Decision No. A 024/2006

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of appeals under clause 14 of the First Schedule to the Act
BETWEEN	**THE DIRECTOR-GENERAL OF CONSERVATION**
	(ENV A136/04 and RMA 697/01)
AND	**LANDCO LIMITED**
	(ENV A183/04)
AND	**M J DUNN**
	(ENV A129/04)
	Appellants
AND	**WHANGAREI DISTRICT COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)
Environment Commissioner R M Dunlop
Deputy Environment Commissioner Dr B Gollop

HEARING at Whangarei on 26, 27 and 28 July 2005. Closing submissions 12 August 2005.

APPEARANCES

S T Gordon for the respondent
A F D Cameron and S Grieve for the Director-General of Conservation
A J Davidson and A J Hurst for Landco Limited
M J Dunn for himself
T Grove for himself and C Fielding (s274 party)

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INTERIM DECISION

List of Abbreviations

APDP	Amended Proposed District Plan
CA	Controlled Activity
CCE	Coastal Countryside Environment [zone]
CE	Countryside Environment [zone]
CMS 2002	Whangarei Coastal Management Strategy 2002
DA	Discretionary Activity
D-G	Director-General of Conservation
EB	Environmental Benefit
FNDC	Far North District Council
MRPL	Mighty River Power Ltd
MRU	Minor Residential Unit
NLA	Notable Landscape Area
NRCP	Northland Regional Coastal Plan
NRPS	Northland Regional Policy Statement
NZCPS	NZ Coastal Policy Statement
OLA	Outstanding Landscape Area
ONF	Outstanding Natural Feature
PDP	Proposed District Plan

RDA	Restricted Discretionary Activity
RMA	Resource Management Act
RU	Residential Unit
SEA	Significant Natural Feature
TDP	Transitional District Plan
V5	Variation 5

Introduction and Issues

[1] The hearing concerned appeals on Proposed District Plan and Variation 5 issues, objectives and policies for subdivision and development across all zones in the plan ("Environments") as well as rules for subdivision and built density in the Countryside (CE) and Coastal Countryside Environments (CCE). The D-G was the sole appellant against the PDP provisions. That appeal [RMA 697/01] was not pursued at the hearing but remains should Variation 5 be withdrawn. The hearing was accordingly concerned almost solely with Variation 5.

[2] Essentially at issue were the intensity of subdivision and development to be allowed in rural parts of the district, including along the coast. The latter is generally recognised as being of high quality for much of its extent. It has been and remains subject to significant development pressure. This aspect dominated the hearing, with the council generally seeking through the Variation to tighten the coastal provisions. In contrast, the paucity of evidence on CE matters, which we will come to, was notable.

[3] By the time we heard the appeals the contested issues, objectives and policies had largely been resolved as between Landco, the D-G and the respondent following what Ms Gordon described as a *negotiation meeting.* As a result Landco largely supported the respondent's position and called no evidence The D-G, having accepted the refined **Issues, Objectives and Policies** and an agreed **Environment Benefit Rule** (subject to qualifications put forward by the council's ecologist witness Mr M R Poynter) was concerned with controls in other rules. Mr Dunn was unable to attend the negotiation meeting. In the event, he did not accept all of the agreed changes and various of them were challenged by him in a wide ranging brief of evidence. The latter feature caused us to work to carefully identify exactly what matters Mr Dunn was entitled lawfully to contest, in order to establish jurisdiction. Mr Grove adopted the general thrust of the evidence in support of the council's case, focusing his submission primarily on the lot size rules.

[4] In her opening Ms Gordon advised that a related appeal by **Mighty River Power Limited** (ENV A134/04) had largely settled by consent; also that a Consent Order had been sealed in an appeal by the **Ngatiwai Trust Board** (ENV A143/04). We have had regard to the Consent Order in making this decision. We have also taken into account the 12 August 2005 memorandum from counsel submitting a draft consent order for the MRP appeal. The memorandum was received by the Court after the hearing concluded. Findings and directions in respect of the draft MPPL consent order are made in the body of this decision.

[5] We should make mention of the time it has taken us to produce this decision. A quick glance at it will demonstrate the reason. This was one of those cases where an amazing amount of complex information and professional opinion was offered during what on its face was a relatively short hearing. Added to which, the subject-matter is of considerable significance, involving issues of district, regional and national importance.

[6] As will be seen from the decision, we were faced with a situation in which we came to understand:

- The approach taken by the council did not meet the purpose of the Act by a considerable margin;

- The s32 studies were totally inadequate;

- The solutions offered in V5 were broadbrush, even crude, and the relief sought by the parties almost equally so;

- We were advised by the council that studies are ongoing, and that V5 is merely intended as some sort of a stop-gap and for "administrative convenience";

- The council considered it quite urgent that it make the proposed district plan operative, and it would be loath to initiate a further variation.

[7] Accordingly we faced a situation in which our decision was likely to be something of a blunt instrument itself if we were to avoid recommending a further variation. This is to be regretted, and we have little doubt that the council will want to move as soon as possible to move forward with its current studies and promulgate a Change after the Plan becomes operative.

Specific matters requiring determination

[8] Variation 5 replaced all of the plan's Chapter 7: Subdivision and Development provisions except for Sections 7.5 (Methods) and 7.6 (Environmental Results Anticipated and Performance Indicators). Ms Gordon helpfully identified and summarised the contested provisions into two categories. It will be evident the first included an aspect of section 7.6[1].

i) Chapter 7 Subdivision and Development (as promulgated by Variation 5)

Provision	Agreed	Not agreed
Issues	First new Issue Second New Issue Existing Issue 4 Exiting Issue 5	Existing Issue 1 Existing Issue 2 Existing Issue 3
Objectives	Objective 7.3.1 (Objective 7.3.5)[1]	Objective 7.3.2 Objective 7.3.3 Objective 7.3.7
Policies	Policy 7.4.1	Policy 7.4.2 Policy 7.4.3 Policy 7.4.4. (Policy 7.4.18)[1] (Policy) 7.4.19)[1]
Methods		(7.6 Anticipated Environmental Results)
New Explanations	"Ribbon development"	"Sprawling or sporadic subdivision" "Objectives" and "policies"

ii) Countryside and Coastal Countryside Environments Subdivision rules

Rule 50.4 allotment area

- Rule 50.4A which allows additional lots as a discretionary activity where subdivision results in an *environmental benefit*
- Rule 50.4B Boundary Adjustments
- Rules 28.23 and 28.23A for residential units and minor residential units respectively

[1] Changes to Sections 7.5 and 7.6 have occurred through the submissions process as evidenced by the V5 Decisions version and when settling the Ngatiwai Trust Board appeal [refer Consent Order paragraph 8: addition of a 6th bullet to Section 7.5.1 Regulatory Methods]:

Statutory framework

[9] We now set out the statutory framework relevant to determining the appeals, acknowledging in particular the submissions by Ms Gordon and Mr Cameron.

[10] Ms Gordon appropriately synthesised principles applicable to the hearing of appeals from previous Court decisions[2] in the following manner, noting what she aptly described as the *"top down"* approach to be adopted for rules:

- The purpose of the Act - s5;
- The principles of the Act - sections 6 - 8;
- Local authority functions - s31;
- Consideration of alternatives, benefits and costs - s32;
- The purpose of plans - s72;
- The contents of plans - s75; and
- The purpose of rules - s76.

[11] It is established law that rules in a plan must also satisfy the well-known ***Nugent***[3] principles, namely:

- Be necessary in achieving the purpose of the Act;
- Assist the territorial authority to carry out its functions of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act;
- Be the most appropriate means of exercising that function; and
- Have a purpose of achieving the objectives and policies of the plan.

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[2] *Kiwi Veterinary Holdings Limited and Northland Shelf Co No. 9 v Whangarei District Council* Decision A161/2003

[3] *Nugent Consultants Limited v Auckland City Council* [1996] NZRMA 481-484.

[12] We remind ourselves that in addition to the preceding matters, reference proceedings are in the nature of an *inquiry* to ascertain the extent to which land use controls are necessary in the sense of being *desirable* or *expedient*[4].

[13] As regards over-arching considerations, we adopt Ms Gordon's submissions that "*restrictions on land use must be justified*" [5] and it is the scheme of the RMA:

> ...to enable people and communities to provide for their wellbeing, subject to the important sustainable management qualifications which authorise control only if there are environmental or Treaty concerns under sections 5 - 8; the proposed objectives, policies and rule pass the s32 tests; and on balance the proposed regulatory control would better achieve sustainable management than other methods of implementation.

[14] Finally, Ms Gordon submitted that as the plan and Variation 5 were notified prior to the enactment of the Resource Management Amendment Act 2003, the provisions of the Act are to be applied in these proceedings in their un-amended form. Surprisingly, no other party demurred. We do not accept the submission. Reference should be made to Judge Newhook's decision ***Environmental Defence Society v Far North District Council***[6] where he held that reference appeals filed after 1 August 2003 are to be heard and decided in accordance with the provisions of the RMA as amended from that date. The present appeals concerning V5 were filed in May 2004. Little turns on this in connection with the provisions of Part II of the Act, but s75 was significantly amended in the 2003 Amendment.

[15] Mr Cameron endorsed the statutory framework for coastal issues enunciated by the Court, similarly constituted, in ***Bay of Islands Coastal Watchdog v Far North District Counci1***[7]**.** Whilst the focus in that interim decision was primarily on rules, we agree that the RMA 1991 and New Zealand Coastal Policy Statement provisions referred to in that decision are also apposite here, particularly s6:

> **S.6 - Matters of National Importance**
>
> 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 recognise and provide for the following matters of national importance:

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[4] *Leith v Auckland City Council* [1995] 400, *Hibbit v Auckland City Council* [1996] NZRMA 529, and *Kamo Veterinary Holdings Limited at para 33.*

[5] Having regard to s9 RMA as discussed by the Environment Court in *Ferrier v Auckland City Council*[1999] NZRMA 401 at 405.

[6] Decision A112/2004

[7] *Bay of Islands Coastal Watchdog Inc v Far North District Council* A029/2005 paras 19-24.

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), ...rivers and their margins, and the protection of them from inappropriate subdivision, use and development.

(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

[16] We note also the provisions of subsections (c) and (d) of s6 concerning the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, and the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers. Neither should subsection (e) be overlooked concerning, the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

[17] We also acknowledge the relevance of other matters in s.7 to which particular regard is to be had in achieving the purpose of the Act, especially in this case sub-sections (b), (c), (d), (f)and (g).

New Zealand Coastal Policy Statement

[18] Section 75(2)(a) (post August 2003) requires that a district must give effect to the New Zealand Coastal Policy Statement. NZCPS Policies 1.1.1 and 1.1.3 provide as follows:

Policy 1.1.1

It is a national priority to preserve the national character of the coastal environment by:

(a) Encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;

(b) Taking into account the potential effects of subdivision, use or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location;

(c) Avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

Policy 1 .1.3

It is a national priority to protect the following features, which in themselves or in combination, are essential or important elements of the natural character of the coastal environment:

(a) Landscapes, seascapes and landforms, including:

(i) Significant representative examples of each landform which provide the variety in each region;

(ii) Visually or scientifically significant geological features; and

(iii) The collective characteristics which give the coastal environment its natural character including wild and scenic areas;

(b) Characteristics of special spiritual, historical or cultural significance to Maori identified in accordance with tikanga Maori; and

(c) Significant palaces or areas of historic or cultural significance.

[19] Mr J A Riddell, a Department of Conservation planner called by the Director-General, drew our attention to the following additional matters in the NZCPS, which we agree are relevant:

Policy 3.1.2

Policy statements and plans should identify (in the coastal environment) those scenic, recreational and historic areas, areas of spiritual or cultural significance, and those scientific and landscape features, which are important to the region or district and which should therefore be given special protection; and that policy statements and plans should give them appropriate protection.

Policy 3.1.3

Policy statements and plans should recognise the contribution open space makes to the amenity values found in the coastal environment, and seek to maintain and enhance those values by giving appropriate protection to areas of open space.

Policy 3.2.1

Policy statements and plans should define what form of subdivision, use and development would be appropriate in the coastal environment, and where it would be appropriate.

Policy 3.2.2

Adverse effects of subdivision, use or development in the coastal environment should as far as practicable be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects to the extent practicable.

[20] Section 75 (2)(b) and (c) provide, respectively, that a district plan must not be inconsistent with (in this case) the [Northland] Regional Policy Statement and "any regional plan for any specified in s30(1)".

Northland Regional Policy Statement

[21] Mr Riddell referred to the NRPS, Section 22 - Coastal Management. We note that it includes as Issues:

- Impacts, including cumulative effects, of subdivision, use and development on the natural character of the coastal environment, particularly its ecological, cultural and amenity values;
- Proliferation of structures and their effect on landscape values; and
- The finite nature of some coastal resources...

Other salient provisions were noted by Mr C Stewart, a consultant planner called by the respondent, including:

> (a) **Policy 22.4(a)(1) Preservation of Natural Character**
>
> In both the plan preparation and...processes to preserve the natural character of the coastal environment by, as far as practicable, avoiding adverse effects on:
>
> (i) Significant landscape values, including seascapes and significant landforms which impart a distinctly coastal character; and
>
> (ii) Significant indigenous vegetation, significant habitats of indigenous fauna, predominantly indigenous ecosystems and indigenous biodiversity; and
>
> (iii) Cultural heritage values, including historic places and sites of significance to Maori; and
>
> (iv) Intrinsic and amenity values, including the values of wild and scenic areas.
>
> Where avoidance is not practicable adverse effects should be mitigated and provisions made for remedying those effects to the extent practicable.
>
> **(b) Policy 22.4(a)(2) Preservation of Natural Character**
>
> In protecting the coastal environment from inappropriate subdivision, use and development (including any adverse effects associated with location, scale and/or character), councils will have particular regard:

(a) In relation to preservation of natural character avoiding:

(i) Types of use and development (including sporadic and sprawling subdivision) that would be likely to have adverse effects on the coastal environment; and

(ii) Cumulative adverse effects (including those associated with incremental change and a shift towards dominance of the built form); and

(iii) Any conflict (potential or actual) with current or existing uses, values and the natural character of adjacent land and water areas; and

Where it is not practicable to avoid these matters, councils will have regard to the extent to which they may be remedied or mitigated.

