ORIGINAL

DOUBLE SIDED

Decision No. A 31 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **EMERALD RESIDENTIAL LIMITED**

(RMA 0499/03)

Appellant

AND **THE NORTH SHORE CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge C J Thompson
Environment Commissioner B Gollop
Environment Commissioner J R Mills

HEARING at AUCKLAND on 18 and 19 February 2004. Site visit 17 February 2004. Closing submissions received 1 March 2004.

COUNSEL

P T Cavanagh QC for Emerald Residential Limited
B S Carruthers and S A Carnachan for the North Shore City Council

DECISION

Background

[1] On 27 June 2003 the respondent Council refused consent for the erection of an apartment building containing 3 two-bedroom units and 1 one-bedroom unit at Monte Cassino Place, Birkenhead. The property of which the site forms part has a complicated planning history. Broadly, it is as follows:

- A 64 unit Comprehensive Housing Development (CHD) was approved on 28 January 1998.
- A three lot subdivision and amalgamation of lots was approved in 1998.
- A 33 lot residential subdivision was approved on 2 December 1998.

- A 41 unit CHD was approved on 28 January 2000. The original application was for 45 units, but the applicant deleted one building of 4 units. This proposal also involved the amalgamation of 12 lots of the 33 lot subdivision into two sites of 2831m2 and 2701m2 on which the CHD was to be constructed. The conditions of consent were the subject of an appeal.
- In March 2001, that appeal was settled by a Consent Order.
- In November 2002 the 41 unit CHD consent was varied under s127 to reduce the number of units to 40.
- The current application adds a further four units to the 40 unit CHD consent.

It is accepted that the 45 unit application was amended by deleting one block of 4 units because the then developer wished to avoid delays to the project arising from objections by a neighbouring landowner, Ms Carrick, who was concerned about the effect on her views and amenity from the proposed building in front of her residence at 11A Rangitira Avenue. It was that building which was dropped from the proposal and which, in a modified form, the current application and appeal seek to reinstate.

[2] As now developed, Monte Cassino Place drops quite steeply down from Rangitira Ave, through a cutting with high retaining walls on both sides. It then forks into two culs de sac of more or less equal length and running approximately east-west. The two lots formed from the amalgamation of the former 12 lots run along the south sides of the culs de sac, and it is on those that the currently consented 10 buildings, each containing 4 apartments, are being built, four on the east side, and six on the west. The building which is the subject of this appeal would be the fifth on the east cul de sac, and closest to the intersection with the entrance road. On the north sides of the culs de sac, on land falling relatively steeply from the road, are a number of single unit dwelling sites, some are being built on at present. We were informed that there is a proposal to amalgamate some of those lots also, and build more apartments, but that is not an issue before us. At the end of the east cul de sac is an open area, relatively steep, which runs down to a stormwater retention pond. It is to be vested as a reserve and there is a new proposal to construct a small childrens' play area on the upper part of it. The issue of open space generally in the development was quite contentious, and we shall return to it.

[3] In general terms, the appellant's position is that the 11th apartment building is a logical completion of the CHD, visually and architecturally. It would, so it is said, complete Monte Cassino Place and make it a coherent whole. It concedes that the 11th building had always

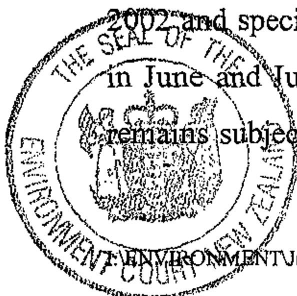
been part of the overall plan, but was removed from the application to avoid the delays to the whole project that the objection would have caused. But since this appellant took over the development it has been open in its intention to reinstate it. Ms Carrick was not a party to the appeal, but the issue of effects on her views and amenities form part of the Council's reasons for opposing the consent. The design of the 11th building has been adapted in an effort to mitigate effects on her property, with one of the two second floor apartments being reduced to one bedroom, allowing the western façade to be stepped back by 2.8m, giving her an increased field of view. The 2 bedroom apartments have decks of 17.4m2, and the 1 bedroom apartment one of 10.5m2. There is no private open space associated with any of the apartments in the entire development.

