Decision No. A133/2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals pursuant to section 120 of the Act

BETWEEN **HAPU KOTAREl LIMITED**

(ENV A0127/04)

Appellant/Applicant

AND **PAKIHI MARINE FARMS LIMITED**

(ENV A0125/04)

Appellant

AND **MANUKAU CITY COUNCIL**

Respondent

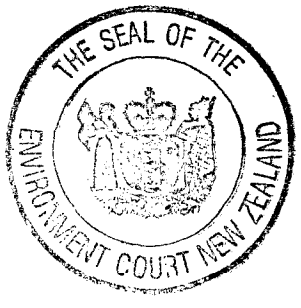
BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting (presiding)
Environment Commissioner K Prime
Environment Commissioner A Sutherland

HEARING at Auckland on 23 March, 1 & 8 April 2005

APPEARANCES

Mr R Brabant and Mr J Brabant for Hapu Kotare Limited
Mr S Ryan for Pakihi Marine Farms Limited and McCallum Family Interests
Ms M Dickey and Ms J Bain and Mr D J Neutze for the Manukau City Council



DECISION

Introduction

[1] Hapu Kotare Limited owns an attractive coastal property of 55.1613 hectares, situated on the Clevedon/Kawakawa Road, approximately 10km east of Clevedon Village. The property consists of rolling hill country pastoral land which covers either side of a soft ridge formation, which runs on a north-south axis through the middle of the property[1]. The elevated land has extensive views across the Hauraki Gulf.

[2] The company sought and obtained a resource consent to subdivide a rural residential title of 4.4 hectares off the property. The consent was subject to conditions and is attached as Appendix 1. The conditions inter alia provided for:

(i) the setting aside of an esplanade reserve;
(ii) the setting aside of an esplanade strip;
(iii) the creation of access strips;
(iv) a reserve contribution of $10,000 (inclusive of GST); and
(v) a series of advice notes.

[3] The company has appealed the setting aside of the esplanade reserve and esplanade strip; the creation of the access strips; the amount of the reserve contribution; and a number of the advice notes.

[4] Pakihi Marine Farms Limited appealed some of the conditions on the grounds that they were not stringent enough. Counsel for Pakihi Marine Farms Limited appeared on the first day of the hearing and sought the withdrawal of the appeal. Counsel also represented the McCallum Family interests, an interested party in the Hapu Kotare appeal. They withdrew their interest in the appeal, advising that they will abide the decision of the Court.

Background

[5] Mr Stanley Carwardine, a director of the company, gave evidence. He told us that through that company his family have owned the property since 30 October 1991. As well as the house he and his wife occupy, the company relocated a house

[1] See Putt, EiC, paragraph 2.9.

on the property some 300 - 400 metres above the existing home for Mr and Mrs Carwardine's daughter and her family to live in. As they have a son who lives in England, they spend some four to five months in England and Europe each year.

[6] Since Mr and Mrs Carwardine live outside of New Zealand for a large part of each year but have family and friends in the district they wanted to retain a home on the property. They accordingly decided to seek subdivision consent so they and their family could retain the family homes and sell the remainder of the farm.

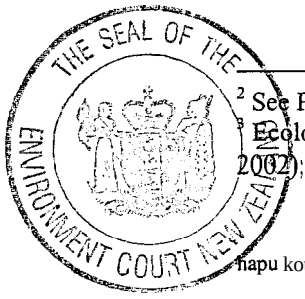
[7] The property has riparian frontage to Kauri Bay, includes Kahuru Point, and to a limited extent has additional riparian frontage to Wairoa Bay. The property constitutes the eastern enclosure of Kauri Bay, matching the western enclosure which is formed by Pouto Point. Pouto Point is also a headland and forms a peninsula at the mouth of the Wairoa River further westward[2]. Attached as Appendix 2 is the relevant district plan map and the property is outlined in blue.

[8] A mangrove wetland is located at the western end of the property and adjoins the extensive tidal areas of Kauri Bay, including the outlet of the Rotopiro Stream which forms part of the southern boundary of the property. Ecological evaluation reports[3] have identified the wetland as containing the best coastal mangrove forest on mudflats and coastal banks within the district.

[9] Part of the mangrove area is the subject of protection in perpetuity through an open space covenant agreed between Hapu Kotare Limited and the Queen Elizabeth the Second National Trust. The open space covenant provides for a total of 24.3050 hectares of wetland and the coastal margin bush to be set aside for protection.

[10] The QE II covenant was registered against the property title on 24 June 1999. The covenant runs with and binds the land subject to the burden of the covenant, and is deemed to be an interest in the land for the purposes of the Land Transfer Act 1952.

[11] In order to achieve the objectives of the QE II covenant, the covenant requires the owner to implement a management plan. The management plan contains policies agreed by the owner and the Trust, that the owner will protect and



[2] See Putt, EiC, paragraph 2.5.
[3] Ecological values of Hapu Kotare by Jamieson and Lovegrove (ARC Natural Heritage Series, 2002); and Hunua Ecological District Protected Natural Areas Programme (Hunua PNA Report).

enhance native vegetative cover, revegetate open ground and clear the site of weeds. The owner needs to control weeds and monitor animal pests.

[12] Section 33 of the Queen Elizabeth the Second National Trust Act 1977 states that the public shall have freedom of entry and access to all land subject to an open space covenant, subject to such conditions as may be included in the specific covenant. The original term relating to access in the covenant stated that members of the public shall have access to the land with the prior permission of the owner.

[13] The covenant was varied on 1 October 2004. Public access conditions were amended so that the owner could determine conditions of access. This covenant was again varied on 7 February 2005, further restricting public access. The Variation comprises a new clause which states that the owner may only permit entry and access to the property by persons or groups engaged in essential work, scientific studies or environmental research intended to advance the objectives of the covenant. The owner's discretion shall not be used to allow general rights of access to the public or recreational access.

The subdivision

[14] The subdivision consent granted consent to a rural residential title. This is Lot 1, which contains 4.4 hectares. This leaves a balance lot which is Lot 2, comprising 50.7613 hectares.

[15] Lot 1 is situated on the lower slopes of the southern rolling end of the property. The eastern boundary is the existing property boundary between the subject site and the neighbouring property. The southern boundary has a new fence line established along part of the boundary of the QE II Trust covenanted area which adjoins the Rotopiro Stream. The west boundary is an existing fence adjoining the main farm road. The northern boundary has an existing fence which separates the existing houses and orchard areas from the grazing blocks to the north. No boundary adjoins Mean High Water Springs or a stream edge. Lot 1 contains the two present houses on the site, both of which are fully serviced for effluent and stormwater management and water supply.

[16] The balance of the area is Lot 2. On Lot 2 a complying house development site is noted in the development plan to demonstrate that a dwelling can be built as a permitted activity.

[17] Details of a proposed esplanade strip and access strips are shown on the proposed reserves plan attached to the consent issued by the Manukau City Council[4].

Issues

[18] The issues can be conveniently grouped as follows:

(i) Issue 1 - relating to the esplanade reserve and esplanade strip. This issue can be subdivided into three sub-issues:

(a) Sub-issue 1(a) - whether the Council has jurisdiction under the Act to impose conditions 4(b), 4(c), 4(e), 5 and 6 with respect to the esplanade reserve and esplanade strip;

(b) Sub-issue 1(b) - if there is jurisdiction, whether the conditions satisfy the well known Newbury tests[5];

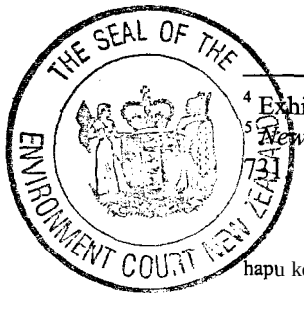
(c) Sub-issue 1(c) - if there is jurisdiction and the ***Newbury*** tests are satisfied, whether the creation of an esplanade reserve and an esplanade strip should be waived;

(d) Sub-issue 1(d) - whether conditions 6(a) - (e) are lawful.

(ii) Issue 2 -whether the Council has jurisdiction under the Act to impose condition 4(e) with respect to access strips.

(iii) Issue 3 - whether the Council has jurisdiction to impose "advice notes" as an addendum or addition to a consent which is granted subject to conditions.

(iv) Issue 4 - relating to the reserve contribution. This issue can also be subdivided into two sub-issues:



[4] Exhibit 1.
[5] *Newbury District Council v Secretary of State for the Environment* [1981] AC578; [1980] 1 All ER 731

(a) Sub-issue 4(a) - relates to the current market value of a nominal building site against which the reserve contribution is assessed; and

(b) Sub-issue 4(b) - whether the Council's calculation was in error by including GST in the assumed market value and then adding GST to the contribution figure calculated on 6% of current market value.

(v) Issue 5 - whether condition 4(c), which requires vesting in the Crown of the balance allotment which is in the Coastal Marine Area and which adjoins the proposed esplanade reserve or is otherwise required by the Minister of Conservation, is lawful.

[19] We deal with each issue in turn.

Issue 1 - esplanade reserve and esplanade strip

Issue 1(a) -jurisdiction

[20] Mr Brabant's primary submission was that the Council did not have jurisdiction to impose conditions requiring the establishment of an esplanade reserve or strip. Mr Brabant's argument was:

(i) The application for subdivision consent sought consent to:

> Enable the creation of a rural residential lot from a farm property in the Rural 1 zone.

The decision granting the consent says:

> Subdivision consent for a subdivision to sever a rural residential lot containing two dwellings from a farm property in the Rural 1 zone at 1030 Clevedon/Kawakawa Road.

(ii) Section 218 of the Act sets out the meaning of *"subdivision of land"*. Relevantly for these proceedings it means the division of an allotment:

(i) By an application to a District Land Registrar for the issue of a separate certificate of title for any part of the allotment.

(iii) The statutory authority vesting the Council with power to create an esplanade reserve or esplanade strip is section 230(5) of the Act. That section provides that if any rule made under section 77(2) so requires, (but subject to a condition of the consent waiving or reducing the width of an esplanade reserve or esplanade strip), *"where any **allotment** of 4 hectares or more is **created** when land is subdivided"*, an esplanade reserve or esplanade strip shall be set aside or created from that **allotment** along the mark of Mean High Water Springs of the sea and along the bank of any river and along the margin of any lake.

(iv) The allotment shown on the survey plan from which the esplanade reserve is to be set aside is Lot 2 or the balance or parent lot, as it is this allotment which has a boundary with Mean High Water Springs of the sea.

(v) The **allotment** created for the purposes requested in the application, Lot 1, was a rural residential lot. It does not adjoin the mark of Mean High Water Springs of the sea, the bank of any river or the margin of any lake.

(vi) The subdivision consent, consistent with the purpose for which consent was sought, created a rural residential lot. After creation of that new allotment, a balance area or parent lot remains, but this is not an allotment of more than 4 hectares created when land is subdivided. It is the remainder area.

[21] In summary, Mr Brabant's primary argument was that the application for subdivision consent sought to create a rural residential lot from the existing farm property. Since the rural residential lot so created does not adjoin Mean High Water Springs, the Council does not have jurisdiction under the Resource Management Act to impose the conditions relating to an esplanade reserve and/or esplanade strip. Simply, Mr Brabant argued that subdivision conditions can only be imposed in respect of Lot 1, the rural residential lot as the balance of the area of subdivision is not an allotment for the purposes of section 230.

[22] Ms Dickey on behalf of the Council contended that the proposed subdivision in fact creates two allotments:

(a) Lot 1 - the rural residential lot comprising approximately 4.4 hectares, containing the two existing houses; and

(b) Lot 2 - the remainder of the property of approximately 50.76 hectares.

[23] Ms Dickey's argument can be summarised as follows:

(i) Section 218 of the Act sets out the meaning of *"subdivision of land"* and *"allotment"*. Section 218(4) of the Act sets out how Lot 2 should be treated. Section 218 (4) reads as follows:

> For the purposes of subsection (2) the balance of any land from which any allotment is being or has been subdivided is deemed to be an allotment.

