

**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2018] NZEnvC 217**

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under clause 14(1) of the First  
Schedule of the Act in relation to the  
Proposed Invercargill District Plan  
BETWEEN THOMAS ANDREW DIXON, DOUGLAS  
STANLEY MUNRO AND R MUNRO,  
JOHN DAVID SCOTT AND OAKLAND  
FAMILY TRUST  
(ENV-2016-CHC-097)  
GREGORY SIMMONS  
(ENV-2016-CHC-101)  
Appellants  
AND INVERCARGILL CITY COUNCIL  
Respondent

Court: Environment Judge J R Jackson  
Environment Commissioner K A Edmonds

Hearing: at Invercargill on 6 August 2018

Appearances: R Chapman for the appellants  
M Morris for Invercargill City Council  
W & J A Devine in person (s 274 party)

Date of Decision: 9 November 2018

Date of Issue: 9 November 2018

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**INTERIM DECISION**

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A: The relief sought by Mr Devine is declined.

B: Costs are reserved.

C: A consent memorandum is to be filed with the Court within 30 working days of the issue of this decision.



## REASONS

### Judgment of Environment Judge Jackson

[1] I have read and agree with the judgment of Environment Commissioner Edmonds. Accordingly, the Environment Court will make the orders she proposes.

[2] The appellants all in principle supported the proposal filed with the Court on 16 February 2018.<sup>1</sup> However, they accepted there is to be “fine tuning” of the draft rules, objectives and policies before any consent memorandum can be signed. Accordingly, a consent memorandum signed by all parties is to be filed with the Court within 30 working days of the issue of this decision.

[3] Mr Devine also needs to be given an opportunity (two weeks appears reasonable) to advise the Council whether he will sign the consent memorandum as to the finalised provisions for the deferred Residential 4 zone or not, and if not, why not. He cannot of course re-open the issues resolved in this Decision.

### Judgment of Environment Commissioner Edmonds

#### Introduction

[4] The hearing is in relation to an appeal by Thomas Andrew Dixon, Douglas Stanley Munro and R Munro, John David Scott and Oakland Family Trust and Gregory Simmons for land on the north-eastern edge and adjoining a residential area of Invercargill City. The Notified Version of the Proposed Invercargill District Plan zoned the area Residential 3 but Proposed Variation 8 (the Variation) resulted in the land reverting to the Rural zone in the Decisions Version of the Plan. The appellants and Mr Devine objected to the Variation, with the appellants taking the Council’s decision to appeal, and Mr Devine joining as a s 274 party.

[5] As part of the resultant mediation process the appellants and the Council agreed to a deferred zone to be known as Residential 4 with the Rural zone provisions to continue to apply to the area until the extension of footpaths and reticulated

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<sup>1</sup> Memorandum of Parties in support of the Residential 4 Zone of the Proposed Invercargill City District Plan (16 February 2018), para 13.



sewerage services in accordance with a concept plan to be included in the district plan (and yet to be finalised).

[6] That deferred Residential 4 zone covers 14 privately owned properties with an area of 32.7161 ha<sup>2</sup> with access from Retreat Road or Mclvor Road, with Retreat Road joining Mclvor Road at a T-intersection. The land was previously zoned as Rural Sub Area under the operative plan in 2005.

[7] On 2 February 2018 the Court directed that the parties that support the deferred Residential 4 zone proposal were to file a memorandum setting out the proposal for the Court's information. Any parties who disagreed with the Residential 4 zone proposal were to file their own memorandum setting out what is in dispute and what they propose instead.

[8] The appellants, Southland Regional Council (a s 274 party) and Invercargill City Council (Council or respondent) filed a memorandum on 16 February 2018. That memorandum records that the appellants all in principle support the proposal for a Residential 4 zone (deferred), accepted by the Council, which will only become a zone once certain infrastructure is constructed and funded by those wishing to bring the zone into operation. Further, the infrastructure involves a sewage pipeline to connect all properties as on-site effluent disposal is not suitable for the subdivided lots in this area. Pedestrian access is also required to be developed along the eastern side of Retreat Road or otherwise be in place or achievable. Reticulated water services will not be extended to this zone as of right. The memorandum also states that there is to be "fine tuning" of the draft objectives, policies and rules before any consent memorandum can be signed.

[9] In addition, the Southland Regional Council filed a memorandum with the Court dated 23 February 2018 setting out its support for the proposed deferred zone on the basis that infrastructure is required to be provided prior to urban development occurring.<sup>3</sup> That memorandum repeats that the Council had indicated that there is to be "fine tuning" of the draft objectives, policies and rules before any consent

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<sup>2</sup> As described in Mrs Devery's evidence-in-chief dated 4 April 2018 at [9] and outlined on Attachment 1 Map of the Land – Geographical scope of this evidence: 180 Mclvor Road, 166 Mclvor Road, 118 Retreat Road, 104 Retreat Road, 92 Retreat Road, 84 Retreat Road, 70 Retreat Road, 60 Retreat Road, 51 Retreat Road, 61 Retreat Road, 69 Retreat Road, 81 Retreat Road, 101 Retreat Road and 117 Retreat Road.

<sup>3</sup> Memorandum of counsel on behalf of the Southland Regional Council 23 February 2018.



memorandum can be signed.

[10] On 23 February 2018 Mr Devine<sup>4</sup> responded to the joint memorandum of 16 February 2018 and commented on the Residential 4 zone proposal for the Retreat Residential Road area, setting out his continuing concerns and remedy sought. Of particular relevance to proceedings are the amendments to the proposal sought by Mr Devine and which the Council opposed.

[11] Mr Devine's memorandum states:

1. The proposed requirements to allow for a deferred zone 4, subject to the conditions of reticulated sewerage being available to all properties along Retreat Road before subdivision below 2 ha is permitted is restrictive. I do not agree with some of the conditions being proposed under the proposed Residential 4 zone.  
**Remedy sought:** Permit and change all reference to minimum lot size in the proposed zone 4 along Retreat Road to allow subdivision to **1.9 hectares** ... in all proposed rules, objectives and policy. Equitable cost sharing for any future reticulated sewerage expansion. Affected residents of Retreat to be consulted.
2. The introduction of a foot path being made available before any subdivision along Retreat Road does not reflect the public safety risk that already exists.  
**Remedy sought:** Immediately progress to reduce the speed limit along Retreat Road including the Inverurie development to 50 kmh. Equitable cost sharing between all affected parties for any footpath that may be required in the future.
3. The rules and policy statements pertaining to sewerage disposal requirement of minimum lot sizes of 2 ha are too general and restrictive. With proper design and there is more than one available, that can be used on smaller lot sizes. I understand that the Southland District Council allows minimum residential lot sizes of 1 ha in rural areas. Current restriction eliminates other suitable remedies available now and in the future.  
**Remedy sought:** Practical consideration of each site proposal below 1.9 ha and suitable options to allow for onsite sewerage solutions on smaller lot sizes. One size does not fit all.

