IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2004-485-1671

BETWEEN	WALTER JAMES OLLIVER AND PATRICIA OLLIVER Appellant
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing: 21 June 2005

Appearances: R D Crosby for Appellants
B P Dwyer for Respondent

Judgment: 8 July 2005

In accordance with r540(4) I direct the Registrar to endorse this judgment with the delivery time of 3.45pm on the 8th day of July 2005.

RESERVED JUDGMENT OF GENDALL J

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[1] Walter James Olliver and Patricia Olliver ("the appellants") reside on a property at Rarangi, a coastal community to the North West of Blenheim. They wished to subdivide their property. Resource consent was necessary and this was declined by the Marlborough District Council. The Ollivers appealed to the Environment Court under s120 of the Resource Management Act 1991. In a reserved decision delivered on 2 July 2004 that Court dismissed the appeal, upholding the Council's decision.

[2] The appellants now appeal to the High Court pursuant to s299 of the Act which enables an appeal to be brought on a point of law only. In their notice of appeal the appellants set out what are said to be 19 separate questions or errors of

law. They have become refined in counsel's submissions and I return to them in paras [13] – [16].

Background

[3] Matters of fact, and findings of fact made by the Court, are largely uncontested. The appellants' property comprises 1.41 hectares and the proposed subdivision was in an area zoned Deferred Township Residential Zone ("DTRZ"). The site contains a two-storey home occupied by the appellants and a small one-bedroom "granny flat" situated separately on the property. This was authorised by a Council resource consent provided that a bond was entered into by the appellants allowing it to be used only by family members, and that it be removed if the appellants cease to be registered proprietors of the land. Both the house and the granny flat have separate effluent disposal fields with a common water supply from a well on the property. The appellants' proposal was to subdivide the property into two lots, one of which would contain the granny flat and associated land, and one would contain the homestead. Legal and physical access was to be provided from the roadway by an existing sealed driveway on the ground to the appropriate rights of way. Water was to remain shared from the common well with a water easement to be created. The appellants had proposed a condition requiring an improvement to the effluent disposal system.

[4] The Court referred to the agreement between the parties which it said allowed it to concentrate on aspects fundamental to the appeal. Those points were

> "• there is very little dispute between council and the appellants as to factual matters;
>
> • it is accepted that the Olliver property is in the DTRZ;
>
> • it is accepted that the Proposed Plan is the relevant plan document as its provisions relating to Rarangi in the deferred zone are not subject to reference;
>
> • it is accepted that the appellants may satisfactorily dispose of any effluent generated by any new dwellinghouse (provided the effluent disposal system is established in accordance with the recommendations of the appellants' engineer)."

Environment Court decision

[5] The Court observed that there appeared to be some confusion between the status of the application to subdivide and the status of any residential developments which may occur after subdivision. That was because the subdivision application was "non-complying" in terms of the Proposed Plan, and the appellants' counsel, whilst accepting that the actual subdivision to allow residential activity was non-complying the residential activity had a discretionary activity status. The Court however said that, from its understanding of the Proposed Plan, it could not agree that the subdivision activity in the DTRZ could ever be discretionary, and without reticulated water supply connected to all the existing houses in the DTRZ, any application for subdivision in that zone was non-complying.

[6] The Court set out the appellants' contentions which essentially were that the effects of granting consent to the subdivision would be minor; that there would be no significant precedent created given that the Ollivers' property was the only large property in the DTRZ with one house on it, it already had two dwellings, was larger than any other DTRZ sections (other than a nearby golf course); and that the stance of the Council that subdivision in the DTRZ was prohibited unless a reticulated water supply was provided, was incorrect. The Council's position was that although water and waste water disposal could be achieved in isolation on this site, that needed to be weighed against the consideration of the objectives for the wider DTRZ, namely that the undeveloped area of the Rarangi Township had to grow in a way which properly managed and protected natural resources so as to ensure the social and economic wellbeing of the existing and future community of Rarangi. To that extent the application signalled that development might take place with drinking water protection being affected by proper septic tanks being installed rather than the establishment of a reticulated water system, but such an approach was, it was said, directly opposed to the objectives and policies of the Proposed Plan.

[7] After setting out the relevant statutory framework the Environment Court noted that the adverse effects of the proposal, by agreement, were regarded as being minor and then proceeded to assess the objectives and policies of the Proposed Plan. In having regard to such objectives, policies and rules in terms of s104(1)(d) the

Environment Court outlined certain objectives and policies for urban and rural residential environments, as contained in the Proposed Plan. The Court concluded that those provisions indicated that small sized residential townships development be controlled, and for Rarangi in particular, that water supply and sewage disposal was to be carefully managed. It refers to the careful management of Rarangi as being explained in the Proposed Plan as:

> "An additional Deferred Township Residential Zone has been applied to Rarangi in recognition that limited further residential development will be considered applicable once a permanent potable water supply has been installed." [11.2.3]

[8] The Court said that the Plan recognised that further residential development on a limited scale would take place but only once a permanent drinking water supply is installed. The Court noted a further provision in the Plan (Methods of Implementation Rules) which stated in part that Plan rules required all subdivisions and residential development in the Township Residential and Deferred Township Residential to make satisfactory provision for on-site water supply and effluent and storm water disposal (where a community sewage disposal system is not available).

