ORIGINAL

Decision No. W187/96

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to s.120 of the Act

BETWEEN DI ANDRE ESTATES LIMITED
(formerly Prix Car NZ Ltd)

(Appeal: RMA 31/96)

Appellant

AND RODNEY DISTRICT COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

His Honour Judge Treadwell presiding
Mr R G Bishop
Ms J D Rowan

HEARD at AUCKLAND on the 9th, 10th, 11th, 14th, 15th and 16th days of October 1996

COUNSEL/APPEARANCES

Mr R B Brabant for appellant
Mr M J MacLean for respondent
Mr J K MacRae for Townsend Brooker Ltd (submitter)

INTERIM DECISION

This is an appeal pursuant to the provisions of s.120 of the Resource Management Act 1991(RMA) against a decision of the respondent Council refusing consent to enable the subdivision of a property containing 59.3800 ha at Omaha near Matakana being part of Lot 2, on Deposited Plan 93079 into four allotments.

Background

In order to understand the situation we have annexed a series of exhibits some in colour.

The first marked "A" is an aerial photograph of the Omaha Beach area flown in approximately 1988. This shows the inner harbour (Little Omaha Bay) which will be discussed in the evidence of Mr Scott where he considers the subject site more part of the inner harbour than the outer harbour and as such has visual affinity with the Omaha beach settlement.

The photograph clearly shows the settlement some years ago. It has now extended further onto the spit; reasonably extensive activity on the headland to the north; horticultural activity and closer settlement to the west; areas of native vegetation; the appeal site outlined towards the south showing the proposal for four allotments with the access road; a pine forest which is now almost ready for harvest further south and immediately west/south-west not within the boundaries of the subject site, areas of native bush on a property owned by Townsend Brooker Ltd (Townsend Property). That area is more extensive than appears on the photograph. The photograph is taken with north to the left, south to the right and the Omaha beach settlement facing east out to sea.

The next marked "*B*" is a plan of the subdivision as now proposed. That plan also indicates various areas with potential for horticulture. The next marked "*C*" is a colour aerial photograph flown in 1992 which shows the Omaha beach settlement with a large tract of protected native forest behind it on the banks of the estuary; reasonably intensive development on the headland near the bottom left of the photograph; the subject site forming part of a cleared pastoral area with its boundary terminating in a more or less straight line (but shown as undulating because of the oblique angle of the photograph) with pine forest and native forest scattered behind and to the west/south-west of the pine forest. The Tawharanui Regional Park encompasses a large tract of regenerating native forest stretching out to the headland.

Of significance in this photograph and in the plan of subdivision are the small pockets of native vegetation shown tonguing into the subject site from the foreshore (which is an esplanade reserve). These tongues of bush on the subject property are not in good order and condition at the moment. They are more clearly seen in the photo we annexed as "*D*" which also shows again the outline of the subject site.

The topography of the subject site slopes mainly in the direction of the Omaha settlement but to the east rises to a ridge with that eastern part of the property inland of the coastal bush forming a shallow amphitheatre which faces west/north west. From that ridge it then slopes to the east and the north, those areas containing the pockets of bush we have referred to. As one moves to sea from the Omaha settlement the facade of the subject property is

clearly visible and we agree with Mr D J Scott that it seems to form part of the general inner harbour landscape (Little Omaha Bay), that inner harbour being clearly seen on the two photographs we have annexed. As one moves out to sea and to the south the subject site becomes largely hidden by the ridge immediately behind the patches of bush and from there to the south the landscape is remarkably devoid of any visible buildings apart from three houses owned by the adjoining owners (Townsend Property) to whom we have previously referred. Those houses are occupied by shareholders of Townsend Brooker Ltd.

Any structures therefore on the eastern face of the subject site would be clearly visible for quite some distance and, in particular, we suspect would be visible from parts of the regional park. Any structures at the west or the inland site of the property may or may not be visible but such structures would not form part of the visual coastland environment, when viewed from out at sea.

The appeal site slopes as we have recorded in a north/north westerly direction to its common boundary with an adjoining neighbour. That latter property has gentle slopes terminating in flat land stretching towards the Omaha settlement. That particular property has a small headland of its own, with scattered vegetation upon it. That headland is visible in the photographs and is contiguous with a southern termination of Omaha beach. That owner has proceeded to plant his property with indigenous trees which will presumably result in a future visual impression similar to the pine forests of the Townsend property. Activities of that type in this area are hardly conducive to the enhancement of the beauty of the coastal environment. We record that the pine forest upon the Townsend property will be due for harvest shortly.

This is a broad background. We must now consider it against the broad canvas upon which the Rodney proposed district plan is drawn and to which the sustainable management principles of the Act apply. Also of relevance, is the Regional Coastal Policy and the New Zealand National Coastal Policy Statement.

Subdivisional History

The subject site forms an allotment created by subdivision of a large farm unit referred to in the evidence as the Fraser farm. It is just under 60 hectares in area. The first application to Council for subdivision is shown annexed hereto marked *"E"* as Proposed Subdivision of Lot 5 on approved Plan Scheme R19524, dated 14 December 1995.

This plan is a little difficult to follow but essentially shows one large balance [illegible] which contains an area of bush, then four other allotments nos: 2, 3, 4 & 5 of which only three were intended to provide building platforms. There were originally to be five platforms but by reason of the rules relating to this subdivision two were to be amalgamated together to provide a qualifying

area of native bush. The existence of areas of bush is one of the circumstances giving rise to subdivisional rights.

It will be seen that the lots were clustered towards the headland where the pockets of native bush exist and some buildings would undoubtedly be visible from the sea. The Council made a decision that the matter could proceed as a non-notified application in that its effects upon the environment would be minor and furthermore that if each of the proposed allotments contained a complying area of qualifying native bush then the subdivision would be a permitted subdivision. Essentially, as we understand it, although Council officers did not conduct an on foot site inspection, the Council finally decided that the vegetation did not comply as *"significant"* under the Council's bush assessment criteria. Also relevant to its decision was a conclusion that the development would have an adverse effect on the amenity and quality of the surrounding environment because extensive highly visible earthworks would be required to provide access to the proposed lots. Also designated building sites were in prominent and obtrusive locations. The Council also made the following comment in its decision:-

> *"Consent to the subdivision would conflict with the Council's responsibilities and duties under Sections 6(a)(b), and 7(c) and (f) of the Resource Management Act 1991."*

It should not be necessary for the Court to be repeatedly required to inform Councils that they must give reasons for their decision. The sections which the Council have quoted are of great importance and it is essential that a Council does not merely parrot the legislation but tells a subdivider why the Council considers a conflict exists.

Nevertheless, we are satisfied from the evidence that we have heard that the bush as it stands although visually prominent, may not comply with the Council's guidelines of significance although on the other hand we would consider any bush on this prominent headland position to be worthy of preservation. Put shortly, the possum has wreaked havoc with the more significant vegetated elements of this headland and pohutukawas in particular have been virtually obliterated.

Upon receipt of the Council's decision the present appeal was lodged but the appellant took the Council decision seriously insofar as bush quality was concerned and decided it would embark upon a major reassessment of the subdivisional potential of the land in question. To that end it commissioned Mr D J Scott, a landscape architect and resource management consultant who specialises in assessment planning and management projects in the rural and coastal sectors. We will discuss his qualifications in a little more detail later. Mr Scott reached the conclusion that merely to protect the existing pockets of native vegetation or replant them was not enough and he produced a plan, a copy of which is annexed as *"F"* showing not only replanting and enhancement of the existing native vegetation but extensive replantings of the

whole property in native vegetation particularly on slopes facing towards Omaha beach. He then relocated the house sites to not only take advantage of these replantings but to enable residents to manage the replantings with particular regard to the possum infestation.

We thus have the repositioning of house sites for the purpose of environmental enhancement, not for the purpose of subdivisional benefit. The number of building platforms created would remain at four. Access tracks would largely remain unaltered but we record that in any event the main access track goes along the top of the ridge and would be virtually invisible from any direction other than from the air and from some parts of the Townsend property.

Present Potential for Development without subdivision

In terms of proposed plan change No 55, which indicates the present thinking of Council, the property is within the Tawharanui Special Character Activity Area. As permitted activities (exclusive of buildings) are (inter alia) arable farming, forestry, horticulture and pastoral farming. These are deemed to achieve the intended environmental results. Environmental performance criteria are stated in Part II, 91. Controlled activities under 9.2 are *"required to achieve the intended environmental results and environmental performance criteria and required to comply with the development and environmental controls"*. Two controlled activities are relevant.

1. **Buildings** (excluding dwellings) and other structures, ancillary to arable farming, forestry, horticulture and pastoral farming.

2. **Buildings and structures** (other than dwellings and accommodation buildings) up to 200 m^2 gross floor area, ancillary to outdoor recreation or the conservation or interpretation to the public of natural resources:

3. **Farm dwellings and accessory buildings**.

   One dwelling per site accessory to arable farming, forestry, horticulture, pastoral farming and an additional dwelling on:-

   (i) Any site used for arable farming, or pastoral farming that is over 40 hectares in area, or

   (ii) Any established horticulture site with more than 8 hectares in permanent crop, or

   (iii) Any greenhouse unit with 2500 m^2 or more growing area permanently under cover.

In addition to this, there is the ability to construct one minor household unit per site. On sites subdivided after 12 October 1995 the minor household unit

must be located on a building platform specified on the plan of subdivision creating the site.

There are some discretionary activity provisions which are not greatly relevant to the case presently before us.

