

adverse effects of the proposed private access way through Lot 14 on the Winter property and the wider receiving environment.

51. Ms Millton notes that in terms of the effects on the environment, *“the section of ROW across Lot 14 will result in an impermeable surface which will be visually separate from the residential activity associated with a future dwelling within Lot 14. However, amenity planting proposed along the western side of the road will soften its overall appearance and must reduce potential dominance of the hard surface area.”* While we agree with Ms Millton that a driveway could be constructed to a future dwelling on Lot 14 at this location, an access way to service 8 lots on the adjoining property is, in our view, exceptional and, notwithstanding Rule 14.2.4.1(iv),<sup>9</sup> is not an anticipated use of a residential lot in a subdivision approved under the rules of the District Plan and the Act. As there is no mention of the potential for private access ways in RM020634, or advice notes attached to the conditions, in our view Mr and Mrs Winter are, in effect, in the position of bona fide third party purchasers without notice. The unanticipated adverse effects of the private access way on the Winter property include traffic movements (estimated at an additional 88 vehicle movements per day), associated noise, loss of residential amenity and character, and loss of privacy.
52. Ms Millton has concluded that *“the associated noise and general disturbance from vehicle movements to the existing amenity of the Winter property would be minor”*. However, having considered Mr Winter’s submission, particularly in light of his reasonable expectation that development on Lot 14 would comprise and indeed be restricted to “a single residential dwelling with ample curtilage”, we are not persuaded that the effects on the Winter property will be minor. Rather, we accept Mr Winter’s submission that the adverse effects of traffic movements, and residential amenity and character will be far greater than minor. Although a private right of way is ostensibly proposed, in substance this has, due to its size and specifications, the character and effect of a public road. The proposal produces a tenfold increase in vehicle activity in very close proximity to the Winter boundary. We agree with Mr Winter that this traffic effect is not anticipated for this location, will result in a significant increase in noise (including anticipated late night and very early morning hours of operation of vehicles) and significantly diminished amenity from the existing dwelling. Mr Winter stated that the bedrooms are located on the first floor of the house and that, due to the number of movements and direction of

---

<sup>9</sup> which sets out technical specifications that are required to be met in respect of private access ways based on anticipated use and is not enabling as such.



noise resulting from the proposed access way, these effects are not able to be mitigated by the Applicant to a degree that is less than minor.

53. We further agree with Mr Winter that the public pedestrian walkway along the eastern boundary will diminish the privacy and residential amenity of the Winter property to an extent that is greater than minor. Mr Winter submitted that the property was purchased, and the dwelling designed and built on the basis that it would have exposure to public scrutiny from one boundary only (the northern boundary facing Mathias Terrace). Accordingly, the dwelling has not been positioned to mitigate against potential “public scrutiny” from the boundary adjoining Lot 14. The proposed footpath between the vehicular access way and the boundary of the Winter property is expected to result in a significant number of pedestrians travelling past Mr and Mrs Winter’s living, kitchen and dining areas. We note that the fences on side boundaries are limited to a maximum height of 1.5m under the Atley Downs subdivision covenant; accordingly, the Winter property will be able to be viewed clearly by the large majority of adults on the walkway.
54. In summary, we consider the effects of traffic movements and loss of residential amenity on the Winter property to be greater than minor, particularly as there is no effective means of reasonably mitigating the effects generated by the proposed vehicular right of way or the pedestrian walkway.
55. In her report, Ms Millton states:
- “At the time the Atley Downs subdivision was created, a private land covenant was registered on each of the titles. To a certain degree, all residents within the subdivision relied on the covenant to predict what development may or may not occur within the lots. It could be expected that those surrounding property owners would have had a reasonable expectation that typical residential development would have occurred within Lot 14, rather than the creation of a right of way. However, there is no restriction imposed on the land covenant which specifically restricted the creation of a ROW as proposed.”*
56. In our view, the reasonable expectations of purchasers of properties in the Atley Downs subdivision is a legitimate consideration when assessing the actual and potential effects on both the submitter’s property and the wider receiving environment. If the proposed Lot 14 access way had been within contemplation, there is a valid argument or expectation that it should have been imposed under Rule 15.2.8.1 at the time consent was granted.



