

DECISION OF THE QUEENSTOWN-LAKES DISTRICT COUNCIL

RESOURCE MANAGEMENT ACT 1991

Applicant:	Larchmont Developments Limited
RM reference:	RM100624
Location:	109c Atley Road and 31 Mathias Terrace, Arthurs Point, Queenstown
Proposal:	Subdivision of Lot 1 Deposited Plan 398656 into nine lots, creating eight additional certificates of title; and creation of a private right of way over Lot 14 Deposited Plan 332867.
Type of Consent:	Subdivision
Legal Description:	Lot 1 Deposited Plan 398656 contained in Computer Freehold Register 393405; Lot 14 Deposited Plan 332867 contained in Computer Freehold Register 134630.
Valuation Number:	N/A
Zoning:	Low Density Residential/Rural General
Activity Status:	Discretionary
Notification:	Limited
Commissioner:	Commissioners Taylor and Overton
Date:	1 March 2011
Decision:	Declined

UNDER THE RESOURCE MANAGEMENT ACT 1991

IN THE MATTER OF

an application by **LARCHMONT DEVELOPMENTS LIMITED** to subdivide Lot 1 Deposited Plan 398656 into nine lots, creating eight additional certificates of title; and to create a right of way access over Lot 14 Deposited Plan 332867.

Council File: RM 100624

DECISION OF JANE TAYLOR AND LEIGH OVERTON, HEARINGS COMMISSIONERS APPOINTED PURSUANT TO SECTION 34A OF THE RESOURCE MANAGEMENT ACT 1991

Introduction

1. Larchmont Developments Limited ("the Applicant") has sought resource consent to subdivide Lot 1 DP 398656 ("Lot 1") into nine lots (via three stages), creating eight additional certificates of title; and to create a right of way access over Lot 14 DP 332867 ("Lot 14"). The properties are located at 109c Altey Road and 31 Mathias Terrace respectively.
2. Lot 1 is located in the southern area of Arthurs Point and is currently accessed from Altey Road via a private unsealed right of way. The site is primarily zoned Low Density Residential ("LDR"), with a small strip of Rural General land (64m²) located in the eastern part of the site. The property is predominantly flat, although the southern portion is elevated above a large terrace. The flat area of the site is level with the adjoining Mathias Terrace allotments. A residential dwelling is located in the western part of the site, and two existing sheds are situated in the northern area.
3. The Applicant has entered into a conditional sale agreement¹ in respect of Lot 14 (31 Mathias Terrace) over which it proposes to form a private right of way to access the Lot 1 subdivision. Lot 14 was created as part of the Atley Downs residential subdivision (RM020634), which was approved on 10 June 2003 and comprises 45 lots. Properties in the Atley Downs subdivision are subject to a private land covenant 6210232.3 ("the Atley Downs covenant") between the developer, Aspen

¹ Subject to obtaining resource consent for the proposed access way to the adjoining Lot 1.

Grove Limited, and all lots within the subdivision. This covenant provides, amongst other things, that there will be no further subdivision of any of the lots, including Lot 14. "Subdivision" is defined in the transfer instrument as having the meaning set out in s.218(1) of the Act.

4. The proposed subdivision would be relatively uncontroversial but for the proposed utilisation of part of Lot 14 as an access way to Lot 1 in place of the existing private right of way access via Atley Road. The Applicant relies on Rule 14.2.4.1 (iv) of the District Plan – *Parking Area and Access Design*, which provides for private ways, being the land within a right of way, to provide shared access for up to 12 residential dwellings as a controlled activity. However, the owners of the neighbouring Mathias Terrace residential lot, Lot 13 (and, anecdotally, members of the Mathias Terrace community generally) oppose the subdivision on the grounds, inter alia, that the access way was not contemplated or provided for as part of the Atley Downs subdivision and that the adverse effects on their residential property and the wider receiving environment will be substantial.