Although these activities are specified to be controlled activities subject to a series of criteria contained in 10.1 (a) the Council would have great difficulty in resisting a proliferation of buildings. The plan provides as permitted or controlled for three dwelling houses (one of which must be a minor household unit) and an unspecified number of accessory buildings associated with activities upon this site. As a controlled activity Section 104 of the RMA is only relevant in settling conditions.

The only criteria which might be said to inhibit building placement upon this site is 10.1 (a)(v) which states:-

> *"No building or structure shall detract from any view or vista of natural features obtained from any public road or other public place."*

The whole farm is presently a natural feature but the controlled activity criteria could not be used for the purpose of preventing use of the site for buildings. The other difficulty which would face a Council in respect of controlled activity applications is that were the buildings to be shifted towards the coastal side of the property, thus removing them from proximity to a subdivision presently proceeding on the Townsend property, residents on that property would then be faced with a view of the access to those building sites. If the buildings were shifted inland so that the access requirements were less extensive then the buildings themselves could be viewed from the Townsend property.

We record at this stage that the owners of the Townsend property complain that views of the appellant's proposal from future houses erected upon their subdivision will result in a drop in value of its sections. It is perfectly clear from the wording of the proposed plan change that the Council has no intention of protecting private views.

The provisions of the Transitional Plan in respect of buildings are much the same. Therefore under both the Proposed Change and the Transitional Plan the appeal site is not protected from a proliferation of buildings even without subdivision. Indeed the only difference between the situation now and that following subdivision (provided conditions can be imposed as suggested by the appellant) is that there would be four dwelling houses with accessory buildings on the area as subdivided as opposed to a potential for three dwellings (inclusive of a minor household unit) plus accessory buildings plus unspecified number of farm, horticulture or similar buildings which could be constructed as a right.

It may be suggested that this is unlikely to eventuate but this is exactly what has happened on the Townsend property next door with three houses presently on a large unsubdivided property occupied by the shareholders of a company which is the owner.

There was some suggestion that when subdivided each of the subdivided allotments could then also attract a minor household unit but the subdivisional provision for only one building platform per site would prevent this. Clause 9.5 only permits a minor household unit :-

> *"... on any site subdivided after 12 October 1995 a minor household unit shall be located on a building platform specified on the plan of subdivision creating a site."* (emphasis added)

The appellants have not requested building sites for minor household units.

Therefore, when considering the effects of this proposed subdivision it must at all times be borne in mind the as of right and/or controlled provisions of the transitional and proposed plans.

Preliminary Legal Issues

This essentially relates to whether the Court has jurisdiction to entertain the redesigned subdivisional format at all or whether it should be remitted back to Council to be further considered by Council in two respects:-

(a) Whether it should now be notified and
(b) Whether it should be consented to.

The Council initially decided that the application did not need to be notified. That decision was apparently made by a Council officer under delegated authority with the reasons for that decision being non-existent.

To now consider this issue. Section 94 provides firstly that an application for a subdivision consent need not be notified in accordance with s.93 if the subdivision is a controlled activity.

It will be noted that approval from persons who might be adversely affected is not required in that regard. Pursuant to s.405(2)(c) the present subdivision would be deemed a controlled activity and that is obviously the way the Council addressed the issue. However, the Council then determined that the bush lots did not qualify therefore the subdivision presumably became a non-complying subdivision in terms of s.405(3)(b).

The Council having reached that factual conclusion did not seek the views of others by way of the public notification procedures. Such procedures can often elicit submissions in support as well as in opposition. The Council did not publicly notify but determined the matter on a non-notified basis therefore the consent authority was presumably satisfied pursuant to s.94(2)

that the adverse effect on the environment of the activity for which consent was sought would be minor and that no written consents would be required, and in those circumstances it would be unreasonable to require the obtaining of approvals. Having regard to what could happen on this property as of right, we consider that a reasonable conclusion.

Whatever may be the reasons for a Council decision, it is not for this Court to endeavour to unravel them because the fact remains that a decision was made not to notify the application and this Court has no further powers in that regard in relation to the original application.

The next factor is that the subdivisional format has been changed by creating much larger allotments than originally envisaged with a resultant change in the positioning of houses. The original subdivisional layout contained five allotments but it was only intended to construct a house upon four. The balance allotment in that original subdivision was 50.58 ha therefore, two further houses could have been constructed on that balance allotment as of right and presumably in terms of the rules we have discussed, if a building platform were identified for a minor household unit, three residences could be erected with associated farm buildings. Of the remaining four allotments there were only three building platforms identified because two of the original allotments were to be amalgamated for the purpose of creating a bush area sufficient to qualify.

The access way was long with virtual dead running for most of its length unconnected with dwelling houses. It was not until it reached its termination near the coastal areas that its function in servicing dwelling houses became apparent and effective. The changed four allotment format now suggested leaves the building platform for two of the dwelling houses unchanged but the positioning of the other two building platforms, previously in a rather dominant coastal position, have been shifted well back inland where they are in a less dominant position but more readily visible from the Omaha beach settlement.

The Council on the original plan could have used its powers to require re-identification of building platform sites and had it done so then consequential adjustments to the boundaries of the allotments would have been required.

Having regard to the as of right situation in respect of permitted activities, we regard the changed location of building platforms as inconsequential. The fact that the building platforms might now be seen from the Townsend property adjoining, (which has been subdivided taking advantage of bush lot provisions), is not of resource management significance. The Proposed Plan clearly addresses views from public places not views from private land.

In relation to adverse effects resulting from the creation of large rather than small allotments, the main purpose of the large allotment exercise is to facilitate the extensive replanting of native vegetation now envisaged as part of the total concept as a result of the work of Mr Scott. For our part we consider the extensive revegetation proposal a vast improvement to the

landscape qualities of inner Omaha Bay and cannot understand why the Council did not welcome this innovative enhancement approach with a degree of enthusiasm rather than the negative attitude exhibited before this Court where every point possible was raised in opposition even to the extent of challenging the power of the Court to impose conditions to achieve environmental enhancement, conditions welcomed by and asked for by the appellant.

Turning to the law, we approach the case law from a factual finding that the original subdivision has been amended in order to enhance the environment of this area. This is similar to the situation in South British Auckland Property Company Ltd v Auckland City Council, 12 NZTPA 94, relating to substantial reductions to the height of buildings from the heights shown in the concept originally advanced to Council. The Tribunal there said, at page 96:-

> *"Occasionally a case arises at appeal level where the changes or amendments to plans are so far-reaching or fundamental that the Tribunal declines to hear the appeal and directs the Applicant to lodge a fresh application:* ***Meadow Mushrooms Ltd v Paparua County 8NZTPA237*** *was such a case. But usually it is a question of whether other persons and bodies might now wish to intervene. The answer to that question requires an assessment of whether buildings constructed in accordance with the new plans are likely to affect the public generally or any individuals in any manner different from or to any degree greater than buildings constructed in accordance with the original plans would have done."*

Later the Tribunal said:-

> *"My assessment is that in respects material to this appeal the new plans would lead to less impact, and that no new feature of planning significance has been introduced."*

We adopt those statements with approval and in the present case point out that the present positioning of the building platforms relate to buildings which could have been erected largely without subdivision or a notified resource consent as controlled activities. The Council has had every opportunity to address the new plans and suggest other locations for platforms but has refused to make suggestions, even to the extent of refusing a request for mediation by the appellants, such request being made in order to see if some common ground could be reached.

In Darroch v **Whangarei District Council, Decision 18/93** the Tribunal reiterated that it is the original application and documents incorporated which define the scope of the consent authority's jurisdiction. In relation to amendments, it said on page 27:-

> *"However, they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the*

scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required."

In the present case, the scale and intensity is not increased nor has the amendment significantly altered its character or effect. Indeed, by the conditions which the appellant is willing to accept the scale and intensity of the building activity will now be reduced below that which would be permitted as of right upon this site, i.e. minor household units will not be permitted. There can be no public benefit arising from a referral back to Council.

The appellant is essentially fine tuning the subdivision following the advice of an experienced consultant and in so doing has embarked upon an environmental enhancement exercise which will result in a development far superior to that which could take place as of right upon this property.

Insofar as the Townsend property is concerned, we consider any effect upon that property to be de minimus. Indeed having regard to the fact that the owner of that property has embarked upon a fourteen allotment subdivision, some of the allotments being contiguous with and slightly above the appeal site and also visible from the appeal site, it is difficult to see in view of the Council's present stance, why the owners of the Di Andre Estate Property were not made aware of that subdivision. The Council (notwithstanding the fact that some of the allotments may not comply with rules) embarked upon consent procedures by non-notified application. It is reasonably clear to us having heard from the owners of the Townsend property, that an objective is to make the present subdivisional exercise as difficult as possible for the appellant company because of a boundary dispute they have with that company, whereby an incorrectly positioned fence line mislead the present owners of the Townsend property when they purchased it and now find some hectares of mature pine forest which they thought they had bought, to be within the confines of the appellant's property. That is nothing to do with this Court but we record that the owners of the Townsend sought to raise it through counsel before us.

We therefore propose to deal with the new subdivision on the basis that the original concept has had minor amendments, designed to meet the concerns of Council and to create a better environment within which houses can be constructed. It does not increase the intensity of the subdivision and its effects upon the character of the neighbourhood is superior to the first suggestion. The Court therefore proposes to continue with its decision on the basis that it is dealing with a non-notified application falling within the original concept.

The Subdivisional Concept

We will generally refer to this as the "*Scott*" concept, being the format developed by Mr D J Scott, a landscape architect and resource management

consultant to whom we have referred before. To justify the weight we have accorded his evidence, it is necessary to set out in a little detail his qualifications and experience.

