Before the New Plymouth District Council

Independent Hearings Commissioner

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Subdivision Consent Application SUB22/48271 and LUC24/48416– proposed two Lot Rural Subdivision at 373 Maude Road

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CLOSING SUBMISSIONS ON BEHALF OF GARRY AND CATHERINE BROADMORE (APPLICANTS)

Dated: 20 May 2024

Counsel:

SARAH ONGLEY
NEW PLYMOUTH 4620
Phone: (06) 7699400
Fax: (06) 7699425
PO Box 8213
sarah@ongley.co.nz

OUTLINE OF LEGAL SUBMISSIONS

INTRODUCTION

1. These submissions summarise the oral closing submissions delivered on 13 May 2024 and reply on the matter of plan integrity/precedent effects.

Engineering/Building platform

2. Mr Murray stated he had geotechnical expertise. That may be so, but Mr Murray cannot claim to be an expert in these proceedings under the Expert's Code of Conduct, Environment Court's Practice Note 2023. A geotechnical report has been prepared on behalf the Applicants by Jeck Icaro of OneElevenSix Engineers, a suitably qualified and experienced expert. Condition 19 which require a geotechnical completion report, refers to this engineering Report.

Reverse sensitivity

3. Refer Opening submissions [29] – [30] and:

   a) The Murrays appeared to state they were concerned about sub-leasing part of the new title to dairying. Ironically, this indicates the creation of the dwelling in which the Murray's reside has created reverse sensitivity issues for dairying (a rural activity anticipated in the zone).

   b) Spraying should not be the subject of a separate consent condition because it is governed by separate regulatory requirements:
      i) *Blueskin Bay Forest Heights Ltd v Dunedin City Council* [2010] NZEnvC 177 at [34] *"Spray drift is an issue of general legal liability. For the reasons already discussed, we must assume that Blueskin Farm and its contractors will comply with their obligations in that regard."*

      ii) *Avatar Glen Ltd v New Plymouth District Council* [2016] NZEnvC78 and [2016] NZEnvC 126 – this case contained an 'opposite' fact scenario to the present. An existing activity (a tamarillo orchard) conducted spraying of agrichemicals. A new activity (a resthome) was proposed that could have created reverse sensitivity effects upon the orchard. In its interim decision, the Court noted that spray drift was managed with

relevant planning and regulatory controls (at [100]) but sought further information. In its final decision, the Court after considering the required notification regime under existing documents (including NZ Standards and Taranaki Regional Air Quality Plan) noted that it was "*minded to think that regime might suffice*" (at [2]). The owners of the tamarillo orchard did not offer any augmented regime of notification to the resthome for their spraying, such as further notifications (because they sought decline of consent for the resthome). The Court accepted submissions on behalf of the resthome applicant that a notification regime based on existing obligations would be adequate (at [8] – [9]).

c) *Blueskin Bay Forest Heights Ltd v Dunedin City Council* [2010] NZEnvC 177 at [35]: *"We accept the possibility that the secondary effect of reverse sensitivity may arise. But we think there does need to be a measure of robust realism about this. Those who might come to this area to live have to expect some rural noise, and just have to accept that as a fact of life, or not come at all."*

d) In this case, spraying is a primary effect, not a secondary effect. It is also an existing effect and is not increased by the change in land use. This was clearly stated in the s42A Report.[1]

e) Taranaki Regional Air Quality Plan at Rule 56 - requires verbal or written notice to occupied dwelling houses and sensitive areas within 30 m of the area to be sprayed (ground application), either as a general notice before the beginning of a particular spray season or not less than 2 hours and not more than 4 weeks prior to spraying.

f) Mr Garry Broadmore rejects the Murray's allegation that there was spraying on the proposed subdivision property in the past two weeks. There was spraying conducted on the Broadmore Farms property, which is well in excess of 100 metres from the Murray boundary.

The Broadmores state they continue to provide suitable notice of any spraying or fertiliser activity, all in accordance with the Regional Air Quality Plan.