The Proposal

5. The Applicant proposes to subdivide Lot 1 into nine allotments, creating eight additional certificates of title. Rather than utilising the existing private access via Atley Road, the Applicant proposes to create a new private right of way through 33 Mathias Terrace (Lot 14 DP 134630).
6. The proposal is fully described in the s.42A planning report at page 5. For the purposes of this decision, the salient features are as follows:
 - The proposed access way from Mathias Terrace to Lot 1 traverses Lot 14, which currently has an area of 917m². The net area of Lot 14 after the proposed right of way has been created is 636m², which is less than the 800m² minimum allotment size for the Arthurs Point Low Density Residential zone. However, the creation of a private access way through Lot 14 does not comprise a subdivision as defined in s.218(1) of the Resource Management Act 1991 ("the Act"). Accordingly, as the creation of the access way easement over Lot 14 does not create a separate "lot" or "balance" lot" as defined in the District Plan, the proposal does not technically breach Rule 7.5.5.3 (iii) – *Site Density*.

- Following consultation with Lakes Environmental, the Applicant has volunteered a public pedestrian access secured by a right of way in gross to the Queenstown Lakes District Council between Mathias Terrace and the western boundary of the Applicant's site. As a consequence, the right of way over Lot 14 is required to be widened from 6.0 m to 9.0 m to contain the footpath formation. At the hearing, the Applicant advised that it is willing to accept a condition requiring the owners of Lot 14 and Lot 9 of the proposed subdivision to maintain the pedestrian walkway for a period of two years following its construction and acceptance by Council, following which maintenance will revert to Council.
- Importantly, at the time the Atley Downs subdivision consent was issued in June 2003, no provision was made for an access way from any part of this subdivision to the boundary of Lot 1, notwithstanding that the District Plan reserves specific control under Rule 15.2.8.1 in relation to controlled subdivision activities for access for future potential subdivision on adjoining land. The Applicant considers that Council's alleged omission to provide such access was "remiss" and that, as a consequence, the development potential of Lot 1 was left "landlocked". It is fair to say that the current application has been carefully crafted to comply with the literal meaning of the District Plan rules and, in part, the Atley Downs covenant, in order to facilitate the planned development of Lot 1 as a controlled subdivision activity.

Submissions

7. Following an assessment in accordance with s.95B of the Act, Lakes Environmental determined that the only party potentially adversely affected to a minor or more than minor extent by the application were the owners of the adjoining property, Lot 13 (33 Mathias Terrace), Mr Stephen and Mrs Julie-Ann Winter. Accordingly, the application was processed as a limited notified consent application.
8. In their written submission, Mr and Mrs Winter opposed the application on the following grounds:
 - The proposed right of way is not an appropriate activity for the lot;

- The proposed development will cause significant ongoing adverse effects with respect to the safety and efficiency of the Mathias Terrace/Atley Road roading network and the amenity value of the existing local street;
- The proposed development will cause a significant decrease in the amenity value and the enjoyment of the Winter's home;
- The proposed public pedestrian walkway further diminishes the privacy and enjoyment of the Winter home;
- The application is not an appropriate level of "buy in" to the Atley Downs community, which may lead to vehicle speeds and traffic safety issues which will increase;
- The application has not considered alternative access upgrades;
- Further development on currently undeveloped low density residential land may lead to an upgrade of Atley Road and, accordingly, it is not appropriate for the Applicant to turn its back on the upgrade, simply on a balance of convenience;
- There is a future risk that additional land could be joined to the development property, to extend access to undeveloped land to the south, further increasing adverse effects; and
- The application involves the removal of trees and landscaping that is protected under the Atley Downs covenant on Lot 14.

The Hearing

9. The hearing was held at Queenstown on Thursday 3 February 2001. The Applicant was represented by Mr Neil McDonald, a principal of Clark Fortune McDonald & Associates, Land Surveyors and Planning Consultants based in Queenstown. Mr McDonald called evidence from Ms Emma Dixon, a Planner at Clark Fortune McDonald & Associates.

10. Mr Stephen Winter attended the hearing and spoke to his submission. We will refer to parts of Mr Winter's oral submission in our discussion to follow.