He holds diplomas in urban valuation and landscape architecture. These qualifications have been augmented by 22 years of experience in a wide range of environmental and landscape planning, design and management projects. These include (and this list is not exhaustive) the Marlborough Sounds Planning Study; Coastal Development and Protection for the Northland Regional Planning Scheme; Russell Planning Study; Rangarunui Harbour study; Hokianga Environmental Issues and Options paper; Bay of Islands Water and Coastal Planning Study; Planning and Resource Management framework for the preparation of the Hauraki Gulf District Plans and for the rural section of the Waitakere City Council Proposed District Plan; Pt Chevalier Coastal management plan and Manukau Harbour Coastal management plan.

Apart from studies, actual coastal project clients include the Auckland City Council, Waitakere City Council, Department of Conservation, Whangarei District Council, Auckland Cement Works, and the Waitangi National Trust.

Of great importance to the present case is his specialist knowledge in the field of landscape restoration and repair. He has managed the Ministry of Works Kauri nursery in Northland and has carried out research in connection with the Aokutere Plant Science Centre. That research initiated pioneer techniques in the area of large scale landscape restoration and repair. He has refined these techniques and methodologies through his role as technical manager of Awarua Nursery which is concerned with specialist revegetation and production and specialist revegetation implementation. He has advised land owners and farmers in the rural sector on the development and management of sustainable productive properties based on personal experience as a farmer and manager and on education in farm forestry at Flock House and in Tasmania. Academically he has been a part-time lecturer and tutor.

Of particular interest are designs for coastal subdivision with particular emphasis on the Hauraki Gulf Islands and the Northland Coast. Such projects draw from detailed work his firm is presently carrying out for major subdivision projects on Great Barrier Island and Waiheke Island.

It can therefore be seen that any subdivisional design based on replanting and restoration of areas by means of native revegetation planned and/or supervised by Mr Scott deserves a great degree of respect and attention particularly as s.5 directs us to consider promoting sustainable management. t includes development of natural resources while sustaining the potential of such resources to meet the reasonably foreseeable needs of future generations. That primary concept of the Act is of course allied to the provisions of s.7 also contained in Part II which is a section relating back to the main purpose of the Act. The relevant parts of s.7 read:-

"In achieving the purpose of this Act, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to -

...

(c) the maintenance and enhancement of amenity values:..

...

(f) maintenance and enhancement of the quality of the environment:.."

We record in passing that Mr Scott told us in evidence that he has filed submissions in respect of the proposed district plan of the respondent Council on the basis that questions of enhancement have not been fully addressed. Those submissions do not specifically apply to the appeal site.

As will be seen in the course of our discussion on the Scott concept an immediate rift between the Transitional and Proposed Plan on the one hand and the Scott concept on the other becomes apparent. The plan seeks to preserve existing stands of native forest which are considered to be of significance. These are haphazardly scattered throughout the district and the particular positioning does not necessarily indicate a suitable location for a house merely because it is allied to a subdivision for bush lot purposes. The Scott concept on the other hand considers the pastoral landscape; sets in place a replanting programme for the purpose of creating future stands of native forest; and then locates residences within that enhanced environment. In respect of existing stands which have suffered damage replanting is planned. As well as replantings it is intended that the areas be fenced off and retired from undergrazing. Continuation of pastoral grazing as permitted by the Council Plans is clearly deleterious to bush conservation.

To move now in a little more detail to the Scott concept.

Generally his brief is to seek a subdivision resource consent that will allow the appellant to subdivide its property in a manner which is sensitive and complementary to the natural landscape character and ensures that appropriate landscape protection is given and sustainable outcomes achieved. He presented his evidence in three categories namely:-

1. To demonstrate that the site although included in the Tawharanui Special Character Activity is physically and environmentally part of the Whangateau Harbour and inner coastal settlements and therefore should be considered in this context. We have previously referred to the inner or Little Omaha Harbour, which is seaward of the settlement. The Whangateau Harbour forms the estuary inland of the settlement.

2. To highlight inadequacies within proposed plan change 55 with particular regard to general and specific objectives within the Tawharanui Special Character Activity Area and the appendix relating thereto.

3. To demonstrate that the proposal is not a traditional subdivision in that it is environmentally based. The proposed design achieves sustainable management of a currently degraded landscape. All existing and potential adverse effects are to be avoided, remedied or mitigated.

Essentially, he operates on a design philosophy for subdivisions intended to derive sustainable management solutions from a catchment management approach and to attack the matter from an effects based approach based on development and protection of natural and physical resources.

In the course of our discussion of his evidence we will also consider some evidence of a technical nature called by other parties suggesting that the ability to implement the Scott concept may be suspect.

We accept as do all parties and witnesses, that the landscape of the Rodney District is characterised and dominated by the rural and coastal landscape and natural environment as well as the results of human activities carried out within it. We further agree that elements of landscape are not static and cannot be held static by rules in plans. As we apprehend Mr Scott, his intention is to develop the landscape where possible, if close to or within the coastal landscape and natural environment, in a way which will enhance what is presently there and which presently in part exhibits remnant forest characteristics. In passing we record another example of changing landscape permitted by the Transitional and Proposed Plans which all witnesses considered offensive in the context of objectives and policies namely the unfettered ability to plant indigenous commercial forests. This in fact appears to be happening between the appeal site and the Omaha beach settlement.

Although some attempt was made to indicate that the present property could continue as a pastoral farm it is perfectly clear to the Court that it would be at best a run off property with no hope of becoming economic in its own right. However parts are capable of conversion into horticultural activities such as vineyards which we will discuss later but we record that if horticultural activities did take place the activity would carry with it the right to a dwelling house on small parcels of land usually 8 ha or, if under glass 2500 m^2 . The presence of houses is what this case is all about.

In any event, the Scott concept first assessed whether the present use of this property for pastoral farming was inappropriate leading as it has to a degraded landscape of reduced economic yield. He concluded that the subject property has been developed for pastoral purposes with considerable loss to the natural environment and that it is for the Council and this Court in terms of the RMA to address its attention to the best way to rectify the particular concern. The Scott concept works on the basis that the sustainable management of natural and physical resources if possible should be associated with the opportunity to repair and enhance landscapes and to maintain such landscapes for the future. This underlying philosophy forms the basis for establishing the lot layout and lot size was supported by the appellant.

As an example he referred to the Auckland City Council approach to the Hauraki Gulf Islands District Plan which includes provision for effects based incentives to help achieve sustainable management outcomes in relation to subdivision. This recognition that subdivision provides an opportunity to encourage and initiate positive landscape changes has also been implemented successfully on Waiheke Island but is not provided for in terms of the respondent Council's plans, which in respect of native vegetation is directed to protecting what is there rather than to recreating what may have been there in the past.

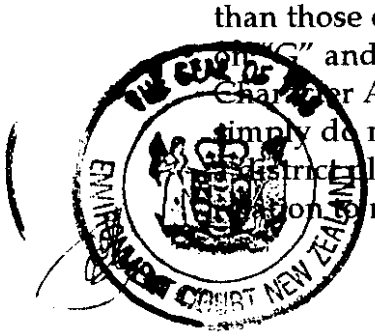
Turning to the Tawharanui landscape itself, Mr Scott developed a theme which runs parallel to the more global approach adopted in the Transitional and Proposed Plans.

The proposed plan to which we will address most of our attention (although subject to substantial submissions challenging its contents) places the appeal site within the Tawharanui Special Character Activity Area which is described as *"extensive indented coastline with remote and non-urban character"*. Mr Scott however, subdivides the vicinity of the appeal site into two dominant identity areas. Firstly the *"outer coast"* which includes Omaha Bay and Tawharanui Peninsula (the site of the regional park) and secondly, the *"inner coast"* which includes Whangaeteau Harbour and Little Omaha Bay. These areas are shown more clearly on the map we have appended as "G". The area is characterised by pastoral farming, plantation forestry and limited horticulture.

The area from Karamuroa Point to the end of the Tawharanui Peninsula when viewed from out at sea is set in a separate landscape identity area giving an impression which accords with the description in the plan. A ridge line coinciding with the south eastern and eastern boundaries of the appeal site separates two catchment faces, one of which drains into Omaha Bay on the Peninsula and one of which drains into Little Omaha Bay being the inner harbour.

However, when one stands on the appeal site as opposed to viewing the properties from out at sea there can be seen a mixture of activities which when taken together are not consistent with the *"remote character"* referred to in the plan.

As a matter of fact, we accept the evidence of Mr Scott backed by our own inspection of the area that the inner coast including Whangateau Harbour and Little Omaha Bay is characterised by more intensive land use patterns than those of the outer coastal area. The area to which Mr Scott refers shown "G" and is quite different from the rest of the Tawharanui Special Character Activity Area. If the proposed district plan says otherwise then we simply do not agree and we are not bound by statements of fact contained in the district plan. As a brief comment on that, it will be noted that s.104(i)(d) in addition to matters to which we shall have regard states:-



"Any relevant objectives, policies, rules or other provisions of a plan or proposed plan; ..."

The eiusdem generis rule applies - that is to say that the general expression 'other provisions' must be things of the same genus as the words preceding it. This approach is supported by the dictionary definition of the expression 'provision' which indicates that it is a condition or a stipulation or proviso or something of that nature incorporated in a legal sense.

Therefore a contested factual statement merely has the weight which should be given to it when supported or not supported by evidence.

