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

Decision No. [2018] NZEnvC 239

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal pursuant to section 358 of the Act and of applications for declarations pursuant to section 311
BETWEEN	PETER WILLIAM MAWHINNEY (AS A TRUSTEE OF WAITAKERE FOREST LAND TRUST AND THE FOREST TRUST)
	(ENV-2015-AKL-088)
	(ENV-2018-AKL-145)
	Applicants
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge J R Jackson (Sitting alone under section 279 of the Act)
Hearing:	In Auckland on 1 October 2018 (Final submissions received 15 October 2018)
Appearances:	P W Mawhinney for the Waitakere Forest Land Trust and the Forest Trust B Ford for the Auckland Council
Date of Decision:	18 December 2018
Date of Issue:	18 December 2018

DECISION

A: (ENV-2015-AKL-088) Applications 73 to 87 are struck out by consent.

B: (ENV-2018-AKL-145) Under section 358 Resource Management Act 1991 the appeal is refused and the Auckland Council's decision is confirmed.

C: Costs in both proceedings are reserved.

REASONS

Introduction

Background

[1] The primary proceeding to be resolved in this decision is appeal ENV-2018-AKL-145 under section 358 Resource Management Act 1991 ("the RMA" or "the Act"). There is a related application ENV-2015-AKL-88 ("the 2015 proceedings") for declarations which I will consider at the end.

[2] On or about 5 July 2018 the Auckland Council ("the Council") issued a decision under section 357D of the RMA in which objections about conditions of subdivision consent SUB-2011-63 were variously upheld, amended or dismissed. Mr Mawhinney as a trustee for the named trusts, appealed under section 358 RMA.

[3] The Council's decision processed the application as if it were for a discretionary activity. Mr Mawhinney contends that the proper status of the subdivision was as a controlled activity, or at worst restricted discretionary activity. As a consequence of that alleged error, he says that conditions were imposed that were *ultra vires*; they went beyond the matters over which the consent authority had reserved control or to which it had restricted its discretion, in contravention of what is now section 87A(2)(b) and section 104A(b) RMA.

[4] The reason for the Council's approach was that it treated the proposed subdivision as a "boundary adjustment". Mr Mawhinney claims that the correct approach was to recognise that only two existing allotments were to be divided and that was the only division that required subdivision consent.

[5] After the hearing a timetable was set for closing submissions. The Council lodged submissions on 15 October 2018. Mr Mawhinney lodged none, despite receiving a reminder from the Registrar that his submissions were (over) due.

The original application and its history

[6] On or about 17 November 2011[1] the trustees of the Forest Trust applied to what is now the Auckland Council for subdivision consent of land in the (exotic) Waitakere Forest. The application states:

> The proposal is to divide:
>
> (a) existing Lot 323 DP210991 comprising 6.7419 hectares ... to produce proposed Lot 423 comprising 4.1971 hectares ...; and
>
> (b) existing Lot 324 DP 210991 ... to produce proposed Lot 424 comprising 4.0200 hectares ...
>
> The excess land will be annexed to existing Lot 200 DP 210991 to produce proposed Lot 400 ... There is no increase in the number of allotments. Access to proposed Lots 423 (blue) and 424 (orange), and to existing Lots 225 and 309 DP 210991, will be over proposed Lot 400, which will be held in shares by the registered proprietors of those parcels in the same ratio as in existing Lot 200 DP 210991.

[7] Lot 200 is jointly owned by the owners of, and serves, the following five lots:

(a) 90-96 Anzac Valley Road Waitakere;
(b) 98-100 Anzac Valley Road Waitakere;
(c) 199-201 Anzac Valley Road Waitakere;
(d) 102-104 Anzac Valley Road Waitakere;
(e) 193-197 Anzac Valley Road Waitakere.

[8] I note that the applicant has no interest[2] in Lots 323 or 324, but may have some legal interest in Lot 200. Consequently, the likelihood that any consent will ever be given effect to is probably very small.

[9] The before and (proposed) after areas and allotment[3] numbers are shown in this Table:

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1 Mr Mawhinney's first affidavit claims the application was lodged in February 2011. The application is undated, but it appears the Council did not accept it until November 2011. That is potentially important because the Resource Management Amendment Act 2011 came into force on 1 October 2011.

2 Application for resource consent para 1.3.

3 As defined in section 281(2) RMA.

Existing legal description	Area before (ha)	Area after (approximately) (ha)	Proposed legal description
Lot 200 DP 210991	0.3919	4.8986	Lot 400
Lot 323 DP 210991	6.7419	4.1971	Lot 423
Lot 324 DP 210991	6.0057	4.0200	Lot 424

[10] It will be seen that Lots 323 and 324 are being subtracted from and the parts removed are being added to Lot 200 which increases by 1,196% (0.39 ha to 5.05 ha). A key issue in the proceeding is "whether Lot 200 is part of the subdivision application?"

[11] On 22 June 2012 SUB-2011-63 was granted, in Mr Mawhinney's words, to divide two existing allotments, being Lot 323 and 324 DP 210991, and to add parts from those two lots to existing Lot 200 DP 210991.

[12] The consent was subject to various conditions with which the Forest Trust was not happy. It lodged an objection under section 357 RMA. That languished for some years, so the application for consent was the subject of proposed declarations 73 to 87 in the 2015 proceeding. Since then the objection has been considered by the Council and a decision issued in July 2018 as described above. The primary issues raised in the section 358 appeal are in relation to that decision.

