

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of a resource consent application to
Waikato District Council for
subdivision and land use consents
for residential development at 24
Wayside Road, Te Kauwhata.
(SUB0009/17)

AND of an application under the National
Environmental Standard for
IN THE MATTER Assessing and Managing
Contaminants in Soil to Protect
Human Health 2011

SECTION 113 RESOURCE MANAGEMENT ACT 1991

DECISION ON APPLICATION

1. For the reasons outlined in this decision notice and pursuant to section 104D of the Resource Management Act 1991 ("**RMA**"), consent is refused.

Introduction

2. This decision notice records a summary of the public hearing held on the application in Ngaruawahia, 21 February 2018, the decision made, and the principal reasons for this.
3. A site visit was undertaken to the site and surrounds on Saturday 17 February 2018.
4. As the application had been subject to the RMA's pre-circulation requirements, the application material, written submissions Council's s.42A report, and expert evidence on behalf of the applicant had been read before the hearing.

5. On behalf of the Council in its capacity as a Consent Authority the following were in attendance:
 - a. Ms. E. Makin (Consents Team Leader – East)
 - b. Ms. S. Salmon (senior planner)
 - c. Mr. P. Henderson (senior land development engineer)
 - d. Mrs. B. Parham (legal counsel)
 - e. Ms. L. White (urban design consultant)
 - f. Ms. L. Jack (landscape architecture consultant)
 - g. Mrs. L. M. Wainwright (Committee Secretary)
 - h. Ms. W. Wright (Committee Secretary)

6. On behalf of the applicant the following were in attendance:
 - a. Dr. J. Forret (legal counsel)
 - b. Mr. I. McAlley (for the applicant)
 - c. Mr. A. Gray (traffic engineer)
 - d. Mr. D. Mansergh (landscape architect)
 - e. Mr. M. Graham (landscape architect)
 - f. Mr. C. Dawson (planner)

7. On behalf of the submitters the following were in attendance:
 - a. Mr. B. Jones
 - b. Mr. N. Patterson
 - c. Mr. K. Peach

8. At the conclusion of the hearing, it was adjourned on the basis that I asked Ms. Salmon and Mr. Dawson to further collaborate regarding potential conditions of consent (should consent be granted). Dr. Forret also agreed that given the technical nature of the differences of opinion between the Council's staff and the applicant's team, and a legal question regarding the existing environment, a written statement of reply would be appropriate. On receipt of this information, and then having determined that I had sufficient information to progress to a decision on the application, I closed the hearing on 14 March 2018.

Background

9. I have been appointed by the Waikato District Council under s.34A of the RMA to hear the evidence and submissions, and to make a decision on the application.
10. The application, site and its environment have been comprehensively explained in the application documents and Council's s.42A report prepared by senior planner Ms. Salmon, and also in the evidence of Mr. Dawson. There was no disagreement regarding the site context and description. Based on my site visit I also agree with the descriptions provided to me. The following is a brief summary:
 - a. The site is approximately 16.25ha, of an irregular shape, and at 24 Wayside Road, west of the Te Kauwhata town centre.
 - b. The site sits at the interface between the "Country Living" zone and the "Living" zone, and is near the SH1 exit to Te Kauwhata.
 - c. The site undulates and is sloped.
 - d. The proposal is a new subdivision of 163 residential lots within 7 stages. The lots will vary in size from 569m² to 962m².
 - e. A recreation reserve and 2 drainage reserves to vest are also proposed, as well as roads to vest.
11. For more detail on the proposal I refer to the application documents and the description provided by Ms. Salmon in her s.42A report at section 1. I adopt this in full given that it was accepted by Mr. Dawson.
12. A key factor of context is an approved subdivision for 129 lots on the site, granted by the Council in September 2015 (SUB0163/14). This was varied under s.127 of the RMA in November 2016, to authorise a number of changes to the subdivision (SUB0163/14.01). This previous subdivision was referred to by the Council's staff and the applicant's team as the "Silverspur" subdivision. Its relevance to the current proposal was a key aspect of the hearing.
13. I also refer to the history of planning for the area, culminating in the Te Kauwhata Structure Plan and its implementation through the District Plan by way of Chapter 15A in the District Plan and land use zones enabling development. This process commenced via Variation 13 to the Proposed

District Plan, for the Te Kauwhata West Living Zone. This zone was supported by a Te Kauwhata West Living Zone Urban Design Guide. After a decision was released by the Council (supporting the Variation), it was appealed to the Environment Court. The Court resolved to support the Variation via an interim decision (1 May 2012). A subsequent consent order finalised the provisions to apply (7 September 2012).

Consents required

14. Mr. Dawson and Ms. Salmon have each identified the consents required. There was broad agreement between the two planners as to the consents required (Mr. Dawson identified additional contraventions in his evidence at Appendix 3 for completeness), including that the activity falls as a **non complying** activity. As such any relevant environmental effect or RMA Plan policy matter can be considered. Given that there was no disagreement between the applicant and the Council's staff as to what consent status applied, I have accepted this.
15. I accept and adopt the consent requirements set out in Mr. Dawson's statement of evidence at his Appendix 3. Consent is in summary required under District Plan rules 21.10; 21.13; 21.16; 21.17; 21.38; 21.41; 21.43; 21.46A, 21.65, 21.66; 21.73; 21B.4; 21B.6; 21B.8; 21B.9; 21B.11; 21B.12; 21B.19; 21B.20; 21B.21; 21B.22; 21B.23; 21B.28; 28.22; A14; A21; A21.A; A22; A23; and A24.
16. For completeness and to avoid any doubt, I also accept that consent is required under the National Environmental Standard for Managing Contaminants in Soil to Protect Human Health ("**NES**"). Consent under the NES was granted as part of the previous Silverspur subdivision consent. This required preparation of a Detailed Site Investigation, which has occurred, and various remediation works, which have occurred in part.
17. In her s.42A report Ms Salmon identified that not all of the requirements relating to the Silverspur (NES) conditions of consent have been implemented, and that some would be transferred to this current proposal were it granted consent.

Statutory and planning considerations

18. Section 113 RMA outlines requirements for decisions on applications that were notified and this decision has been prepared in accordance with these requirements.
19. In making this decision, the following provisions of the RMA have been particularly considered:
 - a. Sections 113, 104, 104B, 104D, 106, and 108.
 - b. Part 2 in its entirety, but only to the extent that it has guided my consideration of the District Plan's objectives and policies rather than as a separate filter of analysis separate to my consideration of the Plan. Although both Mr. Dawson and Ms. Salmon provided a separate Part 2 analysis over and above consideration of the specified s.104 RMA matters, I do not consider that there is any material obvious defect or inconsistency in the planning provisions that warrants this.
20. In making this decision, the following provisions of RMA planning instruments have been particularly considered:
 - a. Waikato District Plan (Waikato Section): chapters 1A, 3, 6, 8, 9, 11, 13, 15, 15A, 21, 21A, and 21B.
21. Both Ms. Salmon and Mr. Dawson provided an analysis of the proposal against the Waikato Regional Policy Statement ("**WRPS**"). I find that the WRPS provisions do not materially aid me in determining the key matters in contention between the Council staff, submitters, and the applicant. The WRPS provisions are in my view tailored towards District Planning responses, such as the Te Kauwhata Structure Plan process that has been undertaken by the Council and which led to the operative zoning of the land subject to the proposal. Overall, I find that the WRPS is not particularly relevant to the proposal and I have not placed considerable weighting on it.
22. In her s.42A report, Ms Salmon also identified as relevant the National Policy Statement on Urban Development Capacity 2016 ("**NPS**"), and the Waikato Regional Plan ("**WRP**"). Having reviewed these in light of the matters raised in contention, I find that as with the WRPS they do not provide me with any

particularly determinative direction, and I have not placed considerable weighting on them.