(ii) Subsection (4) she submitted was added to section 218 by section 39 of the Resource Management Amendment Act 1997 (No. 104) and that the amendment was made to clarify the very issue raised by Mr Brabant. Section 218(4) was contained in the Resource Management Amendment Bill (No. 3). The Planning and Development Select Committee reported as follows:

> Clause 37 amends section 218 of the RM Act which defines the term "subdivision of land". It adds a new subsection (4) to indicate that the balance area of a subdivision is to be defined as an "allotment". Currently District Land Registrars do not recognise balance areas as allotments. **If a balance area is not classed as an allotment then it is not subject to certain conditions as specified in section 220(1)(c) of the Act, and one of those conditions is the provision of esplanade reserves along water bodies when a subdivision occurs. There had been cases of applicants creating balance areas along water bodes to avoid having to provide esplanade reserves or strips.** (emphasis Ms Dickey's)

(iii) Ms Dickey then went on to submit that this extract provides further support for the Council's contention that the definition of subdivision in section 218 is relevant to the esplanade provisions in the Act. She said that it is clear that this amendment was introduced to prevent

applicants from trying to avoid providing esplanade reserves or strips, by creating "spite strips".

(iv) Ms Dickey referred to the decision of the Environment Court in ***Just One Life Limited v Queenstown Lakes-District Council and Minaret Resource Limited***[6]**.** She submitted that that case confirmed that if an allotment is divided, at least two new allotments are created. She referred to paragraph [54] of the decision where the Court sets out section 218(1) of the Act and observes:

> That makes it look as if there may be a new lot and a balance lot. However the term allotment is defined in this way in section 218(2)...

(v) The Court then went on to set out section 218(2) and section 218(4) in full and concluded:

> In ***Re An Application by Portmain Properties (No. 7) Limited*** the Court held that all lots subject to change in a subdivision plan are allotments in the subdivision.

(vi) With regard to the decision of ***Re An Application by Portmain Properties (No. 7) Limited,*** Ms Dickey contended, that while it is accepted that the Court in this case did consider a Council's ability to impose consent conditions in relation to the "balance area", the circumstances were different from the one presently before us. The ***Portmain*** case concerned an application for subdivision of part of the ground floor of a 4-storey building. The Council imposed a condition on the subdivision consent requiring the balance of the building to be brought up to building code standards. The applicant argued that the balance of the land/building was not relevant. However, the Court did not accept that argument and confirmed at page 10 of the decision that:

> ...the total product of the subdivision must be relevant for the purpose of deciding whether subdivision consent can or should be granted.

She then referred to the Court's conclusion at page 16:

> It is my conclusion that the kind of condition the Council is thinking of imposing here is unlawful because it would not

[6] Environment Decision C136/2004.

> be for the purpose of controlling activities or the effects of activities in terms of the Resource Management Act 1991. Rather, it would be a condition relating to the physical structure of the building and going beyond the kind of condition contemplated by section 220(1)(c) of the Act. Thus to impose it would be for an ulterior motive or purpose unrelated to the subdivision that is the subject of the application for consent.

(vii) Ms Dickey maintained that essentially the Court in ***Portmain*** considered that the proposed condition was a matter exclusively within the control of the Building Act 1991 and therefore, in line with ***Newbury v Secretary of State for the Environment***[7] was not for a resource management purpose and therefore not unlawful.

(viii) Ms Dickey therefore submitted that ***Portmain*** is limited in its application and cannot be used as authority for Mr Brabant's argument. She argued that while section 220(1)(c) may not permit a condition relating to the physical structure of the building, which is a matter exclusively within the control of the Building Act 1991, section 220(1)(a) and section 220(1)(aa) of the Act do contemplate the type of conditions imposed by the Council in respect of esplanade reserves.

(ix) She also referred to ***Clutha Environment Society Incorporated v Queenstown Lakes-District Council***[8]**,** where the subdivision plan attached to an application for subdivision consent did not show the remainder of the land. The Court confirmed that balance areas are allotments in the subdivision, citing the ***Portmain*** case. The Court found that in not showing these areas, the plan was misleading and what was to happen on that balance land was an important consideration.

(x) Ms Dickey argued that clearly section 220 of the Act contemplates conditions requiring the creation of an esplanade reserve. Section 230(5) also refers to rules requiring esplanade reserves where an allotment of 4 hectares or more is created. Rule 15.15.3.1.1 of the District Plan requires the setting aside of an esplanade reserve/strip:

[7] [1980] 1 ALL ER 731.
[8] Environment Decision C012/1998.

> Where any subdivision proposed of land abutting the mark of Mean High Water Springs of the sea...including where an allotment of 4 hectares or more is created...

Rule 15.15.3.1.1, she said, therefore applies to Lot 2, as it is an allotment as a result of the subdivision.

[24] In response Mr Brabant submitted.

(i) The "deeming" provision of section 218(4) makes it plain that balance lots are deemed allotments, rather than allotments **created** in the usual way, where a subdivision of 1 or more lots out of a larger area of land is involved.

(ii) He conceded that because of the deeming provision, Lot 2 is an allotment for the purposes of the subdivision provisions of the RMA.

(iii) However, he emphasised that it is and remains a balance area, by reference to the purpose for which consent is sought, and by reference to the subdivision provisions which require an esplanade reserve or esplanade strip in respect of allotments created through subdivision.

(iv) He argued that if the balance area (Lot 2) was an allotment created by subdivision (in that sense), then it would not need to be described in subsection (4) of section 218 as a deemed allotment.

(v) With regard to ***Just One Life v Queenstown Lakes District Council*** he argued that that decision confirms the very point argued by him. He pointed to an interesting comparison on the facts between the two cases. In this case Mr Putt's evidence was to the effect that the balance area complied with the Council rules (as to minimum lot size) and that there was a nominated building site where a farmhouse (or rural dwelling) could be constructed as of right. This evidence addressed, in a holistic way, the effects on the environment of granting the subdivision consent.

(vi) He contended that the finding in paragraph [54] of ***Just One Life*** that the balance area of the subject land must be considered as an allotment because it is deemed to be one, did not address the issue

before us here. It did not relate to the provisions of section 230(5) of the Act. The Court in that case was concerned, said Mr Brabant, with the cumulative effects of a house and associated development on the balance area which flows out of the consent to subdivide the proposed new lots from that balance area.

[25] We have given careful consideration to the arguments of both counsel. We reject Mr Brabant's contention. As we understand the issue, we have to determine whether Lot 2, or the balance lot, is an allotment for the purposes of section 230(5) of the Act, when the purpose of the subdivision was to create a rural residential lot - Lot 1.

[26] We start with section 230(5) which says:

> If any rule made under section 77(2) so requires, but subject to any resource consent which waives, or reduces the width of, the esplanade reserve or esplanade strip, **where any allotment of 4 hectares or more is created when land is subdivided,** an esplanade reserve or esplanade strip shall be set aside or created from that allotment along the mark of Mean High Water Springs of the sea and along the bank of any river and along the margin of any lake, and shall vest in accordance with section 231 or be created in accordance with section 232, as the case may be. (highlighting ours)

[27] Section 3 of the Act defines allotment as:

> **Allotment** has the meaning set out in section 218:
>
> Section 3 is of course prefaced with the words unless the context otherwise *requires...*

[28] A subdivision under Part 10 of the Act is defined[9] as (relevantly):

> (a) The division of an allotment-
>
> (i) By an application to a District Land Registrar for the issue of a separate certificate of title for any part of the allotment...

As pointed out by Judge Jackson in ***Just One Life,*** that makes it look as if there may be a new lot and a balance lot. However the term allotment is defined in this way in section 218(2). It states relevantly:

> (ii) In this Act the term **"allotment"** means-

[9] See section 218(1) of the RMA.

(a) any parcel of land under the Land Transfer Act 1952 that is a continuous area and whose boundaries are shown separately on a survey plan, whether or not-

(i) the subdivision shown on the survey plan has been allowed, or subdivision approval has been granted, under another Act;

(ii) a subdivision consent for the subdivision shown on the survey plan has been granted under this Act;

(b) any parcel of land or building or part of a building that is shown or identified separately-

(i) on a survey plan; or...

Then, section 218(4) states:

(4) For the purposes of subsection (2) the balance of any land from which any allotment is being or has been subdivided is deemed to be an allotment.

[29] To give to section 218(4) the restrictive interpretation suggested by Mr Brabant fails to have regard to the direction given in section 3 of the Act that defines allotment in terms of section 218 for the purposes of the Act as a whole. In our view the section 218 meaning in its entirety is to apply to "allotment" wherever that word appears in the Act, unless of course to do so is inconsistent with the context.

[30] We see no inconsistency between the deeming provision of subsection 4 and the words of section 230(5) which say:

Where any allotment of 4 hectares or more is created when land is subdivided...

[31] Create is relevantly defined in the Concise Oxford Dictionary as:

(i) bring into existence;

(ii) cause to originate.

We can see no reason why an allotment cannot be brought into existence, caused or originated by operation of a deeming statutory provision.

[32] In our view to give the restrictive interpretation would not be in accordance with the purpose of section 218(4) which, according to the report of the select committee previously quoted, among other things was enacted to avoid the suggestion advanced by Mr Brabant.

[33] Furthermore, our interpretation is in accord with authority. It reflects the view of the Environment Court in ***Portmain***[10] and ***Just One Life.*** It is true that those cases were not concerned with the creation of esplanade reserves or strips. In ***Just One Life*** the learned Judge found as a matter of law that *"there is no such thing as a 'balance' lot under the Act"*. His conclusion was not dependent on addressing the holistic effects on the environment of the whole subdivision. This is so because he said in paragraph [56]:

> Of course, while as a matter of law, both proposed Lot 2 and Lot 4 DP300476 are allotments in the subdivision before us, the applicant is entitled to say that the only effects which we need to consider are those in and around proposed Lot 1 because everything else is part of the existing environment, ie there no other changes.

[34] We accordingly find that as a matter of law, the balance lot, or Lot 2, is an allotment under the Act. We find that the Council has the statutory jurisdiction to impose the conditions creating the esplanade reserve and esplanade strip.

[35] We now turn to the next issue. Whether the conditions satisfy the ***Newbury*** tests.

Issue 1(b) - do the conditions satisfy the well known *Newbury* tests?

[36] The tests for the validity of conditions in a resource consent were laid down in the English decision of ***Newbury.*** To be valid at law, a condition must:

(i) be for a resource management purpose, not for an ulterior one;
(ii) fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and
(iii) not be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it.

[10] We note however that *Portmain* was decided before the coming into effect of subsection (4) to the provisions of the Resource Management Amendment Act 1997.

[37] The New Zealand Court of Appeal held that the ***Newbury*** tests remain of general application and that the New Zealand Courts should continue to apply them in relation to the Resource Management Act[11].

[38] Mr Brabant argued that the conditions breached all three of the tests. We thus consider each in turn.

Test 1 - a condition must be for a resource management purpose and not an ulterior one

[39] Mr Brabant argued that the conditions are opportunistic in the sense that the Council has seized the chance of acquiring an esplanade reserve for purposes relating to its parks strategy and the alleged demand for public open space in the Clevedon Ward in which the property is situated[12].

[40] Provisions for the creation of esplanade reserves and esplanade strips are contained in sections 229 - 237 of the Act. The relevant provisions are:

(i) Section 229 states the purposes of esplanade reserves or strips. They are:

> (a) To contribute to the protection of conservation values by, in particular,-
>
> > (i) maintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or
> >
> > (ii) maintaining or enhancing water quality; or
> >
> > (iii) maintaining or enhancing aquatic habitats; or
> >
> > (iv) protecting the natural values associated with the esplanade reserve or esplanade strip; or
> >
> > (v) mitigating natural hazards; or
>
> (b) To enable public access to or along any sea, river, or lake; or
>
> (c) To enable public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values.

[11] See *Housing New Zealand Limited v Waitakere City Council*, CA258/00.

[12] We heard evidence of the Council's park strategy and the demand for public open space in the Clevedon Ward from Mr White, Environmental Policy Planner for the Council.

(ii) Section 230, to which we have already referred, relevantly provides:

> (5) If any rule made under section 77(2) so requires, but subject to any resource consent which waives, or reduces the width of the esplanade reserve or esplanade strip, where any allotment of 4 hectares or more is created when land is subdivided, an esplanade reserve or esplanade strip shall be set aside or created in that allotment along the mark of Mean High Water Springs of the sea and along the bank of any river and along the margin of any lake, and shall vest in accordance with section 231 or be created in accordance with section 232 as the case may be.

[41] The operative plan contains rule 15.15.3.1.1 which says:

> Where any subdivision is proposed of land abutting the mark of Mean High Water Springs of the sea or the bank of a river subject to tidal influence, an esplanade reserve or esplanade strip of not less than 20 metres measured from the mark of Mean High Water Springs of the sea or the bank of a river subject to tidal influence, will be set aside, including where an allotment of 4 hectares or more is created, except as provided for in 15.15.3.2 and 15.15.3.3.