Therefore we accept that there is a separate sub-environment which the Tawharanui Special Character Activity Area does not address. It consists of Ti point which is reasonably closely settled; various camping grounds etc around the Omaha river; the Whangaetau harbour including a reasonably close settlement at Port Wells; the very closely knit settlement at Omaha itself; and fairly intensive horticultural activities and other activities which have fairly prominent buildings particularly on Ti point. It is towards this that the subject site faces and it is from these areas that the subject site will largely be viewed. It is not until one clears Little Omaha Bay, as we have previously recorded, and proceeds by sea around the coast to the east, that the appeal site fades from view.

We accordingly find as a fact that the appeal site does not come within the definition of *"quite extensive indented coastline with remote non-urban character"*.

Having reached that conclusion the more generic statements in the plan, particularly those relating to protecting and retaining the natural coast in a non-urban and remote character role and protecting the natural environmental values present within the Tawharanui Peninsula, tend to become a little confused in that those objectives and policies apply to a set of facts set forth in the proposed plan with which we do not agree. It will also be noted that the policies and objectives set out to *"protect"* and *"retain"* and seldom does the word *"enhance"* appear. As Mr Scott put it in his evidence, the special character activity area appears to concentrate on existing landscape character and amenity values.

Mr Scott then proceeds to set the boundaries of the inner coastal landscape and considers the use of catchment boundaries appropriate in determining landscape character areas rather than the method of determining them through visual qualities alone as those latter qualities are most likely to change. We agree with him in that regard and have referred already to the permitted use of exotic forestry and to the ability to erect structures upon properties exceeding 40 ha as of right. In that regard, as recorded before, the Townsend property is a classic example of a property which was previously subdivided where three shareholders of the owner company occupy one of the three houses present upon site <u>without</u> subdivision.

Mr Scott then addressed the remnant forestry upon the subject site and the fact that it should be replanted and regenerated if possible.

Turning to the maps of the properties, Mr Scott discussed the site in detail and identified various wet lands, slopes which lack stability, catchments, and areas visible clearly from the sea. Having assessed the landscape and considered it from the viewpoint of sustainable catchment management, he then moved to a consideration of protection and enhancement of critical landscape elements. As he put it:-

> *"The essence of the technique therefore is to identify the critical landscape elements within any catchment that require protection and enhancement. The values that relate to these critical elements include: scenic protection, vegetation conservation, erosion control, water quality and habitat protection ...*
>
> *Put simply, the technique identifies these elements and a line is drawn around them. A pattern emerges that is continuous in nature, containing and enclosing areas of land suitable to human activities and development."*

From this he moved to considering the areas needing high protection which would benefit from appropriate cover such as vegetation. This of course would result in visual benefits and the ability to provide walkways and other means of active recreation.

Mr Scott then considered and developed the proposal which we have referred to as a Scott concept. For the purpose of assisting the reader, we consider the introduction to the proposal should be set out in full. It reads:-

> *"The Catchment Management design process applied to this subdivision has played a critical role in determining the final subdivision layout. The process is essentially evolutionary, whereby the identification and analysis of many factors contributes to the final design of the subdivision. Factors influencing the layout incorporate an analysis of the existing landscape and how future management can assist with achieving overall sustainability. Effective design requires determining the attributes of limitations inherent in the subject land.*
>
> *In the present application, taking into account the District Plan criteria, block layouts and boundaries are located acknowledging natural systems, and the protection of fragile systems, so that areas for dwellings and production can be appropriately located. This way an overall design concept has been arrived at which is further assessed and refined in detail. In designing the subdivision layout the surveyed lot boundaries are regarded as being of much less importance than the proposed landscape pattern. The final boundaries chosen in this case are not all straight forward lines which follow land contours, catchment and identity area boundaries. However, provided the landscape pattern and other land use opportunities including building platforms and access ways are retained, other subdivision boundary lines including the original ones could be used."*

Various plans were then prepared by Mr Scott covering catchments, wet lands, ponds etc followed by an identification of sensitive landscape elements and matters of that nature then followed by a land development plan which added house sites, revegetation patterns, access and proposed lot boundaries. The concept was then referred to surveyors for preparation of a scheme plan of subdivision which is the plan with which we are now dealing.

In adopting the design process the management objectives for each lot included:-

- Provision for access which follows good contour minimising cut and fill operations.
- Locating open areas of good contour as proposed building platforms.
- Retiring and revegetating all steep, unstable land, margins of streams and wet lands.
- Protecting native vegetation in order to allow the process of natural regeneration which is already occurring.

Mr Scott then set forth the various mechanisms designed to achieve those objectives which included building design covenants, building envelope plans, restrictive covenants relating to landscaped areas, and performance bonds.

Lastly in his evidence, he conducted a visual impact assessment and made clear that he was concentrating on protection and enhancement of existing stands of native bush plus revegetation of land not suitable for production. He made to us a significant comment when he stated:-

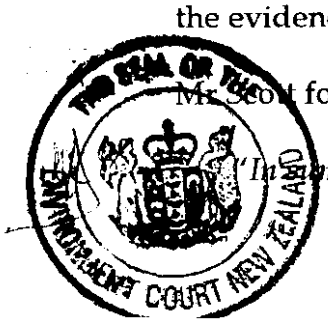
> *"It is considered that from a landscape management perspective dwellings are accessories to land rehabilitation."*

Essentially within the subdivision he has set out to enhance both the natural character of the coastal environment and the more highly modified and currently degraded landscape. He addressed fully, the location of dwellings and had obviously considered carefully their placement and their visual significance. The only reservation we have is in respect of one allotment where the building site will be visible from the sea and will intrude upon the remoteness associated with that view.

On the other hand we cannot help but be reminded of the provisions of the proposed plan which would enable other dwellings to be located in prominent positions upon pastoral farms within the sweep of bay leading to the regional park on the end of the peninsula. Nevertheless the building platform suggested for that lot is <u>not</u> within the inner harbour as defined in the evidence.

Mr Scott for his part, stated:-

"In summary, the location of each dwelling has been considered relative



to both its individual and cumulative effect. To this extent, it is considered the visual impact of each dwelling will be minor and the cumulative effect of the four dwellings is not an issue. As at most only three of the dwellings can be seen together from a limited view and locations."

The foregoing is a description of the Scott concept taken from his evidence with some general comment. In support of the revegetation concept, evidence was given by Mr N F Johnson, a member of the New Zealand Institute of Forestry who considered that (subject to the exclusion of stock and the eradication of possums). This rehabilitation project would succeed.

The Council called Dr Nigel Clunie who was somewhat pessimistic at the chances of success and considered that the new forest plantings would be unlikely to succeed nor would revegetation.

He acknowledged the expertise of Mr Scott and acknowledged that he was not aware of various projects which Mr Scott had undertaken and which were referred to in the supplementary evidence given by the latter witness. In that evidence Mr Scott referred to several very recent projects in which revegetation requirements had a major role namely:-

(a) Church Bay - Waiheke 60 ha coastal revegetation including approximately 240,000 native plants

(b) Waiheke Coastal Estates with a proposed revegetation of 80 ha with 400,000 native plants

(c) Golden Bay Cement - Whangarei 300,000 native plants

(d) Kuluz Property - Waitoke 20 ha of revegetation, 85,000 plants.

Mr Scott in the supplementary evidence referred to the procedures and techniques involved in revegetation and simply did not agree with Dr Clunie's pessimistic approach to this matter.

Dr Clunie acknowledged that he had not spent a great deal of time upon the appeal site and in the circumstances of the present case we prefer the evidence of Mr Scott.

In any event, even if there were some minor degree of experimentation and failure (and we do not acknowledge from the evidence that this is likely to occur), when a developer sets out to enhance the environment he should be given every encouragement and not be faced with a series of negative obstacles set in his path by the territorial authority.

We now move to the planning evidence which of course will include a consideration of the various plans. We will group that evidence under the following subheading.

The Transitional and Proposed District Plans and the Planning Assessments of this Project

We heard from three planners of experience - Mr S Dietsch, consultant planner called by the respondent Council: Mr B W Putt called on behalf of the appellant and Mr H Briggs called on behalf of Townsend Brooker Limited.

To first arrive at common ground. It was not disputed that the appellant could embark upon a replanting and regeneration proposal upon the appeal site as of right. Therefore the property in years to come (possibly as short as five years with fast growing native species) could start to achieve the beneficial visual environmental aspect of the Scott concept. It was further common ground that once this had occurred a bush lot subdivision could then eventuate as has happened on the adjacent Townsend property. On that property the positioning of houses is largely dependent upon the contiguity of a house site with significant bush rather than areas of significant bush being established as part of a total package in which the positioning of houses becomes an integral part.

We accept nevertheless that planting followed by a five year to ten year wait is unlikely to eventuate because of the great cost incurred in the revegetation project plus the ongoing surveillance and maintenance needed of that planting programme. It is perfectly evident to the Court that if financial inhibitions are set to one side and if the success of the replanting programme is accepted, then we are not talking about <u>if</u> houses should be built but rather <u>when</u> they should be built. In assessing the matter under s.104 of the RMA we will be looking later in this decision at balancing a short-term haphazard development of the appeal site in a manner not prevented by the Transitional or Proposed plan as against a comprehensive and well considered development which will ensure in the medium to long term that the environment will be enhanced. We record that the planners called by the Council and the adjoining property owner did not address their minds to the as of right situation upon the appeal site nor indeed did the planner called by the appellant but in the case of the latter witness he was fully supportive of the proposed subdivision without the necessity to address his mind to the as of right situation.

For convenience we will consider firstly the evidence of Mr Dietsch and will comment on plan contents as set out in his evidence.

