BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KOOTI TAIAO
I TĀMAKI MAKAURAU ROHE **ENV-2024-AKL-000**

UNDER	the Resource Management Act 1991 (**RMA**)
IN THE MATTER	of an application under section 311 of the RMA for a declaration as to the activity status of subdivision in Chapter E39 Subdivision – Rural of the Auckland Unitary Plan (Operative in Part) (**AUPOP**)
BETWEEN	**CATO BOLAM CONSULTANTS LIMITED**
	BETTER LIVING LANDSCAPES LIMITED
	WARKWORTH SURVEYING LIMITED
	FLUKER SURVEYING LIMITED
	BUCKTON CONSULTING SURVEYORS LIMITED
	TERRA NOVA PLANNING LIMITED
	PARALLAX CONSULTANTS LIMITED
	Applicants
AND	**AUCKLAND COUNCIL**
	Consent Authority

AFFIDAVIT OF PATRICIA JOY GILES IN SUPPORT OF APPLICATION FOR DECLARATION

22nd **MAY 2024**

Hornabrook Macdonald Lawyers
Level 5, 12 O'Connell Street
Auckland
Solicitor acting: Samantha Hiew
Counsel acting: Kitt Littlejohn

DX CP 21015
PO Box 91845
Phone [09] 353 7999
Fax [09] 353 7599

I, **PATRICIA JOY GILES**, planner, of Auckland, swear:

Introduction

1. My full name is Patricia Joy Giles. I am a resource management planner and hold the qualifications of a Bachelor of Surveying.

2. I am a senior planning consultant at Fluker Surveying Limited (**FSL**). I have been working for FSL for 14 years. I held various roles prior to this in the planning field.

3. I am authorised to give this affidavit on behalf of FSL and in support of the application for declaration.

Scope of declaration and issue

4. Together with a number of other planning and surveying companies, FSL has applied for a declaration in relation to the status of subdivision in Chapter E39 Subdivision – Rural of the AUPOP. Specifically, the declaration asks whether certain types of rural subdivision activities should be processed as a (restricted) discretionary activity or as a non-complying activity.

5. The four types of subdivision activity addressed by the declaration application are:

   (a) in-situ subdivision under rules A16 and A17C in Table E39.4.2 where it meets standard E39.6.4.4 and, in relation to Table E39.6.4.4.1, where the Area of Feature Protected on the site is as required by the Table for the number of in-situ sites sought;

   (b) in-situ subdivision under rule A18 in Table E39.4.2 where it meets standard E39.6.4.5 and, in relation to Table E39.6.4.5.1, where the Established Area of Native Revegetation Planting Protected on the site is as required by the Table for the number of in-situ sites sought;

   (c) Transferable Rural Site Subdivision (**TRSS**) under rule A21C in Table E39.4.2 where it meets standard E39.6.4.6 and, in relation to Table E39.6.4.4.1, where the Area of Feature Protected on the site is as required by the Table for the number of TRSS sites sought; and

   (d) TRSS under rule A22 in Table E39.4.2 where it meets standard E39.6.4.6 and, in relation to Table E39.6.4.5.1, where the Established Area of Native Revegetation Planting Protected on the site is as required by the Table for the number of TRSS sites sought.

6. In all of these rules the issue sought to be clarified by the declaration is the way in which the "Area of Feature Protected" and "Established Area of Native Vegetation" referred to in Tables E.36.6.4.4.1 and E39.6.4.5.1 respectively, is to be measured. This is important because compliance with that measure either makes the application (restricted) discretionary (where it complies with this standard), or non-complying (where it does not comply with this standard), assuming all other standards are also complied with.

7. After conferring with several of my colleagues, it is clear that a difference of opinion has arisen between Council resource consent officers and several of the applicants as to how to undertake this measurement.

8. In numerous recent cases Council has said that the area required under the respective tables needs to comprise a single, continuous area. However, other experienced planning consultants preparing applications in reliance on the rules consider that the respective tables do not say this. These planners (and I am one of them) interpret the rules such that provided the area to be protected or established meets the total area required for the number of in-situ or TRSS lots sought, that is compliance, and it is irrelevant that not all of the area is comprised in a continuous, single area or feature. That is, that it may be comprised in smaller portions on the same site and still comply with the applicable standard (albeit that where the area is indigenous vegetation to be established all portions must be contiguous with existing Significant Ecological Area).

Background to declaration

9. Appeals in relation to AUPOP Chapter E39 Subdivision – Rural were not finally determined by the Environment Court and concluded provisions confirmed until 2021 by the Court's decision *Cabra Rural Developments Limited & Ors v Auckland Council* [2021] NZEnvC010.

10. In the final stages of resolving the provisions of Chapter E39 before the Environment Court, the Council sought to modify the wording of Note 1 to Table E39.6.4.4.1 to add a requirement that SEA features to be protected must be "contiguous".

11. This proposal was rejected by the Environment Court, which noted as follows:[1]

> *[27] The main difference is that the Council has added a requirement for the areas to be contiguous on a site in order to qualify as SEA for protection. This is not a matter which was discussed before the court. The issue of vegetation being contiguous was discussed only in relation to* ***re-vegetation*** *where this method is used for deriving subdivision rights. This is new planting not existing SEA.*

[1] *Cabra Rural Developments Limited & Ors v Auckland Council* [2021] NZEnvC010

[28] We cannot see the grounds for a change of the kind now being sought by the Council and it would seem to reduce the protection afforded existing identified and qualifying SEA. We accept the Appellants arguments on this matter…

12. The outcome was that Note 1 to Table E39.6.4.4.1 was confirmed in its current form in the AUPOP as follows:

> ***Note 1 for Table E39.6.4.4.1**: Where indigenous vegetation is proposed to be protected using Table E39.6.4.4.1. the area of indigenous vegetation protected can consist of either indigenous vegetation identified in the Significant Ecological Areas Overlay or shown on the Kawau Island Rural Subdivision SEA Control or meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) or a combination of both. Where a wetland is proposed to be protected using Table E39 Subdivision - Rural Auckland Unitary Plan Operative in part 19 E39.6.4.4.1 the area of wetland can consist of either wetland identified in the Significant Ecological Areas Overlay or shown on the Kawau Island Rural Subdivision SEA Control or meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) or a combination of both. For example, where the indigenous vegetation comprises 1 ha of indigenous vegetation identified in the Significant Ecological Areas Overlay and 1 ha meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) the 2ha area will be sufficient to generate one site for TRSS.*

13. The Council has not sought to change the AUPOP since 2021 to change this Note, nor either of the Tables, to achieve the outcome it endeavoured to have the Environment Court incorporate in 2021. Despite this, as the example I set out below in this affidavit shows, the Council has ignored the Court's decision and continued its pre-AUPOP practice (per the legacy Auckland Council District Plan Operative Rodney Section 2011 – Chapter 23 – Subdivision and servicing) of requiring any areas of bush or wetland being protected to be of a continuous minimum area. I note though, unlike the AUPOP, the legacy plan rules 7.14.3.2.1 (a) and 7.14.3.2.5 (a) (bush) and 7.14.3.3.2 (a) (wetland), included the word "continuous".

Example of Council approach to rules in question

14. The application which brought this issue to light for FSL involves a proposal to create one additional site suitable for in-situ development through the protection of a total area of 7.01ha of indigenous vegetation identified in the Significant Ecological Areas (**SEA**) Overlay of the AUPOP. A copy of the AUPOP planning map showing the application site and mapped SEA is attached and marked "**A**". A copy of the proposed scheme plan of subdivision is attached and marked "**B**".

15. The application was prepared and lodged on 8 December 2022 under rule A16 of Table E39.4.2 in the AUPOP on the basis that it complied with Standard 39.6.4.4, in terms of the minimum area threshold being met, but was non-complying for other reasons.

16. However, since the application was lodged Auckland Council processing staff have maintained that it is also a non-complying under rule A17 instead, because the SEA feature to be protected is not comprised of a single continuous area that exceeds 4ha in area, but rather is made up of five areas of SEA feature ranging in size from 0.27ha to 2.6ha, although it meets the minimum area threshold of 4ha of indigenous mapped SEA area to be protected.

17. Since this position has been communicated, FSL's client applicant has attempted to challenge the Council processing officer's interpretation of the relevant Table and standard.

18. In July 2023, FSL sought legal advice for its client from barrister Kitt Littlejohn. Mr Littlejohn had been heavily involved in the final AUP Rural subdivision appeals and was familiar with the issues. Mr Littlejohn's advice, which FSL's client waives any privilege in, was that 'continuousness' of the SEA "Area to be Protected" was not a requirement of the relevant rules and Council's interpretation was wrong. A copy of Mr Littlejohn's opinion dated 15 August 2023 is attached and marked "**C**".

19. FSL's client shared its legal opinion with the Council processing officers in the hope that they would change their mind and assess this aspect of the application as complying (i.e., (restricted) discretionary). Attached and marked "**D**" is a copy of an email trail between myself and Mr Dan Rodie of Auckland Council following my enquiry of Ms Riddell as to Council's response to the legal opinion FSL had supplied. In short, Mr Rodie advised that he had sent Mr Littlejohn's opinion to Council's external lawyers for a response. In his email to FSL of 30 August 2023, Mr Rodie comments on the legal opinion and refers to what he calls "Council's existing practice" as follows:

> *The Court did not comment on the existing council practice of requiring the first area threshold relating to the protection of indigenous vegetation or wetland to be met by one contiguous area of indigenous vegetation or wetland respectively and then the subsequent threshold areas to be met by adding other areas of indigenous vegetation or wetland to that initial area. Council has continued to follow that practice.*

20. My understanding is that while the practice may have previously occurred in Council, that was because in the legacy Auckland Council District Plan Operative Rodney Section 2011 – Chapter 23 – Subdivision and servicing, rules 7.14.3.2.1 (a) and 7.14.3.2.5 (a) (bush) and 7.14.3.3.2 (a) (wetland) expressly included the requirement that the areas to be protected must be "continuous". However, there is no such requirement in AUPOP standard E39.6.4.4, nor in Table E39.6.4.4.1 that relates to the standard. Excerpts of these rules from the legacy plan (Auckland Council District Plan Operative Rodney Section 2011) are attached and marked "**E**".

21. Further to this, Council officers (Mr Dan Rodie and Ms Helen McCabe) then required that the processing officer, Ms Philippa Riddell, seek advice from the Auckland Council Policy Team. I was notified of the request for the Council processing officer to seek this further advice from the policy team on 9 October 2023. A copy of the email trail confirming this is attached and marked "**F**".

22. The advice from Auckland Council Policy team, which was prepared as a memorandum by Ms Alison Pye, is undated but was provided to me on 23 November 2023. A copy of this memorandum is attached and marked "**G**". It confirms the Auckland Council view that because the bush area to be protected by this application was not contained in one contiguous area of more than 4 ha, the application was a non-complying activity. The analysis from Ms Pye states on page 1:

> *The interpretation of the rule as requiring a contiguous 4ha area to meet the qualifying threshold is the correct interpretation of the rule.*

23. Given this dispute as to activity status, the application was then scheduled to be decided by a Duty Commissioner. Council Officer Helen McCabe wrote a memorandum to the Duty Commissioner dated 31 January 2024 a copy of which is attached and marked "**H**". In this memorandum Ms McCabe expressed her view that the first area threshold within the Table E39.6.4.4.1 must be met in one contiguous area. The memorandum states on page 2 paragraph 4 that:

> *Council's stance with respect to both In-Situ and TRSS subdivisions based on the protection of indigenous vegetation, being either SEA or meeting one of the SEA factors, is that the first area threshold within Table E39.6.4.4.1 of the AUP(OP) must be met by one contiguous area of qualifying indigenous vegetation and then the next area threshold can be met through the addition of other non-contiguous areas of qualifying indigenous vegetation.*

24. The memorandum also states on page 4 paragraph 2 that:

> *In this instance, the applicants are seeking to create one in-situ lot through the protection of five individual areas of indigenous vegetation (SEA) (Areas B – F) all sized between 0.27ha and 2.10ha in area; totalling 8.28ha. Therefore, all the areas proposed for protection fall considerably short of the 4ha minimum area threshold required for protection within Table E39.6.4.1.1 to yield one in-situ lot.*

25. The memorandum goes on to say that:

> *Therefore, the approval of this application would likely encourage similar subsequent applications seeking the creation of in-situ lots based on the protection of undersized areas of indigenous vegetation within the rural zone, thereby creating a precedent. This*

would significantly undermine the rural subdivision framework of the AUP(OP) and unravel the balance of incentives to undertake TRSS subdivision and diminish the benefits which underpin the outcomes intended from the TRSS framework.

26. A confusing aspect of Ms McCabe's opinion expressed in this memorandum is that in January 2024, I was inadvertently made aware of an approval for a subdivision application under the same rule and table, but for a TRSS lot. In that case, the "area" threshold of 2ha for a TRSS lot was not contained within one contiguous area. This was not referred to as an aspect of non-compliance with Table E39.6.4.4.1 in the decision. The decision was issued in November 2023, under delegated authority, by the same officer, Ms McCabe, who wrote the memorandum for the Duty Commissioner (attachment "H" referred to above).

27. As an aside, having relooked at the wording of rules A16 and A17C in Table E39.4.2, and standard E39.6.4.4 and, in relation to Table E39.6.4.4.1, I do not understand the interpretation of the relevant provisions as per the wording and analysis put forward by Council officers that the first area has to be continuous, but subsequent areas beyond that do not. The wording within the rule, standard and table is not different for the first area, or subsequent areas. There is no word "continuous" or "contiguous" in this rule, standard, or table, or the policies and objectives which relate to this rule.

28. After being provided Ms McCabe's memorandum, FSL was advised that the application was set down before the Duty Commissioner on 8 February 2024. On 23 February we were advised by Council Officer Ms Helen Mc Cabe that

> *The Duty Commissioner has asked questions regarding Council's position concerning the 'need for a feature to be contiguous', in light of the comments made within Kitt Littlejohn's letter. Given the questions raised, we are having to seek Legal input.*

29. On 4 March FSL was then advised by Council Officer Ms Helen McCabe that:

> *Further to your e-mail and as way of update, we have since received a response from Legal regarding queries raised by the Duty Commissioner.*
>
> *As you'll no doubt be aware the response is confidential and legally privileged. Therefore, we are unable to provide you with a copy of the response.*
>
> *However, I can advise that the response does substantiate my memo.*

30. A copy of the email trail regarding this exchange is attached and marked "**I**". On behalf of its client, FSL insisted that it be provided with a copy of the legal advice referred to by Ms McCabe, it having been provided to the Duty Commissioner in question. This request was refused.