11. Prior to the hearing, we had the benefit of comprehensive s.42A reports prepared by the following Lakes Environmental personnel:

- Ms Lucy Millton, Planner; and
- Ms Keri Garrett, Engineer.

12. Ms Millton recommended that subject to new or additional evidence being presented at the hearing, the application be granted for the following reasons:

(i) It is considered that the adverse effects of the activity will be minor as:

- The proposed allotments meet the minimum lot size for the Arthur's Point Low Density Residential zone.
- Amenity planting throughout the site and lot configuration will ensure that the development will seamlessly merge with the existing residential developments within the surrounding area.
- The proposed subdivision can be adequately serviced.
- Appropriate mitigation measures can be implemented to ensure that adverse effects resulting from increased traffic volumes can be adequately avoided. Recommendations from traffic experts can be imposed to provide ongoing safety to all users of the Mathias Terrace/Atley Road intersection.
- The adverse effects of the subdivision will be no more than minor in regard to density, amenity, infrastructure and traffic.

(ii) The proposal is consistent with the relevant objectives and policies of the District Plan.

(iii) The proposal promotes the overall purpose of the Act.

13. Both Ms Millton and Ms Garrett attended the hearing and gave further verbal evidence in response to elements of the Applicant's case and Mr Winter's submissions.
14. Prior to the hearing, the Commissioners conducted a site visit to the two properties, Lot 1 and Lot 14, and viewed both the Mathias Terrace/Atley Road intersection and the existing access to Lot 1 from Atley Road.

District Plan Provisions

15. The site is zoned Low Density Residential under the District Plan.
16. In her s.42A report, Ms Millton identified that the proposal requires the following resource consents:
 - A **controlled subdivision activity** pursuant to Rule 15.2.3.2 (lot sizes 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 (Stormwater Disposal), Rule 15.2.13.1 (Sewerage Treatment and 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) and Rule 15.2.18.1 (Easements). Council's control is in respect of these matters.
 - A **restricted discretionary consent** pursuant to Rule 14.2.2.3 as the proposal does not comply with Site Standard 14.2.4.1(iv) with respect to the radius of the turning circle for the proposed right of way across Lot 14. The proposed turning circle will be less than the specified 9.5m minimum as specified in Council's Subdivision and Development Standards NZS4404:2004. Council's discretion is with respect to this matter.
17. At the time the planning report was prepared, Ms Millton also identified that a discretionary consent pursuant to Rule 14.2.2.3 was required, as in her opinion the proposal did not comply with Site Standard 14.2.4.2(iv) with respect to the minimum site distance from Mathias Terrace onto Atley Road. As a result, the application was assessed as a discretionary activity. However, at the hearing Mr McDonald submitted, and Ms Millton accepted, that Site Standard 14.2.4.2(iv) cannot apply to an existing road intersection that is remote from the application site. Rather, Rule

14.2.2.3 is intended to apply to a vehicle access created by the application. It was subsequently agreed that Rule 14.2.2.3 does not apply and consequently this discretionary activity consent is no longer required.

18. Accordingly, the application must, prima facie, be considered under the controlled subdivision activity rules and, in relation to the radius of the turning circle, as a restricted discretionary activity.
19. However, in our view that is not the end of the matter. Lot 1 was created following a subdivision application by Mr and Mrs Murphy (the principals of Larchmont) under RM070524, which resulted in Lot 1 containing the land which is mainly zoned Low Density Residential (with a very small piece of Rural General zoned land) and proposed Lot 2, which was made up entirely of Rural General zoned land. This application was assessed as a discretionary activity and subsequently granted on a non-notified basis. Access to both lots was via the existing right of way off Atley Road. In the decision, the Atley Road private access was assessed by Lakes Environmental's engineer, who stated:

"Access to the site is via a right of way off Atley Road. The access ways are currently in an adequate condition for the current level of development as both lots have existing residential dwellings on them and no further land use is proposed by this application. However, because proposed Lot 1 is located within the Low Density Residential zone and under the density rules could have up to 19 dwellings at one per 450m²; Plan Change 6 would cause issues with this density due to the ROW being restricted in legal width and it is doubtful that the full legal width required to comply with Council standards for this many dwellings could be achieved".