[4] The site we have described as running along the east cul de sac, on which the 4 blocks are presently being built, is described as Lot 2 on the current subdivision plan, and has an area of 2701m2. The 4 existing blocks of 4 apartments each therefore give a density ratio of 1:168m2. The addition of a further 4 apartments would reduce that to 1:135m2. While that ratio is high [and we shall return to it] it can be said to be better than that of the west cul de sac, which has an area of 2831m2 and has 24 apartments being built on it, giving a density ratio of 1:117m2. The two Lots combined, if this proposal is approved, would have an overall density ratio of 1:125m2.

[5] It is common ground that we are dealing with a non-complying activity, and that the law to be applied is that existing before 1 August 2003. Therefore, the application must pass one or other of the threshold tests in s105(2A); ie that its adverse effects on the environment will be minor, or that it is not contrary to the objectives and policies of the relevant planning document(s).

The Planning Documents

[6] There are two planning documents to be considered; first, the North Shore City District Plan: – partially operative as from July 2002. We are informed that any remaining references are not relevant to this matter. Secondly, Proposed Plan Change 1 was notified on 18 July 2002 and specifically deals with intensive residential developments. Submissions were heard in June and July 2003 and the decisions version released in July 2003. We are told that it remains subject to one global reference which opposes the change in its entirety. Its contents



are though a useful guide to the more recent thinking of the Council and the community on this sort of housing.

[7] Section 16 of the Operative District Plan outlines the major resource management issues affecting residential parts of the city. Clause 16.2 contains these issues:

- *How to accommodate new housing developments in both the developed and undeveloped parts of the city without compromising the environmental values of those areas.*
- *How to ensure that the high standard of amenity which characterises the existing residential area is maintained and, in newly developing areas, is created.*
- *How to provide opportunities for innovation and flexibility to meet the demand for new and different housing solutions while ensuring that residential amenities and environmental values are protected.*

[8] Objective 16.3.1 is:

"To protect the environmental and amenity values of residential areas."

The Explanation and Reasons for that objective are stated as being these:

> *"Zoning is an important technique in the implementation of the residential sections amenity and environmental protection strategy. It involves the identification of land of similar characteristics, including environmental and amenity values, and the application of appropriate objectives, policies and rules relating to development. Seven different residential zones have been developed and are summarised in Table 16.1. ... As can be seen from the brief zone description in that table the variety of zones reflect the varied nature of land use and landscapes in the city."*

And it has as its supporting policies the following:

> *"(1) By the use of zones to identify land having similar character, amenity and environmental values, within which appropriate development opportunities can be prescribed.*
>
> *(3) By recognising the existing differences in character and amenity within the main residential area when identifying zones for higher density and office residential development."*

[9] The land in question here is zoned Residential 4B. That is described in Table 16.1 as:

"Areas of conventional urban character."

It is common ground between the planning witnesses that the proposed density of this development significantly exceeds that provided for in the Residential 4B zone. The density in fact is similar to that provided for in the Residential 6 *"Intensive Housing"* zone where up to 1 unit per 150 square metres is envisaged in certain environments..

[10] Objective 16.3.3 *"Development Controls"* has as its aim:

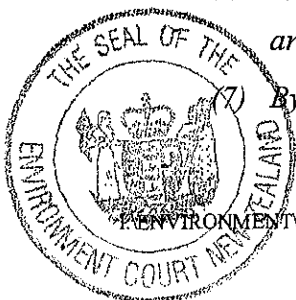
> *"To control the form of development in order to achieve good standards of on-site and neighbourhood amenity, including the protection of the character of the streetscape."*

The explanation and reasons for that objective are as follows:

> *"Controls have been imposed on development which will regulate the form and intensity of land use to a level which will ensure that local amenities and environmental values are protected. They have been applied to protect adjacent sites, the streetscape and the neighbourhood as a whole from the effects of development. Controls of this nature include maximum height, height in relation to boundary, yards and maximum coverage. The retention of the streetscape of existing areas is considered to be important, as it significantly affects neighbourhood character, and often the availability of views. In addition, controls have been imposed to ensure that a reasonable standard of amenity exists on every site, including requirements for outdoor living spaces and service courts. These controls recognise that good standards of on-site amenity create a pleasant and attractive living environment and in doing so contribute to wider neighbourhood amenity."*

Its relevant supporting policies are:

> *"(1) By requiring compliance with controls designed to maintain on-site and inter-site amenity values.*
>
> *(2) By providing for basic building controls to be varied through the Control Flexibility provisions, provided that the development will achieve the intent of the controls and will not adversely affect amenities.*
>
> *(6) By controlling the maximum building coverage and minimum permeable area.*
>
> *(7) By requiring buildings to be set back from the street frontage.*



(9) By requiring the provision in association with every residential unit of an outdoor living space and service court of sufficient area and dimension, to meet residential requirements for leisure and service functions.

