BEFOR THE SELWYN DISTRICT COUNCIL

RC225180

In the matter of	the Resource Management Act 1991	
	Sections 88-120, Resource Management Act 1991	
Between	**Party**	KeaX Limited
	Role	Applicant
And	**Party**	Robyn Casey, Clark and Elizabeth Casey and Dave and Donna Kewish ("Joint Submitters")
	Role	Submitter

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LEGAL SUBMISSIONS FOR THE JOINT SUBMITTERS
Date 23 February 2023

J M van der Wal
Barrister
40 Walker Street Chambers
Christchurch
Also at 14 Queen Street
Blenheim

INTRODUCTION:

1 These legal submissions are provided on behalf of Robyn Casey, Clark and Elizabeth Casey and Dave and Donna Kewish ("Joint Submitters"), who lodged a joint submission in opposition to the grant of consent application RC225180, and Dave and Donna Kewish, who also lodged an individual submission.

KEY POSITION

2 This is a proposal to establish a 250ha 3m high, highly reflective power station in a rural zone, on highly productive land, indefinitely. It will, for the purposes of the appropriate definitions in s2 Resource Management Act 1991 (RMA), change the land from primary production land to industrial or trade premises. As a result it will have a range of actual, likely and potential effects that are so different from and at odds with the rural character of the receiving environment, that they must be more than minor and cannot be granted on the basis sought and certainly not without public notification.

3 The Joint Submitters seek that consent be refused because:

3.1 The effects of the proposed activity are more than minor and accordingly the application should have been publicly notified, but was not, so there is a jurisdictional bar against granting consent;

3.2 The applicant has failed to demonstrate an operational need for the activity to be located on the highly productive soils;

3.3 The adverse effects on the Joint Submitters and the wider receiving environment will not be appropriately avoided or mitigated by the conditions proposed; and

3.4 Such mitigation of the contamination-related effects as may be given by the regional council consents will last only for fifteen years, the term of the stormwater discharge permit.

4 If the application were to be resubmitted and publicly notified, then the failure to demonstrate an operational need to be located on the highly

productive soils would still require a refusal of consent. This is a threshold that cannot be met. If, however, it could be met, then additional mitigation, as described by the Joint Submitters' expert witnesses, would be required, with the most important features being, but not limited to:

4.1 Delaying construction until all screening vegetation has been fully established;

4.2 In any event, not granting a duration beyond 15 years; and

4.3 Providing a mechanism to ensure that on cessation of operations or sudden significant releases of contaminant, there is the ability to remediate the site entirely.

EVIDENCE

5 In support of their submission, the Joint submitters have filed expert briefs of evidence by:

5.1 Mr Paul Smith, Landscape Architect;

5.2 Mr Mark Lewthwaite, Acoustic Engineer;

5.3 Mr Ray Henderson, a person with considerable experience in handling and dealing with contaminants; and

5.4 Mr Stewart Fletcher, Planner.

6 In addition, the Joint submitters will provide evidence of fact themselves.

ASSESSMENT OF EFFECTS ON THE ENVIRONMENT

7 It is submitted that the only way that the s42A officer could accept that the effects of the proposal are not more than minor, is by virtue of a number of errors of law as to determining effects on the environment. These are dealt with at the outset, because both the issue as to whether s104(3)(d) deprives you of jurisdiction to grant consent and the requirements of s104(1)(a) render the magnitude of the effects on the environment crucial.

Conflation of Policy and Benefits into Adverse Effects Assessment

8 There is no doubt that s7(j) and the National Policy Statement for Renewable Electricity Generation 2011 (NPS REG) render the fact that this application is for a renewal energy generation proposal a key positive consideration to which you are to give significant weight when exercising any discretions conferred on you by the Statute.

9 However, what they do not do is permit you to underassess, downplay or in any way ignore the *adverse* effects of this proposal. This, it is submitted, is the error into which both the Applicant's planner and the s42A officer must have fallen. In their appropriate enthusiasm for renewable energy generation proposals, it seems like they have incorrectly endeavoured to shoehorn the effects of this proposal into a "minor" assessment in order to ease the processing path.

10 This, it is submitted can be the only explanation for assessing the proposal to establish a permanent 250ha power station on highly productive soils in the rural zone, turning it from production land to industrial or trade premises, could have been assessed as have had no more than minor effects.

11 The very point behind s7(j) and the NPS REG is to signal that even though renewable energy proposals may have more than minor *adverse* effects, the benefits of renewable energy may well mean that there are sound policy reasons for granting consent for such a proposal.

12 With respect, the Council's task is to assess:

12.1 The magnitude of the *adverse* effects to determine whether they are more than minor the purposes of s104(3)(d) jurisdictional test (which is addressed in more detail below); and, if you consider that test does not bar the Council from granting consent -

12.2 The magnitude of those adverse effects, and the magnitude and nature of the positive effects and benefits; and

12.3 Under s104(1)(b) and the further statutory considerations, whether those adverse and positive effects/benefits, when weighed against the applicable policy framework (and other statutory considerations, such as the need to avoid, remedy or mitigate adverse effects on the environment), render the grant of consent appropriate.

13 It is respectfully submitted that in this particular receiving environment, it is simply not going to be possible to establish a solar array with this density and size, without causing adverse effects that are more than minor. That does not mean that a solar array cannot be granted consent within the rural zone of the Selwyn District. It may well be that after public notification, a proposal that is appropriately and sensitively designed, which is not located on highly productive soils, would be considered appropriate under the applicable policies and objectives.

Receiving Environment

14 Both the s42A officer and Ms Kelly consider that the permitted baseline is applicable. For reasons addressed elsewhere below it is submitted that you should not apply it. Nevertheless, both consider that certain effects should be disregarded because there are rules that permit these or similar effects.

15 At the same time, they pay no attention to the changes that can be made as of right, or which will occur over time, within the receiving environment, which would considerably increase the adverse effects of the proposal. A key example of this is the existence of a shelter belt in a box drain immediately north of the Kewish property, which may need to be removed[1]. Part of it is not on the Applicant's site. The Applicant has no control over that part.

16 In the same way, any other vegetation not on the Applicant's property are not within its control and cannot be relied on to mitigate adverse effects. As will also be addressed elsewhere below, this application seeks consent for an indefinite term. It cannot be assumed that all vegetation outside the

[1] See paragraph 58, Evidence of Paul Smith

applicant's site will remain indefinitely, and no provisions for replacement planting, primarily for shelter belts is provided for.

17 When it comes to contamination effects, Ms Kelly's evidence is that those effects will be dealt with by the regional council consents. However, those consents have a duration of 15 years and will expire. Beyond the expiry of those consents, the receiving environment cannot be assessed as including authorised or mitigated contaminant discharges.

Permitted Baseline

18 At paragraph 71 the s42A report lists a number of permitted activities that it considers are relevant to the permitted baseline. At paragraph 4.22 of her evidence, the applicant's planning witness, Ms Kelly, adds a number of extra activities.

19 While it is not disputed that these activities could occur as of right under the plan, both the officer and Ms Kelly fail to address adequately the following essential points regarding the permitted baseline, as now statutorily incorporated by way of s104(2) and 95D(b):

19.1 It is discretionary[2]; and

19.2 It should only include a non-fanciful permitted baseline[3].

20 Importantly, neither provide any evidence of whether the activities are not fanciful and if so, whether it would be appropriate to apply the permitted baseline. It is submitted that therefore it is not appropriate for you to disregard those effects.

21 For example, there is no indication that it is reasonably feasible that someone would wish to establish 250ha of tunnel houses in this location. There are no indications that there are any such scale horticultural activities

[2] *Protect Aotea v Auckland Council* [2022] NZHC 1428. While this case refers only to s104(2), it is submitted that the ratio relating to the use of the word "may" applies equally to the use of that same word in s95D(b).
[3] *Rodney DC v Eyres Eco-Park Ltd* [2007] NZRMA 1(HC)

in the immediate vicinity. It is understood that they are not reliant on highly productive soils, which would suggest the contrary. Even if that were not an issue, the nature and appearance of these structures is not comparable or similar to the solar panels. The former are primary production structures with an entirely different shape, appearance and no glare. The latter are industrial or trade structures with significant glare issues.

22 Another example is plantation forest. Once again there is no evidence that it is feasible that this productive land would be used for forestry. Even if there were, there can be no comparison between trees, which even in a monoculture environment, have a natural character aspect to them, and industrial solar panels. The trees will grow over time, with many years between when they are planted as seedlings and when they reach the 3m height of the structures. They will be harvested. In contrast, the panels will appear at their full height and the applicant seeks an indefinite duration.

23 On this basis it is submitted that it would be inappropriate to apply the permitted baseline to disregard any part of the visual, glare or noise effects of this proposal.

Role of Duration

24 Mr Fletcher's expert planning evidence for the Joint Submitters highlights the discrepancies with the term of the consent[4]. While the s42A officer may have recommended a term of 35 years, that is not what the Applicant has sought. The consent authority is to assess the magnitude of the effects of the proposal on the basis of what has actually been sought, not subject to terms or conditions that the consent authority has the power to impose to mitigate the adverse effects on the environment beyond what is proposed by the Applicant.

25 By doing so the s42A officer has made an important error of law that materially affects his assessment of the magnitude of the adverse effects of the proposal. This is demonstrated by his conclusion in his paragraph 100 of

[4] Evidence of Stewart Fletcher, paragraph 4.19 onwards.

his notification report, where he categorises the effects on highly productive soils as “temporary”.

26 While the current leases are for a 35 year period, the indefinite duration sought by the applicant would mean that, if granted, there would be no ability for the consent authority to prevent the effects extending beyond 35 years by the renewal of the leases or even purchase of the land.

27 Even if the application were to be for a 35 year term, to categorise the effects as “temporary” would be incorrect. Indeed, at paragraph 49 of his report to you, the s42A officer has cited a definition of “temporary” that places a limit of 12 months on the term “temporary”. The regional council consents, which are granted a term of fifteen years, do not classify the respective discharge or land use activity as “temporary” activities, nor their effects as such. On the contrary, for discharge permits and regional land use consents, 35 years is the longest term possible. The regional council s42A report considered it inappropriate to grant consent to discharge contaminants for a period of more than 15 years. Effects that endure for 35 years, or even 15 years, cannot properly be regarded as “temporary”.

28 In any event, even if the activities could be categorised as “temporary”, the High Court Held in *Trilane Industries Ltimited v QLDC*[5] that it is wrong to categorise effects as “minor” because they are temporary, when for the duration of those effects they are “more than minor” (in that case moderate). At paragraph 77 of his report the s42A officer has made that very error by categorising effects that will reduce over a period of four years, as “minor” because they are “temporary”. That assessment error is compounded at paragraphs 82-86.

Uncertainties

29 A matter related to the previous issue is the confidence you can have that the effects and benefits will be as indicated by the Applicant.

[5] [2020] NZHC 1647

30 The first example of this is that the Applicant's witnesses and the s42A officer make much of the ability for the land to revert to production land. Nevertheless, what cannot be disputed from the Applicant's evidence is that if consent is granted, there will be 250 or so ha of land covered in 3m high solar panels with the necessary piles to support them driven into the ground some 1.8m[6]. There are no indications as to how many piles will be driven into the ground, but for 250 ha, the number will be very large.

31 From Mr Henderson's evidence it is also clear that the panels will contain contaminants which, if released into the environment, will cause very significant and lasting adverse effects.

32 Nevertheless, the Applicant has not provided you with the assurance that the resources required to remove these structures and contaminants will be available when the time for their removal comes, be that through expiry of the lease, regional council consents or the current consents if they are granted for a limited duration, or through some kind of damage.

33 There is no indication of the cost of removing and disposing of 250 ha of solar panels and their support structures, let alone of land remediation should there be a significant damage event leading to large contaminant releases. It is however submitted that by way of comparison it is likely that the operational cost of removing dwellings from undersize lots, amalgamating them into larger commercially viable lots and returning those to primary production land would pale into insignificance when compared with such remediation costs.

34 You have no assurance that the proposal will continue to give rise to sufficient financial resources to fund removal and/or remediation if or when the need for this arises. There is no way you can be assured that granting this proposal will result in 250 ha of solar panels and supporting structures (or any leachate) remaining on land when the applicant has ceased to exist.

[6] Planning evidence of Ms Kelly, paragraph 3.6, bullet point 9.

35 This is a relevant consideration that the s42A officer has not taken into account. It is directly relevant to the magnitude of the adverse effects (including those under s3(f)) and the appropriateness of the mitigation measures.

36 A further uncertainty that arises is that around the purported benefits of retaining an "underlying pastoral" use. There is no evidence as to:

36.1 What percentage of the land surface will actually be covered with solar panels; or

36.2 Whether the sunlight that does reach the pasture, in combination with the absence of any irrigation on these soils in an area chosen for plenty of sunlight, will result in any stock carrying capacity at all or certainly at levels that would allow the land use to be properly categorised as "pastoral".

Noise and District Plan Standards

37 There is no dispute that overall this application is to be considered as a fully discretionary activity. As a result, the full range of effects is to be considered, unless there is a proper evidentiary basis for applying the permitted baseline to exclude them. This applies to noise also.

38 Therefore, the fact that the noise levels emitted will comply with the limits in the district plan that constitute the standards for permitted activities does not render the noise levels appropriate for something that, like the current proposal, is not a permitted activity. The only way that you could disregard them is if you decided there was a non-fanciful activity that is permitted by the district plan, which is sufficiently similar in its noise effects that those effects can be said to be allowed by the district plan.

39 In the current situation there is no suggestion that that is the case. The evidence of Mr Lewthwaite is that the noise has a significantly different character from the existing ambient noise. There is no evidence provided by the applicant of a comparable activity that would be permitted by the district plan that would emit a similarly characteristic constant hum.

40 It would therefore be inappropriate to:

40.1 Apply the permitted baseline to disregard the very unique and characteristic noise effects of this proposal;

40.2 Disregard the noise effects simply because the noise emissions are predicted to remain below the standards applying to permitted activities quite different in nature; or

40.3 Regard them as appropriate simply because of compliance with those same standards.

41 It is submitted that they are very real and a significant component of the adverse effects on the receiving environment and in particular the residences at which they will be able to be heard. They are something that you must take into account and give significant weight.