Mr Dietsch commenced with a history of this matter, a description of the site and locality, the type of application and the consents required.

He identified the various aspects of the application in terms of the Act as follows:

"Non-complying activity consent is required for:-

(a) *The subdivision as originally and now proposed.*

(b) *Vehicle access over one right-of-way to the subdivision as originally and now proposed. This relates to the fact that the main leg of the right-of-way leading from the public road to the boundary of the appeal site already serves a number of allotments and the addition of three further allotments on the appeal site will bring it above that permitted by the plan.*

(c) *Earthworks exceeding 500 m^3.*

(Note: This figure is disputed by the appellants and in that regard we are of the opinion that the earthwork requirement relates to concentrated excavations rather than the minor flattening of contours over a distance by effectively skimming the surface. That is the situation in the present case. Ploughing and harrowing are little different from what is presently proposed for most of the accessways.)

Discretionary activity consent is required for:

(a) *Buildings accessory to residential buildings exceeding 200 m^2.*

(b) *The excavation/deposition of soils/spoil in excess of 200 m^3.*

(Note: Our previous comment applies to this aspect.)

Controlled activity consent is required for:

(a) *Farm dwellings and accessory buildings (not exceeding 200 m^2).*

(b) *Any other ancillary building.*

(c) *The excavation/deposition of soils/spoil not in excess of 200 m^3."*

Mr Dietsch then turned his attention to the Transitional District Plan which addressed itself to the character and amenities of the district and its natural environment and in particular rural and coastal areas. In terms of that scheme there are distinct landscape types of special quality. The general objective for the zone is:-

> *"To conserve and enhance where practicable those features of the natural environment that contribute significantly to the amenities of rural, coastal and water areas."*

A specific objective for the Rural Conservation 3 zone is to preserve the landscape qualities of open space and remoteness in coastal and rural areas, this being supported by policies and rules. It is common ground that the subdivision does not comply with the rules. Plan Change 55 proposes a

substantial change to the Transitional District Plan embarked upon in terms of the RMA. In terms of this plan the property is zoned Tawharanui Special Character Activity Area and the change has attracted over 700 submissions, both for and against. Section II of the plan identifies *"the significant rural resource management issues and in particular adverse effects of land use on rural character, amenities, cultural and heritage values and the adverse effects of development on significant landscapes and natural features"*. We are told that the New Zealand Coastal Policy Statement to which we will later refer has been taken into account.

The proposed plan change continues with a discussion of ongoing development in rural areas affecting rural character. It will be noted in this context that the expression *"ongoing"* is used and this continues to dwell upon the creeping and irreversible effect on the rural environment of subdivision and that although individual subdivisions and development may have only limited adverse effect, the cumulative effects could be significant. The objectives then continue with an objective to maintain and protect rural character but on the other hand to recognise countryside living as a valid rural activity.

Naturally this theme flows into the Tawharanui Special Character Activity Area which repeats the cumulative theme with an objective at page 17:-

> *"To protect from an inappropriate or insensitive building and development and enhance where possible landscape and natural features of regional and coastal significance."*

It will be noted that this is one of the few places where the word *"enhance"* appears. This is followed by general policies to maintain and protect the special natural character followed by strategies addressed to that end and to the provision of opportunities for productive activities.

To comment upon these matters, there appears to be no argument but that the special character of this area must be preserved although it is hard to see how this is being achieved by the present rules and in particular rules which allow a proliferation of buildings on pastoral units and a rule which allows a property such as the Townsend property to be fragmented in the way in which it has been fragmented merely because it contains haphazard pockets of native vegetation. In that regard we must observe that the native vegetation on that property is itself being subdivided therefore one pocket of bush appears to act as a catalyst for many houses. Nevertheless all the planners and consultants who appeared before us were firm in holding that indiscriminate subdivision in the special character area should not be permitted. The difference between them arose because Mr Scott was adamant that the subject site was not within that area but was within a subcatchment where subdivision of the subject site into large allotments and further subdivision of the area between the subject site and the Omaha settlement would not affect the special character area. Mr Putt was of the same view.

Mr Dietsch then noted the special issues identified within the activity area which are remoteness, non-urban character, primary production in particular:- plantation forestry, pastoral farming and some horticulture. This specific issue of identification inevitably lead to a general objective namely:-

> *"To retain the natural, non-urban and remote coastal character of, and the high landscape and natural environmental values present within, the activity area whilst providing for the continued operation of the productive activities undertaken."*

As Mr Dietsch correctly concluded the approach taken was to achieve that objective by limiting the range of activities largely to those occurring at present. In our opinion the ability to enhance has not been addressed except as a very minor side issue.

The special activity area accordingly limits subdivision to four situations, namely:-

1. Creation of sites for the protection of significant stands of native bush or significant natural features.

2. Creation of sites for dwellings on Maori land.

3. Boundary adjustments.

4. Creation of sites for specific activities such as cemeteries, urupa or historic places.

It will be noted that subdivisional criteria refers to the *"protection of significant natural features"*. We record that an argument was advanced, an argument with which we agree, that the subject site itself is a significant natural feature (or could be if revegetated) when viewed from the Omaha area and from within the inner harbour area. Its protection from <u>inappropriate</u> subdivision and development is therefore of some importance and in that context we consider a subdivision which will enhance that natural feature should be encouraged.

A specific objective 5.1 is:

> *"To protect and retain the natural coastal, non-urban and remote character of, and the natural environment values present within, the Tawharanui Peninsula."*

Moving to the policies relevant to that particular objective, there is a requirement to protect the area fronting Little Omaha Bay by limiting activities to those of a non-urban nature and scale and through controls in the siting of building and other structures. There was furthermore a policy to

limit the establishment of exotic forest to land not presently used for that purpose, a policy which has apparently since been abandoned.

It is here that confusion is starting to become apparent and we agree with Mr Scott that the plan does not proceed to differentiate between the wider special activity area and the area fronting Little Omaha Bay the latter area clearly lacking in remoteness and many of the other elements so greatly valued in the special activity area.

This is reflected when one addresses the intended environmental result at page 140 which is:-

> *"(a) A non-urban and remote character reflecting a relatively low density of permanent occupation and related building structures (including roads and other infrastructure) in this coastal/rural environment is retained and protected*
>
> *(b) The high quality coastal/rural landscape reflecting low density of manmade structures is maintained, and development is compatible with and sensitive to the high quality landscape in which it occurs."*

It will be noted that the character relates to low density of manmade structures. There are then specific criteria relating to such structures preventing them protruding above the natural landform, ridge, hill or existing native trees. Criteria also relate to the number and location of buildings which must not result in the loss of the non-urban and remote character in the general vicinity.

Mr Dietsch then moved to what is really the issue before us, namely the fact that this subdivision does not presently contain significant stands of native bush or significant natural features. While the latter element, i.e. significant natural features is a matter of opinion, there is no question that some of the allotments do not presently contain a significant stand of native bush.

Turning now to the Regional Policy Statement, it is significant that, unlike the district plan, the regional policy statement subdivides the area into two. The coastal edge of the applicant's site is given a landscape quality rating of 6 (regionally outstanding) whilst the rest of the site has a landscape sensitivity rating of 5 (regionally significant).

The regional policy statement continues with the following statements in policy 6.4.19:1, namely:-

> *Subdivision, use and development of land and related natural and physical resources shall be controlled so that in the areas identified in map series II and III:*

(i) *The quality of outstanding landscapes (landscape rating 6 and 7) is protected by avoiding adverse effects on the character, aesthetic value and integrity of the landscape unit as a whole;*

...

(iv) *Regionally significant landscapes with a sensitivity rating of 5 are protected by ensuring that any subdivision, use and development can be visually accommodated within the landscape without adversely affecting the elements, features and patterns which contribute to the quality of the landscape unit."*

The intention is to protect the aesthetic and visual quality character and value of the major and unique landscapes from inappropriate subdivision, use and development.

With all respect to the views of Mr Dietsch, we consider that the appellant's present proposal falls precisely within (iv) above. The subdivider in the present instance has gone out of its way to enhance a regionally significant landscape by substantially covering it with native vegetation and in return for that significant expenditure wishes to locate four dwellings in visually unobtrusive areas.

Mr Dietsch in his assessment considers that the proposal presently before us fails to comply with the various types of subdivision provided for in the Transitional District Plan and the Proposed Plan Change 55. Setting aside non-compliance with the maximum number of lots serviced from a right-of-way, it is debatable in the opinion of this Court whether a subdivision designed to enhance a regionally significant landscape feature is in fact a non-conforming activity in that the Proposed Plan Change permits the creation of sites for the protection of significant natural features and the Regional Plan recognises sensitive subdivisions.

Mr Dietsch then turned to Part II of the Resource Management Act. He placed great emphasis on the fact that the land is clearly visible from Broadlands Drive, Little Omaha Bay and the coastal land to the north (Ti Point and Leigh), and from Omaha Bay on its seaward side. This may well be so but with due respect, we consider that the visual effect of this property with significant reafforestation and a scattering of houses would be superior to its present somewhat barren pastoral appearance. Also we observe that Mr Dietsch has overlooked the ability to develop this property in a similar fashion to the coastal part of the next door property with two dwellinghouses and a minor unit upon it.

He then turned his attention to s.6 of the Act concerning preservation of the natural character of the coastal environment but we again observe that the Regional Council appears to have also turned its attention to that matter and given the site (apart from its true coastal facade) a rating of 5. Essentially any contravention of s.6 relies heavily on whether a subdivision is inappropriate

or not and in the present case it is highly appropriate to encourage landowners in directions which will enhance the environment.