20. The decision goes on to state:

"The Applicant is currently investigating alternative access arrangements, and has volunteered a restrictive legal instrument to state that no further development will be permitted on proposed Lot 1 until access can be provided to Lot 1 to the acceptance of Council ..."

21. Lakes Environmental's engineer reviewed the suggested development restriction and stated:

"The current ROW is undersized for the existing number of lots that have access to it when compared to the requirements set by Council under Plan Change 6, although it appears to work adequately at the moment. I would find it very difficult to argue that there is an adverse

effect from separating the two existing lots but if Mr Murphy wants to increase the number of dwellings onto the ROW, I would have to say it would need upgrading to a legal road to cater for the potential dwellings. So my conclusion is if Mr Murphy would state that he will not increase the number of lots/dwellings, then there will be no effect created by separating the two sections as proposed."

22. The Planner then concludes:

"Overall, there is not considered to be any adverse effects in terms of traffic generation and vehicle movements of the proposal, and the adverse effects of the right of way not complying with Plan Change 6 are considered to be appropriately mitigated by the restriction on any further development on Lot 1."

23. Accordingly, a consent notice was registered against the title of Lot 1. Condition c) states:

*"There shall be no further subdivision or development on Lot 1, until such time as an accessway **to the acceptance of Council** is able to be provided to the lot."*

24. Having read the consent authority decision that established Lot 1 (RM070524) quoted from above, and taking into account the wording of the resulting consent notice condition, it is our opinion that Council has clearly reserved unfettered discretion to approve any proposed access way **prior to** any further subdivision or development on Lot 1. In other words, in order to vary, amend or cancel the condition, the consent of the territorial authority is required. We are not persuaded by Mr McDonald's submission to the effect that the condition will "automatically be able to be removed" if this current application is granted. In effect, this is the equivalent of putting the cart before the horse. It is plain from the decision in RM070524 that at the time consent for Lot 1 was granted, Council envisaged an upgrade of the existing Atley Road private right of way to, prima facie, comply with Council standards (although, of course, a lesser upgrade could potentially be granted as a non-complying activity) before any further development on the site could proceed. Any alternative access proposal must therefore be considered in view of this background and after consideration of all relevant effects on the environment and the objectives and policies of the District Plan.

25. Further, the inclusion of the words "*to the acceptance of Council*" imply that Council's discretion is much wider than simply just the provision of physical access; rather, a more holistic approach, cognisant of achieving an optimal overall solution for the balance of developed and undeveloped low density residential land is

implied. If it were not, then the words “to the acceptance of Council” would be redundant and the condition could simply have read: *“There shall be no further subdivision or development on Lot 1, until such time as an accessway is able to be provided to the lot”*. It is also relevant that by agreeing to leave the question of “acceptable” access to a later date, Council was simply deferring consideration of matters which would otherwise have been evaluated and determined as part of the discretionary activity consent at the time RM070524 was granted.

26. In our opinion, an access way that is acceptable to Council involves broader considerations than purely the provision of physical access and, in any event, certainly invokes a process more aligned to the discretionary consent process mandated by the Act. Section 221 applies to conditions which are to be complied with on a continuing basis by the subdividing owner.² In this regard s.221(3A), provides that ss.88 to 121 and 127(4) to 132 apply to any application to cancel a condition under s.221(3). Indeed, at law, the purpose of enduring consent notice conditions is to facilitate planning control by requiring any subsequent variation or cancellation to follow due process. This is to ensure that if any enduring condition inserted into a subdivision consent for a resource management purpose is varied or cancelled, the Act’s purpose of sustainable management of natural and physical resources continues to be maintained, hence safeguarding and ensuring protection for the wider community and receiving environment.
27. Accordingly, as a result of the consent notice registered on the title of Lot 1, a **discretionary activity consent**, either formally pursuant to s.221(3A) of the Act, or informally via a Council internal process,³ is required prior to or concurrently with any grant of a controlled activity subdivision consent for the subdivision and development of Lot 1. Although the activity status to be applied is not entirely plain from the amended legislation, it seems (and is logical) that it should devolve from the activity status of the original subdivision, RM070524.⁴ We have proceeded to assess the application on this basis, as was co-incidentally (and fortuitously) the approach adopted by Ms Millton (albeit for other reasons) in the first instance.