42 As such it is submitted that the evidence will show that, despite mitigation measures and compliance with District Plan noise standards, the noise effects play an important role in contributing to the significant adverse effects of the proposal on rural amenity.

Property Values

43 At paragraph 187 the s42A report concludes that he does not "*consider that any potential impact of the proposal on the value or desirability of neighbouring properties is a relevant effect*". In her evidence the applicant's planning witness, Ms Kelly was somewhat more nuanced in her approach and stated that: "I *advise that the question of adverse effects on property values has been addressed by the Environment Court on several occasions. Some of the case law articulates the idea that if it occurs at all, property value is simply another measure of adverse effects on amenity values.*"[7]

44 While there are later cases on the topic, they do not alter the correctness of the above statement by Ms Kelly, which is accepted as reflecting the current

[7] At paragraph 9.10, citing *Foot v Wellington City Council,* W73/98, 2 September 1998, paragraph [256]

state of the law. Importantly, the law as cited by Ms Kelly indicates that if loss of property values does occur, it is a measure of adverse effects on amenity values. As such, it cannot be "irrelevant" as claimed by the s42A report.

Contamination Effects

45 Both the s42A officer and the Applicant's planner urge you not to consider contamination effects, as they are, as a regional council issue, not relevant to this consent. They consider that the regional council consents have dealt with the contamination effects. With respect, that is also a serious error of law for a number of reasons.

46 First, as indicated above, the stormwater discharge consent granted to the Applicant (CRC223909) is only for a period of 15 years. Consent for a longer duration is not considered appropriate. If you were to accept the Applicant's evidence on this point, then at best you can only accept that the contamination effects (from stormwater runoff) will be addressed for a period of 15 years. For that reason, and for reasons of integrated resource management, it is submitted that consent cannot be granted for a period of longer than 15 years.

47 It is also established law that the decision maker is able to take into account the effects of activities that will flow inevitably from the grant of consent, but which are not before that decision maker[8]. For that reason it would also be wrong to disregard the contamination effects.

48 That those are real effects is confirmed by Mr Henderson's evidence for the Joint Submitters, as he confirms that they are effects of high potential impact, of which there is a real risk that they will occur[9]. This renders them an effect for the purposes of s3(f)[10].

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[8] *Pukenamu Estates Ltd v Kapiti Environmental Action Inc* HC Wellington CIV-2002-485-22, 17 December 2003

[9] Evidence of Raymond Henderson, p??

[10] N*orth Canterbury Gas Ltd v Waimakariri DC EnvC* A217/02

49 It is submitted that the Selwyn District Council was wrong not to decide that the applications for the Regional Council consents had to be jointly heard[11]. While you have no power to review that decision, it is submitted that you can find as a consequence that you cannot be satisfied that the contamination-related effects of the proposal are appropriate when considered in the integrated wholistic manner required by the statute.

50 This matter is further compounded by the fact that you cannot be satisfied that the Applicant has sought or been granted the discharge consents it requires for this proposal for two main reasons:

50.1 It did not seek consent (and therefore could not have been granted consent[12]) to discharge the range of contaminants for the durations identified in Mr Henderson's evidence; and

50.2 It did not seek, nor was it granted, consent to do something that would, but for a resource consent, contravene ss15(1)(d) and possibly (c).

51 Importantly, by virtue of the definition of Industrial or Trade Premises in s2, the site will become industrial or trade premises, as it no longer meets the definition of Production Land in s2. This means that any discharges to land are unlawful under s15(1)(d) (irrespective of whether they may enter water or not) and any discharges to air are unlawful under s15(1)(c) – unless they are expressly allowed by a resource consent, regional rule or national environmental standard.

52 Nevertheless, the applicant has applied only for, and has only been granted, a consent to discharge "operational stormwater" to land in circumstances where it may enter water, which is clearly a consent to do something that would otherwise contravene s15(1)(b).

53 From Mr Henderson's evidence it is likely that discharges of contaminants to land and to air will occur as a necessary consequence of granting the land

[11] *AFFCO NZ Ltd v Far North DC (No 2)* [1994] NZRMA 224(PT)
[12] *Gillies Waiheke Ltd v Auckland City Council* [2004] NZRMA 385(CA)

use consents. There is no consent to discharge contaminant from industrial or trade premises, to land or to air.

54 An option available to you is to exercise the consent authority's power under s91 to require an application to be lodged with the Canterbury Regional Council for such discharges.

55 In any event, it is respectfully submitted that it is not appropriate for you to disregard the very considerable adverse effects on the environment addressed by Mr Henderson's evidence.

Less than Minor, Minor and More than Minor

56 A further issue that arises with the Applicant's expert evidence and the s42A officer's report is the confusion of terminology surrounding the magnitude of the adverse effects on the environment. The word "minor" as a qualifier of "effects" appears most critically in ss95A, 95D and 95E. However, its use is in two different contexts for two different purposes:

56.1 "Minor": This is used in ss95A and 95D, where it applies to the overall effects of the proposal, excluding land adjacent to the site. If the effects are "more than minor" then, provided no other public notification reasons exist, the application must be publicly notified;

56.2 "Less than Minor": This is used in s95E, for the sole purpose of determining whether a person is adversely affected by a proposal. If the effects on them are "less than minor" they are not adversely affected. If they are minor, moderate or significant, then they are adversely affected.

57 Each of them is therefore an "on-off switch" for the procedural issue in their specific provisions:

57.1 For the purposes of ss95A and 95D (and for that matter s104(1)), the "less than minor" threshold is irrelevant, as it does not appear and has no consequences. The only relevant threshold is "more than minor". The dichotomy is between "minor" or "more than minor";

57.2 For the purposes of s95E, the unqualified "minor" is not strictly relevant. The only term used is "less than minor". The dichotomy there is between "less than minor" and "not less than minor". It is only ever used to qualify effects on other persons, but not on the environment overall.

58 Nevertheless, both the s42A Officer and the Applicant's witnesses use the term "less than minor" to qualify the overall effects on the environment[13], in which context it is irrelevant. It is not, it seems their intent to say that the effects are "nil" or "de minimis", which would be the only other relevant qualifiers at the low end of the scale of effects when measuring their overall magnitude.

JURISDICTIONAL BAR – S104(3)(D)

59 Section 104(3)(d) provides that:

"A consent authority must [[not,]]—
(d) grant a resource consent if the application should have been… notified and was not."

More than Minor v Minor

60 In *Oasis Clearwater Environmental Systems Ltd v Selwyn DC* [2007] NZRMA 497(EnvC), refused to overturn a decision of the Council on appeal to the effect that it could not grant consent because the effects were more than minor and therefore s104(3)(d) deprived it of jurisdiction to grant consent.

61 The Court in that decision made no finding as to whether the test is to be applied at time of the notification assessment or at the time of the hearing. However, it found that because the proposal did not meet the test at the time of hearing, where there was the benefit of some further written consent and mitigation, it could not meet the more stringent test of the

[13] See for example, s42A Report: Paragraphs, 149 and 155; Evidence of Ms Kelly: Paragraphs 6.47

time of original notification assessment either. That made the issue of the timing of the assessment academic.

62 Although it will be submitted further below that the test is to be applied as at the time of notification, it is submitted that the current situation is much the same as *Oasis Clearwater*; even if you were to assess the overall effects as they now stand with the further mitigation proffered by the applicant, the Joint Submitters' evidence shows that the effects are still more than minor[14].

63 Once all the above legal principles with regards to assessing the magnitude of the adverse effects on the environment are correctly applied, the effects on the environment can only be correctly assessed as more than minor, even if the test is applied to the proposal as it stands now, rather than at the time of the hearing. This is still the case when the effects on "adjacent properties" are excluded, as required by s95D.

64 Nevertheless, if you consider that the overall effects of the application as it was when the notification assessment was made were more than minor, but the additional mitigation proposed or clarification provided by the Applicant since then will render the effects minor, then it becomes relevant which version of the application is to be assessed for the purposes of s104(3)(d). Relevant in this regard is that the landscape evidence peer review of Mr Densem concluded that there will be a "marked change"[15] in rural character and that the rural character will be "greatly less"[16].

65 It is submitted that using the approach to interpretation prescribed by the s10 Legislation Act 2019, s104(3)(d) requires the test to be applied as at the time of the original notification determination. This flows from the text and its purpose.

66 The tense of the wording of s104(3)(d) is critical "*should <u>have been</u> notified*". When this is given its plain and ordinary meaning, it relates to the

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[14] See in particular Evidence of Stewart Chapman, paragraphs 4.11, 4.19, 6.2, 6.8, 6.11, 9.3, Evidence of Paul Smith, paragraph 85.
[15] 18 September 2022 Landscape Review by Graham Densem, paragraph 59;
[16] Idem

assessment and decision at the time it was done. This is in keeping with the purpose of the provision, which is recognised by the Court in *Oasis Clearwater* as being to ensure the ability of the public to participate.

67 Applying it at the time of the hearing means that those who would have made a submission have no say in whether the mitigation has indeed achieved what was required. It undermines the purpose of s104(3)(d). It is submitted that if Parliament had intended s104(3)(d) to provide an opportunity to retrospectively cure a defective notification assessment, it would have been explicit on this point. It is not.

68 It is also relevant to note that for matters such as scope and Judicial Review of the notification decision, the critical approach of the Courts has been to apply the test as at notification[17]. To take the alternative approach would mean that different tests would apply that could lead to different results. As you are aware, an absurd or unworkable result is to be avoided where possible.

Failure to Notify Other Affected Persons

69 Mr Fletcher also indicates that he considers that there were a number of other persons on whom the adverse effects of the proposal, when appropriately assessed, are not below the "less than minor" threshold in s95E. It is his view that this would also trigger the jurisdictional bar in s104(3)(d). Importantly, Mr Densem's view is that there are "Possible more-than-minor effects on ten close residential neighbours and unbuilt lots". While the terminology relates to s95A, at the risk of stating the obvious, it must mean that the effects on those persons cannot be "less than minor" as required by s95E.

70 Although Counsel has been unable to find any authority to the effect that it does or does not, it is submitted that a proper interpretation of s104(3)(d)

[17] *Atkins v Napier CC* (2008) 15 ELRNZ 84(HC) as to scope and *Auckland Council v Wendco* [2017] NZSC 113 at [45] as to notification.

and what its purpose is as identified in *Oasis Clearwater* would suggest he is correct:

70.1 Section 104(3)(d) only uses the term "notified", without the qualifier "public". The omission of that qualifier must be assumed to be deliberate and given effect. That would signal that it was intended to apply to both forms of notification.

70.2 Section 95B specifically uses the term "notification" and "notify" in its title and text.

70.3 Section 95B(8)&(9) require the consent authority to "notify" each person who is an affected person under s95E (which contains the "less than/not less than minor" threshold).

70.4 Every such person is, to no lesser extent (and perhaps arguably a greater extent) than a person who is able to make a submission where an application in publicly notified, someone who the statutory scheme requires should be given the opportunity to make a submission on the application.

70.5 It therefore cannot be that Parliament would have intended the protection that s104(3)(d) provides, to apply only to those who were deprived of the opportunity to make a submission by the failure to publicly notify, but not to a person deprived of that opportunity by the failure to limited notify them.

71 Even if you do not consider the adverse effects of the proposal are more than minor, then, it is submitted, s104(3)(d) still deprives you of the jurisdiction to grant consent, because there are persons who ought to have been notified but were not.

OPERATIONAL NEED/NATIONAL POLICY STATEMENT FOR HIGHLY PRODUCTIVE LAND 2022

72 A key matter that has arisen from the s42A report is the applicability of the National Policy Statement for Highly Productive Land 2022 (NPS HPL). Being

a policy statement that does not affect the activity status of the proposal, it is a document that, despite having come into effect after lodgement of the application, is not something from which the application is shielded by s88A.

73 The application site has not been mapped in an operative regional policy statement as highly productive land and as such does not meet the definition of Highly Productive land in Clause 1.3(1). However, because the application site consists of Land use Capability 2 and 3 soils, Clause 3.7(a) requires it to be deemed to meet that definition. That renders the NPS HPL policies applicable.

74 As a result, Policy 3.9 is applicable. In Clause 3.9(2) it requires the consent authority to *avoid* the inappropriate use and development of highly productive land. It goes on to state that a use of highly productive land is inappropriate *unless* it meets one of the exceptions.

75 It is accepted that the proposal meets the definition of "Specified Infrastructure" in Clause 1.3(1). That would potentially render the exception in sub-clause (j)(i) applicable. However, that can only apply if the Applicant can demonstrate that there is a functional or operational need for the development to be on the highly productive land. A plain and ordinary reading of the applicable provisions would therefore mean that unless the applicant can demonstrate that there is a functional or operational need for this specified infrastructure to be located on the highly productive land, the particular use and development before you must be avoided.

76 I respectfully agree with the s42A Report that the definition of "Operational Need" in the National Planning Standards is relevant, particularly because of the statutory status of those standards. Because that definition is relevant, the definition of "Functional Need" in those same standards is also relevant. It is evident from those definitions that "Functional Need" is a more stringent test. Of course, the use of the word "or" indicates that if the less stringent test of "operational need" is met, then the exception also applies.

77 For completeness, the definition of "Operational Need" in the National Planning Standards is:

"means the need for a proposal or activity to traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints"

78 While there has been some case law on "functional need" as used in the Planning Standards, Counsel has been unable to find direct guidance "operational need" as defined in those Standards. However, in *Archibald v CCC*[18] the Environment Court did consider the term "operational need", as it arose in the Christchurch City Plan. Although it did not rely on the definitions in the National Planning Standards, it is submitted that it arrived at a test that is entirely consistent with those Standards.