Mr Dietsch then referred to s.7 and considered changing the character of the natural resource to another character did not constitute an efficient use or development. Again with respect he has overlooked the permitted uses upon this site and appears also to consider that a change of character largely back to pre-European times is in some ways unacceptable, an approach with which we do not agree.

The question of access and the visual appearance of roads we will address in a little more detail later, but we record that the access track which is presently visible and subject to criticism was not constructed by the appellant and indeed the appellant took some exception to it.

Mr Dietsch then discussed actual and potential effects including cumulative effects. Again he dwelt on the visibility of the proposed activity upon site and believed that the subdivision would have a cumulative adverse effect of diminishing the outstanding landscape quality and significant landscape sensitivity of the land between the applicant's site and Broadlands Drive, Omaha. We prefer the approach of Mr Scott whereby the total area outlined on annexed plan G should be regarded as one unit and in that context a scattering of houses set amongst replanted native vegetation does not in our opinion constitute a cumulative adverse effect.

Mr Dietsch then went on to consider s.105(2)(b) and the question of public notification with which we have already dealt.

In rebuttal Mr Dietsch referred to some parts of Mr Putt's evidence with which we will later deal and with aspects of change number 55.

We must again stress at this stage that as a matter of fact we do not consider that the Council can blanket the inner harbour with words such as *"remote"* and *"non-urban"* as identified in the Special Activity zone. Even accepting the doubtful propositions that areas such as the regional park on the peninsula despite a visitation of 160,000 persons per year, can be regarded as remote, we consider it artificial to attach the subject site to the area behind it and over the ridge line rather than to the area to the north of it which is not within the Special Activity zone. An arbitrary line has in fact been drawn which for the purposes of effects assessment in terms of the RMA is neither sustainable nor logical if the proposal passes the threshold tests of s.105.

Turning now to the evidence of Mr Briggs on behalf of the neighbouring property owners, Townsend Brooker Limited. Mr Briggs had been called in at short notice which left him at somewhat of a disadvantage. He commenced with a general site description commenting upon the openness of the ridge with very little physical development or structures visible although the new accessway can be clearly seen. He initially expressed some difficulty with understanding how this particular subdivision in a sensitive coastal

location could have been considered on a non-notified basis but we have previously commented upon that and find it significant that the property owned by his clients suffered a like fate although admittedly not in a coastal location except in a very general way. We have previously addressed his views on the extent of change from the original concept to that presently proposed.

He commented on the long joint accessway which we drove over on site inspection. The maximum number of lots including those presently served will be eight so the access over the permitted five is not great. That part of the right-of-way serving a greater number than permitted is generally flat with passing bays and should pose no great problem. When the right-of-way climbs into the appeal site that part of the right-of-way does not serve more than the permitted number. Although non-conforming in that respect we have no difficulty with the right-of-way and would in particular comment that the right-of-way is a per site rule rather than a per house rule. As we have previously commented an overload of houses upon the right-of-way system could occur without subdivision.

Mr Briggs generally covered the district and regional plan policy statements and our comments in that regard are contained in the section of this decision relating to the evidence of Mr Dietsch. The provisions of the Proposed Regional Plan (coastal) were also emphasised and it will be seen in the conclusion of this decision that the Court remains unsatisfied with the siting of a building visible from the sea and from the direction of the houses upon the Townsend property but again concedes that other structures could be erected in that environment. In respect of the coastal environment, the bush vista will be enhanced by replanting of the bush on the seaward escarpment.

Mr Briggs then turned to the effect upon his clients. He first addressed the question of non-notification considering the subdivision to have a significance well beyond the boundary of the property. We find this a little hard to understand because his clients have had the advantage of a non-notified application consent themselves for a subdivision far more extensive than the one presently proposed - a subdivision which may have run into some difficulties if it had in fact been notified.

He traversed the provisions of Part II of the Act with which we have already dealt and raised the question of s.8 remarking on the lack of consultation with local iwi.

An individual applicant for a consent is under no obligation to consult with iwi but it is wise to do so for reasons we have expressed in other decisions. It is perfectly obvious that the Council in deciding that the application should not be notified must have had the question of Maori interests in mind and reached the conclusion that there are no known Maori land features or taonga which required consultation.

Mr Briggs discussed the moving away of building sites from the seaward side of the ridge lines thus moving closer to his client's site and impacting on

views from that property. Neither Mr Briggs nor anyone else could bring our attention to any provision in the rules or plans which require protection of private views as opposed to public views.

Essentially the evidence stressed the character of the peninsula as one of openness being unspoiled and relatively remote. In terms of the plans we agree but in terms of the evidence of Mr Scott we do not. Mr Briggs indeed conceded that within the overall Special Character Activity Area there could be several different sub-catchments or particular environments that could have some specific design or different development activity controls applied but he resisted that approach to the present problem as being a challenge to the proposed plan which is presently being put through the legal process. In any event he did not believe that the subject site was any different to many others that could be found on similar pieces of coastline whether in this activity area or others. After discussing the regional policy Mr Briggs moved on to an assessment of environmental effects and stressed the visibility of the subject site from Omaha and its approaches. He further considered that the impact upon his client's land would be significant. In that regard he was also concerned about agricultural or horticultural activities in visible locations. Nowhere in his evidence was the question of present permitted activities discussed.

We are grateful to Mr Briggs for his candid answers when subjected to cross-examination. He had worked with Mr Scott for some ten years and expressed great respect for his work. He found merit in the work that had been done in the present case in that the proposal made a good use of resources. He was quick to concede that some permitted activities could have an equally adverse effect such as pine trees and that reafforestation with exotics was a possibility. In particular he conceded that houses within the present proposal would need to be seen in the context of the revegetation. He made a most significant and honest concession when he stated that as a whole package it was a positive environmental change from that initially propounded although the house sites would still be visible.

Turning now to the evidence of Mr Putt. He is a consultant planner employed by the appellant company. He commenced his evidence by making clear that he agrees with Mr Scott in placing the bulk of the site appropriately within the inner Little Omaha Bay visual and physical catchments which give the site a spacial and landscape context far more accurately than achieved from an analysis of the site using the district plan documents. That is to say its *"facade"* if one may use that expression, is an essential element in the coastal environment viewed from the outer bay whereas its flank facing towards the beach settlement is within the inner bay. His evidence is based on a premise which we will later discuss concerning its value for pastoral farming purposes. He discussed the landward landscape relationship with the Whangateau Harbour and the protected forest in that area.

In a discussion of the Auckland regional policy statement he referred to the fact that the landscape has a rating of 6 as being an outstanding landscape

and in such circumstances the aesthetic value and integrity of the entire landscape unit is to be protected from adverse effects. The policy does not prohibit but seeks to avoid subdivision use or development where activities cannot be visually accommodated within the landscape in an appropriate manner. Mr Putt found support for the Scott concept of revegetation by policy 6.4.10 relating to *"restoration of natural heritage"*. In particular the regional policy 6.4.10.1 states:-

> *"Significant ecosystems that have been damaged or depleted should be protected and restored to the stage where their continued viability is no longer under threat."*

This is followed by a series of statements concerning bringing resources closer to their original state; control of pests; fencing and legal protection; the use of indigenous species and revegetation work and matters of that nature. Indeed the regional policies so closely mirror the aspirations of Mr Scott that one suspects that his work in the Auckland area has influenced the Regional Council in the compilation of its policies rather than the other way round. It is however of tremendous significance that the present subdivisional proposal accords so closely with the heritage provisions of the policy statement. Mr Putt also referred to the principle of Kaitiakitanga which is mentioned in the regional policy and commented that the essence of the present application reflects the care and stewardship of the land within the coastline which is an essential element of the Kaitiakitanga concept as defined in the Act.

Turning to the proposed regional coastal plan Mr Putt discussed the provisions of that plan and concluded that its contents were not challenged in any way. He then discussed the provisions of the transitional plan and the proposed plan and in particular pointed to the anomaly whereby Rule 10.7.15 referred to *"native forest"* but that the definition upon which the Council based its refusal was a definition *"native bush"*. The matter was further confused by a definition of *"native trees, bush and vegetation"* which *"means all species of indigenous flora regardless of size"*. That argument is largely academic because the appellant has essentially abandoned the original bush lot concept.

Turning to Proposed Plan Change 55 which constitutes The Tawharanui Special Character Activity Area, Mr Putt had discussed the state of this plan change with the senior Council planner and found:-

(a) There are submissions opposing change 55 in its entirety;

(b) There are submissions opposing the Tawharanui Activity Area provisions in their entirety;

(c) There are submissions opposing the Tawharanui subdivision controls, seeking the reinstatement of the operative rules;

(d) There are more than 700 submissions arising from change 55 and approximately just as many further submissions but of those further submissions at least 400 are from the Auckland Regional Council.

Mr Putt then went through the objectives and policies which we have commented upon when discussing the evidence of Mr Dietsch. He was of the opinion that the objectives fail in two ways. Firstly because the objective is focused on the present *"as if to protect a snapshot of the Rodney district at this point in history"* and secondly because while attempting to provide for a legitimate rural activity, namely countryside living, the methodology becomes prescriptive and deterministic by restricting that activity to selected parts of the district. He made a very valid point that if countryside living is a valid rural activity then it would surely be provided for throughout the rural district where appropriate criteria and justifications can be met.