(14) By requiring that all Controlled Discretionary and Non-Complying activities comply with the development controls applying to Permitted activities, unless an alternative standard is required for the operation of the activity.

(15) By the provision of detailed performance and assessment criteria in the Plan for Controlled and Discretionary activities which are designed to ensure such activities do not detract from the character and amenities of residential areas."

[11] We particularly note that Policy 14 requires that non-complying activities must comply with development controls applying to permitted activities unless an alternative standard is required for the operation of the activity.

[12] Objective 16.3.5 *"Housing Choice"* has as it aim:

"To provide a diverse range of living environments and housing opportunities in order to meet the varied needs of the community, in a manner which is compatible with the maintenance and protection of residential amenity and environmental values."

The policies supporting that objective are:

"(2) By providing opportunities in the main residential area for housing developments at a variety of densities which are compatible with the maintenance of local environmental values.

(3) By providing opportunities for the establishment of a variety of housing forms throughout the residential zones, including houses, units, apartments and minor residential units, by the inclusion of such activities as Permitted, Controlled and Discretionary activities.

(5) By the imposition of development controls which are designed to provide residents with choice in building form, whilst still providing a high degree of certainty for neighbours.

(6) By providing opportunities for innovative forms of housing and for flexible controls where a comprehensive approach to larger developments enables

> *house design, site layout and subdivision design to be integrated to provide better on-site and neighbourhood amenity."*

[13] The specific objective for the Residential 4 zone is contained in Objective 16.4.4. It aims:

> *"To protect the character and amenity of the main residential area while providing opportunities for its growth and development."*

[14] The development provisions within the Residential 4B zone allow for subdivision and development of infill housing to 1 unit per 400 square metres. The Residential 4 zone applied to residential neighbourhood with a conventional character and provides opportunities for medium density housing through comprehensive housing development. The Assessment Criteria 16.7.3.11 establishes that the maximum CHD density in the Residential 4B zone shall be 1:350. In so far as the Residential 4B zone is concerned, the Explanation and Reasons for the assessment criteria are as follows: (16.4.4)

> *"The Residential 4B zone applies to parts of East Coast Bays and Birkenhead. It continues the transitional plan's requirement for 450 square metres per unit, thereby ensuring that the amenities of these areas are retained and that, on a city wide basis, opportunities are provided for housing at a variety of different densities. In order to provide a limited degree of flexibility, opportunities are provided for unit area requirements to be slightly reduced for larger developments (3 or more units), provided that the impacts on the environment will be slight."*

[15] Policies 6, 8 and 9 supporting Objective 16.4.4 read as follows:

> *"(6) By providing as a Discretionary activity in the Residential 4B zone for those larger unit developments which require minimal or no earthworks or tree removal to have a reduced area per unit in order to provide limited flexibility.*
>
> *(8) By including development controls which are designed to minimise the impact of buildings and activities on adjoining sites and to achieve a reasonable level of on-site amenity.*

> (9) *By the inclusion of controls in assessment criteria on Controlled and Discretionary activities which will ensure the development is compatible with the maintenance and protection of amenity and environmental values."*

[16] Plan Change 1 deals solely with Intensive Housing Developments. The objective is described as:

> *"To ensure that intensive residential developments are designed to a high standard, integrate well with their neighbourhood, and are located where the physical and social infrastructure support them, and any adverse environmental effects will be avoided, remedied or mitigated."*

Relevant Policies include:

- *location within easy walking distance of....a substantial public reserve (or reserves) that provides a range of recreational opportunities.*
- *location well served by roads capable of handling increased traffic; road frontages or nearby kerbside areas having adequate visitor parking spaces, and community facilities.*
- *designed to achieve...reasonable outlook and useful outdoor space for occupants; effective and efficient catering for traffic, parking and servicing.*