79 At paragraph [44] the Court made the following helpful observation:

79.1 *"If 'operational' concerns the activities employed in doing or producing something, per Cambridge Dictionary, then we find the particular proposal being residential in nature, and of a scale consistent with the outcomes for the Residential Suburban Zone, has an operational need to locate within a residential zone and that need (meaning requirement) arises from the character and amenity afforded by residential zones."*

80 Also relevant is the wording of the exception in Clause 3.9(2)(j)(i):

"a functional or operational need for the use or development to be <u>on the highly productive land</u>" (emphasis added).

81 It is accepted that in isolation the use of the definite article before "highly productive land" may suggest this particular piece of highly productive land. However, it is submitted that such an interpretation is only available if this is read in isolation from:

81.1 The purposes of the NPS HPL;

[18] [2019] NZEnvC 207

81.2 The definition “operational need” in the National Planning Standards;

81.3 The fact that the words operational need are preceded by the words “functional or…”; and

81.4 The Court’s approach to operational need in *Archibald*.

82 The fact that it is used as an alternative to “functional need” means it must be a high bar. If the bar represented by “operational need” is too low, it renders otiose the words “functional need”. If all the emphasis is placed on the definite article as used, then the impact would be that as long as a piece of land has attributes that render it particularly suitable for a solar farm, then it matters not whether it is highly productive land.

83 There would be no need to consider whether there is a need to locate this activity on highly productive land, or whether land that is not highly productive would also meet those operational needs. If this approach were to be taken, it would frustrate the purposes of the NPS HPL.

84 It would ignore totally that the term “operational need”, which was adopted after the definition in the National Planning Standards came into force, uses the words “in a particular *environment*” (my emphasis) and not “in a particular location”. The latter would be the result to which the overemphasis on the definite article “the” above would lead. It is submitted that the use of that defined term is deliberate and imports that defined meaning, relating it to “a particular environment”, which in this case is highly productive land.

85 This approach is in line with the Court’s approach in *Archibald,* in which it becomes apparent that “need” is something stronger than simply “advantage” or “convenience”. It is a requirement. It is submitted that the proper interpretation of the term as used in this context is that there is an operational need to locate such solar arrays on highly productive land.

86 In the *Archibald* case the Court was considering whether guest accommodation had an operational need to be in a residential zone. The Court concluded that the residential zone had a number of characteristics that met the operational needs or requirements of guest accommodation. They were characteristics that flowed out of the fact that it was residentially zoned.

87 In applying *Archibald* and the National Planning Standards definition, it becomes apparent that the "operational need" in this context, is met if the characteristics that are needed for this particular use flow out of the fact that the land is highly productive land.

88 It is submitted that the evidence of Mr Fletcher in particular demonstrates that the fact that this site happens to have a number of the features that on Mr McMath's evidence anyway, are necessary[19] for a solar array, does not flow from the fact that it is highly productive land as characterised by the NPS HPL. The fact that it has highly productive soils is not the factor that makes it suitable for a solar farm.

89 In contrast with the *Archibald* decision, where the Court found that by going to the residential zone one would go to a site with attributes that met the operational needs of visitor accommodation because that zone gave rise to those attributes, the same does not apply for solar arrays and highly productive land. It is not necessary to locate on land with productive soils to find a site that meets the needs of a solar array. The reason that it is a flat site, is close to a substation and sufficient sunshine, for example, does not flow from the fact that this is highly productive land.

90 For those reasons it is submitted that the s42A officer was wrong to conclude that the site might well have features capable of demonstrating an operational need. That approach is not consistent with a correct interpretation of that term and the way it is used in Policy 3.9(2).

[19] The Joint Submitters' position is that they are beneficial rather than "necessary"

91 You will be aware of the consequences of the use of the words "must avoid"[20]. They mean that unless the Applicant can satisfy you that there is an operational need to locate this particular proposal on highly productive land, then you must refuse consent. As the evidence of Mr Fletcher outlines, that is the most likely outcome.

OTHER STATUTORY CONSIDERATIONS

92 These submissions have concentrated primarily on the magnitude of the adverse effects on the environment and the requirements of the NPS HPL. This is because, as will have become evident, the further statutory considerations should not arise, because:

92.1 In the light of the effects being more than minor, s104(3)(d) deprives you of the jurisdiction to grant consent; and

92.2 There being no operational need to locate on highly productive land, Policy 3.9(2) NPS HPL requires you to refuse consent.

93 Nevertheless, in the event that you do not accept those submissions, it is submitted that there are still policy reasons why you should refuse consent.

94 It is accepted that operative policy documents are deemed to give effect to the requirements of Part 2 and as such Part 2 cannot be relied on of itself to refuse consent in a manner that is not consistent with the applicable policy framework. Nevertheless, the policy requirements identified Mr Fletcher at paragraph 8.4 of his evidence give effect to critical Part 2 requirements. As Mr Fletcher indicates, those policies *"include provisions seeking to avoid, remedy or mitigate significant environmental effects[21], maintain rural character and support[22], maintain or enhance the function and form, character and amenity[23] of rural areas".*

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[20] *See Environmental Defence Society Inc v Otago Regional Council,* (2019) 21 ELRNZ 252 (HC)
[21] Section 5(2)(c)
[22] Section 5(2) "enabling" provisions.
[23] Section 7(c)

95 In order to meet the "subject to Part 2" requirement in s104(1), it is therefore critical that you ensure that these policy requirements are met. As you will have noted, Mr Fletcher concludes that the current proposal does not meet these requirements. In its current form granting it can therefore not be seen to be in accordance with the purposes of the Act.

96 If a proposal that is not blocked by the s104(3)(d) and operational need issues raised above were before you, it would still only be capable of being approved as being in accordance with the purposes of the Act if it were redesigned to achieve the policy aims identified by Mr Fletcher.

SUBMITTER EVIDENCE

97 As indicated in the introductory comments above, the submitters will each give evidence. Primarily this should be treated as evidence of fact. However, this being a Council hearing, it is appropriate for them to address you on how they view the proposal and why they request that you refuse consent. It is submitted that their right to be heard is an important part of this hearing in this regard.

98 While the above submissions have concentrated principally on legal issues and expert evidence, what the submitters themselves have to say to you will also include real evidence of significant adverse effects on them, which it is submitted have not been adequately anticipated or addressed by the Applicant. These are also important matters for you to consider and should add to the adverse effects as outlined by the Joint Submitters' expert evidence.

CONCLUSION

Primary Relief

99 It is submitted that the evidence will show that consent must be refused because:

99.1 The adverse effects on the environment will be more than minor, requiring public notification and there are persons who were not

notified who should have been notified. As a result, s104(3)(d) deprives you of jurisdiction to grant consent.

99.2 Even if this were not the case, then the inability to demonstrate that there is an operational need to locate this proposal on highly productive land means that you are obliged by the NPS HPL to refuse consent.

99.3 Even if this were not the case, the proposal has not been designed in a manner that meets the requirements of the policies that give effect to key requirements of Part 2 of the Act.

100 This is the primary relief sought by the Joint Submitters. It is their position that the flaws in the application cannot be cured. Nevertheless, while not rendering the proposal in any way acceptable or appropriate, they do consider that there are ways in which the proposal can be rendered "less unacceptable". These are set out under the heading below.

Partial Relief

101 This title is used to indicate that it is not the full relief sought and is not an acceptable alternative relief. The Joint Submitters' position is that on the evidence before you the following additional mitigation would be available and would at least render the proposal less unacceptable:

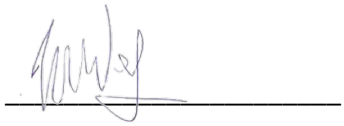
101.1 Imposing a duration of no more than fifteen years to align with the Stormwater discharge permit;

101.2 Redesigning the proposal as outlined by the evidence of Mr Fletcher;

101.3 Delaying the implementation of the structures as per the recommendations of Mr Smith;

101.4 Utilising the opportunities for noise attenuation alluded to by the evidence of Mr Lewthwaite; and

101.5 Providing some degree of security for removal or remediation, for example by way of the provision of a bond in accordance with ss108(2)(b) and 108A(1)(a) and (b).



J M van der Wal

Counsel for the Joint Submitters

ORIGINAL

Decision No. C 72 /2007

IN THE MATTER	of the Resource Management Act 1991 (**the Act**)
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	OASIS CLEARWATER ENVIRONMENTAL SYSTEMS LIMITED
	(ENV-2006-CHC-385)
	Appellant
AND	SELWYN DISTRICT COUNCIL
	Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J A Smith (presiding)
Environment Commissioner C E Manning
Environment Commissioner S J Watson

Hearing at Christchurch on 29 and 30 March 2007

Appearances
Mr A J Prebble for Oasis Clearwater Environmental Systems Limited (**Oasis**)
Ms R M Dunningham for the Selwyn District Council (**the District Council**)

DECISION AS TO JURISDICTION

Introduction

[1] To our knowledge this case raises a novel jurisdictional point of wide application where limited notification has occurred. The application of section 104(3)(d) was argued as a preliminary point in the appeal.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[2] Oasis Clearwater Environmental Systems Limited wishes to establish a plant to manufacture concrete sewage treatment systems on a 5.27 hectare property at 524 Old West Coast Road on the outskirts of Christchurch City in the Selwyn District. It submitted an application to do so to the Selwyn District Council on 15 August 2005.

[3] On the basis of advice from the Council that the proposed activity did not fall within the definition of 'Industrial Activity' contained in the Proposed District Plan (the only plan currently relevant to the application), it sought consent for a restricted discretionary activity, with the Council's discretion restricted to the effects of exceeding the permitted level of 30 equivalent car movements per day. On that basis the Council determined that the application need not be publicly notified on 26 September 2005. However, the application was served on five parties on 7 October 2005 (**limited notification**). Four of these made submissions on the matter.

[4] During the course of hearing the application the Commissioner, appointed by the Council for that purpose, came to the view that the application should have been publicly notified. After an adjournment, during which necessary consents from the Regional Council were obtained and further refinements made to the proposal, and following a re-convened hearing, the Council issued a decision refusing consent pursuant to section 104(3)(d) of the Act.

[5] Section 104(3) of the Act provides:

> *A consent authority must not –*
>
> ...
>
> *(d) grant a resource consent if the application should have been publicly notified and was not.*

The issue

[6] Oasis has appealed against the refusal of consent and seeks that the Court overturn the Council's decision. We observe that the test as to whether an application should be publicly notified differs from the various matters a consent authority must have regard to under section 104(1) when forming a judgement on whether a consent

should be granted. This decision concerns whether, having regard to the provisions of section 104(3)(d), the Court has jurisdiction to grant consent. The parties were agreed that this question should be determined prior to the Court conducting a hearing on the substantive appeal.

[7] The tests of whether an application for resource consent requires public notification are set out in section 93(1) of the Act which states:

> *A consent authority must notify an application for a resource consent unless –*
>
> *(a) [irrelevant];*
>
> *(b) the consent authority **is satisfied** that the adverse effects of the activity on the environment will be **minor**.*
>
> [Emphasis added]

The parties accept that the test as to *satisfaction* and the requirement that the effects of the activity on the environment will be minor, is a higher test than that which the Court would necessarily adopt in determining the discretionary application if it finds it has jurisdiction.

[8] Unfortunately how section 104(3)(d) should be applied by the consent authority at a substantive hearing, and on appeal by this Court, is less clear. Mr Prebble for Oasis submits that the application should be considered in the form in which it stands before the decision-maker, that is with the benefits and disadvantages derived from neighbours' consents, amendments to mitigate effects on potentially affected parties and the like. Ms Dunningham's submission is that the application is to be considered in the form in which it was before the Council at the time a decision on notification was made, but on the basis of all the information the Council should have had before it.

[9] The arguments on that question are in our view finely balanced. However, we only need to determine this timing issue if the requirements of section 93(1) are satisfied by the application at one stage in the process, but not at another. It is accepted that the applicant's case is strongest if it is considered as the application stands at the time of the Court's hearing and the Council's if it is considered as it was at the time of notification.

The position of the parties

[10] The parties are agreed that the notification decision was flawed, in that the Council restricted its discretion to the matter of traffic generation at a time when the activity was fully discretionary under the Proposed District Plan, and non-complying under the Transitional Plan, which remained operative. They are also agreed that the activity now falls within the Proposed District Plan's definition of industrial activity. We also record that a joint memorandum was submitted by the qualified traffic engineers appointed by both parties, Mr A McD Mazey and Mr R N Edwards, to the effect that any adverse traffic effects of the proposal would be less than minor, provided that the existing entranceway is upgraded in accordance with appendix D of the Proposed District Plan.

[11] In addition to potential adverse traffic effects from the proposal, the planning witness called by Oasis, Mr J G Phillips, identified the potential for:

- visual effects and effects on rural character and amenity;
- effects on rural soil resources; and
- noise effects

to be adverse effects on the environment that required evaluation. Mr Phillips' uncontested evidence was that the proposal would have no adverse effects on the site's existing soil resources and its potential for rural activity. The Council did not accept that the effects of noise, or the effects on rural character and amenity were no more than minor, as the applicant contended.

[12] In the remainder of this decision we describe the site and its environs, we then consider the application in the form it was at the time of our hearing. If we have jurisdiction on this basis then we would move to consider whether the situation is different at the time of notification. We consider firstly visual effects, then noise effects, and finally effects on rural character and amenity, recognising that in this case visual and noise effects will have considerable impact on how that rural character is perceived.

The applicant accepts that if the effects are found to be more than minor as at the time of the Court's hearing, its position is not improved by consideration of them at any earlier time

The site and its surrounding environment

[13] The application site is a 5.27 hectare property located on the north side of Old West Coast Road. The site is bounded to the west by Scarlet Oaks Drive, to the north by an unformed legal road, and to the east by a 2.0 hectare rural residential property owned by Mr and Mrs Rogers. These boundaries are generally screened by densely planted pine hedges. However to the south of an existing workshop activity along West Coast Road, the site presents a less screened appearance where immature planting is situated behind a two metre shade cloth fence. Opposite the site on the south side of Old West Coast Road are rural-residential type properties owned by Mr and Mrs Giles and Mr and Mrs Cadenhead.

