McKay identifies further distinguishing features of this proposal including:

    (a) The Application was prepared and lodged under the ODP and prior to decisions on submissions on the PDP and achieves consistency with the relevant provisions of the ODP. Although greatest weight should now be placed on the policy direction of the PDP, the ODP is still relevant to the assessment of this application. Any current or future applications being received by CHBDC will not be able to place any reliance on the ODP.

    (b) The subject site is unique in comprising of a 1,500ha General Rural Zone coastal farm, including four separate and contiguous coastal titles exceeding 100ha in area. The conditions proposed to limit land fragmentation by lifestyle subdivision to the equivalent of what can be achieved by a controlled activity under

32 in paragraphs 80 – 83 of his EIC

the PDP would not likely be available to any other coastal properties in the same zone.

(c) Other characteristics of the site which when combined become difficult to replicate include:

(i) Location immediately adjacent to a Large Lot Residential (Coastal) Zone, and therefore an existing level of residential development.

(ii) Location outside of any identified 'High Natural Character Areas', 'Significant Amenity Features', Significant Natural Areas', or 'Outstanding Natural Landscapes'.

(iii) Contributions to an improvement in natural coastal character over time resulting from the proposed 'Landscape Enhancement Zone' plantings, and as confirmed by expert landscape evidence.

(iv) Confinement of lifestyle sites to land of low rural productivity being LUC6 and LUC7 category land, and the avoidance of any LUC1 – LUC3 highly productive land.

(v) The ability to locate and buffer the proposed lifestyle sites to avoid reverse sensitivity effects on production land.

**Part 2 of the RMA**

59. It is submitted that there is no need to refer to part 2 of the RMA and to do so would add little to the evaluative exercise.[33]

60. The proposed subdivision achieves the sustainable management purpose of the RMA while appropriately avoiding, remedying, or mitigating any adverse effects on the environment; while appropriately providing for the matters listed in section 6(a), (d), (e), (f), and (h); having regard to the mattes in section 7(b), (c), (f), (g), and (i); and taking into account the principles of Te Tiriti o Waitangi (section 8).

33 R J Davidson Family Trust v Marlborough District Council [2018] 3 NZLR 283

## Conclusion

61. As noted in opening comments, this is not a contest between there being subdivision development or no subdivision development in this locale. The plan envisages and provides for the mechanisms by which development can occur albeit over time.

62. The danger with such an approach is that the development becomes piecemeal and lacks the integration and mitigation provided for in this application.

63. The limitation proposed to align this proposal with the District Plan envisaged development that could occur over the next 9 years reinforces that position.

64. More fundamentally however, this is an application that stands on its merits. It promotes sustainable management of the trusts resources and achieves a limited level of development in a sympathetic and integrated way.

65. This proposal should be endorsed and consent granted accordingly.

____________________________

M B Lawson

Counsel for the Applicant.

25 June 2024