Rule 15.15.3.2 is the assessment criteria for reduction in width of an esplanade reserve or strip. Rule 15.15.3.3 contains the assessment criteria to determine when esplanade reserve or strip requirements may be waived.

[42] Rule 15.15.3.1.1 is in accordance with sections 77(2) and 230(5) for allotments in excess of 4 hectares.

[43] The implication of the words "any subdivision" and "will be set aside" in rule 15.15.3.1.1 create an imperative to set aside an esplanade reserve or strip. The Council is therefore obliged in appropriate cases to take esplanade reserves or strips on subdivision. The following part of the sentence provides exceptions to this requirement. The exceptions are a waiver of the esplanade reserve or strip or a reduction in width. To give effect to that exception the enforcement authority, or this Court on appeal, is required to have regard to the provisions of the Act and the assessment criteria set out in the rule.

[44] The relevant statutory provisions of the Act together with rule 15.15.3.2 of the operative plan formed the basis for the Council imposing the conditions relating to esplanade reserves and strips. Those statutory provisions reflect a resource management purpose. Accordingly, in our view, the first ***Newbury*** test is satisfied.

Test 2 - the conditions must fairly and reasonably relate to the development authorised by the consent

[45] With regard to the second ***Newbury*** test, Mr Brabant submitted that the conditions in question do not fairly and reasonably relate to the development authorised by the consent. He submitted that this is clear from the wording of the application and the wording of the grant of consent. He argued that the development (here a subdivision) authorised by the consent is the establishment of a rural residential lot for the reasons explained in the AEE and in the evidence that was provided to the Council and to the Court, namely to establish a rural residential lot on Mr Cawardine's farm.

[46] He submitted that extracting an esplanade reserve and an esplanade strip from the parent or balance lot does not fairly and reasonably relate to the purpose for which consent was granted.

[47] While the application for subdivision consent sought consent *to enable the creation of a rural residential lot from a farm property in the Rural 1 zone*[13], we do not consider a consent authority or this Court on appeal is limited to the wording of the application for consent in determining the overall purpose for which the consent is sought. We have already decided that the balance lot is an allotment for the purposes of the Resource Management Act. Further, it is clear from the evidence, that the balance lot has been sold by the applicant. Clearly one of the purposes of the application for subdivision consent was to enable the separate sale of the balance lot to a purchaser. The creation of the balance lot is related to the development authorised by the consent. Accordingly, in our view, the second ***Newbury*** test is satisfied.

Test 3 - the condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it

[48] With regard to the third ***Newbury*** test, Mr Brabant submitted that the conditions in question fail that test in the sense that the Council has acted unlawfully in seeking to impose those conditions. For this, he relied on the legal interpretation by reference to the operative words of section 230 of the Act and the "deemed allotment" provision in section 218(4) not being applicable to acquisition of

[13] Application for subdivision consent and notice of appeal, paragraph 5.

esplanade reserves and strips. We have already rejected that legal submission. Accordingly, in our view, the third ***Newbury*** test is satisfied.

Sub-issue (1)(c) - should the creation of esplanade reserves or strips be waived

[49] Rule 15.15.3.3.1 of the district plan sets out the assessment criteria to be considered in assessing an application for waiver of an esplanade reserve or strip. It also refers to the applicable criteria contained in rule 15.15.3.2.1 which relates to reduction in width of esplanade reserves or strips. In addition to the relevant listed criteria in the two rules, we are required to have regard to:

(i) Part II of the Act;
(ii) The purposes of esplanade reserves and strips as set out in section 229; and
(iii) The objectives and policies of Chapter 11 and 15 of the district plan.

[50] The objectives and policies of Chapter 11 seek to:

(i) preserve and protect from inappropriate subdivision, use and development, natural features (including significant indigenous vegetation and habitats), sites of significance to tangata whenua and landscape qualities of the coastal environment; and

(ii) to maintain and enhance public access to and along the coast.

These objectives and policies are consistent with the purposes of esplanade reserves set out in section 229 of the Act. They are also consistent with the relevant provisions of the New Zealand Coastal Policy Statement and the Regional Policy Statement[14].

[51] Mr White, the Environmental Policy Planner for the Council, addressed the specific criteria set out in rule 15.15.3.3.1. He said:

[14] See in particular Policies 3.5.1, 3.5.2, 3.5.3 and 3.5.4 (Maintenance and Enhancement of Public Access to and Along the Coastal Marine Area) of New Zealand Coastal Policy Statement 1994; the Auckland Regional Policy Statement 1999, Chapter 18 (Esplanade Reserves and Strips); and the Auckland Regional Plan: Coastal 2004, Chapter 7 (Public Access) and Chapter 10 (Use and Development (General)).

Having regard to the assessment criteria contained in rule 15.15.3.3.1 for applications that seek to waive the requirement for an esplanade reserve or strip, I note that:

(i) the application is for the subdivision of a rural site, the result of which will be a rural residential lot and a rural lot. The subdivision will create an additional household site as a permitted activity;

(ii) health and safety of people will not be compromised by the creation of esplanade reserve or strip;

(iii) maintenance of the coastal protection works by the owner will require access to the coast. This access can be achieved over the proposed esplanade strip;

(iv) the circumstances around this application and site are not so exceptional as to warrant waiving the requirement for esplanade reserve and/or strip;

(v) that there are no other factors present in this application or in this site that suggest that the provision of an esplanade reserve or strip will have little or no value in achieving the purpose of esplanade reserve as set out in the RMA;

(vi) the site is subject to the Queen Elizabeth the Second National Trust Open Space covenant. This covenant achieves many of the same outcomes as esplanade reserves. A deemed conflict between the public access reasons for an esplanade reserve or strip in the wording of the covenant are discussed elsewhere in this evidence and in the evidence of Graham Power;

(vii) the pubic or private ownership of the esplanade reserve or strip will not affect the association of tangata whenua with the area;

(viii) the application is not for a minor site for network utility services.

[52] Mr Brabant's grounds for seeking waiver are found in his opening submissions. We summarise them as follows:

(i) Of particular importance he said, is the existing covenanting of a large part of the property for conservation purposes under the Queen Elizabeth the Second National Trust Act 1977;

(ii) The conditions imposed by the Council indicate an intention by the Council to ensure that public access is available to the esplanade reserve;

(iii) To ensure public access would conflict with the conservation values recognised in the covenant by the limitation of public access.

[53] Mr Putt put it this way:

> The imposition of the esplanade reserve through these conditions of consent is opportunistic and in my opinion is contrary to sound open space management given the special covenant arrangements that already exist on the site and the limited value of the coastal edge involved for public use, and the very good reasons why public access should not be available.[15]

[54] Ms Dickey for the Council, submitted that while the RMA does not provide specific guidance on how the RMA and QE II Open Space covenants should interact, section 229 of the Act does assist indirectly in considering the two regimes. She accepted, quoting ***Tairua Environment Society Incorporated v Thames-Coromandel District Council***[16]**,** that there is a tension between the conservation values and access and public recreation. Nevertheless a consent authority, and this Court on appeal can balance the conservation values protected under the QE II covenant and under section 229, with public access and recreational use. We agree. The question is whether such a balancing act can be achieved.

[55] The most helpful evidence on the conservation values of the area was given by Mr David Lawrie, Chairman of the Miranda Naturalists' Trust. The Trust has established and operates the Miranda Shore Bird Centre which provides educational facilities relating to the shore birds that inhabit the Firth of Thames.

[56] Mr Lawrie discussed in some detail the main species of birds that would be affected by public access. They are the Banded Rail, New Zealand Dotterel, Bar Tailed Godwit, Red Knot, and Black Billed Gull. Each of these bird species has a different use of the habitat and would therefore be affected differently by increased numbers of people.

[57] He discussed in some detail each of the bird species likely to be affected and the manner in which they would be affected by increased numbers of people. He concluded:

> In my opinion increased public access into the Kauri Bay area will have detrimental effects on the habitat of Banded Rail, the inter-tidal feeding areas and resting spaces for Godwit and Knot and the breeding success of New Zealand Dotterel.[17]

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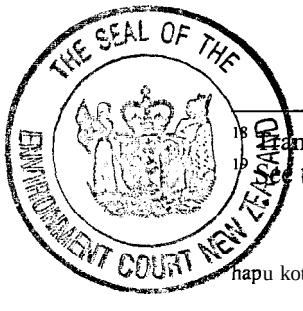
15 Putt, EiC, paragraph 6.2.
16 Environment Court Decision A097/2004.
17 Lawrie, EiC, paragraph 4.2.

[58] In paragraph 4.3 of his written statement of evidence, Mr Lawrie emphasised that the most important area is on the western side of the Rotopiro Stream. He was cross-examined by Ms Dickey on this point and also answered a number of questions from the Court[18]. It became apparent to us during the course of the cross-examination that the area on the western side of the Rotopiro Stream was some considerable distance from the esplanade strip. With reference to a point on the "Proposed Reserve Plan" marked "D" (Appendix 1) Mr Lawrie estimated that the shell bank that caused him concern would be about a kilometre away. Notwithstanding, he pointed out that during low tide people could wade across the estuary to the shell bank. However, he also accepted that appropriate signage could be put in place to persuade people not to recreate in the area near the sensitive shell bank. In our view, we are satisfied that the conservation of the shell bank can be adequately protected by the Council by limiting public access to that part of the estuary.

[59] This left the remaining area of concern which related to the Banded Rails nesting area which was adjacent to, or possibly on, the access strip. He was not absolutely sure of their nesting habitat in this region as he had not inspected the area where they actually nest[19]. He accepted that the most vulnerable time is during the nesting season and that restrictions could be put in place during that time.

[60] The evidence relating to the nesting of the Banded Rail in the vicinity is lacking an empirical foundation. However, we are satisfied that the Council as a responsible body and knowing of the presence of the Banded Rail would be motivated to carry out necessary empirical studies to ensure appropriate protection measures are put in place. Indeed the provisions relating to access contained in the QE II covenant and which will bind the Council will ensure that the conservation values of the area are protected. For more liberal access to be allowed the Council would have to negotiate a variation of the existing provisions.

[61] We are satisfied that the conservation values and public access and recreation values can be balanced in a way which adequately ensures that the bird species likely to be affected by increased public intrusion can be adequately protected.



[18] Transcript, pages 46-48 and pages 52-57.
[19] See transcript, page 55, lines 33 to the end of page.

[62] The alleged potential conflict between conditions requiring the esplanade areas and the QE II covenant was addressed in the evidence presented by Mr Putt and Mr Smith. Their evidence focussed on the apparent conflict between the QE II covenant which (at paragraph 12.4) restricts public access to the covenanted area to that permitted by the owner, and the public access purposes of esplanade reserves and strips.

[63] In our view, in practice this conflict will be minimal due to the provisions of condition 6 that propose to restrict public access to the esplanade strip to those persons permitted by Council on terms set out in condition 6. Further, until the covenant provisions are varied the Council is bound by them.

[64] As Mr White pointed out, Chapter 15 of the district plan identifies the potential conflict between conservation and access in relation to esplanade reserves. Such conflict is to be resolved at an individual park level through the Reserve Management Plan process.

[65] Further, Mr Power a planning consultant called by the Council, opined that in any event the number of walkers seeking access to the foreshore in this area is likely to be low. This is because of the relative distances pedestrians would have to walk to access the esplanade reserve or foreshore. We agree with Mr Power's assessment. We also agree with his opinion that the combination of low demand and restricted access by permit, will constrain pedestrian usage and will have little effect on the sea birds in Kauri Bay and on the vegetation on the pohutukawa cliffs.

[66] A further reason advanced by the applicant through the evidence of Mr Putt was the limited recreational value of the area, particularly the extension of Wairoa Bay onto the subject site. In this regard we were impressed with the evidence of Mr Power who made a careful examination and assessment of the suitability of the foreshore and shoreline for esplanade reserve or esplanade strip purposes. This assessment related to the foreshore at Wairoa Bay, the pohutukawa cliffs, the shoreline of Kauri Bay, and the esplanade strip adjoining the mangroves. He concluded:

> That part of the subject site immediately adjoining MHWST has high scenic, ecological and recreational values and provides a suitable viewing area for observing the sea birds roosting in Kauri Bay. The inclusion of these features of the site within a series of esplanade reserve/strips and access

> strips will enable the growing population of the Manukau district to meet its social, cultural and recreational needs.[20]

[67] We agree with Mr Power's conclusion, which reflects what we observed on our extensive site visit. After a careful consideration of all of the evidence and of the relevant statutory instruments we are satisfied that the Council's decision to impose conditions relating to the esplanade reserve and esplanade strip are in accordance with the Act and the relevant statutory instruments. The application for waiver is refused.