31. On 8 March FSL was supplied with documentation from the Duty Commissioner via a Council administrator, which included "Directions from the Duty Commissioner" dated 8 March 2024. These directions are attached and marked "**J**". In paragraph 2, the Duty Commissioner notes:

> *The details of the actual application, including the resource consents required, are set out in Ms Philippa Riddell's (Consultant Planner) planning report. I have also received comments from Ms Helen McCabe (Council's Team Leader) supported by Council's Senior Policy Planner (Ms Alison Pye) who are of the view that the application should be declined consent on policy grounds. It is on this basis that the application was sent to me for my consideration and the disagreement on how the provisions of the AUP:OP's Table E39.6.4.4.1 should be applied as they relate to the nature (contiguous or not) of the area of protected vegetation required to take advantage of the in situ provisions for subdivision in the Rural Protective Zone (sic).*

32. This illustrates the extent to which the interpretation of the rule and table is an important aspect in the evaluation of subdivision consent applications under the AUPOP, and the issue at hand.

33. The document at attachment J included the direction to arrange a hearing.

34. On 20 March 2024, FSL received a further refusal from Ms Helen McCabe for Council to provide a copy of the response from Council Legal obtained by the Duty Commissioner and referred to in his decision-making documentation, relating to the subdivision. A copy of this email exchange is attached and marked "**K**".

35. A copy of the Duty Commissioner's report dated 7 March 2024, confirming the application is to proceed on a non-notified basis, is attached and marked "**L".** I note that at page 2 of this report, the documentation read in assessing the application is outlined and bullet point 2 refers to: "*Council's legal advice on this matter dated 1 March 2024;*"

36. Having received the documents noted above, and on the basis of the refusal by Council to provide a copy of their legal advice, FSL's client considered it appropriate under the circumstances to place its application on hold. That is the current status of the application – effectively awaiting guidance from the Court on this plan interpretation impasse.

Conclusion

37. In my opinion there is nothing in the AUPOP to support the Council Officer interpretation. To the contrary, Objective E39.2(14)(a) and Policy E39.3(15)(b) are focussed on limiting the creation of in-situ sites to situations where indigenous vegetation is protected. The method to achieve that policy is set out in the rules noted above and Standard E39.6.4.4. Neither the policy, nor the method, are qualified in the manner suggested by Council staff: it is the total area being protected that justifies the additional lot. I consider that Council's interpretation is not supported by the plain words of the provisions. I consider that the interpretation is directly contrary to the policy intent of the AUPOP.

38. In order to be provided with transparency, clarity and certainty on this matter, FSL has joined with the other applicants to seek this declaration.

SWORN at SILVERDALE this 22ND day of May 2024 before me:

P J Giles

~~A Barrister/Solicitor of the High Court of New Zealand or~~
Justice of the Peace

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

"A"

This is the annexure marked "**A**" referred to within the Affidavit of Patricia Joy Giles sworn at
on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Sheffield Road

Area C
SEA
0.27 ha

Area B
SEA
1.50 ha

1
DP 162015

2
DP 497858

Area D
SEA
2.60ha

Area E SEA 2.10 ha

Area F
SEA 0.47 ha

Allot SW75
PSH OF Ararimu

N

Notes

Significant Ecological Areas are from Auckland Council Geomaps

Title

- SEA Area

Title

Mapped SEA on Lot 1 DP 164642

REGISTERED PROFESSIONAL SURVEYORS,
LAND DEVELOPMENT PLANNING
& ENGINEERING

fluker
SURVEYING LTD

184 Hibiscus Coast Highway
Orewa
Phone: (09) 427 0003

PO Box 84
Red Beach
Hibiscus Coast 0945
URL: www.fluker.co.nz
Email: reception@fluker.co.nz

Scale
1 : 3000 (A3)

Drawn
RP

Date
30/04/2024

Survey Ref.
16683

"B"

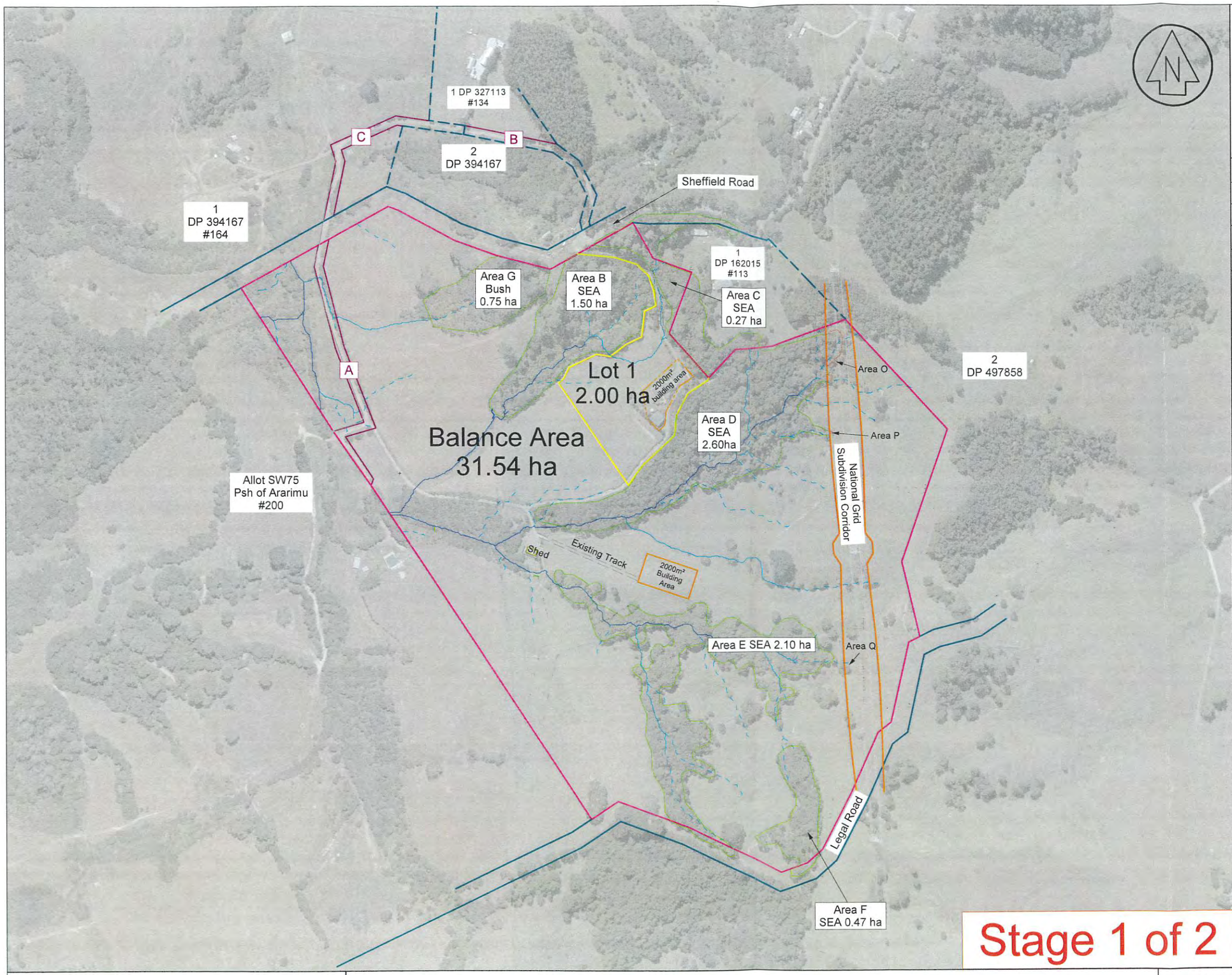
This is the annexure marked "B" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

"B"



Zoning: Rural - Rural Production Zone
Legal Description: Lot 1 DP 164642
Record of Title: NA93C/829
Site Address: 135 Sheffield Road
Helensville
Total Area: 33.5445 ha

NB: Dimensions and areas are subject to survey

Existing Subject Easement

Purpose	Shown	Servient Tenement	Created By
ROW	A	Balance Lot hereon	Transfer B311540.2

Existing Appurtenant Easement

Purpose	Shown	Servient Tenement	Created By
ROW	B	Lot 1 DP 327113	Transfer B311540.1
	C	Lot 1 DP 394167	

Stage 1

Creation of Lot 1 and Balance Lot and protection of areas B – E

Stage 2

Creation of Lot 2 and Lot 3 and protection of areas H and I

Proposed Covenants

Areas B- G are to be subject to a land covenant to protect native bush.

Area O-Q

Areas to be excluded from protected vegetation covenant as required by Transpower, to allow Transpower to undertake maintenance to the National Grid and provide for the Transpower required vegetation trimming corridor as is required by Transpower. This will allow Transpower to undertake vegetation trimming activity in this area that is controlled by both the Electricity (Hazards from Trees) Regulations 2003 and the Resource Management Act 1991

Legend:

- Proposed Fencing
- Overland Flow Paths

Details:

S & S Glasson
135 Sheffield Road
Helensville

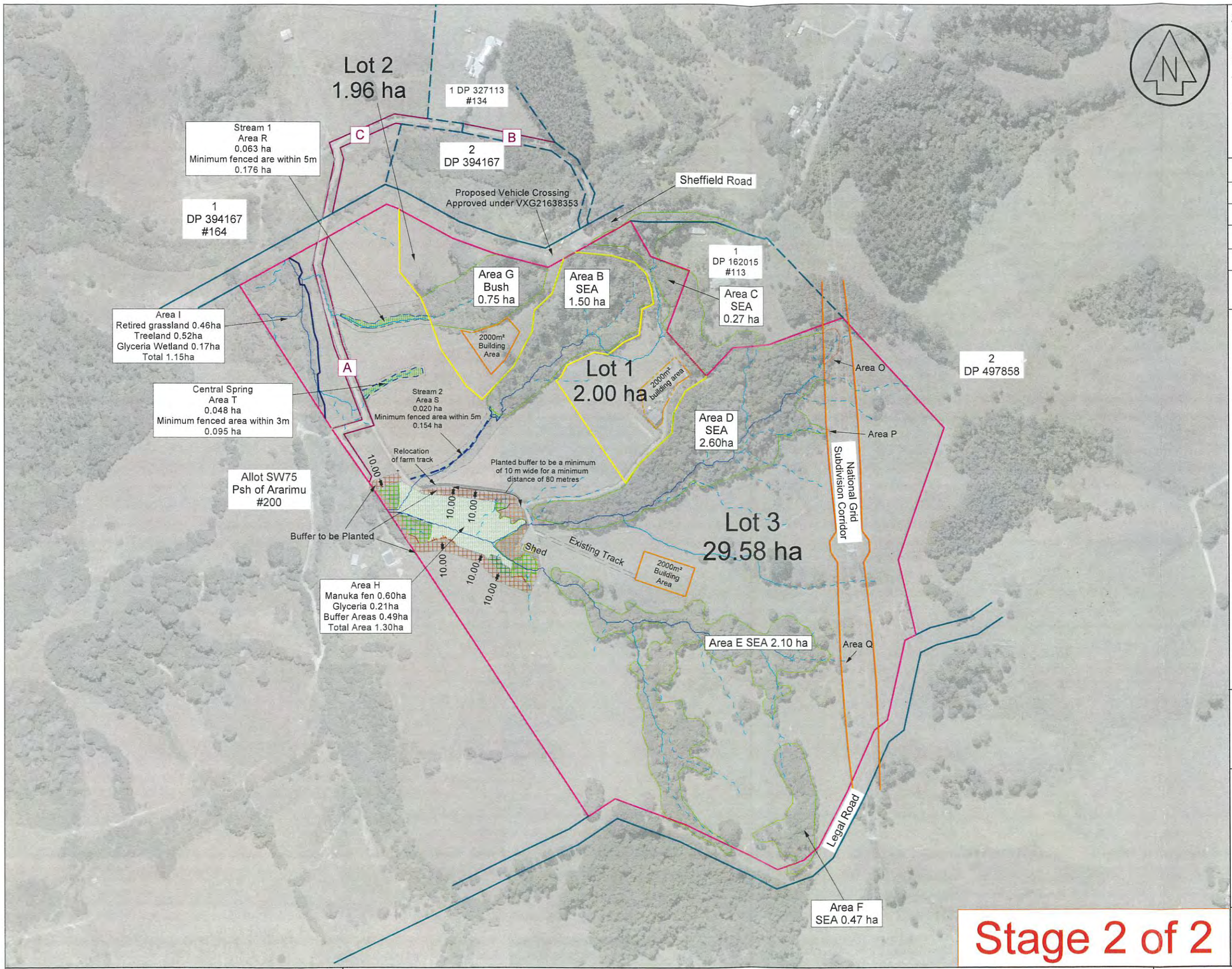
Stage 1 of 2

LAND DISTRICT: North Auckland
COUNCIL: Auckland

Lots 1 - 3 Being a Proposed Staged Subdivision of Lot 1 DP 164642

REGISTERED PROFESSIONAL SURVEYORS, LAND DEVELOPMENT PLANNING & ENGINEERING
fluker SURVEYING LTD
184 Hibiscus Coast Highway, Orewa
PO Box 84, Red Beach, Hibiscus Coast 0945
Phone: (09) 427 0003
URL: www.fluker.co.nz
Email: reception@fluker.co.nz

Scale 1:3000 (A2)
Date 08/09/2023
Ref 13477 M
Pg 1/2



Zoning: Rural - Rural Production Zone
Legal Description: Lot 1 DP 164642
Record of Title: NA93C/829
Site Address: 135 Sheffield Road
Helensville
Total Area: 33.5445 ha

NB: Dimensions and areas are subject to survey

Existing Subject Easement

Purpose	Shown	Servient Tenement	Created By
ROW	A	Lot 3 hereon	Transfer B311540.2

Existing Appurtenant Easement

Purpose	Shown	Servient Tenement	Created By
ROW	B	Lot 1 DP 327113	Transfer B311540.1
	C	Lot 1 DP 394167	

Stage 1

Creation of Lot 1 and Balance Lot and protection of areas B – E

Stage 2

Creation of Lot 2 and Lot 3 and protection of areas H and I

Proposed Covenants

Stage 1
Areas B- G are to be subject to a land covenant to protect native bush.

Stage 2
Wetland area H is to be subject to a land covenant to protect wetland.
Area R,T,S, and, I is to be subject to a covenant to protect bush.