[12] In a memorandum of 27 February 2018, also signed by the Regional Council, the Council set out its reasons for opposing amendments to the proposal to accommodate what it considered to be three areas Mr Devine did not agree with. That memorandum also recorded that the Regional Council supported the Council's

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<sup>4</sup> The relief sought by Mr Devine in his submission on Proposed Variation 8 sought: That variation 8 be struck out and the proposed long-term plan proceed as originally proposed. A compromise would be to allow those properties in Retreat Road rezoned Rural 2 to be allowed to subdivide down to 0.8 ha with their own on-site water and septic systems. A special Rural 2(S) zone be created allowing for reduced lot size (0.9 ha) along Retreat Road Special Rural 2(S) could also be applied in other proposed Rural 2 areas under variation 8.



response to the issues raised by Mr Devine insofar as the responses relate to the provision of infrastructure being required prior to urban development occurring.<sup>5</sup> The Regional Council took no part in the hearing proceedings before us.

[13] The fine turning of provisions has not yet occurred and there is no consent memorandum yet before the Court. I deal with the key features of the deferred Residential 4 zone only insofar as is necessary to decide this case, noting that there is no consent order documentation in front of the Court at this time.

### **The parties' positions**

[14] The appellants took no part in the hearing other than for their counsel to enter an appearance and seek leave to withdraw which the Court granted.

[15] In opening the Council said it understood that Mr Devine opposed the new zone believing that the ability to subdivide the properties contained within the Residential 4 zone should be immediate and not have to wait for, or pay for, the wastewater pipe network or install the footpaths. The Council said it understood that Mr Devine was arguing this on the basis that the properties are of such size that they cannot be subdivided under the Rural zone (either operative or proposed) and further that the owners of the properties should be entitled to rely on on-site wastewater disposal systems.

[16] During the hearing, and as confirmed in Mr Devine's closing submissions<sup>6</sup>, it became clear that Mr Devine was seeking the ability to subdivide properties along Retreat Road down to a minimum lot size of 1.9 ha with on-site wastewater disposal as a discretionary activity. In opening the Council characterised Mr Devine's case as seeking the ability to do this regardless of the zones. The provisions of the Rural zone that remain in effect until the activation of the deferred Residential 4 zone rules mean that subdivision of land into two lots at 81 Retreat Road (owned by Mr Devine and his wife) is a non-complying activity. The proposed Residential 4 zone once triggered would also mean that subdivision down to a minimum lot size of 1.9 ha relying on on-site wastewater disposal would be a non-complying activity.

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<sup>5</sup> Memorandum of parties that support the Residential 4 Proposed Zone of the Proposed Invercargill City District Plan (27 February 2018) at [4].

<sup>6</sup> Reply to the opening submissions of the Council 10 August 2018.



[17] The Council submitted that:<sup>7</sup>

The only way for Mr Devine's proposal to work in all reality would be to spot zone Mr Devine's property and the Council does not believe there is sufficient justification for this to occur in these circumstances. The ... [district plan allows] ... full subdivision below the existing 2 ha threshold as a discretionary activity upon the completion of the reticulated [wastewater] pipeline and for installation of the footpath along the roads. Once this is done the owners of the land will have a far easier path to subdivision than if the Residential 4 zone was not created.

This outcome will be much more efficient than having a spot zone enabling one property to be subdivided without the benefit of the connection to the reticulated network and other improvements.

Simply put, it is the ... [Council's] position that if Mr Devine wishes to subdivide then he needs to ... contribute to the installation of the wastewater pipeline ... and the footpaths and he will then be able to enjoy the benefits of the new Residential 4 Zone once it has been made operative and will be able to subdivide his property.

The other option for Mr Devine is to apply for a resource consent now and seek to subdivide.

Subdivision will always require a resource consent. The only change will be the activity status. Use of an onsite wastewater disposal system will be one factor that the Council will consider when processing the consent.

[18] Mr Devine raised points concerning the infrastructure requirements in his evidence and during the hearing on the infrastructure requirements which are a prerequisite to the Council passing a resolution to bring into effect the Residential 4 rules providing for a 4000m<sup>2</sup> minimum lot size for subdivision as a discretionary activity (and residential activity on each such lot as a permitted activity). The infrastructure trigger requirements are that the development of the reticulated sewerage services and the footpaths for the Residential 4 zone, to be set out in a concept plan to be included in the district plan, have been completed.<sup>8</sup> I do not understand Mr Devine to be opposing those elements of the Residential 4 zone. However, I cover the points Mr Devine made and the Council's response for completeness. Similarly, with Mr Devine's seeking of a speed limit reduction along Retreat Road to 50 km/h.

[19] Mr Devine did not call any expert to give evidence but gave evidence as a lay

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<sup>7</sup> Council submissions at [40]-[47].

<sup>8</sup> RMA, s 75(1)(c).



witness<sup>9</sup> in addition to making opening and closing submissions. Mrs Elizabeth Devery, a Council planner, gave two sets of evidence for the Council. The earlier evidence was on the planning context.<sup>10</sup> The later evidence comprised a more detailed assessment of the suggested provisions drafted through mediation and an assessment of the proposed amendments sought by Mr Devine.<sup>11</sup> Mrs Devery was the reporting officer for the Council on the Variation.

[20] Fundamentally then the issue before the Court: is it appropriate to amend to the rules for the area along Retreat Road, and particularly as they relate to 81 Retreat Road, to provide for subdivision (relying on onsite effluent disposal) down to a minimum lot size of 1.9 ha as a discretionary and not a non-complying activity?

### The law

[21] A district plan must give effect to any regional policy statement.<sup>12</sup> I refer to any provisions of the Southland Regional Policy Statement 2017 (RPS) where necessary.

[22] A district plan must state the objectives for the district, the policies to implement the objectives and the rules (if any) to implement the policies.<sup>13</sup> A district plan may include other considerations,<sup>14</sup> which the Invercargill City Proposed District Plan has done. These are: the significant resource management issues for the district; the methods, other than rules, for implementing the policies for the district; the principal reasons for adopting the policies and methods; and the information to be included with an application for a resource consent.

[23] A territorial authority must prepare and change its district plan in accordance with its functions under s 31, the provisions of Part 2 and its obligations under s 32.<sup>15</sup> Those functions include:<sup>16</sup>

- (a) The establishment, implementation, and review of objectives, policies, and

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<sup>9</sup> Statement of evidence 15 April 2018; Statement of evidence and rebuttal 10 May 2018.

<sup>10</sup> Statement of evidence 4 April 2018.

<sup>11</sup> Statement of evidence 14 May 2018.

<sup>12</sup> RMA, s 75(3)(c).

<sup>13</sup> RMA, s 75(1).

<sup>14</sup> RMA, s 75(2).

<sup>15</sup> RMA, s 74(1).

<sup>16</sup> RMA, s 31(1)(a)-(b).



methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district.

- (b) The control of any actual or potential effects of the use, development, or protection of land ... .