57. Unless there is an advice note to the contrary, and given the existence of alternative access to the balance of the Low Density Residential zone at the time the Atley Downs subdivision was granted consent, the subsequent construction of what is essentially, in substance, a road on a lot that could be expected to have the same degree of residential character and amenity as the balance of the lots in the Atley Downs subdivision, is relevant to our assessment. Although private rights of way were not specifically prohibited in the Atley Downs private covenant as Ms Millton rightly notes, it is, given the circumstances surrounding the subdivision, unlikely that this outcome was contemplated as a serious possibility at the time. In support of this conclusion, we note that provision was made for services to be provided to the balance of the Low Density Residential land (including Lot 1) through the Atley Downs subdivision; however, there was no such provision for a vehicular right of way notwithstanding Council's powers to remedy this.
58. Mr McDonald relies on Rule 14.2.4.1(iv), which he considers provides planning authority for private rights of way for up to 12 dwellings as a controlled activity. However, on examination, the rule is not enabling: rather, the purpose of the rule is simply to set standards for the construction of private ways (depending on the number of units to be serviced), up to a maximum of 12 dwellings. In any event, this rule is subject to the provisions of s.348 of the LGA, which mandates a much wider evaluation of all relevant circumstances.
59. We also have concerns that the private access way through Lot 14 could, at some future point, be utilised to provide access to the remaining adjoining undeveloped Low Density Residential land (rather than through the Atley Road private right of way). Accordingly, in our view the proposal potentially breaches Rule 14.2.4.1(iv), which states that: "*No private way or private vehicle access or shared access shall serve sites with a potential to accommodate more than 12 units **on the site and adjoining sites***". Although we were assured by Mr McDonald at the hearing that an extension of the private right of way was not possible under the present District Plan Rules, an application on a non-complying basis cannot be ruled out in the absence of any legal mechanism to restrict such a proposal. Mr McDonald also referred to the Atley Downs covenant, which contains a prohibition on subdivision, as a form of control, noting that the vesting of a legal road in Council would trigger a subdivision of Lot 14. However, from a reading of the covenant document, clause 9.1(b) provides that further subdivision is controlled by and at the discretion of Aspen Grove Limited. Accordingly, if the approval of Aspen Grove Limited was obtained, it appears that subdivision of Lot 14 remains a legal possibility.



60. Further, the Applicant was not prepared to offer a consent notice condition or covenant to restrict the level of development on Lots 1 and 14 to that applied for (that is, 12 dwellings). The private covenant proposed in respect of allotments created by the subdivision (which has not been offered as a condition of this consent but which we were told the Applicant intends to give effect to) specifically provides that further dwellings and/or subdivision remain a possibility with the consent of the Applicant or any nominee of the Applicant.
61. On the basis of our analysis above, we have concluded that although there are plainly significant barriers to any further development beyond that proposed for Lot 1 (via the planned Lot 14 access way) at present, this outcome cannot entirely be ruled out. If such a further subdivision application were to obtain consent, the potential adverse effects on the Winter property and, indeed, the wider receiving environment of the Atley Downs residential subdivision, could be significantly greater than that generated by the current application per se.
62. In summary, given the lack of volunteered conditions or covenants in relation to the private right of way being limited to 12 residential units in accordance with Rule 14.2.4.1(iv), we consider the potential adverse effects, should the right of way be converted to a legal road and extended to the balance of the undeveloped Low Density Residential land, to be significantly greater than what has been proposed by this application. The Applicant has not volunteered any means of assurance that would satisfy us to the contrary in this respect and, indeed, there is a risk (albeit low) of layering of consents occurring in the future.

### *Traffic generation and vehicle movements*

#### *(a) The turning circle*

63. The turning circle for the proposed ROW over Lot 9 is to have a radius of 8m; 1.5m less than that required by the District Plan. Ms Millton notes that the Applicant has provided a swept path diagram to demonstrate that an 8m long rigid truck (such as a rubbish truck or emergency vehicle) is able to complete a three point turn at the end of the cul-de-sac by utilising the entrance of the right of way serving Lots 3 and 4. This arrangement is acceptable to Lakes Environmental's Engineer. However, the Applicant has not provided any evidence in support of the arbitrary dispensation in the need to comply with the District Plan rule and it seems to us that the only reason



for the reduction in the radius is to enable the maximum number of 800m<sup>2</sup> lots to be created. No assurance that the private right of way serving Lots 3 and 4 is legally able to be utilised for this purpose has been provided. Nor have we been provided with any evidence that the rubbish contractors or emergency services are satisfied that the proposed arrangement is acceptable. If, for example, the rubbish contractor refuses to collect waste from the Lot 1 subdivision properties because the turning circle is considered inadequate, this will require residents to presumably cart their rubbish bins/bags to Mathias Terrace for collection, which will further impact on the character and amenity of this subdivision.

64. In the absence of any evidence in relation to these issues, we do not accept that the arbitrary reduction in the turning circle radius as mandated by the District Plan is acceptable. Although this is perhaps a minor point in the overall context of this application, there is no clear reason why a dispensation from the rules should be granted, particularly as there are no supporting reasons as to why the arbitrary reduction in the radius is necessary or desirable and, indeed, no assurance that potential adverse effects will not eventuate.