The subdivision rules in the Waitakere Plan

[13] When the subdivision consent application was accepted as lodged in November 2011, the operative district plan was the Waitakere City District Plan ("the Waitakere Plan") which had been notified in 1995.

[14] The relevant rules (italicised words are defined in the Waitakere Plan) are:

> **2.1 Permitted Activities**
>
> (a) *Subdivisions* meeting the following Performance Standards are *Permitted Activities* (other *subdivision* rules do not need to be complied with):
>
> (i) *boundary adjustments* where any existing *on-site connection* to *infrastructure* is not affected or is replaced with a new *connection* and no existing *site* is adjusted in *site* area by more than 10%.
>
> ...

2.2 Controlled Activities

Subdivisions meeting the following Performance Standards are *Controlled Activities:*

...

(a) *proposed sites* for any purpose other than for *road, open space* or a *designation* where a *building platform* is identified on the plan of *subdivision.* The *building platform* shall be designed to allow for *development* likely in the relevant *Human Environment* Rules.

Assessment of *Controlled Activity* applications will be limited to the matters of *design,* location and *construction* and will be considered in accordance with Assessment Criterion 2(a).

...

2.3 Limited Discretionary Activity

(a) Activities meeting the following performance standards are Limited Discretionary Activities (no other subdivision rules need to be complied with);

(i) boundary adjustments where no existing lot is adjusted in site area by more than 10% if:

- the subject titles prior to the boundary adjustment are all contained within the same Human Environment or Special Area; and
- any existing on-site connection to infrastructure is not affected or is replaced with a new connection.

[15] It will be noted that this rule refers to "no existing lot" rather than "no existing site" but I consider the terms are intended to be synonymous in this context. All the rules deal with situations where any existing site (lot) is not adjusted in area (i.e. increased or decreased) by more than 10%.

[16] "Boundary adjustments" that do not meet the requirements of 2.3(a)(i) require consent as a Discretionary Activity under rule 2.4(c) Waitakere Plan.

[17] *Site* is defined[4] as mean[ing]:

- an allotment comprised in a single certificate of title; or
- an allotment shown on an approved survey plan for which a separate certificate of title could be issued without further consent of the Council; or
- the aggregation of *land* held in more than one certificate of title for the purpose of a particular *development*, where an encumbrance or equivalent is incorporated on each title so that the title cannot be disposed of separately, provided that, in reference to all relevant plan rules other than those relating to minimum *site area*, where an area

4 Waitakere Plan Definitions p 22.

of land is contained or described in a title issued under the Unit Titles Act 1972, that '*site*' shall be deemed to be the whole of the *land* subject to the unit plan; and

- which has legal access to a formed *road*.

[18] Rule 2.3(a)(i) refers to a change in size of a site of 10% or more, rather than a reduction in size only. A boundary adjustment is therefore an activity carried out on all lots that change size not simply those that have parts excised from them. The Council's decision held that conditions could be imposed on proposed Lot 400.

[19] Rule 7 includes these provisions (relevantly):

> **7.1 Controlled Activities**
>
> *Subdivisions* meeting the following Performance Standards are *Controlled Activities:*
>
> (a) the minimum *site area* for each *proposed site* is 4ha; and
>
> (b) each *proposed site* has practical and legal motor vehicle access to a *road*; and
>
> (c) each proposed *rear site* or *shared driveway* has a *driveway* which:
>
> (i) has a *driveway* width of not less than 3.5 metres at any point; and
>
> (ii) serves no more than 4 *rear sites*; and
>
> (iii) is provided with a *carriageway* of not less than 2.5 metres in width;
>
> ...
>
> Assessment of *Controlled Activity* applications will be limited to the matters of:
>
> - the *design*, location, *construction* and *alignment* of *driveways* and *roads*;
> - the *design,* scale and location of *sites*;
> - provision for *landscape treatment;*
> - protection of *natural features*;
> - the location, *design* and *construction* of *infrastructure*;
>
> and will be considered in accordance with Assessment Criteria 7(a)-(z).
>
> **7.2 Limited Discretionary Activities**
>
> ...
>
> (c) any *subdivision* which is otherwise a *Controlled Activity* not meeting the standards in Rule 7.1(c).
>
> Assessment of *Limited Discretionary Activity* applications will be limited to the matters of:
>
> - the *design*, location, *construction* and *alignment* of *driveways* and *roads*;
> - the *design*, scale and location of *proposed sites*;
> - provision for *landscape treatment*;
> - provision for protection and enhancement of *vegetation* (in respect of the *Oratia Structure Plan*, generally as indicated on that *Structure Plan*) and other drainage works and other *infrastructure* works;
> - *driveway construction* between *road carriageways* and individual *sites*; and
>
> — in respect of Rule 7.2(c) will be considered in accordance with Assessment Criteria 7(b), 7(d), 7(f), 7(g), 7(h) and 7(i).

[20] Mr Mawhinney says that subdivision rule 7.2(c) was subsequently renumbered by plan change to 7.2(d) but I cannot confirm that from any of the documents.

[21] There are two other relevant definitions in the Waitakere Plan[5]:

- *Subdivision* is defined as having the meaning given in section 218 RMA;
- Boundary Adjustment means a *subdivision* which is intended for the adjustment of *site boundaries* only and does not result in any increase in the number of *buildable sites*.