[24] When preparing a district plan a territorial authority shall have regard to any management plans and strategies prepared under other Acts to the extent that their content has a bearing on resource management issues of the district.<sup>17</sup>

[25] A territorial authority may, for the purpose of carrying out its functions under the Act and achieving the objectives and policies of the plan include rules in a district plan.<sup>18</sup> In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.<sup>19</sup>

### **Section 32**

[26] Section 32<sup>20</sup> provides:

#### **32 Requirements for preparing and publishing evaluation reports**

- (1) An evaluation report required under this Act must –
- (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
  - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by –
    - (i) identifying other reasonably practicable options for achieving the objectives; and
    - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
    - (iii) summarising the reasons for deciding on the provisions; and
  - (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
- (2) An assessment under subsection (1)(b)(ii) must –
- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for –

<sup>17</sup> RMA, s 74(2)(b)(i).

<sup>18</sup> RMA, s 76(1).

<sup>19</sup> RMA, s 76(3).

<sup>20</sup> This version of s 32 was in effect from 3 December 2013 to 18 April 2017.



- (i) economic growth that are anticipated to be provided or reduced; and
  - (ii) employment that are anticipated to be provided or reduced; and
  - (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
  - (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.
- (3) If the proposal (an **amending proposal**) will amend a ... plan ... that is already proposed or that already exists (an **existing proposal**), the examination under subsection (1)(b) must relate to –
- (a) the provisions and objectives of the amending proposal; and
  - (b) the objectives of the existing proposal to the extent that those objectives –
    - (i) are relevant to the objectives of the amending proposal; and
    - (ii) would remain if the amending proposal were to take effect.
- ...
- (6) In this section, -
- objectives** means, -
- (a) for a proposal that contains or states objectives, those objectives:
  - (b) for all other proposals, the purpose of the proposal
- proposal** means a proposed ... plan for which an evaluation report must be prepared under this Act.
- provisions** means, -
- (a) for a proposed plan ... , the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan ... :
  - (b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal.

[27] I consider the relevant Section 32 matters in our overall evaluation concluding this decision.

### **Proposed District Plan provisions**

[28] I now set out the Proposed District Plan provisions for subdivision, the Rural zone and the proposed new Residential 4 zone.

### ***Subdivision***

[29] The district plan has general issues, objectives and policies dealing with subdivision. Of particular note are two objectives in 2.14.2:

**Objective 8:** The subdivision of land is undertaken in accordance with the Objectives for Zones and resources of the city recognising that because subdivision sets the long-term



pattern of development, subdivision is a major determinant of how land is used and therefore of the environmental effects of land use.

**Objective 9:** The process of creating allotments through subdivision is integrated with planning for the relevant utilities and services and infrastructure to which it is anticipated the allotments will be connected.

[30] Two implementing policies in 2.14.3 are also pertinent:

**Policy 1 Adverse effects:** To ensure in the creation of new allotments any adverse effects on the environment are avoided, remedied or mitigated.

**Explanation:** In order to avoid the adverse effects of subdivision and subsequent development, it is necessary to develop assessment criteria to ensure that the lot is appropriate for the intended use. For example, if new lots are unable to dispose of waste water effectively subdivision and development should not be located in that position.

**Policy 5 Reticulated services:** To avoid the adverse effects that subdivision and subsequent development can have on the physical and economic sustainability of reticulated services.

**Explanation:** Subdivision and development can adversely affect the sustainability of reticulated services. The full cost associated with the connection to, and any upgrading of, existing reticulated services which is brought about by subdivision and subsequent development, shall be met by the developer.

[31] The relevant Section 3.18 Rules for subdivision are:

**3.18.6** Subdivision is a non-complying activity where it would create lots as follows:

(K) Within the Rural Zone: Allotments of less than two hectares.

### **Rural Zone**

[32] The significant resource management issues for the Rural zone (2.40.1) are:

- (1) The amenity of the rural area can be adversely affected through subdivision and consequent development and/or by reverse sensitivity.
- (2) Rural-residential subdivision and development can limit the use of the rural land resource for primary production activities.
- (3) Conflict between rural and non-rural activities can adversely affect rural productivity
- (4) Long-term pressures for urban expansion can adversely affect the character of the Rural Zone and lead to demands for urban services.
- (5) Sporadic subdivision can lead to poor connectivity and adverse effects on existing infrastructure.
- (6) Ongoing problems can occur with on-site sewage disposal systems, especially on smaller sites.
- (7) Connection to the Council's sewerage reticulation system can create ongoing cost



to ratepayers for expanded services.

[33] Objectives and policies of relevance are:

#### 2.40.2 Objectives

**Objective 1:** The rural environment is maintained and enhanced while allowing for productive rural activities to be undertaken.

**Objective 2:** Provide for the use and development of land within the rural area while maintaining, and where practical enhancing, amenity values.

**Objective 3:** New urban development within the Rural Zone only occurs within the areas identified in Appendix XV and in general accordance with an operative outline development plan included in the District Plan through an approved Plan Change, and only when adequate servicing and infrastructure are available.

#### 2.40.3 Policies

**Policy 1 Rural Zone:** To require rural allotments to be of a size and nature that enables rural activities and maintains the rural character and visual amenity of the Rural Zone.

**Policy 2 Rural activities:** To provide for rural activities to establish and operate within the Rural Zone.

**Policy 3 Non rural activities:** To avoid activities that do not have a need to locate within the Rural Zone and which would result in adverse effects inconsistent with the function, character and amenity provided for by the Rural Zone.

**Explanation:** *The primary purpose of the Rural Zone is to provide for rural activities such as agriculture, horticulture and forestry. A minimum lot size of two hectares for rural properties will provide for sustainable "lifestyle" properties that are not connected to reticulated services. These activities give a characteristic of openness to the area. Regulatory controls will ensure that the amenity of the Rural Zone is maintained and enhanced to provide for the ongoing operation of rural production activities.*

**Policy 4 Soils:** To maintain the life supporting capacity and productive value of the soil resource in the Rural Zone.

**Explanation:** *Fragmentation of rural properties, non rural land uses and poor soil management practices can reduce the productive use of land in the Rural Zone.*

**Policy 5 Historical sections:** To allow a single dwelling on sites under two hectares which existed with a Certificate of Title issued prior to 29 October 2016 and which can be connected to the Council's reticulated sewerage system.

**Explanation:** *This policy is to ensure that owners of sections which existed prior to the introduction of controls on lot sizes are able to use their land.*

**Policy 6 Outline Development Plans:** To identify areas within the Rural Zone for long term urban development as Outline Development Plan Areas. Within these areas development does not proceed until an operative Outline Plan for that area has been included within the District Plan and adequate servicing and infrastructure is available.

**Explanation:** *"Outline Development Plan Areas" are identified in the District Plan as the preferred areas for any future greenfield residential growth. The reason for providing them is to enable the City to respond, reasonably quickly and in a considered way, to any future pressure for residential growth.*



*These areas have been identified because they connect directly to existing Invercargill City Council infrastructure and services which have capacity for growth, and immediately adjoin residential areas. ...*

[34] In the Rural zone rules for land use permitted activities (3.38.1) include: residential activity, residential care activity limited to a maximum of eight persons, agriculture, animal boarding activity, home occupation, home stay and veterinary clinic. Importantly there are limitations on a permitted activity in terms of residential density (which reflect the subdivision threshold for a permitted activity in Rule 3.38.8).