(b) Intersection of Mathias Terrace and Atley Downs

65. The Lakes Environmental Engineer, Ms Garrett, has noted that the sight distances at the existing intersection of Mathias Terrace and Atley Road are less than required for roads with a 50km/hour speed limit. Independent advice in relation to the safety of the intersection was obtained by Lakes Environmental from Council's traffic engineering consultants (MWH). In their report dated 14 October 2010, MWH summarised their conclusions as follows:

*"We do not recommend any proposed increases in the traffic volumes exiting Mathias Terrace as the result of further subdivision development.*

*The approximately 40m site distances at the intersection are considerably less than the minimum value of 80m in Table 3, Section 14 of the District Plan and less than Table 3.2, Austroad's Guide to Road Design Part 4A guideline minimum value of 67m.*

*There are few feasible options available to improve the intersection visibility. The removal/relocation of the walls would be very disruptive and would meet with property owner resistance."*

66. MWH conclude by recommending:



*“A traffic engineering report to be prepared by a suitably experienced professional and design undertaken for engineering approval to address the following matters:*

- Installation of a traffic mirror on the western side of the T intersection to assist Mathias Terrace drivers to undertake turning movements.*
- Provision of a change in the pavement texture and/or colour (e.g. pavers) and raising of surface of intersection to assist in slowing approaching drivers.*
- Advanced warning signage on the Atley Road approaches to the intersection.”*

67. From further oral evidence provided, it appears that the substantial rock retaining walls, which are contributing to the problem, are on private land and, accordingly, cannot be altered to improve visibility.

68. The MWH report was conclusive in that no further *increase* in traffic volumes exiting Mathias Terrace should be contemplated until such time as the intersection is improved. However, it is not entirely clear from the report’s conclusion that, in the absence of further investigation, the very limited range of options suggested could actually improve safety to the required standard due to the constraints imposed by the existing rock walls and the consequent restriction of visibility.

69. Accordingly, the 25% increase in traffic volumes as a result of the current proposal will result in adverse effects on safety that are more than minor. As a consequence, Lakes Environmental’s Engineer recommended conditions of consent to mitigate the adverse effects as follows:

*“The intersection of Mathias Terrace and Atley Road shall be upgraded in accordance with the recommendations of the report prepared by MWH reference: Z19269-31, dated 14 October 2010. A traffic engineering assessment and detailed design of the intersection shall be prepared by a suitably qualified and experienced professional and submitted to Council for review and approval prior to construction. The design shall incorporate specific design measures to reduce vehicle speeds and improve traffic safety at the intersection by ensuring that available sight distances are appropriate for this speed environment. Consideration shall be given to the following:*

- Installation of traffic mirrors on the western side of the T intersection to improve visibility for Mathias Terrace drivers undertaking turning manoeuvres.*



- *Change in the pavement texture and/or colour (e.g. by the use of pavers) and raising of the surface of the intersection to assist in slowing approaching drivers.*
- *Advanced warning signage on the Atley Road approaches to the intersection.”*

70. At the hearing, Mr McDonald submitted that Council cannot impose a condition on the Applicant to carry out works on the Council's roading network well beyond the site and that the recommended condition: *“appears as an opportunistic attempt to have the Applicant fix a pre-existing safety problem”*. He further stated: *“I would submit that if the intersection is unsafe for the existing significant level of traffic, it will be made no more unsafe by the additional traffic generated by this proposal. If it is unsafe for one vehicle movement, it is as unsafe for 100”*. However, no expert evidence was provided to support his views, or to contradict MWH's advice to the contrary.

71. Mr McDonald also submitted that a condition along the lines suggested by the Planning Officer is, by definition, a “financial contribution” as defined by s.108(9) of the Act, as it involves a contribution of money to the consent authority. Section 108(10) states that a consent authority must not include a condition in a resource consent requiring a financial contribution unless the condition is imposed in accordance with the purposes specified in the plan (including the purpose of ensuring positive effects on the environment offset any adverse effect and the level of contribution is determined in the manner described in the plan).

72. Mr McDonald concluded by making it quite plain that the Applicant was not prepared to volunteer the condition required by Lakes Environmental's engineer (and which was a pre-requisite to the recommendation of the planning officer to grant consent) and that, in effect, the upgrading of the intersection to improve safety was solely the Council's responsibility.

73. Notwithstanding Mr McDonald's technical arguments in relation to financial contributions (in relation to which it is not necessary to express an opinion), it is plain that in the absence of any planned upgrade to the intersection, the adverse effects on safety generated by the additional traffic movements cannot be mitigated to an acceptable level. Accordingly, based on the MWH evidence and in the absence by any volunteered condition by the Applicant to mitigate the safety effects of the additional traffic movements, or any assurances from Council or other party that the intersection both can and will be made safe, we cannot contemplate a grant



of consent. We are not prepared to exacerbate the existing safety problem at the Mathias Terrace/Atley Downs intersection, particularly in view of the strong recommendations of the MWH report. Nor is it reasonable to impose the burden of upgrading the intersection to accommodate the increase in traffic generated by this application on Council without satisfactory evidence of consultation or agreement.