[22] The reason it is important to know whether or not Lot 200 is part of the subdivision is that, if it is, different rules may apply to the application.

Relevant form of the RMA and the relevant plan for determining status

[23] Since the application was lodged in November 2011, the relevant form of the RMA is that which was in force up until that date. The relevant form of the RMA includes all amendments up to and including the Resource Management (Simplifying and Streamlining) Amendment Act 2009 and the Resource Management Amendment Act 2011. Establishing that is significant because each of the parties alleges that at some point the other has relied on an irrelevant amendment.

[24] For his part, the appellant alleges that the Council wrongly relied on a subsequent (2017) amendment in its decision[6] by applying an incorrect version of section 11 RMA. Mr Mawhinney says that the consent authority relied on what is now section 11(1A) RMA – introduced by the Resource Legislation Amendment Act 2011 ("the RLAA") – to incorrectly determine that a consent requirement arises for the addition of land to existing Lot 200 DP 210991 on the basis that it contravened a rule in a district plan, but the version of RMA incorrectly relied upon did not come into force until 17 October 2017. The Council accepts[7] that the decision refers to the incorrect version of section 11 of the Act but maintains that this error has no effect on the outcome as the correct provision restricts subdivision that is not expressly allowed by a district plan rule or resource consent.

5 Waitakere Plan Definitions.
6 Auckland Council decision 1 July 2018 para 43.
7 Auckland Council submissions at [12] and [13].

[25] The Council in turn, observes that Mawhinney relies at two points on section 108AA RMA (first in relation to a condition relating to proposed Lot 400). That section was introduced by the RLAA 2017, i.e. well after the application was made. Accordingly I will not consider any argument based on section 108AA.

[26] The current district plan is the Auckland Unitary Plan, which had legal effect under section 86B RMA on 19 August 2016, and which was made operative on 15 November 2016. That plan would have been required to be had regard to by section 88A(2) RMA, but it did not exist or have any legal effect when the subdivision consent in SUB-2011-63 was granted on 22 June 2012. The situation is governed by section 88A RMA, which states that the type or category of activity for which the application was made is required to be processed, considered and decided as an application for the type or category that applied when the application was first lodged in November 2011.

Is there a subdivision of Lot 200?

The law

[27] The RMA contains a five-link chain to establish what is meant by subdivision. It starts with section 11 RMA which states (relevantly):

> **11. Restrictions on subdivision of land**
>
> (1) No person may subdivide land, within the meaning of section 218, unless the subdivision is—
>
> (a) both first, expressly allowed by a national environmental standard, a rule in a district plan as well as a rule in a proposed district plan for the same district (if there is one), or a resource consent and, second, shown on one of the following:
>
> (i) a "survey plan", as defined in paragraph (a)(i) of the definition of survey plan in section 2(1), deposited under Part 10 by the Registrar-General of Land; or
>
> (ii) a ""survey plan", as defined in paragraph (a)(ii) of the definition of survey plan in section 2(1), approved as described in section 228 by the Chief Surveyor; or
>
> (iii) a "survey plan", as defined in paragraph (b) of the definition of survey plan in section 2(1), deposited under Part 10 by the Registrar-General of Land ...

[28] Section 87(b) RMA defines a subdivision consent as consent "... to do something that would otherwise contravene section 11".

[29] Third, in section 218(1)(a) RMA, a necessary element for subdivision of land is that an allotment is divided into "parts". That subsection states in part:

> **218 Meaning of subdivision of land**
>
> (1) In this Act, the term **subdivision of land** means —
>
> (a) **the division of an allotment—**
>
> (i) by an application to a District Land Registrar for the issue of a separate certificate of title for any part of the allotment; or
>
> (ii) by the disposition by way of sale or offer for sale of the fee simple to part of the allotment; or
>
> (iii) by a lease of part of the allotment which, including renewals, is or could be for a term of more than 35 years; or
>
> (iv) by the grant of a company lease or cross lease in respect of any part of the allotment; or
>
> (v) by the deposit of a unit plan, or an application to a District Land Registrar for the issue of a separate certificate of title for any part of a unit on a unit plan[8].
>
> [underlining added]

[30] The fourth link in the chain is that section 220 RMA states (relevantly):

> **220 Condition of subdivision consents**
>
> (1) Without limiting section 108 or any provision in this Part, the conditions on which a subdivision consent may be granted may include any one or more of the following:
>
> ...
>
> (b) Subject to subsection (2), a condition that any specified part or parts of the land being subdivided or any other adjoining land of the subdividing owner be—
>
> (i) Transferred to the owner of any other adjoining land and amalgamated with that land or any part thereof; or
>
> (ii) Amalgamated, where the specified parts are adjoining; or
>
> (iii) Amalgamated, whether the specified parts are adjoining or not, for any purpose specified in a district plan or necessary to comply with any requirement of the district plan; or
>
> (iv) Held in the same ownership, or by tenancy-in-common in the same ownership, for the purpose of providing legal access or part of the legal

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8 Mr Mawhinney said of this: Where the definition of subdivision of land under section 218(1)(b) also has the meaning, in addition to the division of an allotment, of an application to a District Registrar for the issue of a separate certificate of title in circumstances where the issue of that certificate of title is prohibited by section 226 RMA, that provision is not relevant for the purposes of section 11 RMA, pursuant to section 226(2) RMA (for 25 of his applications for declarations – 2015 proceeding).

access to any proposed allotment or allotments in the subdivision;

...