23. I find that all planning matters relating to the proposed subdivision and the matters that are in contention are comprehensively addressed within the District Plan, especially Chapter 15A.
24. I have therefore given predominant weighting to the specific Te Kauwhata Structure Plan objectives and policies within the District Plan; then secondary weighting to the balance of the relevant District Plan objectives and policies; and lastly the WRPS, WRP, and NPS provisions.

Notification, submissions and late submissions

25. Ms Salmon identified in her s.42A report, section 4, that thirteen submissions were received on the application within the submission period of 2 October 2017 to 30 October 2017. By her count, nine were in opposition, one was neutral, and three were in support. The written submissions were included as Appendix G to Ms Salmon's s.42A report and she summarised the key issues raised by them in section 4 of the s.42A report.
26. My review of the written submissions is that there were twelve, with eleven in opposition and one in support.
27. The submissions were from:
 - a. Mr. I. & Mrs. J. Sunde, 126 Travers Road, Te Kauwhata (opposed).
 - b. Mr. I. Hartley, 17 Green Acres Drive, Te Kauwhata (opposed).
 - c. Ms. B. L. Cox, 78 Travers Road, Te Kauwhata (opposed).
 - d. Ms. K. J. Poloa-Weir (Wayside Trust), 52 Wayside Road, Te Kauwhata (opposed).
 - e. Mr. B Jones¹, 62D Wayside Road, Te Kauwhata (support, but with concerns).
 - f. New Zealand Transport Agency (opposed subject to concerns being addressed).
 - g. Mr. N J Patterson, 62A Wayside Road, Te Kauwhata (opposed).

¹ This submitter filed two submission forms, each one recording a different concern. However, for the purpose of my consideration of submitters, I consider that this party is one submitter, and the submission addresses multiple points.

- h. Mr. K. & Mrs. W. Peach, 62B Wayside Road, Te Kauwhata (opposed).
 - i. Ms. J. L. Kelly, physical address undeclared (opposed).
 - j. Mr. T. J. Hinton, 129 Travers Road, Te Kauwhata (opposed).
 - k. Mr. P. J. Castles, 50 Travers Road, Te Kauwhata (opposed).
 - l. Mrs. N. J. Patterson, 62B Wayside Road, Te Kauwhata (opposed).
28. One late submission was also received, one day after the close of submissions. This was from Nga Muka Development Trust, and the submission was in support of the proposal.
29. The late submission was recommended to be accepted by Ms Salmon and also the applicant, and under s.37 and s.37A RMA I have resolved to accept the late submission for the reasons that:
- a. The one-day lateness did not prejudice any party;
 - b. I consider that receiving information regarding cultural effects and the inclusion of Tangata Whenua is helpful to my decision making and relevant under Part 2 of the Act (s.8 RMA); and
 - c. The applicant supported acceptance of the late submission.

Summary of evidence given at the hearing

30. The following is a brief summary of the evidence presented at the hearing. For full accounts, I refer to the s.42A report, pre-circulated evidence, written submissions, information given at the Hearing, and the minutes of the Hearing kept by the Council.
31. At the commencement of the Hearing I asked participants of their time constraints and amount of time they wished to spend before me.
32. As a result of this exercise, it transpired that the three submitters that were in attendance had read the papers and pre-circulated evidence, and each only sought between 2-5 minutes of time to reiterate their key thoughts to me. They confirmed to me that they would be pleased at the opportunity to present at the commencement of the hearing rather than after the applicant's presentation had concluded (the applicant indicated that it required approximately 5 hours).

33. After discussing this with Dr. Forret, who indicated no opposition to the relatively unusual circumstances of submitters proceeding ahead of the applicant, I agreed that there would be no disadvantage to any party and invited the submitters to present first. I note for completeness that in the absence of pre-circulation of evidence for the submitters to review ahead of their presentation, I would have been less inclined to proceed with their presentations ahead of the applicant's.

Submitters

34. Mr. Bryan Jones lives at 62D Wayside Road, adjoining the application site. He confirmed that although he ticked the "support" box on the submission form, he meant to tick the "oppose" box. This raises a potential jurisdictional constraint inasmuch as a submitter may not take a submission at a Hearing further than the confines of what was stated in the written submission. However, in this instance Mr. Jones outlined specific concerns in his original written submission, despite also indicating support for the proposal, and he spoke only to those at the Hearing. I find I am able to consider those matters.
35. Mr. Jones outlined his concerns with site works and storm water flow, and shared his experience with water nuisance on his site as a result of previous developments and earthworks. He also identified that sites should be a minimum of 900m² and that proposed Lots 147 and 148 should be combined together to achieve this.
36. Mr. Nigel Patterson lives at 62A Wayside Road, adjoining the application site. Mr. Patterson identified that he had been involved in the previous process that led to involvement of the Environment Court and establishment of the Te Kauwhata Structure Plan zones in the District Plan. Mr. Patterson's principal concern was that, having participated in what was by his account a draining exercise to establish the relevant District Plan rules for the area, he saw no justification for those rules to not be complied with. He indicated specific concern with minimum lot sizes, especially those smaller than 900m², and the frequency of retaining walls proposed.
37. However, Mr. Patterson also candidly agreed that the proposed subdivision, as it related to his own property, would be less objectionable than the existing Silverspur subdivision consent would be.
38. Mr. Kevin Peach lives at 62B Wayside Road, adjoining the application site. Mr. Peach echoed and agreed with the concerns identified by Mr. Patterson,

and also expressed concerns with drainage. He discussed with me concerns regarding whether and whom would maintain storm water ponds within the applicant's site such that storm water would not become a nuisance on his property.

39. I record my appreciation to Mr. Jones, Mr. Patterson and Mr. Peach for the time and care they took in preparing their submissions and in their attendance at the Hearing.