Sub-issue 1(d) -whether conditions 6(a) - (e) are lawful?

[68] Condition 6 relates to the instruments granting the esplanade strips. It directs the City solicitor at the applicant's expense to process the documentation which is to be based on the 10th Schedule to the Resource Management Act 1991 and to contain the restrictions set out in paragraphs (a) - (e) which relate to the Council restricting public access along the esplanade strips.

[69] Mr Brabant submitted that those consent conditions are unlawful and unenforceable as against the Council. It is, he said, almost trite that conditions on a subdivision consent are imposed in order to control, prevent or restrict the use of the land by the consent holder or his successor in title. As these conditions are directed at the Council they are unlawful.

[70] Mr Brabant's submission is misconceived. Condition 6 relates solely to the esplanade strips. It does not apply to the creation of an esplanade reserve. Condition 6 merely directs that the instrument granting the esplanade strip is to be based on the 10th Schedule to the Act together with the additional matters set out in paragraphs (a) - (e) relating to access. The condition merely reflects section 220(1)(a) and section 232 of the Act. Section 220(1)(a) provides for a condition of consent specifying the provisions to be included in the instrument creating an esplanade strip under section 232. However, we consider that the condition would be better worded to read:

> The instrument granting the esplanade strip shall be based on the Tenth Schedule of the Act together with the additional matters set out in paragraphs (a) to (e) granting access. The costs of obtaining the instrument shall be met by the applicant.

…

[20] Power, EiC, paragraph 9.1.

Issue 2- Has the Council jurisdiction to impose condition 4(e) with respect to access strips ?

[71] This matter can be dealt with briefly. Section 237B states:

> **237B Access Strips**
>
> (i) A local authority may agree with the registered proprietor of any land to acquire an easement over the land, and may agree upon the conditions upon which such an easement may be enjoyed.

[72] Mr Brabant argued that unless the registered proprietor is in agreement the Council cannot by way of condition in a resource consent impose an obligation on the registered proprietor to enter into an easement to provide an access strip. Ms Dickey sensibly agreed with Mr Brabant's submission.

[73] Accordingly, all reference to access strips in condition 4(e) or in any other condition is to be deleted from the conditions of consent.

Issue 3 - Has the Council jurisdiction to impose advice notes as an addendum or addition to a consent which is granted subject to conditions?

[74] Again, this matter can be dealt with briefly.

[75] Section 104B provides that after considering an application for a resource consent for a non-complying activity, a consent authority may grant or refuse the application, and if it grants the application, may impose conditions under section 108.

[76] Section 108 provides that a resource consent may be granted on any conditions that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).

[77] In short, there is no statutory authority for the imposition of "advice notes" as an addendum or addition to a consent which is granted subject to conditions. This position is accepted by Ms Dickey on behalf of the Council.

[78] Accordingly, Ms Dickey advised the Court that the Council accepted that Advice Note 6(b)(ii) to (vii) go beyond what an advice note should contain and are more in the nature of conditions and should therefore be deleted.

[79] Mr Brabant submitted that the following further amendments should be made:

(i) The reference to recording the advice note on the Council's Land Information Register should be deleted.

(ii) The wording of subclause (a) should be amended, as it currently states that there will need to be a foundation investigation report. If construction of a house on the site is a permitted activity, then the matter will be dealt with by the Council under the Building Act not the Resource Management Act. The decision as to whether or not a foundation investigation report will be required, will be taken by the Council under its building jurisdiction at the appropriate time.

(iii) For the same reasons the wording of subclause (b) needs to be amended so it reads as an advice note rather than a direction.

Mr Brabant suggested that the advice note, if the Court decides it can be retained, should read as follows:

(a) The consent holder is advised that any building on the nominated house site (where construction of a residential dwelling is available as a permitted activity) may need to be the subject of a foundation investigation report.

(b) The consent holder is advised that a specific design of an on-site wastewater treatment and disposal system is likely to be required with construction of a dwelling house on a nominated house site. Reference should be made to the Auckland Regional Council's proposed Air, Land and Water Plan for guidance.

(iv) In relation to Advice Note 7, Mr Brabant submitted that the advice note needs to be deleted. First, because he argues that the esplanade strip requirement should be removed. But second, because the advice note is not giving advice to the consent holder of what he, she or it should do (as in the nature of advice note 6 in its amended form, or advice note 4), but rather is purporting to tell the consent holder (or landowner for the time being), what the Council will do in the way of signs or marker posts. This is not a proper advice note. The decision as to whether or not marker posts and signs will be erected will be made by the Council's Park Division.

[SO] We agree with Mr Brabant's submissions. In our view, we can see no harm in advice notes being added as an addendum to the conditions of consent. While there is no statutory authority for advice notes, they are, and can be helpful to the resource consent holders. However advice notes should not give directions nor should they require the consent holder to carry out some form of action or work. An advice note going that far effectively becomes a condition.

[81] Accordingly, the advice notes are to be either deleted or amended as follows:

(i) Advice Note 6 is to be deleted and substituted with the following:

6(a) The consent holder is advised that any building on the nominated house site (where construction of a residential dwelling is available as a permitted activity) may need to be the subject of a foundation investigation report.

(b) The consent holder is advised that a specific design of on-site wastewater treatment and disposal system is likely to be required with the construction of a dwelling house on the nominated house site. Reference should be made to the Auckland Regional Council's proposed Air, Land and Water Plan for guidance.

(ii) Advice Note 7 is to be deleted.

Issue 4 - reserve contribution

[82] The two sub-issues in Issue 4 relate to a valuation of the property and the subsequent fixing of the reserve contribution.

Issue 4(a) - current market value of a nominal building site

[83] Mr Brabant in his opening submission accepted that the Council could impose a condition requiring a reserve contribution which was to be based on the current assessed market value of a nominal building site of 2000 m2 located in Lot 1.

[84] We received evidence from two qualified and experienced valuers who each assessed a market value effective for February 2004 for such a site.

[85] Mr Priest, valuer for the Appellant, inspected the site in December 2004 and backdated his assessment to February 2004. He described the total property (Lots 1 and 2) as an uneconomic breeding (sheep) and fattening (cattle) farm with sea views zoned rural 1 under the Manukau City Council Town Planning Scheme. He noted the property was similar in use and size to many properties in the vicinity and that major improvements by way of extensive planting of native trees, stopbanking and flood drainage had been undertaken. By way of a summary Mr Priest described the property as an attractive and well managed uneconomic property in the popular Clevedon/Kawakawa area of Manukau City.

[86] To arrive at his assessed value Mr Priest considered recent sales of a rural residential nature in the vicinity of the property. Ten properties (two of which were in his rebuttal evidence) were referred to with sale prices ranging from $315,000 to $630,000. The latter referred to a property in Whitford an area in which, Mr Priest states in his rebuttal evidence, land values are much higher than those in the Clevedon area. If this figure is disregarded Mr Priest's sale prices range from $315,000 to $425,000.

[87] Mr Priest gives his assessed value, having given weight to sales of properties near the subject property, of $360,000 (excluding GST).

[88] Mr Khan, valuer for the Respondent, inspected the property in February and December 2004 and again in February 2005. His assessment refers to his first visit in February 2004. Annexed to Mr Khan's evidence was a detailed valuation report one purpose of which was to assess the value of a notional building site within proposed Lot 1. The description of the property in this report aligns with that presented by Mr Priest.

[89] In coming to his assessment Mr Khan considered recent sales of properties with just rural views, all of which are in the Clevedon area, and then sales of properties with sea views all of which are in the Whitford area. Sales figures for the former (4 of) ranged from $350,000 to $550,000. The three Whitford had sales ranging from $800,000 to $1,500,000. Mr Khan notes that each of these three properties is better located, ie closer to Auckland City, than the subject property.

[90] Following the February 2004 visit Mr Khan assessed the residential site at $800,000 (including GST). He later reduced this to $600,000 following an objection by the owner. In his evidence to us Mr Khan confirmed his view that $600,000 (including GST) was the appropriate figure.

[91] We find the evidence of Mr Priest to be more compelling and note that his assessment falls within the range, albeit at the lower end, of Mr Khan's quoted figures for the sites in the Clevedon area. Accordingly we accept Mr Priest's assessment of $360,000 as an appropriate figure upon which to base a reserve contribution. But for the reasons given in the next section GST will need to be added.

Issue 4(b) Council's calculation of Reserve Contribution

[92] Condition 8(a) of the subdivision consent requires a reserve contribution of 6% plus GST of the current assessed market value of a nominal building site. The Council claims that in assessing the market value GST is included. The appellant claims that including GST in the assessed market value and then adding GST is an error and effectively amounts to double dipping.

[93] Rule 15.15.2.3.1 of the district plan provides a method for calculation of the reserve contribution as follows:

> The reserve contribution shall be assessed by the Council and its registered valuer according to the assessed market value (which is inclusive of any Goods and Services Tax) of the allotments in the subdivision at the date of subdivision consent and according to the rules pertaining to the principal purpose of the subdivision as if the allotments are available for sale at that date; GST will be payable in addition to the assessed contribution in terms of the Goods and Services [Tax] Act 1985.

[94] "Market value" is defined in the district plan as follows:

> ..."land value" as defined by the Valuation of Land Act 1951 which is "in relation to any land, means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements (as herein before defined) has been made on the said land.[21]

[21] Chapter 18 of the district plan.

[95] Mr D J Neutze for the Council submitted that the reserve contribution is thus calculated by reference to the amount that an owner might be expected to realise on the sale of the land. The Council specifically sets out in rule 15.15.2.3.1 that the assessed market value should include any GST. He submitted that the district plan simply adopts standards and accepted valuation practice, and is supported by case law.

[96] Mr Neutze referred to ***Minister of Lands v Gillian Nutsford-Cumming***[22]**.** This was an appeal to the High Court from an Interim Decision of the Auckland Land Valuation Tribunal concerning the relevance of GST to the assessment of market price[23]. The case involved acquisition of the land being valued.

[97] The respondent was the owner of land in Greenhithe being purchased by the Crown for the Greenhithe motorway. An interim payment had been made and the issue that was before the Land Valuation Tribunal and on appeal to the High Court, was whether or not the valuations should include GST. In that particular case, because it was the only valuation methodology available, the valuers were carrying out the assessment using a methodology known as the "hypothetical subdivision methodology".

[98] The Interim Decision was delivered on the 30th of April 2002 and the High Court decision was delivered on 17th of March 2003. The High Court referred the matter back to the Tribunal for a Final Decision.

[99] In the Final Decision the Tribunal said[24].:

> Inherent in the definition is the "amount" of money which would change hands in the transaction. Thus:
>
> - How much money would the vendor receive from the purchaser?
> - How much money would the purchaser physically pay to the vendor?

[100] Mr Neutze submitted that in the context of this case there could be two hypothetical purchasers of the nominal building site; a GST registered builder and an unregistered individual. The hypothetical purchaser who is not GST registered will need to include GST in the price offered to be competitive in that market. So, he

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22 *Minister of Lands v Gillian Nutsford-Gumming* AP83SG02 17 March 2003. Salmon J and J W Charters
23 LVP 20/01, 30 April 2002.
24 LVP 20/01,13 February 2004.

said, the "market value" will need to be expressed in "GST inclusive" terms. Whether in any particular case GST would be payable will in fact depend on the registration status of the particular vendor or purchaser. Hence the words "if any" are often added.

[101] Mr Neutze then referred to the definition of "market value" in the district plan which is defined in terms of the definition of "land value" in section 2 of the Valuation of Land Act 1951. This statute has been repealed by the Ratings Valuation Act 1988 from 1 July 1998. However, "land value", is defined in section 2 of the Ratings Valuation Act in almost identical terms to the valuation of Land Act:

> ..."Land value" in relation to any land, and subject to sections 20 and 21, means the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or charge, might be expected to realise at the time of valuation if-
>
> (a) offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose; and
>
> (b) no improvements had been made on the land.

