

In the Matter of the Resource Management Act 1991 (the Act)

AND

Applications to Subdivide Land and Associated Works

By Onoke Heights Limited (OHL) at Kamo Whangarei

AND

Whangarei District Council (WDC) and Northland Regional Council (NRC)

Decision of Independent Commissioner Alan Withy

19 February 2024

Council References: WDC SL2100055 & NRC APP.043305.01.01

SUMMARY

For the reasons expounded below the Commissioner **grants consent to the applications** (under delegated authority in terms of Section 34A of the Act) on behalf of the Whangarei District Council and Northland Regional Council, subject to the attached conditions.

HEARING

The Hearing was held in the Whangarei Council Offices on 14th and 15th November 2023. Advocates and witnesses for the Applicant, Councils and Submitters were present and addressed the Hearing. The Commissioner thanks all for their helpful submissions and evidence.

An advisor from the District Council's Maori Outcomes Team sat with the Commissioner throughout Day One when Mana Whenua representatives made submissions and gave evidence, some of which was in te reo Maori. He provided helpful verbal summaries and where appropriate translations of addresses in te reo Maori.

A register of attendances and record of proceedings is available from Whangarei District Council on request. (Consent.Admin@wdc.govt.nz)

1) The proposals and their status under the RMA

- a) Mr **Alister Hartstone, an independent Planning Consultant and s42A Reporting Officer** (RO), summarised the proposals and their status as follows (recommending WDC refusal, but approval for the concurrent Application to the Northland Regional Council [NRC] for associated works.)¹:

Onoke Heights Limited have made application to Whangārei District Council for a residential subdivision and associated land use activities consisting of 93 residential lots with associated servicing, roading and reserve network. The subject site is located within the General Residential Zone and requires consent as a discretionary activity.

The application to the Northland Regional Council is for an earthworks consent covering all construction works associated with the subdivision development and a stormwater discharge consent. The application requires consideration under the proposed Regional Plan for Northland as a controlled activity.

The application was subject to joint public notification with Whangārei District Council as lead agency. A total of twenty-nine (29) submissions were received by both Councils. The majority of submissions received raise issues that span the jurisdiction of both Councils.

This planning report assesses the extent of potential adverse and positive effects that may arise from the proposal and considers the relevant planning provisions contained in various national, regional and district planning documents. Careful consideration has been given in particular to the Regional Policy Statement for Northland, proposed Regional Plan for Northland, and Whangārei District Plan Operative in Part 2022.

*Based on the suite of technical reports and evidence provided, **the recommendation on the application lodged with the Whangārei District Council is that it be declined.** That recommendation is based on the potential adverse effects arising on cultural values associated with the site.*

*The **recommendation on the application lodged with the Northland Regional Council is that it be approved.** That recommendation reflects the controlled activity status under the Regional Plan.*

- b) Ms **Melissa McGrath, an independent Planning Consultant engaged by the Applicant**, addressed the status issue and consequences in Evidence-in-Chief (EiC); and Evidence-in-Reply (EiR) as follows²:

Mr Hartstone verbally expressed his opinion during the hearing that the activity status of the application i.e., restricted discretionary activity vs discretionary activity, makes no difference to the assessment of the application with respect to cultural effects. I disagree with this statement.

¹ Alister Hartstone s42A Report,

² Melissa McGrath evidence in reply, Paragraphs 14 ff

c) She opined that the proposal should be considered as a Restricted Discretionary Activity and legal submissions from Ms Marianne Mackintosh on behalf of the Applicant supported this opinion. However, they also said consent was appropriate if considered in terms of s104B and s6(e) Part 2, if that was concluded to be necessary by the Commissioner.

d) Ms McGrath went on to say that ³:

The Act clearly establishes a difference in how applications must be determined according to activity status a discretionary activity must be determined under s 104B of the Act, which allows open assessment of all potential effects of a proposed activity, all relevant objectives and policies, and including an unlimited discretion to impose conditions [whereas] a restricted discretionary activity must be determined under s104C of the Act, which limits Council consideration only to the matters of discretion in the Operative District Plan