Applicant

40. The applicant's presentation commenced with legal submissions from Dr. Joan Forret. Dr. Forret outlined reasons why in her view the Council staff conclusions outlined in the s.42A report were flawed and why the evidence presented on behalf of the applicant and in support of the granting of consent should be preferred. Key topics touched on by Dr. Forret included that the applicant was willing to promote two public reserve options (to be resolved through a condition of consent) as a means of addressing concerns of Council staff and consultants; the question of the existing environment and the Silverspur subdivision consent; and various comments regarding the Environment Court process that led to the operative zoning.
41. Of note and relevant to the matters in contention before me, in Dr. Forret's opinion the existing Silverspur consent should form part of the existing environment in my analysis and decision making.
42. Mr. Ian McAlley, the applicant's representative, discussed with me the history of the proposal, and why in his view the current TKL proposal would lead to a superior outcome than the Silverspur consent. He also outlined to me specific steps taken to protect an existing minor residential unit on Mr. Bryan Jones' property, which was historically built on land now identified as being within a flood plain. He also confirmed to me that of the two reserve options being put forward by the applicant, an "engineered" one and a "hilltop" one (elaborated more, later in this decision), the "engineered" one was the applicant's preference.
43. Mr. Alasdair Gray, a traffic engineering consultant, outlined reasons why in his view the application should be granted consent. He concluded that the road network could accommodate the proposal's traffic generation, and that the design of the subdivision was slightly more positive than the Silverspur

subdivision, largely because the road gradients were overall slightly flatter than in the Silverspur consent, and this would be easier for pedestrians and cyclists to use.

44. Mr. David Mansergh, a landscape architecture consultant, provided background evidence relating to the Te Kauwhata West Living Zone (Variation 13) process, specifically as it relates to the location of a future reserve notation on an existing knoll / hilltop on the Structure Plan map. Mr. Mansergh acted as a witness for the Council in that process. In Mr. Mansergh's view, the existing knoll / hilltop is not as significant a feature as was being interpreted by the Council's staff and consultants, and that the earthworks and alternative "engineered" reserve location preferred by the applicant was not problematic in terms of the outcomes intended by Variation 13 being achieved. Critically, to Mr. Mansergh, the District Plan provisions did not explicitly state that the existing knoll must be retained (presumably such as by way of a rule or an explicit policy).
45. Mr. Mansergh also drew my attention to a separate subdivision application in Pokeno, referred to as "Hitchen Stage 2", on the basis that in his view the Council's urban design and landscape consultant Harrison Grierson may not be offering consistent advice for the purposes of this current TKL application. He conceded that the Hitchen Stage 2 proposal was on a different site and that different District Plan provisions applied to it.
46. Overall, Mr. Mansergh considered that the original outcomes sought by Variation 13 would be better served by the "engineered" reserve solution preferred by the applicant, and that retaining the existing hilltop as a reserve would be inferior.
47. Mr. Michael Graham, a landscape architecture consultant, provided evidence relating to landscape and also urban design effects. His analysis was that the TKL proposal was superior to the existing Silverspur consent and that consent should be granted to the application.
48. Mr. Graham explained the urban design and landscape characteristics of the proposal, and this also touched on the numerous problematic defects, in Mr. Graham's opinion, of the Silverspur consent. These included road gradients, retaining wall heights, and the way that development may interact or relate with front boundaries to streets.

49. In Mr. Graham's opinion, that the TKL proposal will be more accessible to users, especially those with mobility restrictions, than the Silverspur consent was a very relevant benefit of the proposal, to the extent that it outweighed the lack of permeability (i.e. the larger block perimeters) that were proposed in the TKL proposal vs. the Silverspur consent, and which were of concern to the Council's urban design consultant Ms. White.
50. Mr. Christopher Dawson, resource management planning consultant, outlined his analysis and reasons in support of his conclusions. Like Mr. Mansergh, Mr. Dawson was previously involved in Variation 13 (as a witness supporting the Council). Mr. Dawson was therefore able to discuss with me the background to many aspects of the Operative provisions. Mr. Dawson also provided me with a detailed chronology of the application including the frequent requests for information or analysis issued by the Council.
51. In Mr. Dawson's view, the proposal was appropriate with respect to the issues raised by submitters in opposition to the proposal, and appropriate in terms of both environmental effects and the relevant planning framework. I note that a substantial proportion of Mr. Dawson's evidence was devoted to comparing the TKL proposal to the Silverspur consent, and establishing in his view which was the more desirable.
52. In terms of the s.104D RMA gateway tests that apply to non complying activities (no more than minor adverse environmental effects, and being not contrary to the objectives and policies of the District Plan), Mr. Dawson concluded that the proposal passed both. Following on from that, in terms of s.104 RMA and s.104B RMA, Mr. Dawson concluded that on overall merit the consent should be granted subject to conditions.

Council officers

53. The Council's staff sought to respond to the applicant's evidence in writing, and to that end had prepared brief response statements. Dr. Forret, while not objecting, expressed disappointment that the information had not been made available at the commencement of the Hearing.
54. For completeness, the RMA pre-circulation process and timeframes are silent on the matter of rebuttal evidence, further or response information, or whether Council officers should provide responses to the applicant's evidence, when and if invited to do so, in writing or verbally. No request was made to me by

any participant to provide for such, which I would have been able to consider prior to or at the Hearing.

55. I find that information helping narrow points of disagreement or to focus on where disagreement exists is helpful to me, and that the presentation of written response statements by the Council's staff and consultants – which were worked on as the applicant presented its evidence through the Hearing – was appropriate in this instance.
56. Ms. Bridget Parham, legal counsel for the Council, provided me with commentary regarding legal issues raised by the applicant's evidence and written legal submissions. In summary these were the Silverspur consent's place in the existing environment, and the relevance of Part 2 to my decision making.
57. In Ms. Parham's view, the Silverspur consent should not form part of the existing environment, because it was not "likely" that the consent would be implemented. However, Ms. Parham agreed with Dr. Forret's interpretation of relevant case law to the effect that, were I to find that it was likely that the Silverspur consent would be implemented, I would necessarily have to include it in my consideration of the existing environment.
58. Secondly, Ms. Parham recommended that it would be prudent for me to consider Part 2 in my decision making, for the purposes of any s.104 consideration I undertook, in the absence of definitive clarity from the Courts on when it should be referred back to.
59. Ms. Summer Salmon provided a brief response to the applicant's evidence. She remained of the view that the Silverspur consent should not be included in the existing environment. However, Ms Salmon confirmed that were I to find that the Silverspur consent did form part of the existing environment, the difference in adverse effects between that and the current TKL proposal was sufficient for her to continue recommending refusal of consent.
60. Ms. Lisa Jack, consultant landscape architect, responded to the issues raised in the evidence of Mr. Graham for the applicant. While she identified some matters where clarification had led to a change in her view of specific matters, she remained overall opposed to the proposal and maintained the recommendations outlined in her report to Ms. Salmon (Appendix C to the s.42A report).

61. Ms. Lauren White, consultant urban designer, responded to issues raised in the evidence of Mr. Graham for the applicant. Ms White conceded that the proposal did have some urban design benefits when compared to the Silverspur proposal, in terms of reduced road gradients and some less visually prominent retaining walls. However these did not outweigh what were in Ms. White's view inappropriate block width, layout, and density effects, and visual effects of some TKL retaining walls in relation to Road C. Ms. White was particularly critical of the number and layout of rear lots proposed, which in her view would not provide for the on-site and neighbour-to-neighbour privacy and amenity expected by the District Plan, and otherwise reflected an approach to subdivision contrary to what was sought within the zone.