[102] Therefore, Mr Neutze submitted, the financial contribution is calculated by reference to the amount that a hypothetical vendor might be expected to realise in the sale of the relevant land. Such a hypothetical vendor would, he argued, expect to realise the price inclusive of GST.

[103] Mr Brabant referred to rule 15.15.2.3.1 and emphasised the word "any" in the phrase "... according to the assessed market value (which is inclusive of any Goods and Services Tax) of the allotments...". The use of the word "any", he said, begs the question as to whether Goods and Services Tax is to be included.

[104] Mr Brabant then referred to the International Valuation Standard and the advice on "Market Value Basis of Valuation", in particular paragraph 1.2 which states:

> "Market Value" is a representation of value and exchange, or the amount a property would bring if offered for sale in the (open) market at the date of valuation under circumstances that meet the requirement of the "market value" definition.

[105] He then quoted from the Valuation of Land Act 1951 (now repealed), in particular the definition of "land value" adopted by the Court of Appeal in ***Valuer General v Mangatu Incorporated***[25]**,** which says:

> "Land value", in relation to any land, means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements (as herein before defined) had been made on the said land.

[106] The important word, he said, was "realise" and he quoted its relevant meaning from the Shorter Oxford Dictionary, namely as:

- Convert into cash or money;
- Realise one's property;
- Of property or capital; Yield (a specified return);
- Fetch as a price.

[107] He argued that the sale of a property which does not involve any Goods and Services Tax (ie a person who is not selling a residential property in the course of business) does not include GST, and so the amount the seller realises is the actual market value (excluding GST), as reflected in the price a willing purchaser is prepared to pay.

[108] Mr Brabant then referred to paragraph 3.3 of the International Valuation Standard, which states that market value is understood as the value of an asset estimated "without regard to costs of sale or purchase and without offset for any associated taxes". He submitted that the reference to offsetting taxes supports the view that a GST component should not be included in the assessed market value when valuing for reserve fund contribution purposes, unless there is a reason for including GST as a necessary component of any assessed sale. He referred to the High Court decision of ***Minister of Lands v Gillian Nutsford Gumming*** and in particular paragraph [19] which refers to the hypothetical subdivision methodology - a methodology used without the inclusion of GST. The High Court said:

> It is appropriate to recall the purpose of a hypothetical subdivision formula. It is a method of arriving at "market value". That is its only utility. It does not have some life of its own beyond that. As we understand the purpose of hypothetical subdivision formula, it is to arrive at a figure which takes into account potential sale prices and expenses so that the end result is a price

[25] [1997] 3 NZLR 641 at 649, line 43.

> which would be seen to be fair by both the willing vendor and the willing purchaser.

[109] Mr Brabant submitted that in the present instance there was no sale or compulsory acquisition. Instead there is an assessment of the market value of a hypothetical building site so a reserve fund contribution can be calculated. To say that the assessed market value can include GST (if any) is to introduce an element of indirect taxation which is inappropriate.

[110] At first Mr Brabant's submission, to the effect that the Council was in error in including GST in the assessed market value and then adding GST to the calculated amount, and that this practice amounted to "double dipping", seems attractive. However, on closer analysis the attraction dissipates. Mr Brabant's submission, at least indirectly, implies that the GST status of a person in the appellant's position is a relevant issue of whether market value is inclusive of GST or not. He argued that the word "any" or the words "if any" begged the question, and opened the door to situations where GST is not relevant, for example, where a vendor is not GST registered.

[111] As Mr Neutze pointed out, the ***Nutsford Gumming*** decision addressed this very issue. In that case the claimant was not GST registered and the Courts held that there should be just one "market value", not two. The Land Valuation Tribunal stated at paragraph [11] of its 2002 decision:

> The market value does not alter: what alters is the net return to the vendor. A useful analogy is to consider the effects of income tax on such a transaction. Whether or not a vendor might be subject to income tax on a particular sale is dependent on that person's taxation status. It has never been suggested that because a person may be subjected to income tax that the sale price of his land should alter accordingly.

[112] The High Court agreed with these findings. At paragraph [24] the High Court stated:

> At the end of the day, however, the market value cannot be different depending on whether or not GST is payable or claimable by the purchaser. If GST is to be included in the market value, that can only be because a willing purchaser would add back the amount of the GST refund...knowing that unless he was prepared to do so, the price he was offering would not be a competitive one in the market.

[113] It is clear from the High Court decision that the term "GST inclusive" is used to make it clear that the figure mentioned is the total which the purchaser has to pay regardless of whether or not there is a GST component in the price and the words "if any" are often added to make this point clear[26].

[114] Mr Brabant's submission also emphasised that the purpose of this valuation of the notional building site is to enable the reserve contribution to be calculated. Because GST is a tax that is only payable on sale and purchase transactions and the property was not valued for that purpose, he contended the valuation figure should not include any reference to GST.

[115] We consider that the purpose for which a valuation is undertaken should not affect the market value of land. As discussed above, and held by the Court of Appeal in the ***Mangatu Incorporation*** case, market value is the amount that a willing seller would sell for and a willing buyer would be prepared to pay for the property. It is an hypothetical exercise and involves the consideration of a property as if it was for sale on the open market. This is not dependent on an actual transaction taking place at the date of valuation. The purpose of the valuation is irrelevant to consideration of the market value of the land; there can be only one market value.

[116] This is confirmed by the Court of Appeal in ***Boat Park Limited v Hutclzinson***[27]**.** This case involved a valuation obtained for mortgage purposes. At page 83, the Court found:

> The market value, or fair market value, is arrived at by determining what price the property would sell for on the open market under the normal conditions applicable in the market for the type and location of the property being valued.

[117] Thomas J set out the definition of "market value" from Valuation Standard 1, (by reference to the former Standard in operation at the time) and concluded:

> It follows that there cannot be a market value for one purpose and a market value for another purpose. The price for which the willing seller would sell the property to a willing but not over anxious purchaser cannot vary depending on the purpose of the valuation.

[26] See paragraph [22] of the High Court decision.
[27] [1999] 2 NZLRA 74.

[118] We find that the market value must fairly reflect the reality of the market place. GST is a factor which reflects the market place irrespective of whether it has to be paid. We therefore find that the Council was not in error in the manner in which it calculated the market value by including GST.

Issue 5 -whether condition 4(c), which requires vesting; in the Crown of the balance allotment which is in the Coastal Marine Area and which adjoins the proposed esplanade reserve or is otherwise required by the Minister of Conservation, is lawful

[119] Section 237A states:

> 237A Vesting of ownership of land in coastal marine area or bed of lake or river in the Crown or territorial authority-
>
> (1) Where a survey plan is submitted to a territorial authority in accordance with section 223, and any part of the allotment being subdivided is...within the coastal marine area, the survey plan shall-
>
> …
>
> (b) Show as vesting in the Crown-
>
> (i) Such part of the allotment in the coastal marine area as adjoining an esplanade reserve shown as vesting in the territorial authority; or
>
> (ii) Such part of the allotment in the coastal marine areas as is required to be so vested as a condition of a resource consent-
>
> If such vesting of land in the Crown has the written agreement of the Minister of Conservation.

[120] For the purposes of complying with section 237A the Council imposed the following condition 4(c):

> Pursuant to section 237A of the Resource Management Act 1991, the survey plan submitted to the Council in accordance with section 223 shall show as vesting in the Crown all that part of the allotment which is in the Coastal Marine Area and which either adjoins an esplanade reserve, or is otherwise required by the Minister of Conservation. The applicant shall, in conjunction with the Council, submit a draft of the preliminary survey plan to the Minister of Conservation identifying the areas of the allotment which are in the Coastal Marine Area and shall seek the agreement of the Minister as to which areas must vest in the Crown.

[121] In his opening submissions Mr Brabant submitted that the subdivision consent to create a rural residential lot does not trigger the provisions of section 237A so the Council lacks jurisdiction to impose this obligation. We have already rejected that argument.

[122] In his submissions in reply Mr Brabant submitted that despite attempts by the Council to obtain acquisition by the Crown at the time the original application was publicly notified, and the period of time that has passed, the Crown has not made a formal commitment to the acquisition by way of vesting. In the absence of the Crown indicating formally that it agrees to that vesting, the condition should never have been imposed.

[123] Ms Dickey submitted that quite simply, as the Council had no evidence before it as to whether the Minister wanted the land, it determined that it would be prudent to impose condition 4(c), which is dependent on the Minister's agreement. We agree with the submission. A condition precedent to the condition being fulfilled is the consent of the Minister which is required under section 237A. We do not consider the wording of the section is such that a consent application needs to be held up pending the consent of the Minister.

Summary of findings on the issues

[124] (i) Issue 1

(a) Sub-issue 1(a) - whether the Council has jurisdiction under the Act to impose conditions 4(b), 4(c), 4(e), 5 and 6 with respect to esplanade reserve or strips.

We find the Council, and this Court on appeal, has jurisdiction under the Act to impose the conditions with respect to esplanade reserves or strips.

(b) Sub-issue 1(b) - if there is jurisdiction, whether the conditions satisfy the well-known ***Newbury*** tests.

We find that the conditions do satisfy the ***Newbury*** tests.

(c) Sub-issue l(c) if there is jurisdiction and the Newbury tests are satisfied, whether the creation of esplanade reserves or strips should be waived.

We find that the creation of esplanade reserves or strips should not be waived.

(d) Sub-issue 1(d) - whether conditions 6(a) - (e) are lawful.

We find conditions 6(a) - (e) are lawful but the wording of the conditions should be amended to read:

> The instrument granting the esplanade strip shall be based on the Tenth Schedule of the Act together with the additional matters set out in paragraphs (a) to (e) granting access. The costs of obtaining the instrument shall be met by the applicant.
>
> ...

(ii) Issue 2 -whether the Council has jurisdiction under the Act to impose condition 4(e) with respect to access strips.

We find the Council does not have jurisdiction under the Act to impose condition 4(e) with respect to access strips. Accordingly any condition or part of a condition which relates to access strips is to be deleted.

(iii) Issue 3 - whether the Council has jurisdiction to impose "advice notes" addendum or addition to a consent which is granted subject to conditions.

We find the Council does not have jurisdiction to impose "advice notes". However, we can see no harm in "advice notes" being added as an addendum to the conditions of consent for the purposes of assisting and helping resource consent holders, providing "advice notes" do not give directions or require the consent holder to carry out some form of action or work. Accordingly the "advice notes" are to be either deleted or amended as follows:

(i) Advice Note No. 6 is to be deleted and substituted with the following:

6(a) The consent holder is advised that any building on the nominated house site (where construction of a residential dwelling is available as a permitted activity) may need to be the subject of a foundation investigation report.

(b) The consent holder is advised that a specific design of on-site wastewater treatment and disposal system is likely to be required with the construction of a dwelling house on the nominated house site. Reference should be made to the Auckland Regional Council's proposed Air, Land and Water Plan for guidance.

(ii) Advice Note No. 7 is to be deleted.

(iv) Issue 4

(a) Sub-issue 4(a) - relates to the current market value of a nominal building site against which the reserve contribution is assessed.

We find that the current market value of a nominal building site should be assessed at $360,000 plus GST.

(b) Sub-issue 4(b) -whether the Council's calculation was in error by including GST in the assumed market value and then adding GST to the contribution figure calculated on 6% of current market value.

We find that the Council's calculation was not in error by including GST in the assumed market value and then adding GST to the contribution figure calculated on 6% of current market value.

(v) Issue 5 - whether condition 4(c), which requires vesting in the Crown of the balance allotment which is in the Coastal Marine Area and which adjoins the proposed esplanade reserve or is otherwise required by the Minister of Conservation, is lawful.

We find that condition 4(c) is lawful.

Determination

[125] We determine that the appeal is allowed to the extent that:

(i) Condition 6 is to be amended to read:

> The instrument granting the esplanade strip shall be based on the Tenth Schedule of the Act together with the additional matters set out in paragraphs (a) to (e) granting access. The costs of obtaining the instrument shall be met by the applicant.
>
> ...

(ii) The provision of, or any reference to, access strips is to be deleted from the conditions of consent.

(iii) The "advice notes" are to be amended as set out in the summary of findings.