Area O-Q

Areas to be excluded from protected vegetation covenant as required by Transpower, to allow Transpower to undertake maintenance to the National Grid and provide for the Transpower required vegetation trimming corridor as is required by Transpower. This will allow Transpower to undertake vegetation trimming activity in this area that is controlled by both the Electricity (Hazards from Trees) Regulations 2003 and the Resource Management Act 1991

Legend:

- Proposed Fencing
- Overland Flow Paths

Details:

S & S Glasson
135 Sheffield Road
Helensville

Stage 2 of 2

LAND DISTRICT: North Auckland
COUNCIL: Auckland

Lots 1 - 3 Being a Proposed Staged Subdivision of Lot 1 DP 164642

fluker SURVEYING LTD
REGISTERED PROFESSIONAL SURVEYORS, LAND DEVELOPMENT PLANNING & ENGINEERING
184 Hibiscus Coast Highway, Orewa
PO Box 84, Red Beach, Hibiscus Coast 0945
Phone: (09) 427 0003
URL: www.fluker.co.nz
Email: reception@fluker.co.nz

Scale	1:3000 (A2)
Date	08/09/2023
Ref	13477 M
Pg	2/2

"C"

This is the annexure marked "**C**" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

kittlittlejohn
barrister

15 August 2023

Ms Trish Giles
Fluker Surveying Limited
PO Box 84
Red Beach 0945
AUCKLAND

By Email

Dear Trish,

S & S GLASSON – 135 SHEFFIELD ROAD, HELENSVILLE

I refer to your email of 4 August 2023, our subsequent telephone discussion, and the additional application materials sent through.

Your clients' proposal (per stage 1) seeks consent to create one additional site suitable for in-situ development of a rural residential dwelling through the protection of 7.01ha of indigenous vegetation identified in the Significant Ecological Areas Overlay of the Auckland Unitary Plan (Operative in Part) (**AUPOP**). You have sought my opinion as to whether this aspect of the application is to be considered as a restricted discretionary activity (per Rule A16 of Table E39.4.2), or as a non-complying activity (per Rule A17 of Table E39.4.2). The appropriate status hinges on whether the protection aspect of the proposal complies with Standard E39.6.4.4 or not.

Standard E39.6.4.4 requires, for one additional in situ site, that the Significant Ecological Area (**SEA**) feature to be protected must be between 4ha and 9.9999ha in area. As the application proposes the protection of 7.01ha of SEA feature, it complies with Standard E39.6.4.4, and under Rule A16 is therefore a restricted discretionary activity.

I understand that the Auckland Council processing officer contends that the application is non-complying in respect of this aspect because the SEA feature to be protected is not comprised of a single continuous area that exceeds 4ha in area, but rather is made of a five areas of SEA feature ranging in size from 0.27ha to 2.6ha. They claim[1] that the Council takes "*a more stringent view of the SEA interpretation*" and is "*looking for further justification from the applicant on this aspect (non-complying activity, precedent effects, etc. etc)*". The "*more stringent view*" referred to appears to be an interpretation of Table E39.6.4.4.1 to the effect that the SEA feature to be protected must be in a single area.

[1] Email from Philippa Riddell, Associate at Senitinel Planning (Consultant Planner) dated 31 July 2023

Kitt Littlejohn
Quay Chambers
Level 7, 2 Commerce Street
PO Box 106215, Auckland City 1143
DX CP 18023 Lower Albert Street
Auckland, New Zealand
DDI: (09) 374 9669
Fax: (09) 377 5071
Mob: 021 657 379
littlejohn@quaychambers.co.nz
www.resourcelaw.co.nz

There is nothing in the AUPOP to support this interpretation. To the contrary, Objective E39.2(14)(a) and Policy E39.3(15)(b) are focussed on limiting the creation of in-situ sites to situations where indigenous vegetation is protected. The method to achieve that policy is set out in Standard E39.6.4.4. Neither the policy, nor the method, are qualified in the manner suggested by Council staff: it is the total area being protected that justifies the additional lot. Council's so-called "stringent" interpretation is not supported by the plain words of the provisions and in my opinion is directly contrary to the policy intent of the AUPOP.

I note that in the final stages of resolving the provisions of Chapter E39 before the Environment Court, Council sought to modify the wording of Note 1 to Table E39.6.4.4.1 the add a requirement that SEA features to be protected must be contiguous. This proposal was rejected by the Environment Court, which noted as follows:[2]

> *[27] The main difference is that the Council has added a requirement for the areas to be contiguous on a site in order to qualify as SEA for protection. This is not a matter which was discussed before the court. The issue of vegetation being contiguous was discussed only in relation to* ***re-vegetation*** *where this method is used for deriving subdivision rights. This is new planting not existing SEA.*
> *(28] We cannot see the grounds for a change of the kind now being sought by the Council and it would seem to reduce the protection afforded existing identified and qualifying SEA. We accept the Appellants arguments on this matter...*

The outcome was that Note 1 was confirmed in its current form in the AUPOP, and any aspiration by the Council that the area of SEA feature to be protected had to be a single area was implicitly excluded by the Court.

Council has not sought to change the AUPOP since 2021 to incorporate this aspect on which it was unsuccessful. It is therefore concerning, and potentially contemptible, that it is attempting to apply an "interpretation" to achieve such an outcome by other means.

In my opinion this aspect of your clients' application is not non-complying; there is no "*shortfall*" of SEA feature to achieve compliance with Rule A16, and no lawful basis for the Council to seek "*further justification*" or "*anything else that could be offered up*" to address the (alleged, but unlawful) non-complying status determination.

If Council persist with this approach, I would be more than happy to bring this matter to the attention of the environment Court.

Yours sincerely

Kitt Littlejohn
Barrister

---

[2] *Cabra Rural Developments Limited & Ors v Auckland Council* [2021] NZEnvC010

"D"

This is the annexure marked "**D**" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Trish Giles

From: Dan Rodie <Dan.Rodie@aucklandcouncil.govt.nz>
Sent: Wednesday, 30 August 2023 8:56 am
To: Trish Giles
Cc: Philippa Riddell; Helen L McCabe (Resource Consents)
Subject: RE: 135 Sheffield Road - applicant's response 13477
Attachments: Cato et al memo re final provisions (150121).pdf; [2021] NZEnvC 010 Cabra Rural Developments Limited v Auckland Council.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Trish,

Philippa has asked that I provide you with an update in regard to when council's Legal Team will provide comment in relation to Kitt Littlejohn's legal advice, which you provided. I sent Mr Littlejohn's legal advice to the council Legal Team and DLA Piper and requested that they provide a response. I was advised last week that we are likely to receive at least initial comments this week.

Please note that as part of the process of finalising the rural subdivision provisions to reflect the outcome of the appeals submitted in relation to some of the Rural Subdivision provisions, Mr Littlejohn provided the Environment Court with the attached memo to address the discussion that took place in relation to whether all areas of wetland or indigenous vegetation proposed for protection had to be contiguous to qualify for each of the respective threshold areas to create either in-situ sites or TRSS donor site opportunities.

In that memo Mr Littlejohn said: *"Counsel is instructed to clarify that the Council's proposal above departs from the historic application of similar rules in the legacy plans, and is inconsistent with current practice, whereby, provided the initial area threshold for the first lot is met, the total area of feature to be protected (and thus the lot yield from the subdivision) is calculated by aggregating all areas of bush or wetland on the application site."*

The Court addressed this matter at paragraphs 24-28 of its February 2021 decision, see attached, and stated that it was not a matter that was discussed before the Court. The Court then, at paragraph 28 confirmed that the area thresholds in the table could be met by a combination of areas of indigenous vegetation or wetland that was either identified as SEA or meet one of the factors specified in Policy B7.2.2(1).

The discussion between the parties and the Court's comments appeared to relate to the note council proposed to require all of either the wetland or indigenous vegetation proposed for protection having to be contiguous to qualify for each of the respective threshold areas. The Court did not comment on the existing council practice of requiring the first area threshold relating to the protection of indigenous vegetation or wetland to be met by one contiguous area of indigenous vegetation or wetland respectively and then the subsequent threshold areas to be met by adding other areas of indigenous vegetation or wetland to that initial area. Council has continued to follow that practice.

I will let you know the outcome of the Legal Team's review of Mr Littlejohn's advice when I receive their comments. In the meantime, I can give you a call later today to discuss this matter, if that would assist?

Regards
Dan

Dan Rodie | Principal Specialist – Planning

North-West Resource Consenting Unit –

Department of Regulatory Engineering & Resource Consents
Auckland Council | Mobile 021 826 067

Orewa Office, Level 1, Pacific Building, 50 Centreway Road, Orewa
Visit our website: www.aucklandcouncil.govt.nz

Please note that I do not work on Fridays

From: Philippa Riddell <philippa@sentinelplanning.co.nz>
Sent: Tuesday, August 29, 2023 12:41 PM
To: Rue Statham <Rue.Statham@aucklandcouncil.govt.nz>
Cc: Dan Rodie <Dan.Rodie@aucklandcouncil.govt.nz>; Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Subject: RE: 135 Sheffield Road - applicant's response

Helen / Dan

The Applicant is after an update, or better still an ETA for the response from the legal team - if you would have one for me to pass on?

Many thanks
Pip

Philippa Riddell
Associate

+64 9 551 6205 | +64 22 031 0543
https://www.sentinelplanning.co.nz/
Lvl 1, 150 Hurstmere Road, Takapuna, Auckland

SENTINEL PLANNING

"E"

This is the annexure marked "**E**" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

environment for which development has the potential to significantly adversely affect.

Rule 7.14.3
Subdivision for the Protection of Natural Areas

Subdivision for the Protection of Natural Areas: Specific Subdivision Requirements

The Council may consent to the subdivision of land where the proposed subdivision permanently, legally and physically protects from farming, forestry or other rural activities, all areas on the site containing significant stands of native trees, native bush, scrub or wetlands or significant wildlife habitat where the following requirements are met:

The subdivision entitlements in Rule 7.14.3.2 and 7.14.3.3 can be utilised simultaneously or separately. Any application for subdivision made in reliance on both Rule 7.14.3.2 and 7.14.3.3 must be accompanied by a report from a suitably qualified person clearly defining on a scheme plan the area defined as wetland and the area defined as native bush. The areas shall not overlap and each will need to satisfy the rules and assessment criteria in its own right to enable a subdivision. The area defined as wetland shall include both the wetland itself and its associated riparian area. Where any wetland adjoins an area of native bush, the width of the riparian area around the perimeter of the wetland shall be 20 metres. This riparian area shall be included in the wetland area and excluded from the area defined as native bush.

Where the natural area is defined as a Significant Natural Area on the Planning Maps, the applicant may either utilise the subdivision entitlement in Rule 7.14.3.2 on its own or apply to utilise both Rules 7.14.3.2 and 7.14.3.3 This flexibility is provided to ensure that the Significant Natural Area definition does not reduce the subdivision entitlement for the land.

Rule 7.14.3.1
General Requirements

General Requirements

The rules in *Chapter 23 - Subdivision and Servicing* shall apply.

Rule 7.14.3.2
Subdivision of Sites for the Protection of Native Bush and Significant Natural Areas

Subdivision of Sites for the Protection of Native Bush and Significant Natural Areas (SNAs)

The natural areas which may be subdivided shall be Significant Natural Areas defined on the Planning Maps as such, or significant native bush that has not been identified as a Significant Natural Area. All natural areas proposed to be protected as a basis to subdivide under these rules shall meet the criteria set out in Appendix 7B.

Rule 7.14.3.2.1
Number of Sites Allowed

Number of Sites Allowed

(a) One rural residential site shall be allowed on any site with at least 2 hectares and up to 11.9999 hectares of native bush or Significant Natural Area meeting the criteria set out in Appendix 7B or of Significant Natural Areas defined on the Planning Maps for which the quality and extent has

been verified by a suitably qualified person and which is not already legally protected. Any area of native bush or Significant Natural Area used to meet this requirement shall be at least 2 hectares of continuous native bush or natural area.

(b) Where any site contains over 11.9999 hectares of significant native bush or Significant Natural Area defined on the Planning Maps which is not already legally protected in perpetuity the number of residential sites that may be created is as follows:

Area of Native Bush or Significant Natural Area Protected	Total Number of sites that may be created
2.0 ha - 11.9999 ha	1
12.0 ha - 21.9999 ha	2
22.0 ha - 31.9999 ha	3
32.0 ha - 41.9999 ha	4
42.0 ha - 51.9999 ha	5
52.0 ha - 61.9999 ha	6
62.0 ha - 71.9999 ha	7
72.0 ha - 81.9999 ha	8
82.0 ha - 91.9999 ha	9
92.0 ha - 101.9999 ha	10
102.0 ha - 111.9999 ha	11
112.0 ha - 121.9999 ha	12
122.0 ha - 131.9999 ha	13
132.0 ha - 141.9999 ha	14
142.0 ha - 151.9999 ha	15
152.0 ha - plus	16

Rule 7.14.3.2.2
Application of Native Bush and Significant Natural Areas

Application of Native Bush and Significant Natural Areas

(a) Rule 7.14.3.2.1 shall apply to any area identified as a Significant Natural Area (SNA) defined on the Planning Maps.

(b) Where the native bush has not been identified as a Significant Natural Area on the Planning Maps, the native bush shall meet the acceptance criteria in Appendix 7B "Guidelines for the Field Assessment of Native Bush Quality in Rodney District".

(c) All applications based on protecting significant native bush or Significant Natural Areas shall demonstrate that an assessment of native bush complying with the guidelines has been undertaken, and that the area meets the acceptance criteria in the guidelines. The assessment shall include a description of the ecological values of the area, detail the main vegetation type and the quality of the forest (e.g. diversity, vegetation patterns and sequences, ecological linkages, context within the surrounding landscape, rarity, habitat for wildlife) and recommendations for management and protection. All applications based on protecting significant natural native bush or Significant Natural Areas shall demonstrate that an assessment based on the criteria set out in Appendix

7B has been made.

Rule 7.14.3.2.3
Location of Significant Natural Areas or Native Bush, and Site for Dwelling

Location of Significant Natural Areas or Native Bush, and Site for Dwelling

(a) The area of Significant Natural Area defined on the Planning Maps or Native Bush meeting the criteria in Appendix 7B, can either:

(i) remain entirely within the parent site from which the rural residential site is subdivided; or

(ii) be contained within the new rural residential site provided that the required area for building and access (1,500m²) does not require or result in the removal or destruction of native bush and trees, or compromise in any manner any other feature to be protected — except where there is no, or insufficient area for building or access that is not covered in native bush and trees, in which case the application for subdivision may include provision for native bush and trees to be removed in accordance with Rule 7.9.4.1.

Rule 7.14.3.2.4
Protection of Native Bush and Significant Natural Areas

Protection of Significant Natural Areas Defined on the Planning Map or Native Bush Meeting the Criteria in Appendix 7B

(a) Every resource consent based on the protection of any native bush meeting the criteria in Appendix 7B or Significant Natural Area defined on the Planning Maps shall include a condition or conditions providing for the effective and permanent protection of that native bush or feature.