Hearing adjourned

62. At this point, I adjourned the hearing to allow Mr. Dawson and Ms. Salmon to confer and further consider the question of what conditions of consent should be imposed, were I to ultimately grant consent to the proposal. I identified to Dr. Forret that three matters that were of particular interest to me based on the information and evidence given to me thus far. These were the proposed rear lots, the proposed earthworks / reserve location, and conditions of consent. I asked that, whatever else the applicant may wish to present in its reply, these three matters be included.
63. It was to also allow Dr. Forret to prepare a written right of reply to me addressing the key concerns identified by the Council's staff and submitters.
64. This information was received on 6 March 2018, and I formally closed the Hearing on 14 March 2018.

Applicant's right of reply

65. Dr. Forret provided the right of reply and in it she reiterated, with reference to case law, why in her view it would be correct of me to include the Silverspur consent in the existing environment. She also reminded me that two submitters that were immediate neighbours, Mr. Patterson and Mr. Peach, both considered that the TKL subdivision would provide a more desirable outcome for them than the approved Silverspur subdivision.
66. In terms of the proposed rear lots, Dr. Forret identified that the applicant would accept 6m building height restrictions on rear lots to minimise the

opportunity for privacy intrusions between neighbours. This had been translated into new proposed conditions of consent.

67. Dr. Forret also provided me with a detailed analysis of the proposed conditions of consent, and the remaining differences between Mr. Dawson and Ms. Salmon.

Principal issues in contention

68. The information and evidence before me raised the following principal issues in contention:
- a. The existing environment.
 - b. Urban design effects including road network design.
 - c. Hilltop reserve location and landform modification.
 - d. Consistency with the District Plan.
69. In respect of all other matters, including other adverse environmental effects than those listed here, the requirement for consent under the NES, and concerns identified by submitters, I find that there are no pathways that would lead to the refusal of consent, and that conditions of consent such as were proposed by the applicant and Council staff could appropriately avoid, remedy or mitigate adverse environmental effects. This specifically includes the matters of drainage and storm water raised at the hearing by Mr. Jones and Mr. Peach.

Findings on principal issues in contention

The existing environment

70. While the Silverspur and TKL subdivisions have some face-value similarities, I consider that they are very different outcomes with very different environmental effects. Indeed, were the TKL proposal materially commensurate with the Silverspur proposal, a s.127 RMA variation rather than a new consent could well have been pursued with the advantage of a de facto discretionary activity status rather than the non complying activity status that applies here. I also note that the question of whether an existing consent should form part of the existing environment appears to me to be different in the context of a s.127 variation *to the conditions of that very consent*, and

what is proposed here, a fundamentally new consent to supersede a previous consent and replace it with a different outcome.

71. Ms. Salmon and Mr. Dawson, interpreting plans provided by Mr. Graham, identified several retaining walls that in Mr. Graham's opinion would be needed to implement the Silverspur subdivision. These do not in all instances appear to have resource consent and it is likely that at least some of them would need resource consent. This is one key reason why Ms. Salmon considered that the Silverspur consent should not form part of the existing environment; it was also a key point on which Mr. Graham identified that the TKL proposal was superior to the Silverspur consent. Mr. Dawson considered that these unconsented walls could be simply excluded from the rest of the Silverspur consent, which could be otherwise included in the existing environment.
72. I find that the position taken by Mr. Dawson and Ms. Salmon (and Mr. Graham) towards the additional Silverspur retaining walls is not factually correct and is as such not relevant to the question of the existing environment. Having reviewed the material before me, I am satisfied that the Silverspur consent (taking into account its s.127 variations approved to date) has been granted on the basis of relying on sloping or contoured lots and relatively few retaining walls as one key means of balancing the site's sloped characteristics with the zone's provisions for subdivision. The additional / new retaining walls identified by Mr. Graham do not reflect what was actually applied for or consented as part of the subdivision for Silverspur; it reflects the augmentations that would be required of the Silverspur consent to provide the flat lot outcomes preferred by TKL. In this respect, the retaining solution identified for Silverspur by Mr. Graham could be better described as "retaining walls required to achieve TKL's preferred version of the Silverspur subdivision", rather than "retaining walls required to implement the Silverspur subdivision". While TKL does not prefer sloped lots, this is not a sufficient basis to demonstrate that the consented subdivision cannot be implemented without augmentation such as has been identified by Mr. Graham.
73. As such I find that my consideration of whether or not the Silverspur consent forms part of the existing environment is strictly limited to the consented subdivision, not the augmented version relied on by Mr. Graham for most of his analysis and including the potential additional retaining walls discussed by Ms. Salmon and Mr. Dawson. Related to this, I also record my related finding

that the evidence in support of the need for flat lots put forward by the applicant was not convincing; while the applicant identified outcomes for sloped sites and hills where flat lots have been developed, I was given no substantiation that it was the only way to viably subdivide the subject site in terms of the District Plan provisions that applied (a key point made by Ms. White, and which I agree with).

74. Both Dr. Forret and Ms. Parham were in agreement that unimplemented resource consents should be included in the existing environment, where it is likely that the resource consent(s) in question will be implemented. A number of Court of Appeal, High Court and Environment Court cases were referred to me², and for details of these I refer in turn back to Dr. Forret's legal submissions and right of reply statement, and Ms. Parham's response submissions of the Council. For simplicity, I have not sought to provide an analysis of these cases because between Dr. Forret and Ms. Parham there was no pivotal difference of interpretation or relevance to be addressed.
75. However, between Dr. Forret and Ms. Parham, the question of how I might determine what was or was not likely to be implemented remained one that was largely open to me to resolve.
76. In Ms Parham's view, my investigation in this regard could be so broad as to consider the applicant's character and credibility as a developer given the public statements made in evidence by it and its consultants criticising the approved consent in question. Dr. Forret did not suggest that such breadth would be misplaced or inappropriate. I have not pursued this particular avenue of potential inquiry simply because I received no evidence to suggest that the applicant was not a credible developer. As such I accept the face value submissions of Dr. Forret and Mr. McAlley that the applicant, if it is not successful at obtaining the current TKL proposal, intends at this time to revert to the Silverspur consent.
77. This finding is however not sufficient to convince me that it is likely that the Silverspur consent will be implemented; it merely establishes that there is no clear evidence that it is unlikely to be implemented.

² These were *Queenstown Lakes DC v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299; *Bay of Plenty RC v Fonterra Cooperative Group Ltd* [2011] NZEnvC 73, (2011) 16 ELRNZ 338; *Te Runanga-a-iwi O Ngati Kahu v Far North DC* [2013] NZCA 221; *Te Runanga-a-iwi O Ngati Kahu v Far North DC* (2011) 16 ELRNZ 708; *Calveley v Kaipara DC* [2014] NZEnvC 182; and *Nash v Queenstown Lakes DC* [2015] NZHC 1041.