The only matter of discretion I consider relevant to cultural effects or historic heritage and to which Council is limited to its consideration and impositions of conditions are: The location of proposed allotment boundaries, building areas and access ways or rights-of-way so as to avoid sites of historic heritage including Sites of Significance to Māori. there is insufficient evidence to confirm that a “site” of historic heritage is located within the Site, noting that the matter does not include “areas of historic heritage”. Therefore, it is my opinion that this matter of discretion is irrelevant to the assessment of the Proposal.

e) She also said ⁴:

The Commissioner asked Mr Hartstone, as to whether or not s6(e) of the RMA applies to the proposal..... no assessment of Part 2 is required due to invalidity, incomplete coverage or uncertainty in the planning provision..... premised upon the Proposal being a restricted discretionary activity. Should the Commissioner accept the Council proposition that the Proposal is a discretionary activity under the Historic Heritage definition, then I consider that it would be appropriate to refer back to Part 2 because the Tangata Whenua and Sites of Significance to Māori Chapters have not yet been reviewed and would not be considered to be competently prepared. Regardless, whether recourse to Part 2 is considered appropriate by the Commissioner, this does not change my assessment

f) A joint-witness-statement was presented at the Hearing, that indicated the two planners agreed on all relevant matters except the following two:

i) Firstly, the status of the proposed activity – Mr Hartstone contending for Discretionary Activity status, and Ms McGrath for Restricted Discretionary Activity status.

ii) Secondly, the effects on “potential adverse effects arising on cultural values associated with the site” – Mr Hartstone recommended the Application to WDC **be declined** on that

³ Ibid

⁴ Ibid

basis, but Ms McGrath was of the view that the potential for such effects were of lesser significance and the Application could be approved subject to suitable conditions.

g) Having considered the above and other relevant submissions and evidence the Commissioner concludes if he determines the proposals to comprise only Restricted Discretionary Activities, consent is obligatory subject to conditions. However, the Commissioner takes seriously the position of Mr Hartstone as RO, which is supported by Mana Whenua assertions, together with advice from Ms Sarah Shaw (Counsel for Council) who advises consideration as a Discretionary Activity. Therefore, he approaches the proposals as a Discretionary Activity and includes reference to s6(e) in Part 2 of the Act. That approach may lead to either consent or refusal.

2) Approach and consideration

- a) The Commissioner has read and carefully considered the legal advice of Counsel for both the Applicant and for Council, and also the evidence of the planners for Council and Applicant. He concludes that it is understandable that the Applicant relied on the residential zoning that has pertained for some years, and that Restricted Discretionary Activity status would give Council authority only to apply conditions. However, it is equally understandable that Mana Whenua representatives consider the Environment Court Judgement of 1996 (ECJ)⁵ effectively prevented subdivision of the land for residential purposes.
- b) If the activities have “restricted activity” status the Commissioner’s discretion is limited to appropriate conditions. However, if the correct status is “discretionary” the Commissioner is required to determine consent or refusal. After careful consideration of the legal submissions and the matters described in the planners’ joint-witness-statement, the Commissioner takes a cautionary approach and considers the proposals as a Discretionary Activity in terms of s104B.
- c) Having determined the appropriate activity status, both legal counsel advised consideration in terms of s104 in the “normal way”. That section provides the guide for consideration of applications and reads:

..... the consent authority must, subject to Part 2 and section 77M, have regard to—
(a) any actual and potential effects on the environment of allowing the activity; and
(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
(b) any relevant provisions of..... [the applicable planning instruments]
(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

- b) Sub-sections (a), (ab) and (b) of Section 104 are relatively straightforward. However Sub-section (c) and Section 6(e) of Part 2 of the Act have exercised the mind of the Commissioner in depth. Consideration of these matters was primarily prompted by the powerful testimony

⁵ Environment Court A99/96, CDL Land New Zealand Ltd v Whangarei District Council

of Mana Whenua representatives; but also, the differing conclusions of the Applicant's planner (Ms McGrath) and the s42A Reporting Officer (Mr Hartstone) based on Mana Whenua cultural concerns.