² Although it is perhaps moot as to whether Consent Notice conditions c) is “continuing” for the purposes of s.221, we have taken the view that access is a continuing effect and that as it was a significant issue in the granting of RM070525 (which was assessed as a discretionary activity) it follows that cancellation of this condition should follow a resource management process, whether formally or informally. The provision of access to the “acceptance of Council” therefore invokes an evaluation of all of the holistic considerations that would have been taken into account had access been formalised as part of the original consent process. Otherwise, simply “conditioning” this aspect could be a technical means of avoiding a proper resource management process and evaluation at first instance.

³ But in our view one which mirrors the approach under s.221(3A).

⁴ This approach corresponds to general legal advice received by Lakes Environmental that variations or cancellation of conditions under s.221 should be treated in the same way as the original application.

28. Reference was made in Ms Millton's report to the provisions of the Local Government Act 1974 which apply to the formation of private roads or private ways.⁵ The provisions and rules of the District Plan (which includes Rule 14.2.4.1 (iv)) are subservient to and must be read in accordance with these statutory provisions.
29. Section 348 of the Local Government Act 1974 ("the LGA") provides the powers of Council with respect to private roads and private ways, and reads as follows:
- "(1) **Except with the prior permission of the council**, no persons shall lay out or form any private road or private way, or grant or reserve a right of way over any private way, in the district.
 - (2) Subject to s.347, **in granting any such permission the council may**
 - (a) **Impose such conditions** as to widths, levels, entrances, courses, formation, cost of formation, maximum number of buildings to be erected fronting any such private road or private way, minimum distances between any two buildings, position of building line, **and otherwise in all respects whatsoever as the council thinks fit**; and
 - (b) Require the owner or owners to whom permission is given to enter into a bond to comply with any conditions imposed by the council.
 - ...
 - (6) Nothing in this section applies to a private road or private right of way lawfully created as part of a subdivision under the Resource Management Act 1991." [Our emphasis]
30. The Applicant has made it plain that there is no subdivision intended in respect of Lot 14 (otherwise the overall activity status would prima facie be non-complying as the proposal breaches Rule 15.2.6.3(i)(a) in relation to Lot Sizes, and indeed potentially in breach of the Atley Downs covenant, although we need not express an opinion on this latter aspect). Where no subdivision is proposed (and therefore ostensibly in this case the non-complying resource consent process is not followed), the broader effects of the creation of a private right of way can be taken into account by Council in deciding, in terms of s.348, whether or not to grant permission with or without conditions. Council's discretion in this regard is unfettered. Importantly in respect of this application, although Lot 1 is plainly a subdivision, as Lot 14 is not being subdivided the application does not, in our view, qualify for the exemption

⁵ Although the vast majority of the Local Government Act 1974 provisions were repealed with the enactment of the 2002 Act, there are a number of provisions still in force, including those relating to private roads.

contained in s.348(6).⁶ The implications of s.348 of the LGA will be discussed further in our decision.

31. In summary, although the Applicant has endeavoured to confine the application to that of a controlled activity status (with a restricted discretionary consent required in respect of the radius of the turning circle), in our view two preliminary matters must be addressed before consent to the overall subdivision may be granted:

- (i) A **discretionary activity** consent under s.221 of the Act (or an equivalent informal process by Council) in order to satisfy and/or subsequently cancel consent notice condition c) registered against the title of Lot 1; and
- (ii) **Council permission under s.348 of the LGA**, which gives Council unfettered discretion in relation to the formation of any private right of way in the district. We note that in respect of the proposed right of way over Lot 14, as this is not being "lawfully created as part of a subdivision under the Resource Management Act 1991" (as there is no subdivision intended in respect of Lot 14), Council permission under s.348(1) is required.