The explanation and reasons for those objectives and policies note that generally this type of development will involve more than 5 units per site, with densities generally not to exceed an average of 1 unit per 150m2. They go on to note that *"Quite significant adverse effects, both immediate and cumulative, can arise...Where intensive residential development requires a resource consent, as either a Discretionary or Non-Complying activity, the objective and policies above are an important component of Council's assessment of them."*

[17] Given the stage that Plan Change 1 has reached, we think that it should be given considerable weight, notwithstanding the outstanding reference.

[18] We record in passing that it was common ground that there are no relevant regional policy statements or plans.

Approaching the s105(2A) gateways

[19] The fundamental statutory point is s105(2A) which, relevantly, reads:

> ...a consent authority *must not* grant a resource consent for a non-complying activity unless it is satisfied that –
>
> (a) The adverse effects on the environment (other than any effect to which s104(6) applies) will be minor; or
>
> (b) The application is for an activity which will not be contrary to the objectives and policies of (the relevant plan). [Emphasis added].

We note that the owner of the houses at 9A and 17A Rangitira Ave have consented to the proposal. Some issue was made of the fact that the house at 9A is rented, and the tenant has not given separate consent. In the absence of any evidence that the tenant takes a different view, we think that the owner's consent should be regarded as effective. We therefore do not consider the effects on that house, in terms of s104(6). In considering para (b) we take 'contrary' to mean 'repugnant to' and not merely that the proposal is not directly supported by the provisions of the Plan.

Permitted baseline and Cumulative effects

[20] It seems to be common ground between the parties, and we do not disagree, that the planning 'site' to be considered here is the amalgamated Lot 2, on which the four blocks are presently being built, and which will also contain the proposed block. So what exists at the moment is the four blocks, lawful by virtue of the existing resource consent. They are part of the existing environment, as they are presently being built, so we do not need to go into questions of unimplemented consents. What could go onto the area proposed for the 5th block, as of right, is an auxiliary building of some description of up to 27m2 in area. There are issues with how that 27m2 could be utilised without drifting into the realm of 'fanciful' activities, and we shall return to that.

[21] In logical and practical terms, it is almost impossible to consider any adverse effects of this proposed building as an entirely 'stand alone' development. We discussed this point in the decision in *Vodafone New Zealand Ltd v North Shore City Council* [A206/03]. Differently constituted Courts have touched on the same, or a similar, issue. See eg *Kapiti Environmental Action Inc v Kapiti Coast DC* [A060/02] at para 138, and *Ohope Beach Development Soc Inc v Whakatane* DC [A136/02] at paras 21–27. Reflection on Mr Cavanagh's and Ms Carruthers' submissions on the point has not eased the issue of how one might sensibly consider 'cumulative effects' while at the same time acknowledging the 'permitted baseline' approach; at least if one takes the Court of Appeal decisions in the area absolutely literally.

[22] Those decisions are *Dye v Auckland Regional Council* [2001] NZRMA 513 and *Arrigato Investments Ltd v Auckland Regional Council* [2001] NZRMA 481, *Bayley v Manukau City Council* [1998] NZRMA 513 and *Smith Chilcott v Auckland City Council* [2001] NZRMA 503. Taken together, they hold that the permitted baseline is the existing environment overlaid with such relevant [and not fanciful] further activity as is permitted by the plan and perhaps, in some cases, by an unimplemented resource consent. If the existing environment and any permitted activity have already, or will, create some adverse effect, that adverse effect does not count in the s104(1)(a) and s105(2A) assessments. So far, so good.

[23] But the definition of 'effect' in s3 of the Act includes '...any cumulative effect which arises over time or in combination with other effects...regardless of the scale, intensity, duration or frequency of the effect...' If, therefore, the existing activity has adverse effects, and the proposed activity also has an adverse effect, even if only minor, which would add to the existing effects, then to comply with the definition one would have regard to it. That is because it will have an impact 'in combination with other effects' even if its 'scale, intensity, duration or frequency' is not, of itself, more than minor. That would comply with the ordinary meaning of 'cumulative'. It would be an exception to the 'permitted baseline' concept, but only to the extent that one could have regard to existing adverse effects when, and only when, taken together with the 'new' effect, they produce a synergetic impact on the environment.