[35] The Residential Density land use rules specify:

**Residential Density**

**3.38.8** The maximum residential density is:

(A) One residence per two hectares or more under contiguous ownership.

**3.38.9** Where an activity does not comply with Rule 3.38.8 above, then it is a non-complying activity.

**3.38.10** Applications under Rule 3.38.9 above shall address the following matters, which will be among those taken into account by the Council:

(A) The reasons for a higher density of residential activity.

(B) The effect on open space and amenity values of the Rural Zone.

(C) The size and location of structures.

(D) The extent to which solar gain to the living areas is achieved.

(E) The extent to which practicable outdoor living is achieved.

(F) Vehicle access, manoeuvring and parking.

(G) Effects of the proposal on stormwater flows.

(H) The extent to which the development incorporates qualities of good urban design.

(I) The ability to provide for on-site sewage treatment and disposal on the site

***Residential 4 Zone***

[36] I now deal with the proposed new Residential 4 zone insofar as it informs decision making on the relief sought by Mr Devine.

[37] The Residential Overview proposes to describe the Residential 4 Zone as:

The Residential 4 Zone is a deferred Zone that, once limited services are in place, will meet a demand for low density, large lot residential properties at the interface with the rural environment, with few urban service expectations.

The proposed new section of the Residential chapter is headed 2.39A Residential 4 (Residential Transition) Zone.



[38] Two key objectives for the Residential 4 zone are:

Objective 1: Limited large lot residential development is to be provided for at the interface of the Rural Zone, offering some of the experience of country living in a semi-rural environment adjoining a residential area of Invercargill following the extension of Council's reticulated sewerage system and the footpath along Retreat Road.

Objective 2: The provision of reticulated sewerage services and footpaths will be completed in a comprehensive and integrated manner for the entire Zone prior to the development of low-density residential development.

[39] Key implementing policies are:

Policy 1 Deferred zoning: To retain the Rural Zone provisions for the Residential 4 Zone until the footpaths and Council's reticulated sewerage system have been extended in accordance with the relevant Concept Plan in Appendix X. Council accepts no responsibility for the costs involved in the extension of these services.

Policy 2: Low-density residential development: To provide for:

- (A) Lots of two hectares or more where the lot is not connected to the Invercargill City Council reticulated sewerage system.
- (B) For residential housing on lots of 4,000m<sup>2</sup> or more which are connected to the Invercargill City Council reticulated sewerage system, and
- (C) To restrict residential activities on lots less than 4,000m<sup>2</sup>.

Policy 8 Infrastructure – costs: To require developers to pay for any extensions and connections to the Council's infrastructure services, and any consequential upgrades, at full cost to them and with no contribution from the Council.

Policy 9 Infrastructure – reticulated sewerage: To require the extension of Council's reticulated sewerage services for the entire Zone to be completed in accordance with the relevant Concept Plan prior to subdivision creating lots with an area less than 2 ha.

Policy 9 – Infrastructure – reticulated sewerage: To require that new individual allotments with an area of less than two hectares in these Zones connect to the ICC reticulated sewerage system.

Policy 11 Infrastructure – transportation: To provide for alternative modes of transport by methods such as requiring a footpath be developed along the length of the eastern side of Retreat Road in accordance with the relevant Concept Plan prior to subdivision creating lots with an area less than 2 ha.

[40] The proposed new Residential 4 zone rules state:

3.37A.1 Deferred zone provisions: The Rural Zone Objectives, Policies and Rules apply to the land in the Residential 4 Zone until a Council resolution has been passed that the development of the reticulated sewerage services and the footpaths for the Zone, as set out in the relevant Concept Plan in Appendix X have been completed.

[41] Subdivision is generally a discretionary activity (with controlled activity status



for boundary adjustments) in the proposed new Residential 4 zone but is a non-complying activity where it would create lots as follows:<sup>21</sup>

- (K) Within the Residential 4 Zone: Allotments of less than two hectares (if not connected to the Council's reticulated sewerage system) or 4,000 square metres (if connected to the Council's sewerage system).

Within the Rural zone, which remains in place until the deferred Residential 4 zone is triggered, subdivision of allotments of less than 2 ha is a non-complying activity.<sup>22</sup>

[42] Residential activity is to be a permitted activity provided it meets the maximum residential density requirements, otherwise it is to be a non-complying activity.<sup>23</sup> The maximum residential density is:<sup>24</sup>

- (A) One residence per 4,000 square metres under contiguous ownership, where the proposed residence is to be connected to Council's reticulated sewerage system.
- (B) One residence per 2 ha under contiguous ownership, where the proposed residence is not to be connected to Council's reticulated sewerage system.

### **Proposed Residential 4 zone**

[43] The Council's decision on Proposed Variation 8 states that reconsideration of the area of land included in the Residential 3 zone was triggered by the Director of Works and Services at the hearing to consider submissions to the Proposed District Plan, where he advised there was no funding programmed by the Council for the extension or maintenance of sewerage infrastructure within the zone.<sup>25</sup> As a consequence, Variation 8 reduced the extent of the Residential 3 zone to that able to be serviced by the Council's infrastructure. Mrs Devery (who was the reporting officer on the proposed variation) considered such a reduction in area was appropriate having regard to the impact on ratepayers, and the possible oversupply of residential land in the future.

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<sup>21</sup> 3.37 A Rule 3.18.6.

<sup>22</sup> Rule 3.18.6L.

<sup>23</sup> Rule 3.37A.5-7.

<sup>24</sup> Rule 3.37A.5.

<sup>25</sup> Decision No. 34 Residential Zones 11 October 2016 page 8.



[44] The Council submitted that:<sup>26</sup>

As ... in Mrs Devery's evidence, it is clear that the Residential 4 Zone is not the Council's preferred option in relation to these appeals. The respondent's position is rather that this is "bad planning" and if Council was looking purely from a planning perspective this would not be an option.

However, the respondent in this case acknowledges that there are merits to what the appellants are seeking and that if the infrastructure requirements are met by the appellants themselves, then one of the main concerns of the respondent is addressed. With the installation of infrastructure resolved the respondent does not believe that an argument purely on "planning principles" would be a worthwhile use of its, the appellants', or the Court's resources.

Therefore, the Residential 4 Zone is a pragmatic and practical resolution to this appeal.

[45] The Council submitted that the evidence of Mrs Devery is sufficient for the Court to be satisfied that the proposed Residential 4 zone is justified and appropriate. Further, that it meets the Council's obligations in terms of the higher order documents, specifically the RPS and under Part 2 of the RMA. The Council considered the proposal to be an efficient use of the resources in the area and to allow for that community to better provide for its needs while minimising the potential adverse effects on the environment specifically from failing wastewater systems.