[14] The land on the western part of the site is grazed, and this situation is expected to remain whether or not the resource consent is granted. On the eastern part of the site there is an engineering workshop, an office and an outdoor storage area developed in accordance with a resource consent issued in 1995. Until recently those facilities were used by Powell Construction Limited for heavy engineering, metal work and concrete-slab manufacture and storage. That business has now ceased to operate, and Oasis now operate a small part of their business from the site. This involves the employment of four staff to assemble and finish approximately five unfinished sewage treatment systems daily, and the subsequent storage of them on site until delivery to purchasers. Oasis' operation was established in September 2006 in accordance with the District Plan rules then in force and includes a 150 m^2 workshop building, a manufacturing bed immediately north of the workshop, and outdoor storage areas.

[15] There are formed areas for access and car-parking located between the workshop building and the Old West Coast Road. We note that the resource consent permitted 7700 m^2 of the site to be used for the manufacture of building and construction components. Of this, 3025 m^2 can be used for workshop purposes, including an engineering workshop and office. These activities are screened from the neighbouring

Rogers property not only by a shelterbelt, but by a mound of around two metres high running along the eastern boundary from a point about 75 metres from Old West Coast Road This mound has been installed by the applicant.

[16] The site is located in an area of relatively poor soil Surrounding land is divided into comparatively small rural allotments which are used predominantly for 'rural lifestyle' purposes. There is light grazing on some of the land but little or no evidence of horticulture. There are numerous shelterbelts along roadsides and separating properties which limit the openness of the environment.

[17] Mr A W Craig, a landscape architect called by the applicant, drew attention to the presence of a number of quarries 1.5 km south-east of the site, and also noted other detractions from rural amenity such as cars, drums and dilapidated machinery stored on a site in the vicinity. The landscape architect called by the Council, Ms N S Vance, did not consider that the quarries, or other dissonant elements, dominated the locality and commented on the relative peace and quiet of these environs. Though Mr Craig clearly considered that the area had rather less amenity, he considered it had a *laid back* rural character. He noted that rural character and amenity were generically present because of the prevalence of open space and greenery over built form. That is significant. If what would occur on site as a result of what Oasis now proposes would detract from the rural character of the area as Mr Craig understands it, we would need to evaluate carefully the scale of that effect.

The proposal and its evolution

[18] Current buildings on site are an existing workshop of 150 m^2 and a 504 m^2 tilt slab bed. It is proposed to add the following items which fall under the District Plan's definition of buildings[1]:

- a steam boiler (78 m^2);
- concrete plant and premix storage (500 m^2);
- a storage shed (36 m^2);

[1] J G Phillips, evidence-in-chief, para 22, footnote 2

- a washdown pad (104 m^2);
- two concrete casting pads (77 m^2 and 98 m^2);
- an office for Oasis (110 m^2).

This would produce a total of 1657 m^2 occupied by buildings. Outdoor storage and activity areas would also be expanded, occupying, inclusive of buildings, 4820 m^2 in contrast to the present permitted 3025 m^2.

[19] The application proposed in total:

- the use of the buildings, manufacturing bed, outdoor storage areas and car-parking which occupy 7700 m2 of the site;
- the establishment of an office to replace the relocatable facility used by Powell Construction Limited;
- the establishment of a 10.4 metre high, 2.4 metre diameter cement silo;
- the establishment of a new three-walled open concrete manufacturing plant and storage bay approximately three metres high, and a sealed washdown and water re-circulation area;
- the establishment of an 80 x 37 metre outdoor storage area where products will be stored to a maximum height of three metres;
- the establishment of two nine metre high gantry cranes, operating with 80 metres of travel;
- new landscape plantings along the site frontage and property boundaries;
- site related signage at the entry to the site.

The proposal, if it receives consent, will result in the employment of approximately 23 full-time staff on the site.

[20] At the hearing before the Council the applicant offered a number of conditions to avoid or mitigate adverse effects identified by submitters. These included the formation of a sealed vehicle crossing extending from the edge of Old West Coast Road to 15 metres inside the front property boundary, the erection of a sign at the site entrance advising of a speed limit of 15 kph on site, a restriction on the operation of the gantry

cranes, preventing them working south of the southern façade of the old workshop building, the establishment of a monitoring programme at the applicant's expense, and on-site planting in accordance with a landscaping plan. The planting was to include the planting of Leyland Cypress trees with a minimum height of 1.5 metres at 1.2 metre intervals along part of the Old West Coast Road frontage and along the open part of the eastern boundary, and the erection of green wind cloth fencing two metres high along part of the southern boundary. The conditions required the planting to be irrigated for the first two growing seasons, and maintained to achieve a minimum height of six metres[2]. Prior to the planting being undertaken, the planting area was to be excavated and backfilled with clean topsoil. Mr Craig told us that the applicant intends to put further mounding along the Old West Coast Road frontage and perpendicular to it, though this was not included in the list of conditions attached to the evidence of Mr Phillips.

[21] Written approval to the proposal has been given by Mr and Mrs Cadenhead who live on the south side of Old West Coast Road to the south-east of the application site and by Mr and Mrs Rogers whose property adjoins it on its eastern boundary. The Cadenheads gave their approval at the reconvened Council hearing, the Rogers between that hearing and this preliminary issue coming to hearing by the Court. In terms of the effects at the time of the Court hearing we disregard any effects on these properties. Neither of these approvals would be relevant to an evaluation of effects at the time of notification.

The effects of the proposed activity at the time of hearing

[22] We note that the comparison for the purpose of measuring effects in this case is between the activity as currently consented (the permitted baseline) and as proposed in the application on appeal. The parties were not agreed whether the noise levels set by the Plan established a permitted baseline in respect of noise, or whether we should exercise our discretion to disregard such effects. We discuss this issue later in this decision.

[2] A W Craig, evidence-in-chief, para 8.4; Appendix C, attached to evidence of J G Phillips

Visual effects

[23] The proposal, if consented would add 60% to the area occupied by building, outdoor activity and storage, in addition to the further buildings outlined in paragraph [18], and increase the number of people on site almost six-fold.

[24] Despite this Mr Craig considered that the increased effect of the proposal over that consented upon visual amenity would be minor at worst, and that the character of the site would remain the same. He noted that apart from the proposed office, the new buildings would be located west and north-west of the western façade of the existing workshop. They would thus be as far as possible from the Old West Coast Road frontage of the site. Further, it was his evidence that in three to five years the Leighton's Cypress planted at the road frontage would provide total screening apart from at the entrance. Even before that occurred, in his view the distance of the structures from the road and the effects of perspective would reduce the apparent size of even the tallest of them.

[25] Mr Craig considered the additional effects of the proposal on neighbouring properties and on road users. As far as road users, he regarded any further adverse effects as negligible. In this vicinity Old West Coast Road has a 100 kph speed limit, and motorists would see at most a glimpse of the activities on the site. In terms of effects on neighbours we consider now the effects on Mr and Mrs Giles, since they had not, even at the time of our hearing, consented to the proposal. Ms Vance accepted that, of the neighbours who had not consented, they alone received adverse effects that could be considered more than minor.

[26] Mr and Mrs Giles own a property on the south side of Old West Coast Road almost directly opposite the application site. Mr Craig acknowledged that, from a second-storey window of their dwelling and from some parts of the site, there were views into the application site; existing trees on the Giles' property served to mitigate the effects of these views, and eventually, in Mr Craig's opinion, the Leighton's Cypress would screen views of the activity area, though this would take time; in the meantime the shade-cloth would provide some relief. It was Mr Craig's evidence that the distance of the Giles' dwelling and outdoor spaces from the activity area on the application site

and the backdrop to the structures of existing tall evergreen shrubs would *reduce the visual dominance of the structures on the application site;* though tall, these structures were not of substantial size. Mr Craig indicated that there were additional adverse visual amenity effects on Mr and Mrs Giles, but that they were minor.

[27] Ms Vance did not agree that the character of the application site would remain unchanged. She stated:

> *[t]he proposed activity will require at least 22 additional staff, covers a greater area of the sites, manufactures a different product, creates more noise, and involves gantry cranes, potentially 40 tonnes of concrete product per day and significantly more vehicular movements into and out of its premises including heavy vehicles. This change in character will be a significant modification to the current character and people's appreciation of the landscape*

She opined that the change would be much greater than indicated by the increase in area used for the proposed activity. She expected much greater intensity of activity with the area between structures occupied by drums, palettes, skips and other paraphernalia of an industrial nature associated with the activity. There would be a perceptible increase in hustle and bustle. In this respect we note the evidence of the planning witness called by the Council, Mr S B Elvines, that the resource consent issued in 1995 restricted the number of staff on site to a maximum of four.

[28] Ms Vance further considered that the planting along the Old West Coast Road would be slower to take effect in screening the activity from the road and the Giles' property. Allowing for the fact that the gantry cranes would now be set back 150 metres from the Giles' residence, and would be screened from it by vegetation five metres high on the Old West Coast Road frontage, she considered that it would be six to nine years before such screening would be achieved. She noted the growth pattern of Leighton's Cypress which produce a tall thin leader in the top half of the tree, and the bulk of vegetation in the bottom half. Ms Vance also had less confidence in the ability of vegetation on the Giles' property to ameliorate the visual effects of the expanded activity. In cross-examination she pointed to a gap between eucalypt and spruce trees on the Giles' property which provided a view shaft to the proposed crane on the application

site from the Giles' lounge and their outdoor seating area. So she considered more of the Giles' living area would be affected than was suggested in the evidence of Mr Craig, and that the visual impact would last longer.

[29] In evaluating these effects, we share Mr Craig's view that the impact on passing motorists would be limited. What glimpses they gain would be brief, and where there is a view through the entranceway it would be to an existing and consented building. In terms of the Giles, even allowing for the north-west orientation of their dwelling, there would be visual amenity impacts from the extension of industrial activity immediately north of their site across the road and north-north-east of their dwelling. These impacts are more than *de minimis* and are to be brought into account in our final judgement as to whether we can be satisfied that the effects of the activity on the environment will be more than minor.

Noise effects

[30] We accept that the impact of additional noise, as well as being an identifiable effect in itself, also impinges on people's appreciation of rural character and amenity. Potential noise effects from the expanded activity were the subject of expert evidence called by both parties to this case which we evaluate at this point, recognising that our conclusions on this issue must be factored in to our overall assessment of effects on rural character and amenity which we undertake in a subsequent section of this decision.

[31] Mr R C Malthus, an environmental consultant with significant expertise in the measurement of noise, produced the following summary of predicted noise levels at notional boundaries of neighbouring sites from the proposed development. The notional boundary is a line 20 metres from the façade of a rural dwelling.

Dwelling location	*Daytime*		*Night-time*	
	L_{10}	L_{max}	L_{10}	L_{max}
West of the site	*50*	*53*	*30*	-
East of the site (Rogers property)	*54*	*63*	*34*	-
South of the site (Giles property)	*53*	*63*	*30*	-

We note that a number of local authorities have adopted the concept of *notional boundary* in setting noise standards in rural areas to avoid placing unnecessary restrictions on farming activities to protect other farmland at some distance from any dwelling. Mr Malthus' estimates compare with the current consented noise limits of 50 dBA L_{10} for the current activity. The zone standard in the Rural zone is 60 dBA L_{10} (day time) with a 5 dBA tonal penalty if applicable (Rules 1.15[3] and 1.6[4]). In accordance with the same rule the L_{max} is 85 dBA (daytime) with similar provision for a tonal penalty.

[32] We did not understand the acoustical expert called by the Council, Mr S Camp, to differ greatly from these predictions, though he noted that in achieving his figures Mr Malthus had allowed for 5 dBA attenuation by structures and materials on site, including the earth mound on the east side of the property. Mr Camp drew attention to the absence of mounding on the southern boundary and concluded that while finished product and stored materials might provide some acoustic screening, their extent and position on site would vary; as a result of this they should not be relied on for noise predictions. His opinion on this matter was not challenged either in cross-examination or in the rebuttal evidence of Mr Malthus and we accept it. As a consequence we conclude that the daytime L_{10} figure for noise from the proposed activity at the Giles'

[3] p.329
[4] p.189.

notional boundary would be around 58 dBA. It would also increase the L_{max} figure to around 68 dBA.

[33] Except on the point outlined above, we did not find significant differences in the experts' accounts on factual matters. Their measurements of background (L_{95}) noise levels on the Oasis site (including current consented activity and traffic noise) ranged from 38 to 42 dBA, and Mr Camp did not challenge the evidence of Mr Malthus that the ambient L_{10} levels at a distance of 50 metres from Old West Coast Road, the approximate distance the Rogers' and the Giles' dwellings are set back from the road boundary, were in the range of 58 dBA. We must assume the L_{10} is dominated by traffic and existing activity on the Oasis site. Despite this agreement Mr Malthus and Mr Camp differed widely in their estimation of the quantum of adverse effects that the proposed activity would produce.

[34] Mr Malthus, noting the similarity of L_{10} levels likely to be produced by Oasis' operations and that already occurring as a result of road use, told us that the additive effect of noise from the Oasis' proposal would be approximately 1 dBA (L_{10}), which he described, relying on WHO guideline values for community noise, as a perceptible change of marginal effect. Mr Camp considered that while in some circumstances a change in L_{10} levels was an appropriate indicator of effects, that was not the case on a site such as this where traffic noise is intermittent. In such cases he found it appropriate to consider the degree to which noise from the activity on site would exceed background noise, because in these circumstances noise less than that of traffic can still be clearly heard. He referred to NZS 6802:1991 *Measurement of Sound* which suggested that an intrusive noise should not exceed the background noise level by 10 dBA or more. On this basis he considered an appropriate limit for noise not expected in a rural area 45-50 dBA (L_{10}). Overall, he considered the effects of noise more than minor.