#### *Summary of actual and potential effects on the environment*

74. For the reasons given above, we consider the adverse effects on the environment, both actual and potential, to be greater than minor in respect of the effects of traffic movements, residential amenity and character, and privacy on the Winter property and, in relation to the Mathias Terrace/Atley Road intersection, on the wider receiving environment.

#### **Objectives and Policies of the District Plan**

75. Ms Millton has carried out an extremely thorough analysis of the objectives and policies of the District Plan under Part 4 – *District Wide*, Part 4 – *Earthworks*, Part 7 – *Residential Areas*, Part 14 – *Transport*, and Part 15 – *Subdivision Development and Financial Contributions*. We accept Ms Millton's analysis, subject to the following comments.

#### *Part 4: District Wide*

76. Mr Winter drew our attention to Part 4 (section 4.9) – *Urban Growth* and the associated objectives and policies, which Ms Millton has not referred to in her analysis. We agree with Mr Winter that the sustainable management of growth is relevant to this application, particularly principal issue C, which relates to the effects of urban growth on the identity, cohesion and economic and social wellbeing of the existing residential, farming and settlement communities.

77. Objective 2 – *Existing Urban Areas and Communities* states:

“Urban growth which has regard for the built character and amenity values of the existing urban areas and enables people and communities to provide for their social, cultural and economic well-being.

Policies: 2.1

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  
..."

78. Under the heading "Explanation and Principal Reasons for Adoption", the Plan recognises that the policies above focus on the social well-being of communities and, in particular, residential or "community cohesion". It states:

"Within a management regime which focuses more on the physical effects of activities, it is easy to overlook the importance of community well-being and social effects. There are many factors which contribute to community well-being including, commonality of aspirations, outlook, purpose and interests. Each of these interacts with the others to give rise to a sense of community at both a general level, or at a residential neighbourhood level."

79. In our opinion, the proposed development is contrary to Objective 2 – *Existing Urban Areas and Communities*, and, in particular, Policy 2.1. We accept Mr Winter's submission that the proposal will have a significant adverse effect on the existing character and amenity of the Atley Downs/Mathias Terrace residents and, in particular, Mr and Mrs Winter. It is plain that the application has focused on the physical effects of activities and simply ignored the reality of the significant adverse effects of an unplanned right of way access to a nine lot subdivision on the existing community and, in particular, on the Winter property. We are cognisant of the concerns raised by Mr Winter in relation to the quality of the proposed new subdivision, the lack of controls in relation to the quality of buildings (with discretion being reserved to Larchmont Developments Limited) and the potential degradation of the existing Mathias Terrace subdivision and sense of community. Indeed, the current state of the existing buildings and condition of Lot 1 gives us no confidence that the proposed development will maintain the standard of both physical amenity and community cohesion that is plainly evident in the Atley Downs subdivision.

80. At Part 4.9, Objective 3 – *Residential Growth*, Policy 3.4 states:

"To provide for lower density residential development in appropriate areas and to ensure that controls generally maintain and enhance existing residential character in those areas."

81. This policy is similarly contravened for the reasons given above. Further, we concur with Mr Winter that the creation of a new right of way, rather than attempting to utilise the existing Atley Road access, contravenes this policy in that it fails to accommodate urban growth through policies of consolidation. Indeed, it is quite possible that over time, if consent to this development was granted, both the private right of way and an upgrade of the Atley Downs access to a legal road could



eventuate: in terms of the objectives and policies of the District Plan and indeed, sustainable management generally, this would be a sub-optimal outcome for the existing (and future) community.

#### *Part 7: Residential Areas*

82. Ms Millton canvassed the relevant objectives and policies set out at Part 7 – *Residential Areas*. We note, in particular, the policies set out at Objective 3 – *Residential Amenity*, which is to provide pleasant living environments within which adverse effects are minimised while still providing the opportunity for community needs.
83. In our opinion, the proposal is strongly contrary policy 3.1, which is to protect and enhance the cohesion of residential activity and the sense of community and well-being obtained from residential neighbours. The proposal will result in significant adverse effects on the Winter property, and will not enhance the cohesion of residential activity or the sense of community well-being obtained from residential neighbours. Indeed, it seems to us that the opposite is a highly likely outcome.
84. As the applicant has not offered a condition of consent that would satisfy us that the external appearance of buildings, landscaping and other design controls as compared to the neighbouring Mathias Terrace residential subdivision will be maintained or enhanced,<sup>10</sup> the proposal is not consistent with policy 3.4. The neighbouring Mathias Terrace/Atley Downs subdivision has created a high standard of landscape and a coherent urban character as it relates to the landscape. The current proposal, which has access through this subdivision, therefore has the ability to impact adversely on the existing landscape values and urban character. Without any assurance that the proposed subdivision of Lot 1 will maintain, and importantly, not undermine the existing standards, the application is considered contrary to this policy.
85. Similarly, policy 3.6, which aims to ensure a balance between building activity and open space on sites to provide for outdoor living and planting, is offended when the proposed development of Lot 14 is considered in the context of the Atley Downs consented subdivision. In our view, this application cannot be viewed in isolation –