- c) The Commissioner records that both planners have extensive experience in the district; occupied for several years senior positions within Council Staff; and have had considerable contact with tangata whenua representatives and issues.

3) Mana Whenua and Part 2 Issues

- a) Senior Kaumatua and Kuia appeared at the Hearing and argued for clear Wahi Tapu and other Maori significance within the Onoke area. The problem for the Commissioner is to what extent and in what ways that significance relates to all or parts of the proposal land, and how that affects the decision-making.
- b) The caselaw (Environment, High, Appeal and Supreme Court – helpfully referred to by legal counsel) indicates that Mana Whenua can (where evidentially convincing) have sole prerogative in establishing the existence of significance to Maori in any given instance. The Commissioner accepts the evidence clearly established that the Onoke area has considerable significance to Maori.
- c) That is a relevant matter in approaching decision-making but to what extent and in what ways that applies to the proposal land is more problematic.
- d) That significance must also be weighed against the fact the land is residentially zoned in the District Plan and there appears to have been some consultation with Mana Whenua representatives in the processes leading to that zoning. (A summary of relevant and significant events during the last 20+ years was provided as requested by the Commissioner at the Hearing and copied to the Applicant.)
- e) In the mid-1990s a private plan change application sought subdivision of the proposal land and that was declined by both Council and the Environment Court.⁶ It would be understandable if Mana Whenua representatives relied on that judgement⁷ as discouraging (if not preventing) future successful subdivision applications and consents in relation to the land. However, this is a new day with new proposals; and new circumstances pertain.
- f) It is noted that considerable residential and lifestyle subdivision has occurred in recent years surrounding the Hurupaki and Onoke cones, and also between them and Kamo. Some of that land could be construed to have similar or greater significance to Maori than the subject land. The significance of Onoke cone to Maori is undisputed given the caselaw and

⁶ Environment Court A99/96, CDL Land New Zealand Ltd v Whangarei District Council

⁷ Ibid

evidence. However, the Commissioner finds little relevant evidence particular to this land that might prevent subdivision for residential purposes.

- g) The evidence indicated the significance of Maori concerns focuses on the top of the cone and sites of particular significance to the north of this land. The only features identified within the Onoke Heights site were the stream and puriri trees, apart from general references to historic battles and associated activities such as treatment of casualties. The fact the land was apparently worked, lived on and voluntarily sold by a kaumatua in the late 19th century is also relevant.⁸
- h) The stream is proposed to be enhanced as part of the development and the Commissioner accepts the evidence that the situation will be physically improved rather than degraded. The Applicant would be wise to consult with Mana Whenua regarding what might be done to mitigate the effects of concern to them.
- i) The evidence suggested the Puriri trees are not old enough to have existed when the battles may have taken place on or near the land, and that they have no significant botanic, ecological nor historic importance.
- j) The legal framework gives the Commissioner jurisdiction to grant or refuse consent on the basis of the evidence from the planners, Mana Whenua and others. That consideration is guided by s104 and in this case reference to sub-section (c) and Part 2. Mr Hartstone found it unnecessary to refer to Part 2 to reach his conclusion the subdivision should be declined, but Ms McGrath supported consent with reference to Part 2 if necessary.
- k) The Commissioner concludes the evidence was very clear and specific in relation to the Onoke Cone but not persuasive enough to prevent subdivision of this lower land for residential subdivision and occupation. Having considered “other matters” under s104(c) and reviewed the decision-making by reference to Part 2 matters he concludes consents should be granted to allow development subject to suitable conditions.
- l) The conditions necessarily respect as far as possible the concerns relating to the stream and its surroundings where evidence indicated that most cultural concerns are focused. Ms McGrath indicated some of the proposed conditions could be ultra vires. If that is so the Commissioner recommends strongly that the Consent Holder accepts them as serious recommendations for consultation with Mana Whenua representatives.