(f) A condition requiring that any easements be duly granted or reserved:

(g) A condition requiring that any existing easements in respect of which the land is the dominant tenement and which the territorial authority considers to be redundant, be extinguished, or be extinguished in relation to any specified allotment or allotments.

(2) For the purposes of subsection (1)(b)—

(a) Where any condition requires land to be amalgamated, the territorial authority shall, subject to subsection (3), specify (as part of that condition) that such land be held in one certificate of title or be subject to a covenant entered into between the owner of the land and the territorial authority that any specified part or parts of the land shall not, without the consent of the territorial authority, be transferred, leased, or otherwise disposed of except in conjunction with other land; and

(b) Land shall be regarded as adjoining other land notwithstanding that it is separated from the other land only by a road, railway, drain, water race, river, or stream.

(3) Before deciding to grant a subdivision consent on a condition described in subsection (1)(b), the territorial authority shall consult with the [Registrar-General of Land] as to the practicality of that condition. If the [Registrar-General of Land] advises the territorial authority that it is not practical to impose a particular condition, the territorial authority shall not grant a subdivision consent subject to that condition, but may if it thinks fit grant a subdivision consent subject to such other conditions under subsection (1)(b) which the [Registrar-General of Land] advises are practical in the circumstances.

Amalgamation conditions are a practical measure in part to stop the need for ever-diminishing lot sizes and the proliferation of certificates of title. Another function is to ensure that the land in certificates of title can be managed appropriately under the RMA and statutory instruments under it. The important point for present purposes is that amalgamation conditions can draw other land, not being subdivided in the strict sense, into a subdivision consent. Conditions can then be imposed on how that land is to be legally held and managed.

[31] The fifth link in the chain is that, under the definition of "resource consent" in section 2 RMA, amalgamation conditions of a subdivision consent are like all conditions on a resource consent – part of the resource consent.

The cases

[32] Mr Mawhinney submits that if an allotment is not divided but is added to, that process is not subdivision of land for the purpose of the RMA. He relies on *Justus v Wairoa Borough Council*[9] a decision under the Town and Country Planning Act 1977. There the Planning Tribunal determined that where there is a boundary adjustment between two allotments, the allotment to which land is being added is not part of the subdivision and the council has no power to impose conditions in relation to that land.

[33] He also relies on *Mawhinney and Anor v Waitakere City Council*[10] ("*the 2005 decision*") where Mr Mawhinney (in the Environment Court's words):

> ... argued that if an allotment is not divided, it is not a subdivision; that division is an essential element of subdivision as defined. Where land is added to an allotment with no division of any part of it, that is neither subdivision of land, nor boundary adjustment, and does not require resource consent.

[34] The Environment Court determined:

> [98] The proposal involves additions of land severed from rural-residential parcels to a common parcel. That process is division of the rural residential parcels, though not a division of the common parcel.
>
> ...
>
> [99] So I accept the appellants' contention in that regard.

The Court discussed the possibility of successive applications to subvert the 10% rule but did not appear to come to any conclusion on that. It did not discuss all the components of a subdivision consent. In particular it did not refer to the definition of "resource consent" in section 2 or the nature of amalgamation conditions under section 220.

[35] The more recent decision of the High Court in *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd*[11] was referred to by the parties. There Palmer J stated:

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9 *Justus v Wairoa Borough Council* (PT) Decision No. W43/82.

10 *Mawhinney and Anor v Waitakere City Council* (EnvC) Decision No. A199/2005 at [94].

11 *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277, (2017) 19 ELRNZ 682, (2017) 18 NZCPR 587 at [46].

Conceptually, the case lies at the intersection of the law of property rights and the law regulating the use of land. Legally, the question comes down to whether the definition of 'subdivision' in s 218 of the RMA should be interpreted:

(a) with a wide meaning extending to arrangements with the same substance and effect of those that are explicitly caught?; or

(b) more strictly according to the text of the words it uses, and the legal concepts to which it explicitly refers"?

[36] Palmer J continued[12]:

[56] What is the correct purposive interpretation of s 218? I agree with Randerson J in *Waitakere City Council* that the RMA is intended to be a code to regulate subdivisions because they can affect the use of land which is the core focus of the RMA. But the definition of 'subdivision' itself, in s 218, is relatively tight. It is defined exclusively to "mean", rather than to "include" six specified means of subdivision in s 218(1)(a) and (b). The words chosen by Parliament to specify those six forms are specific to the forms of subdivision known at law on the enactment of the RMA. It would have been a reasonably simple task for legislative drafting to make the definition non-exhaustive. Parliament could have included an anti-avoidance clause, or included some catch-all clause such as "or other arrangement with similar substance and effect" or used the sort of "deeming" clause in the predecessor s 271(3) or even used a non-exhaustive verb such as "includes" rather than "means". It did none of these things.

[57] Instead, Parliament opted for the relative certainty of reference to five specific means of subdivision using different legal techniques in relation to "part of" an allotment or unit: a separate certificate of title; sale of the fee simple; lease for more than 35 years; a company lease or cross-lease; a unit plan. In referring to "the disposition by way of sale or offer for sale of the fee simple to part of the allotment", in s 218(1)(a)(ii), Parliament invoked the certainty of a long-established concept in property law. It echoed its predecessor in s 271(1)(a). As William Young J noted in *Big River Paradise*, s 218 of the RMA goes well beyond "the core meaning of the word 'subdivision' ".