[9] The Court recorded the reasons for the establishment of the DTRZ which were to be found in the Council decision, the subject of the appeal to that Court. The decision refers to the objectives and policies and the Proposed Plans providing "an effective bar" to further rural residential developments in the area until a potable water supply was installed and connected so that the issue was managed properly. The decision goes on to state:

> "[53] The appellants say this amounts to a prohibition of subdivision and development and is not intended by the Proposed Plan. We do not agree. It provides a defined starting date for development when a developer steps up who is prepared to provide a reticulated water supply connected to the new houses.
>
> [54] We remind [sic, ourselves] that s105(2A)(b) requires that a consent authority *must not* grant a resource consent for a non-complying activity unless it is satisfied that the activity (in this case the subdivision) will not be contrary to the objectives and policies of the Proposed Plan. If we were to approve this proposal, it would be contrary to (in the sense of repugnance) [sic] to the test formulated in *New Zealand Rail v Marlborough District Council* [1992] 2 NZRMA 449 for a clearly stated set of objectives and policies."

The Court later emphasised that it was the subset provision component in its non-complying status that initially controlled any associated later development such development of a site in the DTRZ being discretionary activity.

[10] The Court then analysed the evidence of the strategic planner and consultant engineers on matters such as ground water studies and the desirability or otherwise of piecemeal development prior to the provision of a reticulated potable water supply. It said:

> "[69] We agree with the council that reticulation is a necessary infrastructure to have in place before the deferred status is lifted from the DTRZ, and the Proposed Plan's objectives and policies reflect this. The way forward the appellants suggest is not efficient either for the community or the council."

[11] It then dealt with the appellants' arguments that the proposal would not provide any precedent effect because of the unique physical features of the property which does not exist on any other property in the DTRZ. In the end the Tribunal turned to consider Part II matters (of the Act) and in its decision it said in paras [78] – [81]:

> "[78] It is clear based from the provisions we have quoted and other supporting provisions that the Proposed Plan:
>
> - anticipates residential growth at Rarangi;
> - recognises the vulnerability of the water supply in terms of contamination from soakage fields;
> - in its objectives and policies it is absolutely clear/explicit about the timing of any future residential development at Rarangi;
> - in its rules make subdivision without reticulation a non-complying activity.
>
> [79] This case is about the sustainable management of Rarangi's natural and physical resources. We acknowledge that deferment of part of the residential zone at Rarangi has been done in order to ensure that the future development of this community is sustainable. Whilst the Council through its witness…, does not dispute the Ollivers' treatment system, the Council in this very sensitive area identifies the difficulties it has had with the maintenance and monitoring of on-site waste water management systems.
>
> [80] The ongoing performance of any system relies upon the appropriate operation and maintenance….Mr Kennedy is concerned that approval of the Ollivers' application will send the wrong signal to those others who may

> wish to develop in the area. He states it threatens the integrated management of the resource.
>
> [81] We conclude that there is potential for further subdivision applications, and were we to grant this application the clear message would be that '*ad hoc*' disposal treatments were acceptable in the DTRZ. Further subdivision and associated residential development in the DTRZ require community infrastructure or, in the alternative, a plan change to allow community input into any other options."

[12] The Court concluded at para [82]:

> "[82] We see the intention of the planning provisions to avoid ad hoc solutions and to advance residential development at Rarangi in an integrated manner, allowing for planned communal infrastructure."

Submissions on this appeal

[13] Mr Crosby's written submissions span 23 pages. I mean no disrespect to him if they are not recorded in their entirety but he said the nub of the errors of law were as follows. He argued that the Court erred because, having determined that no adverse effects on the environment would arise from the proposal:

(1) It inaccurately or wrongly, in terms of s104(1), assessed the rules, policies and provisions of the Proposed Plan;

(2) It was flawed in its conclusion as to the precedent effect, and any undermining of the integrity of the Plan, this being a conclusion that was not realistic when measured against the facts of this case and the Proposed Plan provisions;

(3) As an inter-related submission, the Court erred in law in elevating the sanctity of the Plan provisions, so as to overlook the opening requirement of s104(1) namely the words "subject to Part II".

[14] In a broad way counsel submitted that any concern of the Court that future development might send "the wrong signal" was flawed because this proposed subdivision would not, it is said, lead to a potential development that posed any risk in terms of effluent treatment. Counsel submitted that the Environment Court, in making findings of fact and recognising that no adverse effects from the environment

would arise, erred in its consideration of Plan provisions. He submitted that errors flowed from the crucial finding, fundamental to the Court's decision set out in paras [11] and [12], above. The submission was that the Environment Court took the view that the grant of consent would undermine the integrity of the Proposed Plan but given that there was a finding that there would only be minor effects, enabling the application to pass the threshold test, it was not possible as a matter of law to say that the integrity of the Plan could be undermined by such minor effects.

