QUEENSTOWN LAKES DISTRICT COUNCIL

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# DECISION OF THE QUEENSTOWN LAKES DISTRICT COUNCIL

## RESOURCE MANAGEMENT ACT 1991

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| **Applicant:** | **Quail Rise Estate Limited** |
| **RM reference:** | **RM140324** |
| **Location:** | Snowshill Lane, Quail Rise |
| **Proposal:** | Three lot subdivision, erect dwellings on each lot, and cancel consent notices |
| **Type of Consent:** | Subdivision, land use and s.221(3) |
| **Legal Description:** | Lot 6 DP 472617 |
| **Valuation Number:** | 2907147456 |
| **Zoning:** | Quail Rise Zone |
| **Activity Status:** | Non-complying |
| **Notification:** | Publicly Notified, 9 July 2014 |
| **Date Issued:** | 13 October 2014 |
| **Decision:** | **Consent Refused** |

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | the Queenstown Lakes District Plan |
| AND | an application for resource consent |
| BY | QUAIL RISE ESTATE LIMITED RM140324 |

**DECISION OF COMMISSIONER T DENIS NUGENT**

**Introduction**

1. This application highlights the difficulty faced by decision makers when dealing with provisions included as conditions on consent in an Environment Court Consent Order without any examination of the merits nor any explanation of the purpose of, or reasons for, the condition.

**Hearing and Site Visit**

2. The hearing was held in Queenstown on 30 September 2014. I visited the site both before and after the hearing on the same day.

**Appearances:**

Applicant

- Mr W Goldsmith, Counsel
- Mr D Broomfield, Director of Quail Rise Estates Ltd
- Mr B Espie, Landscape Architect
- Mr C Vivian, Planner

Submitters

- Mr C Thomsen, Counsel for Mr D Drew

- Mr D Drew
- Mr A Sproull (tabled)

Reporting Officers

- Ms A Giborees, Planner
- Dr M Read, Landscape Architect

**Further Information**

3. At the conclusion of the hearing I requested that the applicant provide a draft set of conditions that I could consider if I were minded to grant consent. These were received on 2 October 2014 and circulated at my request to the submitters and Council officers to enable them to comment on them, they not having been given that opportunity at the hearing. I received a brief Memorandum from Mr Thomsen on the conditions which I refer to below.

4. During the course of the hearing Mr Thomsen referred me to a number Environment Court decisions and he undertook to provide full citations on his return to the office. These were received on 1 October 2014.

5. After considering the material I had before me, I requested that the applicant clarify the extent of Activity Area R2(C) ("R2(C)AA") in the Quail Rise Zone and identify the residential sites within that area extant when Plan Change 37 ("PC37") was made operative. This information was received by way of a Further Joint Planning Statement on 7 October 2014.

**The Application**

6. The applicant proposes to subdivide a 2,822m$^2$ property on Snowshill Lane, Quail Rise, into three lots and erect a house on each lot. The legal description is Lot 6 DP 472617 contained in Computer Freehold Register 644815 Otago Registry. As this land is subject to consent notices which, among other things, prohibit the erection of buildings on much of the site, the applicant also seeks the removal of the consent notices. Earthworks are required for the establishment of building platforms and consent is

sought for those. The application also sought approval for specific building designs on each proposed lot.

7. Proposed Lot 5 would be located on that part of Lot 6 DP 472617 located north of Snowshill Lane. It would have an area of 914m$^2$, including some 192m$^2$ contained within Snowshill Lane. Some 605m$^3$ of spoil[1] would be cut from the site to create a building platform at a finished level of 487.5m. A four bedroom single level home of 229.53m$^2$ is proposed on the site, oriented such that the east wall would be parallel to and 4m from the eastern boundary. On the west boundary the dwelling would be 3.3m from the boundary at the closest point. The bedrooms are located along the east side and the living areas to the west. A garage forms the southern part of the building.

8. Proposed Lot 4 would be immediately to the south of Snowshill Lane and have an area of 759m$^2$. Some 520m$^3$ of spoil would be cut from the site to create a building platform at a finished level of 488.5m. A three bedroom single level dwelling of 146.68m$^2$ is proposed on this site. The orientation of this building has the long axis running north-south with bedrooms at the northern end and the living area at the south extending westward. At its closest point this building is 3.9m from the western boundary and 2.8m from the southern boundary. A separate garage of some 42m$^2$ is proposed in the northwest corner of the proposed lot, some 2m from the western boundary.

9. Proposed Lot 6 is in the southern and east part of the site south of Snowshill Lane and is proposed to comprise some 1,148m$^2$. That area includes some 190m$^2$ of Snowshill Lane and a 4m or wider strip some 20m long providing access from Snowshill Lane to the building platform. This lot will require some 247m$^3$ of cut and 169m$^3$ of fill to create a building platform with a finished level of 485.95m. A three bedroom single level house of 200.91m$^2$ is proposed on this lot, with a long axis running northeast to southwest. At its closest point this house would be 3.3m from proposed Lot 4 to the north and 3.0m from the southeast boundary.

10. A Structural Landscape Plan proposes the planting of Portuguese Laurel hedges along most of the north, east and west boundaries of proposed Lot 5, along the eastern and northern boundaries of proposed Lot 6 and

[1] These cut and fill figures are taken from the Table in Section (b)(v) of the Assessment of Effects on the Environment prepared by Vivian & Espie dated 8 May 2014.

along most of the boundary between proposed Lots 4 and 6. It also proposes clumps of beech trees at the northeast and northwest corners of proposed Lot 5, at the northeast corner of proposed Lot 4 and at either end of the southwest boundary of proposed Lot 6.

**Reasons for the Application**

11. The land is zoned Quail Rise Zone and is located within the Activity Area Residential 2(C) ("R2(C)AA") as defined on the Structure Plan for the zone. Within this zone residential activities and buildings are a controlled activity and only one residential unit may be located on a site. Within the R2(C)AA there is no minimum lot size, but Zone Standard 12.15.5.2(i) limits the number of residential units in that Activity Area to 31. Relevant to this application, internal setbacks are set at 4m and site coverage is limited to 30%.

12. The Joint Planning Statement presented by Ms Giborees and Mr Vivian stated that resource consents were required as follows:

Subdivision

- A **controlled** activity resource consent pursuant to *Rule 15.2.3.2* for subdivision of land which complies with all site and zone standards for the Quail Rise Special Zone. Council's control is limited to those particular matters specified in Subdivision *Rules 15.2.6 to 15.2.18*; being:

  *Rule 15.2.6.1* (lot sizes, averages and dimensions);

  *Rule 15.2.7.1* (subdivision design);

  *Rule 15.2.8.1* (property access);

  *Rule 15.2.10.1* (natural and other hazards);

  *Rule 15.2.11.1* (water supply);

  *Rule 15.2.12.1* (storm water disposal);

  *Rule 15.2.13.1* (sewerage treatment and disposal);

  *Rule 15.2.14.1* (trade waste disposal);

  *Rule 15.2.15.1* (energy supply and telecommunications)

  *Rule 15.2.16.1* (open space and recreation)

  *Rule 15.2.17.1* (vegetation and landscaping)

  *Rule 15.2.18.1* (easements).

Land Use

- A **controlled** activity consent pursuant to Rule 12.15.3.2[ii] for residential activities provided the maximum number of residential units that may be erected within the zone (excluding Activity Area R1 and Lots 1 and 3 DP 300264) shall not exceed 218, provided that no more than one residential unit is permitted per allotment.

- A **controlled** activity consent pursuant to Rule 12.15.3.2[vi](b) for the erection of any buildings within the R2(C) Activity Area in respect of:

  (i) External appearance; and

  (ii) Access and earthworks; and

  (iii) Interior and exterior lighting; and

  (iv) Landscaping, including the protection of any existing or proposed trees.

- A **controlled** activity consent pursuant to Rule 12.15.3.2[vii] for parking, loading and access in respect of earthworks and the impact of the safety and efficiency of the surrounding road network and the number of parking spaces to be provided in respect of visual impact of earthworks.

- A **restricted discretionary** activity consent as the proposal does not comply with Site Standard 12.15.5.1[ii](c) which states that the minimum setback from internal boundaries and road boundaries shall be 4m. Council's discretion is restricted to this matter.