Turning to the Tawharanui Activity Area, it is perfectly obvious as pointed out by Mr Putt, that the Tawharanui Regional Park containing some 588 hectares and the adjacent marine park extending 800 metres out from the coastline form a significant catalyst for the whole activity area. He does not agree that it has a remote character because of the number of visitors and because it is just over one hour's drive from the Auckland central business district. He had obtained figures indicating that 164,000 visitors came to the park last year. However as we have observed previously in our decision, when viewed from the sea or viewed we suspect from areas within the park, a sense of remoteness can nevertheless be experienced.

Turning to the specific objectives and policies. Intended environmental results and performance criteria against which the results are measured are set out in a table and Mr Putt was of the opinion that the application can be measured satisfactorily against the performance criteria because:-

- The application maintains and enhances the habitat of indigenous flora and fauna.

- It does not involve modification of a sand dune system.

- It does not involve the extraction of ground or water based materials.

- It does not involve the excavation or deposition of more than 200 m^3 of material.

- It does not involve the removal or destruction of any native trees.

In respect of natural ecosystems:-

- The application does not reduce the life supporting capacity of any ecosystem.

- The application does not degrade any natural body of water or remove any indigenous riparian vegetation. The design of the application specifically avoids such outcomes.

- The application does not involve the modification or diversion of any stream or wetland but will in fact improve water course and wetland management through the planting regime and grazing controls proposed.

- There are no contaminants intended to be discharged onto the land because all household effluent will be treated in an approved manner.

- No septic tank discharge point will be located within 15 metres of any water course.

- There is no extraction of naturally occurring material from the ground or from bodies of water adjoining the site.

In respect of the next intended environmental result, namely character, the result seeks a non-urban and remote character reflecting in relatively low density of permanent occupation and related built structures. Mr Putt simply does not agree that this area under consideration by the Court is in any way remote but he nevertheless assessed the activity against the criteria and concluded:-

- The application involves no activity or building or other structures in areas of native trees or bush. Instead the primary focus is on revegetation.

- The property can continue to be used for farming purposes in a manner which complies with the criteria.

- The application does not involve any outdoor recreation activities except normal household activities.

- The three additional dwelling sites which arise from the application do not affect the three coastal pockets of high natural environmental value which are to be protected, maintained and enhanced in quality through protective covenants and revegetation programmes.

A second character requirement seeks that man-made structures reflect a low density and be maintained and developed in a compatible manner. Mr Putt concluded that the criteria are met and in particular the four identified building platforms within lots ranging from 5.85 hectares to 22 hectares ensure that the land use remains non-urban in character. A rule which is possibly infringed by two of the building platforms is that the building platform not be located within 200 metres of mean high water springs. We agree with Mr Putt that this is a totally arbitrary and illogical provision and that these platforms have been selected using the more valid design and location criteria developed by Mr Scott. Amenities of the vicinity are

identified as a further environmental result and in that regard the application is not generating noise, dust etc and none of the noxious land uses listed are involved in the application. In terms of intensity of development and numbers of persons involved, this activity is expected to maintain the existing character of the area. Two criteria apply:-

- The proposal envisaged is only a farming related activity and an associated dwelling which will not over-intensify use of the site.

- None of the activities involve public carparking.

As Mr Putt correctly observes the existing character is not greatly altered and a low level of permanent occupation is maintained.

Turning now to permitted activities Mr Putt referred to Change 55 which divides farming into arable farming, horticulture, intensive farming and pastoral farming. Although revegetation is not specifically mentioned it was not argued by anyone that the proposed plan set out to prevent such an obviously desirable land use. Parts of the property are suitable for horticulture, namely olives and/or grapes.

Mr Putt then turned his attention to the subdivisional rules and in that regard we agree with him that the rules relating to areas and locations wherein subdivision is permitted are not effects based except to a very limited degree. The Council has set out to establish a regime and only in terms of the rules of that regime may a person subdivide. In its anxiety to protect existing significant stands of native vegetation it has not considered the effects subdivision based on that rule may have on the landscape in general. Indeed it may be commented that there is already a single lot bush subdivision in a contiguous area facing Omaha which at first sight appears to be part of the subject site. There is a stand of bush on this particular parcel of land and a house will arise in due course. That house will be visible from the roads and houses in the Omaha settlement area.

The Townsend property next door also forms a classic example of subdivision driven by haphazard scatterings of existing stands of native vegetation although the ultimate objective of preservation is laudable.

We do not intend to go into the subdivisional controls in any detail because this is clearly non-conforming but on the other hand it is innovative and within the spirit and intention of the RMA.

Mr Putt in his assessment of adverse effects and matters of that nature largely agrees with Mr Scott. Also in his opinion the objectives and policies of both the Transitional and Proposed Plan change are not offended by the present proposal and with that we agree.

Turning to a consideration of Part II we do not intend to dissect at length the various provisions of that part of the Act. Taking into account the provisions of s5 concerning development whilst providing for further generations, we

find that the benefit of reafforestation of this property (which is of low value for pastoral purposes) is twofold. It enhances the environment on the one hand and by careful positioning of the reafforestation areas leaves clear land which could be used for more intensive horticultural purposes. Combined with that is a scattering of buildings in visually unobtrusive locations (apart from one allotment which we will shortly address). We wish to make clear that the Court is not viewing this as a trade-off i.e. native vegetation in return for otherwise unacceptable building sites. We are viewing it as one package and agree with Mr Putt that the positioning of the dwellinghouses and accessory buildings is and must be environmentally benign.

We must however take issue in relation to the building platform on lot 3. This lot is incorrectly numbered as lot 4 on the coloured plan annexed to this decision but is correctly numbered on the plan of subdivision also annexed. The original position of the building suggested by Mr Scott when viewed from the seaward side of the bluffs is visually unacceptable within the coastal environment. It was then suggested it be moved back below the ridge to a position presently occupied by a Bell South communications tower. That would place it very close to the boundary of the Townsend property leaving limited potential for afforestation to hide any building from view. Once the pine forest has been felled the building site would be open for all to see in a most prominent position. Indeed we would go so far as to say that its presence would adversely affect the revegetation project on that lot. We are not impressed with the fact that, because of topography, the building platforms suggested are the only platforms available on lot 3 and we are not prepared to give our approval to this allotment unless a building platform can be identified facing towards the west or north-west on the other side of the ridge and in a position where a building will not obtrude beyond the ridge. However we are prepared to consider further short written submissions if necessary.

This accords with the evidence relating to inner and outer harbour. The platform must be within the inner harbour catchment.

<u>Planning Conclusions</u>

Setting aside ss.105 and 104 for the moment, we have reached the firm conclusion that the subdivision accords with the approach of the Regional Council as evidenced by its policy statement and proposed coastal plan. We are furthermore of the opinion that in general terms the proposal does not offend the policies and objectives of the Transitional Plan and/or Proposed Plan Change 55 both of which are lacking in provisions encouraging enhancement of environmental values with particular regard to rehabilitation and revegetation of indigenous forest. It is however not in accordance with the rules of either the Transitional or Proposed Plan Change, but in that regard if the rules seek to prevent a result encouraged by Part II of the Act then the Council should certainly redress the omission. In particular we refer again to s.7 which in subclauses (c) and (f) refers to enhancement of amenity values and environment. This present subdivision clearly seeks to further the

sustainable management principles of the Act and its purposes in a most positive, imaginative and practical way.

Sections 104 and 105

Turning our attention first to s.105(2)(b) we have already addressed the question of the adverse effect on the environment of this proposal and have reached the conclusion that such adverse effects, if any, are minor. Indeed the total package is far superior to what could happen upon this property either by way of permitted activities or controlled activities. Turning to the objectives and policies we do not find this proposal contrary to those objectives and policies in the sense of being opposed to them. That can be clearly demonstrated by the fact that we are merely looking at the timing of the house building exercise rather than whether or not it should be permitted at all. Were the reafforestation to take place as planned by Mr Scott then there would be a time lapse whilst the forest grew and then the houses would be permitted by way of a bush lot subdivision. Environmentally in years to come the precise concept now before the Court could come to fruition and we can see no reason to delay house building because to do so may well result in an absence of the finance necessary to bring this concept to fruition.

We therefore consider the proposal passes both the threshold tests of s.105. Turning to s.104 it will be noted that that section is subject to Part II of the Act and we have already held that this proposal is fully in accordance with that part of the Act therefore if any of the other matters in s.104 such as rules in a plan or proposed plan change indicate that the proposal is not acceptable then in such case the rule would not prevail being subservient to Part II.

The first matter to consider is the actual and potential effects on the environment of allowing the activity and we have already been into those matters at length. In our opinion the effects on the environment are beneficial and minor adverse effects have been mitigated in respect of the two visual effects which are of concern. The first is the positioning of the building platforms combined with the height of buildings. These can be adequately dealt with by conditions relating to placement of buildings and building envelope. We except lot 3 from that comment. Also the ability to construct a minor dwelling is already covered by the provisions of the proposed plan change and we make clear that we will not allow a building platform for a minor building to appear upon the subdivisional plan. If it is not shown on the plan of subdivision then the rules prohibit a minor unit

The second effect relates to the access road which will run along a ridge line and for most of its course will be invisible to anyone other than possibly the occupants of some future houses upon the adjoining property or from the air. In respect of the formation of the accessway we have considerable doubt as to whether, for most of its course, it can be regarded as an excavation or a filling. The access track is already there but only passable by four-wheel-drive vehicles. Essentially its course and contour will remain unchanged. The surface will be shaved off and replaced with metal (or concrete on the steeper parts) and will be surfaced with an environmentally friendly

coloured material. In very few places will actual cut and fill be required. If cut and fill is required then that is clearly within the rules pertaining to excavation and filling if it complies with the rules concerning 200 m^3. As previously recorded we have doubts as to whether the shaving of the surface could truly be said to be an excavation within the normal meaning of that word. In any event the precise quantities involved have yet to be determined to see whether the activity if it be an excavation is permitted, discretionary, or non-complying. That matter can be later addressed, but the mathematical calculations do not assist in addressing the actual effects which are not likely to be great.