78. It was very clear that the applicant, and its experts, are not enthusiastic about the Silverspur consent. It has already obtained variations to the original Silverspur consent via changes to conditions of consent under s.127 of the RMA to help bring the subdivision closer to what it prefers. It remains unclear what other or further changes under s.127 RMA might be sought to help bridge what appears a clear gap between what the applicant seeks and what it has consent for (such as flatter lots and additional retaining walls identified by Mr. Graham), in the event that this new application were refused consent. This is a material uncertainty in my mind, that would not exist if the applicant were not so strongly critical of the resource consent in question.
79. But while this introduces doubt in my mind as to whether the Silverspur consent as it currently stands is likely to be implemented, it is also not of itself sufficient to establish that it is not likely to be implemented.
80. And although the applicant's experts were rather unsparing in their criticism of the many shortcomings of the Silverspur consent, at least as they saw them, none went so far as to allege that the consent should not have been granted or that it was otherwise fatally defective (although Mr. Graham came in my view very close when describing it as having "compromised" road gradients³). Rather, the view expressed to me, in the round, was that the TKL subdivision proposal was simply much better than the low-quality and poorly planned Silverspur one. Similarly, none of the Council's staff or consultants expressed the view that the Silverspur consent was defective or could not be implemented.
81. On this basis, and in consideration of my previous finding relating to whether sloped lots are viable or whether new lots must be flat, there is no environmental or planning impediment to the Silverspur consent being implemented. However, this speaks more to establishing that the consent apparently *could* be implemented rather than that it is *likely* to be.
82. In overall consideration of the facts and evidence before me, and based on what seems to be a clear view of the applicant that it would seek further changes to the Silverspur consent such as have been identified by Mr. Graham, I am not comfortably satisfied that it is likely to be implemented.

³ Mr. Graham evidence, paragraph 171.

83. Over and above this I have turned my mind directly to the practicality of considering a previous resource consent “A” as part of the existing environment on the basis that it is likely to be implemented, when granting a current and wholly replacement application “B” would of itself render the previous consent “A” irrelevant and not implemented at all.
84. In this scenario, the likelihood of consent “A” being implemented rests entirely as a contingent response to the question of whether application “B” is first granted or refused.
85. This proposition, which I consider fairly represents the situation before me from the applicant, complicates the matter of “likelihood”. The applicant is not submitting to me that it *is* likely to implement the Silverspur consent; the applicant’s submission is that it *would* be likely to implement the Silverspur consent, subject to additional authorisation for further changes such as have been identified by Mr. Graham, but only as something of a “Plan B” if the current TKL proposal is refused consent (and presumably an option to appeal such a decision was not taken or was not successful).
86. This does not in my mind sit comfortably within the framework of understanding the existing environment and the environmental effects likely to result within that environment, as a matter of fact, against which the effects and merit of the new proposal can be understood and considered. There is no scenario where the Silverspur consent and the TKL consent could co-exist together; the TKL subdivision would plainly supersede the Silverspur one and in so doing lead to the Silverspur consent not being implemented. This would be exacerbated as a contradictory resource management outcome if subsequent consent being granted to the TKL proposal happened to be materially connected to an initial decision to accept the Silverspur consent it would replace as part of the existing environment to start with (this is itself merely an observation of decision making possibility, not a statement that this would necessarily occur).
87. Overall, there is in my view an artificiality to considering the Silverspur consent as part of the existing environment when, as hoped by the applicant, it would be superseded and set aside by the grant of consent to the TKL subdivision.
88. I prefer a more reliable, real-world approach being taken. In conclusion, I find that the Silverspur consent cannot at this time be regarded as being likely to

be implemented. At best, it may in some potentially augmented form be likely to be implemented if the current TKL proposal were refused consent and the RMA appeals process did not change that. I consider that this is a bridge too far for comfort in establishing a direct and factual “likelihood”, more so in conjunction with the applicant’s and its experts’ antipathy towards the Silverspur consent.

89. However, and as a follow on from this finding, I do consider that the existing Silverspur consent does not then ‘disappear’ simply because it does not form a part of the existing environment. It remains a relevant matter to be kept in mind, and I find that s.104(1)(c) provides the means by which the Silverspur consent can be appropriately considered, including that an urban subdivision for 129 lots and including substantial earthworks and other environmental modifications has been demonstrated as being possible on the site under the applicable planning framework.

Urban design effects and road network design

90. Much of the analysis that follows involves comparisons between the Silverspur subdivision and the TKL proposal. I do not consider that there is any relevant RMA test that requires such a comparison, or that to grant consent to the TKL proposal it must be shown to be “better than” or even just “as good as” the Silverspur consent; it merely has to be demonstrated as being able to “stand on its own two feet”. However, the urban design evidence from both Mr. Graham and Ms. White frequently revolved around the two designs and as such my findings reflect the content of their evidence.
91. Mr. Graham, and primarily Mr. Gray, provided evidence to the effect that principal design benefits of the TKL proposal included gentler road gradients than Silverspur, which would in turn promote more walking and cycling in general. In summary, and with reference to Figure 5 in Mr. Gray’s evidence, the Silverspur and TKL subdivisions have an effectively equivalent provision of road gradients between 0% and 4%; the TKL subdivision has more roads in the 5% - 8% range than Silverspur; and Silverspur has more roads in the 9% - 12% range than TKL. In any event, the maximum desirable gradient of a road for accessible use (wheelchair access) is 5% (Mr. Gray, paragraph 36), and in each scenario most roads exceed this. Conversely, all roads comply with a gradient of at most 12% (1:8), which according to Ms. White (paragraph 6.28), is in any event in line with NZS:4404. It is therefore appropriate to record, overall, that:

- a. Both subdivisions achieve adequate road gradients.
 - b. Neither subdivision, due to the subject site being a (sometimes steeply) sloping hill, is able to achieve truly flat or near-flat gradients suitable for 1:20, wheelchair-friendly or accessible navigation.
 - c. Most roads in each subdivision will be sloped between 5% (1:20) and 10% (1:10), and almost all roads will be at or less than a 10% gradient (1:10).
 - d. The TKL subdivision has more roads within an 8% (1:12) range than Silverspur, and as such can be fairly said to be slightly flatter.
 - e. However, the Silverspur subdivision includes more linear metres of road on account of its finer block structure.
92. In Mr. Graham's opinion, the benefits of making walking more appealing to a wider demographic outweighed what were in Ms. White's view dis-benefits of a less permeable urban block structure, which amongst other things may result in longer and less direct walking routes. In Ms. White's view, a combination of factors influenced walking, including route directness, safety, visual interest and overall amenity. However, Ms. White accepted that gentler road gradients and improved walkability would be benefits of the TKL proposal. However, she noted she was not an expert on the matter of road gradients and the inclination for people to walk more frequently or further; she accepted the benefits identified by TKL at face value.
93. I find that this plank of the applicant's approach to be speculative and unproven. No evidence was given to me to substantiate, even in general terms, what quantity of additional pedestrian activity would be predicted to result from the slightly gentler road gradients proposed by TKL and on that basis what urban design benefit it might result in. As noted above, most roads would still exceed the maximum 5% / 1:20 limit identified by Mr. Gray as being suitable for accessible use. When asked questions to this end from me, neither Mr. Gray or Mr. Graham could direct me to any study, metric or basis for supporting the assertion that more walking would result in the TKL subdivision than in Silverspur as a result of shifting a number of road gradients from closer to 10% down to closer to 8%, other than a general principle of common sense that it is easier and hence more desirable to walk on flatter ground. Mr. Gray indeed softened his view of the likely pedestrian benefits from "positive" to "slightly positive" after my questioning of him.