(b) Such conditions shall include a requirement that a permanent fence (minimum seven wire post and batten fence with no gates) capable of preventing browsing or other damage by farmed animals shall be erected (and maintained) around the perimeter of the area to be protected, unless an exemption is provided under clause (i) below. No grazing of animals shall be permitted within the fenced area.

Exemption from the fencing requirement applies in the following circumstance:

(i) Where a natural feature, eg. a cliff edge, will provide an effective barrier to stock access, a waiver of the fencing requirement may be considered, provided it is demonstrated that this will not result in a lesser standard of protection than adhering to the fencing requirement.

(c) The area of native bush or Significant Natural Area shall be made free of plant pests, and maintained in that state.

(d) A pest control programme shall be prepared indicating how pests including possums, goats, deer and rats are to be controlled to physically protect the legally protected area of native bush or other natural feature.

(e) Any conditions for the protection of native bush or Significant Natural

Area shall be complied with on a continuing basis by the subdividing owner and subsequent owners and shall be the subject of consent notices to be registered under the Land Transfer Act 1952.

Rule 7.14.3.2.5
Area to be Protected

Area to be Protected

(a) Where any plan of subdivision shows a single rural residential site to be created in accordance with Rule 7.14.3.2.1(a), the minimum area of native bush meeting the criteria in Appendix 7B or Significant Natural Areas defined on the Planning Maps to be protected shall be 2 hectares of continuous native bush. All native bush on the parent site up to a maximum of 11.9999 hectares of native bush shall be protected.

(b) Where any plan of subdivision shows additional rural residential sites (beyond a single site) to be created in accordance with Rule 7.14.3.2.1(b), the minimum area of native bush meeting the criteria in Appendix 7B or Significant Natural Area defined on the Planning Maps to be protected shall be the lower limit specified in the relevant row of the table at Rule 7.14.3.2.1. provided all native bush on the parent site up to the upper limit specified in the relevant row of the table at Rule 7.14.3.2.1, shall be protected.

Rule 7.14.3.2.6
Minimum and Maximum Site Size

Minimum and Maximum Rural Residential Site Size

(a) **Where the Protected Native Bush or Significant Natural Area is to Remain on the Parent Site**

The new rural residential site shall have:

(i) a minimum site size of 1 hectare.
(ii) a maximum site size of 2 hectares.

(b) **Where the Protected Native Bush or Significant Natural Area is to be Contained Within the New Rural Residential Site**

The new rural residential site shall have:

(i) a minimum site size of 2.15 hectares (2 hectares protected area and 1,500m² for a building site and access).
(ii) a maximum site size determined by the size of the protected area together with a 1,500m² building and access area.

(c) The minimum site size for the balance area shall be 1 hectare.

Rule 7.14.3.2.7
Access Frontage

Minimum Frontage and Access

(a) The minimum frontage for the rural residential site shall be 6 metres and the minimum frontage for the balance area shall be 6 metres, provided that up to five sites may gain frontage over a jointly owned access lot, or right of way for the benefit of the sites, or combination of both, of not

less than 6 metres in width.

Rule 7.14.3.2.8
Design of Subdivision

Design of Subdivision

(a) If more than 5 rural residential sites are created, the rural residential sites shall be clustered in one or more groups and shall be shared accessways. The clustered sites shall be designed so that the location of buildings will comply with the Development Controls and Performance Standards in Rule 7.10.

(b) A conservation subdivision plan complying with Rule 7.14.2.7 shall be completed and shall be used as a basis for the plan of subdivision and shall be submitted with the plan of subdivision. The plan of subdivision shall provide appropriate legal mechanisms to ensure the avoidance of the constraints and mitigation and/or permanent protection values identified in the conservation subdivision plan.

(c) No rural residential site or access shall be created in the Significant Natural Area or Native Bush meeting the criteria in Appendix 7B, or wetland meeting the criteria in Appendix 7E.

(d) Any rural residential sites shall be located so that a household unit can be erected upon it without unduly limiting quarry operations or future extraction at sites identified on the Planning Maps as a Significant Mineral Extraction Resource.

Explanation: The desirable buffer distance between a mineral extraction and processing site and an activity that could potentially conflict with extraction and processing activity is 500 metres for rock extraction using blasting and 200 metres for other extraction. Exceptions to this desirable buffer distance from the mineral extraction and processing site are shown in the Planning Maps where the "Quarry Effects Management Area" on the map may vary to reflect different local circumstances.

(e) Each rural residential sites created shall comply with the requirement of Rule 7.14.2.5 Riparian Margin Protection Standards, and Rule 7.14.2.6 Management of Overland Flows.

Rule 7.14.3.2.9
Defined Building Area

Defined Building Area

(a) Each defined area for building shall be identified on the ground before the proposed plan of subdivision is submitted for approval and shall be shown on all plans of proposed subdivision submitted for approval including the plan submitted for deposit and its existence shall be noted on the title for each site pursuant to a consent notice under section 221 of the Act, or similar mechanism.

Explanation and Reasons
See Explanation and Reasons in Rule 7.14.3.3.

7.14.3.3
Subdivision of Sites for the Protection of Significant Wetlands

Subdivision of Sites for the Protection of Significant Wetlands

Rule 7.14.3.3.1
General Requirements

General Requirements

The rules in *Chapter 23 - Subdivision and Servicing* shall apply.

Rule 7.14.3.3.2
Number of Sites Allowed

Number of Sites Allowed

(a) One rural residential site shall be allowed on any site with at least 5000m² of continuous significant wetland which is not already legally protected, meeting the criteria set out in Appendix 7C.

(b) Where any site contains over 5000m² of significant wetland meeting the criteria in Appendix 7C which is not already legally protected in perpetuity the number of rural residential sites that may be created is as follows:

Area of Wetland Protected	Total Number of Sites that may be Created
5000m² - 1.9999 hectares	1
2.0 - 3.999 hectares	2
4.0 - 7.9999 hectares	3
8.0 - 11.999 hectares	4
12.0 - 15.9999 hectares	5
16.0 - 19.9999 hectares	6
20.0 - 24.9999 hectares	7
25.0+ hectares	8 plus 1 additional site for each 5 hectares of wetland above 30 hectares

Note: Wetland areas located in the Coastal Marine Area are outside the jurisdictional boundaries of Rodney District Council. These areas cannot be included in any subdivision application under Rule 7.14.3.3.2 Subdivision of Sites for the Protection of Significant Wetlands.

Rule 7.14.3.3.3
Assessment of Wetlands

Assessment of Wetlands

(a) For the purposes of determining what constitutes a significant wetland, the guidelines entitled "Guidelines for the Field Assessment of Wetland Quality in Rodney District" set out in Appendix 7C shall be used. The wetland shall meet the acceptance criteria in these guidelines.

(b) All applications based on protecting significant wetlands shall demonstrate that an assessment of the wetland has been undertaken,

and that the wetland meets the acceptance criteria set out in the guidelines in Appendix 7C.

Rule 7.14.3.3.4
Location of Protected Wetland, and Site for Dwelling

Location of Protected Wetland, and Site for Dwelling

(a) The area of the wetland to be protected can either:

(i) remain entirely within the parent site from which the rural residential site is subdivided; or
(ii) be contained within the new rural residential site provided that the building area for building and access, (1,500m^2) does not require or result in the removal or destruction of native bush and trees, or compromise in any manner any other feature to be protected.

Rule 7.14.3.3.5
Protection of Wetland

Protection of Wetland

(a) Every resource consent involving the protection of a wetland shall include a condition or conditions providing for the effective and permanent protection of that wetland.

(b) Without limitation, such conditions shall include a requirement that a permanent fence (minimum seven wire post and batten fence with no gates) capable of preventing browsing or other damage by farmed animals shall be erected (and maintained) around the wetland to be protected. Any such fence shall be setback a minimum distance of 10 metres from the wet area of the wetland in instances where there are no adjoining areas of native bush. No grazing of animals shall be permitted within the fenced area.

(c) The area of wetland shall be made free of plant pests, including other plant and tree species that are detrimental to wetlands i.e. willows, poplars and invasive terrestrial plant species, and maintained in that state.

(d) Any conditions for the protection of the wetland shall be complied with on a continuing basis by the subdividing owners and subsequent owners and shall be the subject of consent notices to be registered under the Land Transfer Act 1952.

Rule 7.14.3.3.6
Minimum and Maximum Site Size

Minimum and Maximum Site Size

(a) **Where the protected wetland is to remain on the parent site**

The new rural residential site shall have:

(i) a minimum site size of 1 hectare.
(ii) a maximum site size of 2 hectares.

(b) **Where the protected wetland is to be contained within the new rural residential site**

The new rural residential site shall have:

(i) a minimum site size of 1 hectare.
(ii) a maximum site size determined by the size of the protected area together with a 1,500m^2 building and access area.

(c) The minimum site size for the balance area shall be 1 hectare.

Rule 7.14.3.3.7
Minimum Frontage and Access

Minimum Frontage and Access

Rule 7.14.3.2.7 shall apply.

Rule 7.14.3.3.8
Design of Subdivision

Design of Subdivision

Rule 7.14.3.2.8 shall apply.

Rule 7.14.3.3.9
Defined Building Area

Defined Building Area

Rule 7.14.3.2.9 shall apply.

Explanation and Reasons

The Council may consent to a subdivision which results in the permanent protection of Significant Natural Areas (SNAs) as identified on the Planning Maps, including areas of significance for their wildlife habitat values or their vegetation values, and areas of bush which meet specific criteria set out in Appendix 7B. The minimum area which can be protected is between 2 and 11.9999 hectares, as research indicates that this is the minimum size at which edge effects are minimised and the microclimates are created, thus increasing species diversity and reducing the chance of weed invasion. Therefore if a landowner has more than 2 hectares of contiguous bush or Significant Natural Area the Council will require the protection up to 11.9999 hectares in return for the creation of a single site. With regard to multiple site applications, all bush on the parent site up to the maximum limit specified in the relevant row of the table at Rule 7.14.3.2 shall be protected. The maximum limit is key to ensuring the protection of the native bush and the sustainable application of the rules.

In the case of wetlands, there are less than 1 per cent of the original wetlands remaining in Rodney District. Therefore, the smaller wetlands are important as habitat, for plant diversity, the mitigation of flooding and retaining water quality. Therefore, the Council allows subdivision for smaller areas of wetland meeting the criteria in Appendix 7C to encourage their protection.

In the case of Significant Natural Areas defined on the Planning Maps, bush meeting specified criteria in Appendix 7B and wetlands meeting specified criteria in Appendix 7C, the landowner is required to permanently protect the area identified by covenanting and fencing the area. The area also requires animal and plant pest management to ensure the long-term substainability of these areas.

If more than 5 sites are created then the rural-residential sites need to be clustered to mitigate the adverse effects of the subdivision or rural character, amenity values

and on the wildlife values of these areas.

The natural feature to be protected can remain with the parent site or on the newly created site, as long as none of the area identified for protection is damaged or destroyed. An exception is made however, for clearance in accordance with tree and bush removal provisions at Rule 7.9.4.1 where there is no, or insufficient area for building or access that is not covered in native bush and trees. The exception provides for the removal of native bush when a site is completely covered in SNA/native bush to enable a dwelling to be built. NB It should be noted that the required area (1,500m2) for building and access at Rule7.14.3.2.3(ii) is a subdivision design requirement made in the context that sufficient area is included within the boundaries of the newly created site allowing for development and future development which will not necessitate clearance of SNA/native bush. It does not represent a baseline against which clearance of SNA for a building platform or access should be measured. The ability to clear bush under Rule 7.9.4.1 is limited to 500m2 as a Restricted Discretionary Activity. This is considered sufficient for a dwelling in what is an exceptional circumstance, where a site is covered in significant bush or SNA. It is noted that to clear an area greater than 500m2 is a Discretionary Activity.

Retaining the rural character is also achieved by having a minimum site size of 1 hectare and a maximum of 2 hectares, and having a minimum frontage of 6 metres which allows for the screening of the rural residential sites.

The design of the subdivision has to be done in a comprehensive manner to ensure that all the environmental values and constraints are taken into account and the adverse effects avoided, remedied or mitigated.

Rule 7.14.4
Subdivision for Significant Enhancement Planting

Subdivision for Significant Enhancement Planting: Specific Subdivision Requirements

The Council may consent to the subdivision of land for the purposes of enabling significant enhancement plantings using native plants, which are permanently protected from farming, forestry or other rural **activities in circumstances meeting Policy 7.4.10**; where the following requirements are met:

Rule 7.14.4.1
General Requirements

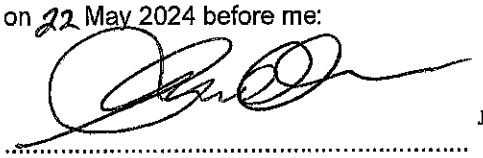
General Requirements

The rules in Chapter 23 - Subdivision and Servicing shall apply.

In circumstances where compliance with the Standards for Engineering Design and Construction would result in adverse effects on landscape values, natural character, or visual amenity in the Landscape Protection Rural Zone, East Coast Rural Zone, and Dune Lakes Zone, then alterations to the Standards for Engineering Design and Construction will be considered by Council so long as the outcomes sought by the performance standards set out in 23.8.11 are achieved.

"F"

This is the annexure marked "**F**" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:



Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Trish Giles

From: Philippa Riddell <philippa@sentinelplanning.co.nz>
Sent: Monday, 9 October 2023 7:20 am
To: Trish Giles
Subject: RE: Relocated Farm track SUB60413188 135 Sheffield Road, Punganui 13477

Follow Up Flag: Follow up
Flag Status: Flagged

Morning Trish,

Helen and Dan have requested that I seek input from Council's policy team. This request has been made and I am chasing them up.

Kind regards
Pip

Philippa Riddell
Associate

+64 9 551 6205 | +64 22 031 0543
https://www.sentinelplanning.co.nz/
Lvl 1, 150 Hurstmere Road, Takapuna, Auckland

SENTINEL PLANNING

From: Philippa Riddell
Sent: Thursday, September 28, 2023 12:27 PM
To: Trish Giles <Trish@fluker.co.nz>
Subject: RE: Relocated Farm track SUB60413188 135 Sheffield Road, Punganui 13477

Hi Trish,

The information and detail you added below, was given to Helen and subsequently Rue and Dan.

Dan discussed the proposal with Council's legal team and asked for an online meeting with myself, Helen, and Rue on Tuesday.

The upshot is that the application is being processed as a non-complying activity.

At Council's request, I have updated my report to reflect the changes made by the Applicant and the initial review comments from Helen and sent it back to Helen for a decision just now. My recommendation is to grant the application.