(c) Policy 22.4(d)(1) Public Access

1. To maintain and enhance the provision of public access to and along sections of the coast for scientific, educational, recreational and cultural purposes.

2. To protect culturally or ecologically sensitive areas of the coast from over use and potential degradation, and to restrict public access to them.

3. To require compensation where the public are deprived of access to and along the coastal marine area as a result of subdivision, use or development.

[22] The relevant RPS Methods of Implementation section states that the policies are to be given effect through a mix of regulatory and non-regulatory means, including by district and regional plans

Northland Regional Coastal Plan

[23] Notwithstanding the requirements of s75(2)(c)(ii) we received no submissions and very little evidence on the provisions of the Northland Regional Coastal Plan except from Mr S J Cocker, a landscape architect called by the respondent. He opined that one of the plan's key themes relevant to landscape is:

> That integrated management of land and sea is critical to maintaining and enhancing natural character and environmental quality.

Consideration of the cases presented by the parties

[24] We now address matters in the following order:

- Jurisdiction
- Context and Background
- Issues
- Objectives and policies
- Rules

Jurisdiction

[25] We heard wide-ranging evidence from all the principal parties across a broad spectrum of subjects, seeking diverse outcomes. We accept that in all cases this was done with the best of professional intentions as counsel and witnesses grappled with a challenging subject. It was notable that the evidence of council's witnesses did not coincide on all matters with council's decisions on V5 submissions. Their integrity in this regard was commendable, and indeed is a requirement of the Court's Practice Note. Other witnesses traversed ground beyond the relief sought in the appeals. To avoid the unproductive review of extraneous materials we have found it necessary to make the following findings on jurisdiction at an early point.

[26] We have been guided in this by the relevant principles from the Court's ***Vivid Holdings Limited***[8] decision which we respectfully adopt, namely:

> ...any decision of the Council, or requested of the Environment Court in a reference, must be:
>
> (a) Fairly and reasonably within the scope of:
>
> (i) An original submission, or
> (ii) The proposed plan as notified, or
> (iii) Somewhere in between
>
> Provided that:
>
> (b) The summary of the relevant submissions was fair and accurate and not misleading.

We also follow the approach directed by Panckhurst J ***in Royal Forest and Bird Protection Society Inc v Southland District Council***[9]**,** namely that:

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[8] *Re an Application by Vivid Holdings Limited* [1999] NZRMA 468 at para 19.
[9] [1997] NZRMA 408.

> . . .[T]he assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

[27] Our principal focus in the jurisdiction area was on the evidence offered by Mr Dunn, who was possibly widest ranging with his submissions and evidence, but lacking in jurisdiction for many of them. His status as an appellant derives from further submissions made in support of submissions by Landco Limited and Lands and Survey Limited. We have studied them closely together with the relief sought in his appeal, and there being no complaint about the notified summary of submissions, find there is jurisdiction for those matters set out below. In summary, Mr Dunn sought three amendments to "relevant objectives, policies and methods" [Relief 7(i)(a) - (c)] and six rule amendments [Relief 7(ii)(d) - (i)]. None of the submissions supported by Mr Dunn requested withdrawal of the Variation or indeed substantial modifications; and the issues before us were relatively modest and focussed in comparison to those that could have manifested themselves on a subject so important. We find the *live* matters on his appeal, where there is jurisdiction, to be (with the qualifications noted):

(i) Amendments sought to relevant objectives, policies and methods to recognise and explain the environmental and resource management advantages of *clustering* of residential units and allotments in the CE and CCE. Standing derives from Mr Dunn's support for all of the Landco submission which opposed the use of 8 ha and 12 ha caps for calculating complying average lot sizes and which sought that related matters be addressed through subdivision controls and clustering.

(ii) The amendment of objectives, policies and methods to remove reference to *"sporadic subdivision and development", "ribbon development"* and *"overall average density"* or the inclusion of appropriate definitions of the terms and associated explanatory material [Relief 7(ii)(b) and (c)]. The Landco submission which Mr Dunn supported sought the redrafting of objectives, policies and *"other provisions"* . However, the relevant part of Mr Dunn's appeal refers only to objectives, policies and methods. There is accordingly no jurisdiction to deal with the terms elsewhere in the Variation, for example, in Issues. We summarise the relevant objectives and

policies in the following manner, noting that there is relevant reference in Methods (7.5).

Contested Term	Objectives	Policies
Sporadic subdivision and development	7.3.3	7.4.2, 7.4.18 and 7.4.19
Ribbon development	7.3.3	7.4.2 and 7.4.19
Overall average density	7.3.7	7.4.4

(iii) In Rule 50.4 - the CE/CCE minimum CA lot size; CE/CCE average and minimum RDA lot sizes; use of *true*[10] averaging in the CE/CCE (rather than capped maxima/lot) complemented by use of clustering; and deletion of the CE/CCE *tiered*[11] lot size control as a DA;

(iv) In Rule 50.4A - correct a perceived lack of certainty/clarity; and amend so each significant feature protected qualifies for an additional lot, with "feature" suitably defined by reference to value and area. However we can see no reference in either of the subject submissions that affords status for the "restoration and re-vegetation projects" matter in Mr Dunn's Relief 7(ii)(h).

(v) In Rule 50.4B - the percentage of a site's area able to be changed by the boundary alteration mechanism.

[28] In addition Mr Dunn sought [Relief 7(ii)(j)] *"such other amendments as are necessary and consequent on the above relief sought being granted"*. We find this to be a potential basis for consequential amendments arising out of the principal grounds, but not a *catch all* for other matters however meritorious.

[29] The D-G's appeal sought that the CA minimum lot size be the same in both the CE and CCE. Mr Cameron amended this relief in opening by seeking that the CCE control apply only to so much of the CE as is located in the coastal environment (s.6(a)). More particularly, it was submitted that all CE zoned land in the study area adopted for the Whangarei Coastal Management Strategy 2002 ("CMS 2002") and generally coinciding with the coastal environment, should be subject to the CCE subdivision controls. We find that there is jurisdiction for this

[10] A term explained subsequently.
[11] Explained subsequently.

without commenting on the merits at this juncture. Where we lack jurisdiction is to re-zone any part of the CE as CCE.

[30] The respondent's witness on ecological matters Mr Poynter gave evidence on attributes required under the Environmental Benefits[12] provisions of Rule 50.4A. Put simply, Mr Poynter opined that the attributes should be better defined in both qualitative and quantitative terms than Variation 5 achieves. Through a supplementary annexure to Mr Poynter's evidence, the respondent introduced a detailed document which it contended met this purpose, entitled Criteria for Ranking Significance of Areas of Indigenous Vegetation and Habitat in Relation to the Environmental Benefits Rule (A Guideline for Plan Users). We find there is jurisdiction for the material by virtue of the relief sought by Mr Dunn[13] but, again, without comment at this juncture on the merits or our misgivings about compliance with Court practice for the prior circulation of evidence.

Context and Background

[31] The RMA came into effect in 1991. The PDP was notified in September 1998. Decisions on submissions were released in July 2001. Variation 5 was notified in December 2002 with the current appeals lodged in May 2004. These dates demonstrate the length of time for which, in the Whangarei District, there has been an unsettled regulatory environment, adding to costs and uncertainty. More importantly, there is still no operative plan for the Whangarei Countryside zones that accords with the sustainable management purpose of the Act, 14 years after it came into force. We find this a less than satisfactory state of affairs, and it is with reluctance we must protract the timeframes further to secure the Act's purpose

[32] The Council's expressed reasons for Variation 5 were to "[deal] *principally with a number of administration changes to the rural subdivision rules ..... in response to a number a administrative difficulties experienced with the wording of the Allotment Area Rules in the Countryside and Coastal Countryside Environments of the Amended Plan"*[14]. We have already set out the scope of Variation 5 and agree with Mr Dunn that in reality some of its changes are more substantial than described

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[12] An Environment Benefit site, put simply, is a bonus lot that may be approved when a valued resource is protected.
[13] Dunn appeal - Relief 7(ii)(h).
[14] Section 32 Report Variation 5: Subdivision Rules: Countryside and Coastal Countryside Environments, September 2002 page 2.

above, especially those on allotment sizes and "environmental benefits" [15]. It is difficult to conceive that anything but different environmental outcomes were sought, particularly for the CCE. We illustrate the point with the following comparison (amongst many that are available):

Plan	Controlled CE	Controlled CCE	Discretionary CE	Discretionary CCE
APDP	4 ha average	6 ha average	1.5 ha average, 2,000m^2 minimum	3 ha average, 2,000m^2 minimum
Variation 5	4 ha minimum	6 ha minimum	4 ha average, 4,000m^2 minimum, balance lot capped at 8ha, and *tiered* range of lot sizes.	6 ha average, 6,000m^2 minimum, balance lot capped at 12 ha, and *tiered* range of lot sizes.

[33] As already intimated, we heard opinions from council witnesses that the decisions version of V5 remains in imperfect shape. Significant technical work is apparently being progressed on various related plan matters with the potential ultimately to affect the shape of the CE and CCE provisions. Whilst not an exhaustive list, examples include: an urban growth study, which we understand will review settlement boundaries and countryside living provisions; implementation of the Coastal Management Strategy 2002, which may introduce additional zones in the coastal environment; and a review of the outstanding landscape provisions. Ms Gordon's frank acknowledgment was in our view correct that:

> . . .[it] is not an ideal situation . . . . that Variation 5 is before you, and some of the background work is not yet completed, ... the council is doing the best that it can to catch those matters and it does appreciate the difficulty that the Court faces.

[34] We have also come to agree with Mr Cameron's submission that, having regard to all the circumstances, the best that can possibly be achieved on the current proceedings is a workable set of arrangements in the nature of a *"holding measure"*, which meets the purpose of the Act and does not result in adverse effects. This will not preclude the council returning to the subject in a more integrated fashion, as forecast by Ms Gordon. We turn now to the matters to be decided.

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[15] Dunn EIC para 2.2.
Ms Gordon TOP p113 lines 5 - 10.

"Issue" Provisions

[35] We heard submissions and evidence on seven issues; two proposed new ones and five existing. The issues were agreed by all parties (subject to amendments) except Mr Dunn. We will revert to the amendments shortly. Mr Dunn lacks standing on this aspect and his evidence cannot affect the Court's related findings. But that is not to say his professional opinions were without merit. Generally the Court would not traverse such material. However, as will be seen, the matters dealt with in V5 have some distance to travel either by means of V5 as a vehicle or council's foreshadowed plan change(s). The Statement of Issues, (as also certain objectives and policies) may ultimately benefit from our making a limited record of Mr Dunn's constructive analysis. We therefore record the following sections of his evidence with tentative approval:

> …the rules don't really have an environmentally sound issue and objective/policy basis, in other words it is not clear what the Council is trying to achieve and why.
>
> In my opinion the redrafted Variation still doesn't have a coherent set of objectives and policies outlining why the Council is controlling subdivision in the manner proposed in the two zones. Clear objectives on matters like, the protection and enhancement of [rural] amenity values, coastal natural character, indigenous vegetation or biodiversity, public access to water bodies and traffic safety do not really exist. Instead the objectives are based around somewhat ill-defined concepts . . . . . Of particular concern is the lack of a policy framework surrounding the two key regulatory methods - being "allotment sizes" and "environmental benefits". As a result the rules are disjointed and difficult to follow.

[36] Two new issues were initiated by Landco and accepted in an amended form by those parties with standing. Mindful of the consensus, we find that they should be adopted but we do so with little enthusiasm given their blandness and lack of focus. The statements are to read:

> First new Issue - Subdivision and development can provide a catalyst for environmental protection and enhancement.
>
> Second new Issue - Subdivision and development can provide opportunities for people and communities to advance their wellbeing.

[37] Mr Stewart also presented amended versions of existing Issues 1 and 2 agreed by those with standing. The statements are to read:

> Existing Issue 1 - Subdivision and development can have effects on the environment, including effects on ecosystems, biodiversity, landscapes, versatile soils, amenity, natural character and heritage values.

> Existing issue 2 - Subdivision can have effects on historic and cultural values and areas of significance to tangata whenua.

[38] In order to acknowledge the scope for positive and negative effects, and the direction in s.5(2)(c) concerning avoiding, remedying or mitigating adverse effects of activities, parties at the negotiation meeting agreed to add the following text to the Overview in Chapter 7 (Subdivision and Development):

> Effects can be positive or adverse. Section 5(2)(c) of the Resource Management Act 1991 requires that any adverse effects on the environment be avoided, remedied or mitigated.

[39] Two matters arise from that proposition. First, the merits of the text which is proposed be added to the Overview. And secondly, it has come to our notice in preparing this decision that the wording of Existing Issue 2 as amended by a Consent Order between Ngatiwai Trust Board and the respondent dated 29 September 2005 in ENV A 0143/04 is different from the version now proposed in evidence led by the respondent, and agreed by others, on the current appeals.

[40] We deal with the matters in the order stated. Mr Stewart was correct that the first sentence of the paragraph proposed to be inserted into the Overview, would be an unnecessary duplication of s.3. The second sentence in the paragraph may be an incorrect statement of the law as decided in ***Catchpole v Rangitikei District Council*** and confirmed in ***Federated Farmers v Matamata-Piako District Council***[17]**.** There is no such absolute requirement in the sense of requiring that all adverse effects be internalised within site boundaries. For these reasons we consider that the statement should not be included.