94. Similarly, concerns regarding the likelihood of retaining walls separating sites from the street in the Silverspur subdivision such as illustrated in Figure 6 of Mr. Gray's evidence also appear speculative and overstated. It seems that the Silverspur subdivision was not premised on flat sites being achieved, and it is only TKL's expert's assumptions that purchasers will wish to incur the cost of lifting site frontages with street-boundary retaining walls that would in most instances appear to create the issue of concern to them. My understanding of the Silverspur subdivision is that in many cases the use of batters and slopes were intended to manage gradient transitions, and I have not been convinced that the subsequent front yard retaining structures presumed by Mr. Gray and Mr Graham are probable.
95. I remain unconvinced that there would be any measurable increase in pedestrian activity as a result of the TKL layout and gradients compared to the Silverspur layout, and as a result I do not agree that there is a relevant positive effect to consider in this respect. At best, based on the evidence I have been given, it could be fairly said that the TKL layout and road gradients may make walking trips slightly gentler for those wishing to walk than in the Silverspur scenario, but not to the extent that would make a material difference to the overall amenity offered to pedestrians, and not in my view to the extent that would negate the shortcomings of less direct and longer routes identified by Ms. White.
96. Turning to the key adverse effects of concern to Ms. White, the TKL proposal includes over 25% of the lots as rear lots, and as a result, the blocks are larger in perimeter than might otherwise be the case. In Ms. White's view, these resulted in a number of inappropriate and more than minor amenity and urban design effects relating to pedestrian amenity, residential amenity (including privacy between properties), and the visual effects of density.
97. Mr. Graham explained that the rear lots proposed were not only justified from the point of view of positive pedestrian effects arising from flatter road gradients (discussed above), but in terms of managing the site's gradient and achieving more frequent but lower retaining walls and building platform 'steps' across the slope. In Mr. Graham's view, the TKL proposal was superior in every respect than the Silverspur subdivision (to the extent that when I asked him if there was any urban design point on which the Silverspur subdivision was superior he answered "no").

98. In response to the issues discussed through the Hearing, the applicant volunteered building height restrictions of 6m on rear lots in its right of reply, to address potential privacy concerns raised by Ms. White. I find that this would mitigate some of the effects of the proposed rear lots and is a helpful inclusion by the applicant.
99. I find that there are no clear facts before me to definitively differentiate between the surprisingly wide differences of views between Mr. Graham and Ms. White. Although I have found the potential pedestrian benefits of TKL's gentler gradients to be unproven and overstated, this does not of itself mean that the concerns raised by Ms. White remain as concerning as she has concluded.
100. In considering the disagreement between Mr. Graham and Ms. White, I have turned my mind to the qualifications and experience of each expert. I have also considered the content of their evidence and responses to my questions. This is an unremarkable investigation that a decision maker may undertake when testing evidence.
101. For Ms. White, I noted that she has an urban design qualification and in her evidence described herself as an urban designer. When asked to provide comments to me on the merits of the Silverspur and TKL subdivisions, Ms White was able to readily identify positive and negative attributes of each. For Mr. Graham, I noted that he did not have an urban design qualification and in his evidence he described himself only as a landscape architect rather than an urban designer. I was surprised that he was unable to identify a single instance where the Silverspur subdivision was superior to the TKL proposal, or where Ms. White's concerns may be correct or even have merit. Mr. Graham did briefly confirm to me that he has worked on a number of urban design projects, and sits on the Hamilton Urban Design Panel, which I recognise. But he did little to help explain to me what of his work experience had been as a landscape architect and what as an urban designer, and specifically what it was that made him an expert in urban design. I do not accept that urban design expertise is an inherent sub-set of landscape architecture, architecture, or other built environment expertise.
102. I am mindful of Dr. Forret's comments in reply that (reply paragraph 30):
- "For completeness, I note that Mr Graham gave evidence as to his experience in Urban Design since completing his university qualification. In*

my submission, his evidence is not to be given less weight merely because his length of expertise and practise extends beyond the time when urban design first became recognised as a specialised component of landscape architecture (and of architecture) in its own right.”

103. While I accept the thrust of this submission and that experience is a critical plank of expertise, Dr. Forret’s statement warrants a short response. I have never previously heard that urban design has become a specialist component of landscape architecture (neither Mr. Graham or Ms. White described their expertise as such, and Ms. White appears to have no landscape architecture qualification or expertise), and I am also aware that urban design qualifications have been available as a distinct speciality for considerably longer than the 15 years of work experience that Mr. Graham has identified in his evidence. As such, I have not found Dr. Forret’s commentary helpful in addressing the matter.
104. Overall, and including the more rounded and open-minded responses that Ms. White offered, I find that Ms. White is the more reliable witness on urban design matters and I prefer her evidence over Mr. Graham’s. As such, I prefer and accept her conclusions that the urban design effects arising from a relative lack of permeability, the number of rear lots proposed, retaining walls up to 3m tall along street frontages, will be more than minor.
105. In reaching this conclusion, I do not consider that the Silverspur consent, as a relevant s.104(1)(c) matter but not part of the existing environment, would result in adverse urban design effects as problematic as the TKL proposal, and certainly not worse as was contended by Mr. Graham. As such I do not consider that the Silverspur consent is relevant to my finding on this matter. A key defect in the approach taken by Mr. Graham is that he did not in my view consider the Silverspur subdivision as it was granted and as it was envisaged, being to include sloping sites and various batters; instead and based on work assisting TKL to look to adapt the subdivision to its own preferred development model, Mr. Graham appears to have modified the Silverspur subdivision to make sites flat, thus identifying a variety of retaining walls that were hitherto unbeknownst to the Council as being “part” of the Silverspur consent. They are in my view not; they are a ‘hybrid’ of the Silverspur subdivision layout and earthworks levels adapted to suit the development approach preferred by TKL. I find that this was not a helpful

basis to evaluate the TKL subdivision proposal before me, and it weakened my confidence in Mr Graham's conclusions.

106. In terms of Ms. White's concerns relating to landform modification and the issue of the hilltop reserve, these will be addressed in the next section, along with Mr. Graham's evidence on those matters.