*The evidence of Mrs Devery*

[46] Before assessing the suggested provisions drafted through mediation Mrs Devery identified that she gave evidence on Variation 8 recommending that the boundaries of the Residential 3 zone be retained and the land involved in the appeals be zoned Rural. She said that from a planning perspective she supported the Council's decision on the zone boundaries as a better outcome.<sup>27</sup> However she went on to give evidence on the outcome of the mediation process and the alternative option for land around the northern end of Retreat Road. She worked through the statutory requirements for developing a district plan in some detail before giving her support to the proposed deferred Residential 4 zone (the proposal).

[47] Mrs Devery considered the only relevant planning documents to be the operative Southland Regional Policy Statement 2017 (RPS) and the proposed district

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<sup>26</sup> At [17]-[20].

<sup>27</sup> At [10]-[11].



plan is to give effect to it.

[48] The RPS has an Urban chapter (Chapter 17) with a focus on ensuring development occurs in an integrated, sustainable and well-planned manner and setting out what is expected of territorial authorities.<sup>28</sup> Mrs Devery acknowledged that the proposal is not promoting developing existing urban areas ahead of greenfield development or in areas with existing infrastructure capacity. Also that the proposal does not encourage higher housing densities or the intensification or regeneration of existing urban areas and is not in line with the policy of promoting a compact urban form.

[49] Notwithstanding these RPS provisions, Mrs Devery gave reasons as to why she considered the proposal to be acceptable in terms of the Urban chapter, particularly in terms of identifying and planning ahead for an urban growth area and managing the effects of such growth. She said that the reliance on the installation of the relevant infrastructure before the deferred zone becomes operative means that urban development of this area cannot occur without the appropriate infrastructure to support it. She was of the opinion that the proposal is directed at development occurring in an integrated, sustainable and well-planned manner.

[50] Mrs Devery also referred to provisions in the Infrastructure chapter (Chapter 15) of the RPS that seek the integration of infrastructure with land use activities and the environment<sup>29</sup> and that sequencing of new subdivision and associated development is coordinated with the development, funding, implementation and operation of infrastructure<sup>30</sup>. In her opinion, deferring the zone until the infrastructure is developed in a comprehensive manner for the entire area prior to development of properties to a more intense residential scale will result in less ad hoc development. The result should be that future land use will be better integrated with the existing infrastructure.

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<sup>28</sup> Method URB.2.

<sup>29</sup> **Objective INF.1 – Southland’s infrastructure**

Southland’s regionally significant, nationally significant and critical infrastructure is secure, operates efficiently, and is appropriately integrated with land use activities and the environment.

<sup>30</sup> **Policy INF.5 – Development, subdivision and land use**

Management of development, subdivision and land use shall ensure:

...

(b) the nature, timing and sequencing of new development is coordinated with the development, funding, implementation and operation of infrastructure, as appropriate for the type of development being undertaken.



[51] In relation to Chapter 5 of the RPS addressing Rural Land and Soils, Mrs Devery pointed out that the Proposed District Plan identifies the land the subject of her evidence as containing High Value Soils. She said that the RPS seeks to avoid the irreversible loss of high value soils from productive use<sup>31</sup> and acknowledged that the high value soils are less likely to be used productively under the Residential 4 zone. She considered that continuing to allow agricultural activities on sites over 4,000m<sup>2</sup> as permitted activities will provide for some productive use.

[52] Importantly in relation to Chapter 5 of the RPS addressing Rural Land and Soils, Mrs Devery gave evidence that:<sup>32</sup>

Retaining the two hectare minimum lot size for properties that are not serviced by the reticulated sewerage system addresses issues raised in ...part of this chapter of the RPS, particularly around soil and water health. The RPS recognises that on-site systems can give rise to environmental effects on water, soil, amenity and public health. Resource consent applications processed over the last ten years for subdivision in the area indicate the importance of specialist design of on-site effluent disposal systems for properties below two hectares. ... The soil types in the area and the depth of the water table make it important for site-by-site assessment for development, as provided for through the suggested provisions.

[53] Mrs Devery said that the proposal addresses Chapter 5 RPS provisions dealing with effects of development in the rural area on amenity values and the potential for reverse sensitivity. In her view keeping the minimum lot size to 4,000m<sup>2</sup> will result in this area being a transition between the rural zone and the more intense adjoining residential development.

[54] When developing provisions in a district plan, the Council is required to have regard to management plans and strategies prepared under other Acts. Mrs Devery referred to a non-statutory spatial plan prepared under the Local Government Act 2002 dated January 2012 called *Invercargill: The Big Picture*. That spatial plan identified the land involved in the proposed deferred zone for staged residential expansion, with some parts for “large lot” residential development and other parts for “suburban

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<sup>31</sup> **Policy RURAL.4 – Loss of high value soils from productive use**  
Avoid the irreversible loss of high value soils from productive use, through inappropriate subdivision.

<sup>32</sup> At [31].



density” with reference to active or deferred zoning. She noted that while the spatial plan is a planning document with a 30-year rather than the district plan 10 year planning horizon, she considered the deferred zoning to be in general accordance with the spatial plan.

[55] In addition, Mrs Devery gave evidence that the Council’s Long-Term Plan 2015-2025 states that the focus of the Council’s Infrastructural Strategy over the next 30 years is to renew its current assets. The Long-Term Plan states that the Council does not anticipate any significant expansion of the infrastructure networks, with one exception which is not relevant. She also referred to the Council’s 2015-2025 Activity Management Plans for water, stormwater, roading and sewerage and the Asset Management Plans, but said that there is no expenditure programmed for growth and for development of additional services as a result of subdivision development within the timeframe of these plans. She pointed out that these plans assume that developers will pay the costs of extensions of services and development of new services.

[56] Mrs Devery also gave evidence that the Council is hearing submissions on the 2018-2028 Long Term Plan, which again focusses on the maintenance and renewal of the current asset base. It states:<sup>33</sup>

Look to not expanding the existing infrastructure networks (at our own cost), only improve levels of service to meet consent and legislated requirements, utilise the networks current capacity to meet forecast growth.

[57] Mrs Devery then went on to analyse the new deferred zone provisions against the relevant objectives and policies in the proposed district plan. The Residential Section of the Proposed District Plan includes an objective that seeks to maintain critical mass within defined residential areas, along with 2.35.2 Objective 4 which states:

Unplanned peripheral expansion of the built-up area resulting in increased demand for urban services is avoided.

She said that by zoning the land and including controls over amenity and infrastructure issues, it changed the development of the area from the unplanned to the planned category.

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<sup>33</sup> At [56].



[58] Mrs Devery also said that the Rural zone has a bias against urban expansion, with an objective that new urban development within the rural area only occurs within the areas identified as an Outline Development Plan area in the Plan, and only when adequate servicing and infrastructure is available. If the owners of the properties along Retreat Road or Mclvor Road were to develop their properties for residential development at an urban scale, the development would be contrary to these objectives and policies.