[15] Counsel emphasised that certain circumstances or facts made, in his view, the case unusual as the property was different to others in the DTRZ and that the Environment Court overlooked the fact that any perceived risk of precedent effect Plan objectives came from "development" and not subdivision. He submitted that the Court overlooked or misapplied the proper approach in interpreting s104 and its reference to Part II. To decline consent was placing the District Plan objectives and policies and the "integrity" of the Plan, he said, in "a position that is above the law and the purposes and principles of the Act itself in Part II". The essence of that submission was that it was not correct in law for the integrity of the Plan, on its own, to be considered to be a reason for declining consent when the grant of that consent would cause either minor or no adverse effects to the environment. He further submitted that the decision overlooked the fact that the discretionary activity rules contained in the Proposed Plan were a crucial part of the Plan and the Court did not give to those discretionary activity rules the weight or emphasis that was required. That is, counsel submitted that the Court placed undue weight on certain parts of the Plan and not others, and (thereby counsel submitted) that the Court misdirected itself when referring to s105(2A)(b) in para [54] of its decision, (quoted in para [9] above). Counsel submitted that consideration of this provision was clearly wrong given that the application had already passed through the threshold gateway in terms of s105(2A)(a) as to the "minor adverse effects". It was argued that the Court misinterpreted the relevance of the existence of the second dwelling.

[16] Finally, counsel submitted that the Court failed to apply the relevant objectives and policies, referring to a provision in the Proposed Plan which provides:

> "The Rarangi community has an older settled area that has historically taken water from shallow wells. This water source is very susceptible to the risk

> of contamination and development will be permitted when this aspect is identified and provided for."

It was counsel's submission that such a provision does not require a community supply to be the only solution.

Submissions of counsel for the respondent

[17] Equally thorough as Mr Crosby, Mr Dwyer's submissions encompassed 26 pages or 60 paragraphs and I do not propose to set them out in detail. He emphasised that the Court's decision was that there should be no further development in the DTRZ until either a reticulated sewage scheme or a reticulated water scheme was established, and that at the heart of the decision to decline subdivision application was a rejection of the appellants' proposal to subdivide their property before the establishment of the reticulated water supply system. He said that the decision was based upon the proposal being contrary to the clear objectives and proposals of the Proposed Plan. It was his case that the appellants' arguments did not identify errors of law on the part of the Court, but were attempts to challenge matters of fact and weight given by the Court to the clearly stated objectives and policies of the Proposed Plan as against the immediate physical effects of the appellants' proposal.

[18] Mr Dwyer referred to certain provisions in the objectives and policies of the Proposed Plan, contending that as they relate to Rarangi, they spread across both urban environments and rural environments. But the provisions are absolutely clear and provided a blue print for the development of the DTRZ at Rarangi – that is, development could take place in conjunction with the establishment of a reticulated water supply rather than on an individual or ad hoc basis.

[19] It was said that the Court's obligation under s104 was to have regard to the various identified criteria and it had done so and despite the absence of immediate environmental effects it still had to have regard to the proposal against the objectives or policies in the Plan. He said that was a task that the Court was uniquely able to undertake. He emphasised that the Court heard evidence as to the desirability of having a co-ordinated rather than piecemeal approach to the provision of water. The

reliance placed by the appellants on the argument that the property was different to other properties in the DTRZ was, counsel submitted, a matter acknowledged by the Court in its decision, and did not concern a question of law. Whilst considerable emphasis was placed by the appellants on the distinction between "development" and "subdivision" Mr Dwyer submitted that the true legal position is that in considering the effects of a subdivision it is appropriate to have regard to the development which will follow as a consequence of such subdivision being submitted. Counsel submitted that to refuse planning consent, where there are only minor or adverse effects on environment, would place the Plan objectives, policies and integrity of a District Plan in a position above the law and the principles and purposes of the Act itself in Part II. This argument was put to this Court in ***Calapashi Holdings Ltd v Marlborough District Council*** (HC Blenheim, CIV 2004-485-1419, 22 March 2005, Ellen France J). In that case, the Court clearly considered that Part II and the deferment of the residential zoning arose in order to ensure sustainability of future development of the community. That is, management of the natural resources require that future subdivision and development take place in the context of the availability of reticulated water supply as contemplated by the Proposed Plan.

[20] Counsel submitted that the Proposed Plan simply identified a defined starting date for development, namely when the water reticulated supply water is available as the Environment Court observed.

[21] Where the Court referred to objectives and policies in the rural environment sections of the Proposed Plan taking precedence over the general list of objectives and policies in the urban environment section it did not err in law. That is because although the term "precedence" suggests there was some conflict or clash between the two, in fact that was not the case, they being entirely consistent. Further residential development in Rarangi would be considered appropriate once a permanent potable water supply had been installed. Counsel submits the comment simply reflects the rule or concept that the specific predominates over the general. Counsel concluded that the Environment Court decision, covering 21 pages of careful reasoning, did not disclose any error of law and that in reality the appeal constituted an attack on the findings of fact, and weight given to considerations by

the Court. It is said the heart of the Court's judgment was that the appellants' proposal was contrary (and indeed said to be repugnant) to the objectives and policies of the Proposed Plan relating to subdivision and development in the DTRZ zone at Rarangi.