  The proposed dwelling on Lot 4 is proposed to be located up to 2.9m from the western site boundary, and the proposed garage on this lot is proposed to be located up to 2.0m from the western site boundary, thereby breaching the internal boundary setback by 1.1m and 2.0m respectively. Additionally, the dwelling on this lot is proposed to be located up to 2.9m from the proposed southern site boundary.

  The proposed dwelling on Lot 5 is proposed to be located up to 3.3m from the western site boundary, thereby breaching the internal boundary setback by 0.7m.

  The proposed dwelling on Lot 6 complies with all existing and proposed internal boundary setback requirements.

- A **restricted discretionary** activity consent as the proposal does not comply with Site Standard 12.15.5.1[iii](1)(a) which states that the total volume of earthworks shall not exceed 100m3 per site (within a 12 month period). Council's discretion is restricted to this matter.

  It is proposed to undertake a total of 1,541m3 of earthworks within a 12 month period.

- A **restricted discretionary** activity as the proposal does not comply with Site Standard 12.15.5.1[iii](1)(b) which states that the maximum area of bare soil exposed from any earthworks where the average depth is greater than 0.5m shall not exceed 200m2 per site (within a 12 month period). Council's discretion is restricted to this matter.

  The area of bare soil exposed from any earthworks is proposed to be 1,537m2.

- A **restricted discretionary** activity as the proposal does not comply with Site Standard 12.15.5.1[iii](2)(b) which states that the maximum height of any cut shall not exceed 2.4 metres. Council's discretion is restricted to this matter.

  The maximum height of cut is proposed to be 2.5 metres.

- A **restricted discretionary** activity as the proposal does not comply with Site Standard 12.15.5.1[iii](2)(a) which states that the vertical height of any cut or fill shall not be greater

than the distance of the top of the cut or the toe of the fill from the site boundary. Except where the cut or fill is retained, in which case it may be located up to the boundary, if less or equal to 0.5m in height. Council's discretion is restricted to this matter.

The proposed earthworks include a 2m cut height at / near the boundary with Lot 4 DP 449394 and may create an unsupported 1.5 - 2m vertical batter on that neighbouring lot.

- A **non-complying** activity pursuant to Rule 12.15.3.4[viii] as the proposal does not comply with Rule 12.15.5.2[i] which states that the number of residential units permitted within the zone is 218. The units are to be allocated on the basis of one unit per allotment and restricts the number of dwellings within each activity area as follows:

  Activity Area R2(C): 31 residential units

- A **discretionary** activity consent pursuant to 87B in accordance with Section 221 of the RMA which specifies a cancellation of a consent notice shall be processed in accordance with Sections 88 to 121 and 127(4) to 132. It is proposed to cancel conditions of various consent notices as set out in the application report.

13. No reference was made to Rule 12.15.5.2 v Site Coverage. This sets a Zone Standard of 30% site coverage on any allotment in the R2(C)AA. There is no definition of site coverage in the Plan, rather building coverage is defined and applied in most zones. I note that where site coverage is used in the Resort Zones it is a percentage coverage applied across the entire zone. It is unclear whether the Plan intends there to be a difference between building coverage and site coverage. The definition of building coverage applies to the net site area of the site. If that definition is applied in this application, then the proposed house on Lot 5 would exceed the 30% limit. It may be that the Plan intends the inclusion land used for access and strips less than 6m when calculating coverage in this Zone. Given the lack of discussion on this topic I will accept that the two planners consider the proposal complies with this rule.

14. Mr Goldsmith submitted that the application should be unbundled into three activities: subdivision; cancellation of consent notices; and erecting dwellings. I will deal with this issue below before coming to any conclusion as to the status of the consents required.

**Relevant Statutory Provisions**

15. Section 221 of the Act provides:

> *(3) At any time after the deposit of the survey plan,—*
>
> *(a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:*

*(b) the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.*

*(3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3).*

16. The relevant provisions of section 104 are:

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

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

*(b) any relevant provisions of—*

*(i) a national environmental standard:*

*(ii) other regulations:*

*(iii) a national policy statement:*

*(iv) a New Zealand coastal policy statement:*

*(v) a regional policy statement or proposed regional policy statement:*

*(vi) a plan or proposed plan; and*

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

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

*…*

*(3) A consent authority must not,—*

*(a) when considering an application, have regard to—*

*…*

*(ii) any effect on a person who has given written approval to the application:*

*…*

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

*(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.*

*(7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available.*

17. Section 106 provides that I may refuse a subdivision consent or grant a subdivision consent with conditions in certain situations relating to natural hazards and adequacy of access.

18. As noted above, at least one component of this application is for a non-complying activity. Under s.104D I may grant consent to a non-complying activity only if I am satisfied that –

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

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

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

19. If I am so satisfied, then under s.104B I may grant of refuse consent. If I grant consent I may impose conditions under s.108, and in respect of the subdivision component, under s.220.

**Relevant Plan Provisions**

20. I was not referred to any provision in the Otago Regional Policy Statement, or to any relevant regional plan provisions.

21. In the Queenstown Lakes Operative District Plan I was referred to Chapter 4 – District Wide objectives and policies, the provisions of the Quail Rise Special Zone in Chapter 12 and Chapter 15 – Subdivision, Development and Financial Contributions.

22. The applicant's advisers had undertaken a review of regional and district council records and concluded that the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health did not apply.

**The Existing Environment**

The Existing Site

23. As I noted above, Lot 6 DP 472617 has an area of 2,822m$^2$. It is a rear site and Snowshill Lane is a privateway across the site providing access to Lot 1 DP 427930 (the Drew property), Lot 2 DP 427930 (the Sproull property) and Lot 4 DP 4493994 (5 Snowshill Lane) in part. Snowshill Lane is also partly on this last site. The site is surrounded by residential lots, most containing dwellings.

24. North of Snowshill Lane Lot 6 is in grass. It comprises a natural hillock rising above the surrounding sites and above Snowshill Lane. The apex of this mound is slightly north of the midpoint between the northern boundary and Snowshill Lane and close to the western boundary. It is some 489m$^2$, making it some 4m higher than Sproull property and some 1.5m higher than 5 Snowshill Lane to the west and a similar height above Snowshill Lane.

25. South of Snowshill Lane Lot 6 is largely in grass and also contains a hillock, albeit 1 to 1.5m higher than that to the north. The southern part of Lot 6 has been subject to earthworks which have created a vehicle access

[2] These heights are derived from an examination of the contour plans provided with the application. Unfortunately the plans, while specifying the finished levels of the building platforms, provide no other information on landform heights.

along the eastern side of the site at approximately the 487m contour with further excavation of the southern part of the site to create an area roughly level with the ground level of the site to the immediate west. To the south and southeast the land drops steeply to building platforms on adjacent sites some 5m lower that the excavated area on Lot 6.

26. Much, but not all, of the site is subject to consent notices prohibiting the erection of buildings. This restriction forms part of the existing environment.

The Surrounding Environment

27. The subject site is surrounded by residential development. Ferry Hill Road serves a narrow band of residential development along the south-eastern slopes of Ferry Hill. This site is near the southern end of this development where Ferry Hill Road separates the residential land and the presently open slopes of Ferry Hill.

28. The sites surrounding the subject land are in the range of 731m$^2$ to 1,652m$^2$, with the largest being the Sproull (1,652m$^2$) and Drew (1,493m$^2$) properties. Most of these sites have dwellings erected on them. The exceptions are in the more recently subdivided Batsford Lane to the south.

29. Northeast of the site is a third hillock with exposed rock protruding above the grassy surrounds. This is marked with "no building restriction" in the Structure Plan and Rule 12.15.3.4 makes buildings on that area a non-complying activity.

**Section 42A Report**

30. Ms Giborees prepared a comprehensive s.42A Report which I read prior to the hearing. Her report was supported by a Landscape and Visual Assessment undertaken by Dr Read and an Engineering Report prepared by Mr Wardill. Attached to these reports was the Joint Planning Statement quoted from above and copies of decisions on 9 resource consent applications and one certificate of compliance application affecting the subject land.

31. Ms Giborees considered the proposal as a whole and concluded it required consent as a non-complying activity. She considered it did not

pass either of the threshold tests in s.104D and recommended that consent be refused.