---

<sup>10</sup> Although a private covenant has been mooted, this is not enforceable by the consent authority, and as it does not form part of the application, there is no guarantee or legal requirement that it be put in place. A review of the wording of the draft private covenant suggests that the standards aspired to by the Atley Downs covenant have been somewhat relaxed, and that as a result, the standard of subdivision will be diminished. Although a private covenant was voluntary in the Atley Downs subdivision, it is a requirement for this application if we are to have assurance that the same standard will be achieved, due to the potential adverse effects on the existing community if it is not.



the standard of residential subdivision imposed by the pre-existing consent is relevant: any diminution or reduction will therefore be inconsistent with this policy.

*Part 14 – Transport: Objective 2 – Safety and Accessibility*

86. Ms Millton's analysis was predicated on the proposed condition that the Applicant be responsible for the upgrade of the intersection of Mathias Terrace and Atley Road. As this condition has not been volunteered, it is apparent that the proposal is contrary to the objectives and policies in relation to safety and accessibility of access and vehicle movement throughout the district.
87. We also consider that the proposal is contrary to Objective 3 – *Environmental Effects of Transportation*. Policy 3.4 aims: *"to ensure new roads and vehicle accessways are designed to visually compliment the surrounding area and to mitigate visual impact on the landscape"*. In our view the Applicant has proposed only the bare minimum standard required by the District Plan: it has not provided any design detail of the proposed right of way access over Lot 14 to satisfy us that this policy will be achieved by the proposal. As we have not been provided with any landscaping plans or other detail in relation to the proposed entranceway, we do not share Ms Millton's rather optimistic view that the proposed planting and unspecified pavement detail will ensure that the access will blend into the surrounding area. Rather, we have grave concerns that the Applicant will do the bare minimum that is required, further exacerbating the adverse effects on the neighbouring property and, indeed, the receiving environment generally.

*Part 14: Objective 6 – Pedestrian and Cycle Transport*

88. We note that the pedestrian access way was offered by the Applicant in response to discussions with Lakes Environmental following assessment of the application. At the hearing, the Applicant stated that it is willing to accept a condition which requires the owners of Lot 14 and Lot 9 of the proposed subdivision to maintain the pedestrian right of way for a period of two years following its construction and acceptance by Council *"following which time maintenance would revert to Council"*. However, there has been no evidence that Council is willing to accept the responsibility for maintenance of what will effectively be a private pedestrian right of way (until potentially such time as the balance of the low density land has been carried out). Accordingly, we do not consider this proposal, which places a maintenance burden on Council after two years, to necessarily be consistent with



Policy 6.1 – “to develop and support the development of pedestrian and cycling links in both urban and rural areas”.

*Part 15 – Subdivision Development and Financial Contributions*

89. Objective 1 – *Servicing*, relates to the provision of necessary services to subdivided lots and developments in anticipation of the likely effects of land use activities on those lots and within the developments. Policy 1.1 states:

“To integrate subdivision roading with the existing road network in an efficient manner, which reflects expected traffic levels and the safe and convenient management of vehicles, cyclists and pedestrians.”

90. As has previously been discussed, we do not consider that the proposed private right of way, which will place additional pressure on the safety of the Mathias Terrace/Atley Road intersection is consistent with this policy.

*Part 15: Objective 5 – Amenity Protection*

91. Policy 5.5 states:

“To encourage innovative subdivision design, consistent with the maintenance of amenity values, safe, efficient operation of the subdivision and its services.”

92. As previously discussed, we have grave concerns in relation to the amenity of the proposed right of way access over Lot 14. The Applicant has not demonstrated any innovation in the design of the subdivision, particularly in relation to the right of way, that is, in our opinion, consistent with the maintenance of amenity values in this area. Accordingly, we do not believe that the application is consistent with this policy. Rather, without having any regard to the existing high character and amenity of the Atley Downs/Mathias terrace existing subdivision and the expectations of that community, the Applicant appears to have taken the approach that as this is a controlled activity, the bare minimum is all that is required to obtain consent.

93. The proposal is also contrary to Policy 5.5, which is to minimise the effects of subdivision and development on the safe and efficient functioning of services and roads. As previously discussed, without a satisfactory upgrade of the Mathias Terrace/Atley Road intersection, there is potential for increased adverse effects on both driver and pedestrian safety. In the absence of any volunteered condition by



the Applicant to undertake such an upgrade, or other reasonable solution, the proposal is plainly contrary to this policy.