[35] NZS 6802 recommends a difference between L_{95} and L_{10} levels of up to 10 dBA. Mr Malthus in rebuttal noted that the application of this approach results in a difference of 12 dBA, only 2 dBA higher than the NZS 6802: 1991 recommendation. However in the absence of mounding on the southern boundary that difference at the Giles' notional boundary is likely to be 16 dBA, or 6 dBA above the recommendations of that standard. That degree of difference is likely to be perceptible to a more than marginal extent.

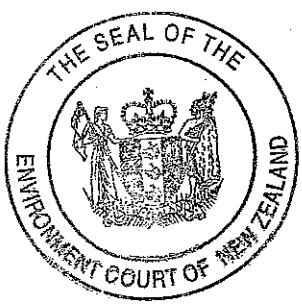
[36] In evaluating the noise effects of the proposal in comparison with those currently experienced by neighbouring properties, the intermittent nature of traffic noise suggests that we should not rely on a comparison of L_{10} levels alone as an indicator of the effects of the potential new activity. We consider that we should also give some weight to the extent to which L_{10} levels produced by Oasis' proposed operations will exceed background noise levels, even though the 1999 version of the standard does not use that method for calculating the acceptability of noise. As a result we are not satisfied in absolute terms that the effect of the increased noise that the Giles would receive would be minor.

[37] Section 104(2) of the Act gives a consent authority, or on appeal this Court, the discretion to disregard adverse effects on the environment that are permitted by the Plan. Rule 1.15[5] contains the following table of noise limits:

> *Table Two*
>
> *Noise Limits assessed at the notional boundary of any dwelling, rest home, hospital, or classroom in any educational facility except where that dwelling, rest home, hospital or classroom is located within a living zone*

Hours	*Noise limit*
7.30 am – 8.00 pm	*60 dBA L_{10}*
	85 dBA L_{max}
8.01 pm – 7.29 am	*45 dBA L_{10}*
	70 dBA L_{max}

However, a passage in the introductory section to the rules which deal with noise measurement and assessment provides for the assessment of environmental sound in accordance with NZS 6802: 1991, and continues[6]:



5 Proposed Selwyn District Plan Rural Section, p. 329.
6 Ibid. p 189

[t]he following additional provisions shall apply to the application of NZS 6802: 1991.

4.5.1 Adjustments for special audible characteristics, if present, as provided for in Clause 4.3 and 4.4 of the Standard shall apply and will have the effect of imposing a numerical noise limit 5 dBA more stringent than the L_{10} numerical limits stated in the rules.

[38] Mr Camp's evidence was that the kind of noise that would be generated by the proposed activity would attract the more stringent noise limit referred to above. In response to a question from the Court, Mr Malthus accepted that this was the case[7], and we do too. As a result of this the proposal would not comply with the noise standards of the Plan. Since there is no noise reduction from mounding along the road frontage of the site, the noise level at the Giles' notional boundary is likely to be around 58 dBA L_{10}. Because of the audible character of the noise, the Plan's standard for a permitted activity is 55 dBA L_{10}. The consent issued to Powell Construction 1995 authorises a noise level of 50 dBA L_{10}. In terms of establishing a 'permitted baseline' the zone standards in the Plan are the most generous available to the applicant. The existing resource consent authorises only 50 dBA L_{10}, and we were told that the existing Oasis consent was established pursuant to the District Plan rules then in force.

[39] Ms Dunningham for the Council is of the view that the noise standard in the Proposed District Plan to which we have referred applies only to permitted activities. Mr Prebble for Oasis submits that the noise standards apply to all activities unless they are expressly exempted, and that any activity in a rural zone that complies with the standard is permitted in terms of noise. The rule is not itself clear on its face. The relevance of the question is at least changed by our conclusion that the proposed activity would not comply with the standards of the District Plan. Even if the rule does apply to all activities – and we make no finding to that effect in the decision – there remains the question of whether the noise level in excess of the standard is an effect that is minor or less.

7 Transcript p 23.

[40] It was Mr Malthus' evidence that in the context of the Plan an exceedance of 3 dBA, L_{10} was a minor effect. For that opinion he relied on a view expressed in Bies and Hansen, Engineering Noise Control, Span Press 2003, that if a compliance standard is exceeded by up to 5 dBA, that would normally be considered a marginal change.

[41] Mr Camp was less certain. We cite the following passage from a discussion with the Court:

> *MR CAMP: Yes. It is a tough question, because although 3 DBA will change in the noise level to [the extent] it would be just noticeable, if you keep applying that same philosophy you end up with 65 sooner or later, because you are only doing it little steps at a time, so sooner or later I think you will have to draw a line in the sand.*
>
> *HIS HONOUR: So one would have to say that it depends at which point you reach a decision that the effects are minor or more than minor, isn't it.*
>
> *MR CAMP: Yes.*
>
> *HIS HONOUR: Either a slight increase over that will still make it major even if for example 55 is the level on which it is minor, then 56 would be more than minor.*
>
> *HIS HONOUR: So in that regard then, the question is that at 58 compared with 55 under the plan, that exceedance may or may not be minor but depends where you pitch the minor point?*
>
> *MR CAMP: Yes, it is.*

[42] In determining whether the effects of exceeding the limits set by the Plan are more than minor, we accept the applicant's position that the context of the application is a rural area and that the level of protection from noise to which those who reside in it are

entitled is less than that provided for in areas zoned residential. But the Plan itself provides for that, amongst other ways, by specifying that noise limits apply at notional boundaries rather than the legal boundary of the site. What we are concerned about is the effects of exceeding the limits set by the Plan to protect the amenity of rural areas.

[43] Mr Malthus referred us to NZS 6801: 1991, which suggests 55 dBA L_{10} as an upper limit for the protection of outdoor residential amenity, and the World Health Authority's Guideline Values for Community Noise, WHO, Geneva 1999, which recommend 55 dBA L_{eq} (approximately 57 dBA L_{10}) as a daytime outdoor threshold of serious noise disturbance for communities. In addition Mr Camp drew attention to another recommendation in the WHO document that a limit of 50 dBA L_{eq} is necessary to avoid moderate annoyance. What is proposed is a potential noise emission of 58 dBA L_{10} with tonal characteristics which the experts agree are such as to invoke the more stringent provisions of the District Plan.

[44] We consider the context in which exceedance of the limits set by the Plan occurs is significant. That context is one where the Plan standards themselves are set at a level close to the threshold beyond which there is serious noise disturbance for communities, and significantly above levels capable of producing moderate annoyance. In that context a 3 dBA excess may be a greater effect than in other circumstances. In our view the effects of the additional noise are at the very least at the cusp of minor and more than minor. There is also the prospect that the additional noise is cumulative on the permitted baseline and existing environment (the current consent and traffic) and that this changes the effects of the noise to more than minor. Further, the acknowledgement that the type of noise generated will be such as to attract the tonal penalty strongly suggests that it will not be of the type associated with the traffic noise or rural activities currently present in the area. Its particular character of the noise will add to the perception of adverse effects.

Effects on rural character

[45] There was no disagreement amongst the experts that the vicinity of the site displayed rural character, even though their precise description of that character varied. The land is divided into smaller allotments than in rural areas further from the city and

shows more evidence of habitation. The division of the allotments by shelterbelts reduces the sense of openness. We agree with Mr Craig that the area is not idyllic, but the discordant elements, including the small scale manufacturing consented activity occurring on the site, are not overwhelming. There is still, as Mr Craig put it, a predominance of natural elements over built form. It is a rural area.

[46] We accept that in this case the visual and noise effects of the proposal are effects of significance for perceptions of rural character. On this site the increase in workers on-site from 4 to 23, their presence on site for 5½ days per week every week of the year, the gantry cranes and the expansion of the area occupied by the activity will produce an intensification of an existing partly industrial character on the site. The percussive noise in working with the concrete products together with gantry and machinery noises may result in quite different character to the noises from the site when compared to surrounding properties.

[47] It is difficult to determine the extent to which the proposal would change the wider environment in which it would be set. There are factual matters, such as the use individuals make of that environment, which might be legitimately drawn to our attention by those who live, work or recreate in the area. If such people do not have the opportunity to bring their case and their evidence to the consent authority (or the Court on appeal) it cannot be satisfied that all relevant information is before it to enable an adequate determination of the effects on rural character to be made.

Overall evaluation

[48] We remind ourselves that we are required to be satisfied that the effects of the activity are minor, before we can conclude that the Council was wrong to invoke section 104(3)(d) of the Act. That test is properly high, given the importance in the scheme of the Act of the public's right to participate. We cite the decision of the Court of Appeal in ***Bayley v Manukau City Council***[8]:

[8] [1998] NZRMA 513 at p. 521, cited with approval in ***Christchurch Civic Trust v Christchurch City Council*** [2001] NZRMA 395 at para 29.

> *There is a policy evident upon reading Part VI of the Act, dealing with the grant of resource consents, that the process is to be public and participatory ... Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular.*

That decision preceded the amendments to the Act made in 2003 and 2005, but we do not consider the situation has been changed by those amendments.

[49] In this case, there are visual effects that are more than *de minimis*, and need to be brought into account in the final evaluation; there are noise effects on the cusp of minor/more than minor; we are not certain that all relevant evidence on the effects of the activity on rural character are before us. In such circumstances we are not satisfied that the adverse effects of the activity on the environment will be minor. In other words, we are dealing with an application which should have been notified and was not. In such circumstances there is no jurisdiction for the consent authority, or on appeal the Environment Court, to grant consent.

[50] We add that we have formed this view on the basis of the most favourable interpretation of the law available to the applicant. If the application is considered as it was at an earlier time, it lacks the benefit of the Rogers' consent at the time of the Council's substantive decision and additionally, at the time of notification it cannot rely either on the consent of the Cadenheads or on the various mitigatory conditions offered at the Council hearing, or on work done on site after notification had occurred. Again if the Court held the view that the noise standards in the Plan were not available as a *baseline* beneath which adverse effects of the activity could be disregarded, we consider that noise effects of the proposal would be more significant in terms of section 93. Applying a more general approach on moderate annoyance levels or WHO criteria we would consider external levels of 58 dBA L_{10} with special tonal characteristics to have potential for more than minor effects. In particular the potential sounds include impact events which could cause annoyance responses and result in effects which would make non-notification even more clearly in breach of the requirements of section 93.

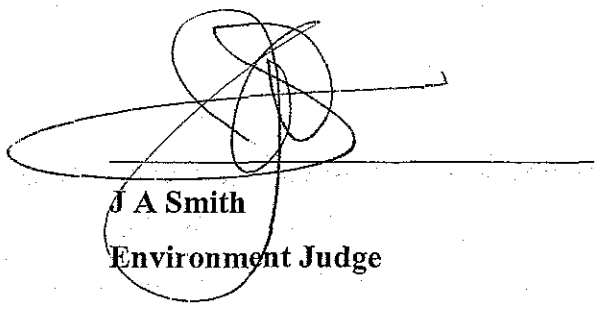
[51] The outcome is that the decision of the Council is upheld.

Costs

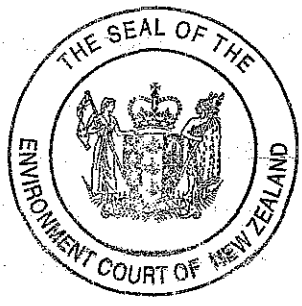
[52] Costs are reserved. We note that there is no practice in the Environment Court that costs awards follow the outcome. In this case the appellant has been put to the expense of an appeal to this Court on a jurisdictional matter, because by Council's own admission the process adopted by the Council in reaching its initial decision on notification was flawed. In the process the applicant faces more stringent tests than would have necessarily been the case had the application initially been notified. We do not pre-judge the outcome of any applications. If there are any applications for costs, they should be submitted to the Court by 9 July 2007. Responses are to be received by 30 July 2007.

DATED at CHRISTCHURCH this 6th day of **June** 2007

For the Court:



J A Smith
Environment Judge



Issued[9]: - 7 JUN 2007

9 Smithje/Jud_Rule/D/2006-CHC-385 doc

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

Decision No. [2019] NZEnvC 207

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal pursuant to s 120 of the Act
	BETWEEN	PHILIPPA ARCHIBALD
		(ENV-2019-CHC-098)
		Appellant
	AND	CHRISTCHURCH CITY COUNCIL
		Respondent

Court:	Environment Judge J E Borthwick Environment Commissioner C J Wilkinson Environment Commissioner A P Gysberts
Hearing:	at Christchurch on 4 December 2019
Final submissions:	13 December 2019
Appearances:	G Todd & L Pankhurst for the appellant B Pizzey for the respondent
Date of Decision:	20 December 2019
Date of Issue:	20 December 2019

DECISION OF THE ENVIRONMENT COURT

A: Appeal is upheld and the resource consent is granted subject to the revised conditions marked Annexure "A" and the plans marked "1", "2", "3' and "4", attached to and forming part of this decision.

B: Costs are reserved, but not encouraged.

REASONS

Introduction

[1] This appeal concerns the Christchurch City Council's decision to decline an application for resource consent to authorise guest accommodation proposed for the suburb of Ilam.

[2] The decision to decline the application turns on the interpretation of a policy in the operative District Plan. While this is a discretionary activity, the Commissioner appointed to hear the application interpreted the policy as effectively preventing the activity. Whether he was right to do so is a matter of some moment not only for the parties to this appeal, but to other people who may be seeking to establish similar guest accommodation within the residential zones.

Issues for determination

[3] We paraphrase next the issues identified for determination:[1]

(a) what is the meaning of the term "restrict" in objective 14.2.6 and policy 14.2.6.4;
(b) whether the proposal is consistent with the relevant objectives and policies of the District Plan; and
(c) whether the grant of consent would undermine the integrity of the plan thereby setting precedent.

Description of the proposal

[4] The proposal is for land use consent to establish guest accommodation within an existing dwelling at 52A Creyke Rd. Evidently, the applicant has been renting the dwelling through Airbnb without consent and, as a result of a complaint by a neighbour, has filed this application. The dwelling is a two-storey home with four bedrooms located on the ground floor and two on the first floor, together with three living areas and a games room. The proposal is to rent out the dwelling to accommodate up to 12 guests at any one time. The property has five car parks onsite.