[59] Mrs Devery concluded that while she did not believe the suggested provisions are the best planning outcome for the District, the provisions drafted through the mediation process generally meet the purpose of the RMA and the functions of the Council. Mrs Devery's evidence was that the provisions do not neatly fit the existing objectives and policies of the proposed district plan. However, she considered the zoning of the land to Residential 4 will enable the management of effects and ensure demands for urban services are addressed holistically prior to development. She referred to the Council having identified the area in other documents as an area for future growth. She said that the provisions are clear that the costs of the extensions to services will not be the responsibility of the general ratepayer. She referred to providing more zoned areas as resulting in more options available for potential urban growth to occur in a planned manner.

[60] Mrs Devery referred to Part 2 of the RMA and in particular s 7(b) the efficient use and development of natural and physical resources, (ba) the efficiency of the end use of energy, (c) the maintenance and enhancement of amenity values and (f) maintenance and enhancement of the quality of the environment. In her opinion that these "other matters" are the core reasons for the deferred zoning and suggested provisions. She said that the zoning seeks to ensure the efficient use of natural and physical resources within the District. She said that by considering the need for extensions of the urban area, the efficiency of the end use of energy is part of the assessment, with particular regard to the need for vehicular movements and ensuring open space around buildings that will enable natural solar gain. Amenity values and the quality of the environment are considerations when determining the activity status of the lot sizes in the area in question.

[61] In answer to questions from the court and with reference to a plan labelled



“General area of proposed infrastructure for Residential 4 zone”<sup>34</sup> she explained what was intended and needed to be included in the concept plan to go into the district plan and which is yet to be produced.<sup>35</sup> That involved a sewer pipeline extending from 41 Retreat Road (with a subdivision consent requiring those services to be put in place and expected in the near future) to the northern most end of Retreat Road. For the footpath there is to be an extension (from the Inverurie Road development) along Retreat Road up to Mclvor Road, and also another footpath requirement to the east of the Residential 4 area coming off the Inverurie development and extending north to Mclvor Road.

*Mr Devine’s submissions and evidence*

[62] In closing Mr Devine confirmed that he was neutral on the agreement reached between the appellants and the Council with the exception of the concerns made in his opening submissions to the Court on the 6th August 2018.<sup>36</sup> It was difficult to align that statement with the many points he made in evidence and submissions.

[63] In summary Mr Devine made submissions and gave evidence to the effect that:

- while he did not oppose the extension of sewerage services down Retreat Road providing there is equitable cost sharing by those who wish to connect including the Council, he considered it to be fair that the party or parties wishing to start the subdivision process first should bear a larger part of the cost. He also submitted that if property owners wish to agree to help fund reticulated sewerage in addition to rates then that is a discussion that all property owners need to have.
- the requirement for a footpath the length of Retreat Road before any subdivision can take place. A footpath may well be needed in the distant decades but this will depend on if and when any subdivision takes place. The Residential 4 zone has added the addition of footpaths without consideration of the number of lots that may or may not be created. The cost should be on an equitable cost sharing basis with the largest

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<sup>34</sup> At page 228.

<sup>35</sup> Transcript pages 16-18.

<sup>36</sup> Closing submission at [19].



proportion contributed by the party or parties wishing to start the process first.

- in closing Mr Devine said he considered the required implementation of footpaths along Retreat and Mclvor Roads as a pre-condition for the Residential 4 zone to be dubious and not justified in the foreseeable future if the speed limit is reduced. This was in response to the Council's submission that the footpaths are to ensure that there is a safe walking area for pedestrians as an alternative mode of transport. The Council also submitted that footpaths will fit within the aesthetic expectations of a more urban zone consistent with the potential subdivision and development under the Residential 4 zone.

[64] As I have said the Court (and the Council) did not understand Mr Devine to be pursuing these points and opposing, or seeking amendments to the proposed Residential 4 zone other than subdivision to a 1.9 ha minimum lot size with on-site wastewater disposal becoming a discretionary (and not a non-complying) activity. However, I record them here for completeness.

[65] In his memorandum Mr Devine sought that the speed limit on Retreat Road be reduced to 50 kilometres per hour as he considered the current speed to present a danger. The Council said that Mr Devine then spoke to the Roding Manager of the Council who advised that he would be undertaking a review of speed limits within the District and Mr Devine was happy to no longer pursue this aspect of his appeal. The Council also said that this review is ongoing and no decisions have been made.

[66] In closing Mr Devine said he was disappointed to hear that there has been no real progress concerning the speed limit on Retreat Road. He was also of the view that the deferred Residential 4 zone will have a similar outcome to the Rural zone in Variation 8 but over a much longer time and that it does not address the current inappropriate road speed limit of 80kmh along Retreat Road.

[67] I agree with the Council that reducing the speed limit on Retreat Road is not a resource management matter in respect of the deferred rezoning proposal and Mr Devine's argument for amended subdivision provisions, and is not one over which I have jurisdiction.



## **Rural Zone Rules**

[68] I turn now to the central issues raised by Mr Devine on the subdivision rules for the Rural zone that remain in place until provisions in the deferred zone are activated. I do that under the headings of subdivision minimum lot sizes, on-site wastewater disposal and activity status. I also note that once activated, the new subdivision rules have non-complying activity status for a minimum lot size of under 2 ha where there is no connection to the sewerage infrastructure as well as for residential land use on such a site in the density requirements of the rules.

### ***Minimum lot sizes***

[69] Mr Devine submitted that the Council is being unreasonable in opposing the ability to subdivide down to a 1.9 ha minimum lot size as a discretionary activity, with particular reference to 81 Retreat Road. Mr Devine considered the restrictions on a subdivision size of 2 ha minimum lot size for the Rural zone, requiring consent for a non-complying activity, are not realistic for Retreat Road. He said that the existing sizes of allotment along Retreat Road have been subdivided from the original approximately 3.82 ha and 81 Retreat Road is now the largest block left subdivided and the last of the original lot sizes in Retreat Road. Mr Devine considered the Council needs to recognise the historic uneven lot sizes in Retreat Road. Part of his argument concerned on-site disposal on a 1.9 ha minimum lot size which I turn to next.

[70] Mr Devine considered that the provisions would stifle development. Mr Devine considered that the division of Retreat Road into two parts, Residential 3 and Rural wastes the opportunity to sensibly subdivide the land at 81 Retreat Road. He was of the view that it would push 2 ha lot subdivision further along Mclvor, Myros and Bainfield Roads thereby breaking up more productive land.

[71] Mr Devine said that the Council has effectively devalued properties in this area by the rezoning to Rural and the changed requirements for future development in this area. Mr Devine did not know when, or if, the deferred Residential 4 zone would come into being. He said there would be a disadvantage to ratepayers by a delay in subdivision.

[72] Mr Devine said that it is unreasonable to ignore what he called “precedence in operative and proposed district plans”. Mr Devine put a lot of emphasis on what the



provisions of the Residential 3 zone of the district plan as notified (and prior to the Variation) would have allowed for the land in terms of subdivision including lower sizes if reticulated sewerage was in place. Mr Devine also considered there are precedents on the costs of extensions to services being the responsibility of the general ratepayer, referring to the general ratepayer helping with the costs to reticulate sewerage to two areas.