[41] The second matter is more troubling. The Court in response to an application by the parties in ENV A 143/04 was led to issue a consent order without it being disclosed that there was an undecided appeal (now before us) on the same plan provision. That is the appeal by Landco Limited (ENV A 0183/04: Relief Sought paragraph 9.1: 4th Significant Issue). The Court is presented with a severe difficulty about deciding the same matter in potentially a different fashion and certainly cannot do so without the Ngatiwai Trust Board and any other parties to the settled appeal having the opportunity to be heard. The consent order has the same effect as a decision of the Court[18] and may perhaps therefore be subject to possible activity under s.294. That is, it occurs to us that it may be possible for the Court to invoke

[17] Catchpole v Rangitikei DC Decision W35/2003, and Federated Farmers v Matamata-Piako DC W055/2004.
[18] Simpson v Canterbury RC C149/01,6 NZED 851.

the principles stated in ***Brockman v Southland District Council***[19] ***and James v Waikato Regional Council***[20] on the basis that there has been a material change in circumstances which requires the matter decided in paragraph 2 of the Consent Order (Existing Issue 2) to be reheard. The change might be said to be that there is an undecided appeal on the same plan provision and the respondent seemingly now supports a different outcome. If necessary, a hearing could be conducted to rehear the matter on its merits. However, that is not the Court's preferred option and we trust agreement can be reached among the parties in both cases. The respondent is directed, within the timeframe set later in this decision in relation to other matters, to advise the Court whether all parties can agree a course of action or whether there will be a need for a rehearing of ENV A 143/04. The situation is disappointing in that the Court should be able to rely on the knowledge of council personnel about all Review appeals when being invited to make a Consent Order.

[42] Mr Stewart next presented amended versions of existing Issues 3 - 5 agreed by those with standing, together with additional words for the Explanations and Reasons to support one of them.[21]

> Existing Issue 3 - Cumulative effects of on-going or subsequent subdivision and development, including sporadic or sprawling subdivision and ribbon development.
>
> Explanation and Reasons - Ribbon development [development which results in a strip of building usually only one or two allotments deep along roads leading to and from settlements] is considered to be generally inappropriate because of the potentially adverse effects on rural character and amenity, service provisions and traffic safety.
>
> "Sprawling or sporadic subdivision" is a term used in the New Zealand Coastal Policy Statement.
>
> Existing Issue 4 - Conflict between incompatible land use activities, including reverse sensitivity effects, can arise where new subdivision and development occurs.
>
> Existing Issue 5 - Subdivision and development can have effects in relation to the provision of the necessary infrastructure, including effects on the efficient, safe and effective servicing of land use activities and on the provision of emergency services.

Mr Riddell told us it was agreed between the parties that Existing Issue 7 (recreation areas/facilities) was to remain unaltered and we assume the same applies to Existing Issue 6 (natural hazards).

Decision C41/2000
Decision A117/2004
Mr Stewart EIC paragraphs 22-37.

Objectives and Policies

[43] In paragraph 24 we have identified the objectives and policies where Mr Dunn has standing. There are additional objectives and policies on which other parties have standing, principally Landco. The latter were the subject of pre-hearing negotiations resulting in a large measure of agreement. Mr Stewart systematically worked through these matters in his evidence in chief presenting views on how the provisions might be suitably framed and the merits of the changes sought. He presented a preferred version for each provision agreed through the negotiation process with the parties except, in some cases, Mr Dunn. There are essentially three matters to be dealt with:

i) Some recurring terms in objectives and policies of concern to Mr Dunn;

ii) Changes to multiple objectives and policies sought by Landco and agreed with the council involving a range of subjects. It is necessary that we record the changes and make a finding on each;

iii) Mr Dunn's position on the term *"clustering"*.

We commence with the objectives and policies, dealing with them in numerical order, before turning to *clustering.*

Objectives

[44] Mr Stewart explained that Objective 7.3.1 in its agreed amended form would read:

> Objective 7.3.1: Subdivision and development that **achieves** the sustainable management of natural and physical resources whilst avoiding, remedying and mitigating adverse effects on the environment [bold added].

[45] The objective was not opposed by Mr Dunn and the Court might normally be minded to endorse it, notwithstanding its innocuous form. Regrettably, we find the wording again conflicts with the Ngatiwai Trust Board consent order (ENV A 0143/04) which expressly provides in paragraph 4 that *"There be no change to the wording of Objective 7.3.1 "* (underlining existing). The same process and timetable are to be followed for resolving this matter as described for Existing Issue 2.

[46] Mr Stewart next presented a revised Objective 7.3.2 and accompanying material for Section 2 with the parties' agreement, namely:

> Objective 7.3.2: Subdivision and development that does not detract from the character of the locality and avoids conflicts between incompatible land use activities.
>
> Section 2.1A Objectives and Policies: The Plan includes objectives and policies. As a guide, an objective is a target - a statement of what the Plan is trying to achieve, and a policy is a statement of how the Plan intends that target to be achieved.

We find that the objective and Section 2 material may be included in its amended form, noting that Mr Dunn does not have standing on the objective. The Landco submission expressly opposed Objective 7.3.2, and Mr Dunn in his further submission supported that. There is nothing, however, in the relief sought in his appeal that either directly or indirectly bears on the objective.

[47] Mr Stewart next presented a revised Objective 7.3.3 with accompanying material for inclusion in Chapter 7 Explanations and Reasons (which follows the objectives) as agreed by a majority of the parties, namely:

> Objective 7.3.3: Subdivision and development that ensures consolidated development in appropriate locations and avoids **sprawling** or **sporadic subdivision and ribbon development.**
>
> Explanation and Reasons: **Ribbon development** [development which results in a strip of building usually only one or two allotments deep along roads leading to or from settlements] is considered to be generally inappropriate because of the potentially adverse effects on rural character and amenity, services provision and traffic safety.
>
> **"Sprawling or sporadic subdivision"** is a term used in the New Zealand Coastal Policy Statement [bold added by us in each provision].

[48] Mr Dunn opposed the wording of the objective and, more particularly, inclusion of the terms *"sporadic subdivision and development"* and *"ribbon development"*. He sought that they either be deleted or defined, including explanatory material. Mr Dunn opined that *"preventing sporadic subdivision"* is redolent of the planning control approach said to characterise the Town and Country Planning Act 1977 as opposed to the *"environmental focus"* of the RMA. It was his view that *"sporadic subdivision"* has no real meaning in a rural context as subdivision generally proceeds at random with little co-ordination between landowners. Mr Dunn deposed that *"preventing ribbon development"* is equally outdated and inappropriate. In his opinion much of the district's urban and rural

settlement form has this characteristic and it should only be prevented where some demonstrable adverse effect would otherwise result.

[49] Mr Stewart addressed these matters initially in the context of Existing Issue 3 and again in respect of Objective 7.3.3. He identified a passage from the s.32 report stating *"……a new objective has been inserted [7.3.3] to reflect the need to consolidate development to prevent sporadic subdivision and ribbon development. This was felt necessary so as to address the requirements of sections 5, 6 and 7 of the RMA, particularly 5(c), 6(a), 6(b), 6(c), 7(b) - (a); and including under 7(b), the efficient and orderly provision of infrastructure and services (which is better enabled when development is not sporadic and uncontrolled)"*. Mr Stewart conceded that, to some extent, most rural subdivision is *sporadic* and offered the opinion that the reference is unlikely to be particularly helpful to plan administrators. He also opined that although the s.32 report linked *"sporadic"* and *"sprawling"* with *"uncontrolled"*, subdivision would never be uncontrolled.

[SO] It was more significant in Mr Stewart's opinion that the NZCPS specifically refers to the need to avoid *"sprawling and sporadic subdivision"* and does so without definition, no doubt simply relying on the words' dictionary meanings. Although addressing the terms in the context of Issues, the evidence of Mr Riddell was also of assistance. He deposed, correctly in our view, that *"sprawling or sporadic subdivision"* can have a range of effects including inefficient provision of infrastructure, a cumulative change to natural and rural amenity character, and reverse sensitivity effects. He also alluded to the term's use in the NZCPS (Policy 1.1.1(a)) and the RPS (Policy 22.4(a)(2)).

[51] Mr Stewart also gave considered evidence on ribbon development which he said was an established land use planning term. He described it as *"usually* [being] *one lot deep along the road"* effecting a change (usually regarded as adverse) in rural character/amenity and sometimes creating inefficiencies in the provision of utility services. He noted, in the context of Existing Issue 3, that ribbon development can also have cumulative effects, which is undoubtedly correct. Mr Stewart considered it unnecessary for objectives to be written with the same precision as rules because their interpretation will always call for judgement. We are inclined to agree although it is a matter of degree. Imprecise objectives should be avoided.

[52] We find that the contested terms are suitable in the context of Objective 7.3.3. The objective is concerned to ensure subdivision and development are consolidated in appropriate locations and that the antithesis, namely sprawling/sporadic/ribbon development is avoided. It is necessary for achieving the purpose of the Act that effects, which would otherwise occur in conjunction with the latter, are effectively managed. We agree with Mr Stewart that the words used in the objective have ordinary plain meanings, or are in customary RMA usage. To the extent greater definition is required, the proposed additions to Explanations and Reasons will suffice and are consistent with Mr Dunn's alternative relief.

[53] Objectives 7.3.4 to 6 are confirmed in their V5 Decisions format, effectively uncontested. That is not to say the Court is enamoured with them. Objective 7.3.4 is especially important. It lumps some 14 matters together. A number are of national importance. The objective would be better *split out* to provide a more focused and robust basis for subsequent policies and rules, not least the so called *"environmental benefit"* rule. Another example, from a substantial candidate list, is *"public access to coast, lakes and rivers"* which we apprehend is the precursor of Policies 7.4.8 Riparian Management and [in part] Policy 7.4.9 Protection of Features, plus rules in Chapter 44. Again these are substantive and important matters, that warrant separate treatment.

[54] Next was Objective 7.3.7 with Mr Stewart again presenting an amended version, namely:

> Objective 7.3.7: Subdivision and development that provides for comprehensive development of land with a range of allotment sizes and that is appropriate to the character of the Environment in which it is located.

Here we encounter the third term which troubled Mr Dunn. His appeal (Relief 7(ii)(c)) sought removal of the words *"overall average density"* or inclusion of an appropriate definition of the term with associated explanatory material. The appeal will be satisfied to the extent the contested words are deleted. While appearing to accept the revised objective (as set out above) Mr Dunn challenged the degree to which related rules allow for a range of allotment sizes. We shall return to that matter when dealing with the rules.

Policies

[55] The A11 parties were agreed Policy 7.4.1 should be amended to read:

> Policy 7.4.1: To design and locate subdivision and development so as to avoid as far as practicable conflicts between incompatible land uses

The policy is again very general. It is not evident to us which of the objectives it is intended to implement. Nor are we confident that it adds anything (except words) to the statutory scheme. It does have the redeeming quality, however, of dealing more appropriately with the related matter proposed for inclusion in the Chapter 7 Overview, discussed previously. The policy is confirmed.

[56] All the parties except Mr Dunn are agreed that Policy 7.4.2 should be amended to read:

> Policy 7.4.2: To encourage consolidated development in existing built up areas or specifically identified areas, and to avoid as far as practicable sprawling or sporadic subdivision and ribbon development, particularly in rural areas and along the coast.

The policy adds little to amended Objective 7.3.3, and is itself rather in the nature of an objective, there being scant indication of *how* the objective is to be implemented. Further, have discerned little in V5 that informs what is meant by *"consolidated"*. At least two interpretations are reasonably open on the face of the policy. The Explanation and Reasons assist to a degree. Where are the *"identified areas"?* We are inclined to prefer the Decisions' Version and find that the shortcomings identified should be redressed so that the policy better assists the council carry out its functions to achieve the purpose of the Act. The policy also employs two of the terms opposed by Mr Dunn. We find for the reasons given previously that they are suitable in the context of Policy 7.4.2. Whilst not addressed by the parties, the amendment to the explanation and reasons for Policy 7.4.2 settled by the Ngatiwai Trust Board Consent Order (ENV A0143/04) is compatible with this aspect of our current decision.

[57] All the parties with standing are agreed Policy 7.4.3 should be amended to read:

> Policy 7.4.3: To ensure that subdivision and development results in a pattern and density of land use which reflects flexibility in allotment size, and is of a density appropriate to the locality.

It would be tiresome to make detailed comment on each of the policies ultimately agreed upon by the parties. Our statutory role in the formulation of policy is limited. Suffice to say that shortcomings of the type noted in preceding provisions are again evident. Should the parties submit a mutually agreed revision with their responses to

this interim decision, it will be gratefully considered by the Court. Otherwise the policy is confirmed. Whilst not addressed by the parties, the amended explanation and reasons for Policy 7.4.3 introduced by the Ngatiwai Trust Board Consent Order does not appear inconsistent.

[58] All the parties except Mr Dunn are agreed that Policy 7.4.4 should be amended to read:

> Policy 7.4.4: To ensure that the **cumulative effects** of ongoing subdivision and development do not compromise the objectives and policies of this Plan, in particular those objectives and policies relating to reducing conflicts between incompatible land use activities, the consolidated and orderly development of land, and the density of development.[bold added]

The revision meets Mr Dunn's appeal (Relief 7(ii)(c)) as it removes "*overall average density*" from the policy. This is an appropriate point to record that while Mr Dunn expressed concerns with all of the policies except Policy 7.4.1 we lack jurisdiction to deal with them except where there is standing. That in no way reflects on the merits of his professional opinions, which we found persuasive in many ways. Whilst essentially a matter for council, it is not clear why this part of the plan should have two policies on cumulative effects (Policies 7.4.4 and 7.4.20) at virtually opposite ends of the section and with Policy 7.4.20 not applying the term except in its heading.

[59] Mighty River Power's proposed Consent Order (ENV A 0134/04) allows for a satisfactory amendment to Policy 7.4.5 Reverse Sensitivity. We think, however, that part of the policy might be better worded to read "*... . . . is designed and located to avoid, remedy or mitigate reverse sensitivity effects on existing or permitted activities* ……." and invite submissions from the parties in accordance with the timetable given below. Findings are made and directions given on Policy 7.4.9 in the context of Rule 50.4A below.