[58] I consider that, in choosing to limit its definition of 'subdivision' in s 218 to an exhaustive list of specified and relatively certain legal means of subdivision, Parliament did not intend to capture other arrangements of similar substance and effect which do not fall within those specified meanings. The wider contextual purpose of Parliament in regulating the use of land that can flow from inappropriate subdivision was not accompanied by an open-ended definition of what subdivisions are regulated.

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12 *Clearspan* above n 11 at [56] to [58].

[37] That decision was appealed. The parties did not refer to the decision of the Court of Appeal in *Spark New Zealand Trading Limited v Clearspan Property Assets Limited*[13] delivered on 13 July 2018. Since that affirms Palmer J's approach and decision in the High Court, nothing turns on that omission by the parties and I have not felt obliged to seek further submissions from them.

[38] There is one point I should mention. Kós J, giving the Court of Appeal's decision, made four points. The first two[14] and the last[15] largely confirmed the High Court decision. The third point was:

> Thirdly, it is reasonably clear to us why Parliament chose a precise transaction definition in s 218(1). It was not seeking to capture each and any interest created in land, but only those transactions with material environmental implications. As Randerson J observed in *Kitewaho*, subdivisions have physical effects, including more intensive use of land and communal infrastructure services, and precedent effects[16]. It is these matters, in particular the intensity and scale of use of land, that the RMA regulation of subdivisions is concerned with and which s 218 focuses upon. It does so by regulating certain land transactions; those that carry the greater risk of intensifying the use of land and services, and of impairing amenities. Typically, district plans establish land use controls governing minimum lot sizes and the density of occupation thereof. The concern of s 218 is not therefore with land transactions unlikely to intensify development, and thereby neither increase the density of occupation nor impact adversely on infrastructure and other amenities. The reasonably short-term lease originally entered by Spark was not s 218's concern, because it did not affect these considerations. Nor, it might be thought, would a transaction not materially different in its environmental implications from that lease. Neither that lease nor the arrangement between the Goldwaters and Clearspan would in practice facilitate intensified development.

[39] I am slightly troubled by that passage because as this case shows, there may be "environmental implications". In particular Lot 400 (the expanded Lot 200) is now big enough to accommodate a house. Certainly the Council was sufficiently concerned to impose conditions about that.

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13 *Spark New Zealand Trading Limited v Clearspan Property Assets Limited* [2018] NZCA 248.

14 *Spark*, above n 13 at [22] and [23].

15 *Spark*, above n 13 at [25].

16 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) at [102].

Application to the facts

[40] Mr Mawhinney considers[17] that:

> ... there was no jurisdiction to the consent authority to interpret the definition of subdivision of land in s218 as including the addition of land to an existing allotment. In SUB-2011-63, the only subdivision of land involved is the severing of existing Lots 323 and 324 DP 210991. The addition of the severed land to existing Lot 200 DP 210991 is not subdivision of land.

[41] Mr Mawhinney submits that for a 'boundary adjustment' to take place, it was necessary for the allotment to be divided, by the definition of subdivision of land in section 218(1) RMA. There is no division of existing Lot 200 DP 210991 in SUB-2011-63. Therefore, there is no 'boundary adjustment' as that expression is defined in the Waitakere Plan.

[42] On the basis of *Justus* and the *2005 decision*, Mr Mawhinney submits that in this case, the increase in area of existing Lot 200 DP 210991 is not a subdivision of land because it is not to be divided and that the only subdivision of land that will occur is of existing Lots 323 and 324 DP 210991, because they would be divided. He says that the error in the consent authority's processing is demonstrated by the sentence[18] of the consent authority's section 357D decision that "Lot 400 would be the result of a division of three existing lots". In summary, his position is that[19]:

> There was and is no proposal to divide "three existing lots". The proposal is and always has been to divide 2 existing allotments, with land to be added to a 3rd existing allotment. That addition of land is not subdivision of land as defined in s218 RMA, and no subdivision consent is required for the addition. Thus no conditions can be imposed in respect of the addition, because conditions can only be imposed when a resource consent is required, by the operation of s108 RMA.

[43] Mr Mawhinney submits that where the consent authority in effect determined that the addition of land to existing Lot 200 DP 210991 was subdivision of land notwithstanding that existing Lot 200 was not divided, there is no jurisdiction to the consent authority to interpret the RMA as covering subdivision of land that is not

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17 Notice of appeal at 6.35.

18 Auckland Council decision at [40].

19 Notice of appeal at 6.15.

expressly set down in section 218 RMA.

[44] In response the Council submits that *Justus*[20]:

> ... is not applicable to the facts in this situation because it does not clearly indicate which definition of boundary adjustment was being applied and the boundary adjustment in that case was in reality an amendment of the titles to reflect the reality on the ground.

I agree and find this decision impossible to follow.

[45] As for the *2005 decision*, Ms Ford submits that the Commissioner's decision correctly found that this case does not support the applicant's construction. The Commissioner stated that 'it is axiomatic that if some lots are reduced as part of a boundary adjustment subdivision, then some lots will increase, within the confines of the parent lot'. Council submits that this is the correct approach, and that the 'parent lot' in this case includes all of what is to become lot 400. In my view this case can be distinguished as being decided on quite different facts, and because it did not need to consider all the elements of a subdivision consent. In particular it did not consider the extra links in the chain which are amalgamation conditions. Emphasising the "division" aspects of subdivision, Sheppard E J did not need to consider other important (but not necessary in all cases) aspects of a subdivision consent.