Hilltop reserve location and landform modification

107. The TKL proposal is to undertake approximately 379,000m³ of earthworks including cuts up to 6m and fills up to 6.8m. By contrast, and as was explained to me in Mr. Dawson's evidence, the Silverspur consent was for 291,875m³ including cuts up to 5m and fills up to 6m. In Mr. Dawson's view, the Silverspur subdivision included retaining walls up to 8m high adjacent to the reserve whereas the TKL proposal was for walls up to 3m maximum (Mr. Dawson, paragraph 86). This was however a matter in dispute; Ms. Salmon included in her s.42A report plans from the Silverspur subdivision application showing retaining walls only up to 3m tall adjacent to the reserve (Image 4, s.42A report). The plans showing retaining walls up to 8m tall in the Silverspur subdivision were prepared by Mr. Graham (for example Pg. 28, attachments to Graham evidence). As noted previously, these do not appear to reflect what was consented for Silverspur based on sloping lots and earth batters, and appear to be Mr. Graham's adaptation of the subdivision to meet a different design brief delivering flat site platforms and retaining walls.
108. The applicant's preference is for what Mr. Dawson described as an "engineered contour reserve", or a new hilltop and new slope in a slightly different location than the natural knoll is and at a lower level (4.5m lower than the existing contour level in Ms. Salmon's view, but only 2m lower in Mr. Dawson's). In response to concerns from Council officers, the applicant also identified and prepared plans for an "existing high point reserve". This alternative reserve retained the existing knoll, integrating it into the TKL scheme by way of steeper gradients around the reserve perimeter. At the Hearing it was proposed by the applicant to volunteer a condition of consent giving discretion to the Council to choose which of the two reserves it preferred once further and more detailed analysis was undertaken.
109. I agree with Mr. Dawson (his paragraphs 97 and 98) that the preferred TKL reserve proposal has a number of benefits, including a size and design more

in keeping with the Council's operational preferences, compared to the Silverspur reserve.

110. Mr. Graham considered that TKL's "engineered contour reserve" was appropriate. In his view it would retain a sufficient sense of naturalness given the reconstruction of a slope and hill proposed as part of the subdivision. He considered that because the Structure Plan did not include any specific provisions requiring retention of the existing knoll, that it was therefore not a matter of critical importance, or at least not of the importance that Ms Jack considered. At paragraph 125 of his evidence Mr. Graham stated:
- "Again the TKL subdivision utilises the local high point for a reserve and integrates the landform into its stormwater management. Note this criterion does not ask if the original landform is retained. That is neither expected nor required unless the landform itself has been identified as being worthy of protection. Irrespective, this does not mean that this landform is ignored. Rather, re-contouring of a landform to fit the intended land use, while responding to and integrating with the general topography is an accepted and appropriate practice."*
111. In reaching his conclusion Mr. Graham confirmed that he sought information from Mr. Dawson and Mr. Mansergh, both of whom had acted as Council witnesses in the Variation 13 process. Mr. Dawson, in his evidence, expressed similar views as to the purpose of the knoll reserve in the Structure Plan and the specific wording, in particular, of the Te Kauwhata Urban Design Guide.
112. Ms. White (urban design) and Ms. Jack (landscape architecture) considered that the proposal was not appropriate, and would result in more than minor adverse effects relating to landform character and urban design outcomes. Ms. Jack did not support either of the TKL reserve designs, considering that neither achieved a satisfactory minimisation of landform modification or retention of landform / landscape characteristics. Ms. White was concerned that the creation of stepped platform sites and loss of the natural knoll feature, even if retained in some manner by the TKL alternative reserve solution, was not in accordance with accepted urban design practice.
113. I find that the proposed condition of consent of allowing a final decision on the reserve to be made later and based on more detailed work to be inappropriate. Each reserve would have different characteristics and raise

different questions in terms of the District Plan framework. I am also concerned that the principal question of whether one or both locations are appropriate need to be determined in this decision rather than put off later. I do however acknowledge the applicant's willingness to incorporate the Council's concerns and preferences by identifying a solution that could accommodate a hilltop reserve at the location identified on the Structure Plan.

114. I am not convinced that the perceived demand for flat sites, even on sites as sloped and constrained as this subject site, is as much of a resource management imperative as has been assumed by Mr. Graham and Mr. Dawson. Similarly, I have not found the replacement "engineered naturalness" proposed by Mr. Graham to be a convincing substitute for a more concerted effort to balance the limitations of the site with a workable subdivision solution. In this respect, the Silverspur consent works as much against the TKL argument as it does for it, given that it demonstrates many of the outcomes considered important by Ms. White and Ms. Jack in a way that seems achievable, albeit without the total number and degree of flat sites sought by TKL for the site or total degree of landform modification.
115. Overall, I have come to prefer the evidence of Ms. Jack, that it is not appropriate to undertake such substantial landform modification as has been proposed. This is because the commentary relating to the reserve in the Structure Plan refers to the reserve as being primarily about retaining the natural character values of the landform, not as a flat play space. To that end, I have not found Mr. Graham's arguments in support of a flatter and more recreationally usable reserve, while noteworthy and including some positive attributes, as relevant as he has.
116. In terms of the District Plan and the Te Kauwhata Urban Design Guide, I find that the proposal is not appropriate. On the evidence before me, the Structure Plan was premised on the natural landform of the knoll being retained, or at least substantially so, and despite the evidence of Mr. Graham and also that of Mr. Mansergh I am not persuaded to the contrary.
117. Overall and for the reasons outlined above, I consider the landform modifications proposed including the preferred TKL reserve solution to be inappropriate and very likely to result in more than minor adverse effects, based on the analysis and conclusions of Ms. Jack and Ms. White.

Consistency with District Plan

118. Based on the analysis of the expert evidence they each preferred, Mr. Dawson and Ms. Salmon undertook an analysis of the relevant planning matters.
119. Neither of the two planners saw issue with the provisions of the WRPS, WRP, or NPS. However, they reached different conclusions regarding the District Plan. I have previously identified that I consider that Chapter 15A to be the most relevant to the proposal, and where I consider most weighting should be placed ahead of the more general remainder of the Plan's objectives and policies.
120. I find that the proposal is consistent with the WRPS, WRP and NPS, although I reiterate my finding that these documents are not particularly relevant to the proposal and enjoy limited weighting in my view. I also reiterate for completeness that there is no issue in terms of the NES.
121. In terms of Chapter 15A, Mr. Dawson considered the proposal was consistent with all of the District Plan's objectives and policies. Ms. Salmon considered that based on the environmental effects of the proposal, the outcomes sought by the Plan would not be met.
122. I find that the proposal is problematic in terms of 15A.2.2(d), (e), (k) and (m), because:
 - a. The proposal does not "retain" views to the natural knoll landform; it is proposed to remove this feature and the replacement contour will not appropriately mitigate this (in either of the TKL reserve proposals).
 - b. The extent of landform modification proposed and the substantial loss of natural character, in conjunction with the density and configuration of lots proposed (including the frequency of rear lots) conveys an unmistakably urban character which does not create a strong association with rural amenity values.
 - c. I do not consider the proposal integrates buildings, open spaces and public open spaces together, for the reasons outlined in Ms. White's evidence.
 - d. For the reasons outlined in Ms. White's evidence, I consider that the proposal frequently fails to achieve the outcomes sought in the Urban Design Guideline. I consider Mr. Graham's evidence less convincing

largely because he has conflated an “engineered naturalness” as being substitutable for “naturalness” in the Urban Design Guide.