[60] Policies 7.4.18 and 7.4.19 did not receive the same attention in evidence as others but also contain terms opposed by Mr Dunn. They read as follows:

> Policy 7.4.18: To direct rural lifestyle and rural-residential development to appropriate locations adjacent to existing settlements, rather than allowing **sporadic** development throughout rural and coastal areas.
>
> Policy 7.4.19: To avoid uniform residential **sprawl** or coastal **ribbon development** by promoting clustered mixed activity settlements focused on existing coastal centres.[bold added to both]

For no evident reason the policies lack any supporting explanation and reasons, and appear to have the character of objectives rather than policies, but we find their intent clear and consistent with council's functions and the purpose of the Act, and to be appropriate in the circumstances. They are reluctantly confirmed unmodified.

[61] The MRPL draft Consent Order allows for the following additional amendments, which are confirmed unless otherwise indicated:

i) Policy 7.4.21 Design and Location is to be amended in a generally satisfactory manner by, inter alia, removing words which lack context ("*. . . ..and special environmental quality . . . .* ") and introducing a suitable qualification. The parties are requested, however, to provide submissions in accordance with the timetable later set, on whether explanations and reasons might usefully be added, setting out amongst other things, that the policy applies to both proposed and, in appropriate circumstances, existing development. If there is agreement, the text for an appropriate amendment is to be submitted at the same time by counsel for the parties to the MRPL matter.

ii) Policy 7.4.22 Design and Location is to be amended by, inter alia, deleting "*rigorous management"* and substituting "*best environmental practice "* and removing reference to "*infrastructure (including sewage[sic] and waste management) "*.

iii) Policy 7.4.23 Design and Location is confirmed.

iv) The draft consent order allows for a new Policy 7.4.25 Continued Operation and Further Development to be added providing for the continued operation, and appropriate further development, of existing business activities located in the coastal environment. It is clear enough to us how the policy might benefit MRPL, but we are not certain that the purpose of the Act will be served by the developments referred to having such advantage. Rather, it occurs to the Court that such developments should be evaluated on the same basis and against the same policy framework as all others. Submissions on this aspect are requested from the parties in accordance with the timetable set later.

[62] We come finally in this section to *"clustering of lots "* as raised by Mr Dunn. Amongst his reasons for appeal is the statement:

> Policy 7.4.9 . . ..seeks to permanently protect a range of cultural and natural features on sites and secure legal access to them irrespective of the form and scale of the subdivision and associated costs. The policy fails to provide any clear incentive to people developing or subdividing land in terms of clustering of lots or dwellings and "additional" lots or dwellings and simply states that the council "may allow additional development potential" [bold added].

The appeal seeks specific relief in respect of clustering, namely amendment of relevant objectives/policies/methods to recognise and explain the advantages of clustering residential units and sites in the CE and CCE. We are inclined to agree with Ms Gordon's submission that *"It is somewhat difficult to know exactly what relief Mr Dunn seeks, as neither his appeal nor his evidence provide any detail as to which provisions of Chapter 7 could make reference to "clustering", nor does he propose any amendments or new provisions ".* There are nevertheless references to the concept in Mr Dunn's evidence in at least two places; albeit obliquely. One occurs where he describes how under the APDP a property could be subdivided as a CA into a cluster of some 6 lots of at least 4,000m^2 with a larger balance area. A second reference is made in the context of the allotment area rule where alternative methods are identified that would better align, in Mr Dunn's opinion, the rule with relevant objectives and policies. He went on to say, however, that the alternatives were:

> ...suggested on the basis that other options, which may have equal or more merit, such as introducing a . . . . . policy area to identify where **. . . . . .clustered** …. subdivisions are to be directed to, **fall outside the scope of the Variation and appeal.** [bold added]

[63] We deduce from his evidence that Mr Dunn considered that:

i) Rules 50.4 and 50.4A and their related objectives and policies do not provide effectively for clusters of relatively small sites off-set by relatively large balance areas in the CE and CCE.

ii) His appeal does not afford jurisdiction to zone or otherwise identify areas specifically for clustered subdivision.

[64] Mr Stewart discussed both Mr Dunn's request for recognition of clustering in some detail and his assertion about lack of clarity on the number of *"environmental benefit"* lots able to be approved under Rule 50.4A. He noted that the appeal does

not explain why clustering is an advantage, and stated that in some situations it might result in adverse environmental effects. Notwithstanding the absence of express provisions, Mr Stewart opined that an appropriately designed clustered development could draw support from Objectives 7.3.1, 7.3.2 and 7.3.3 although none of these refers specifically to clustered development. In similar vein Ms Gordon pointed to Objective 7.3.7 which speaks of "*comprehensive development with a range of allotment sizes"* and Policies 7.4.3 (flexibility in lot size) and 7.4.19 which deal with density. Ms Gordon also submitted that there are numerous issues/objectives/policies, which she identified, that seek to avoid sprawling subdivision and development and that *"as the concept of clustering is almost diametrically opposed to that of sprawling, a clustered development would find ample policy support . . . . "* in the provisions cited. We think this is rather a long bow and not what Mr Dunn contemplated.

[65] More relevantly perhaps, Mr Stewart acknowledged that there are situations where clustering may be desirable. Whilst maintaining the position that existing objectives and policies provide adequately for clustering where its purpose is sustainable management, he suggested Rule 50.4 (matters control is reserved over for Controlled Activities)could be usefully amended to read:

> (i) The location of vehicle crossings, access or ROW and proposed allotment boundaries so as to avoid ribbon development, or **to promote clustered development where this is appropriate** [bold added].

Although doubtless offered with good intent, the suggestion would not facilitate clustering in the manner contemplated by Mr Dunn, as the CE and CCE controlled activity rules require that every proposed allotment have a minimum net site area of 4 ha and 6 ha respectively. At best this could be provided for as a DA but there is a problem in that too. The Ngatiwai Consent Order (ENV A 0143/04) provides at paragraph 10 that *"There be <u>no change</u> to the wording of the assessment criteria for discretionary activities in Rule 50.4 allotment area"*. We are not inclined to make provision for an additional discretionary activity when there is a bar to including related assessment criteria.

[66] We sense that Mr Cocker, the landscape architect called by the respondent, best demonstrated an understanding of the clustering concept and its potential. Having identified that Mr Dunn and Landco seek as a DA reduced average lot sizes

for the CE and CCE of 1.5 ha and 3 ha respectively, with a minimum lot size of 2,000m^2 in each, he stated:

> On the face of it this proposal has merit in that it may provide the opportunity for greater flexibility to achieve the outcomes sought by Council and those sought by the applicant [sic]. The minimum lot size of 2,000m2 would allow **"clustering"** to a relatively high density. Where development is subject to a rigorous landscape analysis and site design which reflects, respects and enhances the landscape patterns, an application including lots of this size **may** be appropriate. However a development to this density would be appropriate only in specific circumstances. . . . . The difficulty lies in Council being able to ensure protection of landscape or natural character when subdivision to this density is sought. It is my opinion that average and minimum lot sizes of the areas sought **need to be dealt with within a management plan process** as prescribed within the Far North District Plan [bold added].

We very largely concur with this view as described in the decision of the Court, similarly constituted, in ***Bay of Islands Coastal Watchdog Inc v FNDC***[22]**.** We find, however, despite the respondent's submissions and evidence to the contrary, that there are insufficient objectives and policies to support the concept and there is no basis in these appeals to insert enabling provisions into the plan as none were before us. For these reasons, (with considerable disappointment) we cannot uphold this aspect of Mr Dunn's appeal.

[67] Mr Stewart helpfully addressed the question of ambiguity around numbers of environmental benefit lots in two supplementary statements prepared during the course of the hearing. We are indebted because it allows the issue to be advanced. He correctly noted that the Explanation and Reasons to Policy 7.4.9 refers to allotments plural and at the *"end of the rule there is provision for discretionary activity subdivision where more than one environmental benefit lot is sought"*. Mr Stewart conceded however that the policy, and Rule 50.4A, would benefit from re-drafting to make their intent clear. We think that was a proper concession and find the following policy and rule amendments generally appropriate subject to finalising other aspects, which we shall come to :

Policy 7.4.9 Protection of Features

> To ensure that during the subdivision and development process opportunities are taken, where available, to secure permanent protection and/or enhancement of, and where appropriate, legal public access to:
>
> - Areas of significant indigenous vegetation and significant habitats of indigenous fauna;

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[22] *Bay of Islands Watchdog Inc and Others v Far North District Council,* A029/2005.

- Outstanding Natural Features and Landscapes:
- Coastal and river margins and wetlands;
- Sites of Significance to Maori;
- Significant archaeological and heritage features

and that where such protection/enhancement is offered the number of environmental benefit lots that can be obtained is related to the **value and areal extent** of the items that are to be protected [words in bold substituted for consistency with the rule amendment that follows]

Rule 50.4A - Environmental Benefit Rule: delete the last sentence in V5 right hand column page 436 and insert the following:

Subdivision creating an Environmental Benefit under (c) above, but which does not meet the standard of (a) or (b) above [as applicable], is a discretionary activity. The matters which the council will consider in its assessment of an application for a discretionary activity consent under this rule include but are not limited to:

- The area and/or the value of the significant natural or historical feature or features to be protected: and
- The matters to which discretion is restricted under the restricted discretionary activity rule above; and
- The effects of the extra environmental benefit lots and their subsequent development in terms of visual effect, effects on natural character, and effect on the sustainable management of natural and physical resources.

Rules

[68] We commence with Rule 50.4 (Subdivision), and its various sub-components, before dealing with Rules 50.4A, 50.4B, and Rule 28.23.

[69] Rule 50.4 applies to the subdivision of land in both the CE and the CCE. The Controlled Activity [CA] minimum lot sizes are presently 4 ha and 6ha in the CE and CCE respectively. Relevantly, control is reserved over the:

- Location of boundaries to avoid ribbon development;
- Location of boundaries and building areas to avoid conflicts between incompatible activities including reverse sensitivity effects;
- Location of boundaries, building areas and access ways to avoid sites of historic, cultural and Maori significance.

- Additional matters listed in Section 48.3 [which appears to have the effect of a rule].

Subdivision is presently a Discretionary Activity [DA] in the CE where the following relevant provisions are met:

- The minimum average lot size is 4 ha provided for the purpose of calculating the average any proposed lot greater than 8 ha is deemed to be 8 ha [we adopt the parties' term *capped* control for the latter provision]; provided :
- The *capped* averaging provision does not apply to 2-lot subdivisions where one of the lots is less than 4 ha and the other is greater than 8 ha; and
- Every lot has a minimum area of 4,000m^2; and
- A maximum of 3 proposed lots may be less than 3 ha and of these not more than two may be less than 2 ha and not more than one less than 1 ha. [We adopt the parties' term *tiered* control to describe this provision].

Subdivision is presently a Discretionary Activity in the CCE where the following relevant provisions are met:

- The minimum average lot size is 6 ha provided for the purpose of calculating the average any proposed lot greater than 12 ha is deemed to be 12 ha; provided :
- The *capped* averaging provision does not apply to 2-lot subdivisions where one of the lots is less than 6 ha and the other greater than 12 ha; and
- Every lot has a minimum area of 6,000m^2; and
- A maximum of 4 proposed lots may be less than 5 ha and of these not more than three may be less than 4 ha, not more than two less than 3 ha and not more than one less than 2 ha..

The DA assessment criteria include:

- Likely location of future rural and urban development, including the effects of sporadic subdivision and ribbon development and effects on efficient services provision;
- Potential effects on the type and density of subdivision on rural amenity, landscape, open space, heritage value, ecological values, riparian management, and the natural character of the rural and coastal environment;
- Cumulative effects on the environment and provision of services;
- Risks from natural hazards;
- Anything else council thinks relevant.

[70] Subdivision that does not comply with a standard for a CA or DA is a non-complying activity.

[71] We turn now to the many disputed matters in Rule 50.4. To the extent possible we deal with them separately but recognise that many aspects are inter-related. Where appropriate, findings are made as we proceed.

Positions on Controlled Activity Minimum Lot Sizes

[72] The V5 decisions version provides CA status for minimum lot sizes of 4 ha and 6 ha in the CE and CCE respectively. Mr Grove submitted that these should be increased, subject to jurisdiction, to 6ha and 10 ha respectively. The D-G's appeal sought 20 ha in both zones although this was not pursued in evidence where the CE is away from the *coastal environment.* Mr Dunn's appeal sought 4ha and 6ha average minima with a 4,000m^2 minimum for environmental benefit sites. His position also changed in evidence. Landco opposed the relief sought by the D-G, relying largely on the evidence of Mr Stewart for the council.

CCE Controlled Activity Minimum Lot Size

[73] Because of his position at one end of the spectrum, it is appropriate to commence with the evidence of Mr Dunn, who considered the allotment area rule to be unsound and unnecessarily restrictive. It was his view that, because the CCE includes a considerable amount of broken land having limited relationship to the coast, there is considerable scope to subdivide parts of it with little impact on the coast's natural character. He illustrated this opinion by reference to the Tutukaka - Matapouri area, where he deposed that many of the houses are not particularly noticeable or inappropriate. He attributed this situation to the previous regulatory regimes (the TDP Rural AC zone, PDP and APDP) which he described as more enlightened than V5 in the sense of enabling people *"to obtain small sites on the coast"*. We apprehend that he considered that V5 would, by contrast, encourage a proliferation of relatively large, equal sized sites across the CCE; possibly involving greater tracts. These matters, in our mind, go to questions such as the CCE minimum lot size; the CCE zone boundaries and whether there is a sufficient range of zones in the plan. We heard other witnesses express related concerns and, in some cases, proposals to redress them.

[74] For Mr Dunn the most appropriate method would be, amongst other things, to introduce a new rural/residential, rural lifestyle zone or policy area to identify where consolidated, clustered or varied lot subdivisions are to be directed to. That might well be a proper course, but as Mr Dunn recognised, it cannot succeed because it is outside jurisdiction. We are left with the smorgasbord of options given as alternatives for promoting the V5 objectives and policies which Mr Dunn supported (comprehensive developments, consolidated developments, a range of lot sizes, flexibility in lot sizes). Of relevance to the CA controls were either the *"reintroduction of a rule similar to that in the APDP that allows true averaging"* or *". . . .a clause which allows true averaging under specified circumstances similar to those in the Kaipara District Plan"*. We have intimated a degree of empathy with the broad strategic direction that we understand Mr Dunn prefers, but for reasons we set out shortly cannot support CA averaging on the current appeals.