[46] I hold that while division of one or more allotments is a necessary part of a "subdivision consent" it is not always sufficient. The conditions of a resource consent are components of the consent[21] and thus amalgamation (and other) conditions are, if imposed, also components of the consent. Any "external" lot with which divided parts of lots are to be amalgamated is also part of the subject of the subdivision consent, and further conditions may therefore apply to it.

[47] I find that the Commissioner's decision took the correct approach albeit for slightly different reasons.

Is the application a boundary adjustment?

[48] There is a further reason for considering Mr Mawhinney is wrong. The Council

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20 Auckland Council submissions at [28].

21 By definition: see section 2 RMA.

considers that what Mr Mawhinney's application describes is a *boundary adjustment* and it would have been inappropriate for Council to rewrite the application as a simple subdivision with no amalgamation. I agree.

[49] These boundary adjustment rules clearly refer not only to the lots which are being subdivided in the strict sense by having land excised from them, but also to the "existing site" (rule 2.1) on "existing lot" (rule 2.3). The connection here is to section 220 RMA which provides for subdivisions to be made subject to amalgamation conditions. The mischief that the rule is directed against is the creation of larger lots which may enable new dwelling houses to be built on them.

[50] In this case the "existing site" (rule 2.1) on "existing lot" (rule 2.3) is being increased by 1,196% (significantly more than the 10% allowed).

[51] For completeness I record that Mr Mawhinney acknowledges that in the case of subdivision rule 7.1, the controlled activity category or class only applies when no more than four rear sites were served by a driveway, referring to subdivision rule 7.1(c)(ii)). He then states in his notice of appeal:[22]

> The subject land is accessed by a driveway that serves more than 4 rear sites (in access Lot 9 DP 166619 which runs between the western end of Anzac Valley Road and the subject land). However, previous subdivision consent had been granted for more than 4 rear sites to be served by a driveway in subdivision consent SPW 20533. That was the subdivision consent that resulted in the creation of existing Lots 200, 323 and 324 DP 210991. If however, it is considered that the subdivision in SUB-2011-63 is not a controlled activity as a result of the number of rear sites served by a driveway, then it falls to being a restricted discretionary activity under subdivision rule 7.2(c) (later renumbered to 7.2(d)). The conditions that can be imposed under the subdivision consent would thereby be limited to those matters to which the consent authority had restricted its discretion, by the operation of s87A(3) and s104C RMA.

[52] Similarly if the proposal for Lot 200 is not a subdivision of that lot, then the matters to which the consent authority restricted its discretion are stated in subdivision rule 7.2(c) (later, possibly, 7.2(d)). They are as follows (relevantly):

> Assessment of Limited Discretionary Activity applications will:
>
> 1) be limited to the matters of:

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22 Notice of appeal at 6.21.

- the design, location, construction and alignment of driveways and roads;
- the design and scale of and the location of building platforms on proposed sites;
- provision for landscape treatment;
- provision for protection and enhancement of vegetation (in respect of the Oratia Structure Plan and the Swanson Structure Plan, generally as indicated on those Structure Plans) and other drainage works and other infrastructure works;
- driveway construction between road carriageways and individual sites.

[53] I accept the Council's argument that because Lot 200 served five (5) not four rear allotments, the subdivision application must be (at best) a restricted discretionary activity. In fact for reasons relating to the size of proposed Lot 400 the application is for a fully discretionary activity.

The merits of the appeal

Introduction

[54] The notice of appeal raises many issues. Those pursued at the hearing relate to:

- activity status and jurisdiction;
- use of proposed Lot 400;
- power and telephone;
- fencing;
- location of driveways;
- administration charges.

[55] Three of those grounds of objection are not relevant. These relate to:

- the cost of complying with the conditions;
- the current ownership of the land; and
- section 108AA of the Act.

[56] The cost of complying with the condition is not directly relevant to reasonableness although it was one factor to be considered when deciding whether or not to grant consent for the reasons stated by the High Court in *New Zealand Rail Limited v*

Marlborough District Council[23]:

> Financial viability ... is not a topic or a consideration which is expressly provided for anywhere in the Act. ... [I]n any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

[57] I emphasise that questions of ownership of the existing lots are completely irrelevant to this decision, and I do not have any regard to the factual situation described in the court's recent decision – *P W Mawhinney v Auckland Council* [2018] NZEnvC 228.

[58] I have already held that section 108AA was introduced after the application was lodged and does not have retrospective effect.

[59] I will not consider these issues any further. The general approach to this appeal is that the relevant matters are set out in section 104. They are the subject of extensive case law which establishes that conditions must be[24]:

a. for a resource management purpose, not for an ulterior one;
b. fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and
c. not to be so unreasonable that a reasonable planning authority, duly appreciating its statutory duties, could not have approved it.

[60] The Waitakere Plan provides a list of matters to be assessed. Criteria 2(n) and 2(z) are particularly relevant. They require consideration of:

...

2(n) the extent to which boundary adjustments enable better use to be made of land;

...