#### *Summary of Objectives and Policies*

94. Overall, although the proposed development is consistent with many of the relevant policies and objectives of the District Plan, primarily as the proposed subdivision is consistent with the zoning and anticipated land use for Lot 1, the proposed right of way access through Lot 14 will result in adverse effects that either have not or cannot be satisfactorily mitigated and, accordingly, fall foul of the objectives and policies discussed above. Further, we consider that the development will significantly alter the residential character of Lot 14 in a manner which is contrary to or inconsistent with several of the most relevant objectives and policies of the District Plan and, accordingly, is inappropriate for this particular site.

#### **Other Matters**

95. There are a number of other matters that have a bearing on this application as follows.

#### *Alternative access via Atley Road*

96. Mr Winter submitted that the Applicant has not considered alternative access upgrade provisions, most notably the current legal and practical access to the property via Atley Road. He pointed out that under the Assessment of Environmental Effects (AEE), the Applicant has instead stated that alternative locations for undertaking the activity have not been considered. Section 1(b) of Schedule 4 of the Act provides that where it is likely that an activity will result in any significant adverse effect on the environment, a description of alternatives should be included. In view of our findings above, we accept Mr Winter's submission that this is a relevant consideration in exercising our discretion.
97. When questioned at the hearing, Mr McDonald stated that although alternative access via Atley Road was "not impossible", it would be difficult to establish due to the multiple ownerships and third parties legally involved in the existing right of way. We understand that, currently, the existing access is via a private right of way and that as there are currently 12 dwellings that obtain access from this right of way, any



further subdivision would trigger a breach of the District Plan Rules and require, inter alia, the road to be vested in Council.

98. We concur with Mr Winter that in considering whether condition c) of the Consent Notice is satisfied, a full investigation of the availability of the existing access way (both legally and practically) to the satisfaction of Council is a mandatory requirement. This is particularly so as should the remaining pockets of undeveloped LDR land subsequently be developed, it is highly likely that access will be provided via this access way.<sup>11</sup> Although it is unfortunate that access to the balance of the LDR land (including Lot 1) was not provided for at the time the Atley Downs subdivision was approved, this does not mean that the various interested parties should not address the issue holistically at this time rather than take the piecemeal approach that has been adopted now and in the past. Indeed, the Applicant acknowledges that a legal road will be created at the time of future development of the adjoining Lots 1 and 2 DP 307630, which is the property to the south of Lot 1 and includes an area of undeveloped LDR zoned land of roughly equivalent size.
99. Accordingly, we consider that before consent to this application could be contemplated, Council must be satisfied that it is not practicable (either legally or physically) to provide access to the balance LDR land (including Lot 1) via the existing private right of way. Although the Applicant submitted that it was not possible to upgrade this access to Council's standards in terms of width, this does not mean that it might not be approved as an exceptional case, given the background, circumstances and finite nature of the potential subdivision; that is, as a non-complying activity. In our view, the provision of access through the existing Atley Road access way is potentially a far more desirable environmental outcome and the Applicant's failure to explore this (even though it may prove more costly) does not accord with the principles of sustainable management. We agree with Mr Winter that although Council is not bound to accept any upgrade to Atley Road that falls short of the District Plan requirements, it is incumbent on the Applicant to engage with Council and the other land owners served by the Atley Road private right of way to explore whether access is feasible, given the limited options and the significant adverse environmental effects of this proposal.
100. It is important to note that if access via Atley Road cannot be satisfactorily resolved, and the adverse effects on the proposed access way via Lot 14 cannot be avoided,

---

<sup>11</sup> Unless the proposed right of way via Lot 14 is utilised, which would, as discussed earlier, generate further potential adverse effects on the Winter property and the Mathias Terrace receiving environment.



remedied or mitigated to a degree that is less than minor, Lot 1 may not ultimately be capable of further development of the sort contemplated by this application. The zoning of land as Low Density Residential under a District Plan does not convey an absolute right to such development unless the proposed subdivision complies with the rules in the plan and, more holistically, the purpose of the Act.

### *Integrity of the District Plan*

101. We have concluded above that the proposal has significant adverse effects, particularly on the Winter property, and that there is a degree of discomfort between the proposal and several objectives and policies of the District Plan.
102. The courts have consistently held that consent to proposals which do not comply with District Plan provisions and which lack any “evident unusual quality” have the potential to undermine public confidence in the consistent administration of the plan and its integrity.
103. There are several features of this proposal which we consider impact on the integrity of the District Plan, particularly given the way that the application has been framed:
  - (a) The failure of the Applicant to simultaneously address the satisfaction of and/or cancellation of consent notice condition c) under s.221 of the Act (either as a formal process or informally), which has much wider considerations than this narrowly confined application. In our view, the processing of this application as a controlled activity (which ostensibly must be granted subject to conditions) on the assumption that the condition of consent will then be satisfied and/or cancelled, directly impacts on the integrity of the District Plan. The purpose of conditions of consent is to require any satisfaction to follow a proper process (whether formally or informally) for the benefit of the wider community in order to ensure that sustainable management is achieved;
  - (b) The radius of the turning circle does not meet District Plan requirements and, in the absence of any unusual quality, there is a risk that granting the application on this basis would undermine public confidence in the consistent administration of the Plan and its integrity; and