**Summary of Legal Submissions and Evidence**

Mr Goldsmith

32. Mr Goldsmith's submitted that the starting point for considering this application comprised the following:

(a) The land is zoned residential and it is not "open space" as defined by the District Plan;

(b) The planting of hedges is permitted and hedges will be planted adjoining the submitters' properties without any control on the hedges height;

(c) 100m$^3$ of earthworks per year is a permitted activity under the Plan and such earthworks will be carried out until the hillocks are removed.

33. As alluded to above, he also submitted that the three different activities of subdivision, consent notice removal and dwelling and earthworks approval are unrelated to each other and should be unbundled and considered separately. He contended that three separate and unrelated applications could have been made for each of these activities.

34. Mr Goldsmith submitted that even if I were to refuse consent to the houses and earthworks and refuse to cancel the consent notices, I should grant consent to the subdivision application as that would enable the applicant to sell the land.

35. Mr Goldsmith then turned his attention to the cancellation of the consent notice. The provision at issue was the condition that prohibited buildings on the hillock areas within the site. I note that several consent notices and amendments are involved, but for brevity will refer to consent notice in the singular.

36. He referred me to *Green v Auckland Council*[3] where the Court identified criteria applicable for considering the cancellation of a consent notice based on the facts of that case. He also referred me to paragraph 87 in the same case where the Court noted that it was accepted in that case that property owners have no right to a view which is not preserved by provisions of the District Plan or covenants running with the land.

37. Mr Goldsmith submitted that the original rationale for the consent notice is to be found in the Commissioners' decision refusing consent to application RM061154 quoted in paragraph 2.11 of the Joint Planning Statement. He then noted that the outcome of Plan Change 37 was that one of the three hillocks covered by the consent notice in its original form, the northern-most one, has been identified as a no build area and thereby protected. It was his submission that the inclusion of that provision in respect of the north-most hillock meant the protection afforded by the consent notice over the southern two was now obsolete.

38. Mr Goldsmith submitted the consent notice restrictions were not imposed to protect the amenities of the Sproull or Drew properties as they did not exist at the time the consent notice was originally imposed. He further submitted that the retention of consent notice restrictions for a purpose different from those for which they were originally imposed is effectively a new imposition of a restriction on adjoining private land which is entirely unjustified. It was his submission that the land was zoned residential and should be able to be used for residential purposes.

39. Mr Goldsmith's final point in respect of the consent notice restrictions were that the hillocks were going to be removed in any event and therefore the restrictions would be pointless.

40. Turning to the houses and related earthworks, Mr Goldsmith submitted the application passed both gateway tests of s.104D and that the evidence of Mr Vivian set out the reasons consent should be granted. He submitted the proposal represented efficient use and development of privately owned residential land, and that granting consent would avoid adverse effects and preserve residential amenity, compared to what would otherwise happen. By this I understood him to be referring to ongoing earthworks and the planting of uncontrolled hedges.

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3 [2013] NZHC 2364 at para 129

41. Mr Goldsmith referred me to Decision RM110470, which re-imposed the building restrictions in Consent Notice 9288032.7 and submitted the condition was erroneously imposed as the reasoning referred to a policy recommended by the Hearing Panel on Plan Change 37, but omitted in the Environment Court Consent Order that settled appeals against the Change.

42. Mr Goldsmith raised issues with parts of the s.42A Report:

(a) He disagreed with Ms Giboree's opinion that the proposal would not specifically provide for affordable housing, noting that the smallish houses on smallish lots proposed were by nature affordable;

(b) He did not agree that Objective 4.2.5 or the policies under that objective referred to were relevant.

Mr Broomfield

43. Mr Broomfield is a director of the applicant company and of Woodlot Properties Ltd that owns the subject site. In his evidence he described the development history of Quail Rise.

44. Mr Broomfield outlined what he described as "*an ongoing debate between [himself] and various Lakes Environmental and Council staff members about the value of three minor hillocks, two of which are located on the site subject to this application*"[4]. He provided his opinion that any value in the hillocks was outweighed by the value of the land on which they are located to provide residential properties.

45. Mr Broomfield asserted in his evidence that

(a) the Council imposed the consent notice restrictions on the land; and

(b) in settling the applicant's appeal against Plan Change 37 "*the Council agreed that the other two hillocks* [those the subject of this application] *were of little value and did not warrant protection*"[5].

[4] D Broomfield, Statement of Evidence, para 5., p.2
[5] Ibid, para 8, p.2

46. Mr Broomfield stated that Woodlot Properties Ltd would excavate the hillocks at 100m$^3$ per year and plant the Portuguese Laurel hedges shown on the application landscaping plans. He asserted those hedges would have an adverse effect on the Sproull property by blocking access to sunlight and obscuring existing views.

47. To avoid such effects, Mr Broomfield volunteered, on behalf of Woodlot, a condition to be applied to consent for the three houses to limit the height of the hedges and planting between the hedge and relevant house.

48. Mr Broomfield confirmed that even if consent was refused for the houses, the applicant sought consent for the subdivision so the smaller sites could be sold for non-residential purposes. He suggested that removal of the consent notices would enable house extensions, garden sheds or additional garages to be built on the land.

49. Mr Broomfield disputed statements made in the submission of Woodfield Properties Ltd.

50. In answer to my questions, Mr Broomfield advised that at the time PC37 was made operative, 6 residential lots existed within the R2(C)AA and that a further 25 have been developed since. He also explained that he has created new sites in response to the market and the Council. However, he was unable to explain why this land had not been developed as part of the development of the 25 additional sites created in R2(C)AA since PC37 was made operative.

Mr Espie

51. Mr Espie is a landscape architect with considerable experience in the District.

52. His evidence was focussed on the degree of amenity effects on surrounding properties, taking into account the applicant's proposal to undertake planting anyway. He concluded that either option would lead to adverse effects on the amenity values of the Sproull and Drew properties and four Batsford Lane properties. He described the effect as moderate in relation to the submitters' properties and slight to moderate in relation to the Batsford Lane properties.

Mr Vivian

53. Mr Vivian is a planner with nineteen years' experience in the District. I note that prior to establishing the practice he and Mr Espie operate, he was employed by the owner of the subject site.

54. Mr Vivian adopted Parts 2 to 7 of Ms Giborees' s.42A which dealt with the Proposal, Submissions, Consultation and Affected Person Approvals, Planning Framework, Statutory Considerations and Internal Reports. He did note that three more written approvals had been provided and tabled those approvals.

55. Ms Giborees had sought information on shading. Mr Vivian presented a diagram showing the shading effects of the proposed Lot 6 dwelling on the adjoining Lot 11 DP 461026, 5 Batsford Lane. I note that as a written approval has been provided in respect of that site I cannot consider the effects on that property in any event.

56. Mr Vivian had been instructed by Mr Goldsmith to treat the application as unbundled. He therefore divided his evidence into three sections:

(a) A three lot subdivision;

(b) Cancellation of Consent Notice condition;

(c) Erection of three dwellings and associated earthworks.

57. With respect to the subdivision, Mr Vivian considered the proposal fully complied with the standards for a controlled activity and therefore consent must be granted. He accepted the conditions recommended by Council's reporting engineer.

58. With respect to the cancellation of consent notices, Mr Vivian considered there was no impediment, taking into account Ms Giborees' opinion, of cancelling Consent Notices 7252903.6 and 7938041.2 (as varied by Consent Notices 8433502.2 and 8742594.2). Mr Vivian then spent some time criticising the opinion of Ms Giborees for concluding that the effect of removing the restriction on building on the hillocks would have adverse effects more than minor. His view appeared to be predicated on the belief that the land was zoned residential and the permitted baseline was

such that the effects arising from the removal of the consent notice restriction were within the range of effects that the permitted baseline allowed. He also placed weight on the ability of a landowner to seek the removal of a consent notice in coming to the view that the submitters could not rely on the hillocks remaining free of buildings.