2(z) the extent to which the subdivision is designed to accommodate potential or existing development in accordance with other relevant rules of the plan made possible by the boundary adjustment.

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23 *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 at p 22.

24 *Newbury DC v Secretary of State for the Environment* [1981] AC 578 approved in *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, (2006) 13 ELRNZ 33, [2007] 2 NZLR 149, [2007] NZRMA 137.

[61] Mr Mawhinney claims[25] that the Council erred[26] by treating the subdivision of land in SUB-2011-63 as a discretionary activity and considering it against those assessment matters. In other words his appeal is not on the merits but on a legal point which I have decided against him.

Use of Lot 400

[62] Condition GL7 prohibits the use of the land in proposed Lot 400 for residential purposes.

[63] Mr Mawhinney asserts that condition GL7 is *ultra vires* in that it is outside:

(a) the list of matters to which the consent authority has restricted its discretion in subdivision rule 7.2(d). It therefore contravenes section 87A(3) and section 104C RMA;
(b) the list of matters for which the consent authority has reserved control in subdivision rule 7.1. It therefore contravenes section 87A(2) and section 104A RMA;
(c) the powers conferred on the consent authority in section 106, section 108 or section 220 RMA.

[64] The reasons for condition GL7 prohibiting the erection of a residential building in Lot 400 or using it for residential purposes are set out at section 2.4 (on page 4 of the consent). The reasons are:

(a) a previous subdivision consent, SPW 18323 granted 20 March 1995, purportedly involved the land in SUB-2011-63 and was based on a purported averaging of areas, whereby 23 parcels of less than 5 ha (minimum subdivision area at the time) were held jointly with a large common area[27] for an average parcel area of 5 ha;
(b) such purported historic averaging is a relevant consideration under section 104(1)(c) RMA;
(c) there is a possibility that Lot 400 could be used for residential purposes;

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25 Notice of appeal at 6.59.
26 Auckland Council decision at [59].
27 Lot 8 DP 166619 comprising 58.7169, since subdivided into Lot 1 DP 3230387 of 51.4860 ha and Lot 922 DP 320387 of 7.2309 ha.

(d) the inference seems to be that such use would be contrary to the purported averaging;

(e) the "planning history" with "an averaging approach" is quoted at para 113 of the consent authority's section 357D decision.

[65] The Council considers that the condition regarding the use of Lot 400 is for a resource management purpose and is reasonable. Counsel submits:[28]

> It is required to give effect to the statement in the applicant's applications that no new development opportunities are created because of the proposal. The applicant has extensively addressed the averaging issue both in the objection and in the notice of appeal. However, the objection was not upheld on that basis. Condition GL7 is central to the decision to grant the consent, as it is central to the definition of activity for which consent is being granted.

I accept that because there are "environmental implications" to use Kós J's phrase in *Clearspan* and they need to be managed.

Power and telephone conditions

[66] The Council submits that:[29]

> The provision of power and telephone connection is required as part of the standard servicing of any subdivision and is for a resource management purpose, to enable the users of the lots created [to] provide for their wellbeing and health and safety. Without conditions 1(a), 1(d), GL 5 and GL6 the ability of the consent to ensure adequate provision for electricity and telecommunications is in question, and would be an example of the 'lines on a map' arguments that have been rejected in previous decisions.

I accept the Council's position on this matter. The conditions relating to power and telephone are relevant to the provision of infrastructure under rule 7.1(c) and under criterion 7(d). I note that applies even if the subdivision is a restricted discretionary rather than a discretionary activity.

28 Auckland Council submissions at 36.

29 Auckland Council submissions at 35.

Fencing restrictions

[67] Condition PK1[30] seeks to restrict the type of fence that can be erected along the western boundary with Lot 2 DP 193044 which is a scenic reserve. It requires a consent notice to be registered.

[68] Mr Mawhinney says that[31]:

> The registered proprietors of the existing Lots 323 and 324 DP 210991 will not agree to such a consent notice being registered on their titles. It would be a blot on their titles. For instance, under s221(4) RMA, such a consent notice is an instrument that creates and (sic) interest in their land. Any subsequent charge against their land such as a mortgage would require the prior consent of the interest holder i.e. the consent authority. Any mortgagee exercising a power sale would not be able to provide a clean title under s105 of the Land Transfer Act 1952 by the operation of s221(4)(b) RMA.

[69] Mr Mawhinney submits that the condition is *ultra vires* because it goes beyond:

(a) the list of matters to which the consent authority has restricted its discretion in subdivision rule 7.2(d). It therefore contravenes section 87A(3) and section 104C RMA;

(b) the list of matters for which the consent authority has reserved control in subdivision rule 7.1. It therefore contravenes section 87A(2) and section 104A RMA.

[70] Mr Mawhinney says that conditions must be fairly and reasonably related to the subject matter of the approval[32] and that Condition PK1 does not fairly and reasonably relate to anything authorised by SUB-2011-63 and is thus contrary to the *Newbury*[33] tests. He referred to *Brookes v Queenstown Lakes District Council*[34] where the Environment Court noted:

> ... Indeed, not only is there no need to do that, but in our view conditions such as those are

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30 SUB-2011-63 p 24.

31 Notice of appeal at 6.79.

32 Mr Mawhinney cites *Kent City Council v Kingsway Investments (Kent) Ltd* [1971] AC 72; [1970] 1 All ER 70 (HL); *Hall & Co Ltd v Shoreham-By-Sea UDC* [1964] 1 WLR 240; [1964] 1 All ER 1 (CA).