[75] Mr Stewart presented a comprehensive assessment of factors he considered relevant to determining appropriate sizes in both the CE and CCE zones, interwoven with other matters. We tackle them in order:

i) The calculation of potential lot yields/km^2 (100 ha) for the different minimum allotment sizes contended for by witnesses. This gave figures for the CE of between 5 lots (D-G) and 25 lots/km^2 (Dunn and V5); and for the CCE 5 lots (D-G) and 16 lots/km^2 (Dunn and V5). The implications of these figures for the resultant intensity of development are readily apparent, particularly in the CCE. Mr Stewart also produced figures for the number of additional lots that might result from the various minima advanced on a district-wide basis. By way of example, we note that in the CE minima of 4, 6, 10 and 20 hectares could produce approximately 28,500, 18,300, 10,000 and 3,800 new allotments respectively. Corresponding figures for the CCE for 6, 8, 10 and 20 hectares were 1,000, 700, 500 and 150 lots. We heard no evidence placing the data in context, for example, relative to existing vacant sites or take-up rates. Whilst limitations attach to the figures, we do not criticise Mr Stewart for attempting the exercise. Quantification of the competing options is an important aspect of understanding their likely effect(s).

ii) The limited range of matters over which council has retained discretion. Notably these do not include amenity and/or any s.6

considerations. As Mr Stewart observed *"... . ..neither the council's approach nor that of DOC prevents lots from being proposed in sensitive areas ".* For this reason we do not necessarily share Mr Stewart's confidence (albeit expressed in a different context) that the criteria are sufficiently well constructed to *"avoid adverse effects on the natural and rural character of the area",* especially where smaller sized lots are concerned.

iii) The merits of averaging versus minimum lot sizes. We agree with Mr Stewart that there are problems with the former in a CA context, where consent must of course issue, because subdivisions could result in an inappropriate number of relatively small lots with a large balance area. And where there is no rule preventing it, the process could be repeated, possibly more than once. Mr Stewart said that problems of this type were experienced with the APDP and contributed, in part, to the initiation of V5. Mr Dunn was not persuaded by the problems Mr Stewart foresaw. He thought council's inability to control the location of 4 and 6ha lots could prove just as problematical as the situation with smaller sites resulting from averaging. He also considered that effective techniques are available to preclude further subdivision. This may well be so, but there is no jurisdiction to address the subject in the context of CA under Mr Dunn's appeal, and the D-G's appeal is concerned with sites created by DA consents. We note that Mr Dunn ultimately reached the same position on averaging as Mr Stewart (albeit for different reasons) when accepting 4ha and 6 ha as minimum lot sizes until council completes further technical studies, which he identified. For the reasons given, we find that whatever CA minimum size is finally determined, there should be no allowance for averaging.

iv) Mr Stewart compared the V5 CA minimum in the CCE with corresponding provisions in the Far North District Plan (20 hectares in the General Coastal Zone when there are no outstanding natural features present). Where such features are present the minimum area is the same but the activity status is RDA. He advanced various reasons why the FNDC provisions are not necessarily appropriate for Whangarei. We acknowledge Mr Stewart's familiarity with both districts, gained through his involvement in the preparation of their

plans, but do not share his view that length of coast is relevant to the matters before us or that the Whangarei coastline is significantly less diverse than that in the Far North. We think he may also have placed excessive weight on preferences of the local community, as gauged through consultation, at the expense of national and regional directives in the provisions of superior instruments (Part II RMA, NZCPS, NRPS and NRCP).

v) Mr Stewart opined that most people want to subdivide smaller lots than 20 ha and it would be unreasonable to require DA consents. We are troubled by the assumption that smaller lots should be provided as CA for this reason, especially in the coastal environment, having regard to the provisions of the superior instruments noted. Mr Stewart, correctly in our view, qualified his position by acknowledging that determining a suitable CA minimum would be facilitated by having additional zones (to complement the CE and CCE) to better manage development in a more targeted manner. He indicated it was council's intention to achieve this by implementing recommendations contained in the Whangarei Coastal Management Strategy: 2002 ("CMS2002"), and referred specifically to the adoption of structure plans to guide continued development of existing settlements. Ms Gordon confirmed the first such plans are to be notified as statutory documents this year. We also endorse, tentatively and in principle, related Category 1 CMS 2002 Recommendation 6.7.1 *"to be undertaken urgently - preferably within 1 - 2 years"* to promote a *"plan change as necessary to direct coastal lifestyle and rural-residential demand to appropriate locations [zones] adjacent to existing centres and to restrict sporadic development throughout the coastal countryside"*.

[76] Mr Stewart concluded that these factors collectively argue for a more conservative approach to CE and CCE minima at this stage to avoid the risk of compromising future, sustainable management options. While deposing that the 20 ha minimum sought by the D-G is unnecessarily restrictive, he considered that V5 (in the context of the APDP) is slightly too permissive for a CA standard applying over the whole district. He suggested instead (provided subdivision in sensitive resource areas is discretionary) that minimum figures *"in the order of 6 ha for the CE and 8 ha for the CCE, with no allowance for averaging"*, would be appropriate

and meet the relevant statutory tests. Without being unduly critical of Mr Stewart we think there might be a degree of intuitiveness in the areas advanced resulting from the circumstances of the case.

[77] Mr Cocker, a landscape architect called by council addressed the CA minimum lot size controls as well. He also opined that it would be appropriate for managing subdivision effects if the minima were increased *"to something in the order"* of the 6 and 8 hectares suggested by Mr Stewart. He based this opinion on the consent authority's inability to delete lots from a subdivision proposal that meets minimum requirements and adverse effects management being limited to detailed matters. Because of its relevance to this and later aspects, we also record his evidence that:

> Consequently I consider a minimum lot size approach to be appropriate in this respect. Whilst it can be regarded as a "blunt instrument" in the managing of the effects of subdivision and development, I believe that, in combination with appropriate controls for the protection of significant landscapes ……, it ensures that development is of a density that may be mitigated through the use of planting or other measures"

[78] Turning to the D-G's case, we have found there is jurisdiction for his amended position that a 20 ha CCE CA minimum lot size should apply to those parts of the CE in the *coastal environment* with the latter defined on the basis of the coastal environment boundary adopted in the CMS 2002. For other parts of the CE the D-G accepted the V5 4 ha minimum CA control. It was Mr Cameron's submission that relevant plan provisions are in need of review to allow for a more refined and targeted approach and in the meantime it is *"....necessary for the values which require protection within the zones to be kept safe from injury or harm . . . . ".* In his submission this requires a 20 ha CA minimum lot size, at the very least, and that the only evidence offering a principled basis for setting lot sizes was that of his client's witnesses. We turn now to that evidence.

[79] Mr P D Quinlan, a landscape architect called by the D-G focussed specifically on the appropriate CA minimum lot sizes. He noted, with reference to plan provisions, that *"preservation of the natural character of the coastal environment"* and *"maintenance of rural amenity values"* , are amongst the main criteria for setting the standards. He concurred with others that minima are something of a blunt instrument and said he would prefer all subdivision and development to be founded on ". . . .a *comprehensive design-based approach in order to tailor a more fitted and site-specific result. "* We are favourably disposed to that proposition in a general sense.

[80] It was more immediately salient that Mr Quinlan considered that subdivision down to 6 ha and 4 ha could have adverse effects on both natural character and rural amenity. In his experience allotments of the latter size result in development with a perceptibly different character from truly rural countryside or unspoilt coastline. Drawing on case law and academic writings, he imparted his understanding of natural character, concluding that a key indicator is *"…. the absence of human artefacts, or the landscape being uncluttered by structures and/or obvious human influence "*. We have no quarrel with that view as far as it goes. It was also his opinion that natural character is closely associated with and overlaps many *rural amenity* values; and that natural character and rural amenity values are affected by dwelling intensities and spread. He illustrated this by reference to typical distances between dwellings at different densities and the frequency they are encountered as one travels through the countryside. Even when moderated, for example, by use of rights of way and private roads, the figures are a useful indication of prospective outcomes for different lot sizes. It was his evidence that a proliferation of rural residential activities is often associated with a *". . .significant and fundamental shift in landscape character "* and that parts of the Whangarei coast are experiencing pressure for such change..

[81] Looking to the future, Mr Quinlan deposed that traditional pastoral farming cannot be relied on to maintain natural character/rural amenity and that *"....minimum lot sizes . . . may inevitably . . . . . become a self-fulfilling prophecy as land use is gradually revised and changed "*. We concur. He said that even 20 hectare lots might be too small to preserve and maintain natural character/rural amenity values, particularly where there are adverse cumulative effects; although 20 ha is likely to afford greater opportunity to locate improvements. While Mr Quinlan's preference for a design-led approach using DA provisions was abundantly clear, he nevertheless supported the D-G's relief on the basis that *". . . . . the adverse effects of a 20 ha minimum would be perceptibly less than 6 and 4 hectares respectively "*.

[82] Mr Riddell addressed the question of suitable CA minima by setting out the matters over which council has reserved control with an eye to their ability to avoid inappropriate outcomes. He noted what he considered significant gaps. For example, the matters do not include effects on the natural character of the coastal environment or on amenity values despite *". . . ..Policy 5.4.4 stating that within the CCE the visual amenity and natural character in particular has to be protected from subdivision that is sporadic or otherwise inappropriate in character, intensity, scale or location"*. He noted Mr Cocker's concern that additional assessment matters

should be added, which we will address in a subsequent section. Mr Riddell then gave the unequivocal opinion that " . . ..*a minimum lot size of either 6 or 8 hectares as a CA in the CCE is inconsistent with the Plan's policy intent for the zone, and the district* ", backed with the following reasoning:

> The policy themes identified above (concentration of development, complementary to the character of the area, incompatible land uses, cumulative effects) are clear, in my opinion, in their intent that the CCE is not a zone for wholesale lifestyle/rural residential use. It follows that the CA minimum lot size applying to the CCE needs to be greater than the range of lot sizes commonly associated with lifestyle/rural residential use. Six and eight ha subdivision is within the range commonly associated with lifestyle/rural residential subdivision.
>
> The intent with the CCE is not to have adverse effects on amenity values, with emphasis on protecting visual amenity and natural character [Policy 54.41. In my opinion, this involves more than directing lifestyle/rural residential subdivision elsewhere. Objective 7.3.2 refers to subdivision that does not detract from the character of the locality. Objectives 7.3.7 and 53.5 and Policy 7.4.3 refer to similar considerations, while Policy 7.4.15 points to sustaining a viable primary industry. Policy 9.4.5 says that subdivision should only occur outside existing settlements where there will be no more than minor adverse effects, taking into account a listed range of matters.
>
> As CA subdivision cannot be refused, setting the minimum lot size needs in my opinion to follow a conservative approach, with a minimum lot size set at a level consistent with the intent of the objectives and policies in the proposed plan.
>
> My professional opinion has evolved over the last few years and I have come to the conclusion that CA subdivision per se may be undesirable in the higher natural character parts of the coastal environment. However, if there is to be a CA lot size set for the CCE then I consider that an acceptable outcome would result with a 20 hectare minimum lot size".

[83] Mr Riddell complemented these considered views, based primarily on the plan's objectives and policies and CA *process* considerations, with further reasons for his position. These included the range of natural character levels and types in the district; the potential for cumulative effects; the generally successful experience with 20 ha provisions elsewhere in Northland; the desirability of having a reasonable difference between the CA and DA standards as an incentive for comprehensive design approaches to the latter; and Mr Quinlan's opinion that 20 ha may not be adequate. We note in cross-examination that Mr Riddell gave the opinion that all subdivision in the CCE should as a minimum be of RDA status. This may well be an appropriate approach in some situations but it is not a matter on which we are seized of jurisdiction.

[84] So what should the minimum CA lot sizes be? On balance, having particular regard to the jurisdictional constraints we face and strategic limitations of the plan's current coastal environment provisions, we prefer the evidence of the D-G's witnesses and find that the CCE should have a minimum lot size of 20 hectares where OLA, NLA and ONF overlays do not apply. This will provide a platform, if a rather crude one, that will keep the environment reasonably safe from harm until the council can conclude its current studies and initiate Plan Change(s) that encapsulate approaches to subdivision in these sensitive areas that better address the purpose and principles of the Act, for instance through design-based or integrated catchment analysis/management techniques.

CE Controlled Activity Minimum Lot Size

[85] Regrettably we received little assistance to guide decision-making concerning the CE. This aspect of the hearing was somewhat unsatisfactory and does not reflect well on the parties, especially the council. In the event, the D-G offered by way of compromise not to pursue 20 hectares as a minimum CA lot size for so much of the CE as is not found within the coastal environment. Until this decision was taken and communicated to the council the latter faced a significant challenge on a subject of moment to rural landowners and the environment, and we would have expected it to have been preparing accordingly. Council ultimately elected to lead evidence from Messrs Stewart and Cracker that the minimum might be better set at 6 hectares outside valued natural resource areas (OLA/NLA/ONF); a 50% increase on the V5 decisions position. Mr Grove a semi-retired but well experienced planner and surveyor submitted for the same, but proffered no evidence.

[86] The s32 report does not assist and we note that Mr Stewart in answering questions from the Court, conceded that that was so. We were left in the position that the only evidence was in Mr Stewart's answers to questions from the Court which he conceded were not based on objective assessment but instead on his long experience as a planner working in the district. He left us with the understanding that the CE is an omnibus zone ill-suited to the multiple resource management requirements of a diverse rural district. Experience in districts like Whangarei suggests that these requirements are likely to include such issues as the management of areas identified for future urban growth; providing for countryside living and intensive forms of production; maintaining versatile land in a subdivision pattern suitable for productive uses; safeguarding valued natural resources and dealing with reverse sensitivity effects. Control of subdivision must inevitably be a key

component in a sustainable management strategy for such matters. In a single zone situation, and because he largely favoured *"letting people do what they want to do "*, it was Mr Stewart's preference to adopt a minimum CA lot size at the lower end of the 4 to 20 ha range; hence his 6 ha figure. This clearly takes no account of the flexibility and role afforded by the V5 DA provisions.