(c) As previously discussed, the Atley Downs subdivision did not provide any legal access to the balance of undeveloped LDR land (of which Lot 1 forms part), notwithstanding that an easement for services was provided. Accordingly, purchasers of the lots in Atley Downs were entitled to the reasonable expectation that all relevant resource management matters were considered and taken into account in the granting of the Atley Downs subdivision and that, therefore, individual residential lots could not later be developed as access ways. Accordingly, there is a risk that granting consent to this application will undermine public confidence in the District Plan and the resource management process, particularly given that Council had the ability to provide for such access under Rule 15.2.8.1 and did not do so (presumably as alternative access to Lot 1 is available via Atley Road).

104. Overall, we consider that the proposal does not have the requisite evident unusual quality and, as a result, it risks undermining public confidence in the consistent administration of the Plan and its integrity.

#### *Section 348 of the Local Government Act 1974*

105. The Applicant has not been granted Council permission under s.348 of the Local Government Act to form the private right of way over Lot 14. As the planned access way over Lot 14 does not comprise a subdivision under the Resource Management Act 1991, it is our view that Council consent is required under the LGA before the right of way can legally be developed.

106. Section 348(1) provides Council with unfettered discretion whether or not to grant permission for a private way. Under s.348(2) of the LGA, Council has wide-ranging powers to impose conditions (in all respects whatsoever as the Council thinks fit). In our view, it is highly likely that in considering whether or not to grant permission under s.348 of the LGA, the Council would take into account the much wider considerations previously discussed, including the availability of an alternative access way via Atley Road; the safety of the Mathias Terrace/Atley Road intersection and the clear need to upgrade this prior to any additional traffic via Mathias Terrace; the significant and unanticipated adverse effects on the Winter property and alternative means of mitigating these (such as, potentially, repositioning the proposed access way so that it traverses through the centre of Lot 14, much further from the Winter dwelling); the design and details of formation of the right of way and any other considerations that are relevant.



107. Accordingly, in the absence of Council permission under s.348 of the LGA, we are not satisfied that, in terms of s.106(1)(c) of the Act, sufficient provision has been made for legal access to each allotment to be created by the subdivision. Indeed, from a very brief analysis of recent applications which have been refused by this Council under s.348 of the LGA, it appears that Council is prepared to exercise its unfettered discretion where private ways were not contemplated as a part of previous planning consents. If Council were to carry out an analysis similar to the one that we have embarked on as a discretionary activity under the Act, it is, in our opinion, highly likely that consent would be refused: indeed, having carried out that exercise, that is our recommendation in this regard.
108. We also consider that Council, in deciding whether to grant permission under the LGA, would take into account the alternative access via Atley Road and look very carefully at whether the better solution was to upgrade this right of way or find some other alternative solution that would be more acceptable to the affected parties in all of the circumstances. This is particularly so given that the development of the remaining LDR land is an issue that Council will be required to face at some future time, and it is sensible to investigate potential solutions at this stage, particularly given the significant adverse effects (both actual and potential) on the Winter property and the wider receiving environment generated by the proposed Mathias Terrace access through Lot 14.

#### *The Aspen Grove private covenant*

109. In his submissions, Mr Winter relied heavily on the Atley Downs private covenant as a basis for refusing consent. He drew our attention to the decision in *Congreve & Murray v Big River Paradise Limited* (CIV 2005-404-6809, Lang J, 4 August 2006, High Court, Auckland), submitting that a consent authority may take account of private property rights (for example, a land covenant) “where relevant and reasonably necessary to resolve the issue”.<sup>12</sup>
110. It is the function of the Commission to determine the application for resource consent in accordance with the Act. Accordingly, only issues that are relevant under the Act may be taken into account. Private property interests are therefore not able to be taken into account unless they are relevant to or reasonably necessary to decide an issue arising under the Act.



111. In the *Congreve* case at paragraph 40, Lang J noted the Commissioner's observation that the application had been "carefully crafted" so as not to offend against "the letter of the covenant". He stated:

*"It suggests that, whilst the proposal did not offend the literal wording of the covenant, it may nevertheless fall outside the spirit and overall meaning to be ascribed to it. Whether or not that was the case, however, was beyond the scope of the enquiry that the Commissioner was obliged to undertake."*

112. Insofar as the Atley Downs covenant is concerned, we note that, unlike the situation with the *Congreve* covenant, the term "subdivision" is defined in the covenant as having the meaning set out in s.218(1) of the Resource Management Act 1991. As the application has been crafted to avoid a subdivision of Lot 14 as defined in s.218(1), the proposal as it stands does not prima facie breach this term of the covenant.<sup>13</sup>

113. Mr Winter also drew our attention to other issues raised by the covenant – potential breaches of clause 3.1(f), the erection, construction or placing of a building within a front yard, and clause 7.2, whereby a transferee must not cause any damage to any part of the legal road adjoining or adjacent to that transferee's servient tenement or interfere with or cause any damage to any trees or landscaping located on any part of any legal road or Council reserve.