[24] Again, so far, so good. But one then comes to para [38] in *Dye* which, taken literally, appears to hold that a 'cumulative effect' can only be one that arises from the proposed activity: *'All of these are effects which are going to happen as a result of the activity which is under consideration.'* The consequence of that would be that only adverse effects emanating from the proposal itself could be brought to account. There could be no cumulative effects [properly so called] created by combining existing or permitted effects with effects arising from the proposal. In turn, that would mean that so long as the adverse effects of the proposed activity are not of themselves more than minor a consent authority could never say "This site has reached saturation point; it can take no more."

[25] That interpretation would, we think, be contrary to the plain meaning of 'effects' in s3 and contrary to the purpose of the Act, as set out in s5 – the sustainable management of natural and physical resources. If a consent authority could never refuse consent on the basis

that the current proposal is the straw that will break the camel's back, sustainable management is immediately imperiled. It is to be remembered that all else in the Act is subservient to, and a means to, that overarching purpose. We recognise that in *Dye* the Court of Appeal thought that in s104(1)(a) the s3 definition of 'effect' had been implicitly abandoned. That may be so, in contrasting 'effect' and 'actual and potential effect'. But a cumulative effect is both a 'effect' in terms of s3, and an actual effect, so it does not matter which definition is used.

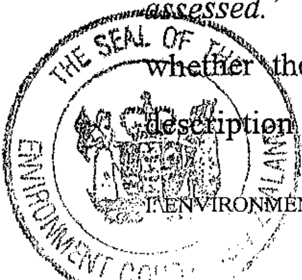
[26] Such a result cannot have been what was intended. It must be that the quoted comment in *Dye* should be read as being confined to the facts of that case, and not being intended to be of universal application in any case where cumulative effects are to be considered. Read in that confined way, the common sense and plain meaning of 'cumulative effect' and the purpose of the Act are undamaged.

[27] What it comes to, in the end, is the acceptance of the logically unavoidable conclusion that what must be considered is the impact of any adverse effects of the proposal on *the environment*. That environment is to be taken as it exists, with whatever strengths or frailties it may already have, which make it more, or less, able to absorb the effects of the proposal without a breach of the environmental 'bottom line' – the principle of sustainable management.

[28] It was this sort of issue that Mr Warren, the appellant's expert planning witness had in mind in his comments at para 56 of his brief:

> I consider that the main issue is whether the effects of the proposed block E when combined with the effects of the approved development take those effects into a new class with a perceptively [sic] greater degree of impact.

[29] Finally, on this issue, we should mention the concept of 'environmental creep' as it was described in *Arrigato Investments Ltd v Auckland Regional Council*. The Court described it as *'...a process whereby having achieved a resource consent for a particular building or activity, a person may seek consent for something more and try to use their existing consent, as yet unimplemented, as the base from which the effects of the additional proposal are to be assessed.'* See para [37] of the decision. For present purposes, it does not seem to matter whether the existing consent has been implemented or not; that remains a reasonable description of what has occurred here. The Court went on to hold, in para [38] that



'*...assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law.*' There should not be, the Court concluded, any rigid rule of law either way in deciding whether the existing consent should form part of the permitted baseline. We rather see that flexible view as supporting the general stance we have taken on the issue of cumulative effects vis a vis the permitted baseline. As a general proposition we think that the use of incremental consent applications should be discouraged. That is not to say that we consider this appellant has been underhand in the way it has gone about this proposal, or that some sanction should be imposed on it. We understand that it took over the development after the fifth Block on Lot 2 had been deleted by the earlier developer, and it has been candid about its intentions since. Nevertheless, such applications make it extremely difficult for consent authorities to fulfil their functions and should be viewed with a critical eye.