59. Mr Vivian also opined that "*the purpose of the consent notice was never to protect the amenity, density or views for surrounding residents (of which none existed at the time) or the public generally. … At the time the consent notice was imposed the entire area was an open field … . There was no residential amenity in existence to protect*."[6]

60. Mr Vivian listed the following reasons why he considered the consent notices should be removed:

- *The purpose of protecting the hillocks in the first place; and*
- *The receiving environment and ownership of the land when the Consent Notice was conceived; and*
- *The permitted baseline; and*
- *The change in zoning under PC37.*[7]

61. In dealing with the erection of the proposed houses and the associated earthworks, Mr Vivian again focussed on Ms Giborees' s.42A report rather than clearly stating his own assessment. As I understand his evidence, he accepts much of what Ms Giborees concludes in respect of the design and layout details of the proposed houses, including traffic and servicing issues. Subject to an amended earthworks condition, he accepts the Council's engineer's evaluation of the earthworks proposed, but does not agree with Ms Giborees that the effects on the owner of 5 Snowshill Lanes would be more than minor. He considered that his proposed condition would remove that potential adverse effect.

62. Relying on Mr Espie's conclusion regarding amenity effects, Mr Vivian was satisfied that the proposal for the houses and earthworks passed the threshold test of s.104D(1)(a).

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6 C Vivian, Statement of Evidence, para 4.20, p.10

7 Ibid, para 4.21, p.10

63. In considering the objectives and policies of the Plan, Mr Vivian disagreed with Ms Giborees' conclusions in respect of Policies 4.2.5-1(a) and (b). It was his view that the fact that there was surplus land in the R2(C)AA means there is greater capacity than the District Plan anticipates, which some would view as a positive.

64. Mr Vivian did not agree with Ms Giborees' opinion that Policy 4.2.5-17 was relevant. He disagreed with her opinion in respect of the earthworks objective and policies and concluded the proposed earthworks protect the overall form and amenity values of the residential area as distinct from the landform itself.

65. Turning to the Quail Rise Zone objectives and policies, Mr Vivian, relevantly:

(a) With respect to Objective 1 focused on the extant provision of reserves and open space;

(b) Considered that in terms of Policy 1.1, this proposal comprehensively dealt with the last remaining piece of undeveloped land in the R2(C)AA;

(c) Concluded that Policy 1.2 was not relevant as it related to open space and the definition of that phrase in the Plan did not include this land;

(d) Agreed with Ms Giborees' assessment that the proposed development would not result in a deviation from the structure plan (Policy 1.3);

(e) Agreed with Ms Giborees' assessment that the proposal was not contrary to Policies 2.1 and 2.2;

(f) Disagreed with Ms Giborees conclusion on Policy 2.3 by focusing on use of the term "adjoining land" by Ms Giborees and the policy.

66. Mr Vivian considered the proposal (houses and earthworks) was not contrary to the objectives and policies of the Plan in the sense of being repugnant or opposed to. He therefore concluded the second threshold test under s.104D(1)(b) was passed.

67. Mr Vivian relied on Mr Espie's conclusion relating to amenity values to conclude in terms of s.7(c) and (f) that these would be better achieved by granting consent. He also considered in terms of s.7(b) that leaving this land undeveloped would not represent efficient use of the land. He concluded sustainable management would be better achieved by granting the proposal, by which I took him to mean the entire package.

68. In answering questions Mr Vivian clarified that PC37 only changed the objectives and policies of the Quail Rise Zone by including the phrase relating to design controls at the end of Policy 2.1.

69. It was Mr Vivian's opinion that a structure plan comprises more than a simple plan, but included the collection of rules and provisions that effectively create a sub-zone within a zone. His opinion that the proposal did not deviate from the structure plan was based on that understanding.

70. Mr Vivian estimated that it would take 15-16 years for the hillocks to be removed using the permitted activity standard.

Mr Goldsmith

71. Before closing his case Mr Goldsmith advised that a proposed set of conditions would be lodged after the hearing. He suggested the subdivision was not for residential purposes and could therefore be unbundled. Finally, he suggested that removal of the hillocks would not require as much excavation as was required to create building platforms, so would take less than the 15-16 years opined by Mr Vivian.

Mr Thomsen

72. The focus of Mr Thomsen's submissions was on the consent notice restriction on building on the hillocks. Mr Thomsen submitted that the proposal was a non-complying activity and that unbundling the application as suggested by Mr Goldsmith was inappropriate. He submitted such unbundling is for the applicant's own tactical purposes rather than a resource management reason, and the decoupling of the subdivision application did not make sense given the servicing conditions relating to residential use.

73. Mr Thomsen referred me to several cases he said supported his position that in a combination of subdivision and subsequent development as proposed here, it was appropriate to bundle the activities together. I will refer to those in more detail when dealing with this issue.

74. Mr Thomsen also queried the applicant's approach that the permitted baseline included the complete removal of the hillocks. In his view that conflated the permitted baseline and the future environment. He submitted that the permitted baseline is what is permitted at this point in time, and on that basis it includes no more than 100m$^3$ of earthworks. He submitted that the yearly limit imposed was material to the baseline, and to treat it as the applicant suggested was fanciful.

75. In relation to the issue of removal of the consent notice, Mr Thomsen provided extensive submissions quoting the *Green v Auckland Council* case referred to by Mr Goldsmith, and also *Foster v Rodney District Council*[8] and *Kapiti Environmental Action Inc v Frandi*[9]. The thrust of his argument was that change or removal of consent notices should be subject to a higher threshold than applies to consent conditions and that the reliance placed on consent notices by other parties and how those parties would be affected by their removal is material. He set a four step approach he submitted it was appropriate for me to follow in considering whether to remove them.

76. Mr Thomsen submitted that the Structure Plan applicable in the zone included the density zone standards as well as the map showing the location of each activity area. His submission was that there needed to be some unusual quality or set of circumstances to justify granting consent departing from the density standards as proposed. He further submitted that the reference to development occurring in an integrated manner within the Quail Rise Zone is to achieve overall development in an organised and harmonious fashion, and that the density limits are key to achieving that.

77. Mr Thomsen submitted that Policy 2.3, which speaks of openness and rural character is relevant to the level of development permitted in the zone and the rationale for the consent notices. He noted that the applicant

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8 Environment Court, A123/09

9 [2003] 9 ELRNZ 235 (CA).

has had opportunity to develop the hillocks within the density provisions of the Plan.

78. Referring to Policy 1.4, Mr Thomsen submitted that policy suggests only minor amendments to the Structure Plan are to be considered, and that in considering such amendments, the decision maker must refer to the effects of the amendment. He submitted that changes to density are seldom minor, especially if the integrity of the Structure Plan is to be preserved.

79. Mr Thomsen submitted that changes made to the zone provisions by PC37 were not a material change such as to make the consent notice no longer relevant and did not agree with the applicant's submissions that the removal of Policy 2.4 by consent on appeal indicated the consent notice was no longer needed.

Mr Drew

80. Mr Drew lives at 2 Snowshill Lane, which is the southern of the two sites adjoining Lot 6 to the east.

81. His evidence was that he purchased his property on the understanding he had, both from documentation and discussions with Mr Broomfield, that the south-western and western boundaries of his property were permanently safeguarded from infill, including the hillocks immediately north and south of Snowshill Lane. He stated that the protection of this land from development was an important factor in his decision to purchase the property.

82. Mr Drew explained the matters which he considered important to his enjoyment of his property and how the hillocks contribute to that enjoyment. He added that in terms of the amenity values of his property, the lack of buildings on the subject site was more important than the existence of the hillocks.

Mr Sproull

83. Mr Sproull was unable to attend the hearing but he provided a written submission to be tabled and Mr Drew presented the photographs he

referred to in that submission. Mr Sproull lives at 1 Snowshill Lane, immediately to the north of Mr Drew.

84. Mr Sproull advised that he also bought his property on the understanding that the adjoining land to the west would not be developed. He suggested that the proximity of a dwelling on proposed Lot 5 would require him to re-orient his house to have his living areas facing east over his outdoor space.

85. The photographs provided by Mr Sproull showed a number of views from inside his house. As a result of viewing those I obtained the consent of Mr Sproull and Mr Drew to view the site from inside their homes so I could better understand the existing situation in relation to that proposed.

Dr Read

86. Dr Read clarified that she had been unaware of the definition of "open space" in the District Plan and that in using those words in her report she had meant "openness". She asked that her report be read with the term open space replaced with openness in every instance.

87. Dr Read accepted Mr Espie's opinion that several neighbours had views to the Remarkables, noting that Glenda Drive was also in such views.