Pip

Philippa Riddell
Associate

+64 9 551 6205 | +64 22 031 0543
https://www.sentinelplanning.co.nz/

Lvl 1, 150 Hurstmere Road, Takapuna, Auckland

SENTINEL PLANNING

From: Trish Giles <Trish@fluker.co.nz>
Sent: Wednesday, September 27, 2023 9:42 AM
To: Philippa Riddell <philippa@sentinelplanning.co.nz>
Subject: RE: Relocated Farm track SUB60413188 135 Sheffield Road, Punganui 13477

Hi Philippa
Any update ?
Thanks Trish

Trish Giles
Fluker Surveying Ltd
Registered Professional Surveyors
Land Development Planning & Engineering
184 Hibiscus Coast Highway, Orewa
P O Box 84, Red Beach 0945
Ph. 09 427 0003 Fax 09 426 8835
Mob 021 178 1665

From: Philippa Riddell <philippa@sentinelplanning.co.nz>
Sent: Thursday, September 21, 2023 8:31 AM
To: Trish Giles <Trish@fluker.co.nz>
Cc: Stuart Glasson <sglasson@xtra.co.nz>
Subject: RE: Relocated Farm track SUB60413188 135 Sheffield Road, Punganui 13477

Thanks Trish,. that is very helpful. Hopefully, I can keep the ball rolling with the decision maker on this. I hope to have an update before tomorrow.

Pip

Philippa Riddell
Associate

+64 9 551 6205 | +64 22 031 0543
https://www.sentinelplanning.co.nz/
Lvl 1, 150 Hurstmere Road, Takapuna, Auckland

"G"

This is the annexure marked "**G**" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....
Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Policy Advice: 135 Sheffield Road, Punganui (SUB60413188)

Address: 135 Sheffield Road, Punganui
Zone: Rural – Rural Production zone
Proposal: Proposed in-situ subdivision through the protection of Significant Ecological Areas (SEA) and Wetland. **(SUB60413188).**

Policy advice requested:
The application intends to use several Significant Ecological Areas identified within the site and the protection of these to establish 2 additional in-situ sites for subdivision.
The consents team has requested policy advice about the **4ha** threshold in Table E39.6.4.4.1 (area of feature protected in-situ subdivision yield) for protection of **SEA** and whether this must be a contiguous area.

Table E39.6.4.4.1 Maximum number of new rural residential sites to be created from protection of indigenous vegetation or wetland either identified in Significant Ecological Areas Overlay or shown on the Kawau Island Rural Subdivision SEA Control or meeting the Significant Ecological Areas factors identified in Policy B7.2.2(1).

FEATURE PROTECTED	TRANSFERABLE RURAL SITE SUBDIVISION (TRSS) YIELD		IN-SITU SUBDIVISION YIELD	
	AREA OF FEATURE PROTECTED	MAXIMUM NUMBER OF NEW SITES FOR TRSS	AREA OF FEATURE PROTECTED	MAXIMUM NUMBER OF NEW IN-SITU SITES
INDIGENOUS VEGETATION	2ha – 9.9999ha	1	4ha – 9.9999ha	1
	10ha-14.9999ha	2	10ha – 20ha	2
	15ha – 19.9999ha	3	Thereafter for every additional 10ha	+1 To a total of 12 maximum
	20ha – 30ha	4		
	Thereafter for every additional 10ha	+1 No maximum		
WETLAND	0.5ha – 0.9999ha	1	0.5ha – 1.9999ha	1
	1ha – 1.9999ha	2	2ha – 3.9999ha	2
	2ha – 3.9999ha	3	4ha and over	3 maximum
	4ha – 9ha	4		
	Thereafter for every additional 5ha	+1 No maximum		

I have reviewed Rule E39.6.4.4 and Table E39.6.4.4.1 relating to the protection of indigenous vegetation and the relevant area threshold. I note that all references to the area to be protected are made in the singular i.e., there is not reference to the protection of 'areas'. The use of the singular is deliberate and signals that the qualifying threshold of the 'area of feature protected' must be intact.

The interpretation of the rule as requiring a contiguous 4ha area to meet the qualifying threshold is the correct interpretation of the rule.

Planning framework

The following provides an overview of the planning framework context (Auckland Plan, Regional Policy Statement, District Plan) in which the subdivision for protection of SEA provisions sit.

The framework clearly articulates through a hierarchy of objectives, policies, and rules (refer Attachment A) that the rural resource is to be protected against growth pressures. A key outcome sought is the avoidance of the proliferation of rural residential sites.

The higher-level strategic planning documents has resulted in the District Plan Rural Subdivision framework being designed to affect a limited yield from the subdivision opportunities.
The qualifying threshold of 4ha is one of the criteria applied to limit yield and ensure ecological protection of a particular standard is achieved. In the absence of clearly defined unusual circumstances any relaxation of the qualifying threshold must be viewed in terms of the impact on anticipated yield and the environmental values.

Auckland Plan 2050 Rural Strategy, and Regional Policy Statement

The Auckland Plan 2050 Rural Strategy sets the high-level development strategy for growth management in the rural areas, which is to focus future rural population growth in existing towns and villages and into the Countryside Living zones and provide only limited rural growth in 'other rural areas' relating to environmental enhancement and existing vacant lots. The focus of limiting growth in 'other rural areas' responds to evidence of ongoing high levels of fragmentation of the rural production resource from high levels of demand for rural residential lots. At pg. 236 the rural strategy highlights **ongoing growth pressures,** reflected in decreasing numbers of rural production properties, and **increasing numbers of lifestyle properties** - *"over the two decades from 1996 to 2016, the number of rural production properties decreased by around 40 per cent, which represents a 25 per cent loss in area, while the number of lifestyle properties increased by around 50 per cent (35 per cent in area)."*

The extent of the problem of fragmentation of the rural resource is discussed in greater detail in the Auckland Plan 2050 -Evidence Report – Rural Strategy, June 2018:

> *6.2.4 Rural subdivision*
> ...
> *The Auckland Plan monitoring report (2016) showed that 60 per cent of rural subdivision consents granted were in the rural production, rural coastal and islands activity areas in the 2013-2016 period, despite a target of no more than 10 per cent being established for the 2013-2020 period (Auckland Council, 2016e).*
>
> *High rates of subdivision leads to increasingly smaller land parcels of rural landholdings resulting in land fragmentation. This increases rural land values, and the likelihood of additional housing being introduced into rural environments, affecting rural character and rural production capability (Auckland Council, 2016h).*
>
> *Between 1998 and 2015 the number of property parcels in rural Auckland increased by over 30 per cent, with the greatest increase (70 per cent) being in the one-two hectare category, followed by a 43 per cent increase in the 0.4-1-hectare range (Auckland Council, 2016h).*

Regional Policy Statement

Objectives and policies of B2 - B2.2 Urban Growth form directs containment of urban activity into urban areas
Objectives and policies at B.9 4 direct that fragmentation of the rural land resource from rural lifestyle subdivision is prevented; and for it to be at an appropriate scale and density.

The Regional Policy Statement directs the achievement of a compact city and associated key outcomes for urban containment, distinct separation of the urban and rural environments and a rural growth strategy which directs the protection of the rural resource against urbanism (in particular the proliferation of rural residential sites) – to retain its focus on rural production activity and to protect rural character and amenity values.

The proposed relaxation of the 4ha qualifying threshold (i.e. using SEA fragments rather than a contiguous area) would enable a greater number of in-situ rural residential site than is intended by the subdivision opportunity.
The increased yield outcome is inconsistent with the protection of the rural resource against urbanisation and in particular, against proliferation of rural residential lots in the rural resource.

District Plan

– **E39 Rural subdivision. E39.14** provides a clear directive that the number of sites created from in-situ subdivision is limited, and that inappropriate proliferation through the rural resource is avoided.
– **H19.2 Rural – General zone (All rural zones)** The purpose, objectives and policies for this zone identify it is focuses on protecting and maintaining rural production activity.
– **H19.3 Rural – Rural Production zone** The purpose of the Rural – Rural Production Zone is to provide for the use and development of land for rural production activities and rural industries and services, while maintaining rural character and amenity values.

The subdivision pathways identified in E39 have been developed for ecological benefits however this is balanced with protecting the rural zones against adverse effects from the proliferation of rural residential sites.
The subdivision pathways have been determined to give effect to the Regional Policy Statement – which seeks to protect rural areas from urban pressures and have been arrived at based on costs and benefits analysis and the yield from uptake of the subdivision opportunity (based on compliant subdivisions); and are considered to strike a correct balance of environment protection and enhancement and protection of the rural resource from urban growth pressures.

E39 Rural subdivision:
The 4ha qualifying area threshold (singular) is key to the SEA protection subdivision opportunity operating within the yield modelled for this subdivision pathway and achieving the intended quality of ecological outcomes. Any relaxation of the qualifying area criteria must be considered in terms of the cumulative contribution to proliferation of in-situ rural residential sites and diminished ecological benefits.

H19.2 Rural – General (All rural zones) /H19.3 Rural Production zone:
The additional yield and reduced environmental benefits outlined are inconsistent with the purpose and outcomes of the rural zone both generally, and more specifically, the Rural production zone. The outcome is a proliferation of yield from the subdivision pathway which in the case of 'in-situ' subdivision, risks impact on the functioning of the rural zone (Rural Production zone) in terms of the zone purpose (focused on rural production activity) as well as outcomes for rural character and amenity outcomes (shifting towards lifestyle values rather than rural production). Reverse sensitivity is a significant concern.

Objective H19 2.1.4 gives a clear directive for avoidance of fragmentation of productive land and highlights reverse sensitivity impacting of rural production activity as a key management issue.

Regarding the Rural Production zone, the purpose statement and objective H20.4.2(2) clearly identify that the primary focus of the rural production zone is the retention and protection of production capability.

NOTE – additional yield if applied to Transfer subdivision has impacts for the Countryside Living zone(receiving zone). This issue is not discussed in this advice – as the application is for in-situ subdivision.

Unique circumstances

The proposal does not appear to present any unique circumstances. It is noted that there are many sites with similar undersized areas of SEA that would seek to apply a similar approach to that which is proposed.

This is essentially providing an additional subdivision pathway with significantly lower threshold tests. If allowed, it is considered it would significantly undermine the rural subdivision framework of the Auckland Unitary Plan such that the outcomes of the subdivision pathways are not aligned to the directives of the Auckland Plan or Regional Policy Statement.

Conclusion

The proposal to not apply the 4ha threshold as a contiguous area cannot be supported from a policy perspective.

Adherence to the area threshold, measured as a singular contiguous area, is key to achieving intended outcomes of the subdivision pathways in the rural zones and in turn, the outcomes directed by higher level planning instruments (Auckland Plan, and Regional Policy Statement) .

The threshold area provisions for subdivision protecting SEA (and other environmental features) have been deliberately written in the singular and set specific requirements commensurate with an anticipated level of ecological benefit, and a set yield in terms of in-situ subdivision in the rural zones.

The anticipated yield from the subdivision rules has been modelled based on the qualifying threshold area being a single entity. The maximum yield is a carefully considered (modelled) balance of environmental outcomes and protection of the rural resource to protected rural production capability and avoids reverse sensitivity.

Allowing non-contiguous areas (i.e plural) to contribute to the 4ha qualifying threshold is significantly more enabling and would significantly increase subdivision yield. The increased yield of rural residential sites spread across the rural zones is incompatible with directives, objectives and policies stated in the Auckland Plan, Regional Policy Statement and District Plan requiring protection of rural resource in terms of maintenance of production capability, and protection against urbanisation (proliferation of rural residential subdivision).

.....
.....
.....

Attachment A - Subdivision Framework

Auckland Plan

The Auckland Plan Rural Strategy sets the high-level development strategy for growth management in the rural areas, which is to focus future rural population growth in existing towns and villages and into the Countryside Living zones
and provide only limited rural growth in 'other rural areas' relating to environmental enhancement and existing vacant lots.

The focus of rural growth capability into rural towns, villages and Countryside Living responds to evidence of ongoing high levels of fragmentation of the rural production resource from high levels of demand for rural residential lots. At pg. 236 the rural strategy highlights ongoing growth pressures, reflected in decreasing numbers of rural production properties, and increasing numbers of lifestyle properties - *"over the two decades from 1996 to 2016, the number of rural production properties decreased by around 40 per cent, which represents a 25 per cent loss in area, while the number of lifestyle properties increased by around 50 per cent (35 per cent in area)."*

The extent of the problem of fragmentation of the rural resource is discussed in greater detail in the Auckland Plan 2050 -Evidence Report – Rural Strategy, June 2018:

> *6.2.4 Rural subdivision*
> ...
> *The Auckland Plan monitoring report (2016) showed that 60 per cent of rural subdivision consents granted were in the rural production, rural coastal and islands activity areas in the 2013-2016 period, despite a target of no more than 10 per cent being established for the 2013-2020 period (Auckland Council, 2016e).*
> *High rates of subdivision leads to increasingly smaller land parcels of rural landholdings resulting in land fragmentation. This increases rural land values, and the likelihood of additional housing being introduced into rural environments, affecting rural character and rural production capability (Auckland Council, 2016h).*
> *Between 1998 and 2015 the number of property parcels in rural Auckland increased by over 30 per cent, with the greatest increase (70 per cent) being in the one-two hectare category, followed by a 43 per cent increase in the 0.4-1-hectare range (Auckland Council, 2016h).*

Auckland Unitary Plan – Regional policy statement, rural subdivision, rural zoning

The parts of the Auckland Unitary Plan of most relevance to this discussion are set out below:

Chapter B - Regional Policy Statement

B2 - Urban Growth and Form:

The following objectives and policy support compact urban development, directing growth into the rural and coastal towns and villages and avoiding urbanisation outside of those areas:

B2.2. Urban growth and form

B2.2.1. Objectives

(4) Urbanisation is contained within the Rural Urban Boundary, towns, and rural and coastal towns and villages.

B2.2.2 Policies
Quality compact urban form

(4) Concentrate urban growth and activities within the metropolitan area 2010 (as (4) identified in Appendix 1A), enable urban growth and activities within the Rural Urban Boundary, towns, and rural and coastal towns and villages, and avoid urbanisation outside these areas.

B9 - Rural Environment

The following objectives and policies set overarching objectives and policies for the rural environment which aim for subdivision outcomes that avoid fragmentation of the rural land resource from rural residential subdivision; and ensure rural lifestyle subdivision is at appropriate scale and density.

B9.4. Rural subdivision

B9.4.1. Objectives

(1) Further **fragmentation** of rural land **by sporadic and scattered subdivision for urban and rural lifestyle living purposes is prevented.**

(2)

B9.4.2. Policies

(2) Enable subdivision for the following purposes:

(c) rural production purposes;

(3) ...