Appeal principles

[22] Because, pursuant to s299, appeals to this Court are limited to points of law the principles developed from the cases, and summarised by Potter J in ***Nicholls v District Council of Papakura*** [1998] NZRMA 233 are to be kept in mind. These are:

> "(a) The High Court will not concern itself with the merits of the case under the guise of a question of law; *Sean Investments v Mackellar* (1981) 38 ALR 363.
>
> (b) The appellate Court's task is to decide whether the Tribunal has acted within its powers; *Hunt v Auckland City Council* [1996] NZRMA 49.
>
> (c) The question of weight to be given to the assessment of relevant considerations is for the Environment Court [Planning Tribunal] alone, and not for reconsideration by the appellate Court as a point of law; *Hunt* (supra), *Moriarty v North Shore City Council* [1994] NZRMA 433.
>
> (d) Any error of law must materially affect the result of the Environment Court's [Planning Tribunal's] decision before the appellate Court will grant relief; *Countdown Properties* (supra); *BP Oil NZ Limited v Waitakere City Council* [1996] NZRMA 67.
>
> (e) To succeed, an appellant must identify a question of law arising out of the Environment Courts [Planning Tribunal's] determination and then demonstrate that that question of law has been erroneously decided by the Environment Court [Planning Tribunal]; *Smith v Takapuna City Council* (1988) 13 NZTPA 156.
>
> (f) On an appeal under s299 it is not for the High Court to say whether the Environment Court [Planning Tribunal] was right or wrong in its conclusion but whether it used the correct test and all proper matters were taken into account; *West Coast Regional Abattoir Co Ltd v Westland County Council* (1983) 9 NZTPA 289."

Statutory provisions

[23] Although s104 of the Act was amended on 1 August 2003 this application was to be determined under the old s104 which provides:

> "**Matters to be considered**
>
> (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –
>
> (a) Any actual and potential effects on the environment of allowing the activity; and
>
> (b) Any relevant regulations; and
>
> (c) Any relevant national policy statement, … regional policy statement, and proposed regional policy statement; and
>
> (d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and
>
> (e) ….
>
> (f) ….
>
> (g) ….
>
> (h) ….
>
> (i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application."

[24] The section which has come to be known as the "gateway" provision to applications for consent to a non-complying activity is s105(2A), which provides:

> "Notwithstanding any decision made under section 94(2)(a) a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that –
>
> (a) The adverse effects on the environment (other than any effect to which section 104(6) applies) will be minor; or
>
> (b) The application is for an activity which will not be contrary to the objectives and policies of –
>
> (i) Where there is only a relevant plan, the relevant plan; or
>
> (ii) Where there is only a relevant proposed plan, the relevant proposed plan; or

(iii) Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan."

[25] Part II of the Act describes its purpose and principles. Section 5 reads:

"**5 Purpose**

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

[26] Section 7(b) provides:

"**OTHER MATTERS** –

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

(a) ….

(aa) ….

(b) The efficient use and development of natural and physical resources:

(c) …."

PLAN PROVISIONS

[27] There are many references in the Proposed Plan to the objectives and policies relevant to Rarangi and it is not necessary to set them all out as it is apparent in the judgment of the Environment Court that it gave consideration to a number of those policies, rules and objectives. I record some of those references.

“**URBAN ENVIRONMENT**

….

Chapter 11

….This Plan aims to make all subdivisions consistent

Objective 5	The development of residential areas at a rate which ensures the maintenance and enhancement of community health standards.
Policy 5.1	Ensure that the unconfined aquifer systems are not compromised by the cumulative effects of sewage effluent discharge (particularly from septic tanks) and other waste disposal to ground.

….

Policy 5.4	Ensure that residential development in non reticulated townships and settlements is within the capacity for sustainable on-site disposal.

[Commentary]

The Plan seeks to ensure that residential developments are served with potable water supplies, and waste collection, treatment and disposal systems which do not contaminate the environment or compromise community health.

Blenheim is fully serviced with water supply and a reticulated sewage collection and treatment system. Therefore all new residential development within or as an extension of the Blenheim area will be required to connect to these systems in the interests of maintaining community health ….

Other townships may also be facing difficulties with the disposal of sewage on-site. However, given the small size of the townships, sewage reticulation may never be economically viable. For example, because Grovetown has high water table levels, groundwater contamination is possible if development were to continue uncontrolled.

Water supply and sewage disposal in Rarangi requires careful management to ensure that sewage contamination and saltwater intrusion does not occur.”

11.2.3

"**Methods of Implementation**

Residential areas outside of Blenheim are zoned Township Residential. This zone allows for the special demands of small town or settlement residential areas. For example the requirements created by the need for onsite sewage disposal. The Township Residential Zone has been applied to the residential areas at Renwick, Seddon, Ward, Spring Creek, Grovetown, Tuamarina, Rarangi and Wairau Valley.

….

An additional Deferred Township Residential Zone has been applied to Rarangi in recognition that limited further residential development will be considered applicable once a permanent potable water supply has been installed."

"Residential development will largely be confined to the identified residential zones in the established settlements. This will ensure a compact urban form, addressing energy efficiency."

[28] Chapter 12 deals with rural areas:

"**RURAL ENVIRONMENTS**

12.2.14 **Safeguarding water resources**

….