88. In her opinion, if the hillocks were removed it would not have a particular effect on the neighbours' views. She considered planting hedges without consents for the dwellings would serve no purpose, and she considered that if the subdivision was consented by itself a consent notice should be imposed restricting planting under Rule 15.2.17.1.

Ms Giborees

89. Ms Giborees' view on what constituted a structure plan was consistent with that provided by Mr Vivian and Mr Thomsen. In her view, this subdivision was too small for the integrated development provisions to be relevant.

Mr Goldsmith's Reply

90. Mr Goldsmith submitted that the Structure Plan was only the map included at the end of the zone, but he did concede that it does need rules to be able to operate. He submitted that Policy 1.4 did not mean that a resource consent could not be obtained, and that the proposal amounted to a minor deviation from the Structure Plan.

91. I was told that if consent was refused then the applicant would apply for a private plan change and change the density provisions to allow three extra dwellings. Mr Goldsmith also told me that Mr Broomfield advised that he had not met Mr Drew prior to Mr Drew's purchase of 2 Snowshill Lane.

92. Finally, Mr Goldsmith submitted:

(a) I cannot apply new purposes for a consent notice as a reason to retain it;

(b) The Council would not put a subdivision application on hold awaiting other consents. That provides a reason to unbundle the subdivision;

(c) As this is the last piece of land in the R2(C)AA precedent is unlikely to arise, and being the last piece of land is an unusual circumstance;

(d) Providing a limit of 31 dwellings in the R2(C)AA does not ensure integrated development.

Mr Thomsen's Comments on Draft Conditions

93. Mr Thomsen noted there appeared to be a typing error in Condition A14(c) in referring to Lot 1 DP 427930 when his client's property was Lot 2 on the same plan. He added that the conditions omitted reference to the hedge proposed between proposed Lot 4 and proposed Lot 6 and he submitted that hedge should also be controlled by a continuing condition in a consent notice.

**Major Issues in Contention**

94. The major issues I am confronted with in this application are:

(a) Do I treat the application as one or unbundle it into three applications?

(b) What is the permitted baseline, and is it relevant?

(c) For what purpose was the building restriction imposed in the consent notice?

95. Only after I have answered those questions am I able to consider the matters in s.104D and s.104.

**To Bundle or Unbundle**

96. The general approach to resource consent applications is to consider them in the round and to not artificially divide them into component parts. Following that approach, where an application may require consent under a number of different rules, the most stringent of the activity classifications under those rules is applied. That describes bundling the application, and if applied in this instance, the entire application would be a non-complying activity.

97. In *Southpark Corporation Ltd v Auckland City Council*[10] the Environment Court reviewed a series of High Court and Court of Appeal decisions before concluding:

> *… it is our understanding that while the Locke approach remains generally applicable, so a consent authority can consider a proposal in the round, not split artificially into pieces, that approach is not appropriate where:*
>
> *(a) one of the consents sought is classified as a controlled activity or a restricted discretionary activity; and*
>
> *(b) the scope of the consent authorities discretionary judgment in respect of one of the consents required is relatively restricted or confined, rather than covering a broad range of factors; and*
>
> *(c) the effects of exercising the two consents would not overlap or have consequential or flow-on effects on*

10 [2001] NZRMA 350

> *matters to be considered on the other application, but are distinct.*[11]

98. In that case the Court was dealing with an electric power line that was in part a permitted activity and in part discretionary (unrestricted). It found it could only deal with that part that was discretionary as there is no discretion to exercise on a permitted activity.

99. Mr Thomsen also referred me to *Newbury Holdings Ltd v Auckland Council*[12]. That case dealt with a situation where the High Court agreed that applications required under the district plan and the regional plan should be bundled together and considered under the most stringent classification. That is not particularly pertinent to the issue in this case.

100. I have set out above the list of consents required as agreed between the planners. On the face of it, the rules relating to subdivision make the subdivision application a controlled activity.

101. The land use activities require a range of consents ranging from controlled, through restricted discretionary to non-complying. It would be artificial to unbundle those consents – they are all inter-related and I am satisfied the approach is to treat them as non-complying.

102. Cancellation of consent notices is classified as a discretionary activity due to the operation of s.87B. Although there are a number of conditions imposed by the various consent notices, the relevant conditions in this application are:

> *There shall be no buildings or structures located within the blue areas or the yellow hatched areas shown on the Concept Plan drawn by Clark Fortune McDonald, referenced Job No 9634 Rev F as shown on the Title Plan DP 403880; X1, X2, W1, W2 and W3.*[13]
>
> *There shall be no building or structures located on Lots 6 and 11 within the areas ZB, ZC, ZD as shown on DP 461026.*[14]

103. These conditions are a clear impediment to the applicant's ability to give effect to the land use activities for which consent is sought. I do not agree with Mr Goldsmith that this component can be unbundled from the land

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11 Ibid at para 15
12 [2013] NZHC 1172
13 Condition 4j) in Consent Notice 7938041.2
14 Condition b) in Consent Notice 8433502.2

use consent application. They are intractably bound together, particularly given that erecting additional dwellings on this land breaches the zone standard for density.

104. *Southpark* suggests that the default position when one required consent is for a controlled activity and the other is discretionary or non-complying, is that the applications can be separated. However, it is necessary to consider the third condition the Environment Court set out in *Southpark*: whether the effects of exercising the two consents would overlap or have consequential or flow-on effects.

105. In reviewing the draft conditions provided by the applicant after the hearing I note the following:

(a) Condition A5 requires the provision of water supply, sewerage connection and stormwater disposal;

(b) Condition A14 requires the imposition of a consent notice on each lot limiting the dwellings on the proposed lots to be those approved in the land use consent;

(c) The same condition imposes restrictions in respect of planting in relation to the roofline of the proposed dwellings;

(d) Conditions A1 and C1 refer to essentially the same plans. That in C1 is a later revision of that in A1 but even that in A1 shows the placement of the dwellings and extent of earthworks. The revisions apparently made adjustments to the locations of the dwellings, added the extent of the no-build area and added original ground levels;[15]

(e) Conditions C6 and C7 are essentially a restatement of Conditions A14(c) and (d). Thus the consent notice imposed on the subdivision consent applies the conditions in the land use consent;

(f) Condition C9(a), (b) and (c) imposes essentially the same requirements on the land use consent as are imposed by Condition A5 of the subdivision consent;

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15 I note that it appears the Council has never received Rev C, but do have Rev D dated 25/6/14.

(g) Conditions A7 through to and including A12 relating to earthworks under the subdivision consent are essentially the same conditions as Conditions C12 to and including C18 on the land use consent.

106. I note also that the application as lodged on Form 9, in describing the application, stated: *Three lot subdivision, the erection of dwellings on each lot, plus earthworks and landscaping.* [new line] *Cancellation/variation of existing consent notices*. As I noted above, the plans lodged with the application showed an integration of the subdivision, the earthworks and the dwellings.

107. I conclude that in this instance there is a clear overlap between the subdivision application and its effects, and the land use application and its effects, that the two must be considered together. In addition, given the conditions presented by the applicant, it would be artificial to consider the subdivision on its own when its implementation restricts the residential use of the site to those activities the land use application seeks consent for.

108. Thus, I will consider the application as one, and it falls to be considered as a non-complying activity.

109. For completeness I note there is a provision in the District Plan that appears to have been overlooked by the parties. Rule 15.2.6.3 setting the zone standards for lot sizes and dimensions contains the following on page 15-28:

> *Subdivisions in all Activity Areas must result in lots capable of accommodating buildings and uses in accordance with the permitted and controlled activity rules and site and zone standards for the particular zone in which the site(s) is located, and the requirements of Section 14 – Transport.*

110. An ordinary reading of that rule would make the subdivision application a non-complying activity in any event.

111. So as to not delay the issue of the decision by asking the parties for submissions on this rule, I have taken no account of it in reaching my conclusions on bundling.

**Permitted Baseline**

112. I accept paragraphs 4.4 and 4.5 of the Joint Planning Statement where the planners agree that planting trees and vegetation and undertaking up to 100m$^3$ of earthworks per annum forms the permitted baseline. I also agree with Mr Thomsen's submission that the repetitive removal of 100m$^3$ of spoil per annum until the hillocks are removed is outside of the permitted baseline. That is not permitted now, even though it may be able to occur and lead to a future environment without the hillocks.