[87] The parties have brought the subject to the Court and we must make a call. That must be for the Act's sole purpose of promoting the sustainable management of natural and physical resources. The D-G did not expressly withdraw that part of his appeal seeking 20ha as the minimum CA lot size in the CE. He merely offered the compromise (4 ha) through Mr Cameron's submissions and Mr Riddell's evidence. We are not duty-bound to rubber-stamp the suggested compromise. Our duty is to serve the purpose of the Act. The 20ha minimum must be imposed in the circumstances. That may not be welcomed by some landowners, or indeed the council. We contemplated alternatives of utilising the provisions of s293 RMA, or asking the council if it would prefer to initiate a further variation. The subject (given its inter-relationship with the many subdivision issues at large) is too broad for s293, and the council has made it sufficiently clear to us that it wishes to make the PDP operative (inclusive of the subject-matter of V5) at the earliest possible time. The council must live with the consequences of its inadequate planning in this area, and will no doubt want to take advantage of the several studies that it has under way, to initiate Plan Change(s) in the near future.

Adequacy of CA Matters over which Control is Reserved

[88] Adequacy of the CA matters over which council has reserved control was addressed by a number of the witnesses. Mr Riddell deposed that these regrettably excluded:

> ...effects on natural character of the coastal environment or on amenity values despite Policy 5.4.4 stating that within the CCE the visual amenity and natural character in particular has to be protected from subdivision that is sporadic or otherwise inappropriate in character, intensity, scale or location. . . .Mr Cocker considers that additional matters should be added on rural amenity, landscape, and ecological values, the natural character of the coastal environment, and the location of building areas, whereas Mr Stewart considers that the existing matters of control are sufficient.

[89] Mr Quinlan generally supported Messrs Riddell and Cocker in these views. Only Mr Stewart considered the criteria adequate to avoid adverse effects. We are inclined to agree with the opinion of the former but for two reasons are constrained

in providing relief. First, we are not confident that Mr Cocker framed the additional matters (over which he sought that council reserve control) in a way that meets the requirements of s.77B(2)(b) and (c). Secondly, and more fundamentally, the Court lacks jurisdiction and we are left wondering why the evidence was led in an unqualified manner. We have traversed the subject solely to signal that the Court generally favours Mr Quinlan's view but without pre-empting future decision-making on the subject.

CA and DA Provisions for OLA, NLA, ONF and SEA

[90] Both Mr Stewart and Mr Riddell gave evidence to the effect that the Rule 50.4 CA and DA provisions are deficient in not having measures to effectively manage the effects of subdivision (as distinct from land use activities) in OLA, NLA, ONF and SEA. Messrs Dunn and Cocker shared this view, with the latter explaining in answers to questions from the Court that some 420km^2 originally identified in the plan as Significant Landscape Area is no longer accorded protection following decisions on submisisons. It was Mr Stewart's opinion that *"....subdivision in any of the resource areas mentioned above should be a discretionary activity"* and he was *". . . . . .aware that the council is presently undertaking revisions of these studies to more closely define the boundaries of the outstanding and significant areas"*. That is all very encouraging and something which the Court may well be inclined to support, but as Mr Riddell acknowledged there is no jurisdiction to redress the shortcoming on these appeals. We traverse it solely to signal the Court's tentative feeling about the issue.

DA Minimum Lot Size

[91] Mr Dunn mounted a strong challenge to the Rule 50.4 DA lot size provisions, including for multiple lot subdivisions. We have given our decision in respect of the CCE and CE CA minimum lot size. The matters where we have jurisdiction are summarised in paragraph 24(iii) above and include minimum and average lot sizes in the two zones, place for clustering, the *tiered* lot size control; and use of *true* averaging. We remind ourselves that the CE and CCE DA rules allow for 4 and 6 ha average lot sizes respectively, with minima of 4,000m^2 and 6,000m^2 together with the *tiered* lot size provisions and *capped* balance lot allowance (8ha and 12 ha respectively) previously described.

TOP 195 line 3.

[92] We summarise Mr Dunn's multiple misgivings in this way. We perceive him to be saying that in both zones there should be greater scope for the clustering of relatively small sites in suitable locations - possibly identified in the plan expressly or through policy guidance - leaving balance areas with their natural character more or less intact. The *tiered* minimum lot sizes are seen by Mr Dunn as stifling flexibility, including the clustering of relatively small sites. He sees the *capped* balance lot provision as also contributing to uniform lot sizes and discouraging sites over 8 ha and 12 ha in the CE and CCE respectively. In Mr Dunn's view the V5 provisions are likely to result in less than satisfactory "complying" CA layouts characterised by equal sized 4ha lots, which would mean not only more roads but *".....lots spread over much more of the whole property with greater ecological and landscape effects ".* In Mr Dunn's view the position is exacerbated by the plan having only two rural zones (CE/CCE) with a 2 ha differential between the CA and DA provisions. He noted there is no rural/residential zone except a Living 3 zone limited to the urban fringe.

[93] Mr Dunn offered the Court a number of alternatives to redress the perceived shortcomings identified, including:

i) Adopting RDA status for either *true* averaging (which we understand to be determined by dividing the area of land in a scheme plan by the number of lots to establish compliance with a specified minimum average lot size) or having *true* averaging in specified circumstances similar to the Kaipara District Plan, or

ii) Having DA status for either a limited number of lots or, in specified circumstances, using a *true* averaging method, or

iii) Having a DA provision based on a management plan concept, or

iv) Elevation of *tiered* minima provisions to RDA status with *true* averaging as a DA.

[94] Mr Dunn did not advance specific lot sizes for the preceding options in a hard and fast fashion, although he clearly preferred the lesser areas and minima in earlier versions of the plan, and even the TDP. He also submitted for our consideration examples of comparable provisions contained in the plans of other councils. The options were advanced on the basis that there was no jurisdiction for other methods

which might have equal or more merit, such as introducing a new rural/residential, rural lifestyle zone or policy area to identify where "*consolidated, clustered or varied lot subdivisions are to be directed,*". We apprehend that, given the choice, Mr Dunn would have preferred one or more of the latter methods, possibly in combination.

[95] Landco ultimately supported "*. . . . the council's position in relation to appropriate subdivision standards, both for discretionary and controlled activities*". The D-G also agreed to the DA subdivision lot size rule. While noting that Mr Quinlan's evidence was somewhat at odds with the position of the party calling him, it seems that the subject has further to travel including in relation to the CE, so it may be helpful to record his opinions on some related aspects as they may usefully inform (though not of course pre-empt) future plan formulation and decision-making.

[96] Mr Quinlan expressed reservations about the *tiered* minimum lot size DA provision, stating that it restricted flexibility and was inimical to the design led approach that he preferred. He questioned the adoption of minimum average and absolute minima lot sizes on the basis there was a risk they would become de facto acceptable standards and be applied with insufficient regard to individual site characteristics. It was his view that the appropriate average lot size for discretionary standards should be *cautiously conservative* and there should perhaps be no minimum lot size at all. He subsequently resiled in cross-examination from the latter in respect of CA, where he acknowledged the practical requirements for such, but clearly supported a comprehensive design based approach to subdivision and development.

[97] The Court has a degree of empathy with the latter as we agree with Mr Quinlan that "*……in some locations and with a careful design process, higher densities of development than the present discretionary standards could be accommodated*". We apprehend this approach parallels closely what Mr Dunn contemplated as a DA management plan provision, which the Court commented favourably on in a recent ***Bay of Islands Coastal Watchdog***[24] decision. We are less comfortable with Mr Quinlan's view that this should necessarily be done through non-complying status procedures. Mr Riddell preferred an average DA minimum to a straight minimum on account of the flexibility the former affords for site-specific responses; provided certain criteria are met. He told us his first two criteria (suitable

[24] *Bay of Islands Coastal Watchdog Inc* v *FNDC*, A29/2005, paragraph 4 1.

level of intensity and robust policy framework) are met by V5 The Third (re-subdivision), we shall discuss shortly. On the question of a suitable average size Mr Riddell opined that:

> ...ideally the threshold should not be an average within the lot size range commonly associated with lifestyle subdivision. However, I consider that the policy environment is strong enough in this case that, coupled with the limited number of small lots that the rule allows to be created, a 6 hectare averaging regime could operate satisfactorily.

[98] Mr Riddell's views are material as they give support, albeit qualified, for V5 in its present form as opposed to the relief in the D-G's appeal that seeks *"replacement of the standards of 6 and 12 hectares in the Coastal Countryside discretionary activity allotment area rules with standards of 10 and 20 hectares respectively"*. We struggle more than a little with his opinions on this aspect. A CCE subdivision that produces average 6 ha sites is more likely to be within the threshold commonly associated with lifestyle subdivisions than one at an average of 10 ha.

[99] As intimated, Mr Stewart provided considered evidence on this subject, making the following points:

- Although the wording of the DA rule may be difficult it allows a mix of lot sizes while controlling the degree/extent of variation;

- The overall density enabled (4ha and 6ha respectively) is the single most important aspect of the rule and is, notably, the same as the CA minimum in the V5 decisions version (increased to 20 ha by this decision).

- As a DA can be declined it is *"... . the nature of the site and the particulars of the application which will determine whether the application is successful ";*

- The sizes allowed for in the rule result from the submissions process and *". . . ..continue to provide for the small lots that many people appear to want but ensure[s] that small lots will not dominate the landscape because of the requirement to provide larger lots as well ";*

- It is appropriate that the DA average minimum be set at a lower level than the CA, which must be approved, because the former - whilst more permissive - receive case by case scrutiny and may be declined.

[100] Mr Stewart deposed that the *tiered* measures addressed, at least partially, the lot size flexibility sought by Mr Dunn especially with 4,000m^2 and 6,000m^2 minima in the CE and CCE zones. He also supported the *capped* balance lot provision on the basis that it was necessary to limit the total number of lots able to be created. Having read the exchanged evidence of others, Mr Stewart fairly conceded that *"....the implementation of a management plan regime as an alternative set of discretionary activity standards could assist many developers who wish to do a good job of subdivision ".* However, it was his overall conclusion in his evidence in chief that the V5 DA regime is appropriate as it is consistent with the requirements of the RMA and the RPS, and will give effect to the NZCPS and plan objectives/policies.

[101] We have concluded that the DA regime in V5 may not be *"the sharpest in the tool box"* (to use Mr Quinlan's nomenclature)but jurisdictional constraints and the Court's proper role preclude our substituting alternative provisions that allow any greater degree of clustering, additional size flexibility or a management plan approach tailored to local conditions as discussed by Messrs Dunn, Quinlan and Stewart. The D-G was minded to suggest a compromise on its Appeal Notice size limits. Landco was similarly accepting of the council's revised position. Amongst other things, Mr Quinlan urged us to be cautiously conservative.

[102] The Court has doubts, like a number of the witnesses, on whether the provisions are the most appropriate means of exercising council's function especially in the CE zone, in relation to which we once again heard little evidence. There is nothing in the CE provisions that preclude the district's rural areas from being subdivided uniformly into 4 ha blocks as a DA. Even with the broad assessment criteria available we cannot be confident that matters of the type earlier identified above will be secured on a sustainable basis. And the Ngatiwai Consent Order (paragraph 10) requires there be no change to the DA assessment criteria.

[103] For these reasons we reluctantly find that the DA provisions for the CE should remain unchanged at this time. Insofar as the CCE is concerned, we find that the 6 ha minimum average provision cannot be relied on to achieve either the purpose of the Act or the plan's objectives and policies. The absence of specific DA controls to manage the effects of subdivision in OLA, NLA, ONF and SEA is a

compounding factor. Given the options jurisdictionally available, at this time, we find the purpose of the Act and council's function would be better served by substituting the relief in paragraph 7(a) 2nd bullet of the D-G's notice of appeal. That is : *"The replacement of the standards of 6 and 12 hectares in the CCE with standards of 10 and 20 hectares respectively"*. In all other regards the DA provisions are to remain unaltered.

Further Subdivision

[104] The D-G's appeal sought the addition of a non-complying activity rule for the re-subdivision of any lot created under the Rule 50.4 CCE and CE average lot size control. Mr Riddell correctly identified that Rule 50.4 as presently framed does not prevent either the controlled or discretionary activity re-subdivision of larger lots created under the DA provisions. Mr Riddell deposed that this situation could be suitably remedied by the inclusion of a rule of the type sought. Mr Stewart addressed the issue in both evidence in chief and rebuttal. He deposed there were significant equity and administration difficulties with the proposition, which were canvassed in the s.32 report. He was concerned that the restriction would not appear on certificates of title and thought it unwise to rely on interested parties accessing LIM reports. He was also concerned that making further subdivision a non-complying activity would motivate subdividers to maximise initial yields or, in his words, *"go for gold"*. He nevertheless illustrated with a practical example how the absence of a suitable rule could be exploited, possibly several times. Mr Dunn recognised the validity of the D-G's concern when answering questions in cross-examination, adding *". . . ..an advice notice under s.221 may be of assistance "*.

[105] We share the concerns of Messrs Riddell and Dunn that the rule's purpose should not be able to be negated. The matters that concerned Mr Stewart must be accorded less weight, and can properly be viewed as part of the cost of undertaking land transactions in an increasingly sophisticated regulatory environment. It is also our experience that subdividers, especially in the coastal environment, seldom fail to realise a property's full potential from the outset, doubtless aware that subdivision regimes change with time. For these reasons the council is to include a non-complying activity provision in Rule 50.4 that implements the relief sought by the D-G.