114. Having considered the matters raised by Mr Winter, we have concluded that it is not reasonably necessary for this Commission to resolve the interpretation of clauses 3.1(f) and 7.2 of the private covenant: this is more properly a matter for a civil court. Without determining the matter, it is apparent that the two potential breaches raised by Mr Winter are a matter of interpretation and it is not necessary for the purposes of this decision that these be addressed, particularly as the Applicant has framed its proposal in order to ostensibly comply with the main thrust of the covenant and the Act. As the proposal, prima facie, complies with the District Plan and the Act, it is not the function of the Commission to determine whether the proposal might be in breach of the contractual obligations of the owner of Lot 14 under the covenant.

## Part 2 of the Act

---

<sup>12</sup> Paragraph 30 of the decision.

<sup>13</sup> This was not the case in the *Congreve* covenant, where subdivision was not defined and was held to bear its ordinary meaning.



115. Part 2 of the Act details the purpose of the Act, which is to promote the sustainable management of natural and physical resources. Sustainable management is defined as:

“Managing the use, development and protection of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic and cultural well-being, and for their health and safety while:

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil and eco systems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”

116. It is important to note that the Act is enabling. The philosophy of sustainable management is to give land owners the flexibility to use their properties in a manner that is not to be arbitrarily curtailed by inflexible adherence to rules.

117. Importantly, the Act also places emphasis on enabling people and communities to provide for their social, economic and cultural well-being and for their health and safety. It is our view that the impact of the proposal on the Winter property in particular, and the wider Atley Downs community, is, therefore, an important and relevant consideration. We have concluded that the effects on the Winter property cannot be satisfactorily avoided, remedied or mitigated, and the Applicant has made it clear that it is not willing to address the safety concerns in relation to the Mathias Terrace/Atley Road intersection. The proposal will impact on the level of residential amenity and character of both the Winter property and the existing Atley Downs subdivision to a degree that is more than minor. Further, the failure of the Applicant to satisfactorily address the alternative means of access via Atley Road provides us with no assurance that the current proposal promotes sustainable management of the wider receiving environment; in particular, the balance of the undeveloped LDR zoned land. We are conscious of the decision in *McIntyre v Tasman District Council* WO83/94, which stated that:

*“The extension of services should be carried out in a co-ordinated progression. If subdivision and development proceed on an ad hoc basis, they cannot be sustainably managed, an aspect which is not commensurate with section 5.”*



118. Accordingly, we have formed the view that the proposal does not promote the overall purpose of the Act.

### **Conclusion**

119. The Applicant has sought consent to subdivide Lot 1 DP 398656 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.
120. In our view, the proposal requires consent akin to a process under s.221 of the Act to satisfy and/or cancel condition c) of the Consent Notice registered against the title of Lot 1. Accordingly, the application has been assessed as a discretionary activity.
121. Having considered the evidence before us and Mr Winter's submissions, we consider that the adverse effects of the application on the Winter property are significantly greater than minor and that the adverse effects of traffic generation on the wider receiving environment, which are unable to be avoided, remedied or mitigated, are material. The proposal is contrary or inconsistent with several of the objectives and policies contained in the District Plan, most notably in relation to urban growth, residential amenity and the safety of the Mathias Terrace/Atley Road intersection.
122. In addition, it is our view that before the consent notice condition may be satisfied and/or cancelled, full consideration and analysis of alternative means of access via Atley Road is required. A holistic approach to access to the remaining undeveloped LDR land in this area is called for. Further, this application raises several matters that impact on the integrity of the District Plan.
123. Having weighed all of the relevant factors, we have concluded that this application does not meet the overall purpose of the Act set out in s.5, and **consent is therefore refused.**
124. Should we be wrong in our analysis of this application as a discretionary activity in terms of s.221, it is our recommendation that, for the same reasons, the access proposed is unacceptable to Council in terms of condition c) of the Consent Notice.
125. Further, we would still refuse consent to this application on the basis that, as required by s.106(1)(c), suitable legal access to the subdivided lots has not been provided as Council permission under s.348 of the LGA has not been granted. In



our view, it is highly likely that if Council adopts a similar approach to that above in its analysis of the decision required under s.348 of the LGA, consent to any application involving a private way through Lot 14 would be refused for the same reasons.

**Jane Taylor and Leigh Overton**

Hearings Commissioners

Date: 1 March 2011