113. Thus, in considering the effects of the 1,541m$^3$ of earthworks, I would consider the effects of the proposal as if it were given effect to at one instance and therefore in comparison with the permitted effects of the removal of 100m$^3$.

114. Similarly, the planting of vegetation, while permitted, may not immediately have any adverse effects. Whether any adverse effects arise will depend upon the viability of the plants, the growth rate, their location and their age. I do not consider I can conclude from the fact that the Plan permits the planting of vegetation that any neighbour will suffer adverse effects, nor if they were to suffer such effects, can I make any conclusion as to the severity or otherwise of such effects, or their timing, notwithstanding Mr Goldsmith's contention that the applicant will impose adverse effects on Mr Sproull by planting a hedge of Portuguese Laurel.

115. After considering the actual and potential effects of the activities that are permitted, and taking into account the uncertainty about effects from vegetation planting, I conclude that little or nothing is to be gained by taking account of them in this application, so I will not disregard those effects under s.104(2) of the Act.

**Purpose of Building Restriction in Consent Notice**

116. In *Foster*[16] the Environment Court concluded the following criteria retained relevance in considering whether to vary or cancel a condition of a consent notice:

> *(a) The circumstances in which the condition was imposed;*

16 *Foster v Rodney District Council*, A123/09 at para 9.

*(b) The environmental values it sought to protect; or*

*(c) Pertinent general purposes of the Act as set out in Sections 5 – 8.*

117. This requires enquiry in this case as to why a restriction on building on the hillocks was imposed. The circumstances of its application are explained in the Council's decision issued by Commissioners Collins and Kelly in respect of consent application RM061154 on 15 June 2007, and the Consent Order of the Environment Court issued on 4 April 2008.

118. It appears that Quail Rise Estate Ltd had applied to create 11 lots ranging in size from 1,103m$^2$ to 4,264m$^2$ in the wider area that contained within it what is now Lot 6, the submitters' properties and the properties facing Ferry Hill Drive from 73 to 89 inclusive. Land use consent was also sought for future buildings on four of the lots. Both the subdivision and the land use consent required approval as a non-complying activity.

119. In their decision, the Commissioners made the following comments about the hillocks:

> In paragraph 17 - "*… in our view it would be unfortunate if one of the clearest elements of this distinctive landform was destroyed. … it would be completely lost with the proposed earthworks and much higher housing density proposed. In our assessment, these earthworks would have an adverse effect that is more than minor*."
>
> In paragraph 28 – "*… we consider that the hillock landform of the application site contributes significantly to the visual amenity values of the Zone so its modification by earthworks would be contrary to this objective*" (referring to Objective 2 of the Quail Rise Zone).

120. It is clear from each of these statements that it was the alteration to the hillocks by way of the earthworks proposed which they considered problematic. There is no comment in the decision at all about the effects of placing buildings on the hillocks. The nearest comment in this respect is the reference in paragraph 17 to the adverse effect arising from the increased density of development.

121. The Court's Consent Order contains no reasoning as to why any of the conditions included in the consent notice by Condition 8 were included,

and I was not provided with any notes that may exist on the Council files or be held by the Council's solicitors. What is apparent is that, notwithstanding the concerns raised in the Council's decision regarding the effects of earthworks, the Council and the applicant chose to restrict buildings on the hillocks and to impose no restrictions, other than the rules in the District Plan, on earthworks on the hillocks.

122. From this I must conclude that the reasoning of the Council in agreeing to Condition 8(n) in the Consent Order was not related to the concerns about earthworks relied on by the Council in refusing consent to application RM061154. Without any information to the contrary, I must conclude that the concern of the Council in settling the appeal was limited to the density of development that would be enabled by allowing buildings on the hillocks.

123. I am supported in this view by the Concept Plan attached to the Consent Order. Rather than the 11 lots referred to in the Council decision, the agreed plan shows 6 lots ranging in size from 886m$^2$ to 1,980m$^2$ and two lots, which contained the hillocks, that exceeded the 4,000m$^2$ minimum lot size applicable.

124. Consequently, I conclude the purpose of the building restriction imposed in Consent Notice 7938041.2 was to limit the density of development in this part of the Quail Rise Zone.

125. Mr Goldsmith also suggested that PC37 had made this condition redundant and referred to the changes made on appeal by Consent Order where a building restriction area was placed on the north most hillock, which is not the subject of this hearing, and the density of the R2(C)AA was increased by 5 residential units.

126. Again I have no information as to why matters were agreed to by the Council in settling the appeal against PC37. However, I do note that s.221(3)(b) provides that a territorial authority can at any time after the deposit of a survey plan review any condition specified in a consent notice and vary or cancel the condition. No such review has been undertaken by the Council. I would have expected that if, having settled the provisions of PC37, the Council concluded that the building restriction condition was of no further relevance, it would have reviewed it with a view to cancelling it.

127. I can only conclude that in agreeing to increase the number of dwellings that could be developed in the R2(C)AA, the Council was mindful of the limitation on density in this particular area imposed by the building restriction.

**Actual and Potential Adverse Effects on the Environment of the Proposal**

S.104(3)(a)(ii)

128. Under this section I am not to have regard to any effect of the proposal on the persons on the following properties:

- 87 Ferry Hill Drive – Lot 2 DP 403880;
- 91 Ferry Hill Drive – Lot 7 DP 449394;
- 5 Batsford lane – Lot 11 DP 472617;
- 9 Batsford Lane – Lot 12 DP 467075;
- 6 Batsford Lane – Lot 13 DP 467075; and
- 4 Batsford Lane – Lot 14 DP 461026.

129. Of these, the first four adjoin the subject site. Although for brevity I refer to "surrounding sites" or "neighbours", in doing so I exclude those sites where written approval has been given.

Infrastructure and Natural Hazards

130. Mr Wardill's engineering report makes it clear that there are no adverse infrastructure effects. Similarly he notes that there are no natural hazard issues arising.

Earthworks

131. With respect to the earthworks, Mr Wardill noted that the earthworks on proposed Lot 5 could potentially create unstable cuts along the boundary with 5 Snowshill Lane. The northern hillock extends onto 5 Snowshill Lane and by cutting a building platform at RL487.5m a portion of the hillock

extending up to 1 or 1.5m higher than this would remain on 5 Snowshill Lane. The conditions proposed by the applicant include a requirement that no permanent battered slope shall be formed at a gradient exceeding 1:1. At the point where this hillock remnant would be left on the adjoining site, the applicant proposes a reduced of 3.3m. Thus, a battered slope would consume almost half of that yard. Alternately, a retaining wall could be constructed. Either way, any adverse effects are internal to the site. The applicant has proposed conditions to enable this issue to be dealt with. One of the options proposed is to seek the agreement of the owners of 5 Snowshill Lane to have the portion of the hillock on their properties removed at the same time as the other earthworks occurred.

132. Mr Vivian detailed the earthwork quantities in his Assessment of Effects on the Environment (AEE). These amount to 1,372$m^3$ of cut and 169$m^3$ of fill. Presuming the fill can utilise cut obtained on the site, some 1,203$m^3$ of cut will need to be transported off the site. Mr Goldsmith told me that the removal of 100$m^3$ of spoil requires about 12 truckloads. Thus, some 144 truckloads of spoil will need to be removed from the site.

133. No provision was made to bring topsoil onto the newly created lots. Given the rocky nature of the hillocks, as is apparent from the earthworks already undertaken on Lot 6, I would expect some 300-500$m^3$ of topsoil would be needed. This would entail some 36-60 truckloads.

134. Mr Vivian's AEE also identified that the total bare soil exposed would be some 1,537$m^2$. This amounts to around 63% of the net site area (that is, excluding Snowshill Lane).

135. Conditions are proposed to control or mitigate any dust, but the area of exposed soil proposed along with the site's juxtaposition in relation to adjacent dwellings means that it is more than likely that there will be adverse dust effects on neighbours. In addition, there will be the noise of earthworks and the noise and traffic effects of some 360-400 truck movements along Snowshill Lane and onto Ferry Hill Drive. If I were to grant consent I would additionally impose limits on the hours of operation of earthworking equipment and the transport of spoil off the site so as to exclude evenings, weekends and early mornings.

136. While the adverse effects from earthworks would be temporary, I conclude, after taking into account conditions that can be imposed, that the effects would be moderate to significant for those properties adjoining the site (excluding those who have provided written approval).