Rule 50.4A: Environmental Benefits

[106] Notwithstanding the area requirements of Rule 50.4, provision is made in Rule 50.4A (as revised in draft following the 17 June 2005 negotiation meeting) for the subdivision of additional lots as a RDA subdivision in the CE where no more than one lot with a minimum area of 4,000m^2 is created for each "environmental benefit" ("EB") obtained and there is a balance area with a minimum site area of 4 ha per allotment created for each EB site. The corresponding CCE provision is for areas of 6,000m^2 and 6 ha respectively. Accordingly, a RDA EB subdivision in the CCE would require a minimum of 6.6 hectares plus the area of the EB feature to be protected. An EB comprises *"....the permanent protection of a significant natural or historical feature where ….."* eight conjunctive criteria are met. The revised Rule restricts council's discretion on a RDA application to 15 matters. The latter include the size and quality of the feature proposed to be protected. No further guidance on these aspects is however afforded. Subdivision *"seeking more than one allotment from any one site using the EB rules . . . . . is a discretionary activity ".* There are no DA assessment criteria in the revised version although council sought to redress this during the hearing. It is not immediately clear what the DA rule provides in addition to the RDA provision beyond clarifying, perhaps, that multiple "bonus" (minimum 4,000 and 6,000m^2) sites can be obtained where there is a corresponding number of EB sites created.

[107] Principal changes made in the revised version of the rule include:

i) The inclusion of a list specifying six types of features able to be considered individually against the EB criteria. In addition to indigenous flora and habitat sites, the rule may be applied to *"[an] Historic site, objects or buildings; significant landscape features; and an area of appropriately designed indigenous re-vegetation or enhancement ".*

ii) Significant expansion of the matters RDA discretion is restricted to, up from 2, to 15.

We were not offered a jurisdictional audit trail for the extensive revisions proposed although we perceive them to be generally desirable in terms of facilitating better implementation of the rule.

[108] The D-G's appeal is not concerned with Rule 50.4A. Ms Davidson for Landco submitted that the revised rule is a marked improvement on the earlier version. She expressed satisfaction with the way that the discretionary aspect of the EB rule was re-framed, however, she was concerned with the detail and perceived a degree of prescription in material circulated by the council at late notice as a supplementary annexure to one of its witness's evidence. We shall return to that matter; suffice to acknowledge Ms Davidson's submission that if the Court were minded to adopt the material we should issue an interim decision allowing the parties to discuss the criteria among themselves and to call evidence on the material if agreement were unable to be reached. Landco's preferred approach was that the Court confirm the revised EB rule with the discretionary rule in council's planning evidence. We apprehend that Mr Dunn was favourably disposed to the rule in principle but had some fundamental reservations, including:

i) It is uncertain how many lots may be created under the RDA provision. There was an impression abroad during the hearing that the rule allows for a *bonus* lot for each EB secured (certainly Mr Dunn's interpretation). The revised version makes this more clear than its predecessor. Mr Dunn opined there was also confusion over the correct interpretation of the DA provision.

ii) It is uncertain what constitutes an "environmental benefit". As Mr Dunn correctly noted the factors in paragraph (c) generate almost as many questions as answers. We need not list them. Suffice to say we accept there is insufficient specificity on too many aspects for the provision to be workable, especially prior to the revision. In Mr Dunn's opinion Rule 50.4A is less satisfactory than the corresponding APDP provisions it replaces and he was generally supportive of the remedial action proposed by council witnesses, to which we now turn.

[109] The principal council witness was Mr Poynter, an ecologist who was briefed specifically to address what an "environmental benefit" should constitute and matters raised by Mr Dunn's appeal. Mr Poynter imparted useful contextual background on related aspects of the APDP not included in V5 (to its detriment). His conclusions we find accurately summarised the revised rule's principal inadequacies:

- ...the interpretation to be given to the proposed Environmental Benefit rule ...suffer[s] from a lack [of] linkage with the relevant policy section of the plan, and also from a lack of supporting criteria and guideline information to assist with the interpretation of qualitative criteria.

- As it stands the proposed rule is likely to lead to varying interpretations as to what constitutes an environmental benefit, and this ambiguity is unlikely to be helpful to the WDC or the users of the Plan.

- A linkage between Rule 50.4A and the schedule of Criteria in my Supplementary Evidence can readily be made by the insertion of an additional sub point under the list provided in the Discretion is Restricted to part of the rule to read:

The significance of the ecological feature as assessed in accordance with the provisions of *Criteria for Ranking Significance of Areas of Indigenous Vegetation and Habitat in Relation to the Environmental Benefit Rule [A Guideline for Plan Users]*.

- There are other examples from other districts which indicate that the development of appropriate Criteria and guidelines can be achieved.

- The development of such Criteria and guideline information should be able to be achieved within a few months.

[110] Mr Poynter attached to his evidence as Appendix 3.4 the revised version of Rule 50.4A, which he had discussed with Mr Dunn. He told us the revision failed to satisfy Mr Dunn on at least two points. First, as intimated, Mr Dunn remained concerned with the failure to accurately define what constitutes *"a significant feature to be afforded an environmental benefit "*. Mr Poynter agreed that this was a critical omission and, as will be seen, sought to remedy it. The second residual matter of concern to Mr Dunn was the failure to carry forward from the APDP a provision in Rule 50.21 that afforded "*....a clear intention to enable modified (but not heavily modified) habitats to accrue an environmental benefit given a sufficient area of restoration and/or enhancement"* (what might be termed a re-vegetation provision). This is difficult to understand because, on the face of it, it appears to have been redressed in the revised version by inclusion of related provisions in the *purpose of the rule* which read *"An area of appropriately designed indigenous re-vegetation or enhancement"* and RDA assessment criterion (ix). Mr Poynter noted that this subject was covered by Mr Dunn's appeal (Relief paragraph 7(ii)(h)) but we do not derive jurisdiction from it as the subject was not addressed in either of the submissions supported by Mr Dunn.

[111] Mr Poynter presented an eleven page Supplementary Annexure to his evidence. It comprised Criteria designed to redress the absence of quantitative and qualitative measures defining significant feature[s] for the purpose of the EB rule. The document's full title is given above in the 3rd bullet point of his conclusions set out above. The Criteria specify minimum areas, dimensions and quality for qualifying indigenous vegetation and habitat. Four quality or *value* categories are allowed for (Outstanding, High, Moderate-High and Moderate). Generally, as the

value of a feature declines the requisite qualifying area/dimensions increase. Where appropriate, reference is made to qualifying natural resources described in Schedules 16B and 16C of the plan. Provision is also made in the Criteria for a Potential/Restoration Value category, which would reinstate provisions paralleling APDP Rule 50.21 (re-vegetation/restoration). Conceptually, the provisions appear satisfactory for their intended purpose but we make no finding on their detail. We note the Criteria are described as guidelines, which raises questions about their intended status. Would they be within or outside the plan? Ms Davidson indicated that the Annexure was provided to other parties only three days prior to the hearing, which is an unfortunate breach of Court practice. And we note Mr Poynter's acknowledgement that the Criteria do not necessarily constitute *".... the final statement on what could be the best guideline or best set of reference points . . . ."* In the 5th bullet point of his conclusions he indicates that additional time and no doubt consultation are required before they achieve an optimal form.

[112] Mr Stewart also gave planning evidence on related aspects of the subject. He deposed that the wording of Rule 50.4A (as revised in draft by the 17 June '05 negotiation meeting) could be further improved. More particularly it was his opinion that the DA provision, where more than one environmental benefit lot is sought, should be amended to make it clearer how applications are to be assessed. In further supplementary evidence to his First Supplementary Statement he advanced the following suggested amendment:

> Environmental Benefit Discretionary Activity Wording:
>
> Subdivision creating an Environmental Benefit under (c) above but which does not meet the standards of (a) or (b) above [as applicable] is a discretionary activity. The matters which the Council will consider in its assessment of an application for a discretionary activity consent under this rule include but are not limited to:
>
> i) The area and/or the value of the significant natural or historical feature or features to be protected;
>
> ii) The matters to which discretion is restricted under the restricted activity rule above:
>
> iii) The effects of the extra Environmental Benefit lots and the subsequent development of them in terms of visual effect, effects on natural character, and effect on the sustainable management of natural and physical resources.

We find that to be a desirable amendment to Rule 50.4A.

[113] Mr Stewart also addressed Mr Dunn's concern about the lack of precision surrounding the number of bonus lots that may be created when securing an EB. He noted the reference to a *bonus* provision in the Explanation and Reasons for Policy 7.4.9 Protection of Features, which includes the sentence *"The protection of such features (including the use of covenants) may allow additional development potential, by way of extra "Environmental Benefit" allotments during the subdivision process"*. Eventually Mr Stewart agreed with Mr Dunn, albeit reluctantly, in a Supplementary Statement that it would be desirable to clarify the number of lots which could be created in return for securing an environmental benefit. Mr Stewart proposed that this be done by adding the following bold text to Policy 7.4.9:

> 7.4.9 Protection of Features
>
> To ensure that during the subdivision and development process opportunities are taken, where available, to secure permanent protection and/or enhancement of, and where appropriate, legal access to:
>
> - Areas of significant indigenous vegetation and significant habitats of indigenous fauna:
> - Outstanding Natural Features and Landscapes;
> - Coastal and river margins and wetlands;
> - Sites of Significance to Maori;
> - Significant archaeological and heritage features.
>
> and that where such protection/enhancement is offered the number of "Environmental Benefit" lots that can be obtained is related to the quality of the items that are to be protected".

[114] Whilst a step in the right direction, we are not persuaded that Mr Stewart's amendment addresses the ambiguity as directly as it should. An unequivocal rule statement is required that a bonus lot may be obtained for each EB secured. Also, it is evident from Mr Poynter's Criteria that quality is but one factor to be considered. Some further observations on the revised rule might usefully be made at this juncture:

i) While it is proper to have regard to objectives, policies and any related explanation when interpreting a rule it is strongly preferable that the intention of the rule be clear on its face. The revision is an

improvement but we are not persuaded it is sufficiently clear that three lots (one containing the EB feature, one not less than 4,000/6,000m^2 and one having a balance area of 4/6ha) may be created using the RDA rule.

ii) There is at best a poor correlation between the features listed in Policy 7.4.9 and the features listed in the *purpose of the rule* in its revised form. Why should they differ?

iii) The policy speaks of securing legal access. The circumstances where this might be appropriate are not explained in either the policy or revised rule (paragraph (c) or matters to which discretion is restricted).

[115] This is an appropriate juncture to address some other residual concerns we have about the revised Rule 50.4A. If it were to be confirmed the following would need to be redressed:

i) Clarification of the relationship between Rules 50.4 and 50.4A. More particularly, what is intended by the introduction to Rule 50.4A where it reads *"This rule is in addition to Rule 50.4 . . . . . "?* Do the provisions of Rule 50.4 have to be complied with in addition to those in Rule 50.4A? If not, is it intended 50.4A have less demanding tests in terms of minimum average, *capped* and *tiered* provisions? If both rules apply how is the activity status of subdivisions relying on both determined?

ii) The inclusion, as Mr Poynter noted, of an express linkage between the Rule and quantitative/qualitative criteria in his envisaged guideline. This might be best done, as he suggested, by wording an appropriate reference or references into the section headed "Discretion is restricted to". His Criteria appear designed to assist implementation of RDA assessment criteria (i), (ii), (iv) and (v) (and possibly others) in a more comprehensive manner than the revised rule achieves and may make some [revised] items redundant.

iii) We would want to see a statement in either item (ix) or Mr Poynter's Potential/Restoration Value Criteria that a s.224 certificate will not

issue for proposed EB lots unless/until re-vegetation/restoration has been successfully completed consistent with performance standards in the Criteria.

iv) Additional material would need to be added to either the "Discretion is restricted to" provision, or Mr Poynter's Criteria, specifying in suitable detail qualifying EB attributes for "*Historic site, object or buildings* " and "*Significant landscape features* ". At present the proposed plan provisions and Mr Poynter's Criteria are disproportionately concerned with indigenous vegetation and habitat. This would also afford the opportunity to review and address criteria for other features listed in Policy 7.4.9. We understood Mr Stewart to agree with this approach from his answers to related questions from the Court.

v) It may be desirable for Item (c)(vi) to expressly require that the *"...same certificate of title or adjoining certificates of title . . . . . "* be in common ownership.

[116] It is evident from the foregoing discussion that the Rule 50.4A provisions even in their recently revised condition are inadequate, as the council's own witnesses acknowledged. Mr Poynter, in particular, helpfully sought to rectify shortcomings with topics within his area of expertise but in so doing created procedural difficulties (late circulation of evidence and possibly jurisdiction)to effecting the changes recommended. Our own consideration of the materials has identified further omissions and difficulties with the provisions placed before us.

[117] **We direct that the council, within 40 working days of this decision, file** with the Court amended versions of Policy 7.4.9 and Rule 50.4A which address the shortcomings identified in our preceding paragraphs. This is to be done in consultation with the parties to this proceeding. The materials filed are to include a commentary establishing jurisdiction for changes proposed. If the changes cannot be jointly agreed, leave is granted for other parties to file separate submissions within a further 20 working days after that. We trust that the latter proves unnecessary and that this aspect of Variation 5 can be settled without further hearing time being required.

Rule 50.4B - Boundary Adjustment

[118] Rule 50.4B provides for subdivision as a CA in the CE where, amongst other things, the minimum area of any lot created is 4,000m^2 and *"The net site area of any proposed allotment created by the boundary adjustment is the same as, or does not differ by more than 10%, of the net site area of that allotment as it existed prior to the boundary adjustment"*. The corresponding CCE provision allows for a minimum site area of 6,000m^2. Control is reserved over the matters listed in Rule 50.4 for controlled activities. Any proposal not complying with the CA standard is to be assessed against Rule 50.4, presumably as a DA.

[119] Mr Dunn sought amendment of the *rule "... . by deleting any reference to a maximum 10% net site area requirement"* (Relief 7(ii)(g)). He told us that the provision was of limited concern but he regarded the 10% limit as very conservative, unlikely to work and vulnerable to negation by repeat applications. He deposed there would be few if any adverse effects in a situation where neighbours with relatively large and small lots altered the size of either by more than 10%. And that it would be difficult for council to resist non-complying activity applications in such circumstances. Mr Dunn stated the rule *". . ..has no policy basis and very limited explanation"*, and lacks s.32 support. He referred the Court to examples of boundary alteration provisions from other plans, which he considered dealt with the subject in a more rational effects based manner. He particularly commended the approach in the Thames-Coromandel District plan and, having considered those provisions carefully, we acknowledge their merit.