[1] At [73] *"… without an increase in pesticide usage. I do not foresee any potential adverse effects on the business operating at 335 Maude Road resulting from the proposal that are more than that already existing in this existing rural environment".*

g) In summary the Murrays have been entirely misguided in raising reverse sensitivity/spray drift here.

Other

4. The Murray's stated they supported the evidence of Mr Bain and Mr Brophy, and respected the professional approach of each consultant. They stated they wanted their business to be recognised as such, not just a shed (it holds a Commercial Kitchen licence). It is noted the Murray's Blue Petal business has been recognised as a business in the opening submissions and in evidence of Mr Bain and Mr Brophy.

Precedent effects/plan integrity

5. The Court of Appeal in *Dye v Auckland Regional Council* [2002] 1 NZLR 337 said that precedent effects of applications can be considered when considering objectives and policies and under s104(1)(c). "Cumulative" effects differ from precedent effects (precedent effects relate to future resource consent applications). Taking precedent effects into account *"the consent authority has no mandatory obligation to conduct an area-wide investigation involving a consideration of what others may seek to do in the future in unspecified places and unspecified ways in reliance on the granting of the application before it".*[2] That case concerned a non-complying activity where the proposal was contrary (in the sense of "repugnant" to) the objectives and policies of the proposed plan.[3]

6. Precedent effects and effects on plan integrity are a matter of weighting: a decision-maker may come to a conclusion that actual effects on the environment (if minor) are outweighed by consideration of the relevant objectives, policies, rules and other provisions of a plan. This occurred in *Olliver v Marlborough District Council* CIV-2004-485-1671 (HC), a situation of a non-complying activity subdivision where the objectives and policies were intended to avoid *ad hoc* development in a particular area until planned communal infrastructure occurred.

[2] At [42], [49].
[3] At [21], [34].

7. The same reasoning has been applied to discretionary activities (as well as non-complying activities).[4]

8. Here, the overall status is discretionary due to s88A. Had the application been lodged after notification of the PDP, it would be non-complying. It is acknowledged questions of plan integrity and precedence arise, but:

   - The issue of precedent effect is based upon the principle that like cases should be treated alike: as stated by Ms Johnston granting the application would not risk creating a precedent due to the how this subdivision is set in the landscape, together with layout, specific mitigations.

   - The planning evidence before you (on the PDP) is that (a) the proposal is consistent with plan policy[5] (Johnston); and (b) after reconciling the objectives and policies of the PDP the proposal is *not directly contrary to* the objectives and policies[6] (Brophy). If this planning evidence is accepted, no precedent effect can be created.

   - The weighting of precedent effects/plan integrity must also be undertaken in light of the weighting to be given to the PDP itself. This matter was dealt with in opening submissions, noting the PDP provisions are under appeal.

Conditions

9. Ms Johnston's proposed (draft) cancellation of the amalgamation condition and existing consent-notices have been reviewed by Mr Brophy and project surveyor Mr Sole, who are both comfortable with the wording as proposed.

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[4] See *Rawlings v Timaru District Council* [2013] NZEnvC 67 where "*the proposed subdivision is in conflict with Objectives and Policies of the District Plan, follows a pattern of other similar subdivisions from which it (at least impliedly) seeks support and its approval may provide support for the further application coming along behind it*." (at [77]). See also *Stirling v Christchurch City Council* [2010] NZEnvC 401 being concerned with strong directive centres-based policy: "*As will be apparent from our conclusions in relation to the assessment matters, we are concerned that a grant of consent would create a precedent from which the City Council would, in our view, be hard pressed to distinguish future applications for other large format retail seeking to establish along Moorhouse Avenue in the B3 zone*" (140). Note there is also some conflicting caselaw states that where an activity is given discretionary status issuing a consent could not harm a plan's integrity.

[5] S42A Report at [120].

[6] Brophy at [5.77].

10. These submissions are accompanied by:

- copy of the Bland & Jackson appeal on the PDP; and
- copies of main authorities cited that have not already been provided.[7]

DATED at New Plymouth this 20th day of May 2024

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Sarah Ongley

Counsel for Mr and Mrs Broadmore

[7] Counsel is happy to provide additional case authorities electronically, if requested.