Visual Amenity Effects

137. As I understood their evidence, Dr Read and Mr Espie agreed that there would be moderate to significant and significant adverse visual amenity effects on the Drew and Sproull properties respectively. Mr Espie described the situation as follows:

> *The proposed situation will affect the relevant Snowshill Lane properties (Sproull and Drew) in that the current openness of the site will be replaced by relatively close dwellings and associated outdoor spaces to the west and southwest. The dwellings themselves will be almost entirely screened by the proposed 1.8 metre high hedges, although visual openness will obviously be enclosed and domestic occupation will be experienced.*[17]

138. As Mr Espie had been instructed that if the application was refused the landowner would plant the vegetation shown on the Structural Landscape Plan and allow it to grow to full height (some 4-4.5m), he then proceeded to say:

> *If the hedging vegetation is planted, maintained and allowed to grow to its full natural height, it would have a more visually imposing effect than if it was maintained at a height of 1.8 metres; it would block more of the view of the sky and Ferry Hill and could restrict solar access. The actual change to views would be affected more than under the proposed situation.*[18]

139. Mr Espie assessed the effects on the Batsford Lane properties in a similar fashion and concluded that the degree of effect would essentially be the same whether consent was granted or not. Mr Espie made no comment on the effects on either 5 Snowshill Lane or 89 Ferry Hill Drive. In each case Dr Read had assessed the visual amenity effects on those properties to be low to moderate.

140. While I accept that it is highly probable that the applicant will proceed to plant the Portuguese Laurel hedges if I refuse consent to this application, I

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17 B Espie Statement of Evidence, para 11, p.5

18 ibid

do not share the level of certainty of the effects that will result that Mr Espie has. The plants will need some time to reach maximum height and that will require their survival in ground that can best be described, based on the excavations already carried out on the site, as rocky.

141. I note also that the Structural Landscape Plan included with the application proposes similar hedging along the boundaries of 5 Snowshill Lane and 89 Ferry Hill Drive, yet the condition proposed by the applicant as to limiting the height of hedges to no more than 1.8m above existing ground level does not apply to hedges bounding those sites.

142. Dr Read undertook a careful assessment of the potential visual amenity effects on each of the surrounding sites. While she did not do so on the basis that the hedging would be planted in any event, it was her opinion that the erection of dwellings in the three proposed location would be the source of adverse effects. It was her opinion that 5 Snowshill Lane and 89 Ferry Hill Drive would suffer an adverse loss of morning sun, and that 2 Batsford Lane would be subject to the dominating effect of the dwelling on proposed Lot 6 being almost entirely against the sky. She concluded the effect of a dwelling on proposed Lot 6 on this property would be significant and adverse.

143. I am satisfied that the adverse visual amenity effects of this proposal on the surrounding properties would on the whole be moderate, although significant in respect of some properties. I consider there is a low probability that the same effects would arise over time as a result of the hedging being planted now, even though I accept there is a high probability of the applicant undertaking that work. I consider the gradual change in visual outlook resulting from the natural growth of plants creates a lower level of adverse effect than the sudden erection of buildings, and that such gradual change is not at a constant rate nor does it create the same degree of impermeable visual barrier.

<u>Other Effects on Amenity Values</u>

144. While Ms Giborees raised the issue of potential shading with the applicant, in a general sense this issue was not considered by either of the planners. In additional to visual amenity values, the noise environment, access to sunlight and daylight and sense of privacy are all components of the

residential amenity values I would have expected to have been considered.

145. The applicant has provided a single set of shading diagrams related solely to the shading effects of the dwelling proposed on proposed Lot 6. These only considered shading at 12:30pm at mid-winter, mid-summer and the two equinoxes. I consider an adequate analysis of shading effects would have provided diagrams showing the effects from all proposed dwellings and structural landscaping at 10am, 12pm and 3pm on each the four days and for 21 December and 21 March identified when the sun was lost to the properties to the east and south and whether that was due to Ferry Hill or the proposed development. It would also have been helpful to have an indication of the present shading effect from the natural landforms on the site for comparison.

146. I noted that the outdoor living area on the Sproull property is on the west side of the house and I accept Mr Sproull's submission that the house is designed with the living areas facing west. Increased shading on the western face of his house and the land between the house and the western boundary would have an adverse effect. However, without adequate information I am unable to conclude the degree of effect.

147. The change in the use of the site to residential activities will change the noise environment of the adjoining sites. The outdoor living area of each of the proposed dwellings is to the east or north-east. Thus there will be more effect on 5 Snowshill Lane and 89 Ferry Hill Drive than on the Sproull or Drew properties. I do not consider this degree of change to be particularly adverse.

148. The development of residential activities on the subject site will alter the sense of privacy presently enjoyed on the Sproull and Drew properties, and may impinge on that enjoyed at 5 Snowshill Lane and 89 Ferry Hill Drive. All three proposed dwellings would sit higher than the dwellings on the Sproull and Drew properties and overlook those properties. In addition, the vehicle and pedestrian access to proposed Lot 6 will be along and above the western boundary of the Drew property. I conclude that the change to sense of privacy the occupiers of those two properties would experience would diminish the amenity values of their properties. The degree of effect would be moderate to significant. The change experienced at 5 Snowshill Lane and 89 Ferry Hill Drive would be less as the

building platforms are at a similar level or lower, but would lead to a more than minor diminution of amenity values.

149. Overall, I conclude that the change to the amenity values other than visual amenity on surrounding sites would be more than minor, and moderate to significant in some instances.

Other Effects on the Environment

150. The form and design of the proposed buildings is consistent with others already built in the vicinity. However, from the limited information provided, it appears that the lot sizes proposed in this subdivision for proposed Lots 4 and 5 are smaller than the size of surrounding lots. I note in particular that the largest building is proposed on proposed Lot 5, yet that proposed Lot has the smallest net site area. This gives the impression, when taking into account the size of the dwellings proposed on each, that the intensity of development proposed is in excess of that in the immediate environment.

151. As the site is surrounded by residential properties, the development is unlikely to have any adverse effects on the wider environment.

Conclusion with Respect to Section 104D(1)(a)

152. The adverse effects of the proposal, when considered in the round, will be more than minor. Therefore this threshold test is not passed.

**Objectives and Policies of the District Plan**

153. I have considered all the relevant objectives and policies in the Plan. The proposal is neutral in respect of many, and consistent with some. In this discussion I only highlight the particularly pertinent objectives and policies, including those brought to my attention.

154. I was referred to District Wide Objective 4.2.5-1 which reads:

> *Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values.*

155. I was also referred to several policies which give effect to that objective. While I have concluded that the proposal would have adverse effects on visual amenity values, I do not consider this objective and its associated policies are helpful in considering a proposal to develop land for residential purposes within a zone that, in a general sense, makes provision for such residential development.

156. District Wide Objective 4.9.3-2 seeks to achieve urban growth which has regard to the existing character and amenity values of existing urban areas. Although the policies in the Quail Rise Zone make reference to rural character, Quail Rise is essentially an urban area. Thus this objective and the relevant policies giving effect to it are pertinent. Policy 2.1 reads:

> *To ensure new growth and development in existing urban areas takes place in a manner, form and location which protects or enhances the built character and amenity of the existing residential areas and small townships.*

157. While the design of the proposed buildings is of a similar character to those in the surrounding area, the development does not protect or enhance the amenity of the existing residential area and as noted above, the site layout and intensity of development is not consistent with the character of the surrounding area. I note also that it should not be necessary to require a Structural Landscape Plan in a low-density residential zone. The placement and juxtaposition of dwellings should be such as to not cause such adverse visual amenity effects.

158. Objective 4.9.3-3 seeks to provide sufficient opportunity for residential growth in the district. Policy 3.4 provides that such growth in low-density residential areas should be subject to controls to maintain and enhance existing residential character in those areas. Again the diminution of amenity values as a consequence of this proposal is not consistent with this policy.

159. Objective 4.9.3-7 is seeking to manage the effective distribution of urban development, and policy 7.5 is to avoid sporadic or ad hoc urban development. This proposal is not contrary to these provisions.