[120] In Ms Gordon's submission the rule allows for only minor adjustments in order to reinforce the density requirements of Rule 50.4. That being the case, one might ask why it does not prevent non-complying existing lots being made smaller. Ms Gordon sought to persuade us that the rule satisfies the Nugent principles, presumably better than Mr Dunn's relief, but we find her submissions on this subject too general to be helpful. For example, the alternative methods she reviewed are far from exhaustive and we see no specific reference to boundary alterations in the objectives, policies and other plan provisions she identified beyond being generally concerned with density.

[121] Mr Stewart opined that the purpose of the rule is to allow minor variations to lot boundaries where this is desirable, to rationalise their shape or better align them with the prevailing topography. In his view the rule was an appropriate measure to

deal with situations of this type and was not intended to facilitate more extensive boundary alterations. We find this consistent with the related discussion in the Section 32 report, but that document assists little with application of the Nugent principles. Mr Stewart cited a district where the boundary alteration rules have been used in an inventive fashion to create relatively small building sites in desirable locations, and cautioned against abandoning the 10% limit lest a similar situation arise through Rule 50.4B.

[122] We share this concern and remind ourselves that the only aspect on which we have jurisdiction is removal of the 10% control and any related consequential amendments. There may well be more sophisticated rules better integrated with targeted objectives and policies potentially available to the council in the future, but they are not available in these proceedings. Faced with making a blunt choice, we find the purpose of the Act, relevant s.6 matters, and plan provisions identified by Ms Gordon, will be better served by retaining the current provision.

Rule 28.23 - Residential Units

[123] Consistent with common practice, Rule 28.23 allows for one residential unit ("RU") on a site in the CE and CCE as a permitted activity. Additional units are permitted activities ("PA")where there is at least 4 ha or 6 ha of site area for each residential unit in the CE and CCE respectively. Rule 28.23A allows for a minor residential unit (MRU) as a PA in the CE if it is the only one on the site and the site is at least 8,000m^2. The corresponding figure for the CCE is 1.2 ha. A MRU is limited in its gross floor area and location[25]. As matters stand before us, construction of additional residential units or MRU's not qualifying as permitted activities are DAs.[26]

[124] The D-G was the principal appellant on these matters. Mr Riddell complemented the preceding matrix of facts by noting that where a site is in an OLA, a RDA consent is required for the construction of any building (Rule 39.3), but this affects only a small portion of the CCE. Mr Riddell deposed that at least five policies require *"effective control over the location, scale and external appearance of buildings in coastal and rural areas if the policies are to be given effect to"* . The policies are concerned with design and location, natural character and

[25] MRU Limited to no more than 70m^2 GFA (excluding vehicle garage) and no more than 15m from a RU.

[26] We assume residential unit in the discretionary column of Rule 28.23A should read MRU.

buildings/structures. Mr Riddell deposed that the Rule's PA provisions are incompatible with outcomes sought by the policies, except in OLA. Mr Riddell acknowledged the council witnesses' support for requiring a resource consent (to secure the matters at issue) but disagreed with their suggestion that a CA would suffice preferring, instead, a RDA. He did so on the basis that consent to a CA application cannot be declined, council's powers are limited to the imposition of conditions, and this could mean consent had to be granted for a RU in an inappropriate location. He deposed that the matters council has retained discretion over in respect of OLA sites under Rule 39.3, with one exception (item xii), would also be appropriate as part of a RDA rule for CCE sites. We accept that opinion.

[125] We were assisted with related aspects of the law by submissions from Mr Cameron. He noted that in the recent decision of the Court in ***Harrison***[27]**,** which involved the proposed subdivision of sites in the CCE, the Court differently constituted found "*. . . . Council's decision did not exclude development from any particular parts of the land, so allotments and houses could be located anywhere on it.*" Mr Cameron cited a decision of another division of the Court in ***Aqua King Limited***[28] as authority for his submission that a consent authority could not lawfully impose a condition on a CA requiring the use of a different building platform from that nominated in an application. In ***Aqua King*** the Court was required to determine whether altering the marine farming structure to be used (standard long lines as against subsurface)would merely be a limitation on the consent or a fundamental change to what was originally proposed. In that case the submission was accepted that the council could not consider anything more than had been applied for, so it had no jurisdiction to limit the consent to subsurface structures. And later[29]: "*To interpret the definition of marine farm as giving the council a discretion over the type of structure to be used is to reserve a discretion which is so wide as to be incompatible with the requirement in s.105 that a controlled use consent must be granted, subject to conditions* ".

[126] We respectfully adopt those findings and concur with Mr Cameron that they militate against imposing a condition requiring a re-located building platform in a CA application. . As intimated, Mr Stewart agreed that erection of RU's in the CCE should require consent in order to more effectively manage potential effects than Rule 28.23(a) presently allows. For reasons given previously, this should be by

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[27] *Harrison and Ngatiwai Trust Board v Whangarei District Council* WO34/2005, para 5.
[28] *Aqua King Ltd v Marlborough District Council,* W38/98 4 ELRNZ 385.
[29] Ibid, para 34.

RDA utilising assessment criteria of the type in Rule 39.3 and not CA as contended for by Mr Stewart.

[127] In response to council concerns that the adoption of RDA rather than CA procedures would add undesirable procedural difficulties, Mr Cameron purported to give an undertaking that the D-G would not demur should the council use s.77D to dispense with notification and service of RDA applications. We can make no finding in that regard.

[128] Mr Riddell also gave evidence on the activity status of other buildings and structures (in addition to RU) having the potential, in his opinion, to adversely affect the natural character of the coastal environment. Two building types caused him concern: MRU and *"other"* buildings. We lack jurisdiction on both aspects and, in this regard, the evidence was somewhat gratuitous, containing nothing on the single aspect of MRU where the D-G had standing (Relief 7(f)).

[129] Mr Stewart gave considered evidence in chief addressed to each limb of the D-G's relief and again in rebuttal. He accepted that Rule 28.23(b) should be amended to reflect whatever change was made to the Rule 50.4 CE CA minimum lot size. We agree with the common position taken on this aspect by Mr Stewart and the D-G, and find that Rule 28.23(b) requires amendment by deleting 4ha and substituting 20ha. That is, that when Rule 50.4 is settled for the CE, Rule 28.23(b) can be finalised in the same manner

[130] Neither Mr Stewart nor Mr Riddell directly addressed Relief 7(d) of the D-G's appeal. This limb of the appeal seeks deletion of the PA provision (Rule 28.23(c)) that allows additional RU's at an intensity of 1 unit/6ha in the CCE and the substitution of a RDA rule allowing them at an intensity of not less than 1 unit/20ha with suitable assessment criteria. Although it was not argued, we find this proposal consistent with the case for RDA control of initial RU's in the CCE and the intensity consistent with our finding on CA CCE minimum lot size. The Rule 39.3 assessment criteria can again be utilised. The plan is to be changed accordingly.

[131] Relief 7(e) of the D-G's appeal seeks that RU's at a greater intensity than 1/4ha [CE] and 1/10ha [CCE] be non-complying rather than the current DA. We are inclined to agree with Mr Stewart that this is unnecessary as DA applications can be reviewed on a broad basis and consent declined when necessary. The issue we see

with the DA provision, as presently framed, is the absence of assessment criteria, which we require to be rectified.

[132] Mr Stewart addressed Relief 7(f) of the D-G's appeal at some length. The appeal seeks that the PA minimum site area for a MRU in the CE (Rule 28.23A(a)) be increased from 8,000m^2 to 4 ha. Largely for the reasons given by Mr Stewart we find no principled basis for such a change. The gross floor area of MRUs is controlled and their location fixed proximate to the relevant RU. In many situations their effect will be minor relative to the unregulated size of RU's. We are also mindful that the D-G elected not to pursue this limb of the appeal recognising, perhaps, that there is only jurisdiction in respect of the CE. With these factors in mind we do not share Mr Stewart's support for elevating Rule 2823A(a) from permitted to CA status (with the corresponding CCE provision remaining a PA) and find accordingly.

Decision : Summary of Findings

[133] Our decision is of necessity an Interim one so that the council and other parties can rectify the many matters discussed. It gives us no pleasure to protract a process that many would consider already excessively long, but our statutory duty affords us no other option. The changes are required primarily to place the management of affected natural and physical resources on a sustainable basis and for the plan to meet its statutory purpose. Various procedural shortcomings visited on the process by parties will also likely necessitate future work. In some regards the provisions required might be considered conservative but they are necessary until such time as the council initiates a better integrated and technically robust approach to its resource management function in both Environments. We were told that it was council's intention do so, at least in some subject areas. The approach we have decided to pursue will ensure that if council does follow that path, sustainable outcomes will not have been compromised in the intervening period.

[134] For the assistance of the parties we summarise findings and matters requiring further attention in the following manner. For the avoidance of doubt, failure to list a matter in the tables that is the subject of either findings or directions in the main body of the decision does not derogate from the latter.

[13 5] Table 1: Issues, Objectives and Policies.

Item Number	Decision Reference	Plan Provision	Action Required
1.	Para. 35	1st and 2nd New Issues	Confirmed
2.	Paras 39 and 40	Existing Issues 1 and 2 and proposed Chapter 7 amendment	Existing Issue 1 confirmed. Parties to the Ngatiwai consent order ENV A 0143/04 and this proceeding to address Existing Issue 2 to be reported back, preferably with agreed provisions. Proposed amendment to Chapter 7 Subdivision and Development: Overview not confirmed.
3.	Para 41	Amended versions of Existing Issues 3 – 5 with additional Explanation & Reasons	Confirmed
4.	Para 43	Amended Objective 7.3.1	Same as #2 re ENV A 143/04. Parties to address jointly.
5.	Para 45	Amended Objective 7.3.2 and Section 2 material	Confirmed
6.	Para 51	Amended Objective 7.3.3 and Chapter 7 Explanation & Reasons	Confirmed
7.	Para 52	Objectives 7.3.4 - .6	Confirmed but Council in consultation with the parties may wish to submit a revised wordings, especially of O 7.3.4
8.	Para 53	Amended Objective 7.3.7	Confirmed
9.	Para 54	Amended Policy 7.4.1	Confirmed
10.	Para 55	Amended Policy 7.4.2	Policy to be re-worded to better address the objective and add specificity.
11.	Para 56	Amended Policy 7.4.3	Confirmed with Council given leave in consultation with parties to submit a *sharpened* version should it elect.
12.	Para 57	Amended Policy 7.4.4	Confirmed
13.	Para 58	Policy 7.4.5. Proposed MRP consent order amendment	Confirmed subject to parties' submissions on further revision suggested by Court.
14.	Para 59	Policies 7.4.18 - .19	Confirmed unmodified
15.	Para 60(i)	Amended Policy 7.4.21	Parties are to consult on the further revision identified by the Court and make related submissions,

			preferably providing an agreed amendment.
16.	Para 560(ii)	Amended Policy 7.4.22	Consent order to be amended to reflect direction.
17.	Para 60(iii)	Amended Policy 7.4.23	Confirmed
18.	Para 60(iv)	New policy 7.4.25	Submissions on merits required of parties.
19.	Para 66	Amended Policy 7.4.9 and Rule 50.4A	Confirmed subject to Item 7 Table 2.

[136] Table 2: Rules

Item Number	Decision Reference	Plan Provision	Action Required
1.	Para 74(iii)	Rule 50.4(b): CA minimum net site area for CCE	Retain minimum without averaging provision.
2.	Para 83	Rule 50.4(b): CA minimum net site area for CCE	Delete 6.0 ha and substitute 20.0 ha.
3.	Para 86	Rule 50.4(a): CA minimum net site area for CE	Delete 4.0 ha and substitute 20.0 ha.
4.	Para 102	Rule 50.4(a): DA minimum average net site area in CE	Confirmed unaltered
5.	Para 102	Rule 50.4(b): DA minimum average net site area in CCE	Substitute relief sought in 7(a) 2nd bullet of D-G appeal relief, ie 10 ha and 20 ha.
6.	Para 104	Rule 50.4: Further subdivision of averaging lots in CE and CCE	Addition of a N-C activity provision for re-subdivision of sites created using averaging.
7.	Para 116	Rule 50.4A and Policy 7.4.9	Council, in consultation with parties, is to submit amended versions that address matters in the decision. Jurisdiction for proposed changes to be demonstrated. In absence of agreement, leave is granted to file separate submissions. Only if necessary will hearing be resumed. Refer also Item 19 Table 1.
8.	Para 121	Rule 50.4B	Retain unaltered.
9.	Para 125	Rule 28.23(a)): initial residential unit in CCE.	Delete permitted activity provision and substitute RDA, utilising Rule 39.3 assessment criteria.
	Para 128	Rule 28.23(b):	Delete 4ha and

		additional residential unit in CE	substitute 20 ha
11.	Para 129	Rule 28.23(c): additional residential units in CCE. Area required for each residential unit	Delete 6.0ha and substitute 20.0ha as an RDA
12.	Para 130	Rule 28.23 DA provision	Add assessment criteria
13.	Para 131	Rule 28.23A(a): permitted activity provision for minor residential units in the CE	Retain unaltered.

Costs

[137] Costs are reserved.

DATED at **AUCKLAND** this 28th day of February 2006.

For the Court:

L J Newhook
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Attachment A: PDP and Variation 5 Provisions Not Subject to Change

1. Section 7.1 Significant Issues

First New Issue

"Subdivision and development can provided a catalyst for environmental protection and enhancement".

Second New Issue

"Subdivision and development can provide opportunities for people and communities to advance their wellbeing".

Existing Issue 4

"Conflict between incompatible land use activities, including reverse sensitivity effects, can arise where new subdivision and development occurs".

Existing Issue 5

"Subdivision and development can have effects in relation to the provision of necessary infrastructure, including effects on the efficient, safe and effective servicing of land use activities and on the provision of emergency services".

Note: Variation 5: Section 7.1 as notified contained six significant issues. The sixth, concerning natural hazards, appears to have gone unaddressed in submissions and evidence and is presumed to remain part of the Variation.