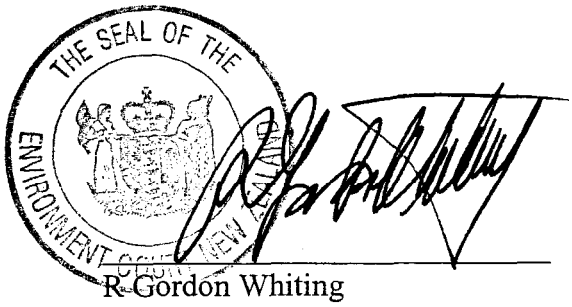
(iv) The current market value of a notional building site is to be fixed at $360,000 plus GST.

In every other respect the appeal is dismissed.

[126] Costs are reserved but it is our tentative view that costs should lie where they fall. If any party wishes to apply for costs that application is to be made within 10 working days of receipt of this decision.

DATED at **AUCKLAND** this 15th day of August 2005.

For the Court:



R Gordon Whiting
Environment Judge

Appendix 1

MINUTE NO. COM/MAR/451/04 - COMMISSIONERS' DECISION

NOTIFIED APPLICATION FOR RESOURCE CONSENT UNDER THE RESOURCE MANAGEMENT ACT 1991. HAPU KOTARE LTD, 1030 CLEVEDON-KAWAKAWA ROAD, CLEVEDON - SEC 1 SO 66848 AND PT ALLOT 12 PARISH OF TAUPO, CT NA91D/886 LTD - THE APPLICANT SEEKS RETROSPECTIVE LAND USE CONSENT FOR A RELOCATED DWELLING AND SUBDIVISION CONSENT FOR A SUBDIVISION TO SEVER A RURAL-RESIDENTIAL LOT CONTAINING TWO DWELLINGS FROM A FARM PROPERTY IN THE RURAL 1 ZONE

Preamble:

The Commissioners have carefully considered the matters raised by legal counsel and witnesses for both the applicant and submitters in regard to the setting of conditions and the acquisition of esplanade reserves, esplanade strips and access strips around and across Lot 2 of the proposed subdivision.

1. *The Commissioners have concluded that the Council has the power under the Resource Management Act 1997 to impose conditions of consent affecting the "balance" lot and also to acquire esplanade reserves, esplanade strips and access strips along the coastline even though the coastline is wholly adjoining the residual Lot 2.*

   Furthermore, section 31 of the Resource Management Act 1991 requires the Council to: "...achieve integrated management of the effects of the use, development or protection of land..."

   This can only be effectively achieved by assessing the effect of the application upon the entire property and not assessing the proposed rural-residential lot in isolation from all the rest of the property.

   The Commissioners' conclusions are based on the following:

   (a) *By definition, 'to subdivide' must involve the subdivision of an original parcel of land into two or-more lots. The Resource Management Act 1991 explicitly states in Section 218(4) that "... the balance of the land from which any allotment is being or has been subdivided is deemed to be an allotment"*

   There is thus no basis for the assertion that a two-lot subdivision is confined to one lot and that the residual or balance lot is not subject to the Resource Management Act 1991 or the provisions of the Operative District Plan 2002.

   in addition the Commissioners note that Rule 19 of the Surveyor-General's rules made under the Cadastral Surveys Act 2002 states that:

   19. *All land affected by division to be accounted for -*

   (1) *A survey subdividing a parcel must account for every new parcel resulting from the subdivision (<u>including every balance or residue parcel</u>).*

   (2) *A survey defining part of a parcel does not have to account for the rest, if-*

   (a) The parcel is -

   (i) Marginal strip, railway or road; or

   (ii) Land that is the bed of a lake, a river, a stream, or the sea; or

   (b) The part is being defined for the purpose of acquisition under the Public Works Act 1981.

   (3) *Subclause (2) overrides subclause (1).*

   The argument that only proposed Lot 1 is the subject of the application is contrary to the above rule.

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(b) *The applicants legal counsel also contended that the Council did not have the power to acquire an esplanade reserve, esplanade strip or access strip as a condition of consent He deposed that as the subdivision was confined to the rural-residential lot remote from the coastline, no esplanade reserve or strip could be obtained as a condition of the subdivision consent.*

The Commissioners are aware that this subdivision does not provide for a lot less than 4ha in area adjacent to the coastline and therefore the Council will have to pay compensation for any esplanade reserve, esplanade strip or access strip it seeks to acquire. Furthermore, the Commissioners note that any disagreement about land values can be settled by referring the matter to the Land Valuation Tribunal.

The form in which the subdivision consent has been lodged with the Council does not provide a sound basis for the assertion that proposed Lot 1 can be considered in isolation from the residual Lot 2. in particular,

(a) *The applicant is seeking a right of way easement for Lot 1 that covers land within Lot 2. The easement is designed to provide vehicular access from Lot 1 to the coastline.*

(b) *No part of proposed Lot 1 is affected by the open space covenant yet in the application documents extensive reference is made to the covenant as a positive outcome of approving the application.*

In addition, no witness presented any evidence which indicated that the interpretation by the Council was incorrect

The Commissioners consider that proposed Lot 1 cannot be assessed in isolation from proposed Lot 2.

2. *Both the applicant and the submitters raised concerns about the level of public access to the proposed esplanade reserves end strips. Particular concerns were the effect of access on the ecological values of the coastline and the adjoining oyster farm.*

The Commissioners consider that, having regard to the particular conservation values of that part of the property comprised in the coastal marine area and the adjoining marine areas, esplanade reserves, esplanade strips and access strips should be vested or created generally along the boundary of the coastal marine area defined by the line of MHWIMST. Access for members of the public should be limited by terms and conditions in the legal instruments granting the esplanade strips and access strips to protect these conservation values and also to limit any adverse effects on the land owner. The conditions in the legal instruments will not conflict with the principles embodied in the Queen Elizabeth II National Trust Open Space covenant it is envisaged that the restrictions on public access will remain in effect for at least ten years, after which the Council may decide to review them following consultation with the land owner and the Queen Elizabeth II National Trust

3. ***At the request of** the Commissioners, the applicant's legal counsel supplied a copy **of the Environm**ent Court decision C127/97 Portmain properties (No.7) Limited for **perusal. A copy** of this document was also supplied to the agent for the submitters.*

*The Commissioners considered the "Portmain" decision but noted that the **judgem**ent of the Court was not contrary to their conclusions outlined in section 1 **above.***

Continued

DECISION

That the application received on 28 November 2003 from Hapu Kotare Ltd seeking retrospective land use consent for a relocated dwelling and subdivision consent for a subdivision to sever a rural-residential lot containing two dwellings from a farm property in the Rural 1 zone at 1030 Clevedon-Kawakawa Road, being Set 1 SO 66848 and Pt Allot 12 Parish of Taupo, be determined as a non-complying activity and that the Manukau City Council HEREBY GRANTS ITS CONSENT pursuant to sections 104, 104D and 108 of the Resource Management Act 1991 subject to the following conditions of consent

CONDITIONS OF CONSENT

GENERAL

1. *That pursuant to section 36 of the Resource Management Act 1991, this consent (or any part thereof) shall not be exercised until such time as all charges in relation to the receiving, processing and granting of this Resource Consent are paid in full.*

PART A - LAND USE CONSENT

2 *That the "non-permitted" wastewater disposal system for the relocated dwelling shall be operated and maintained in accordance with the report by Fraser Thomas Ltd dated 20th February 2003.*

PART B - SUBDIVISION CONSENT

3. *That the subdivision be undertaken in general accordance with the documentation and plans submitted (including the revised survey plan submitted by the applicant at the hearing) with the application (numbered Proposal 23190 (SP 8115) by the Council) as amended by the following conditions.*

4. *The survey plan to be lodged with the Council shall define the following:*

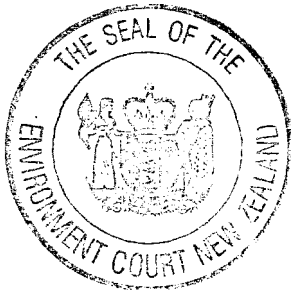
   (a) *Lot 1 - an oversized rural-residential lot of 4.4ha.*

   (b) *Lot 3 - the esplanade reserve with a minimum width of 20m along that part of the coastline notated A to B illustrated on the "'Proposed Reserves Plan" attached to this decision.*

   (c) *Pursuant to Section 237A of the Resource Management Act 1991, the survey plan submitted to the Council in accordance with Section 223 shall show as vesting in the Crown all that part of the allotment which is in the Coastal Marine Area and which either adjoins an esplanade reserve, or is otherwise required by the Minister of Conservation. The applicant shall, in conjunction with the Council, submit a draft or preliminary survey plan to the Minister of Conservation identifying the areas of the allotment which are in the Coastal Marine Area and shall seek the agreement of the Minister as to which areas must vest in the Crown.*

   (d) *Lot 2 - the residual rural lot*

   (e) *in accordance with Section 230 and 232 of the Resource Management Act 1991, an esplanade strip shall be provided adjacent to the line of mean high water mark for spring tides along that part of the coastline notated B to C on the "Proposed Reserves Plan" attached to this decision and in accordance with section 237B of the Act, an access strip shall be provided from points C to D and such other locations as may be identified along the route indicated on that plan where that route does not directly adjoin the line of mean high water mark for spring tides.*



Continued

5. *Lot 3 esplanade reserve shall vest in the Council.*

6. *The instruments granting the esplanade strips and access strips required by Condition 4(e) above shall be prepared by the City Solicitor at the applicant's expense, in accordance with the Council's requirements and procedures for legal documentation. They will be based on the Tenth Schedule to the Resource Management Act 1991, (requirements for instruments creating esplanade strips and access strips) and shall contain the following restrictions.*

   (a) *Public access to and along the esplanade strips and access strips shall be permitted at the discretion of the Manukau City Council having regard to the 'Open Space Covenant' issued by the Queen Elizabeth II National Trust on March 1999, File No S/2/375.*

   (b) *Public access will be confined to pedestrians. No vehicular access by the general public will be allowed. This restriction shall not apply to the owner or lawful occupier of Lot 2*

   (c) *No dogs or other animals will be allowed along the strips. This restriction shall not apply to the owner or lawful occupier of Lot 2.*

   (d) *The owner or occupier of the land will not be prohibited from interfering with any structure or animals lawfully on the land.*

   (e) *For an initial period of 70 years from the date of this consent granting of public access by the Council will be by permit only. Upon receiving a request by the landowner, the Council may after consultation with the Queen Elizabeth II Trust, amend the number of permits allowing public access along the route of the esplanade strips and access strips, if the authorised public access is generating adverse effects on the conservation values of the affected land and the adjacent coastal marine area.*

Easements

7. (a) *The easement of Right of Way notated as 'D' on the application plan prepared by McInnes Read and Lucas Ltd shall be shown in a memorandum of easements on the survey plan and shall be duly granted or reserved.*

   (b) *The easements for power and telephone over both Lots 1 and 2 notated as "D","E" and "G" on the application plan prepared by Mcinnes Read and Lucas Ltd shall be shown on the survey plan in a memorandum of easements and shall be duly granted or reserved.*

   (c) *The easements of Right of Way notated as "F" on the application plan prepared by McInnes Read and Lucas Ltd shall be shown on the survey plan terminating 20 metres from the line of Mean High Water Mark for Spring Tides, being the line of the edge of the esplanade strip required by Condition 4(e).*

Reserves Contribution

8. (a) *A reserves contribution of $10,000.00 (inclusive of GST), being 6% (plus GST) of the current assessed market value of a nominal building site of 2,000m^2 located in the vicinity of the two dwellings on Lot 1 less the amount of compensation for the value of the esplanade reserve Lot 3, and the compensation for the value of the interest in land taken for esplanade strip and access strip. All values have been determined by Quotable Value New Zealand.*

   Value of nominal building site of 2,000m^2: $800,000.00

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Contribution: $800,000.00 x 6% + GST =		*$54,000.00*
Less: Esplanade Reserve, Condition 4(b)	*$24,000.00*	
Less: Value of interest acquired in Esplanade Strips and Access Strips Condition 4(e):	*$20.000.00*	
	$44,000.00	*$44.000.00*
Reserves contribution to pay:		*$10.000.00*

The contribution shall be paid within two years or prior to the issue of the completion certificate pursuant to section 224(c) of the Act, whichever is the sooner.