[1] Planners' agreed statement of facts and issues dated 2 August 2019 at 41-44.

[5] The existing vehicle access is via a shared right-of-way from Creyke Road. The co-owners of the shared right-of-way have given approval to this application. We note that the formed driveway here does not comply with the relevant standards in the plan, and consent is also required for this aspect of the proposal.

[6] The guest accommodation is to be managed by a property management company. Guests may use the property's pool, grounds and tennis court, but the tennis court lights are to be disabled during this time. All guests would be subject to certain conditions of stay that do not permit the playing of outdoor music between the hours of 9 pm – 8 am. While 12 guests may seem a large number of people to be accommodated, the dwelling and property are substantial.[2]

The environment

[7] We draw upon the agreed statement of facts and issues prepared by the planning witnesses to describe the site within the wider environment.

[8] This property, together with several other substantial homes also located down long accessways off Creyke Road, is bounded in the north and east by the Waimairi Stream. Along the Creyke Road frontage the housing styles and densities are of a mixed character. Three townhouses immediately adjoin the western side of the driveway with a single dwelling to the east. These dwellings are zoned Residential Suburban Density Transition. Properties within the Residential Suburban Density Transition zone have been infilled or redeveloped in response to student demand for accommodation and other university related housing needs.

[9] The University of Canterbury is located across the road. Nearby, the other places of note are Medbury School to the east and a small commercial development (cafes, petrol station and offices) to the west.

[10] While the immediate area is dominated by the University of Canterbury campus with its associated higher density of residential development, the surrounding Residential Suburban Zone is lower density, predominantly residential in character.

[2] Being 3931 m^2 contained within three parcels of land the property is legally described as Lot 3 DP 14296 and Lots 1 and 3 DP 397744.

[11] Creyke Road is classified a minor arterial road in the District Plan and carries around 14,000 vehicles per day.

Status of the application

[12] The site is located within the Residential Suburban Zone. The proposal is a discretionary activity under the District Plan.[3] We note that a restricted discretionary activity rule for access design is also contravened.[4]

The law

[13] Section 104 of the Resource Management Act 1991 (RMA or Act) provides that when considering the application for resource consent and any submissions received, the court must, subject to Part 2, have regard (relevantly) to:

- any actual and potential effects on the environment of allowing the activity;
- the relevant provisions of the Christchurch District Plan; and
- any other matter we consider relevant and reasonably necessary to determine the application.

[14] The decision whether to grant or refuse an application for a discretionary activity is made under s 104B of the Act and entails a judgment that is informed by the matters set out in s 104.[5]

[15] We understand from their agreed statement that the planning witnesses are of the view that the operative District Plan gives effect to the Canterbury Regional Policy Statement and the Greater Christchurch Regeneration Act 2016 (and associated plans) and so we have had no regard to their provisions.[6] They also agree the Strategic Directions in Chapter 3 of the District Plan are given effect to by the balance of the plan's objectives and policies and that there are no matters of uncertainty that would require recourse to the same.[7] The planners conclude none of Strategic Directions provide any additional guidance as to how non-residential activities in residential zones should be

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[3] Rule 14.4.1.4 D1.
[4] Rule 7.4.2.3 RD1.
[5] *Stirling v Christchurch City Council* [2011] 16 ELRNZ 798 (HC) at [53].
[6] Planners' Agreed Statement of Facts and Issue at [39].
[7] Planners' Agreed Statement of Facts and Issue at [40].

treated.[8]

Decision of the City Council

[16] As required by s 290A RMA, we have had regard to the decision of the Commissioner appointed to hear the application for resource consent.[9] As we will come to shortly, we do not demur from his assessment of the effects of the proposal on the environment.

[17] Guest accommodation is not "residential activity" as defined by the District Plan, therefore this proposal requires resource consent. In his decision, the Commissioner refers to the Environment Court decision of *Fright v Christchurch City Council*[10] wherein the court accepted within the context of policy 14.6.2.4 "restrict" means "to limit" rather than to "prevent". Even so, the Commissioner remained troubled by the meaning of "restrict" in this policy. He found it unhelpful to equate "restrict" to "limit", as both words are subjective and therefore do not assist in determining "how much of the activity should be restricted or limited". He resolved that "restrict" does mean prevent where an applicant cannot bring themselves within the proviso for activities with a strategic or operational need to locate within a residential zone.[11]

[18] As he could find no strategic nor operational need to locate within the residential area, he concluded the proposal would be contrary to objective 14.2.6 and policy 14.2.6.4.[12] That said, he was also troubled by this outcome given that the proposal while not a "residential activity" bore strong similarities to the same.

Effects of the proposal on the environment

[19] All those persons potentially affected by the proposal have given approval to the same and so we have not had regard to the effect of the proposal on them (s 104(3)).[13]

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[8] Joint statement of planners' expert conferencing at [14].

[9] While dated 1 May 2018, we assume this is in error and the correct date of the decision is 2019.

[10] *Fright v Christchurch City Council* [2018] NZEnvC 111.

[11] Decision of the Hearing Commissioner at [27]-[29].

[12] Decision of the Hearing Commissioner at [27].

[13] Transcript (Blair) at 97. Neighbours' approvals were received from the owners and/or occupiers of 52B Creyke Road, 46A Creyke Road, 60A Creyke Road, 2/54 Creyke Road, 54B Creyke Road and 41 Hamilton Avenue.

[20] Having had the advantage of viewing the site, we agree with the planners that the effects of the proposal will be less than minor. The proposal is comparable to the residential use of the site over the last 50 years. The only difference being what is proposed now is the use of the site for transient guest accommodation.

[21] For completeness, resource consent is also required in relation to the formed driveway that does not comply with two standards in the District Plan. Firstly, driveways providing access for "all other activities"[14] must have a minimum formed width of access of 4.0m whereas the access for the proposed activity is formed to 3.5m. Further, any driveway longer than 50m must have a parking bay provided at some point along its length in order to facilitate traffic movements.[15] Rule 7.4.2.3 RD1 specifies that any activity that does not meet any one or more of the transport standards in Rule 7.4.3 shall be a restricted discretionary activity. We are satisfied that while not provided for, at worst, this will give rise to inconvenience for the residents sharing the driveway.

District Plan Provisions

[22] The provisions in contention are objective 14.2.6 and policy 14.2.6.4, which are set out below noting that the words underlined are defined in the District Plan:

> **14.2.6 Objective – Non-residential activities**
>
> a. Residential activities remain the dominant activity in residential zones, whilst also recognising the need to:
>
> i. provide for community facilities and home occupations which by their nature and character typically need to be located in residential zones; and
>
> ii. restrict other non-residential activities, unless the activity has a strategic or operational need to locate within a residential zone or is existing guest accommodation on defined sites.
>
> **14.2.6.4 Policy – Other non-residential activities**
>
> a. Restrict the establishment of other non-residential activities, especially those of a commercial or industrial nature, unless the activity has a strategic or operational need to locate within a residential zone, and the effects of such activities on the character and amenity of the residential zones are insignificant.

[14] Christchurch District Plan, Appendix 7.5.7, Table 7.5.7.1.
[15] Christchurch District Plan, Rule 7.4.4.10, Vehicle Access Design.

[23] For those words and phrases not defined in the District Plan, their ordinary dictionary meaning is to be used.[16]

[24] What is meant by "residential activities" is important to this appeal. "Residential activity" is defined in the District Plan and means:

> ... the use of land and/or buildings for the purpose of living accommodation. It includes:
> a residential unit, boarding house, student hostel or a family flat (including accessory buildings);
> b. emergency and refuge accommodation; and
> c. sheltered housing; but
> excludes:
> d. guest accommodation;
> e. the use of land and/or buildings for custodial and/or supervised living accommodation where the residents are detained on the site; and
> f. accommodation associated with a fire station.

[25] The definition of residential activity includes "residential unit" which means:

> ... a self-contained building or unit (or group of buildings, including accessory buildings) used for a residential activity by one or more persons who form a single household. For the purposes of this definition:
> a. a building used for emergency or refuge accommodation shall be deemed to be used by a single household;
> b. where there is more than one kitchen on a site (other than a kitchen within a family flat or a kitchenette provided as part of a bed and breakfast or farm stay) there shall be deemed to be more than one residential unit;
> c. a residential unit may include no more than one family flat as part of that residential unit;
> d. a residential unit may be used as a holiday home provided it does not involve the sale of alcohol, food or other goods; and
> e. a residential unit may be used as a bed and breakfast or farm stay.

[26] Several types of "residential activities" involve the charging of a tariff for accommodation. The definitions of bed and breakfast, farm stay and boarding house each refer to the provision of accommodation at a tariff, with bed and breakfast and farm stays being for the provision of transient accommodation at a tariff.

[27] The definition of residential activity does not include "guest accommodation".

[16] District Plan, Chapter 2.

Guest accommodation is defined and means:

> ... the use of land and/or buildings for transient residential accommodation offered at a tariff, which may involve the sale of alcohol and/or food to in-house guests, and the sale of food, with or without alcohol, to the public. It may include the following ancillary activities:
>
> a. offices;
>
> b. meeting and conference facilities;
>
> c. fitness facilities; and
>
> d. the provision of goods and services primarily for the convenience of guests.
>
> Guest accommodation includes hotels, resorts, motels, motor and tourist lodges, backpackers, hostels and camping grounds. Guest accommodation excludes bed and breakfast and farm stays.

[28] The notable features of this definition is that the activity also concerns the provision of transient residential accommodation at a tariff. The definition lists activities that are "guest accommodation", the scale of which would be generally incommensurate with a proposal for the use of a dwelling.

[29] Objective 14.2.6 and policy 14.2.6.4 are particularly important to this appeal and planners addressed these provisions. Mr Pizzey, in legal submissions and through cross-examination traversed other provisions in the District Plan. We were not however aided in the construction of objective 14.2.6 and policy 14.2.6.4 by having regard to the objective and policies for housing distribution and density or the role of the Commercial Central Business City Centre Zone.[17]

[30] We find the provisions for housing distribution and density to be of contextual relevance only insofar as they make provision for guest accommodation for sites that were previously zoned or scheduled for guest accommodation prior to the notification of the District Plan.

[31] We have noted the provisions for the Commercial Central Business City Centre Zone.[18] The objective for this zone – that it re-develops as the principal commercial centre and is attractive for a range of purposes – is implemented by a policy that would ensure the zone provides for the widest range of activities including guest accommodation and residential activities (policy 15.2.6.1). Indeed, the plan encourages

[17] Objective 14.2.1, policy 14.2.1.1 and Table 14.2.1a. Objective 15.2.6 and policy 15.2.6.1.
[18] Objective 15.2.6 and policy 15.2.6.1.

development of guest accommodation in this zone[19] and in other zones through the activity status for guest accommodation activities, whereas the objectives and policies relevant to the Residential Suburban Zone would restrict, not encourage, guest accommodation.

[32] In that regard, provisional leave was granted by the court for Ms Blair to file a supplementary brief identifying zones and overlays in the District Plan for which there is provision for guest accommodation. We surmise that the purpose of this evidence was to demonstrate that from a strategic perspective the District Plan has made adequate provision for guest accommodation in a variety of locations[20] and on this basis we now admit the evidence. We have no difficulty, in principle, that provision has been made for guest accommodation in particular locations around the City.[21] Our view is that this is simply an application for an out-of-zone activity. While the framework of the plan is for guest accommodation to be provided in certain parts of the district, the District Plan's enabling provisions do not purport to prohibit guest accommodation in any other part of the district. Instead, each application must be considered having regard to the matters in s 104 RMA.

Interpretation of plan provisions

[33] When interpreting the District Plan we are to consider s 5 of the Interpretation Act 1999 applying, as it does, to the interpretation of subordinate statutory instruments. Section 5 provides that the meaning of an enactment must be ascertained from its text and in light of its purpose. This principle has been applied and expanded on in relation to the interpretation of district plans *(Powell v Dunedin City Council).*[22]

[34] Returning to policy 14.2.6.4, the Commissioner has interpreted "restrict" as meaning prevent. An activity not able to bring itself within the proviso within this policy is to be prevented. In coming to this conclusion, he may have overlooked three matters.

[35] First, the policy does not say "restrict ... unless" but directs attention onto particular types of activity thus, "restrict .... activities, especially those of a commercial or industrial nature ...". The term "especially" is a comparator and means "principally,

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[19] By 'zone' we also include the Accommodation and Community Facilities Overlay.
[20] See Blair, EiC at [50].
[21] See Blair, EiC at [49].
[22] *Powell v Dunedin City Council* [2005] NZRMA 174 (CA) at [35].

chiefly"[23] or "more with one person, thing, etc. than with others, or more in particular circumstances than in others".[24] An adverb, the term admits to the possibility that some non-residential activities more so than others are to be restricted. These words do not support the Commissioner's strict "restrict ... unless" interpretation. Ms Blair implicitly acknowledges this when – not accepting the Commissioner's interpretation of "restrict" – she says:[25]

> ... the extent of restriction required may be different depending upon the non-residential activity in question, its effects, and its consistency or otherwise with the other objectives and policies in the Plan.

[36] That said, we can well understand the Commissioner's interpretational dilemma. But rather than define "restrict" as meaning "prevent" we would say where an applicant cannot bring themselves within the proviso for non-residential activities then it is open to the consent authority to decline the application.[26] Whether the proposal is to be restricted by not allowing its establishment, is a matter of judgement informed by the circumstances of the case. Our approach is consistent with a definition of "restrict" as meaning to "limit" and is, in our view, to be preferred.

[37] Secondly, the plan does not restrict "commercial activities" or "industrial activities".[27] Rather policy 14.2.6.4 talks about restricting non-residential activities that have a commercial or industrial nature. Because of that we did not find relevant the discussion about commercial activities in the Environment Court decision of *Rogers v Christchurch City Council.*[28] In that decision the court was considering the ordinary dictionary meaning of commercial activity finding a company carrying on the business of renting vehicles to the general public, was engaged in commercial activity.[29] *Rogers* v *Christchurch City Council* turns on its own facts. It is not particularly insightful to say because the appellant is carrying on a business supplying guest accommodation at a tariff therefore the activity is commercial in nature. The same can be said for bed and breakfast, farm stays and boarding houses and yet these activities are defined in the District Plan as "residential activities" and permitted within zone.