(4) provide for new rural lifestyle subdivision in locations and at **scales and densities** so as to:

(a) avoid areas that would undermine the integrity of the Rural Urban Boundary or compromise the expansion of the satellite towns of Warkworth and Pukekohe, and rural and coastal towns and villages;

(f) maintain or enhance landscape, rural and, where relevant, coastal, character and amenity values

Chapter E – Auckland-wide

E39 Subdivision - Rural

E39.2. Objectives

(12) Rural lifestyle subdivision is primarily limited to the Rural – Countryside Living Zone, and to sites created by protecting or creating significant areas of indigenous vegetation or wetlands.

(14) Subdivision is provided for by either:

(a) **Limited in-situ** subdivision through the protection of significant indigenous vegetation and/or through indigenous revegetation planting; or

(b) Transfer of titles, through the protection of indigenous vegetation and wetlands and/or through indigenous revegetation planting to Countryside Living zones.

E39.3. Policies

(3) Manage rural subdivision and boundary adjustments to facilitate more efficient use of land for rural production activities by:

(a) restricting further subdivision in the Rural – Rural Production Zone, Rural – Mixed Rural Zone and Rural – Rural Coastal Zone for a range of rural production activities; and

(b) providing for the transfer of titles to certain Rural – Countryside Living Zones.

(11) Restrict in-situ subdivision for rural lifestyle living to where:

(a) the site is located in the Rural – Countryside Living Zone;

(b) the site is created through the protection of indigenous vegetation; or

(c) the site is created through indigenous revegetation planting.

(12) Enable the transfer of titles to sites in the Rural – Countryside Living Zone which are identified using the subdivision variation control on the planning maps.

(15) Enable limited in-situ subdivision through the protection of indigenous vegetation identified in the Significant Ecological Areas Overlay and indigenous revegetation planting.

(16) Encourage the transfer of titles through the protection of indigenous vegetation or wetlands identified in the Significant Ecological Areas Overlay and indigenous revegetation planting.

(18) Provide limited opportunities for in-situ subdivision in rural areas while ensuring that:

(a) there will be significant environmental protection of indigenous vegetation;

(b) subdivision avoids the inappropriate proliferation and dispersal of development by limiting the number of sites created;

(c) subdivision avoids inappropriate development within areas of the Outstanding Natural Landscape Overlay, Outstanding Natural Character Overlay, High Natural Character Overlay and the coastal environment;

(d) adverse effects on rural and coastal character are avoided, remedied or mitigated;

(e) sites are of sufficient size to absorb and manage adverse effects within the site; and

(f) reverse sensitivity effects are managed in a way that does not compromise the viability of rural sites for continued production.

(24) Require subdivision to avoid creating ribbon development along public roads or multiple access points that may adversely affect the character or amenity values or the adequate functioning of rural roads.

E39.6.4 Subdivision standards – Restricted discretionary Activities

The Auckland wide objectives E39.14 (a) and supporting policies for rural subdivision at policy 18 (a) (b) and (d) clearly direct that in-situ subdivision yield is to be limited, avoids inappropriate proliferation, and that the environmental protection afforded is significant.

Chapter H Rural Zones
H19.2. Objectives and policies – all rural zones
H19.2.1 Objectives
(4) Rural lifestyle development avoids fragmentation of productive land.

H19.2.2 Policies
(5) Enable a range of rural production activities and a limited range of other activities in rural areas by:
(a) separating potentially incompatible activities such as rural production and rural lifestyle living into different zones;
(c)managing the effects of activities in rural areas so that; (ii) reverse sensitivity effects do not constrain rural production activities.

H19.3 Rural – Rural Production Zone description
The purpose of the Rural – Rural Production Zone is to provide for the use and development of land for rural production activities and rural industries and services, while maintaining rural character and amenity values
H19.4.2 objectives (Rural Production Zone)
Objective 2: The productive capability of the land is maintained and protected from inappropriate subdivision, use and development.

Objective H19 2.1.4 gives a clear directive for avoidance of fragmentation of productive land, and highlights reverse sensitivity impacting of rural production activity as a key management issue.

Regarding the Rural Production zone, the purpose statement and objective H19.4.2(2) clearly identify that the primary focus of the rural production zone is the retention and protection of production capability.

The additional in-situ subdivision yield arising from relaxation of the 4ha qualifying threshold would in my view be a significant change in approach which lowers the bar for a qualifying subdivision. The outcome is a proliferation of yield from the subdivision pathway which risks impacts on the functioning of the rural zone (Rural Production zone) in terms of the zone purpose as well as outcomes for rural character and amenity outcomes (shifting towards lifestyle values rather than rural production). Reverse sensitivity is a significant concern.

Ngā mihi

Alison Pye | Senior Policy Planner
Plans & Places | Chief Planning Office
Te Kaunihera o Tāmaki Makaurau | Auckland Council

"H"

This is the annexure marked "H" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

MEMO TO DUTY COMMISSIONER

Memorandum

To: Duty Commissioner

From: Helen McCabe, Team Leader - Planning

Date: 31 January 2024

Resource Consent Application: 135 Sheffield Road, Punganui (SUB60413188)

I am declining to use my delegated powers to determine this application as I do not share Philippa Riddell's *(Processing Planner)* conclusion that the proposed subdivision is not contrary to the provisions of the Auckland Unitary Plan Operative in Part (AUP(OP)) relating to the Rural – Rural Production Zone which seek to ensure that minimum area thresholds, with respect to the protection of qualifying significant ecological features i.e. wetland or indigenous vegetation, are met to create additional in-situ lots[1].

The application proposes to undertake a two staged subdivision to create two in-situ lots through the protection of Significant Ecological Areas (SEA) and wetland as illustrated within Figure 1.

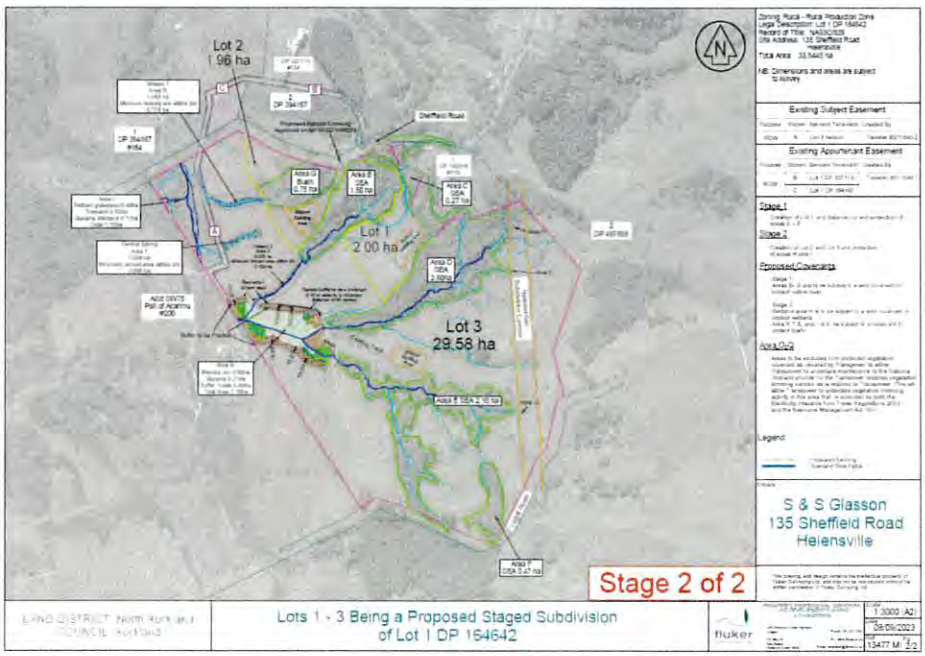


Figure 1 - Stage 2 of the subdivision showing proposed covenant areas. (Source: Application plans).

Stage one will comprise the protection of the identified SEA indigenous vegetation on the site *(Areas B-F)* in addition to an area of indigenous vegetation not identified as being SEA *(Area G),* and the creation of Lot 1 *(which will contain the existing dwelling, utilise existing access, and have a site size of 2ha)* and a balance lot which will be 31.54ha in size, encompass a 2000m^2 building platform

[1] Objectives E39.2(14) & Policies E39.3(3), (11), (15) & (16) (AUP (OP))

and utilise an existing access and track. A total of approximately 7.69ha of vegetation will be protected under this stage with 6.94ha of this identified as SEA under the AUP(OP).

Stage two will include the protection of wetland (Area H) located on the site in addition to the protection of retired grassland, treeland and glyceria wetland (Area I) to create proposed Lot 2 which will have a site size of 1.96ha with a 2000m^2 building platform and gain access via an approved vehicle crossing onto Sheffield Road, and Lot 3 which will be 29.58ha and encompass the Stage 1 balance lot building platform.

Once both stages are completed, the total area of vegetation to be protected will be 8.28ha, in addition to a 1.30ha area (including 0.49ha buffer) of wetland.

Council's stance with respect to both In-Situ and TRSS subdivisions based on the protection of indigenous vegetation, being either SEA or meeting one of the SEA factors, is that the first area threshold within Table E39.6.4.4.1 of the AUP(OP) must be met by one contiguous area of qualifying indigenous vegetation and then the next area threshold can be met through the addition of other non-contiguous areas of qualifying indigenous vegetation.

Table E39.6.4.4.1 Maximum number of new rural residential sites to be created from protection of indigenous vegetation or wetland either identified in Significant Ecological Areas Overlay or shown on the Kawau Island Rural Subdivision SEA Control or meeting the Significant Ecological Areas factors identified in Policy B7.2.2(1).

FEATURE PROTECTED	TRANSFERABLE RURAL SITE SUBDIVISION (TRSS) YIELD		IN-SITU SUBDIVISION YIELD	
	AREA OF FEATURE PROTECTED	MAXIMUM NUMBER OF NEW SITES FOR TRSS	AREA OF FEATURE PROTECTED	MAXIMUM NUMBER OF NEW IN-SITU SITES
INDIGENOUS VEGETATION	2ha – 9.9999ha	1	4ha – 9.9999ha	1
	10ha-14.9999ha	2	10ha – 20ha	2
	15ha – 19.9999ha	3	Thereafter for every additional 10ha	+1 To a total of 12 maximum
	20ha – 30ha	4		
	Thereafter for every additional 10ha	+1 No maximum		
WETLAND	0.5ha – 0.9999ha	1	0.5ha – 1.9999ha	1
	1ha – 1.9999ha	2	2ha – 3.9999ha	2
	2ha – 3.9999ha	3	4ha and over	3 maximum
	4ha – 9ha	4		
	Thereafter for every additional 5ha	+1 No maximum		

Note 1 for Table E39.6.4.4.1:

Where indigenous vegetation is proposed to be protected using Table E39.6.4.4.1. the area of indigenous vegetation protected can consist of either indigenous vegetation identified in the Significant Ecological Areas Overlay or shown on the Kawau Island Rural Subdivision SEA Control or meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) or a combination of both. Where a wetland is proposed to be protected using Table

E39.6.4.4.1 the area of wetland can consist of either wetland identified in the Significant Ecological Areas Overlay or shown on the Kawau Island Rural Subdivision SEA Control or meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) or a combination of both. For example, where the indigenous vegetation comprises 1 ha of indigenous vegetation identified in the Significant Ecological Areas Overlay and 1 ha meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) the 2ha area will be sufficient to generate one site for TRSS.

....

This reflects the appellants understanding of how the provisions are being applied as set out within the attached memorandum *(Appendix 1)* filed with the Court by Mr Littlejohn as part of the process of finalising the Rural Subdivision provisions. Mr Littlejohn provided the Environment Court with the attached memo to address the discussion that took place in relation to whether all areas of wetland or indigenous vegetation proposed for protection had to be contiguous to qualify for each of the respective threshold areas to create either in-situ sites or TRSS donor site opportunities.

In that memo Mr Littlejohn stated:

"Counsel is instructed to clarify that the Council's proposal above departs from the historic application of similar rules in the legacy plans, and is inconsistent with current practice, whereby, provided the initial area threshold for the first lot is met, the total area of feature to be protected (and thus the lot yield from the subdivision) is calculated by aggregating all areas of bush or wetland on the application site".

The Court addressed this matter at paragraphs 24-28 of its February 2021 decision, refer to Appendix 2, and stated that it was not a matter that was discussed before the Court. The Court then, at paragraph 28 confirmed that the area thresholds in the table could be met by a combination of areas of indigenous vegetation or wetland that was either identified as SEA or meet one of the factors specified in Policy B7.2.2(1).

The discussion between the parties and the Court's comments appeared to relate to the note council proposed to require all of either the wetland or indigenous vegetation proposed for protection having to be contiguous to qualify for each of the respective threshold areas *(Note 1 for E39.6.4.4.1)*. The Court did not comment on the existing council practice of requiring the first area threshold relating to the protection of indigenous vegetation or wetland to be met by one contiguous area of indigenous vegetation or wetland respectively and then the subsequent threshold areas to be met by adding other areas of indigenous vegetation or wetland to that initial area. Council has continued to follow that practice.

This is also reflected in paragraph 103 of the Courts September 2020 decision *(Appendix 3),* where it discussed the minimum size of the area of the feature to be protected to create an in-situ lot *(emphasis added):*

In-situ Subdivision for SEA

[103] Having heard again from the parties, we have concluded that:

(a) for in-situ sites generated from SEA protection, 2ha is too small an area of protection to justify a 1 ha lot with a house curtilage access etc. We have concluded that the ***area*** *required for the first site should be between 4ha and 9.9999ha and each additional 1 0ha thereafter should give the ability for a further one lot to a maximum of 12 sites. To achieve a 12-lot subdivision there would need to be around at least 114ha of SEA meeting the criteria.*

In this instance, the applicants are seeking to create one in-situ lot through the protection of five individual areas of indigenous vegetation (SEA) *(Areas B – F)* all sized between 0.27ha and 2.10ha in area; totalling 8.28ha. Therefore, all the areas proposed for protection fall considerably short of the 4ha minimum area threshold required for protection within Table E39.6.4.1.1 to yield one in-situ lot.

I note that the second in-situ lot is proposed to be created via the protection of a 1.60ha wetland area *(Area H) (including 0.49ha buffer)* which does meet with the 0.5ha minimum area threshold under Table E39.6.4.4.1 for the creation of one in-situ lot.

All references to the area to be protected with E39.6.4.4 and Table E39.6.4.4.1 of the AUP(OP) are made in the singular *(i.e there is no reference to the provision of 'areas').* The use of the singular is deliberate and signals that the qualifying threshold of the *'area of features protected'* must be contiguous.