160. Objective 4.9.11-3 seeks to avoid, remedy or mitigate the adverse effects of earthworks on, among other things, the amenity values of

neighbourhoods. Policies 6 and 7 are directed to giving effect to this part of the objective. They read:

> *6. To protect the existing form and amenity values of residential areas by restricting the magnitude of filling and excavation.*
>
> *7. To ensure techniques are adopted to minimise dust and noise effects from earthworks.*

161. I have found above that the scale and location of the proposed earthworks would lead to moderate to significant, albeit temporary, adverse effects. I consider the proposal is contrary to Policy 6 due to the scale of the earthworks and their close proximity to surrounding residential properties.

162. In Chapter 15 Subdivision, Development & Financial Contributions, Objective 15.1.3-5 seeks to maintain or enhance built environment amenities through the subdivision and development process. The following policies to give effect to this objective are relevant:

> *5.1 To ensure lot sizes and dimensions to provide for the efficient and pleasant functioning of their anticipated land uses, and reflect the levels of open space and density of built development anticipated in each area.*
>
> *5.3 To encourage innovative subdivision design, consistent with the maintenance of amenity values, safe, efficient operation of the subdivision and its services.*
>
> *5.5 To minimise the effects of subdivision and development on the safe and efficient functioning of services and roads.*

163. The proposal is consistent with Policy 5.5. However, I consider the adverse effects of the proposal on the amenity values of the surrounding land combined with exceeding the density limits set out in the zone, makes this proposal contrary to Policy 5.1. I do not view the proposal as incorporating innovative design, but even if it did, it disregards the amenity values of surrounding land and would consequently be contrary to Policy 5.3. In reaching these conclusions I have taken account of the expected environmental results set out in 15.1.4. Item (xii) on this list particularly makes reference to the pattern of subdivision being consistent with planned density.

164. Turning to the objectives and policies specific to the Quail Rise Zone, Objective 12.4.3.-1 seeks to enable the development of low density residential activities in conjunction with planned open space and recreational activities. In my view it is the development of low density residential activities that is the prime goal of this objective. The relevant policies are:

> *1.1 To ensure development is carried out in a comprehensive manner in terms of an appropriate strategy and to ensure that activities are compatibly located.*
>
> *1.4 To avoid any deviation to the Structure Plan for the zone.*

165. In my view, these policies in combination require the subdivision and development of the zone to occur in a planned and integrated manner. This is confirmed by the statement in the Explanation and Principal reasons for Adoption:

> *To ensure development takes place in an integrated manner the Council considers it appropriate to include a Structure Plan. Minor amendments may be considered by the Council through the resource consent procedure.*

166. Since PC37 became operative in October 2011 the applicant has subdivided the vast bulk of the R2(C)AA but has not attempted, until now, to integrate the development of this land into that subdivision, notwithstanding that three lots have been created adjoining this land in that time. I do not consider the proposal to increase the density of the Activity Area by almost 10% to fall into the category of a minor amendment to the Structure Plan. I consider the approach taken by the applicant in not integrating the subject land into the subdivision and development of the land in the R2(C)AA, and now seeking to develop it when the maximum number of residential units allowed by the Zone Standard has been reached, to be a wilful disregard of the Structure Plan.

167. Objective 2 includes a goal of conserving and enhancing the amenity values of the zone, which I have found this proposal does not do. I note again the need to include structural landscaping so as to screen the proposed dwellings indicates a level of intensity of development beyond that anticipated by the Plan.

168. I conclude the proposal is contrary to the objectives and policies of the Quail Rise Zone.

Conclusion with Respect to Section 104D(1)(b)

169. While the proposal is consistent with some objectives and policies in the District Plan, I am satisfied that the proposal is on the whole contrary to the objectives and policies of the Plan in the sense that it is repugnant to or opposed to those objectives and policies as I have stated above.

170. The proposal fails both threshold tests in s.104D and therefore I am precluded from granting consent. However, in case I am wrong on this point I will consider the proposal against the remaining matters in s.104(1).

**Positive Effects**

171. Neither Mr Vivian not Ms Giborees noted any positive effects on the environment. I take into account the positive effect on the applicant of approving this proposal and also the positive effect on the wider population in the District by making three additional residential units available. However, I do not consider these positive effects outweigh the adverse effects I have discussed above.

**Other Provisions in the District Plan**

172. Sections 12.14.1 and 12.4.2 describe the nature of the Quail Rise Zone and the relevant issues. Much of this relates to the zone itself fitting within the surrounding rural area. The proposal is neutral in respect of these provisions.

173. The Assessment Matters in Section 12.15.6 do not add any additional matter beyond those I have covered above. They do require consideration of density of development in terms of the impact on the visual quality and amenity values within the zone.

**Integrity of District Plan**

174. This is a relevant consideration under s.104(1)(c). By proposing an increase in density in the R2(C)AA of almost 10% the applicant is severely challenging the integrity of the District Plan provisions.

175. PC37 was a private plan change sought by the applicant. As I understand it, the essential purpose of PC37 was rezone land at and adjoining the southern end of the Quail Rise Zone to enable residential development similar to that allowed in the R2 Activity Area. The Council decision inserted an amendment to Policy 1.2 and a new Policy 2.4, each relating to retaining natural landforms in the zone. It also inserted a limit of 26 residential units in the R2(C)AA in Zone Standard 12.15.5.2.1 and limited the number of residential units in the zone to 213.

176. The applicant appealed the decision and reached an agreement with the Council to settle the appeal. The settlement deleted the additional provisions in the policies and increased the maximum number of residential units in the R2(C)AA to 31 and the zone to 218. In addition, the northernmost hillock, outside of this site, was made subject to a no building restriction on the Structure plan.

177. Given the settlement of the applicant's appeal by Environment Court Consent Order, I must conclude that when PC37 was made operative in October 2011 the Quail Rise Zone provisions reflected the wishes of the applicant. There was no impediment in the zone provisions to the applicant seeking at that time to remove the building restriction consent notice and to subdivide the R2(C)AA in such a way that 31 residential lots, incorporating this land, were created. The only unique characteristic of this land was the consent notice building restriction. As Mr Vivian stated, it was open to the applicant at that time to apply to remove the Consent Notice.[19]

178. If I were to grant this consent the integrity of the District Plan would be severely challenged, not just in the Quail Rise Zone, but in all zones. It would encourage this applicant or other landowners to similarly develop land in accordance with an applicable Structure Plan while leaving a vacant area to fill beyond the level of development contemplated by the applicable zone at a later date. I do not agree with Mr Goldsmith's submission that the issue of precedent would be limited to the R2(C)AA.

**Consent Notices**

179. Ms Giborees has provided a very useful analysis of the four consent notices and three variations or partial cancellations thereto that are

19 C Vivian Statement of Evidence, para 4.10, p.8

attached to this site. It is clear that two, 7252903.6 and 9232040.5, apply conditions of no relevance to this site and could be cancelled.

180. I consider the remaining consent notices, by restricting buildings on this site, contribute to maintaining the density of development at the level considered appropriate in prior resource consent decisions and the provisions of the District Plan. I do not consider it appropriate to vary or cancel the conditions imposed by them.

**Conclusions and Decision**

181. If I were not precluded from granting consent under s.104D I would nonetheless come to the conclusion that consent should not be granted, except for the cancellation of the conditions in Consent Notices 7252903.6 and 9232040.5.

182. In the Quail Rise Zone, the District Plan has set in place a set of objectives, policies and rules at the instigation and agreement of the applicant. These provisions give effect to the provisions of the Act, particularly Part 2. It must follow that in having particular regard to the matters in s.7, I should accept that the Plan provisions are designed to maintain and enhance amenity values and the quality of the environment, and the provisions allocating land for residential use represent the efficient use and development of natural and physical resources. While there is always some leeway in deviating from Plan provisions and still achieving the purpose of the Act, I consider in this case the applicant is going beyond the amount of deviation that would be appropriate.

183. Furthermore, I conclude that to grant consent to this application would severely undermine the integrity of the District Plan, not just in the Quail Rise Zone but throughout the District, and encourage behaviour similar to that displayed by this applicant.

184. For the reasons set out above, pursuant to s.104B consent to the application by Quail Rise Estate Limited to subdivide Lot 6 DP 472617 into three lots, locate a dwelling on each new lot, undertake earthworks and cancel the consent notices applying to that lot is **refused**.

T Denis Nugent
Hearing Commissioner
13 October 2014