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[23] Oxford English Dictionary (Online).
[24] Oxford Learner's Dictionary (Online).
[25] Blair, EiC at [56].
[26] Decision of the Hearing Commissioner at [27]-[29].
[27] No-one suggested activities of an industrial nature were of relevance in this appeal.
[28] *Rogers v Christchurch City Council* [2019] NZEnvC 119.
[29] *Rogers v Christchurch City Council* at [29].

[38] Moreover, we agree with counsel for the appellant,[30] *Rogers* v *Christchurch City Council* is distinguishable because the court there was considering a policy that is to avoid (not restrict) the establishment of commercial and industrial activities unless they have a strategic or operational need to locate in the rural area. Indeed, the City Council's planning witness, Ms H Blair, sensibly advises that for the District Plan to function as a coherent, internally consistent document, the terms "restrict" and "avoid" are to be interpreted differently. She says, commensurate with their discretionary activity status, the term "restrict" allows for the circumstances of a particular proposal for a non-residential activity to be considered.[31] We agree in principle.

[39] Thirdly, policies are to implement the objectives of the District Plan (s 75(1)). The objective also restricts other non-residential activities and while ordinarily we would interpret "restrict" in the same way as the policy (unless the text clearly indicated otherwise), it is not so straightforward with these provisions. Objective 14.2.6 is for residential activities to remain the dominant activity in residential zones, whilst – i.e. at the same time – recognising for the need to provide for community facilities and home occupations and secondly, restricting certain other non-residential activities. In *Fright v Christchurch City Council,* the Environment Court introduced the same provisions of the District Plan making the following observation at paragraph [46]:

> First, where, as we think is the case here, a District Plan contains a mix of drafting styles, the interpretation of the relevant provisions may prove challenging. The relevant provisions include a mix of both activity focused policies and more traditional effects-based provisions. Second, the objective (14.2.6a(ii)) and policy (14.2.6.4) both exempt certain activities from their ambit, however the exemptions made are not the same. The reason for this difference is not clear[32] and this has impacted on the interpretation of the objective and policy suite.
>
> [Footnote omitted].

[40] Finding that the intent of objective 14.2.6(ii) is to restrict non-residential activities unless otherwise provided for in the policies,[32] the court in *Fright v Christchurch City Council* goes on to note policies for various non-residential activities including community activities and community facilities (14.2.6.2); existing non-residential activities (14.2.6.3); small scale retailing (14.2.6.5); non-residential activity with frontage to Memorial Avenue

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[30] Archibald, opening submissions at [20].
[31] Blair, EiC at [62]-[63].
[32] At [52].

and Fendalton Road (14.2.6.6); non-residential activity within Central City residential areas (14.2.6.8), guest accommodation (14.2.6.7) and finally yet 'other' non-residential activities (14.2.6.4).

[41] Returning to this appeal, the City Council submits that guest accommodation is not provided for in the Residential Suburban Zone under one of the above policies and therefore is to be assessed under policy 14.2.6.4.[33] Under policy 14.2.6.4 the difference between residential activities and non-residential activities such as the proposed guest accommodation, is not whether the activities are commercial activities, as clearly both can be. Rather the enquiry in policy 14.2.6.4 is whether the proposed activity is commercial in *nature*. As a noun "nature" concerns the "the physical strength or constitution of a thing, especially a natural substance" [34] or its "basic or inherent features, character, or qualities of something".[35]

[42] Mr Pizzey submits because the activity would charge a tariff it is commercial in nature. Ms Blair, expressing a similar opinion, seemed to give weight not to the activity's residential nature – she agrees the activity is very much like a residential activity – but to the fact that it does not fall within the definition of "residential activity".[36] We find this distinction between substance and form illusory. Having regard to the ordinary usage of the term "residential", in substance the activity is residential in nature albeit that the proposal is for transient accommodation. The occupation of a residential dwelling by fee paying guests is no different in substance to bed and breakfast, farm stays or boarding houses.

[43] We considered also Ms Blair's evidence that in each instance of bed and breakfast, farm stays or boarding houses, a permanent resident is required to be in occupation of the site.[37] Extrapolating from the definitions of these activities, it was her opinion (and indeed that of her counsel)[38] that in order for a proposal to be residential in nature the transient accommodation must be "subservient" to the permanent occupation of the dwelling by another resident. As we said in *Fright v Christchurch City Council*,[39] the problem with using rules and methods to inform the resource management outcomes

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[33] Transcript (Pizzey) at 109.
[34] Oxford English Dictionary (Online).
[35] Lexico (Online).
[36] Transcript (Blair) at 110.
[37] Transcript (Blair) at 110-112.
[38] City Council, submissions at [39].
[39] *Fright v Christchurch City Council* at [47].

under the District Plan's objectives, is that it risks confirmation bias. To illustrate, in giving this evidence Ms Blair does not consider the District Plan's definition of "guest accommodation" in common with "bed and breakfast", as meaning "transient residential accommodation... at a tariff."

[44] We find guest accommodation in this existing dwelling is residential in nature. That is so notwithstanding that a tariff is charged. The proposal is not an activity that is of a type that the policy is "especially" concerned to restrict. That said, for guest accommodation to be contemplated within the Suburban Residential Zone, there must also be an operational need to locate within a residential zone. If 'operational' concerns the activities employed in doing or producing some*thing*, per Cambridge Dictionary,[40] then we find the particular proposal being residential in nature, and of a scale consistent with the outcomes for the Residential Suburban Zone, has an operational need to locate within a residential zone and that need (meaning "requirement")[41] arises from the character and amenity afforded by residential zones. Further, as we are satisfied that the effects of the proposal on the character and amenity of the residential zone will be insignificant, we find the application falls under the exception for non-residential activities created by the objective and the policy.

[45] Given this, we do not need to decide the alternative proposition whether the application has a strategic need to locate within a residential zone.

Temporal or spatial restrictions

[46] A curious feature of the application before us is that the proposal was amended to limit the operation of guest accommodation to six months per year. For the balance of the year, the dwelling would provide charitable accommodation. This was not a feature of the notified application and this aspect of the proposal was not, therefore, able to be considered by neighbouring persons who have given their approval to the application.

[47] "Charitable accommodation" is not defined in the District Plan. As the matter stands we are not satisfied with the description of the activity in the evidence from the

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[40] City Council, submissions at [55].

[41] City Council, submissions at [54], citing Oxford English Dictionary definition of "need". Mr Pizzey also referred to need as meaning "necessity" or "something that is unavoidable". The District Plan distinguishes between "need" and "necessity" in other provisions, see for example policies 17.2.2.1 and 17.2.2.5. We do not accept, therefore, an interpretation that "need" means "necessity" in every case.

appellant's planner, Mr J Cook[42] as we have no sense of the activities that may emerge on this site. That said, counsel for the appellant, Mr G Todd, advised that as it was intended to use the dwelling for the balance of the year for permitted activities (including the occupation of the dwelling by the owner), it was not necessary to refer to "charitable accommodation" in the draft conditions of consent. We agree.

[48] The purpose in amending the application in this way was not clearly spelt out in the evidence of Mr Cook. The restriction talked about in policy 14.2.6.4 is as to the establishment of the proposed activity and not as to its operation. In finding that, the issues of concern for the City Council under policy 14.2.6.3 do not arise.

Outcome

[49] No other basis was advanced upon which we could decline the appeal and uphold the decision of the Commissioner. That being the case, we allow the appeal and pursuant to s 104B of the Act will grant resource consent subject to the proposed conditions of consent.

[50] In so doing we record our agreement with the planning witnesses that the District Plan's strategic directions do not provide us any additional (or different) guidance on this particular interpretational matter.

[51] A precedent upon which others would seek to rely may well be created based on the court's interpretation. The issue for the City Council, however, is not that a precedent is created but that the use of existing dwellings for guest accommodation, including accommodation marketed through Airbnb, was not identified in the proposed plan as being a significant resource issue for the district. Consequently, the plan provisions may not adequately respond to the demand for this activity. Rather than applying a strained application of the plan's provisions, the City Council may consider front-footing the issue meeting the demand through initiating a plan change that responds directly to any issue created by the same.

[42] Cook, EiC at [5.7]-[5.10].

[52] We will reserve costs but note that costs are not encouraged. As we have said on another previous occasion, these provisions bring with them interpretational challenges.

For the court:

J E Borthwick
Environment Judge

Archibald v Christchurch City Council revised conditions

1. The development shall proceed in accordance with the information and plans submitted with the application, except as amended by the conditions of this consent. The Approved Consent Plans have been entered into Council records as RMA/2018/3096 (4 pages).

2. Pursuant to section 123(b) of the Resource Management Act, the duration of this consent ends at five (5) years from the date of this consent.

3. The guest accommodation activity shall only be undertaken in the six month period of 1 November of one year to 30 April of the following year, for the duration of the consent.

4. The guest accommodation activity shall be limited to a maximum of 12 guests at any one time.

5. All sleeping facilities shall be limited to within the existing residential unit as shown on the approved floor plans (pages 2-3 of the Approved Consent Plans).

6. The maximum number of guest and visitor motor vehicles permitted to be onsite at any time shall be five (5).

7. Any existing outdoor lighting and sound systems installed as part of the existing tennis court and outdoor swimming pool facilities shall be disconnected or otherwise disabled so as not able to be used by guests for the duration of this consent.

8. No excessive noise that has the potential to disturb neighbours shall be made at any time. Between the designated "quiet hours" of 9 pm and 8 am:

   a. there shall be no outdoor music;
   b. any outdoor noise shall be limited to that associated with coming or going from the property, which shall be minimised to the best extent practicable;
   c. there shall be no use of the swimming pool or tennis court;
   d. any indoor noise shall not be discernible beyond the boundaries of the subject site; and
   e. the noise limit for noise emitted from the site in the designated "quiet hours" shall be 40dB LAeq and 50dB LAFmax measured in accordance with NZS 6801:2008

"Acoustics – Measurement of environmental sound", and assessed in accordance with NZS 6802:2008 "Acoustics-Environmental noise". Note: this does not detract from the requirement to comply with conditions 8.a-d in the first instance.

9. There shall be no party, or any similar social event, hosted from the property at any time. For the purposes of this condition any gathering of more than 20 persons in total (including guests and visitors) shall be considered to be a party.

10. Vegetation along the accessway to the site shall be maintained on an ongoing basis to ensure a minimum width clearance of 3.5m and a minimum 4m height clearance, and the accessway shall be maintained in a pothole-free state, for emergency service vehicle access.

11. The consent holder, or a property manager(s) acting on their behalf, shall ensure the following for all guest accommodation bookings:
    a. that guests are provided with, and sign, a copy of the 'Terms of Conditions of Stay' as submitted with this land use consent application or similar; and
    b. that a register of the following guest details be maintained:
        i. names of guests staying on any given night;
        ii. their periods of stay including dates;
        iii. motor vehicle registration numbers; and
        iv. copies of the "Terms of Conditions of Stay" document signed by the guests.

12. A copy of the register required by Condition 11.b shall be made available to the Christchurch City Council upon request.

13. The consent holder, or a property manager(s) acting on their behalf shall provide a 24-hour contact phone number and email address to the following:
    a. The Christchurch City Council's Compliance and Investigations Team (via rcmon@ccc.govt.nz); and
    b. The immediate adjoining neighbours to the subject property for the purposes of making any noise or nuisance complaint.

14. Pursuant to Section 128 of the Resource Management Act 1991, the Council may review the conditions of this consent by serving notice on the consent holder within a period of one month of any six (6) month period following the date of this decision, in

order to deal with any adverse effects on neighbours' amenity which may arise from the exercise of this consent and which it is appropriate to deal with at a later stage.