As expanded upon within the advice from Council's Plans and Places *(Ms Pye) (Appendix 4),* the current planning framework clearly articulates through a hierarchy of objectives, policies and rules that the rural resource is to be protected against growth pressures. A key outcome sought is the avoidance of the proliferation of rural residential sites. The higher-level strategic planning documents has resulted in the District Plan Rural Subdivision framework being designed to limit the creation of in-situ lots within the rural zones. The qualifying threshold of 4ha is one of the criteria applied to limit the yield and ensure ecological protection of a particular standard is achieved. In the absence of clearly defined unusual circumstances any relaxation of the qualifying threshold must be viewed in terms of the anticipated yield and the environmental values.

Auckland Unitary Plan (Operative in Part)

E39 Subdivision - Rural

E39.2. Objectives

(12) Rural lifestyle subdivision is primarily limited to the Rural – Countryside Living Zone, and to sites created by protecting or creating significant areas of indigenous vegetation or wetlands.

(14) Subdivision is provided for by either:

(a) Limited in-situ subdivision through the protection of significant indigenous vegetation and/or through indigenous revegetation planting; or

(b) Transfer of titles, through the protection of indigenous vegetation and wetlands and/or through indigenous revegetation planting to Countryside Living zones.

E39.3. Policies

(3) Manage rural subdivision and boundary adjustments to facilitate more efficient use of land for rural production activities by:

(a) restricting further subdivision in the Rural – Rural Production Zone, Rural – Mixed Rural Zone and Rural – Rural Coastal Zone for a range of rural production activities; and

(b) providing for the transfer of titles to certain Rural – Countryside Living Zones.

(11) Restrict in-situ subdivision for rural lifestyle living to where:

(a) the site is located in the Rural – Countryside Living Zone;

(b) the site is created through the protection of indigenous vegetation; or

(c) the site is created through indigenous revegetation planting.

(12) Enable the transfer of titles to sites in the Rural – Countryside Living Zone which are identified using the subdivision variation control on the planning maps.

(15) Enable limited in-situ subdivision through the protection of indigenous vegetation identified in the Significant Ecological Areas Overlay and indigenous revegetation planting.

(16) Encourage the transfer of titles through the protection of indigenous vegetation or wetlands identified in the Significant Ecological Areas Overlay and indigenous revegetation planting.

(18) Provide limited opportunities for in-situ subdivision in rural areas while ensuring that:

(a) there will be significant environmental protection of indigenous vegetation;

(b) subdivision avoids the inappropriate proliferation and dispersal of development by limiting the number of sites created;

(c) subdivision avoids inappropriate development within areas of the Outstanding Natural Landscape Overlay, Outstanding Natural Character Overlay, High Natural Character Overlay and the coastal environment;

(d) adverse effects on rural and coastal character are avoided, remedied or mitigated;

(e) sites are of sufficient size to absorb and manage adverse effects within the site; and

(f) reverse sensitivity effects are managed in a way that does not compromise the viability of rural sites for continued production.

(24) Require subdivision to avoid creating ribbon development along public roads or multiple access points that may adversely affect the character or amenity values or the adequate functioning of rural roads.

The Auckland wide objectives E39.2(14)(a) and supporting policies for rural subdivision at policy E39.2(18)(a), (b) and (d) clearly direct that in-situ subdivision yield is to be limited, avoids inappropriate proliferation, and that the environmental protection afforded is significant.

Chapter H Rural Zones

H19.3 Rural – Rural Production Zone description

The purpose of the Rural – Rural Production Zone is to provide for the use and development of land for rural production activities and rural industries and services, while maintaining rural character and amenity values

H19.2. Objectives and policies – all rural zones

H19.2.1 Objectives

(4) Rural lifestyle development avoids fragmentation of productive land.

H19.2.2 Policies

(5) Enable a range of rural production activities and a limited range of other activities in rural areas by:

(a) separating potentially incompatible activities such as rural production and rural lifestyle living into different zones;

...

(c) managing the effects of activities in rural areas so that;

(ii) reverse sensitivity effects do not constrain rural production activities.

...

H19.2.1 Objectives – general rural

(4) Rural lifestyle development avoids fragmentation of productive land.

H19.3.2 objectives (Rural Production Zone)

(2) The productive capability of the land is maintained and protected from inappropriate subdivision, use and development.

Objective H192.1(4) gives a clear directive for avoidance of fragmentation of productive land, and policy H19.2.2(5)(c) highlights reverse sensitivity impacting of rural production activity as a key management issue.

Regarding the Rural Production zone, the purpose statement and objective H19.4.2(2) clearly identify that the primary focus of the rural production zone is the retention and protection of production capability.

In this case, any relaxation of the 4ha qualifying threshold to create the additional in-situ lot would be a significant change in approach in the subdivision pathway and would lower the *"bar"* for a qualifying in-situ subdivision. The subdivision provisions within Chapter E39 of the AUP(OP) uses the incentive of being able to protect SEA / SEA qualifying features with smaller areas (2ha – 9.9999ha) for TRSS which results in the transfer of subdivision opportunities from rural zones to the Countryside Living zone. If applicants can create in-situ lots based on the protection of features that are less than 4ha in area, it undermines any incentive to create transferable rights.

The outcome would be a proliferation of yield from the subdivision pathway which risks impacting on the functioning of the rural zone *(Rural Production zone)* in terms of the zone purpose as well as outcomes for rural character and amenity *(shifting towards lifestyle values rather than rural production).*

I note that in the Environment Court's September 2020 decision, relating to the appeals submitted in respect to some of the rural subdivision provisions of the AUP, the Environment Court set out in paragraphs 93 – 102 its view with respect to In-Situ subdivision and why it concluded that *":[97] Overall, in-situ subdivision should be limited to situations where more considerable gains are achieved for the environment than those available from transferrable rights. We recognise that because of the difficulty in creating and banking transferrable rights, there may be a preference for in-situ subdivision by some owners. This should come at a price in terms of the amount of land to be protected."*

The higher threshold areas and limits included within the relevant AUP (OP) standards reflect the Court's findings as set out within this section of the Court's decision.

It is also of relevance to this matter, that Standard E39.6.4.4(11) that applies to both In-Situ and TRSS subdivision, specifies that all indigenous vegetation present within a site is protected at the time of subdivision. On that basis, as all the indigenous vegetation present needs to be protected regardless the nature of the subdivision pathway chosen, it is only the difference in area thresholds that create the incentive to undertake TRSS subdivision rather than In-Situ subdivision.

Furthermore, the proposal, in my opinion, does not appear to present any unique circumstances that distinguish the proposed subdivision from other In-Situ subdivisions that may seek to be established in the Rural Production Zone to justify not adhering to those provisions of the AUP(OP).

As advised by Council's Ecologist (Rue Statham) within his Memo dated 26 October 2023 *"The quality, rarity of, and values within the indigenous vegetation being protected is not so demonstrably unique or otherwise scarce in the region that I am unable to agree that the site has such distinctive values that the application exceeds the expectations of the Unitary Plan" (Appendix 5).*

As further advised by Mr Statham *"Whilst these areas of indigenous vegetation may be relatively close to one another, they are as research suggests [partly] unviable in their own right, and with accesses fragmenting them they are, and will continue to be, subject to edge effects. The goal for a forest ecosystem is one where they can achieve a sustainable, potentially significant habitat, where their size and shape ensures their long-term viability, health, and significance. Similar to the aspirations of standard E39.6.4.5, where the revegetation should build upon existing habitats to achieve the same, thus ensuring the planting and indigenous vegetation or wetland combined meets those same standards".*

Therefore, the approval of this application would likely encourage similar subsequent applications seeking the creation of in-situ lots based on the protection of undersized areas of indigenous vegetation within the rural zone, thereby creating a precedent. This would significantly undermine the rural subdivision framework of the AUP(OP) and unravel the balance of incentives to undertake TRSS subdivision and diminish the benefits which underpin the outcomes intended from the TRSS framework.

While I consider that the proposed subdivision will have no more than minor adverse effects on the environment, for the reasons outlined above I consider that the application should be refused as the proposal is contrary to the objectives and policies of the AUP(OP) relating to the subdivision of sites within the Rural Production Zone.

In the event that the Duty Commissioner shares similar views and is minded to refuse the application, I note that the applicant has requested that they be provided with the opportunity to present their case to the Commissioner in person.

"I"

This is the annexure marked "I" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on ~~22~~ May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Trish Giles

From: Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Sent: Monday, 4 March 2024 2:35 pm
To: Trish Giles
Cc: Bonnie Lees
Subject: RE: Processing of SUB60413188 135 Sheffield Road, Punganui 13477

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Trish,

Further to your e-mail and as way of update, we have since received a response from Legal regarding queries raised by the Duty Commissioner.

As you'll no doubt be aware the response is confidential and legally privileged. Therefore, we are unable to provide you with a copy of the response.

However, I can advise that the response does substantiate my memo.

Ngā mihi, Kind regards,

Helen

Helen McCabe | Team Leader | North West Resource Consenting
Waea pūkoro / Phone 09 301 0101 | 021 830 054
Te Kaunihera o Tāmaki Makaurau / Auckland Council

From: Trish Giles <Trish@fluker.co.nz>
Sent: Friday, February 23, 2024 1:55 PM
To: Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Cc: Bonnie Lees <Bonnie.Lees@aucklandcouncil.govt.nz>; Stuart Glasson <sglasson@xtra.co.nz>
Subject: RE: Processing of SUB60413188 135 Sheffield Road, Punganui 13477

Thank you for your reply.
Please send the legal input requested (as below) in February 2024 to me - as soon as you have it, without further delay.
Thank you.

Trish Giles
Fluker Surveying Ltd
Registered Professional Surveyors
Land Development Planning & Engineering
184 Hibiscus Coast Highway, Orewa
P O Box 84, Red Beach 0945
Ph. 09 427 0003 Fax 09 426 8835
Mob 021 178 1665

From: Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Sent: Friday, February 23, 2024 10:12 AM
To: Trish Giles <Trish@fluker.co.nz>

Cc: Bonnie Lees <Bonnie.Lees@aucklandcouncil.govt.nz>
Subject: RE: Processing of SUB60413188 135 Sheffield Road, Punganui 13477

Hi Trish,

The Duty Commissioner has asked questions regarding Council's position concerning the 'need for a feature to be contiguous', in light of the comments made within Kitt Littlejohn's letter.

Given the questions raised, we are having to seek Legal input.

We have yet to receive and pass this on to the Duty Commissioner. However, we have followed this up again this morning.

We apologise for the length of time this is taking.

Ngā mihi, Kind regards,

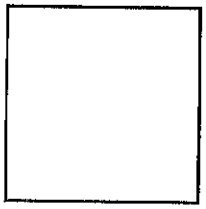
Helen

Helen McCabe | Team Leader | North West Resource Consenting
Waea pūkoro / Phone 09 301 0101 | 021 830 054
Te Kaunihera o Tāmaki Makaurau / Auckland Council

From: Trish Giles <Trish@fluker.co.nz>
Sent: Friday, February 23, 2024 9:25 AM
To: Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>; Bonnie Lees <Bonnie.Lees@aucklandcouncil.govt.nz>
Cc: Sophie Wilkinson <sophie@sentinelplanning.co.nz>; Stuart Glasson <sglasson@xtra.co.nz>
Subject: Processing of SUB60413188 135 Sheffield Road, Punganui 13477

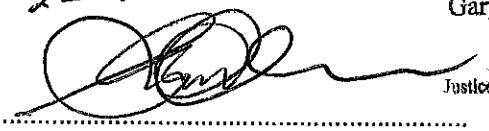
Hi Helen/Bonnie
I have called Sophie from Sentinel Planning, the processing planner, this morning today and I understand that she has had no update on this matter. We have received no update other than to say there is no update and confirmation that the application was with the Duty Commissioner on 8 Feb 2024.
There appears to be highly unusual and on going delays with the decision making relating to this consent. Can you please provide an explanation by Monday.

Thanks Trish
Trish Giles
Fluker Surveying Ltd
Registered Professional Surveyors
Land Development Planning & Engineering
184 Hibiscus Coast Highway, Orewa
P O Box 84, Red Beach 0945
Ph. 09 427 0003 Fax 09 426 8835
Mob 021 178 1665



"J"

This is the annexure marked "J" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:



Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

IN THE MATTER of the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of Resource Consent application: SUB604131880

DIRECTIONS FROM THE DUTY COMMISSIONER

1. Pursuant to section 34A of the RMA, Auckland Council (the Council) has appointed Dr Lee Beattie to be the Duty Commissioner to consider this application. The Duty Commissioners role is to firstly consider the issue of notification (a.95 determination) and then to consider the application's merits under s.104, should the decision be for non-notification of the application.

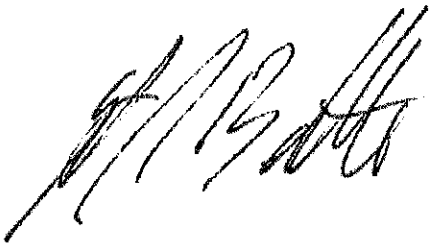
2. The details of the actual application, including the resource consents required, are set out in Ms Ms Philippa Riddell's (Consultant Planner) planning report. I have also received comments from Ms Helen McCabe (Council's Team Leader) supported by Council's Senior Policy Planner (Ms Alison Pye) who are of the view that the application should be declined consent on policy grounds. It is on this basis that the application was sent to me for my consideration and the disagreement on how the provisions of the AUP: OP's Table E39.6.4.4.1 should be applied as they relate to the nature (contiguous or not) of the area of protected vegetation required to take advantage of the in situ provisions for subdivision in the Rural Protective Zone.

3. I have considered all the relevant documentation supporting the application and Council officers' reports and its clear to me that there are significant areas of disagreement between them and the implications of the proposal in land use policy terms. However, I find the issues predominantly relate to my s.104 and s.104D consideration of the proposal, as opposed to the issues on notification, where I have determined the application can proceed on non-notified basis.

4. As a result, and to ensure natural justice, and at the request of Ms Trish Giles I have set this down for a hearing so I can hear and test the evidence from the parties to enable me to reach an informed decision on this matter. In doing, I would like to stress that this should be undertaken in an informal manner (if possible) to reduce time and this would solely relate to the policy disagreements and how these AUP:OP provisions should be applied between the applicant and Ms McCabe and Ms Pye.

5. I have asked Ms Bonnie Lees, Council's Principal Planning Specialist, to work with Council's Democracy Services Hearings team to arrange this as soon as possible, subject to the parties availability, in order to resolve this matter in a timely manner.

Any enquiries regarding these Directions or related matters should be directed by email to the Council's Principal Planning Specialist Ms Bonnie Lees
bonnie.lees@aucklandcouncil.govt.nz.