[73] Mrs Devery gave evidence that Mr Devine's expectation of being able to subdivide has not been supported by Council planning decisions for some time. She said that with the operative district plan publicly notified in 1998, controls over the ability to subdivide to create lots of less than 2 ha have been in force for almost 20 years. While the operative district plan did not stipulate a minimum lot size for the Rural Sub-Area, the residential density provisions had the effect of requiring a minimum of 2 ha per lot in the rural areas of the District.

[74] Mrs Devery had a different opinion from Mr Devine on the minimum lot size question. She referred to:

- zoning as a method and planning principle and not to simply meet the aspirations of individual landowners
- district plan provisions are not drafted to allow every property to be subdivided. When developing zones the approach was to look at an area holistically rather than determining zoning on a property-by-property basis with different rules applying to each individual property.
- concerns about on-site wastewater disposal and other reasons for setting a 2 ha threshold for subdivision beyond which subdivision is not a discretionary but a non-complying activity.
- the Council's record in terms of processing and considering subdivision consent applications.

[75] Mrs Devery was of the view that the proposed district plan lot size provisions set a bottom line threshold. These provisions enable the case-by-case assessment of any undersized lots and likely future land use and development on the newly created lots through the resource consent process for a non-complying activity.

[76] Mrs Devery gave evidence that there have been two resource consent



applications on the western side of Retreat Road to create allotments of less than 2 ha without connection to reticulated services over the life of the operative district plan, both of which were declined. One was for two lots (1.65 ha and 1.05 ha) at 101 Retreat Road and the other for two lots (1.02 ha and 8880m<sup>2</sup>) at 41 Retreat Road. Mr Devine lodged a submission supporting the first application. Mrs Devery said that these applications were declined because of significant actual and potential adverse effects on open space, rural amenity values and soil values and significant variation from the provisions of the district plan. The Council's decision on the second application was appealed and the Environment Court upheld the Council's decision.<sup>37</sup> Mrs Devery saw them as evidence that the Council has stood by its district plan provisions and there should be no expectation of being able to subdivide below 2 ha without services and without full consideration of the effects on the environment on a site-by-site basis.

[77] Mrs Devery also noted that if the infrastructure is installed and the Residential 4 zone residential density provisions come into effect, the district plan provisions will enable a greater number of allotments at 81 Retreat Road with the opportunity to apply to subdivide down to 4,000m<sup>2</sup> as a discretionary activity.

#### ***On-site wastewater disposal***

[78] Mr Devine was of the view that a 1.9 ha lot is more than adequate for on-site waste disposal.

[79] The Council submitted that the Retreat and McIvor Road area has a poor drainage network and there have been problems of failing wastewater systems because of high water levels especially during the winter. Issues relating to this and on-site effluent disposal systems were well traversed in the decision of *Mason v Invercargill City Council*<sup>38</sup> when the Environment Court found against subdivision being granted in part because of the concerns relating to the ability to dispose of wastewater appropriately with an on-site system, given the nature of the soils in that area. The Council submitted that the findings of the Court in that case are equally applicable in relation to on-site wastewater disposals throughout this area.

[80] Further, the Council submitted that it was not opposed to people having an on-

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<sup>37</sup> *Mason v Invercargill City Council* C032/2009.

<sup>38</sup> *Mason v Invercargill City Council* C032/2009.



site wastewater system. However, the Council's approach is to require adequate assessment and with the ability to control the appropriateness of a wastewater disposal system through a resource consent application process. A poorly designed and failing on-site system has the potential to lead to the further and continued degradation of waterways within the area as well as human health effects. While a building consent would be needed it would only be able to consider the system on a case by case basis rather than as an integrated whole – across an area of land. The resource consent process would also give future purchasers of the property satisfaction that the system has undergone sufficiently vigorous analysis to ensure that it will perform to the required standard.

[81] In closing, Mr Devine responded that it is not in any current or future property owners' interest to have a failing on-site waste water system. While Mr Devine agreed that every lot of land will have its characteristics that should be able to be dealt with in a sensible manner in the placement of an on-site system, he considered that it should be able to be dealt with under the appropriate consent process. However, in his view the difference in lot size between a 1.9 ha and a 2 ha lot size on Retreat Road is inconsequential with respect to consideration of the suitability of an on-site wastewater disposal system.

[82] Mr Devine asserted that requiring 2 ha for on-site effluent disposal systems is too general and restrictive. Mrs Devery agreed that there may be occasions where an effluent disposal system can be designed for sites less than 2 ha. While the 2 ha threshold is not set purely to provide for effluent disposal, it does set a line where most properties within the rural area of the District can provide for adequate and safe disposal of effluent into the future. She said that it is generally considered important for subdivision consent applications to include reassurance that the effects of on-site wastewater disposal will not be more than minor, even when a subdivision creates allotments greater than 2 ha.

[83] I have already referred to Mrs Devery's evidence that retaining the 2 ha minimum lot size for properties that are not serviced by the reticulated sewerage system under the Residential 4 zone addresses issues raised in part of Chapter 5 of the RPS addressing Rural Land and Soils. Mrs Devery's evidence equally applies to the Rural zone that remains in effect until the new Residential 4 zone is activated. I note that the Residential 4 zone retains a rule making a sub 2 ha minimum lot size subdivision relying on on-site waste disposal a non-complying activity once the



deferred provisions come into effect.

[84] Mrs Devery went on to give evidence that when assessing an on-site wastewater disposal system a number of matters are considered and site-specific designs are important. As part of its assessment tools, the Council may refer to the Invercargill City Council Technical Memorandum for On-site Domestic Wastewater Management for Local Soils.<sup>39</sup> Accompanying that Memorandum is a document that sets out the soil characterisation and investigation methodology.<sup>40</sup> The document identifies the soils in the general area of Retreat Road as being either in Category 2 (low risk) or Category 3 (medium) risk profile and recommends specialist assessment to inform the design and construction of an on-site wastewater treatment system. A case-by-case assessment of the effects of consequential permitted activities, such as residential activities relying on a domestic on-site wastewater system, is important when determining the potential effects of a subdivision.

[85] Mr Devine considered the low or medium risk categorisation to be reasonable and to support his experience of the Retreat Road area drainage. However, in Mr Devine's view the retention of minimum lot sizes of 2 ha for the general area of Retreat Road is not justified because it is not identified as a high risk area. The Council did not agree with Mr Devine's position on this.

### ***Activity status***

[86] Mrs Devery was of the opinion that the existing non-complying resource consent process involving practical consideration of each site proposed below 2 ha is appropriate for subdivision of 81 Retreat Road.

[87] Mrs Devery's evidence was that while a change to the density provisions will not negate the need for a resource consent for subdivision and the ability for the Council to consider the full range of effects, the minimum lot size of 2 ha should be retained.<sup>41</sup> She considered that the environmental effects of subdivision below the 2 ha threshold extend beyond general amenity and open space issues (although she conceded that the general visual amenity effects of subdividing a 3.8 ha property on

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<sup>39</sup> MWH (2007) Invercargill City Council Technical Memorandum On-Site Domestic Wastewater Management for Local Soils (see Exhibit Four).