32. If we are wrong in relation to the requirement for a s.221 cancellation process, it is nonetheless clear that prior consent under s.348 of the LGA is required, and that, in this respect, Council's considerations in deciding whether or not to grant permission are, in a case such as this, parallel to those mandated by the Act for the assessment of a non-complying activity.⁷ Accordingly, without obtaining LGA permission, the application in its current form (that is, as a controlled activity) cannot proceed as s.106 of the Act applies. By way of explanation, section 87A(2) states that:

"If an activity is described in ... a Plan ... as a controlled activity, a resource consent is required for the activity and

- (a) the consent authority must grant a resource consent (**except if s.106 applies**); and
- (b) the consent authority's power to impose conditions on the resource consent is restricted to the matters over which control is reserved (whether in a Plan or Proposed Plan, a national environmental standard or otherwise); and

⁶ If it were, then this would indeed comprise a "loop hole" in both the legislative framework and the District Plan, as it would avoid a consideration of the proposal as a non-complying activity for the reasons stated above. This cannot have been the intended outcome of a purposive approach to interpretation of the legislation.

⁷ Which would be the activity status of a subdivision of Lot 14 if this had been applied for as part of this proposal.

(c) the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, Regulations, Plan or Proposed Plan.”

33. Importantly with regard to this application, s.106(1) provides that the Consent Authority may refuse subdivision consent in certain circumstances (notwithstanding that the activity may be a controlled activity) and states that:

“A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that ...

...

(c) **sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.”**

34. This aspect of the decision will be canvassed further in our conclusion.

Statutory Considerations

35. As we have determined that it is necessary to assess this application as a **discretionary activity**, s.104 of the Act applies. Subject to Part 2 of the Act, s.104 sets out the matters to be considered by the Consent Authority when considering the resource consent application. Considerations of relevance to this application are:

- (a) The actual and potential effects on the environment of allowing the activity;
- (b) The relevant objectives, policies, rules or other provisions of a Plan or Proposed Plan; and
- (c) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.

36. Following assessment under s.104, the application must be considered under s.104B of the Act. Section 104B states:

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

- (a) May grant or refuse the application; and
- (b) If it grants the application, it may impose conditions under ss. 108 and 220.”

37. The application must also be assessed with respect to the purpose of the Act set out in Part 2, which is to promote the sustainable management of natural and physical resources.
38. Sections 108 and 220 empower the Commission to impose conditions on both a land use and subdivision resource consent.

Assessment

39. As explained above, our approach to this application has been to assess it as a discretionary activity. In particular, the fundamental question for this Commission is: *"Does the proposed provision of a private right of way across Lot 14 satisfy Council in respect of the consent notice condition over Lot 1 volunteered and subsequently imposed by RM070524?."* Similarly, in our view, the required permission under s.348 of the LGA addresses, substantially, the same range of issues and concerns.
40. Accordingly, we proceed on that basis. However, if we are wrong, we note that s.87A(2) of the Act is subject to s.106(1)(c), which requires sufficient provision to be made for legal and physical access to each allotment created by the subdivision. As it is our recommendation that Council decline consent under s.348 of the LGA for substantially the same reasons discussed in our analysis that follows and, accordingly, as insufficient provision has been made for legal and physical access to the proposed subdivision, the application may also be refused on this basis.
41. Accordingly, the proposal requires assessment in terms of the following:
 - (i) The permitted baseline/ existing environment/ receiving environment;
 - (ii) The effects on the environment;
 - (iii) The objectives and policies of the District Plan;
 - (iv) Other matters in accordance with s.104(1)(c); and
 - (v) Part 2 of the Act.

The permitted baseline/ existing environment/ receiving environment

42. Ms Milton states that due to the size of Lot 1, up to nine dwellings could be constructed without requiring resource consent. She also notes that an access way could be created through Lot 14 without resource consent, although this would still

be subject to approval by Council under s.348 of the LGA. The Applicant did not raise any issue with Ms Millton's conclusion in this regard.