Dr Lee Beattie
Duty Commissioner
8 March 2024

"K"

This is the annexure marked "K" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Trish Giles

From: Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Sent: Wednesday, 20 March 2024 12:29 pm
To: Trish Giles
Cc: Jackie Lee; Philippa Riddell
Subject: FW: SUB60413188 - 135 Sheffield Road, Punganui - Duty Commissioner notification determination + direction 13477

Hi Trish,

Further to your e-mail and as previously advised, the response is confidential and legally privileged. Therefore, we are unable to provide you with a copy of the response.

However, I can advise that the response does substantiate my memo.

Ngā mihi, Kind regards,

Helen

Helen McCabe | Team Leader | North West Resource Consenting
Waea pūkoro / Phone 09 301 0101 | 021 830 054
Te Kaunihera o Tāmaki Makaurau / Auckland Council

From: Trish Giles <Trish@fluker.co.nz>
Sent: Wednesday, March 20, 2024 12:24 PM
To: Jackie Lee <Jackie.Lee@aucklandcouncil.govt.nz>
Cc: philippa@sentinelplanning.co.nz; Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Subject: RE: SUB60413188 - 135 Sheffield Road, Punganui - Duty Commissioner notification determination + direction 13477

Thank you for this. Please urgently send through a copy of

Council's legal advice on this matter dated 1 March 2024;

As referred to in the decision report on notification.

Thanks Trish

Trish Giles
Fluker Surveying Ltd
Registered Professional Surveyors
Land Development Planning & Engineering
184 Hibiscus Coast Highway, Orewa
P O Box 84, Red Beach 0945
Ph. 09 427 0003 Fax 09 426 8835
Mob 021 178 1665

From: Jackie Lee <Jackie.Lee@aucklandcouncil.govt.nz>
Sent: Friday, March 8, 2024 2:37 PM

To: Trish Giles <Trish@fluker.co.nz>
Cc: philippa@sentinelplanning.co.nz; Helen L McCabe (Resource Consents) <Helen.L.McCabe@aucklandcouncil.govt.nz>
Subject: SUB60413188 - 135 Sheffield Road, Punganui - Duty Commissioner notification determination + direction

Good afternoon Trish,

135 Sheffield Road, Punganui (SUB60413188)

The Duty Commissioner has considered the above application and supporting documentation and has determined that the application can proceed on a non-notified basis. Please find attached their s95 determination.

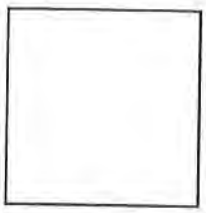
Also attached is a Direction from the Duty Commissioner in which they set the s104 and s104D matters down for a hearing so that they can hear and test the evidence from the parties to enable an informed decision on the matters. In setting this down for a hearing, the Duty Commissioner has noted the request made by yourself, requesting the opportunity for such a hearing.

Please now find attached a hearing deposit invoice and an interim invoice. The interim invoice has been generated to capture all unbilled fees in order to create the hearing deposit invoice as a 'stand-alone' invoice.

Could you please advise me once hearing deposit has been paid so that I can confirm receipt of payment before letting Phillippa know the consent can proceed to the hearing.

Kind regards,
Jackie.

Jackie Lee | Regulatory Support Officer - Resource Consents North/West
Regulatory Engineering and Resource Consents Department
Ph 09 427 3332 | Extn (44) 3332
Auckland Council, 6-8 Munroe Lane, Albany



"L"

This is the annexure marked "L" referred to within the Affidavit of Patricia Joy Giles sworn at SILVERDALE on 22 May 2024 before me:

Gary James Williams, JP
#20017
SILVERDALE
Justice of the Peace for New Zealand

.....

Justice of the Peace/~~Barrister/Solicitor of the High Court~~

Decision on notification of an application for resource consent under the Resource Management Act 1991

Auckland Council
Te Kaunihera o Tāmaki Makaurau

Non-complying activity for a subdivision consent

Application number(s):	SUB60413188 (s.11 subdivision consent)
Applicant:	Suzanne Glasson
Site address:	135 Sheffield Road Punganui 0875
Legal description:	Lot 1 DP 164642

Proposal:

To undertake a staged in-situ subdivision to create 2 additional lots through the protection of indigenous vegetation identified as SEA and wetland qualifying as being significant.

Resource consent is required for the following reasons:

Subdivision consent (s.11) – SUB60413188

Auckland Unitary Plan (Operative in part)

Subdivision (operative plan provisions)

Subdivision – Rural

- The Subdivision of land within the 1 per cent annual exceedance probability floodplain as a restricted discretionary activity under **E39.4.1(A8)**.

- Any subdivision listed in Table E39.4.1 not meeting standards in E39.6.1 as a discretionary activity under **E39.4.1(A9)**.
  - General Standard E39.6.1.1 Specified Building Area (3)(c) requires the specified building area to be identified as the only place within the site where dwellings, any accessory buildings, and related parking and manoeuvring can be located. The Applicant wishes to have flexibility to enable buildings outside of the identified building platforms shown on the scheme plan.
  - General Standard E39.6.1.3 Services (2) requires that where no reticulated water supply is available, sufficient water supply and access to water supplies for firefighting purposes in accordance with the New Zealand Fire Service Fire Fighting Water Supplies Code of Practice SNZ PAS 4509:2008 must be provided. The application does not demonstrate sufficient water supply for firefighting purposes.

- In-situ subdivision creating additional sites through protection of indigenous vegetation identified in the Significant Ecological Areas Overlay not complying with Standard E39.6.4.4, as a non-complying activity under **E39.4.2(A17)**, as the proposed SEA will not consist of a single contiguous area of 4ha in size in accordance with Table 39.6.4.4.1 and four trees will be excluded from the covenanted area within the SEA area (to meet Transpower conditions.) under standard E39.6.4.4(11).

- In-situ subdivision creating additional sites through protection of indigenous vegetation or wetland not identified in the Significant Ecological Areas Overlay but meeting the Significant Ecological Area factors identified in Policy B7.2.2(1) and not complying with Standard E39.6.4.4 is a non-complying activity under **E39.4.2 (A17D)** for the following reasons:
    - Standard E39.6.4.4(3) the proposal will reduce the 20m buffer required around the perimeter of the wetland to a 10m planted buffer in part.

National Grid Corridor

- Subdivision within the National Grid Subdivision Corridor as a restricted discretionary activity under **D26.4.3(A34)**.

The reasons for consent are considered together as a ***non-complying*** activity overall.

Decision

I have read in detail:

- The application, its supporting AEE (prepared by Ms Trish Giles) and associated documents;
- Ms Philippa Riddell's (Associate at Sentinel Planning) planning report and supporting reports including Mr Rue Statham (Senior Ecologist) ecological assessment and his answer to my question dated 6 March 2024;
- The s.92 requests and responses, including Ms Giles letter of 8 Dec 2023;
- Ms Helen McCabe's (Team Leader Planning) memo to me dated 31 Jan 2024;
- Ms Alison Pye's (Senior Policy Planner) memo (undated);
- Mr Kit Littlejohn's letter dated 15 August 2023 and follow up letter dated 7 December 2023;
- Council's legal advice on this matter dated 1 March 2024;
- The relevant sections of the AUP: OP; and
- Undertaken a site visit.

I am satisfied that I have sufficient information to consider the matters required by the Resource Management Act 1991 (RMA) and can make a decision under delegated authority on notification. In considering the application, I have taken into consideration the High Court decision in Wallace v. Auckland Council (2021) NZHC 3095 and have undertaken my own assessment of the application, in light of the information considered above.

The application was sent to a Duty Commissioner to make a determination on the application, given the significant level of disagreement between the Council officers (Team Leader Planning and Senior Policy Planner) and the applicant over how the provisions of Table E39.6.4.4.1 should be applied as they relate to the nature (contiguous or not) of the area of protected vegetation required to take advantage of the in situ provisions for subdivision in the Rural Productive Zone. I note for completeness this also extended to the application's activity status, with Mr Littlejohn

and Ms Giles of the view this was a Restricted Discretionary activity as opposed to a Non-Complying Activity, as suggested by all of the Council officers and consultants.

The application is set out in detail within Ms Riddell's planning report, with the rationale for each parties positions also set out in detail in the information considered above, so I will not repeat these here. Acknowledging that Ms Riddell was of the view that the application could be granted consent and Ms McCabe and Ms Pye considered that it could not, on policy grounds.

It appears to me that the major issue in contention is whether or not the area of 'protected vegetation' needs to be contiguous to take 'advantage' of these in situ subdivision provisions. Mr Littlejohn is of the view that the vegetation does not have to contiguous, whereas the Council officers are. Mr Littlejohn's view was based in part on the Environment Court's decision in Cabra Rural Developments v. AC (2021) and the plain English reading of the relevant AUP: OP provisions, including Table E39.6.4.4.1.

Given the applicant had the benefit of Mr Littlejohn's legal view on the application and the significant administration issues his approach would raise, being a significant departure from the Council's current approach to applications of this type (as suggested by Ms McCabe), I felt it was only appropriate for me to seek my own legal advice on the matter.

In doing so, I asked the question, as Mr Littlejohn suggests, on the plain reading of the relevant AUP:OP provisions, including Table E39.6.4.4.1; does this require the vegetation in question to be 4ha in contiguous area, or is it a combination of the vegetation within the site that counts? I have set out a summary of the legal advice I received below, which in essence, accords with Ms McCabe's view as expressed in her memo to me.

> *In summary, our views are that the best interpretation of Table E39.6.4.4.1 having regard to its text and in light of its purpose and context is that the minimum feature threshold size to enable one new in-situ rural-residential site is one continuous area of at least 4ha of indigenous vegetation, which is required to be protected in perpetuity.*

As a result, and on my reading of these provisions I agree with the Council's officers view on both the application's activity status and how Table E39.6.4.4.1 should be applied. Turning to the application, while I agree that the application could proceed on a non-notified basis, for the rationale as set out below, I agree with Mc Cabe's view that this application does raise significant policy issues for me which need to be explored further. Acknowledging that Ms Giles in her letter of 8 Dec 2023 also requested that should I potentially come to a different view than that of Ms Riddell and Ms Giles (non-notified approval, subject to conditions) the determination of the application (s.104 and s.104D determination) should be set down for a hearing so the applicant can explore these issues further with me.

As a result, and in order to ensure natural justice I have agreed with this request and I have set the matter down for a hearing to enable the applicant to respond to the matters raised by Ms McCabe and Ms Pye. Further directions to this effect will follow this decision.

Public notification

Under section 95A of the RMA, this application shall proceed **without** public notification because:

1. Under step 1, public notification is not mandatory as:
    a. the applicant has not requested it;
    b. there are no outstanding or refused requests for further information; and

c. the application does not involve any exchange of recreation reserve land under s.15AA of the Reserves Act 1977.

2. Under step 2, public notification is not precluded as:

   a. there is no plan rule or regulation in an NES that specifically precludes public notification of the application; and

   b. the application is for activities other than those specified in s.95A(5)(b).

3. Under step 3, public notification is not required as:

   a. the application is for activities that are not subject to a plan rule or regulation in an NES that specifically requires it; and

   b. the activities will have or are likely to have adverse effects on the environment that are no more than minor because:

      - The location and position of building platforms has demonstrated that the bulk and location provisions are able to be met while avoiding the existing areas of vegetation and enabling future a development pattern which could sit within the existing land form pattern.
      - The building platform for the lot will be around the existing buildings and curtilage area, and the establishment of the proposed building platforms on proposed Lots 2 and 3 will not require any vegetation removal (noting it will be fenced and protected by way of future covenants). Given the location of each of the building platforms, which are each separated between the established vegetation on the site of which is proposed to be protected; these will largely be screened from views from each of the respective sites and beyond this will generate less that minor adverse rural character and amenity effects on the environment.
      - I agree with the Council's Development Engineer's assessment of the application and I am satisfied that it has been demonstrated that each lot can be provided with adequate infrastructure to serve future dwellings.

4. Under step 4, there are no special circumstances that warrant the application being publicly notified because there is nothing exceptional, abnormal or unusual about the application, and the proposal has nothing out of the ordinary run of things to suggest that public notification should occur.

Limited notification

Under section 95B of the RMA this application shall proceed without limited notification because:

1. Under step 1, limited notification is not mandatory as:

   a. there are no protected customary rights groups or customary marine title groups affected by this proposal; and

   b. no persons to whom a statutory acknowledgement is made is adversely affected by this proposal.

2. Under step 2, limited notification is not precluded as:

a. there is no plan rule or regulation in an NES that specifically precludes limited notification of the application; and

b. the application is for activities other than that specified in s.95B(6)(b).

3. Under step 3, limited notification is not required as:

   a. this application is not for a boundary activity; and

   b. there are no adversely affected persons because:

      - Views of the full extent of the proposed building platforms from adjoining and neighbouring sites are relatively limited due to topographical differences and vegetation.

      - The scheme plan demonstrates that the size of the lots can accommodate a 2000m² specified building area that meets the 10m front yard and 12m side yard, will align with the pattern of development that has occurred either side of Sheffield Road, with building platforms tucked into the landform and surrounded by either vegetation or rural pastoral land.

      - Suitable access to each lot will be achieved, also noting the existing vehicle access and crossing to Lots 1 and 3 and the recently approved crossing for Lot 2 will be utilised; there are good sightlines in each direction, and traffic volumes will align with the development potential of the site under the AUP(OP) rural production provisions.

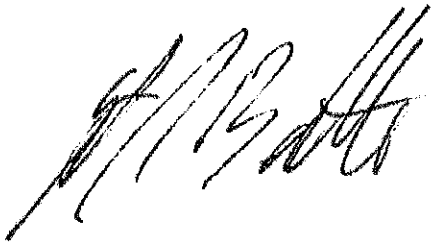
      - Each new lot will be provided with sufficient space for on-site wastewater and stormwater disposal that also meets the necessary engineering standards. In that regard I do not expect there to be any issues with runoff relative to any downstream properties.

      - The proposal will continue to maintain the National Grid Corridor, and Transpower have advised they do not have an issue with the subdivision, and the Applicant has adopted their suggested conditions as part of their methodology.

      - Reverse sensitivity effects are not expected to arise, by and large due to the combination of each of the bullet points above. The house sites are sufficiently separated from external boundaries, and the scale of the development will not generate effects that would have implications for the operation of rural productive activities in the surrounding area or within the development itself.

4. Under step 4, there are no special circumstances that warrant the application being limited notified to any other persons because there is nothing exceptional, abnormal or unusual about the application, and the proposal has nothing out of the ordinary run of things to suggest that notification to any other persons should occur.

Accordingly, this application shall proceed on a **NON-NOTIFIED** basis.



Dr Lee Beattie

Duty Commissioner

7 March 2024