(b) *if the reserve contribution determined in accordance with this condition has not been paid within two years of the date of this consent, the Council may at any subsequent time review this condition pursuant to section 128 of the Resource Management Act 1991 and reassess the reserve contribution required by this condition on the basis of a new valuation undertaken at the time of review. Any such valuation shall be undertaken at the consent-holder's expense.*

Archaeological Sites

9. *No work shall be undertaken within or immediately adjoining the six archaeological sites identified on the NZ Archaeological Association Site Recording Scheme without first obtaining approval under the Historic Places Act 1993. in the event of archaeological features (e.g. shell midden, hangi or oven stones, pit depressions, defensive ditches, artefact material or human bones) being uncovered elsewhere on the property, work is to cease in the vicinity of the discovery and the New Zealand Historic Places Trust and appropriate iwi authorities shall be contacted so that appropriate action can be taken. This includes such persons being given reasonable time to record and recover archaeological features discovered before work may recommence there.*

Land Transfer Plan

10. *The above conditions shall be fully complied with, the Land Transfer plan number notified to the Council and a copy of the survey plan (showing co-ordinates) shall be supplied before a certificate is issued pursuant to section 224(c) of the Resource Managemenf Act 1991.*

ADVICE NOTES

1. *In accordance with section 125 of the Resource Management Act 1991, this consent shall lapse five years after the date on which if was granted unless if has been given effect to before the end of that period.*

2. *The Council's Land informafion Register will record the existence and location of all recorded archaeological sites.*

3. *It is possible that unrecorded archaeological sites may exist on the lots. Pursuant to the Historic Places Act 1993 it is unlawful for any person to destroy damage or modify an archaeological site unless an authority has been obtained from the Historic Places Trust, failure to obtain consent may result in a fine of up to $100,000. The Trust must be consulted prior to development to ensure that the provisions of the Act are observed. Should the applicant or any subsequent purchaser, uncover an archaeological site during development, the New Zealand Historic Places Trust must be consulted.*

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4. *Before any physical work is undertaken in the vicinity of the recorded archaeological sites, the Consent Holder is advised to contact Ngai Tai ki Umupuia regarding the protocol for such undertakings.*

5. *The Council recognises that the unauthorised building works for the erection and servicing of the relocated dwelling:*

   (a) Are currently neither dangerous nor insanitary as defined by section 64 of the Building Act 1991

   (b) Comply "as near as is reasonably practicable" with the relevant provisions of the NZ Building Code 1992.

   The Council takes no responsibility for any act or, omission in recognition of these works and retains the right at any time to serve notices under the Building Act should the works be found to be defective and require remedial action.

6. *The Council's Land information Register will record for Lot 2 that:*

   (a) *Any building on a nominated house site or any alternative building site will need to be undertaken in accordance with a foundation investigation report by a competent geotechnical engineer.*

   (b) *The construction of an on-site wastewater treatment and disposal system will need to be specifically designed for the house and the site. A proprietary system is required and;*

      (i) *should comply with the Auckland Regional Council's Proposed Air Land Water Plan (1991), Permitted Activity Rule 5.5.22 for Sewage Treatment and Disposal or the equivalent rules of subsequent Plans,*

      (ii) *the plans of the proposed installation will be required to be submitted to the Council for approval at building consent stage. Construction shall be supervised and certified by an Engineer appropriately experienced in on-site waste disposal systems. The Engineer's certification and "as-built" plans should be forwarded to the Manager, Environmental Health at Manukau City Council.*

      (iii) an effluent disposal reserve area will need to be provided at 50% of the primary disposal area for dripper irrigation or 100% for other disposal methods. The reserve area shall be detailed on the "as-built" plans required in clause (ii), above.

      (iv) *a maintenance contract will be required to be entered into with the system installers for the life of the system. Copies of the maintenance reports issued by the contractor shall be forwarded by the owner to the Manager, Environmental Health at Manukau City Council, as they become available and at not less than yearly intervals.*

      (v) the system installed shall have appropriate emergency storage capacity, emergency pump capacity and alarm systems to indicate system failure.

      (vi) *effluent dripper lines shall be located no closer than 15 metres from any watercourse.*

      (vii) storm water cut-off drains shall be provided on the upward slope above the effluent disposal field to redirect any overland storm water flow away from the disposal field.

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7. *Prior to the Council issuing permits for pedestrian access along the esplanade strip(s) and access strip(s), the Council will ensure that suitable signs and route marker posts to guide users have been erected in consultation with the land-owner. This information will be recorded in the Council's Land information Register, together with copies of the legal instruments pertaining to the esplanade strip(s) and access skip(s).*

REASONS FOR THE DECISION

1. *The Council is satisfied that the application meets the provisions of Section 104D of the Resource Management Act 1991.*

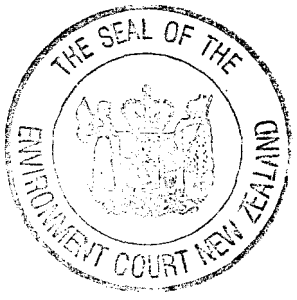
2. *Any adverse effects from the location of two houses on the rural-residential lot would not be more than minor.*

3. *The subdivision will not affect the productive potential of the balance of the farm property.*

4. *National, regional and district planning instruments require the Council to contribute to the protection of conservation values and provide public access to and along the foreshore. The combination of esplanade reserves, esplanade strips and access strips proposed to be acquired by the Council along the foreshore (including the vesting in the Crown of land in the coastal marine area if approved by the Minister of Conservation) will satisfy these planning instruments.*

5. *Kahuru Point and the land adjoining the beach on the Wairoa Bay which form part of the property have high recreation and scenic value. The vesting of esplanade reserve in this location will enable the protection of the conservation values of this area.*

6. *The conditions included in the subdivision consent will ensure that the limited public use of the proposed esplanade reserve, esplanade strips and access strips does not conflict with purposes of the Queen Elizabeth II Open Space Covenant*



REGISTERED SURVEYOR

LOTS 1 & 2 BEING PROPOSED SUBDIVISION OF SEC 1 SO 66848 & PT 12 TAUPO PSH.

THIS PLAN HAS BEEN PREPARED BY MESSRS McINNES READ & LUCAS FOR SUBDIVISIONAL PLANNING PURPOSES. THEY WILL ACCEPT NO LIABILITY IF USED OUTSIDE THIS CONTEXT. AREA AND MEASUREMENTS MAY CHANGE ON FINAL SURVEY.

TOTAL AREA : 55.1613 ha
COMPRISED IN : CT 91D/886 LTD

REGISTERED OWNERS : HAPU KOTARE LTD
PROPERTY ADDRESS : 1030 Clevedon – Kawakawa Road

MEMORANDUM OF EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
RIGHT OF WAY	(D)	LOT 2	LOT 1
RIGHT OF WAY	(F)	LOT 2	LOT 1
POWER & TELEPHONE	(G)	LOT 1	LOT 2

AREAS (A)–(C) ARE SUBJECT TO QUEEN ELIZABETH II NATIONAL TRUST

McINNES READ & LUCAS LTD
SURVEYORS & PLANNERS
21 EAST STREET, PAPAKURA. P.O. BOX 72559
Tel. 298–7288 Fax. 296–1350 Web. www.mrl.co.nz

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Sheet 1 of 2
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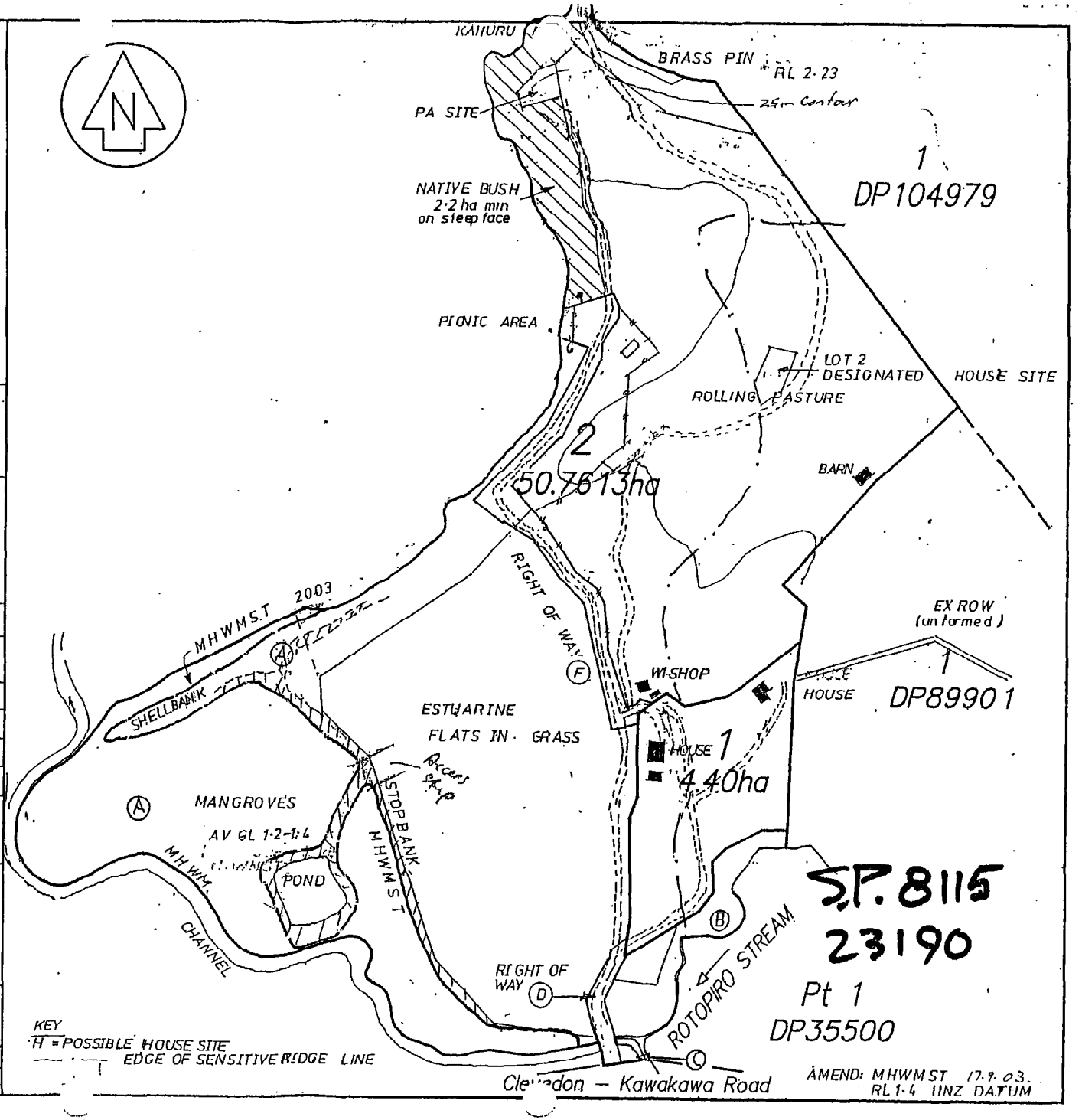