<sup>40</sup> Soilwork Ltd (2007) Invercargill City Council On-Site Domestic Wastewater Management for Local Soils, prepared for MWH (see Exhibit Five).

<sup>41</sup> At [78], page 243.



Retreat Road in two are not likely to be more than minor in the context of the area and the size and use of surrounding properties). Mrs Devery said that given the soil types and stormwater issues (although I note Mr Devine had a different opinion on the nature and means to deal with the latter), the Retreat Road area is one where there is the potential for significant adverse effects. She considered it important that each development be assessed on a case-by-case basis. In her view that should require the Council and the wider community to be satisfied that the subdivision and enabled development has effects that are no more than minor or the proposal is not contrary to the objectives and policies of the plan and passes the gateway test. Once it has passed the gateway test she said that it is appropriate that an application be considered in the same way a discretionary activity would be.

### **Overall evaluation**

[88] I look now at whether the provisions in the proposal are the most appropriate way to achieve the objectives.

[89] Mr Devine was seeking as alternative relief different rule treatment for discretionary activity status for subdivision to a 1.9 ha minimum lot size and on-site effluent disposal, either at 81 Retreat Road or for an extended area along Retreat Road. That would replace the non-complying activity status threshold or requirements specifying a lot size of 2 ha.

[90] The Proposed District Plan gives effect to the RPS, as Mrs Devery explained in her evidence.

[91] The existing subdivision pattern and the position of 81 Retreat Road is not an argument that weighs with me for according different treatment to the area for subdivision. The Proposed District Plan is a forward-looking document. The planning framework in the Proposed District Plan is not, and need not be, designed to reflect historic patterns of subdivision or provide a greater opportunity for landowners with smaller existing lot sizes to subdivide in the future. I note that while the Rural zone provides for historical sections by allowing a single dwelling on sites under 2 ha with a certificate of title issued prior to 29 October 2016 that is only where the dwelling can be connected to the Council's reticulated sewerage system.

[92] The Proposed District Plan contains many reasons in its objectives and policies



(and the significant resource management issues these are designed to address) for adopting a 2 ha minimum lot size before subdivision becomes a non-complying activity. These relate to potential adverse effects on the rural character and amenity of the rural area and use of the rural land resource for primary production activities including from conflict between rural and non-rural activities. In addition, a potential result of long-term pressures for urban expansion is to adversely affect the character of the Rural zone and lead to demands for urban services. Furthermore, such subdivision can lead to poor connectivity and adverse effects on existing infrastructure as well as ongoing problems with on-site sewage disposal systems. The holistic approach taken by the Council to lot size in the Rural zone is an appropriate one. Setting minimum lot sizes for subdivision, with a non-complying activity status, is an efficient and effective approach. Such an approach can reduce the risk of subdivision and future development that could work against achieving the outcome sought in the objectives and policies of the Proposed District Plan.

[93] It is also acceptable for the Council to have different zoning on the land along the northern part of Retreat Road from that in the southern part of Retreat Road. The Proposed District Plan has given that part of the land along Retreat Road that is already serviced or required to be serviced and closest to the urban area a Residential 3 zoning. Further north beyond that Residential 3 zoning the Proposed District Plan retains the Rural zoning along Retreat Road until such time as servicing and footpaths are provided through a deferred zoning (or staging) approach with the Residential 4 zone that will allow a discretionary activity application for subdivision of 4000m<sup>2</sup> minimum lot sizes.

[94] I accept the Council's case and its evidence on the need for careful assessment of a proposal for on-site wastewater disposal system on a lot under 2 ha. I note not only the objectives and policies of the RPS but the provisions to give effect to it in the Proposed District Plan. The Council requires a resource consent application to demonstrate that an on-site wastewater disposal system can be provided for in a way that will adequately avoid or mitigate against adverse environmental effects and will continue to function well into the future before allowing subdivision as the likely precursor to residential activity.

[95] Mr Devine made much of there being no public objections to the Residential 3 proposals in the notified District Plan and referred throughout the hearing to earlier plan provisions. That does not assist his case. As it is entitled to, the Council has carefully



reconsidered the provision made for urban development in Invercargill City. That resulted in a variation to the notified plan.

[96] According special status through a discretionary activity status for subdivision with on-site effluent disposal to a minimum lot size of 1.9 ha in a limited area could be said to be setting a precedent and undermine the district plan's approach. In the future other landowners in the Rural zone outside of the area with different rule treatment might seek to use the lower minimum lot size with on-site effluent disposal as the basis for a private plan change or as an argument to support a resource consent application for a non-complying activity at the reduced size.

[97] At the stage the deferred Residential 4 zoning comes into effect there will be reticulated wastewater provision and a footpath and subdivision and land use density regime that recognises this. At that time landowners will be able to subdivide the land down to smaller lot sizes as a discretionary activity and subsequently build residential dwellings as a permitted activity.

[98] I find that treating part of the Rural zone differently, as Mr Devine seeks, will not implement (or achieve) the objectives and policies of the Proposed District Plan for subdivision and the Rural zone. In terms of the deferred Residential zone there are planning reasons why it is better not to encourage increased fragmentation of the land which could work against comprehensive subdivision, design and development of the area. Also once the deferred Residential 4 zone has been triggered it would not be necessary or appropriate to have on-site wastewater disposal given the wastewater infrastructure will be available to service new residential subdivision and development.

[99] I recognise that non-complying activity status sets a higher bar, adding the gateway test. Mr Devine will need to demonstrate that the proposed subdivision and on-site effluent disposal has minor adverse effects or is not contrary to the objectives and policies to pass through the gateway and that is appropriate. Of course, if the proposal the subject of the resource consent application passes through the gateway the consideration of a subdivision is then the same as for a discretionary activity. That discretionary activity also brings into consideration the objectives, policies, rules and other provisions of the district plan which may be the basis for a finding to decline a resource consent application.



[100] I find that Mr Devine's proposed relief would not achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources, including infrastructure. Neither would it deal adequately with potential adverse effects.

[101] I accept the evidence of Mrs Devery in relation to Part 2 of the RMA in deciding this appeal on the subdivision and on-site wastewater disposal rules.

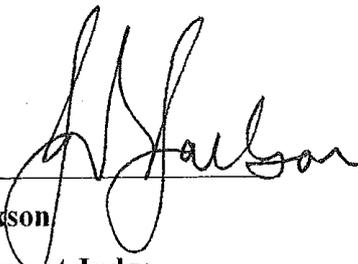
[102] In conclusion I find that Mr Devine has not made out the case for different rule treatment for discretionary activity status for subdivision to a 1.9 ha minimum lot size and on-site effluent disposal, either at 81 Retreat Road or indeed for an extended area along Retreat Road, to be the most appropriate way to achieve the objectives of the Proposed District Plan (whether of the Rural zone or of the proposed Residential 4 zone).

### **Outcome**

[103] The relief sought by Mr Devine should be declined.

[104] Costs are reserved.

For the court:

  
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**J R Jackson**  
**Environment Judge**