The Rarangi Community has an older settled area that has historically taken water from shallow wells. This water source is very susceptible to the risk of contamination, and development will be permitted where this aspect is identified and provided for.

….

….

Objective 3 To maintain or enhance the life supporting capacity of soils, and the quality of surface and groundwater.

….

Policy 3.2 To avoid, remedy or mitigate the adverse effects of discharges on soil and water quality. The Deferred Township Residential Zone at Rarangi will only develop when a permanent potable water supply has been installed and service connection made to all properties in both the Deferred Township Residential Zone and the Township Residential Zone."

Part 12.5

> "Policy 1.4 Ensure that rural residential developments make adequate provision for sewage and stormwater disposal. The Deferred Township Residential Zone at Rarangi will only develop when a permanent potable water supply has been installed and service connection made to all properties in both the Deferred Township Residential Zone and the Township Residential Zone."

[29] This will be seen to reinforce Policy 3.2 quoted above.

[30] There are other provisions or Rules in the Proposed Plan that are recorded in the Court's decision as being relevant or taken into account by it, as well as the Council in its decision. They include:

> "**Section 11.2.3 (Methods of Implementation – Rules)**
>
> ….
>
> Plan rules require all subdivisions and residential development in the Township Residential and Deferred Township Residential Zones to make satisfactory provision for on-site water supply and effluent and stormwater disposal (where a community sewage disposal system is not available)."

[31] The reasons for establishment of the DTRZ can be found in the relevant passage in the Council decision, as recorded in the Court's judgment:

> "The reasons for these changes to the plan as a result of submissions are that the Deferred Township Residential Zone has an interlocking relationship with the adjacent Township Residential Zone. Key elements of that relationship are the structure of aquifers and the pattern of groundwater flows. Redevelopment of the Deferred Township Residential Zone is contingent on either both zones being fully served by and all properties connected to a sewerage scheme, or both zones being fully reticulated for and all properties connected to a potable water supply. The reason for such a contingency is that the older settled area is served largely for water supply by shallow wells. The deferred zone is predominantly on the upstream side of those settled properties and has a high potential to contaminate shallow aquifers through effluent discharges.
>
> The effect of the relationship is therefore to preclude individual initiatives for the reason that where it may be possible for an individual to obtain a water supply to service a part of the deferred zone, the effects of the effluent discharge will not be contained. There may well be solutions in particular circumstances and these can be dealt with through the resource consent process in any event."

Discussion

[32] Essentially, the appellants contend that the Council and the Court were in error when they recognised that no adverse effects to the environment would flow from the grant of consent, but that nevertheless consent should not be given because of the Proposed Plan provisions. It was argued that this is illogical; incorrect conclusions were reached as a matter of law in respect of what is said to be the "precedent effects" (of granting the application); the Court misinterpreted s104; the decision was "irrational"; there were incorrect approaches to the relationship between policies and rules in the Plan and their effect and as to potential adverse effects from non-compliance with conditions; together with a misinterpretation of a condition 1.2 in the Proposed Plan as well as misapplication of s105(2A)(b). In addition, as a sub-point counsel said that the Court erred in failing to take into account as a relevant factor the existence of a lawful dwelling (the granny flat) and soakage field, so that there could be no "precedent effect" as there was no other similar property in the DTRZ. Counsel submitted that the appellants' land was distinctly different to all other land in the DTRZ, so there was no potential for any "precedent effect" and having found the application would have minor effects so as to pass the threshold gateway test it was not possible in law for the Court to say the integrity of the Plan could be undermined by such minor effects.

[33] As the application for consent was a non-complying activity it had to pass through one of the gateways referred to in s105(2A)(a) or (b). Once the application passed through one of the gateways then the appellants had to satisfy the consenting authority and the Court that the application should be granted bearing in mind the matters to be considered in terms of s104(1) and in terms of its overall discretion inherent in s105(1)(c).

[34] Counsel acknowledged the common ground that the adverse effects of the appellant's proposal would be minor, and that the gateway provision in s105(2A)(a) was met, so that there was minor potential effect as it related to s104(1)(a). The Council's decision was obviously based on wider considerations than that. It concluded that, in assessing or considering matters under s104(1)(d) and (i), there should be no further development in the DTRZ until either a reticulated sewage or

water schemes were established such being the clear objective rules and policies of the Proposed Plan. The appellants' wish to subdivide prior to the establishment of a reticulated water supply system was contrary to those policies. The activity for which consent was sought was subdivision, and Plan policies and objectives relating to that activity were clear. Rarangi was regarded as a special environment given that Plan provisions spread across both the urban and rural environment sections but the provisions were, the Court said, clear; namely, that subdivisional development to provide rural residential facilities would take place only in conjunction with the reticulated water supply rather than on an individual and ad hoc basis.

[35] The contention by the appellants that there could be no "precedent effect" through the granting of this consent because of the unique nature of its property, being different to any others in the DTRZ, overlooks the fact that the "precedent effect" relates to the possibility that other subdivision for residential purposes might be sought and pursued before a potable water supply or system had been installed. That is, there had to be a coordinated, rather than piecemeal, approach to the provision of water as was apparent from the evidence presented. The Court referred to the evidence of a Mr Kennedy on behalf of the Council that, in order that the undeveloped area of Rarangi Township grew in a way and at a rate that managed to protect properly the natural resources of the locality, subdivision for residential purposes had to be deferred or delayed until there was a unified connection to a reticulated potable water supply. The Court referred to Mr Kenney's evidence in which he said:

> "That leads me to the view that in the light of current knowledge, it is best to allow future development to proceed in Rarangi, including the subject site, once the water a separate issue has been properly addressed, as anticipated by the Plan, so that there is a coordinated rather than piecemeal approach to the provision of water."

[36] The Court went on to say that Mr Kennedy:

> "Pointed out further that piecemeal development will place a significant obligation on counsel to monitor the operational performance of all on-site wastewater management systems and ground water quality in the area on an ongoing basis, or until a reticulated potable water supply is provided.
>
> …."

> We agree with the Council that reticulation is a necessary infrastructure to have in place before the deferred state is lifted from the DTRZ, in the Proposed Plans objectives and policies reflect this. The way forward the appellants suggest is not efficient either for the community or the Council."

[37] In ***Dye v Auckland Regional Council*** [2002] 1 NZLR 337 the Court of Appeal said in construing the word "effects" as used in ss104 and 105, concerns about the precedent effects of applications were to be addressed as a matter relating to the District Plan under s105(2A)(b) and s104(1)(d) or (i) – but not under s105(2A)(a) or s104(1)(a). It said, at para [42]:

> "[42] ….As with gateway (a), we consider para (a) of s 104(1) is concerned with the impact of the particular activity on the environment. It is not concerned with the effect which allowing the activity might have on the fate of subsequent applications for resource consents. If there is a concern at precedent effect, it should be addressed under para (d) of s 104(1) which is similar in concept to gateway (b) in s 105(2A); albeit para (d) does not have the same constraining effect as gateway (b). Alternatively precedent concerns may be addressed under para (i) of s 104(1)."

and further at para [49]:

> "[49] We can summarise our views….The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s 105(2A)(b) and s 104(1)(d). Cumulative effects properly understood should also be taken into account pursuant to s 105(2A)(a) and s 104(1)(a). But in taking those matters 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."

[38] I accept the submissions of the respondent that it was open to the Court to have regard to the issues of precedent effect in determining whether the application was contrary to the objectives and policies of the Proposed Plan (under s104(1)(d)). It was required to "have regard" to the criteria identified in s104 and weigh the absence of immediate adverse physical environment effects of the appellant's subdivision against the fact that the proposal was contrary to the long-term objectives and policies of the Plan and wider development of Rarangi Township (s104(1)(d) and (i)). Not only did the Tribunal take into account the objectives and policies of the Plan but went further to conclude that the appellants' proposal was repugnant to those objectives.

[39] I am satisfied that what the Court was doing when it said in paras [81] and [82], that there is "potential for further subdivision applications…[with] 'ad hoc' disposal treatments", and "…the intention of the planning provisions to avoid ad hoc solutions and to advance residential development at Rarangi in an integrated manner, allowing for planned communal infrastructure", was clearly addressing a s104(1)(d) matter, and probably also under s104(1)(i). It refers to Part II and the exercise of its discretion, as the heading states, before paras [78] and [82].

[40] The Court's decision as contained in paras [81] and [82] does not, despite counsel's submissions, involve a decision that subdivisions would be prohibited or barred entirely. It simply says that a piecemeal approach to the subdivisional development in the DTRZ was to be avoided, and in order to advance a sustainable management of Rarangi's natural and physical resources subdivision and associated residential development had to be postponed when ad hoc disposal treatments accompanied applications, until such time as a reticulated water supply existed. It would be then that a defined starting date for subdivision ("when a developer steps up") could occur.

[41] The intricate argument on behalf of the appellants that there is a distinction between "development and subdivision" so that it would be the "development" of the subdivided land which undermines the Proposed Plan rather than the "subdivision" is not accepted. Residential subdivision, whilst a legal division of parcels of land, is usually undertaken with a view to disposal of the separate parcels for use or residential development, or for building upon, and in considering effects of a subdivision I accept the respondent's argument that it is appropriate to have regard to the development which will follow as a logical consequence of such division being permitted.

[42] I do not accept the appellants' contention that the Court misinterpreted s104 and Part II, to the effect that once there had been a finding that either minor or no effect would occur then there would be no adverse effects on the environment, to decline consent placed the Plan objectives and policies and its integrity above, in law, the purpose and principles of the Act itself, as set out in Part II. Part II (in ss5 and 7(b)) refers to the purpose of the Act being to promote sustainable management

and efficient use of natural physical resources. The Court itself says that the case is about the "sustainable management" of Rarangi's natural and physical resources so that deferment of part of the residential zone of Rarangi has been done to ensure the future development of that part of the community is sustainable.

[43] A similar argument as to consideration of District Plan objectives and policies by the Court in such circumstances was made in ***Calapashi Holdings Ltd v Marlborough District Council*** (HC Blenheim, CIV-2004-485-1419, 22 March 2005, Ellen France J) but rejected. The Environment Court is given the authority, and is in fact required under s104, to consider a number of matters when it comes to exercising its discretion to grant consent or not. It must consider relevant objectives, policies, rules and other provisions of a Plan. If it comes to the conclusion that they outweigh other matters to be considered, such as actual effects on the environment (whether in terms of the gateway provision in s105(2A)(a) or as a matter to be considered under s104(1) does not matter), it may exercise its discretion and decline the application.

[44] Counsel argued that the Court erred when it said in para [54]:

> "[54] We remind that s105(2A)(b) requires that a consent authority *must* then grant a resource consent for a non-complying activity unless it is satisfied that the activity (in this case the subdivision) will not be contrary to the objectives and policies of the Proposed Plan. If we were to approve this proposal, it would be contrary to (in the sense of repugnance) to the test formulated in *New Zealand Rail v Marlborough District Council* (1993) 2 NZRMA 449 for a clearly stated set of objectives and policies."

Counsel says that as there had been a finding that the gateway provision in s105(2A)(a) had been shown to exist, therefore it was wrong for the Council to refer to subs (b) which is an alternative "gateway". I do not accept that submission.

[45] Section 105(2A) contains a prohibition against granting resource consent in a number of situations. The jurisdictional basis for granting consent might arise under s105(2A) but consent may be declined in the exercise of the Court's discretion if the activity is contrary to the objectives and policies of the relevant Plan. Such matters are to be considered as mandatory considerations under s104(1)(d) and/or (i). Lack of significant adverse effect of a particular activity on the immediate environment

may establish jurisdiction, but may not of itself justify consent to a non-complying activity, as such consent in the end is a matter for discretion following consideration of all the statutory provisions to which the Court must adhere; ***Batchelor v Tauranga District Council (No. 2)*** [1993] 2 NZLR 84 (CA) at p90.

[46] The weight to be attached to the general purposes of the Act, and to be given to any effect on the integrity and objectives of the Plan or rules, must be a matter of judgment for the consenting authority or Environment Court. In ***Batchelor*** it was submitted by the appellants that the Planning Tribunal should have regard to whether a proposed activity was an efficient use of land which could be carried on without offending the sustainable objectives contained in Part II of the Act. The Court of Appeal said at p90:

> "There is no warrant for reading those words into the provision [of s7(b)]. The efficient use and development of resources is one factor in the overall equation. The lack of significant adverse effect of a particular activity on sustainable management objectives cannot of itself justify consent to a non-complying activity, consent being in the end a matter of discretion following consideration of all the statutory dictates….The starting point is that such a use is one which is not permitted as of right. Here the Tribunal has weighed up the advantage of using the site for the intended purpose against a competing consideration of adverse effect on the integrity of the district plan."

[47] Those remarks apply in the present case and it cannot be said that the Court erred in law in the way it interpreted and applied s104 as well as Part II of the Act.

[48] I do not accept the appellants' contention that the Court gave the provisions of the Proposed Plan improper status by elevating them above Part II considerations. The Court did not do so. It specifically looked at s5(1) and concluded that the deferment of the residential zoning was done in order to ensure sustainability of future development of the community, and sustainable management of Rarangi's natural and physical resources. This was to be achieved, it determined, by ensuring that future subdivision and development took place in the context of the availability of a reticulated water supply as contemplated by the Proposed Plan. The Environment Court did not make any error of law in reaching that conclusion.

Irrationality

[49] I do not accept the appellants' argument that the Court acted irrationally so as to lead to error of law. The essence of that argument was that because the appellants' proposal did not result in any adverse effect on the environment as it related specifically to that subdivision, then refusal of consent was irrational. This is but another way of stating the previous argument. Jurisdiction to grant consent arises if the adverse effects will be minor. But it does not follow that to refuse consent would be irrational or perverse because the legislation is quite clear that, in the exercise of its discretion to grant or withhold consent, the consenting authority must have regard to s104. If, as a matter of weight it concludes that some factors outweigh others then, provided they give proper consideration to the relevant factors in reaching a decision, it cannot be said it is irrational.

Applicability of Rules

[50] The appellants contended that there could not be a bar to the activity sought by the appellant because it was not a prohibited activity, and it is the rules that specify what can or cannot occur as an activity, not the objectives and policies upon which the rules were based. Thus, it was submitted that the Court adopted an incorrect approach in assessing the relationship between the policies and objectives of the Plan and the rules. I do not accept that submission. In my view there is no activity prohibited by the Plan; rather, it has simply identified a defined starting date for residential subdivisional development, namely when the reticulated water is available. As the respondent points out, the very term "Deferred Township Residential Zone" illustrates that to be the case. The long-term or future objectives of the Plan were required to be considered upon any applications for residential subdivision in the zone.

Distinction between subdivision/development

[51] It was contended that the Court erred in failing to appreciate or identify distinction between "subdivisions" and "development". Counsel submitted that the Plan provides a non-complying status (arguably) for subdivision but a discretionary

activity status for development, and that therefore they are not the same thing. He argued that the Court should have taken the approach of acknowledging that "development" was the subject of a discretionary activity status, and that "subdivision" could occur distinctly from development so that consent could and should have been granted to the application. I do not accept that submission. The application was for a subdivision. Subdivision for residential development includes subdivision for residential purposes and residential activity. I accept the respondent's submissions that it is not possible to completely sever the concept of subdivision from that of development, as it is referred to in the various objectives and policies in the Plan. The subdivision of sections in respect of this zone is always to be a first step in any residential development, and residential "development" is not used in the Plan to describe the construction and occupation of dwelling houses. The Court considered any distinction (paras [62] – [63]) and I do not accept that it erred in law in the approach it took.