4) Caselaw and procedural issues

- a) Ms Shaw legal advisor to Council advised that the proposal should be approached in terms of s104 ... “... in the usual way...”⁹. She also advised High Court Decisions from

⁸ Jonathon Carpenter archeological evidence,

⁹ Sarah Shaw legal submissions, Paragraph 32, Page 10

2020 and 2021 (cited in proceedings) ... “... have set a new benchmark for evaluation of cultural evidence, such that care is required in relying on earlier caselaw.”¹⁰ and thatoral evidence from tangata whenuashould be considered within the framework provided by the High Court.”¹¹

- b) She pointed to an important observation by the Court that ... “... consequences of identifying significant section 6 values on property rights and development outcomes anticipated in the zone may result in onerous restrictions on the owners of land and that the effects must be considered case by case where land contains such values.”¹²
- c) The Commissioner adopts this recommended approach as appropriate in the circumstances of this proposal. However, he finds on the evidence that given the residential zoning of the land and evidence of attempts to consult Mana Whenua representatives when that zoning was introduced, that it is persuasive for consent.
- d) The “potential adverse effects arising on cultural values associated with the site” (as Mr Hartstone accurately described them) were not sufficiently established by the evidence to negate rights inherent in the residential zoning. The conditions have been developed to address the concerns of Mana Whenua as far as practical in the circumstances.
- e) Ms Mackintosh for the Applicant raised several matters¹³ of concern to her, to which the Commissioner responds as follows:

- i. *Lack of an independent translation of the Te Reo oratory presented by Hāpu at the hearing, despite the assurance from Council officers at the hearing that this would be provided in accordance with the Council’s obligations.*

The Commissioner considers he has received sufficient documentation in support of the oral evidence at the Hearing to adequately consider its relevance and weight. He notes he was assisted in understanding te reo Maori evidence by an officer from Council’s Maori Outcomes Team.

- ii. *Lodgement of a further “statement” from Mr Duncan Scott regarding the onsite meeting on the 21st and an email from Mr Scott directly to the Commissioner dated 16 November 2023.*

The Commissioner’s suggestion that a Council Officer(s) meet with Mr Scott on-site regarding existing stormwater issues was apparently implemented. However, the statement referred to is not relevant to nor taken into consideration in this decision.

¹⁰ Ibid, Paragraph 20, Page 7

¹¹ Ibid, Paragraph 21, Page 8

¹² Ibid, Paragraph 25, Page 9

¹³ Marianne Macintosh Reply Submissions, Paragraph 4 (a) – (c), Page 2

- iii. *Lodgement of an email from a representative of Te Parawhau following adjournment of the hearing, without leave to do so and despite having the opportunity to appear at the hearing.*

The email referred to has not been considered in relation to this decision which is based on the submissions and evidence delivered at the Hearing.

5) Decision and Conditions

- a) Mr Hartstone (the s42A Reporting Officer) chose to not provide draft conditions. Ms McGrath (Planner for the Applicant) did offer a draft and the Commissioner directed that draft be used to develop a suite of conditions acceptable as far as possible to the Applicant and Council.
- b) Mr Hartstone after consultation with Council Officers developed a draft suite of proposed conditions for consideration by the Applicant based on the draft provided by Ms McGrath at the Hearing.
- c) That Council Officers' suite of proposed conditions was submitted to the Applicant which provided amendments in a "tracked" WORD document. That document was provided to the Commissioner who made his own further amendments.
- d) The Commissioner grants consent subject to those conditions developed as above.

Pursuant to s104, s104B, s104C and s108 of the Resource Management Act, and under delegated authority from the District and Regional Councils, consent is hereby granted to the applications described in paragraph 1(a) above (to subdivide the land and carry out associated works including earthworks and stormwater discharges), and as lodged with the District Council and Regional Councils, and subject to the conditions below.



Alan Withy
Independent Commissioner
Dated: 19 February 2024