In terms of s.104(1)(c) the New Zealand Coastal Policy Statement, regional policy statement and proposed regional policy statements are all of relevance.

The New Zealand Coastal Policy Statement 1994 contains some policies of interest. Policy 1.1.1 refers to the national priority to preserve the natural character of the coastal environment by:-

> *"(a) Encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;*
>
> *(b) Taking into account the potential effects of subdivision, use or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and*
>
> *(c) Avoiding cumulative adverse effects of subdivision, use and development in the coastal environment."*

In our opinion the present proposal fits perfectly within that first national policy. Policy 1.1.2 then sets out to preserve the natural character of the coastal environment by protecting areas of significant indigenous vegetation. The present proposal sets out to replant and revegetate the presently degraded bush facing the sea and as such is fully within that national policy also.

Of great importance is Policy 1.1.5 which states:-

> *"It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate."*

Again this present proposal complies. The other policies are more general in nature but none of the policies and in particular those relating to subdivision appear to be infringed.

We have already discussed the regional statements and policy documents and do not find the present proposal offends them.

Section 104(1)(d) refers to relevant objectives, policies, rules or other provisions of a plan or proposed plan. It is only the rules which are offended by this present proposal and in the circumstances we have already outlined we do not consider the rules appropriate and they should not determine the present case.

In terms of s.104(1)(i) we cannot find any other matters which we consider relevant and reasonably necessary for the purpose of determining this present appeal but have addressed some matters under the heading "*Ancillary Issues*" which follows.

Lastly and generally on the question of s.104 (as opposed to s.105(2)(b)(ii)) we are able in assessing this particular proposal to accord weight to a proposed plan commensurate with the degree which it has been through the resource process. We merely record that whilst having regard to it we do not consider it to be in any position of dominance.

Ancillary Issues

We have to date considered the matter on the basis of the testimony of experts. There are three issues we now wish to address, namely the evidence of the director of the appellant company, Mr W J Mortimer, the evidence relating to the value of the appeal site as a farm unit; and the potential for horticultural units.

Mr Mortimer has already taken steps to prevent cattle grazing the bush remnants upon the property. Mr Johnston has examined the bush remnants on the seaward bluffs and finds strong evidence of regeneration which he considers will continue to flourish, a view not shared by Dr Clunie. However for present purposes and looking into the future this Court prefers a positive optimistic approach to the question of regeneration. Mr Mortimer told us if he found that pastoral farming of the land is not economic as demonstrated by the evidence of Mr Schoelfield that he and his wife who are directors of the company are attracted to the lifestyle of olive growing and grape growing and eventually wine production from the property. He points to the fact that the Matakana/Warkworth/Omaha area is developing quickly as a quality wine growing district. He told us that it was only through subdivision that they could possibly afford to undertake the expensive revegetation of the land, an exercise which they have undertaken with success elsewhere. He told us that possums have wreaked havoc particularly upon pohutukawas and that it is their intention to embark upon a control programme which they are prepared to be bound to by conditions.

Whilst the intentions of a particular landowner are normally merely of interest, we were impressed by the positive approach exhibited by Mr Mortimer. He is not unnaturally concerned with making a profit but unlike many developers is not prepared to make a profit at the expense of the environment. However when setting conditions we are conscious of the fact that properties may be sold or present owners move on for one reason or

another therefore we intend to ensure that the construction of dwellinghouses does not precede the replanting programmes.

Turning to the quality of the land we heard from Mr G W H Schoelfield, an experienced farm valuer qualified in that field and a partner in a valuation firm. He was asked to provide an opinion on the farming capability of the appeal site. He told us of the useable areas and the soil classifications and then assessed the financial performance of the farm if run as one unit. His conclusion was that the best return would be if the owner managed the property on a weekend only basis. On his present assessment of property value at $1,250,000 (which is not a pristine farm value) the figures he produced could by no means be described as heartening. Indeed there was a deficit figure of $2,500 without taking into account such matters as return on capital or wages. He concluded that the farm was a lifestyle block in its present state suitable mainly for pastoral farming and although production forestry might be a useful alternative he was of the opinion that that would do little to improve the aesthetic appeal of land adjacent to the coast.

We do not intend to address that further, save to say that except as a run-off property it would have little attraction to a potential purchaser. The fragmentation of the adjoining land into bush lots and the obvious intention of the landowner on the other boundary to afforest his property makes it even less attractive as a separate farm unit.

Turning now to the evidence relating to horticulture, we heard from two witnesses, Mr A D Clarke and Mr R E Parker. Mr Parker did not have great experience in the management of properties in this particular area whereas Mr Clarke was extensively involved in the Matakana-Omaha district. Furthermore Mr Clarke had done a far more extensive survey of the property than had Mr Parker. Mr Clarke's conclusions were that three areas on the property could be suitable for commercial horticulture:- primarily for olives; wine grapes; and possibly some selected tree crops such as macadamia and persimmon. The sites were 3 hectares; 4-5 hectares; and 1-1.5 hectares. We accept that these areas could be used for intensive production. The reason why we have not discussed this to date is that it would have confused an already confusing situation by adding an element of further subdivisional potential not necessary for our present determination.

We mention these factors however because it is possible to address the subdivisional potential of this site in a completely different way should that become necessary. We record that the areas identified by Mr Clarke do not impinge upon the bush rehabilitation areas identified by Mr Scott.

Conclusions

Our conclusions in this somewhat complex matter are of necessity interim. As will be seen from our decision to date the Court is greatly impressed by the innovative approach adopted by the appellant company in hiring possibly one of the most experienced consultants in rehabilitation work in the greater Auckland area and following without question the advice proffered.

It would in our opinion be an extremely backward step if this opportunity to revegetate these slopes visible from the Omaha settlement in a manner fully in accord with the provisions of Part II of the RMA was lost.

This leads us to the question of conditions. We are in no doubt that conditions can be imposed on a subdivisional consent concerning the planting of trees and an ancillary condition could also be imposed requiring that that vegetation be fenced, that being a condition necessary for the purpose of the revegetation conditions.

We are furthermore satisfied that the subdivision can be restricted in that dwellinghouses may be permitted only where building platforms have been identified on the scheme plan of subdivision thus preventing further minor buildings and that is reinforced by the provisions of the plan. In that regard the Court will require a condition to provide that the replanting shall be substantially completed in relation to each lot before a building permit shall issue. Perhaps 75% would be appropriate. We consider that condition to also be within our powers under the transitional provisions of the RMA and under the powers we have under the Local Government Act 1974. We are receptive to submissions directed at the percentage and we are conscious that the bond suggested would enable the Council to complete in case of default.

We are not prepared at this stage to permit a dwellinghouse on the catchment facing the sea and indeed Mr Scott's whole exercise was based on containing development within the catchment facing the Omaha settlement. We are prepared to hear further written evidence and submissions in that regard.

We have considered the draft conditions of consent which were amended some three times during the course of the hearing. That to us indicates a continuing thought process which requires further input from the Council and the appellant. The Council up to the date of hearing and during the hearing were implacably opposed to anything and indeed opposed almost every beneficial condition suggested by the appellant. We now look to a more constructive approach.

The appellant is prepared to do anything to alleviate concerns relating to a proliferation of residential buildings on the allotments to be created. One suggestion was that the consent be a consent to create four (4) rural/residential sites. The use of that expression would carry with it the controls relating to a rural/residential site which do not permit the proliferation of buildings feared by Council.

Other conditions of a general nature are:-

- Existing native bush and revegetation areas shall be retained in perpetuity as areas of existing and/or regenerating indigenous vegetation.

- Covenants are to be registered against the title to that end.

- The areas of existing native bush and revegetated areas are to be fenced to prevent undergrazing.

- The conditions relating to species and percentages of species are acceptable.

- The bond conditions are acceptable but final percentages are yet to be determined. The percentages relate to the release of part of a bond at various stages of the planting programme.

- The building platform on lot 3 is yet to be determined and in the event of an appropriate platform not being available upon that lot within its present boundaries then we would permit an adjustment to the boundaries or if that does not prove possible its amalgamation with one or other of the remaining three allotments.

Other conditions are generally acceptable but obviously require fine tuning.

There was some concern expressed at the vires of some of the conditions and there was considerable debate as to whether the Council could or could not impose a condition. The argument revolved around the case of Augier v Secretary of State for the Environment 1978 QB 219. That was a case where a condition was imposed by consent and the consent holder later tried to argue that it was ultra vires. That was not acceptable to the Court and the condition was held to be binding. The Council in the present case is attempting to distinguish that case from the present case by arguing that if the Council consider the imposition of the condition to be beyond its statutory powers then the consent of the consent holder does not save the situation.

We consider the matter can probably be covered by a condition stating as follows (or in like terms):-

> The conditions relating to this subdivisional consent are a composite whole none being severable from the other and are accepted by the applicant.

We have not heard argument on a condition of this nature but consider that that it would probably cover most of the concerns.

In any event we do not see that any project with the merits exhibited by the present one should be permitted to fail through want of an ability to draft appropriate conditions.

The decision remains interim and we will convene a further hearing if necessary to settle conditions. The question of costs is reserved.

DATED at WELLINGTON this 24th day of December 1996

W J M Treadwell
Environment Judge

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THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND