IN THE COURT OF APPEAL OF NEW ZEALAND

CA705/2011
[2013] NZCA 221

BETWEEN	FAR NORTH DISTRICT COUNCIL Appellant
AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
AND	CARRINGTON FARMS LIMITED Second Respondent
AND	CARRINGTON ESTATE LIMITED Third Respondent
AND	CARRINGTON RESORT LIMITED Fourth Respondent

CA706/2011

AND BETWEEN	CARRINGTON FARMS LIMITED Appellant
AND	CARRINGTON ESTATE LIMITED Second Appellant
AND	CARRINGTON RESORT LIMITED Third Appellant
AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
AND	FAR NORTH DISTRICT COUNCIL Second Respondent

CA54/2012

AND BETWEEN	FAR NORTH DISTRICT COUNCIL Appellant

	AND	TE RŪNANGA-Ā-IWI O NGĀTI KAHU First Respondent
	AND	CARRINGTON FARMS LIMITED Second Respondent

CA56/2012

	AND BETWEEN	CARRINGTON FARMS LIMITED Appellant
	AND	TE RUNANGA-A-IWI O NGATI KAHU First Respondent
	AND	FAR NORTH DISTRICT COUNCIL Second Respondent

Hearing:	26 and 27 March 2013
Court:	O'Regan P, Harrison and French JJ
Counsel:	J S Baguley and J G A Day for Far North District Council J D Gardner-Hopkins and M Wikaira for Te Runanga-a-Iwi o Ngati Kahu R A Brabant, I M Gault and A M Glenie for Carrington Farms Ltd, Carrington Estate Ltd and Carrington Resoort Ltd
Judgment:	11 June 2013 at 2.30 pm
Reissued:	19 July 2013: see minute of 19 July 2013
Effective date of Judgment:	11 July 2013

JUDGMENT OF THE COURT

CA705/2011 and CA706/2011

A The appeals by Far North District Council (FNDC or Council) and Carrington are allowed against the High Court:

(a) declaration that under cl 4 of the settlement agreement Carrington agreed not to expand its accommodation on to land

including the site which is the subject of its amended land use application dated 30 September 2008;

(b) order quashing FNDC's decision relating to the land use consent, and direction referring the consent back to Council for reconsideration on terms, and reserving leave to apply further; and

(c) order for costs.

B The judgment of the High Court is set aside and the land use consent is reinstated.

C Ngāti Kahu is to pay one set of costs each to Carrington and FNDC for a standard appeal on a band A basis and usual disbursements.

CA54/2012 and CA56/2012

D The appeals by FNDC and Carrington are allowed against the judgment of the High Court setting aside the decision of the Environment Court.

E The judgment of the High Court is set aside and the decision of the Environment Court is reinstated subject to the terms of para [157](d) of the High Court judgment.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] Carrington Farms Ltd owns a large tract of what was originally farm land on the Karikari Peninsula in Northland within an area of considerable natural beauty and cultural importance to the local rūnanga, Te Rūnanga-ā-Iwi o Ngāti Kahu.

[2] Carrington has already developed part of its land. About 10 years ago, the local authority, the Far North District Council (FNDC or Council), granted the company resource consents under the Resource Management Act 1991 (the RMA) to develop a golf course, country club and winery complex. Ngāti Kahu challenged the lawfulness of the consent process by seeking judicial review in the High Court. The proceeding was later settled and the development project was completed.

[3] More recently, Carrington decided to develop another part of its land as a residential complex. The company applied sequentially for resource consents – initially, a dwelling or land use consent for 12 residential units and later a subdivision consent for the same land. Council publicly notified the latter but not the former before separately granting both consents.

[4] The two appeals before this Court arise from the separate consents. In chronological sequence, Ngāti Kahu first appealed unsuccessfully to the Environment Court against the subdivision consent[1] and then to the High Court. In the interim, the Rūnanga challenged the lawfulness of the land use consent in an application for judicial review in the High Court. White J heard Ngāti Kahu's appeal against the Environment Court's decision and its judicial review application together. In the result both the appeal and the application were allowed. In judgments issued separately on 29 September 2011 White J quashed the land use[2] and subdivision[3] consents.

[5] Carrington and FNDC appeal against both judgments. For ease of reference our decisions on the two appeals will be included in a composite judgment, starting with the judicial review proceeding.

Facts

[6] The undisputed facts are set out in comprehensive detail in the Environment Court's decision and in both of White J's judgments. We are able to summarise the facts relevant to these appeals more briefly as follows.

[7] Carrington owns between 800 and 1000 hectares of land on the Karikari Peninsula either bordering or in close proximity to Karikari Beach – a long, open and crescent shaped foreshore facing the Pacific Ocean and backed by semi-consolidated sand dunes. Incorporated within this judgment is a map showing the boundaries of Carrington's property, its configuration and the separate areas of the golf course, country club and residential developments.

[8] In March 1999 Carrington applied to FNDC for three resource consents: (a) a land use consent for the country club development consisting of 384 proposed accommodation units and a lodge/golf club complex; (b) a subdivision consent for the same development to create 384 separate titles; and (c) a land use consent to establish a vineyard. FNDC processed all three applications on a non-notified basis

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1 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* [2010] NZEnvC 372 [Environment Court decision].

2 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Carrington Farms Ltd* (2011) 16 ELRNZ 664 (HC).

3 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* (2011) 16 ELRNZ 708 (HC).

– that is, notice was not given to the general public. All consents were granted in May 1999.

[9] In February 2000 Ngāti Kahu applied to the High Court for orders judicially reviewing FNDC's decision not to notify Carrington's consent applications. Carrington was also joined as a party. On 5 March 2001 the parties signed a written agreement to settle the application for judicial review (the settlement agreement). As a result of the settlement, Carrington's development was able to proceed.[4]

[10] In April 2000 Council publicly notified its proposed district plan. In July 2000 Carrington lodged a submission seeking to include a zone known as the Carrington Estate Special Zone: its boundaries were roughly aligned to and bordered the proposed development site. A consent order made in the Environment Court in August 2004 incorporated the zone into the district plan.

[11] In June 2008 Carrington applied for a land use consent to construct 12 single residential units within a relatively small section of a 490 hectare area in the north eastern part of its property, physically separate from the country club development. The land was within the Rural Production Zone in FNDC's Operative District Plan. Ms Baguley advises that the zone is relatively permissive. Its boundaries and the mix of zoning of coastal and rural activities were determined through a public process. The Department of Conservation and the Environmental Defence Society (the EDS) had appealed against the zone's original inclusion in the draft district plan but Ngāti Kahu did not. In November 2006 the zone's boundaries were settled by a consent order made in the Environment Court after the appeals were withdrawn.

[12] Construction of residential units on the sites proposed by Carrington is a permitted activity within the Rural Production Zone. However, the company's proposal exceeded two permitted activity standards. One governed traffic intensity levels; the other regulated the number of lots permissibly served by a single access way. Carrington's proposal was thus a restricted discretionary activity under the

[4] On 16 May 2002, the parties signed an amendment to the settlement agreement but its terms do not bear upon the discrete issue of construction which we must decide.

Operative District Plan. In December 2008 Council decided that Carrington's land use application did not require public notification and granted a resource consent.

[13] In March 2009 Carrington applied for a subdivision consent to create 12 separate allotments for the 12 residential units for which the land use consent was granted together with three additional lots (which are not at issue). Consent was required because the proposed subdivision was a non-complying activity within the Rural Production Zone in that the 12 lots did not meet the minimum lot size specification in the district plan. On this occasion Council publicly notified Carrington's application. In October 2009, against Ngāti Kahu's objection, Council granted consent.

[14] Ngāti Kahu immediately appealed to the Environment Court against FNDC's grant of the subdivision consent. The appeal was dismissed in an extensive interim decision given on 3 November 2010.[5]

CA705/2011 and CA706/2011

Land use consent: judicial review

(a) Settlement agreement

(i) High Court

[15] Ngāti Kahu's application for judicial review of Council's decision to grant the land use consent sought two different remedies. The first remedy was a declaration that by cl 4 of the settlement agreement Carrington had agreed not to expand its accommodation on its land – including the site which was the subject of its land use consent application – to construct 12 single residential units. Carrington challenges the Judge's finding that cl 4 had that meaning and effect when granting the Rūnanga's application. Counsel agree that the question of whether the Judge erred is the threshold issue for determination on this appeal.

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5 Environment Court decision, above n 1.

[16] White J set out the terms of the settlement agreement in full.[6] Those which are directly relevant to Carrington's appeal are as follows:

> 1. Carrington Farms agrees to consult in good faith with EDS and Te Rūnanga concerning resource management matters of mutual interest relating to any part of the development site (including the parts referred to in the following paragraphs and the streams) which may arise in future. This commitment is to be incorporated, on a prospective basis, into the conditions of the consent granted by the FNDC.
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> 2. Furthermore, Carrington Farms agrees not to develop the beach (including the dunes) and wetland areas of its property as identified on the attached plan, and to use its best endeavours to preserve and enhance those areas for the purpose of restoring the natural state of the wetland. The parties agree that this commitment is to be incorporated, on a prospective basis, into the conditions of consent granted by the FNDC.
>
> ...
>
> 4. Carrington Farms agrees not to seek to expand the currently consented provision for accommodation (including hotel, villas or any other form of accommodation), subject to any "as of right" development that may be able to take place without the need for a resource consent at the time of this agreement and any re-siting of elements within the development site. Such re-siting shall not without the consent of the plaintiffs:
>
> (a) involve the relocation of any building covered by the consents to a position closer to the coast than the nearest building permitted in terms of the resource consents which are the subject of this proceeding; and
>
> (b) have any adverse effects on the environment having regard to what is contemplated by those resource consents.
>
> Carrington Farms agrees that Te Rūnanga and EDS would be affected parties for the purposes of section 94(2) of the RMA in respect of any further development of the site subject to these proceedings.
>
> ...
>
> 6. Without limiting its statutory duties and obligations the FNDC agrees that Te Rūnanga and EDS would be affected parties for the purposes of s 94(2) of the Resource Management Act in respect of any further development of the site subject to these proceedings.
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> ...
>
> 8. The FNDC acknowledges the particular interest of EDS in significant developments affecting the coast and of Te Rūnanga and local marae in significant developments affecting the coast within the rohe of Ngāti Kahu.

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6 At [16].

...

12. The parties will issue a joint media statement in which the parties indicate a win-win settlement using a tone of co-operation with the stated objective of achieving a culturally and environmentally sensitive development. The agreed statement shall include a statement attributed to Dr Mutu to the effect that Te Rūnanga was acting on behalf of Te Whanau Moana of Karikari. The parties agree that no other public statement will be made which is inconsistent with the spirit of the agreed statement, or if no agreed statement is reached, which is inconsistent with this agreement.

13. The parties will use best endeavours to agree to the terms of the joint media statement for issue within 14 days of concluding this agreement.

Conclusion

14. All parties to this Settlement Agreement confirm that they shall in implementing the terms of this Settlement Agreement in all respects act in good faith including using best endeavours to achieve the alteration to the conditions of consent contemplated by this agreement within a reasonable time.

15. The parties agree that this Settlement Agreement settles all issues, concerns and disputes however arising out of the grant or exercise of all existing resource consents obtained for the development provided such exercise is in accordance with the conditions of the consents, including the conditions referred to in this agreement.

[17] The settlement agreement annexed a plan, as referred to in cl 2, identifying "... the beach (including the dunes) and wetland areas" of Carrington's property. All areas were within the "Outstanding Natural Landscape" zone in the Council's plan.

[18] Clause 4 is at the heart of this dispute. White J was in no doubt as to its meaning and effect, expressing his conclusion succinctly in these terms:

> [66] ... Carrington's agreement in clause 4 of the settlement agreement "not to seek to expand the currently consented provision for accommodation (including hotel, villas or any other form of accommodation)" was clear and, subject to the express exceptions, was unequivocal. Carrington had agreed not to expand its accommodation on the Karikari Peninsula at all unless one of the exceptions applied.

[19] The Judge then examined whether Carrington's land use application fell within either of the exceptions provided by cl 4,[7] concluding that:

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[7] At [67]–[69].

> [70] On this basis neither exception to Carrington's non-expansion agreement in clause 4 of the settlement agreement applied. As there was no dispute that Carrington's 12 residential dwellings were within the expression "any other form of accommodation" in clause 4, Carrington was seeking to expand its accommodation contrary to its non-expansion agreement in clause 4 of the settlement agreement.

[20] White J was satisfied also that the plain and contextual meanings were consistent in that (a) Ngāti Kahu had an acknowledged interest in and concern for the cultural significance of the whole of the Karikari Peninsula including Carrington's land; (b) the agreement was executed in settlement of a proceeding which challenged the validity of the three consents, and Carrington's agreement not to expand any form of accommodation on any of its property was in apparent consideration for Ngāti Kahu's agreement to the existing consents; (c) the proceeding raised issues about whether Council had taken proper regard of matters of national importance as required by the RMA but the effect of the settlement was that that critical issue was not determined by the Court; and (d) subject to amendments made to their terms, the three consents were accepted as valid.

(ii) Decision

[21] The question is whether White J was correct that by cl 4 of the settlement agreement Carrington agreed in 2001 not to expand its provision of accommodation on its Karikari property at any future time unless one of the two stated exceptions applied. While cl 4 lacks precision, its terms were designed to settle Ngāti Kahu's application to review FNDC's decision to grant consent for the proposed country club development on a non-notified basis. The plan incorporated within the agreement delineated the area of the development, referred to throughout the document as "the development site".

[22] In exchange for the Rūnanga's withdrawal of its opposition, Carrington accepted in the settlement agreement two express restrictions on its rights as owner. One restriction (cl 2) was an absolute prohibition on Carrington's right to develop a large and obviously valuable part of its land outside the development site – the beach and wetland areas – coupled with a positive undertaking to preserve and enhance the areas.

[23] The other restriction (cl 4) was an agreement "... not to *seek to expand the currently consented provision for accommodation* ..." (emphasis added). Carrington's then current consent for accommodation allowed construction of 384 units and ancillary buildings within the country club development together with travellers' accommodation and a manager's unit within the winery complex. The operative part of cl 4 was the only contractual limitation imposed on the company's consent rights; the parties plainly contemplated, for example in the concluding sentence of cl 4, that components of the development site might be further developed.

[24] The meaning of "expand" where used in cl 4 is of central importance. The word means "to increase in size or bulk or importance".[8] Something can only be expanded or increased in size if it is already in existence. In terms of cl 4, what was in existence was the currently consented land use for accommodation granted in May 1999. Clause 4 could not be construed to apply to a "provision for accommodation" which was not then in existence and was not then by definition capable of expansion. As Mr Gault observes, without this express restriction Carrington could have applied at any time to vary the existing consent by increasing, for example, the number of hotel rooms within the development or the size of rooms, possibly without notice.

[25] Carrington had no statutory or contractual right to use the existing consent as a legal platform for developing another part of its property for residential purposes. The company's future pursuit of that objective would always require a new application on different terms for a new consent. We are satisfied that, when considered in light of this context, Carrington's agreement not to seek to expand its existing consent for accommodation was limited to a prohibition on increasing the size of what was permitted according to the 1999 consent. This restriction cannot be construed to prohibit the company from applying at any time in the future for a land use consent to develop another part of its property for residential purposes.

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[8] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005).

[26] Also, as Mr Gault points out, if cl 4 bore the contrary meaning, cl 2 for example would be superfluous.

[27] Other provisions in the settlement agreement support this conclusion, in particular:

(a) Carrington's agreement to consult in good faith with Ngāti Kahu and the EDS was expressly limited to matters of mutual interest "relating to any part of the development site (including the parts referred to in the following paragraphs and the streams) which may arise in future ...". This reference is consistent with the parties' limitation on the scope of the agreement to the development site – that is, a country club, golf course, lodge and associated accommodation units and vineyards (cl 1).

(b) The exceptions to Carrington's right to develop the accommodation area again related to "the development site" with an acknowledgement that "this site" may be the subject of applications for consent for further development in which case Ngāti Kahu and the EDS were to be notified (cls 4 and 6).

(c) The agreement was specifically in settlement of all issues, concerns and disputes "arising out of the grant or exercise of all existing resource consents obtained for the development ..." (cl 15).

[28] In our judgment White J erred in declaring that cl 4 of the settlement agreement operated as a contractual bar to Carrington's application in 2008 for a land use consent.

(b) Non-notification of resource consents

(i) Ngāti Kahu's application

[29] The second remedy sought by Ngāti Kahu was an order quashing Council's decision to grant Carrington's application for a land use consent on terms requiring

its reconsideration, with a direction that the application should proceed on a notified basis to be considered contemporaneously with the application for subdivision consent on the same site. White J's decision to grant this remedy is challenged by both Council and Carrington.

[30] The primary issues to emerge in argument in the High Court, and as identified on appeal, are whether the Judge was wrong to conclude that (a) special circumstances existed which required public notification of Carrington's application and (b) as a consequence Council's decision not to notify was unreasonable.[9]

(ii) Statutory provisions

[31] Sections 93–94D and 104 of the RMA then in force governed Council's notification obligations when processing Carrington's land use consent. Those provisions relevantly stated:

> **93 When public notification of consent applications is required**
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> (1) A consent authority must notify an application for a resource consent unless—
>
> (a) the application is for a controlled activity; or
>
> (b) *the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.*
>
> ...
>
> **94 When public notification of consent applications is not required**
>
> (1) If notification is not required under section 93(1), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.
>
> (2) However, a consent authority is not required to serve notice of the application under subsection (1) if all persons who, in the opinion of the consent authority, may be adversely affected by the activity have given their written approval to the activity.

[9] At [83]–[84].

94A Forming opinion as to whether adverse effects are minor or more than minor

When forming an opinion, for the purpose of section 93, as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—

(a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and

(b) *for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity; and*

(c) must disregard any effect on a person who has given written approval to the application.

94B Forming opinion as to who may be adversely affected

(1) Subsections (2) to (4) apply when a consent authority is forming an opinion, for the purpose of section 94(1), as to who may be adversely affected by the activity.

(2) The consent authority must have regard to every relevant statutory acknowledgement, within the meaning of an Act specified in Schedule 11, made in accordance with the provisions of that Act.

(3) A person—

(a) may be treated as not being adversely affected if, in relation to the adverse effects of the activity on the person, the plan permits an activity with that effect; or

(b) in relation to a controlled or restricted discretionary activity, must not be treated as being adversely affected if the adverse effects of the activity on the environment do not relate to a matter specified in the plan or proposed plan as a matter for which—

(i) control is reserved for the activity; or

(ii) discretion is restricted for the activity; or

(c) must not be treated as being adversely affected if it is unreasonable in the circumstances to seek the written approval of that person.

...

94C Public notification if applicant requests or if special circumstances exist

(1) If an applicant requests, a consent authority must notify an application for a resource consent by—

(a) publicly notifying it in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

(2) *If a consent authority considers that special circumstances exist, a consent authority may notify an application* for a resource consent by—

(a) *publicly notifying it* in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

94D When public notification and service requirements may be varied

(1) Despite section 93(1)(a), a consent authority must notify an application for a resource consent for a controlled activity in accordance with section 93(2) if a rule in a plan or proposed plan expressly provides that such an application must be notified.

(2) *Despite section 93(1)(b), a consent authority is not required to notify an application for a resource consent for a restricted discretionary activity if a rule in a plan or proposed plan expressly provides that such an application does not need to be notified.*

(3) Despite section 94(1), a consent authority is not required to serve notice of an application for a resource consent for a controlled or restricted discretionary activity if a rule in a plan or proposed plan expressly provides that notice of such applications does not need to be served.

…

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

…

(Our emphasis.)

[32] These provisions when read together constituted a discrete regime for determining whether Council was obliged to publicly notify Carrington's application for a land use consent. That was for a restricted discretionary activity. As Ms Baguley emphasises, s 94D(2) applied because the Operative District Plan provided that such an application would not be notified where Council was satisfied that the adverse effects on the environment were minor. By contrast, while the same plan rule provided that controlled activity applications would not be notified, that provision was expressly subject to s 94C(2).

(iii) Carrington's application

[33] It is common ground that Carrington's application for a land use consent fell within the scope of s 93(1)(b); and that Council had a discretion on whether to notify. White J set out fully the terms of Council's decision to proceed on a non-notified basis.[10] He was satisfied that it correctly (a) inquired into and found that Carrington's application for the land use consent did not have any adverse effects when considered against the relevant criteria in the district plan; (b) noted its obligation under s 94A to disregard any adverse effects which did not relate to the matters specified in the plan for which the discretion had been restricted; and (c) concluded accordingly that its statutory discretion was limited solely to traffic intensity and access issues.

[34] Council also noted there were no affected persons within the meaning of s 94B and concluded: "The proposal does not offend the matters over which Council has reserved its discretion and as such merits approval."

[35] On their face, the remaining provisions of ss 93 and 94 were not engaged. In terms of s 94A Ngāti Kahu accepted that it could not challenge FNDC's decision that

[10] At [37].

the adverse effects of the application – that is exceeding traffic and access way intensity standards – were minor. Similarly, s 94B was not engaged.

(iv) Special circumstances

[36] The only question then was whether "special circumstances exist[ed]" in terms of s 94C(2) sufficient to invoke Council's discretion on whether to notify Carrington's application.[11] A "special circumstance" is something, as White J accepted, outside the common run of things which is exceptional, abnormal or unusual but less than extraordinary or unique.[12] A special circumstance would be one which makes notification desirable despite the general provisions excluding the need for notification.[13] As Elias J noted in *Murray v Whakatane District Council*:[14]

> ... the policy evident in those subsections seems to be based upon an assumption that the consent authority does not require the additional information which notification may provide because the principles to be applied in the decision are clear and non-contentious (as they will generally be if settled by district plan) or the adverse effects are minor. Where a consent does not fit within that general policy, it may be seen to be unusual.

[37] In order to invoke s 94C(2), the special circumstance must relate to the subject application. The local authority has to be satisfied that public notification, as opposed to limited notification to a party or parties, may elicit additional information bearing upon the non-complying aspects of the application. We repeat that Carrington's application to construct and use dwelling houses was, as White J accepted, a permitted activity in the Rural Production Zone. FNDC's discretion when determining the application was accordingly restricted by s 94B to those aspects of the activity which specifically remained for its consideration – compliance with the traffic intensity and vehicle access standards.

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11 At [84].

12 At [104] applying *Peninsula Watchdog Group (Inc) v Minister of Energy* [1996] 2 NZLR 529 (CA) at 536.

13 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 310; aff'd [1999] 3 NZLR 325 (CA).

14 At 310–311.

(v) High Court

[38] White J held that "special circumstances" existed, sufficient to take Council's decision out of the ordinary relating to notification of decision making.[15] He found that Council erred in reaching a contrary conclusion. The grounds for the Judge's conclusion are interlinked and can be addressed together. In summary, they are that:

(a) Carrington's land use application was unlikely to be able to be implemented without a subdivision application as well, and in terms of s 91 Council should have considered whether Carrington was required to make applications for both consents;

(b) Carrington intended when lodging the land use application to make a subdivision application as well and its decision to make two different applications, with the land use preceding the subdivision application, was contrary to principles of good resource management practice;

(c) Carrington's application to subdivide was non-complying and contrary to the overall thrust of the relevant objectives and policies of the district plan and in particular the site was within both the "coastal environment" and was "an outstanding natural ... landscape" in terms of s 6(a) and (b) of the RMA;

(d) Carrington was acting in breach of its agreement not to expand its application for consent to use its land for accommodation purposes and contrary to its good faith consultation obligation; and

(e) Council had itself acknowledged under cl 8 of the settlement agreement Ngāti Kahu's "particular interest" in significant developments affecting the coast within Ngāti Kahu's rohe.

[39] White J was satisfied that FNDC knew or ought to have known of these "special circumstances" when making its non-notification decision in

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15 At [115].

December 2008.[16] In particular, he relied on a passage from the Environment Court's decision on the subdivision consent issued in November 2010.[17] He was satisfied that there was no evidence Council made the enquiry of Carrington which it ought to have made. Nor was there any evidence that it turned its mind to the "special circumstances" of the case taking it out of the ordinary and making notification desirable. As a result FNDC had failed to exercise properly its discretion under s 94C(2).[18] For the same reasons, its decision was unreasonable in administrative law terms, and its narrow approach to the issue of notification was unjustified.[19]

(vi) Decision

[40] The first two grounds relied on by the Judge suggest that he gave primary weight to the effect of s 91. That section relevantly provides:

> (1) A consent authority *may determine not to proceed with the notification or hearing* of an application for a resource consent if it considers on reasonable grounds that –
>
> (a) other resource consents under this Act will also be *required in respect of the proposal* to which the application relates; and
>
> (b) it is appropriate *for the purpose of better understanding the nature of the proposal*, that applications for any 1 or more of those other resource consents be made before proceeding further.
>
> (Emphasis added.)

[41] The Judge's reliance on s 91 presents problems. Ngāti Kahu never pleaded that Council's decision not to notify was reviewable for failing to comply with s 91 or that Carrington's conduct in lodging a land use application for consent with the prospect or likelihood that an application for subdivision consent would follow itself constituted a special circumstance justifying public notification. Thus, the application of s 91 was not identified by the pleadings as a contestable issue on review and no evidence was led on it in the High Court.

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16 At [116].
17 Environment Court decision, above n 1, at [139].
18 At [117].
19 At [118].

[42] Also, as Mr Gardner-Hopkins accepts, White J erred in placing primary reliance on what he understood was a finding by the Environment Court[20] that Carrington's land use consent was unlikely to be implemented without a subdivision consent as well. In fact, the Court found to the contrary.[21] The Judge made a consequential finding, again in reliance on the Court's decision, that Council should have considered whether Carrington was required to make applications for both consents together. However, with respect, the Environment Court's observations made in its decision on an appeal against granting a subdivision consent, some years after the land use consent was granted, were not relevant to the validity of the land use consent. The latter consent was not directly in issue before the Environment Court.

[43] In support of White J's conclusion, Mr Gardner-Hopkins submits that in terms of s 91 (a) Carrington's proposal was in reality to develop freehold residential lots in a location close to the beach; (b) given the potential for the subdivision application to follow the land use application Council could reasonably have been expected to make further inquiry; (c) further inquiry would have yielded an affirmative answer from Carrington that a subdivision application would follow; (d) the subdivision application was non-complying and all relevant considerations would arise (not limited to the land use discretion); and (e) the separation or unbundling of the two consent applications was therefore contrary to the concept of integrated resource management and good practice – that is, according to the rule derived from the Planning Tribunal's decision in *Affco New Zealand Ltd v Far North District Council (No 2),*[22] that all resource consents for a project should be carefully identified from the outset and made together so they can be considered jointly. Mr Gardner-Hopkins refers to the company's obligation to lay its "cards on the table", emphasising that the subdivision consent was partially notified.

[44] In answer Mr Gault and Ms Baguley emphasise the distinction between Carrington's two applications and the principle of good resource management practice relied on by Mr Gardner-Hopkins. Counsel point out that each of

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20 At [115](a).
21 Environment Court decision, at [114].
22 *Affco New Zealand Ltd v Far North District Council (No 2)* [1994] NZRMA 224.

Carrington's applications were of a stand alone nature whereas in *Affco* further consents were required to effect the proposal (in that case to establish an abattoir). We agree with this distinction. Section 91 applies where "other resource consents ... will also be required in respect of the proposal". An example is where one local authority is satisfied that an application for subdivision consents will require an additional consent for stormwater discharge from another authority before the proposal can be implemented.[23]

[45] By contrast, Carrington's proposal was for a land use consent to construct 12 dwellings. The RMA creates separate regimes for imposing conditions on land use and subdivision consents although there can be a degree of overlap.[24] This proposal was stand alone and no further consents were necessary to allow its implementation by constructing 12 residential units. Mr Brabant advised us that the only reason why the units had not been constructed was the existence of Ngāti Kahu's application for judicial review and the High Court's decision to quash the consent.

[46] Moreover, in order for s 91 to apply Council had to be satisfied that any other applications be made if appropriate to better understand "the nature of *the proposal*". It could not have lawfully relied on s 91 to defer notification or hearing of Carrington's land use application where the only issue was whether it should exercise its discretion relating to the two activity standards. Council's contemporaneous consideration of a subdivision application would not have assisted it in that respect.

[47] In our judgment Mr Gardner-Hopkins' submission faces a more fundamental hurdle. While it is common ground that Council did not consider s 91 when deciding not to notify Carrington's land use consent, we are satisfied that the provision does not apply in any event. Section 91 is an enabling provision of negative effect; it

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23 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC).

24 *Meadow 3 Ltd v Van Brandenburg* HC Christchurch CIV-2007-409-1695, 30 May 2008.

simply empowers a consent authority "not to proceed with a notification or hearing" if it is satisfied on reasonable grounds that two express factors concurrently exist.[25] These words suggest that the power allows a local authority to defer notification where it has made an underlying decision to notify. The power cannot arise for consideration where in a case like this Council has made a decision not to notify.

[48] A decision by FNDC on whether to exercise the s 91 power could only have related to the separate act of hearing Carrington's application. However, its decision to hear and determine the application was never at issue in this proceeding. The subsidiary question of whether the company followed good resource management practice by filing sequential rather than conjoint applications could only have fallen for consideration in that context, if at all. Public notification of the land use application on the ground that a subdivision application would follow could not have assisted Council in exercising a discretion which related solely to the non-complying aspects of the application. Compliance or otherwise with s 91 or good resource management practice could not have constituted a special circumstance in terms of s 94C(2).

[49] The third ground for White J's decision was that Carrington's subdivision application was non-complying and contrary to the district plan as well as the objectives of the RMA. In this regard also the Judge relied on the Environment Court's findings. However, with respect, this factor was not material. As Mr Gault submits, the contingent status of a possible future application by Carrington relating to the same development was an irrelevant factor for FNDC when considering whether to publicly notify the land use application.

[50] In any event the underlying activity – using the land for residential purposes – was permitted when Carrington made its land use application. Only the traffic and access aspects of its proposal allowed Council to exercise a degree of discretion. Provided Council was satisfied that the effects of both were minor, as Ngāti Kahu accepts, the land use consent would necessarily follow. Public notification could not have changed the result.

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[25] Section 142 of the Resource Management Act 1991 (in force at the relevant time and contained in the part of the Act which deals with decisions on proposals of national significance) contains a cross-reference to s 91 and uses the same language.

[51] The fourth and fifth grounds for White J's decision related to findings of breach of the settlement agreement. As explained, we differ from the Judge on his finding of breach by Carrington. Also, with respect, we disagree with the Judge that FNDC's acknowledgement in cl 8 of the agreement that Ngāti Kahu had a "particular interest" in significant developments affecting the coast was relevant to notification.

[52] Here the Rūnanga had disclaimed any interest in the non-complying aspects of the application. As Mr Gardner-Hopkins accepts, FNDC only agreed under cl 6 that Ngāti Kahu was an affected person for discretionary and non-complying activities. And we agree with Mr Gault that on its plain meaning cl 6 applied only to the site of the original development, not to a proposal to develop elsewhere. In these circumstances cl 8, to which the Judge briefly referred, could not constitute a special circumstance justifying notification.

[53] Counsel also addressed argument before us on the issue of whether White J applied the correct legal approach to judicial review of Council's non-notification decision. That was because of the Judge's emphasis[26] upon Blanchard J's statement in *Discount Brands Ltd v Westfield (New Zealand) Ltd* that:[27]

> [116] Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[54] Both Mr Gault and Ms Baguley criticise the Judge's reliance on Blanchard J's judgment in *Discount Brands*, pointing to this passage from the judgment of Elias CJ in the same case:

> [22] Non-complying and discretionary activities are subject to the same test for non-notification: the consent authority must be "satisfied" that the adverse effects on the environment are minor; and must obtain written approval from every person whom the consent authority is satisfied may be adversely affected (unless obtaining such consent in the circumstances is unreasonable). These requirements are to be compared with those provided for controlled and limited discretionary activities. In the case of controlled and limited discretionary activities the express provisions of the district plan

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[26] At [102]–[103].

[27] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

> have established the scope of what is acceptable after a public process, subject to appeal opportunities. By contrast, applications for discretionary activities where the discretion is not a restricted one and non-complying activities have to be discretely weighed against the general policies and standards of the district plan. They have the potential to undermine expectations based on it.

Keith J made comments to the same effect.[28]

[55] It is unclear whether and to what extent White J ultimately relied on Blanchard J's statement in *Discount Brands*. However, we reject Mr Gardner-Hopkins' submission that in this context the statement can be construed as supporting what has been labelled the "hard look" approach to judicial review and this non-notification decision in particular.

[56] In our judgment the aims and purposes of the RMA cannot be construed as justifying a more intensive standard of review of a non-notification decision than would otherwise be appropriate for a Court when exercising its powers.[29] The judicial inquiry is required to determine whether the decision maker has complied with its statutory powers or duties. The construction or application of the relevant provisions remain objectively constant, and there can be no justification for adopting a sliding scale of review of decisions under the RMA according to a judicial perception of relative importance based upon subject matter.[30]

[57] We are satisfied that Blanchard J was doing no more than noting that in the then statutory context and the circumstances prevailing in *Discount Brands* – where the application was for a non-complying discretionary activity – the High Court on review must carefully scrutinise all the material submitted in support where Council's decision not to notify is challenged. In *Palmerston North City Council v Dury*,[31] cited by Mr Gardner-Hopkins, this Court affirmed Blanchard J's "careful scrutiny" observation when upholding a local authority's decision not to notify an

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28 At [48].

29 *Gordon v Auckland City Council* HC Auckland CIV-2006-404-4417, 29 November 2006 at [11]; *Auckland Regional Council v Rodney District Council* [2007] NZRMA 535 (HC) at [41]–[43]; and *Isak v Refugee Status Appeals Authority* [2010] NZAR 535 (HC) at [28]–[29].

30 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [379].

31 *Palmerston North City Council v Dury* [2007] NZCA 521, [2008] NZRMA 519 at [53]–[54].

application for consent to a restricted discretionary activity where the adequacy of supporting information was in issue. However, Ngāti Kahu did not question the adequacy or otherwise of the information supplied by Carrington to FNDC in support of the land use consent relating to the two activity standards at issue. The distinction in approach towards notification drawn by Elias CJ in *Discount Brands* between non-complying activities on the one hand and restricted discretionary activities on the other – where the district plan has already established by a public process what is acceptable – is directly apposite.

(c) Result

[58] In the result, we allow the appeals by Council and Carrington against:

(a) the declaration made in the High Court that under cl 4 of the settlement agreement Carrington agreed not to expand its accommodation on to land including the site which is the subject of its amended land use application dated 30 September 2008;

(b) the orders and directions made in the High Court quashing Council's decision relating to the land use consent, referring the consent back to Council for reconsideration on terms, and reserving leave to apply further; and

(c) the order for costs made in the High Court.

[59] The judgment of the High Court is set aside and the land use consent is reinstated.

[60] Costs must follow the event. Ngāti Kahu brought its proceeding separately against Carrington and Council. Each had separate interests which justified separate appearances in this Court. Ngāti Kahu is to pay one set of costs to Carrington and one set of costs to Council for a standard appeal on a band A basis and usual disbursements.

CA54/2012 and CA56/2012

Subdivision consent

(a) Environment Court

[61] Ngāti Kahu's challenge to Council's decision to grant Carrington a subdivision resource consent was based upon the Rūnanga's belief that the development would have an adverse effect on its relationship with a waahi tapu known as Te Ana o Taite/Taitehe, a burial cave situated on Carrington's land.

[62] The Environment Court was not satisfied on the evidence that the burial cave Te Ana extended underneath the subdivision site. Even if it had found otherwise, the Court was satisfied that any adverse affects on Te Ana or the wider environment would be caused by Carrington giving effect to its existing land use consent and related permitted activity works. In reaching that conclusion the Court adopted this test:

> [98] We consider that it is clear from *Hawthorn*[32] that we are required to make a factual determination as to whether or not it is *likely* that effect will be given to an unimplemented resource consent [the land use consent]. If we determine that it is likely then the environment against which we assess the effects of a proposal will include the environment as it might be modified by implementation of the unimplemented resource consent in question. We do not consider that we have a discretion to ignore that factual finding as to the future state of the environment.

[63] The Environment Court found that Carrington was likely to give effect to the land use consent. Thus the residential unit construction and related authorised works would form part of the future environment against which it must assess the potential effects of the subdivision proposal. In the result the Court was not satisfied that the adverse effects on the environment would be more than minor.

[64] However, the Environment Court recorded that but for that threshold factual finding it would have allowed the appeal if the application for subdivision consent had been considered on its own in the context of the existing environment without the prospective addition of 12 residential units. In that event the proposal would

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[32] *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424, (2006) 12 ELRNZ 299 (CA).

have been contrary to the relevant statutory objectives and policies.[33] But, once the future environment was considered with the additional 12 residential units, a different result followed.

[65] It is thus clear that the Environment Court's decision was shaped by its formulation and adoption of the relevant legal test, and Ngāti Kahu's appeal to the High Court was based upon it.

[66] Before examining whether the Environment Court did err materially in law, it is appropriate to give a little more factual context to Carrington's application. The company applied to subdivide within the Rural Production Zone[34] lots on which construction of residential units was a permitted activity.[35] As Ms Baguley and Mr Brabant point out, the application to subdivide met all the permitted standards except for the lot dimensions. The proposal exceeded a residential intensity rule requiring development of one lot to every 12 hectares of land. The lots would have been permitted if each had at least 3000 square metres for surrounding exclusive use plus a minimum of 11.7 hectares elsewhere. But for the fact that they were clustered together rather than divided into lots of equal sizes, subdivision would have been a controlled activity.

[67] Also, as the Environment Court acknowledged, the subdivision simply enabled the issue of freehold titles to reflect what was already approved and likely to be implemented under the land use consent.[36]

(b) Statutory provisions

[68] Carrington's obligation to obtain a subdivision resource consent was governed by s 77B of the RMA which provided:

> **77B Types of activities**
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> ...

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33 Environment Court decision, above n 1, at [157]–[158].
34 At [11] above.
35 At [12] above.
36 At [146].

(5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity,—

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the resource consent with or without conditions or decline the resource consent.

(6) Particular restrictions for non-complying activities are in section 104D.

...

[69] The application fell for determination according to ss 104, 104B and 104D of the RMA,[37] which in March 2009 provided:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to—

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) *When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.*

...

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

...

[37] *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council*, above n 3, at [71].

104B Determination of applications for discretionary or non-complying activities

After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority—

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 108.

...

104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of section 93 in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

(Our emphasis.)

(c) High Court

[70] White J emphasised that the High Court's jurisdiction on appeal was limited to determinations of questions of law;[38] and that his answers to the four questions then identified had to be given in the light of the Environment Court's findings of fact, which were not open to challenge on appeal.[39] In particular the Court had found that (a) Carrington was likely to implement the land use consent regardless of whether the subdivision consent was granted; (b) the area of Carrington's proposed

[38] At [56].
[39] At [57].

subdivision was not situated above Te Ana; and (c) the land to be subdivided was within both "the coastal environment" and was an "outstanding natural ... landscape" in terms of s 6(a) and (b).

[71] In setting aside the decisions to grant the subdivision consent, White J correctly noted that his contemporaneous decision in the judicial review proceeding to quash the land use consent had the effect of removing the factual basis for the Environment Court's decision.[40] However, as the Judge also recognised, that decision was not material to his decision to allow Ngāti Kahu's appeal. That was because he was independently satisfied that the Environment Court erred in law.[41]

[72] White J noted that:

> [56] In the present case the parties agreed that in terms of ss 299 and 305 of the RMA the four questions of law raised by the two appeals were:
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> 1. Was the Environment Court obliged to include the residential units consented under RC 2080553 within the future environment upon being satisfied that the consent was likely to be implemented when determining whether the subdivision consent should be upheld or cancelled having regard to the matters in s 6(a) and (b) of the RMA?
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> 2. Even if the Court was obliged to include the consented units in the future environment, was the Environment Court able to decline to grant consent?
>
> 3. Was the Environment Court in error when considering whether subdivision consent should be refused by reference to s 6(a) and (b) of the RMA to take into account only the environment including the 12 residential units already consented under RC 2080553, but have no regard to the permitted baseline in relation to the potential for development of seven residential units on the subdivision site as a permitted activity?
>
> 4. In relation to the proposed revised conditions of subdivision consent, was the Environment Court within its powers in directing a condition of consent must be added to the effect that the subdivision cannot be completed until construction of the residential units authorised by RC 2080553 has been completed?

[73] White J was satisfied that the first two questions were related or sequential. The third is of academic importance. And the fourth, relating to a condition imposed by the Environment Court on Carrington's subdivision consent, was determined in

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[40] At [155].
[41] At [112].

the company's favour and is not the subject of a cross-appeal. In granting leave to appeal on 13 December 2011 White J did not identify a question or questions of law for our determination.[42]

[74] Our decision focuses on the Judge's answers to the first two questions, recognising that this Court's jurisdiction on appeal from the High Court is also confined to questions of law.[43] In advance of the hearing in this Court counsel filed a list of five discrete issues. However, their argument focussed primarily on the first two questions determined by White J, which are of decisive importance to this appeal.

[75] On the first question, White J determined that:

> [110] In light of the preceding analysis of the decisions of the Court of Appeal in *Arrigato*[44] and *Hawthorn* and the 2003 amendments, it is apparent that:
>
> (a) In terms of the "permitted baseline" concept, which applied to the subject site, the Council and the Environment Court had a discretion whether to take into account and give weight to the unimplemented construction consent (RC 2080553) when considering the effects of Carrington's application for the subdivision consent, a non-complying activity contrary to both ss 6(a) and (b) of the RMA and the provisions of the District Plan.
>
> (b) Unimplemented RC 2080553, which related to the subject site, was not a relevant consideration when the Council and the Environment Court were considering the future state of the environment beyond the subject site.
>
> (c) The Environment Court therefore erred in deciding otherwise and in not exercising the required discretion (although it is clear that it would otherwise have declined the application).

[76] On the second question, the Judge determined that the Environment Court erred in failing to exercise its discretionary power to decline consent even if it was obliged to include the unimplemented land use consent in the future environment.[45]

[77] We shall address each of these two determinations in the same sequence.

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42 *Te Rūnanga-ā-Iwi o Ngāti Kahu v Far North District Council* HC Whangarei CIV-2010-488-766, 13 December 2011 (Minute No 2).

43 Resource Management Act, s 308.

44 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA).

45 At [115]–[127].

(d) Decision

(i) Environment

[78] The first question is whether the Environment Court erred in law by holding that it was bound to include Carrington's unimplemented resource consent in the environment against which the effects of the subdivision proposal was to be assessed if it was satisfied that the consent would in fact be implemented.[46]

[79] For this purpose, it is appropriate to summarise more fully the essential steps in the Environment Court's reasoning. After its disputed conclusion on the legal test, the Court followed this approach:

(a) An assessment of the future state of the environment is a determination of the form it might take having regard to activities that are permitted by district or regional plans (s 104(2)) or, as in this case, if the existing resource consents are implemented.[47]

(b) This assessment requires a factual determination as to whether it is likely that effect will be given to the land use consent.[48]

(c) It had no discretion to ignore its factual finding as to the future state of the environment.[49]

(d) It was satisfied, as a matter of fact, that the future environment would include construction of the 12 consented dwellings.[50]

(e) In considering the merits in the context of the future environment including 12 residential units the subdivision consent was not contrary to the district plan's objectives or policies (s 104D(1)(b)(i)).[51]

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46 At [98].
47 At [95].
48 At [96] and [98].
49 At [98].
50 At [114], [130] and [131].
51 At [158].

(f) Any adverse effects of Carrington's development would be a consequence of implementing the land use consent arising out of its development of the 12 unit residential development and its associated earthworks, infrastructure works and vegetation clearance and not the subdivision consent.[52]

[80] The Environment Court's construction of the words "the environment" where used in s 104(1)(a) was central to its decision. "The environment" is not a static concept in RMA terms, as its broad definition in s 2 illustrates.[53] It is constantly changing, often as a result of implementation of resource consents for other activities in and around the site and cannot be viewed in isolation from all operative extraneous factors. As this Court noted in *Queenstown Lakes District Council v Hawthorn Estate Ltd*[54] the consent authority will frequently be aware that the environment existing on the date a consent is granted is likely to be significantly affected by another event before its implementation. In its plain meaning and in its context, we are satisfied that "the environment" necessarily imports a degree of futurity. The consent authority is required to consider the state of the environment at the time when it may reasonably expect the activity – that is, the subdivision – will be completed.[55]

[81] The question then is whether the Environment Court's construction of s 104(1)(a) to the effect that it was bound to take into account the effect of an unimplemented resource consent if satisfied that it would be implemented is consistent with this Court's decision in *Hawthorn.*[56] In *Hawthorn* an application was made for subdivision and land use consents to develop 32 residential units on 34 hectares of land near Queenstown. The activity was non-complying under the operative district scheme but discretionary under the proposed district scheme. The

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52 At [174] and [183].

53 Section 2 of the Resource Management Act provides: **environment** includes:
(a) Ecosystems and their constituent parts, including people and communities; and
(b) All natural and physical resources; and
(c) Amenity values; and
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

54 *Hawthorn*, above n 32, at [52]–[56].

55 *Hawthorn*, above n 32, at [52]–[56].

56 *Hawthorn*, above n 32.

area was within a wider triangle of land of 166 hectares where 24 houses had already been erected with unimplemented consents to construct another 28.

[82] In assessing the effects of the proposal on the environment for the purposes of s 104(1)(a) the Court in *Hawthorn* identified the central question as:

> [11] ... whether the consent authority ought to take into account the receiving environment as it might be in the future and, in particular, if existing resource consents that had been granted but not implemented, were implemented in the future. ...

[83] In answering that question affirmatively this Court conducted a careful and informed survey of the relevant statutory provisions[57] before concluding:

> [57] In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[84] Later, in a passage cited by White J,[58] this Court said in *Hawthorn*, that:

> [84] … It [the environment] also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented. …

[85] White J summarised his analysis of the effect of *Hawthorn* and this Court's decision in *Arrigato*[59] as follows:

> [103] From this analysis of the decision of the Court of Appeal in *Hawthorn*, it is apparent that the Court was making it clear that when a consent authority is having regard to "any actual and potential effects on the environment of allowing the activity" it was permissible and desirable or even necessary for the consent authority to consider the future state of the environment on which such effects would occur and that in doing so resource consents, both implemented and likely to be implemented, **beyond the subject site** were part of the future environment. The Court of Appeal did not, however, "overrule" its earlier decision in *Arrigato*. In *Hawthorn* the Court of Appeal accepted that the "permitted baseline", which recognised both implemented and likely to be implemented consents **for the subject site**, remained relevant for the purpose of assessing the significance of effects of a particular resource application in the context of s 105(2A)(a), the predecessor to s 104D(1)(a) of the RMA.

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57 At [39]–[56].
58 At [101].
59 *Arrigato*, above n 44.

(White J's emphasis.)

[86] The Judge distinguished *Hawthorn* on the ground that the Environment Court's decision in this case was not concerned with the implementation of resource consents beyond the subject site.[60] As a result, the "permitted baseline" test embodied in s 104(2) was relevant to the Environment Court's consideration of Carrington's application.[61] The Judge held that the Court was thus required to exercise its judgment[62] and was not required to consider the unimplemented consent for the subject site when considering the receiving environment beyond it.[63]

[87] White J particularly emphasised the distinction drawn in *Hawthorn* between developments on the site on one hand and beyond the site on the other. He imported the permitted baseline test to justify this distinction. Mr Gardner-Hopkins did likewise. In the former case, he says, the local authority had a discretion to take into account the permitted plan baseline (as codified by s 104(2)); by contrast, in the latter case it was mandatory to take account of activities permitted by the plan or unimplemented consents where they are likely to be implemented.

[88] We do not accept this distinction. The qualification noted by this Court in *Hawthorn* was in the context of pointing out the limitation of the permitted baseline test to the site itself where the appellant had attempted to give it a more expansive application. What is decisive is the exclusionary nature of the permitted baseline test. In essence, as this Court observed in *Arrigato*:[64]

> [29] Thus the permitted baseline ... is the existing environment overlaid with such relevant activity ... as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

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60 At [103] and [105](a).
61 At [105](b).
62 At [105], applying *Arrigato*, above n 44, at [35].
63 At [105](b).
64 *Arrigato*, above n 44.

[89] As Mr Brabant submits, the permitted baseline was irrelevant to the Environment Court's decision. The current codification of the concept[65] in s 104(2) allows a consent authority when forming its threshold opinion under s 104(1)(a) to "... disregard an adverse effect of the activity on the environment if the *plan* permits an activity with that effect" (emphasis added). The statutory purpose is to vest a consent authority with a discretion to ignore the permitted baseline where previously it had been a mandatory consideration.

[90] The Environment Court was alive to the existence of this discretionary power.[66] That was because Ngāti Kahu's counsel had contended before it, as Mr Gardner-Hopkins did in the High Court, that the consent authority had a discretion as to whether it considered the unimplemented land use consent to be part of the permitted baseline or existing environment.[67] However, as the Environment Court pointed out, Ngāti Kahu's argument conflated the concepts of the permitted baseline and the environment as recognised in ss 104(2) and 104(1)(a) respectively. In *Hawthorn* this Court was satisfied that the appellant made the same error although in a different context.[68]

[91] In the RMA context, the environment and the permitted baseline concepts are critically different. Both are discrete statutory considerations. The environment refers to a state of affairs which a consent authority must determine and take into account when assessing the effects of allowing an activity; by contrast, the permitted baseline provides the authority with an optional means of measuring – or more appropriately excluding – adverse effects of that activity which would otherwise be inherent in the proposal.

[92] As this Court pointed out in *Hawthorn*:[69]

> [27] ... the "permitted baseline" is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to resource consent application. It is not to be applied for the purpose of ascertaining the future state of the environment beyond the site.

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65 In the Resource Management Amendment Act 2003, which came into effect after the consent under consideration in *Hawthorn*, above n 32.

66 At [94].

67 At [92].

68 At [90].

69 *Hawthorn*, above n 32.

[93] In this case the Environment Court was not required to undertake a comparative enquiry of the type contemplated by the permitted baseline test. That was because Carrington did not seek to invoke the test in its favour to argue that the district plan permitted an activity having an adverse effect on the environment of the same nature as the proposed subdivision. The Court's enquiry was not into whether the plan permitted an activity with the same or similar adverse effect on the environment as would arise from the subdivision proposal. Its enquiry was focussed instead on the meaning of the "environment", taking proper account of its future state if it found as a fact that Carrington's land use consent would be implemented. Acting within those parameters, it was open to the Court to find as a matter of fact that the potential effects on the environment of implementing the resource consent would be minor when viewed in the context of a future environment that would include the 12 dwellings permitted as a result of the land use consent.

[94] In this respect we note this Court's statement in *Hawthorn*[70] to the effect that it is permissible and will often be desirable or even necessary for the consent authority to consider the future state of the environment. However, that observation does not affect our conclusion. The Court was simply recognising that a consent authority will not always be required to consider the future state of the environment. But, as the Court expressly recognised, it would be contrary to s 104(1)(a) for the consent authority not to take account of the future state of the environment where it is satisfied that other resource consents will be put into effect.[71] This is such a case.

[95] It follows that we must respectfully disagree with White J. In our judgment the Environment Court did not err in determining that it was required to take into account the likely future state of the environment as including the unimplemented land use consent for the purposes of s 104(1)(a) if it was satisfied that Carrington was likely to give effect to that consent.

(ii) Discretion

[96] The second question is whether the Environment Court erred in failing to consider whether to exercise its statutory discretion to decline Carrington's

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70 At [57], cited above at [83].
71 *Hawthorn*, at [54].

application even if it was obliged to include the unimplemented land use consent in the future environment.

[97] In summary White J found that the Environment Court erred because:

(a) The statutory scheme establishes that the decision on whether to grant an application is essentially discretionary in character.[72]

(b) Despite the fact that the land use consent had already been granted to Carrington, the Environment Court was entitled to take into account such factors as national importance, that subdivision was not a permitted activity under the district plan, its view of good resource management factors and its reservations about Carrington proceeding with the construction without obtaining freehold titles.[73]

(c) The fact that the second gateway test was met (s 104D(1)(b)(i)) did not of itself extinguish the need for the Environment Court to consider whether to exercise a discretion.[74]

(d) The Environment Court had an overriding discretion to take account of other relevant factors including that Carrington followed a deliberate strategy prior to maximising what was called "the permitted baseline/existing environment" prior to seeking subdivision consent which failed to meet the requirement of integrated resource management embodied in the RMA and Council's corresponding failure to enquire of Carrington whether it anticipated that subdivision would follow the land use application and whether it was required as part of the overall consent package.[75] In this respect, the Judge gave weight to the provisions of s 91.[76]

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72 At [116].
73 At [117].
74 At [118]–[119].
75 At [121].
76 At [126]–[126].

[98] As a result, White J was satisfied that the Environment Court erred in its reliance on *Hawthorn* in determining that the state of the future environment excluded from account other relevant factors and failed to carry out the required weighing or balancing exercise at all.[77]

[99] We accept that the Environment Court had an overall discretion in determining whether the resource consent should be granted.[78] But that discretion had to be exercised by reference to the relevant statutory criteria. Because this application was for consent to a non-complying activity, the Court first had to find that either of what are known as the gateway tests provided by s 104D was satisfied. This was the starting point for its enquiry into the merits. After consideration, the Court concluded that the application satisfied the second of the gateway tests – that is, it was for an activity that will not be contrary to the objectives and policies of the relevant plan.[79]

[100] However, the Court's enquiry did not end there; it did not treat satisfaction of the gateway test as determining its decision. Instead, the Court concluded after consideration of the evidence that any adverse effects on the environment would have been brought about by Carrington's implementation of the land use consent, not by the subdivision proposal.[80] As noted, the Court was satisfied that the company would build the residential units even if subdivision consent was not granted. This critical evaluative finding inevitably shaped the Court's exercise of its discretion, which had to be related to the merits of the application for subdivision consent. In this respect the Court noted that its decision was based not just on its factual findings but on its consideration of the relevant statutory provisions – ss 104 and 104D.

[101] With respect, we are unable to agree with White J that the Environment Court should have taken into account the factors he identified within its overall discretionary power. It appears that the Judge gave particular weight to the Court's trenchant criticism of Carrington for filing successive consent applications: the Court

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77 At [122].
78 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [5], see also ss 77B(5)(b) and 104B(a).
79 At [158].
80 At [181] and [213].

observed at one stage that it must have been "blindingly obvious" to FNDC when the land use consent was filed that a subdivision consent application would follow.[81]

[102] It is difficult to follow the statutory basis for the Environment Court's criticism. On appeal counsel addressed detailed argument on what was called the bundling or hybrid planning status of applications when considering whether the consents ought to have been determined together or separately on the merits. We have determined a similar argument in our related decision on the judicial review appeal.

[103] Citing *Bayley v Manukau City Council*,[82] Mr Gardner-Hopkins reverts to his central line of argument that when determining whether bundling should occur the question is whether the relevant consent lies at the heart of the proposal;[83] and that this proposal was to secure freehold residential lots in a location close to the beach to which subdivision was integral. Therefore the most restrictive consent category, being non-complying status for the subdivision consent, should have been applied to both applications (if Carrington had applied for both contemporaneously as the High Court concluded). In this argument, as on the judicial review appeal he relies on s 91.

[104] However, Mr Gardner-Hopkins submissions are beyond the scope of this appeal. The Environment Court did not consider s 91. Instead, it made a decisive factual finding: after criticising Carrington's practice of filing successive applications and Council's alleged failure to act, it enquired into whether these acts or omissions had any material affect. The Court concluded that what it called the "the issue of environmental creep"[84] was not determinative given that the decisive

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81 At [139].

82 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580.

83 *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005-485-1490, 29 June 2006 at [31].

84 As defined by this Court in *Hawthorn* (and cited in the Environment Court decision, above n 1, at [134]):

> [77] This is the possibility that someone who has obtained one resource consent might seek a further resource consent in respect of the same site, but for a more intensive activity. It would be argued that the deemed adverse effects of the first application should be discounted from those of the second when the latter was considered under s 104(1)(b).

step in terms of environmental effects was Council's decision to grant the land use consent.[85]

[105] In any event, as Mr Brabant points out, the concept of "environmental creep" could not have had relevance here. That is because the concept is limited to cases where a party obtains one resource consent and then applies for another on the same site but for a more intensive activity.[86] In this case, the subdivision consent did not enable a more intensive use of the site than is allowed by the land use consent. It simply enabled titles to be issued for the 12 units which Carrington has a right to construct.

[106] Furthermore, for the reasons which we have given in the judicial review appeal, Council would have had no option but to determine the subdivision consent discretely. It could not have refused, in reliance on s 91 or a precept of good resource management practice, to deal with the subdivision application because a land use consent had been granted previously. With respect, White J's conclusion to the contrary,[87] cannot be sustained because even if Carrington had filed both applications together, FNDC was bound to deal with each separately on its merits. *Bayley* is distinguishable for that reason. In that case the consent authority was considering multiple consent applications: the issue was whether it correctly dispensed with notification of one of those applications.

[107] In any event, the question of whether Carrington followed a deliberate strategy of filing sequential applications could not have been relevant to a decision on whether the subdivision consent was lawfully granted. The company had not acted unlawfully and its conduct could never constitute a disqualifying factor. With respect, we disagree with White J's endorsement of Mr Gardner-Hopkins' submission that by allowing Carrington's application the Environment Court was permitting the company to take advantage of its own wrong doing.[88] Similarly, FNDC's alleged failure at an earlier date when determining the land use consent to

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85 Environment Court decision, at [146].
86 *Hawthorn*, at [79].
87 At [125]–[127].
88 At [124].

identify that a subdivision consent would be required was irrelevant to the merits of the subdivision application itself.

[108] It follows that we disagree with White J's conclusion that the Environment Court simply failed to carry out the requisite weighing exercise at all. In the context of this application its discretion was of a residual or limited character, tightly confined by the statutory criteria and the factual finding that Carrington was likely to implement the land use consent. We do not consider the Environment Court was bound, or even entitled, to take into account the factors identified by the Judge. Accordingly, we are satisfied that the High Court incorrectly found that the Environment Court erred in law when dismissing Ngāti Kahu's appeal against Council's decision to grant Carrington's application for a subdivision consent.

Result

[109] In the result we allow the appeals by FNDC and Carrington against the judgment of the High Court answering the first and second questions of law in Ngāti Kahu's favour, ordering costs and setting aside the decision of the Environment Court.

[110] The judgment of the High Court is set aside and the decision of the Environment Court is reinstated subject to the terms of para [157](d) of the High Court judgment.

[111] In the normal course costs would follow the event. However, while we heard appeals against two separate judgments, we heard both together because they were interlinked and some issues overlapped. That connection is reflected in the composite nature of this judgment. In the circumstances we are satisfied that the award of costs against Ngāti Kahu in CA705/2011 and CA706/2011 will be sufficient to meet the interests of justice on both appeals. There will be no award of costs on this appeal.

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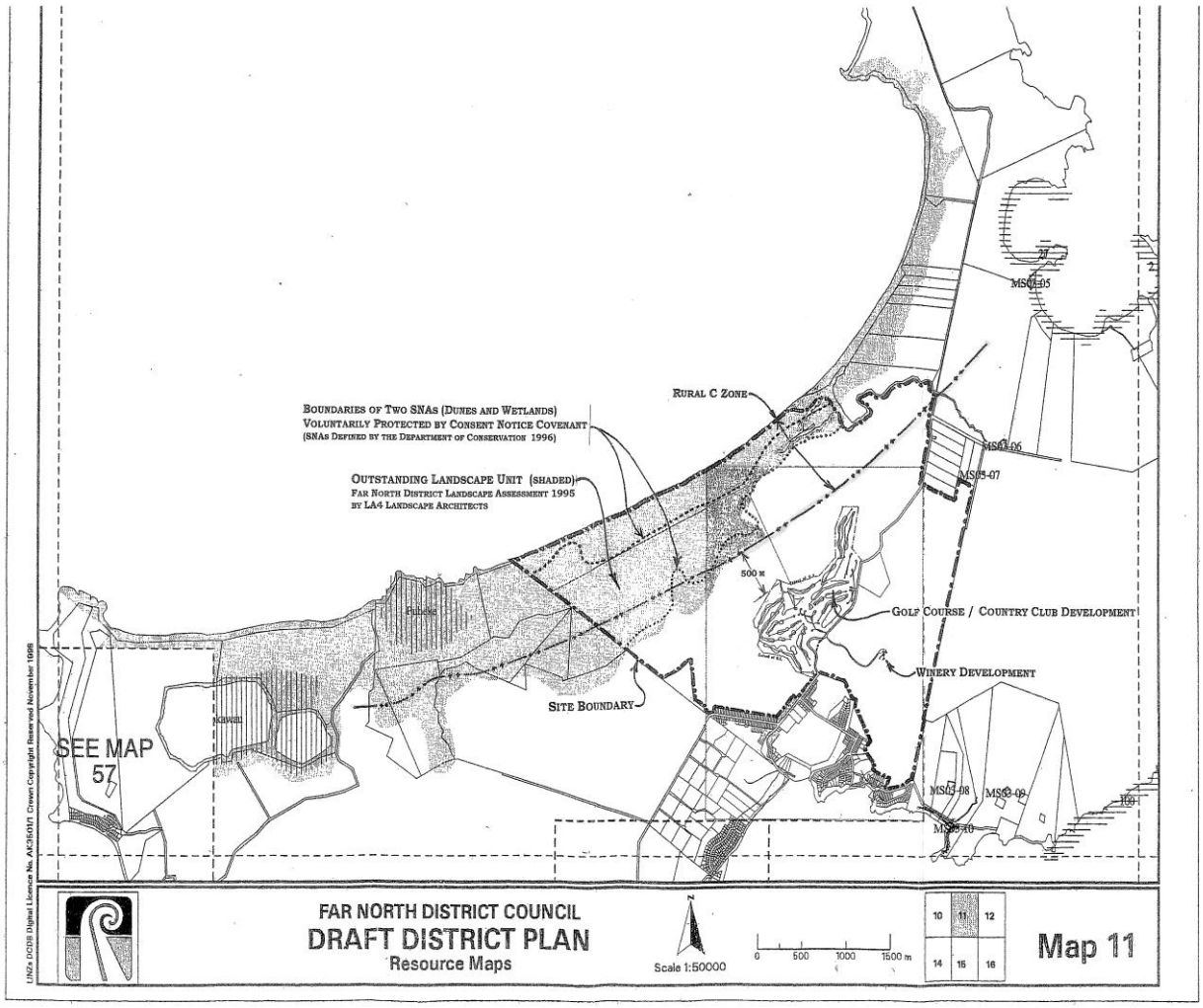
BOUNDARIES OF TWO SNAS (DUNES AND WETLANDS)
VOLUNTARILY PROTECTED BY CONSENT NOTICE COVENANT
(SNAS DEFINED BY THE DEPARTMENT OF CONSERVATION 1996)
OUTSTANDING LANDSCAPE UNIT (SHADED)
FAR NORTH DISTRICT LANDSCAPE ASSESSMENT 1995
BY LA4 LANDSCAPE ARCHITECTS
RURAL C ZONE
500 m
GOLF COURSE / COUNTRY CLUB DEVELOPMENT
WINERY DEVELOPMENT
SITE BOUNDARY
SEE MAP 57
MS05-05
MS05-06
MS05-07
MS05-08
MS05-09
MS05-10
109
FAR NORTH DISTRICT COUNCIL
DRAFT DISTRICT PLAN
Resource Maps
Scale 1:50000
0 500 1000 1500 m
10 11 12
14 15 16
Map 11
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