33 Referring to *Newbury DC v Secretary of State for the Environment* [1981] AC 578.

34 *Brookes v Queenstown Lakes District Council* (EnvC) C81/94 at [1].

> unlawful. A consent to subdivide is a separate and distinct consent from a consent to erect a dwelling. The Act makes this perfectly clear – see section 87. Hence the conditions that Mr Garland referred to on page 2 of his evidence-in-chief should not be imposed on a consent to subdivide.

[71] Relying on that, Mr Mawhinney submitted that[35]:

> Similarly, the erection of a fence is a land use under s9, not subdivision of land as defined in s218 RMA and subject to s11. If any consent is required for the fence, it would be a land use consent as defined in s87(a) RMA, not a subdivision consent as defined in s87(b) RMA.

[72] The Council submitted the conditions regarding fencing are relevant to landscape treatment under rule 7.1(c). It notes that the condition is only triggered if the applicant seeks to erect a fence on the boundary. I agree.

Location of driveways

[73] Condition GL4[36] requires:

> ... confirmation from a cadastral surveyor that services and driveways have been located entirely within easements or allotment boundaries to the satisfaction of the Manager: Resource Consents.

[74] The notice of appeal claims the condition is unreasonable on the following grounds[37]:

> (a) There is no change to boundaries outside of existing Lots 200, 323 and 324. Therefore, there will be no change to the location of driveways or easements in relation to boundaries outside of those allotments, or the existing arrangements currently applying.
> (b) The common area in existing Lot 200 is to be expanded into proposed Lot 400, so that even if the location of driveways and easement in relation to the new boundaries is affected, that will have no practical effect on the use of the driveways and easements for the owners of the parcels the driveways serve and the dominant tenements in the easements, because even more driveway facility and easement area will be include (sic) in the common land.
> (c) The position of the existing carriageways in relation to boundaries was located by a

35 Notice of appeal at 6.89.
36 Subdivision consent SUB-2011-63, p 25.
37 Notice of appeal at 6.124.

> cadastral surveyor under a requirement of the consent authority prior to it issuing its certificate under s224(c) when the existing the existing (sic) parcels were subdivided under consent SPW 20533. That is, the consent authority already holds the confirmation that it requires under condition GL4 in SUB-2011-63.

[75] There is a further ground[38]:

> The cost of complying with condition GL4 could be in excess of $10,000. Given that there is no increase in value of the subject land as a result of the subdivision that might to (sic) otherwise used to fund costs (e.g. no additional allotments), the cost would render the subdivision uneconomic and the subdivision consent nugatory.

[76] Mr Mawhinney alleged[39]:

> Since the objections to the conditions in SUB-2011-63 were lodged in 2012, subdivision consent has been granted in SUB-2015-671 that involves existing Lot 323 DP 210991 and the contiguous Lot 309 DP 210991. The consent enables a new access parcel running west from existing Lot 200 DP 210991 in what is stated as Lot 3 in consent SUB-2015-671. The 1st bullet on the 1st page of that consent records in part:
>
> > "The existing driveway in which the proposed JOAL relates, is in an acceptable condition with no physical changes required or proposed."
>
> That is, the existing all-weather carriageway is known by the consent authority to lie within the boundaries of proposed Lot 3.

[77] Counsel for the Council submitted that the decision was correct to find that the condition regarding survey of driveways was reasonable. The change in the south eastern boundary of lot 323 meant the condition is needed to ensure practical and legal access. The Council says that this is a resource management matter, and a failure to provide legal and practical access is a ground on which subdivision consent could have been declined. Further, if some of the accessways have been surveyed, then Mr Mawhinney already holds the information to comply with this condition, at least in part[40].

[78] I consider all these points are well made and that the condition is within jurisdiction, for a proper purpose, and reasonable.

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38 Notice of appeal at 6.125.
39 Notice of appeal at 6.127.
40 Auckland Council submissions at 37.

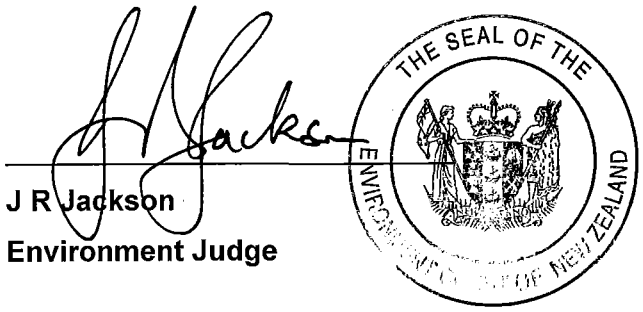
Administrative charges

[79] I find that the charges of $2,476.00 are eminently fair and reasonable for the reasons given in the Council's decision.

Declarations 73 to 87 in the 2015 proceeding

[80] These applications relate to application SUB-2011-63 lodged with the Council (or a predecessor) by the Forest Trust on 17 November 2011 and in amended form in 2012. This was an application for a boundary adjustment in respect of three lots being Lots 200, 323 and 324 DP 210991.

[81] At the hearing of the applications for declarations Mr Mawhinney agreed that the declarations are now superfluous and that all the issues are already before the court with the section 358 appeal. Accordingly these applications should be struck out.



J R Jackson
Environment Judge