[52] Some point was made over a possible confusion by the Environment Court in stating in para [52] that the s12 objectives and policies "take precedence over the objectives and policies in the Urban section", that comment suggesting that there was a conflict or clash between the policies relating to Rarangi and those in the urban section. But I do not see those policies as in fact conflicting; rather, they are consistent. This is clear from the reference in section 11.2.3, namely to the effect that residential development in Rarangi would be considered "applicable" once the permanent potable water supply has been installed. Indeed that is what the Court goes on to say in the concluding parts of para [52]. All that the Court is saying is to make quite clear that subdivision and residential development should be deferred until such time as a reticulated water scheme is available. Viewed in that light there is no conflict between the provisions.

[53] The appellants contended that from a practical point of view they could never be required to connect to a communal water supply so such a condition was incapable of performance. Therefore it was argued the Court's reference to connection "to the new houses" in para [53] did not mean existing houses, and the decision was flawed because there was no mandatory way the law could force existing residential developed properties to have a service connection to a reticulated

potable water supply. These were matters clearly within the contemplation of the Court to which it was able to give such weight as it sought fit. It was dealing with a subdivision application and was entitled to give consideration to wider implications based upon Plan and policy matters in the exercise of its discretion. If it were otherwise, then the Court would have been bound to grant consent – as the appellants contend – simply because the proposed subdivision involved dwellings connected to septic tanks where no direct adverse effect would occur, but where such subdivision could not meet the limiting restrictions of the Plan objectives and policies. I do not accept that must be the case. No error of law arose in this respect.

[54] Counsel said that to illustrate how the Court went so far astray it clearly misapplied s105(2A)(b). That is, that the Court highlighted its error when it said at para [54]:

> "We remind [ourselves] that s105(2A)(b) requires that a consent authority *must not* grant a resource consent for a non-complying activity unless it is satisfied the activity (in this case the subdivision) will not be contrary to the objectives and policies of the Proposed Plan."

Counsel says that this is a gateway or jurisdictional provision and the Court therefore misdirected itself by ignoring the fact that it has already found that jurisdiction existed in terms of s105(2A)(a). In reading the decision as a whole I do not consider that to be the case. The Environment Court was not holding that jurisdiction did not exist under s105(2). It had already determined that question. It was proceeding to consider s104 matters, as it was required to do, and was emphasising the importance that the legislation places upon relevant objectives and policies, in the process of the Court coming to the conclusion that the absence of a reticulated water scheme for Rarangi was contrary to the various objectives and policies in the DTRZ. There was no error of law in this respect.

[55] It was argued that the Court failed to take into account a relevant factor, namely the existing dwellings and soakage field. But it is clear that the Court did turn its mind to those factors (see for example para [71]) and the submission simply amounts to a criticism of the weight the Court gave to such a factor. That is not an error of law.

[56] Finally, it was submitted there was a failure by the Court to apply the relevant objectives and policies of the Plan, because there is a provision that although Rarangi has a water source which is

> "very susceptible to the risk of contamination…development will be permitted where this aspect is identified and provided for." [12.2.1.4]

I do not accept that contention.

[57] Although it was argued that the objectives and policy do not require a community supply to be the "only solution", it is clear that the Court was entitled to look at all the relevant objectives and policies in interpreting them, so as to determine the overall aim and purpose. It had to apply the specific objectives and policies that were relevant to this application for subdivision. The objectives and policies span a much wider ambit than those relied upon by the appellants in respect of the submission.

[58] I do not accept there was any error of law in the Court reaching its conclusion that the appellants' proposal for subdivision was contrary to the objectives and policies of the Proposed Plan relating to subdivision and development in the DTRZ at Rarangi. That was a judgment of fact and discretion which the Environment Court with its particular expertise was entitled to make. I accept the submissions of the respondent that the appeal, although very ably argued, in reality constituted an attack on the Court's findings on matters of fact, and weight to be given to the various considerations under s104(1), to which it was required to pay heed.

[59] This Court has to constantly remind itself when hearing appeals such as this, that it is not for an appellate Judge to determine whether a proposal is contrary to the objectives and policies of a Plan. It is whether it was open to the Environment Court to take such a view, when determining the ambit of the objectives and policies. Care must be taken to avoid the backwards reasoning (by this Court) which tainted the decision in ***Dye v Auckland Regional Council*** (supra) in the High Court, and I am satisfied that the Court was entitled in law to take the view it did.

Conclusion

[60] The appellant has not established that the Environment Court erred in law in any of the respects alleged and the appeal is dismissed.

[61] The respondent Council is entitled to costs which should follow the event and I fix them on a 2B basis together with reasonable disbursements to be fixed by the Registrar if necessary within 21 days.

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J W Gendall J

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