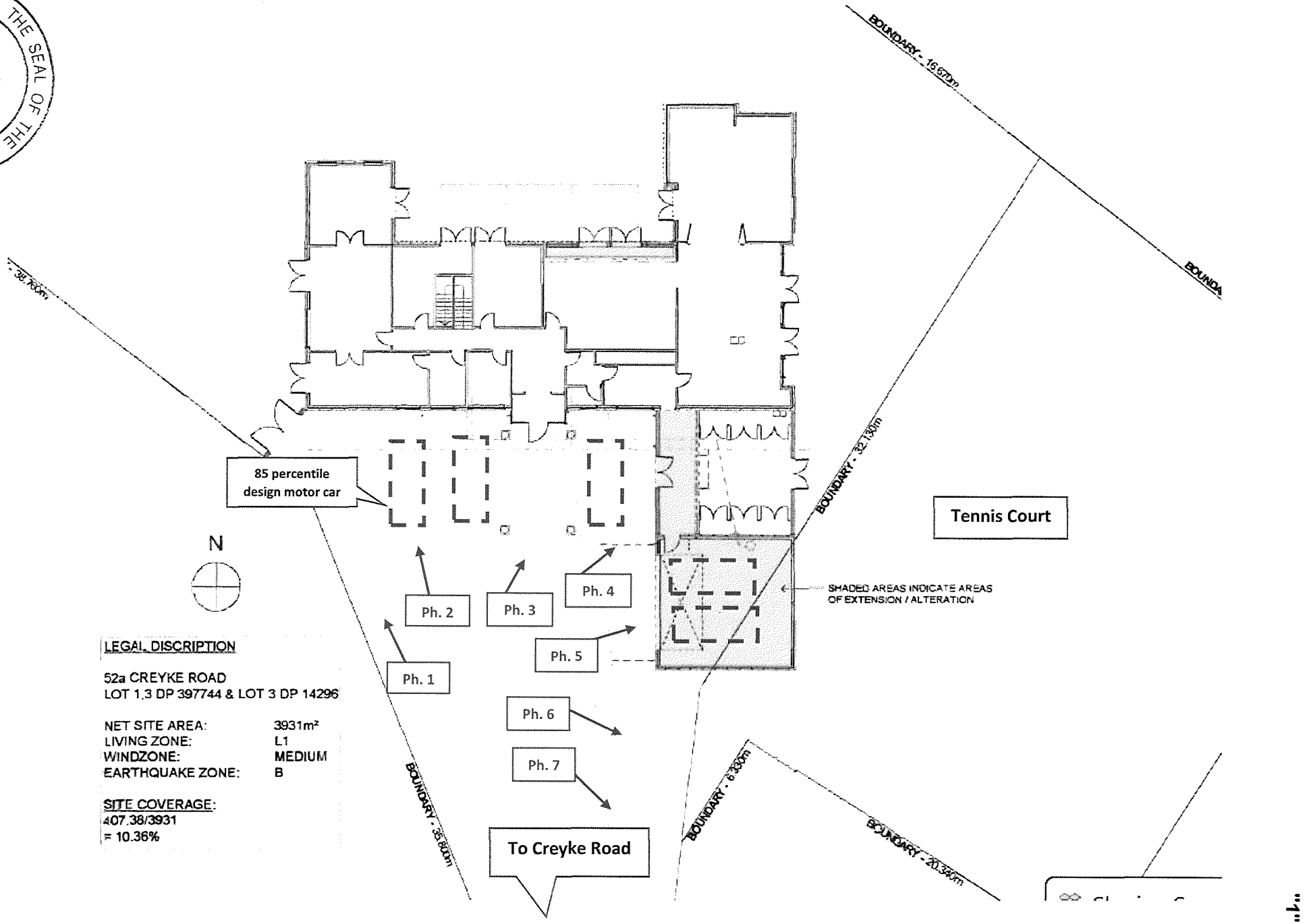
Advice Notes

- The Council will require payment of its administrative charges in relation to monitoring of conditions, as authorised by the provisions of section 36 of the Resource Management Act 1991. The current monitoring charges are:
  i. a monitoring fee of $277.50 to cover the cost of setting up a monitoring programme and carrying out one inspection to ensure compliance with the conditions of this consent; and
  ii. time charged at an hourly rate if more than one inspection, or additional monitoring activities (including those relating to non-compliance with conditions), are required.

- The monitoring programme administration fee and initial inspection fee will be charged to the applicant with the consent processing costs. Any additional monitoring time will be invoiced to the consent holder when the monitoring is carried out, at the hourly rate specified in the applicable Annual Plan Schedule of Fees and Charges.

- No signage is authorised by this consent. Any future signage will therefore need to comply with the relevant District Plan rules or obtain a separate resource consent.

- This resource consent has been processed under the Resource Management Act 1991 and relates to planning matters only. You will need to comply with the requirements of the Building Act 2004. For more information about the building consent process please contact our Duty Building Consent Officer (phone 941 8999) or go to our website https://ccc.govt.nz/consents-and-licences/



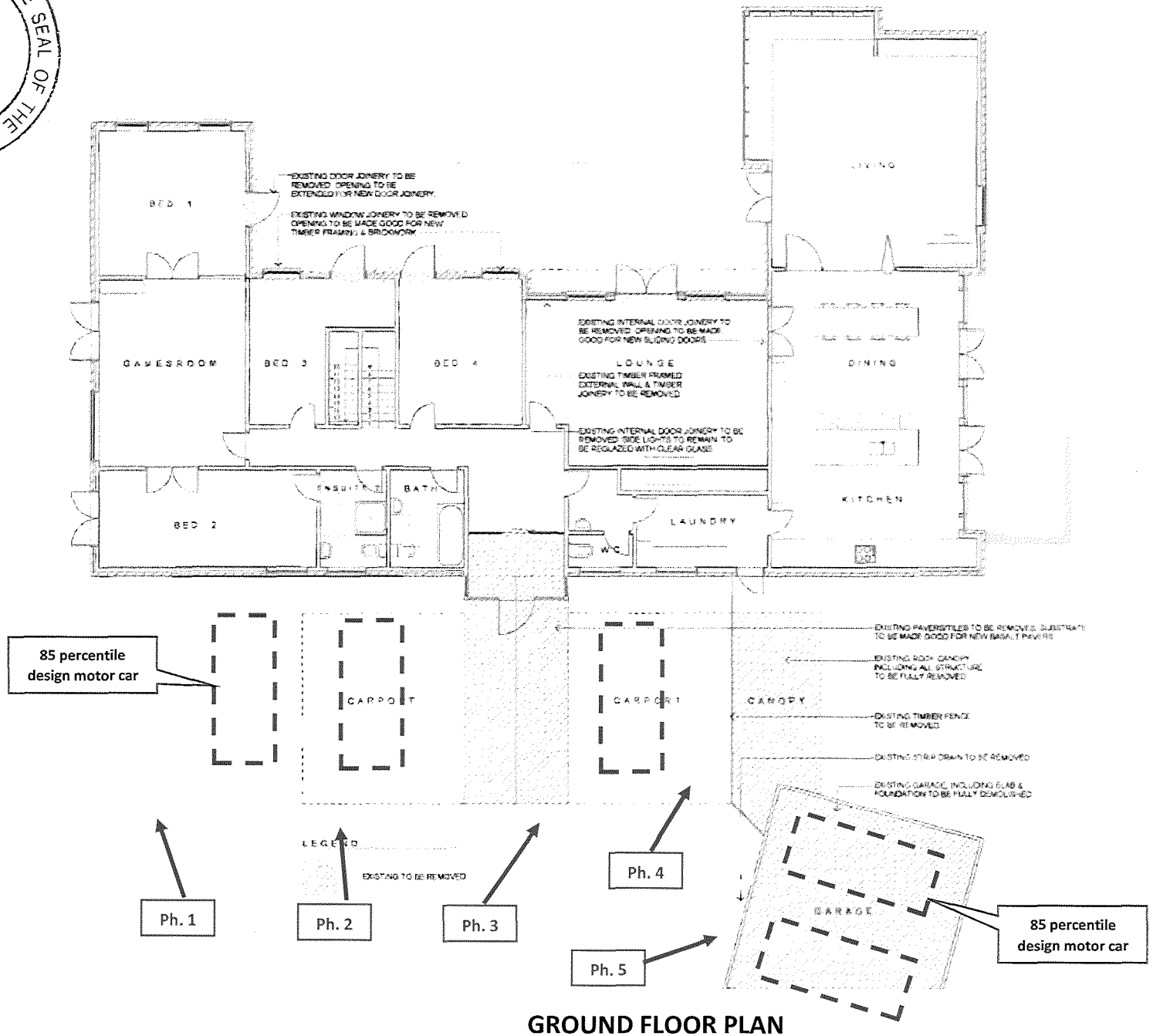
LEGAL DISCRIPTION

52a CREYKE ROAD
LOT 1,3 DP 397744 & LOT 3 DP 14296

NET SITE AREA:	3931m²
LIVING ZONE:	L1
WINDZONE:	MEDIUM
EARTHQUAKE ZONE:	B

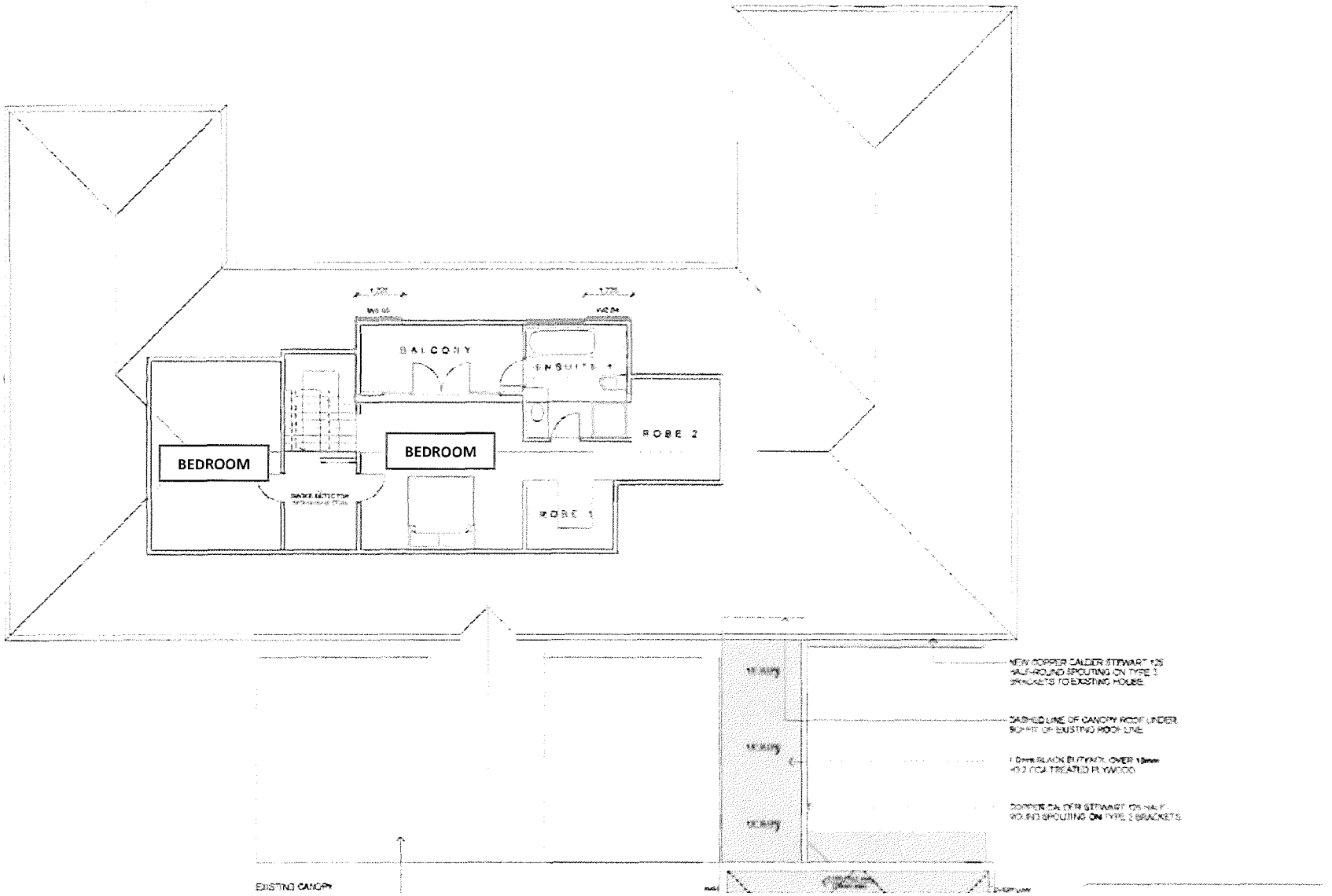
SITE COVERAGE:
407.38/3931
= 10.36%

SITE PLAN



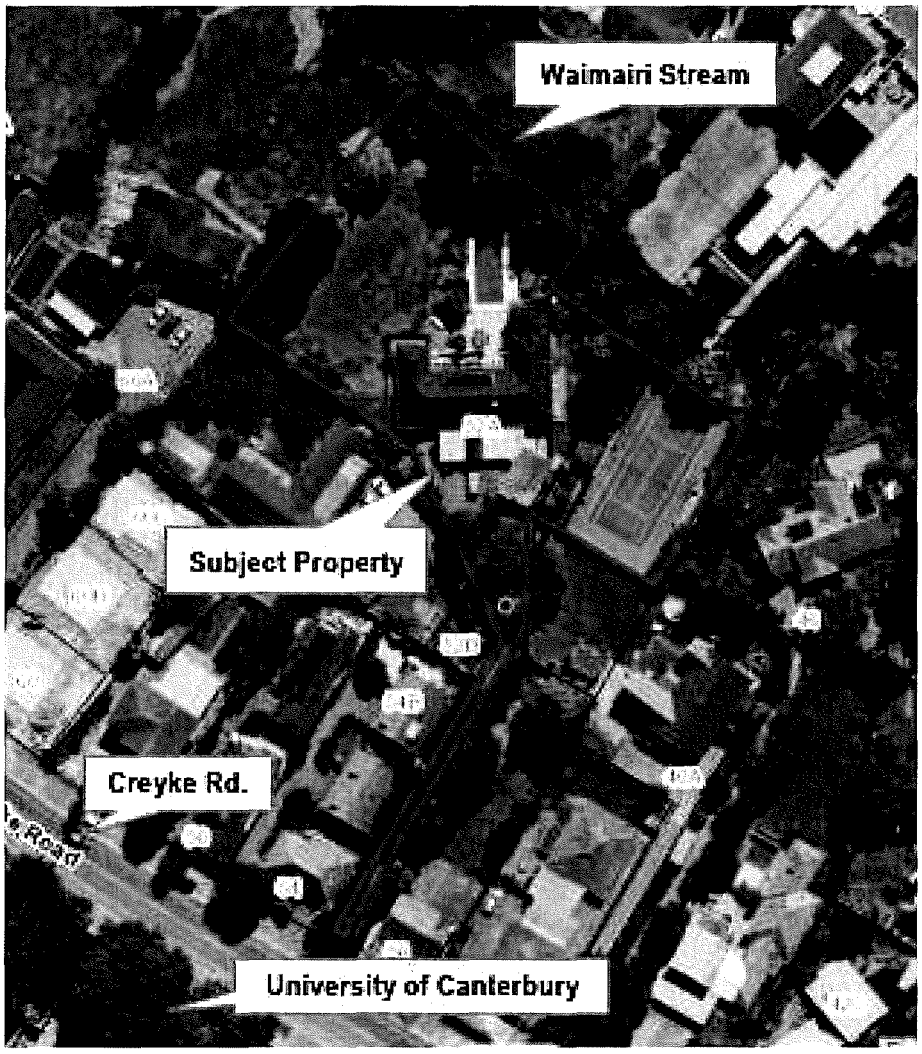
GROUND FLOOR PLAN

"2"



UPPER FLOOR LEVEL

"3"



Aerial Image of the Subject Property and its Surroundings. (Source: 'Canterbury Maps').