43. In our view, the history of this site, both through the resource consent process and by way of plan changes/zoning, is relevant to the permitted baseline/receiving environment. Originally, the site was zoned Tourist Development (T2) in the Transitional District Plan. Between 31 August and 14 September 1998 decisions on submissions to the proposed District Plan were progressively released. As a result of these decisions, the application site was zoned Low Density Residential and, consequently, any subdivision activity requires a controlled activity resource consent pursuant to Rule 15.2.6.1 with regard to subdivision contained within the Low Density Residential zone at Arthurs Point.
44. On 10 June 2003, the Council issued decision RM020634 (Atley Downs) which created a total of 45 residential allotments (including Lot 14) within an area of 6.348 hectares. The lots range from 883m² to 2,912m² in area. Within the subdivision various access lots and roads were provided. Importantly, at the time the Atley Downs subdivision was approved, no formal access or right of way was provided to the balance of undeveloped land zoned Low Density Residential (of which Lot 1 forms part).⁸ Rather, access to the balance of the former T2 zone remained via Atley Road and the existing private right of way.
45. Although no alternative vehicular access was provided to the balance of the undeveloped LDR zoned land, Mr Winter drew our attention to the provision of an easement for services (drainage and sewerage disposal) that was created through Mr Winter's property situated at 33 Mathias Terrace (Lot 13 of the Atley Downs subdivision). Mr Winter advised that a Council water main and Aurora Energy electricity supply to the Larchmont land had subsequently been constructed in anticipation of a future requirement. It may therefore be inferred, in the absence of further information, that at the time the Atley Downs subdivision was approved, services connections to the remaining undeveloped Low Density Residential land were considered and put in place; however, vehicular access was not provided. Certainly, there is no discussion or advice note in RM020634 or any other means which would indicate that rights of way to the undeveloped LDR land on the western boundary or further south were either contemplated or remained a possibility following approval of the Atley Downs/Mathias Terrace subdivision.

⁸ Notwithstanding that, as Mr McDonald pointed out, Council had the ability to impose rights of access under Rule 15.2.8.1.

46. Mr Winter submitted that Lot 14 was approved and created under the Atley Downs subdivision for residential activity and that the proposed right of way over Lot 14 is not an appropriate activity in that it is neither a residential activity nor incidental to a residential activity on the site. He further submitted that the proposal derogates from the intent of RM020634 and that it is:

“... our right and the right of every land owner within the Atley Downs subdivision to reasonably expect that the intent of the Atley Downs subdivision is complied with and have held for the ongoing life of the covenants of the subdivision and that is: the use of the 47 lots for residential use to provide an attractive and quality residential development through increased residential amenity.”

47. The reasonable or legitimate expectations of purchasers of lots within the Atley Downs subdivision, in our opinion, forms part of our consideration of the effects on the environment and the integrity of the District Plan, and is relevant to our discussion of sustainable management under Part 2 of the Act.

Actual and potential effects on the environment

48. Ms Millton has analysed the actual and potential effects on the environment in detail, relying on the advice of Ms Garrett as applicable, at pages 19-13 of her report. Overall, Ms Millton concluded that the proposed activity will have adverse effects on the environment that are no more than minor and that, in terms of s.95B of the Act, the adverse effects of the activity on Mr and Mrs Winter's property at 33 Mathias Terrace are minor. Importantly in what follows, we note that Ms Millton's conclusion was premised on the consent authority having the necessary powers to impose conditions to mitigate the safety of the Mathias Terrace/Atley Road intersection.

49. We respectfully adopt the majority of Ms Millton's analysis (notwithstanding that we arrive at a different conclusion) with the exception of the following matters which are set out as follows:

People and built form

50. Insofar as the subdivision of Lot 1 is concerned, we support Ms Millton's conclusions that provided each residential lot is 800m² in area, the subdivision complies with the provisions of the Arthurs Point Low Density Residential zone. The overall design (within Lot 1) is an anticipated outcome of the LDR zoning and will not result in any adverse effects on any person. However, our principal concerns relate to the