S.P. 8115
23190
Pt 1
DP35500

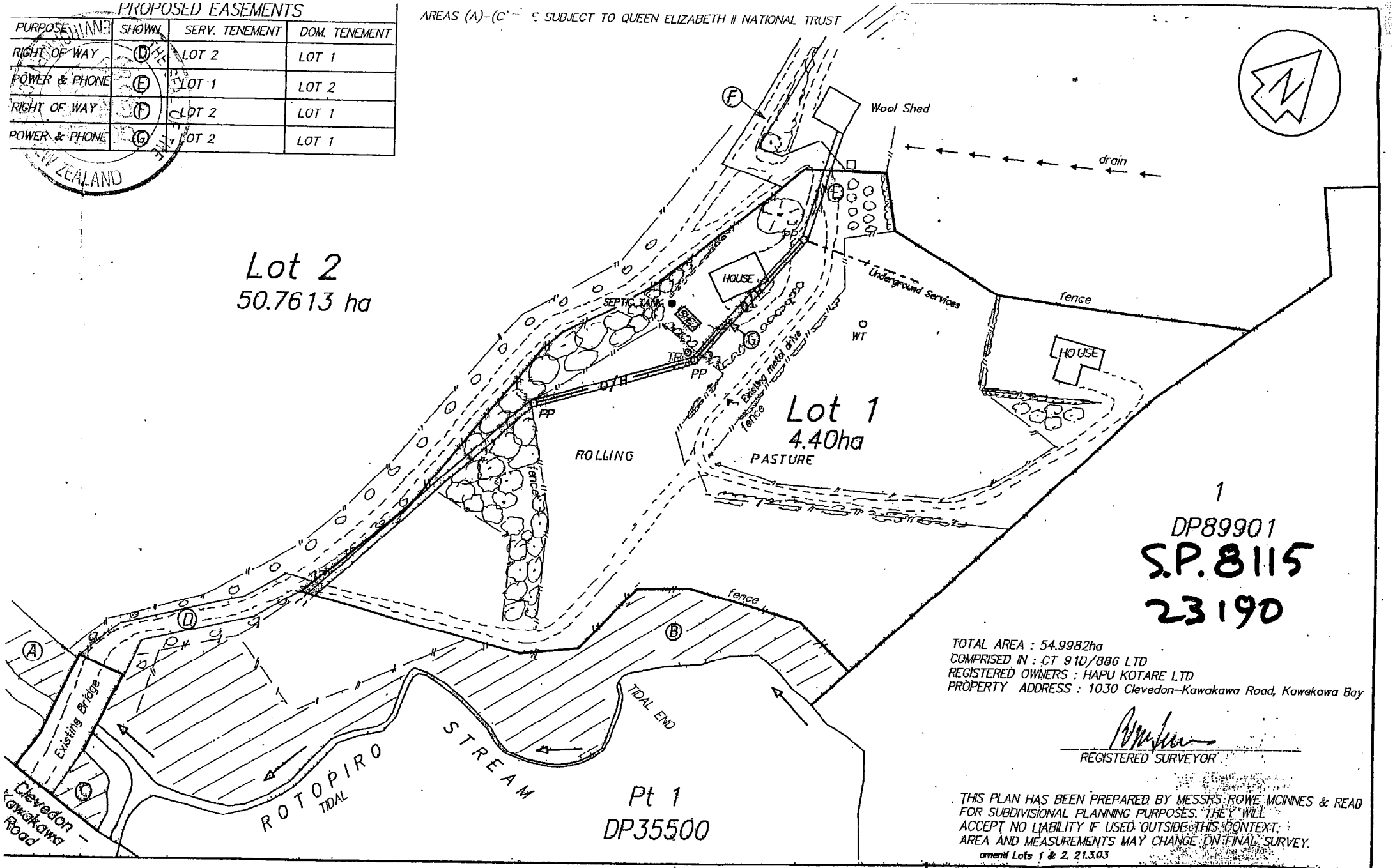
AMEND: MHWMST 17.9.03. RL 1·4 UNZ DATUM

Amended plan produced at hearing 17/3/2004

PROPOSED EASEMENTS

PURPOSE	SHOWN	SERV. TENEMENT	DOM. TENEMENT
RIGHT OF WAY	(D)	LOT 2	LOT 1
POWER & PHONE	(E)	LOT 1	LOT 2
RIGHT OF WAY	(F)	LOT 2	LOT 1
POWER & PHONE	(G)	LOT 2	LOT 1

AREAS (A)–(C) ARE SUBJECT TO QUEEN ELIZABETH II NATIONAL TRUST



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DP89901
S.P. 8115
23190

TOTAL AREA : 54.9982ha
COMPRISED IN : CT 91D/886 LTD
REGISTERED OWNERS : HAPU KOTARE LTD
PROPERTY ADDRESS : 1030 Clevedon–Kawakawa Road, Kawakawa Bay

REGISTERED SURVEYOR

THIS PLAN HAS BEEN PREPARED BY MESSRS ROWE McINNES & READ FOR SUBDIVISIONAL PLANNING PURPOSES. THEY WILL ACCEPT NO LIABILITY IF USED OUTSIDE THIS CONTEXT. AREA AND MEASUREMENTS MAY CHANGE ON FINAL SURVEY.
amend Lots 1 & 2. 21.3.03

PLAN OF PROPOSED SUBDIVISION

1030 CLEVEDON – KAWAKAWA ROAD

ROWE McINNES & READ
SURVEYORS & PLANNERS
21 EAST STREET, PAPAKURA. P.O. BOX 72559
Tel. 298–7288 Fax. 296–1350 Web. www.rmr.co.nz

SHEET	DRAWN	DATE	SCALES at A3	OF
2	C F W	17/02/03	1 : 1500	2

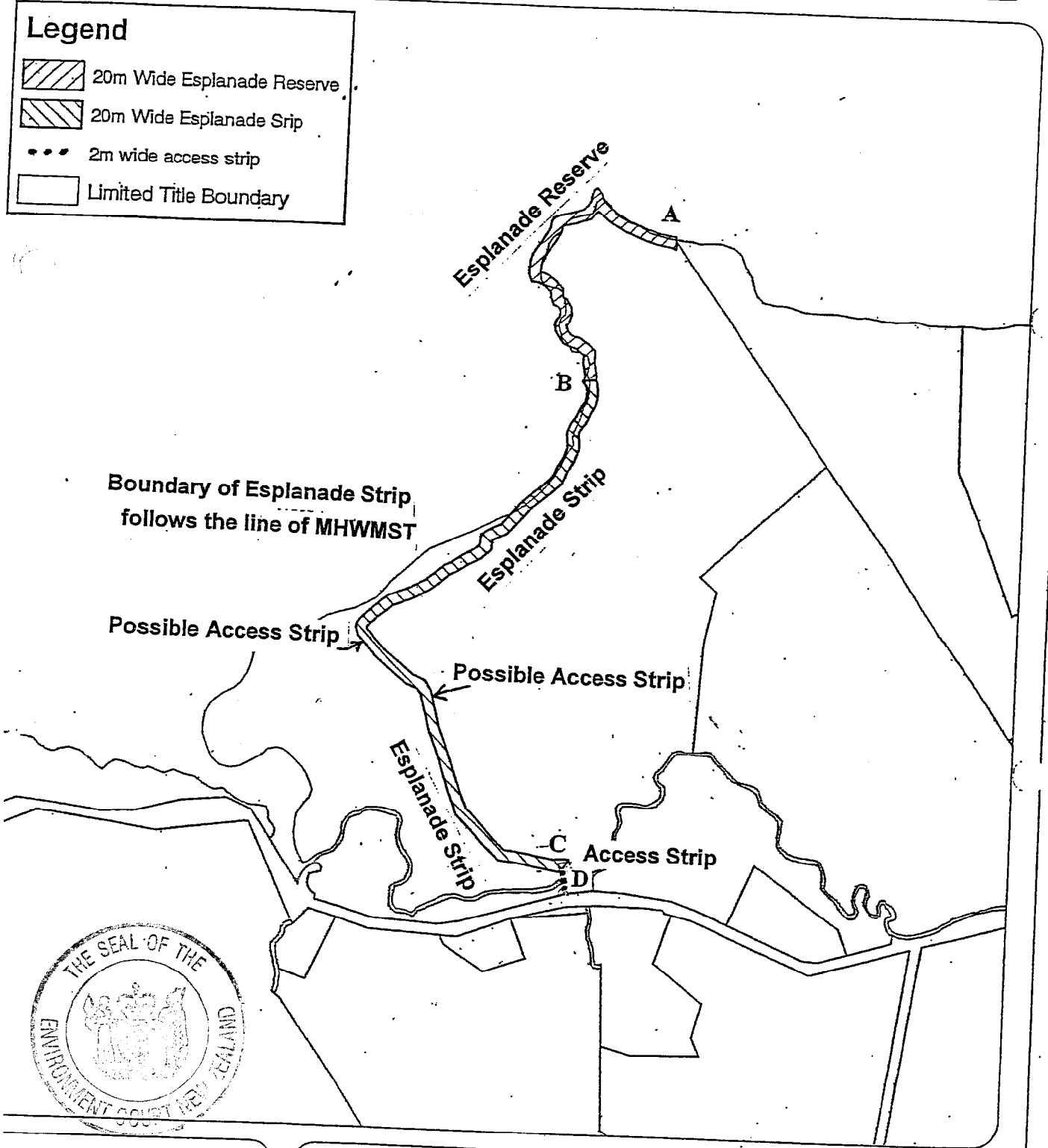
CHECKED
Ref 6ORAP

PROPOSED RESERVES PLAN

N

APU KOTARE LTD
RETROSPECTIVE CONSENT FOR A RELOCATED -
DWELLING AND SUBDIVISION CONSENT
FOR A RURAL RESIDENTIAL LOT
1030 CLEVEDON - KAWAKAWA RD

PLANNING MAP: 65
WARD: CLEVEDON



THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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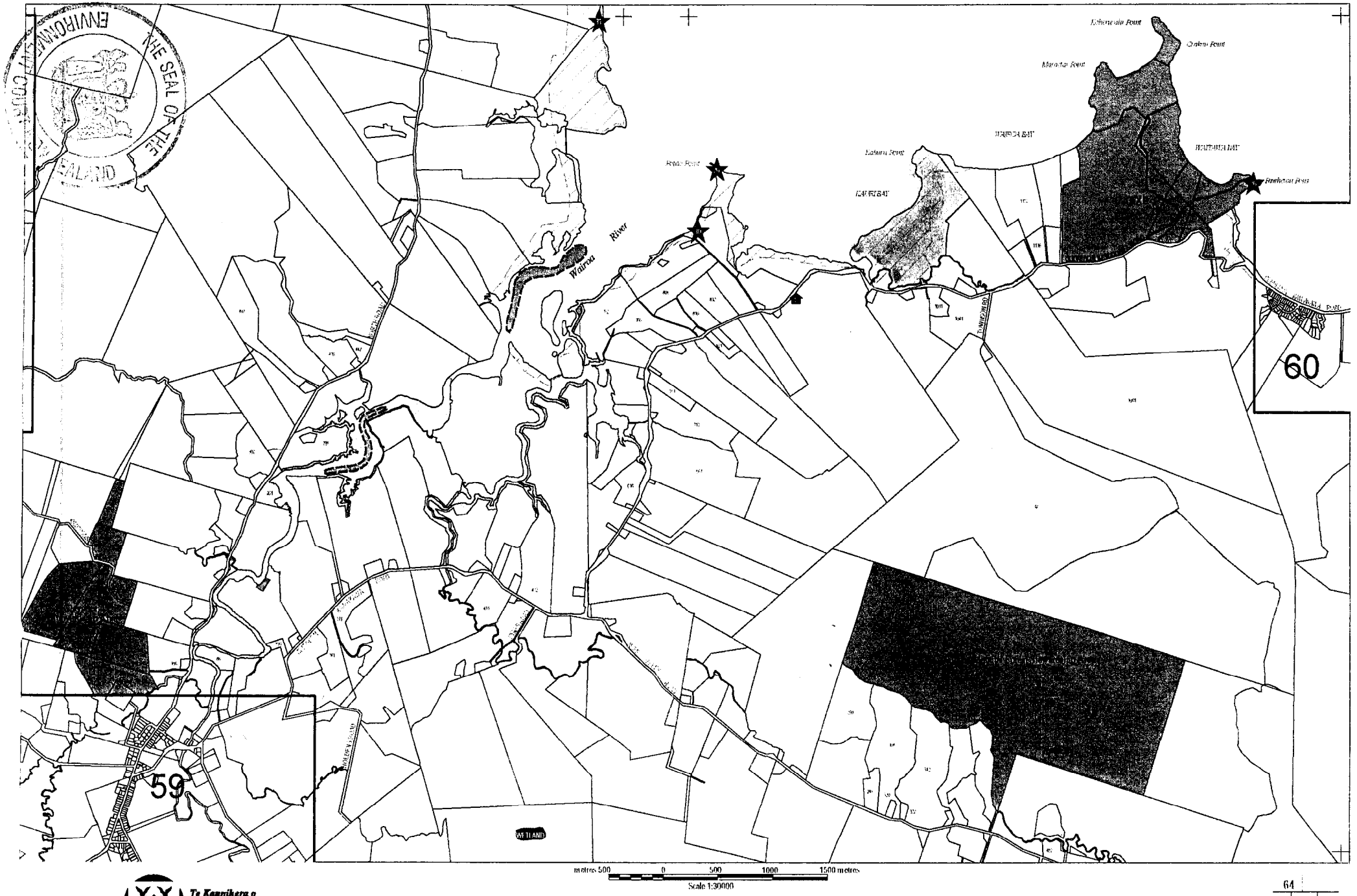
N DUTTON
16/2/2004

Te Kaunihera o
MANUKAU
City Council

SCALE 1:10,362
FILE File Ref.
PLAN NUMBER 23190
AMENDMENTS 23190

PID003045

APPENDIX 2



Te Kaunihera o MANUKAU City Council

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