123. I find that the proposal is particularly problematic in terms of 15A.2.7 and 15A.2.8 because the proposal is not in my view sympathetic to natural features and landscapes, and it does little to retain natural land contours or minimise earthworks. It seems quite clear that where a site in the Structure Plan area is constrained by hills and contours, a solution that works with these rather than seeks to considerably change them, is being promoted.
124. I find that the proposal is problematic in terms of 15A.2.7 and 15A.2.9(a), (d) and (f) because:
- a. The proposal does not seek to “retain” the visually prominent knoll feature, which I am satisfied does contribute significantly to the character of the site and immediate area, based on the evidence of Ms. Jack and Ms. White.
 - b. I do not consider the arrangement of lot sizes, shapes and orientations address site specific issues of topography and the importance of retaining the hilltop knoll landform or the natural landform generally.
 - c. The proposed open space configuration preferred by TKL does not enjoy “substantial” road frontage, although I am inclined to agree that in this instance the topography is a considerably mitigating factor.
125. I find that the proposal is problematic in terms of 15A.2.32(a) and (c) because based on the evidence of Ms. White, which I prefer, the proposal does not provide “convenient and high amenity” walking and cycling routes through the development to beyond the site, and proposes an inefficiently coarse road network.
126. I find that the proposal is problematic in terms of 15A.2.33(b) and (e) because on the evidence before me I have not seen any evidence that the provision of rear lots has been sought to be minimised, and as noted previously I have not accepted the evidence of Mr. Graham that the proposed extent of rear lots is necessary to manage the site’s gradient. In addition, I do not consider the design of roads has been based on minimising earthworks and landform modification; it has been driven by facilitating flatter gradients and the

efficiency of flat lots and this has resulted in more landform modification and earthworks than may be necessary.

127. When I consider these matters together, I find that the proposal is for a scale, type and form of subdivision that is considerably different to what the Plan provisions seek in Chapter 15A, and that the Silverspur consent, relevant as a matter under s.104(1)(c), exhibits a considerably more appropriate and better suited response. The arguments put forward to justify the TKL proposal from the applicant's experts, that the result will be more walkable, look more natural, and be more in-line with market expectations, have not been convincing other than perhaps in terms of policy 15A.2.9(f). Overall, I consider that the proposal is not reconcilable with the pattern, scale and form of subdivision anticipated on the site by Chapter 15A and is inappropriate to the extent that is repugnant to the outcomes sought.
128. In terms of the balance of the Plan's objectives and policies, I find that the proposal is problematic in terms of:
- a. Objective 1A.4.1 and policies 1A.4.2 and 1A.4.3, because based on Ms. White's analysis the proposal will not achieve high amenity values; will not be sympathetic to the site's existing character; and is not in accordance with the outcomes sought by the Te Kauwhata Structure Plan.
 - b. Objective 3.4.1 and policies 3.4.2(a), and (d), because based on Ms. Jack's evidence the landscape and visual amenity values of the knoll feature, as viewed from public places including new public roads proposed in the subdivision and adjacent subdivisions in the future, will not be retained; adverse effects on the landform's removal will not be avoided or mitigated; and the design of the subdivision is not sympathetic with the landform or landscape.
 - c. Objective 13.4.1 and policy 13.4.2(a), because based on Ms. White's and Ms. Jack's evidence the proposal will not be sympathetic to the natural and physical qualities and characteristics of the area.
129. For completeness, I note that for all other District Plan objectives and policies identified by Mr. Dawson in Appendix 5 of his evidence, I find that the proposal is either consistent with them or not so inconsistent that it could lead to a refusal of the application.

130. Overall and for the above reasons, I find that the proposal will be antagonistic to key outcomes sought by the provisions of Chapter 15A of the District Plan, as well as a number of other discrete objectives and policies across Chapters 1A, 3 and 13. This repugnance to the amenity, form, and landscape responsiveness expected of development within the zone is of a magnitude that I conclude, in agreement with Ms. Salmon, that the proposal is contrary to the objectives and policies of the District Plan.

Section 104D analysis

131. Section 104D RMA only provides for applications to be considered under section 104 and 104B RMA where at least one of its two gateway tests are passed. These are, at s.104D(1)(a), that the adverse environmental effects of the proposal will not be more than minor, and at s.104D(1)(b), that the proposal will not be contrary to the objectives and policies of the District Plan.
132. For the reasons outlined above, I have come to the conclusion that the proposal will have more than minor adverse environmental effects, and be sufficiently opposed to the District Plan's objectives and policies that it could be fairly and reasonably said to be contrary to them. Because of this, I am precluded from any further consideration of the proposal's merit.
133. The proposal must be refused consent.

Decision

- (1) Under section 37 of the Resource Management Act 1991, the late submission by Nga Muka Development Trust has been accepted, because:
- a. The one-day lateness did not prejudice any party;
 - b. I consider that receiving information regarding cultural effects and the inclusion of Tangata Whenua is helpful to my decision making and relevant under Part 2 of the Act (s.8 RMA); and
 - c. The applicant supported acceptance of the late submission.
- (2) In terms of the existing environment:
- a. In making my decision and for the reasons outlined in this decision notice, the previous Silverspur subdivision consent referenced SUB0163/14 by the Council, and subsequently varied under s.127 RMA (Council reference SUB0163/14.01), does not form part of the existing environment.

- b. In consideration of the uncertainty surrounding the issue of the existing environment, and in the event that my finding above proves incorrect, I have also considered my decisions that follow from the point of view of including the Silverspur consent in the existing environment. I confirm that doing so would not have led me to different overall conclusions in terms of s.104D RMA. The environmental effects of the TKL proposal are materially different and more adverse, and the form of the subdivision is materially less compatible with the outcomes sought by the District Plan in Chapter 15A, than would result in the environment as a result of implementing the Silverspur consent.

(3) Under section 104D of the Resource Management Act 1991, the application for subdivision and land use consent by Te Kauwhata Land Ltd at 24 Wayside Road, Te Kauwhata, is refused, because:

- a. Pursuant to s.104D(1)(a) RMA, the proposal will have adverse environmental effects that are more than minor in terms of landscape and landform, and urban design.
- b. Pursuant to s.104D(1)(b) RMA, the proposal will be contrary to the objectives and policies of the Waikato District Plan, particularly in terms of Chapter 15A.
- c. Because the application does not pass either of the s.104D RMA gateway tests, consideration of merit cannot be undertaken and consent must be refused.



Ian Munro
Independent Commissioner

5 April 2018