Objectives and policies and adverse effects

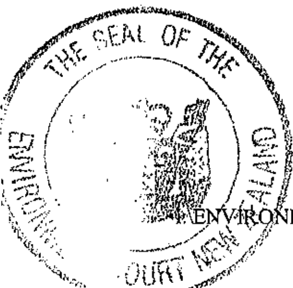
[30] We think that the construction of the 5th block would be contrary to the objectives and policies of the plan, particularly in these respects:

- It is contrary to Objective 16.3.1 and its supporting Policies because it is 'out of zone' and does not have any similarity of ... '*character, amenity and environmental views*' with its neighbourhood, which is, as the Residential 4B description has it, an area of 'conventional urban character'. The specific Objective for Residential 4 is, as mentioned in para [13], '*To protect the character and amenity of the main residential area while providing opportunities for its growth and development.*'
- As a subset of that discordance, the development density of Lot 2, when this building is complete, would be 1:135. The development provisions in Residential 4B allow for subdivision and infill housing to 1 unit per 400m2, or, in terms of Criteria 16.7.3.11 for a CHD in Residential 4B, 1:350. The contrast is so stark that no further comment is necessary.
- Objective 16.3.3 and its supporting Policies are concerned with Development Controls. In particular, Policy 14 requires that '*...all Controlled, Discretionary and Non-complying activities comply with the development controls applying to Permitted activities, unless an alternative standard is required for the operation of the activity.*' This is a non-complying activity. It was not suggested anywhere that alternative standards are required or provided. It cannot comply with the controls for permitted activities; - density controls for instance.

[31] In terms of Plan Change 1, we think there is also conflict between the proposal and its terms. The integration of the proposal with its wider neighbourhood is rather dubious. The formed roadways are narrow – traffic could not pass if there was kerbside parking along the culs de sac; we were not made aware of substantial public reserves within easy walking distance. We agree with Mr Munro's opinion that visitor parking could be problematic, and that there is little or no useful outdoor space for occupants. Collectively, these deficiencies are significant and are not, in our judgement, adequately avoided, remedied or mitigated.

[32] If it was the only development on Lot 2, the adverse effects of the 5th block might arguably come within the rubric of 'minor' [although we imagine that Ms Carrick might understandably disagree]. But when considered cumulatively with the effects of what exists, we are in no doubt that those cumulative effects are more than minor. As is frequently the case, a number of the adverse effects that concern us are the practical face of the conflicts with the Objectives and Policies. Effects that we particularly have in mind are:

- The effects on the view from the property at 11A Rangitira Avenue. We recognise of course that no landowner has an unqualified right to a view that his or her property may enjoy, and we recognise that the proposed building has been modified in an attempt to mitigate the position. We recognise also that that the 27m2 building [see para [20]] could be erected in such a way that it could obstruct at least some of this view. But we find the prospect of a 27m2 three-storey building entirely fanciful. On a 450m2 site, even a two-storey 27m2 building seems extremely unlikely. We think that the possibility of an 'as of right' building blocking any significant part of this view can be reasonably discounted. The loss of about one-third of the view from 11A Rangitira Avenue caused by the proposed block is a not insignificant effect.
- The proposed block, and the existing Block D are designed to adjoin, or so nearly so as to give the impression of one continuous building. From the street that will have an imposing and dominating frontage. From the rear, [11A Rangitira Avenue again] with a façade of almost featureless concrete wall, it will have a bleak presence, emphasising the loss of view already mentioned. We have considered Mr Hornby's evidence that, from an architectural point of view, the proposed block will 'complete' that part of the development. That might be a valid opinion, but there can be little doubt that it will also increase the 'built-in' impression of this wall of



uncompromising buildings in what, theoretically, is still a Residential 4 area. In our view the proposed building will further detract from the visual and landscape amenity of the area, from the street in front, from the property behind, and from the entrance roadway down from Rangitira Avenue.

- The proposed block will add to the density ratio on the site to a measurable degree. That density will be significantly higher than is otherwise provided for in Residential 4B [see para [14]], and higher than that envisaged for Residential 6 [see para [9]]. Coupled with the absence of any significant usable public open space, and there being no private open space apart from decks, this becomes a further, and significant, amenity issue.
- The proposed block will add more traffic movements to a street layout that is of narrow width, and that has only one entry/exit point. It will also create more demand for visitor parking, which is not well catered for.

[33] A slightly different way of looking at the 'synergetic impact' issue of cumulative effects is to start from the proposition that Lot 2 originally had a capacity for development without major adverse effects. As the apartment blocks were built, they did not necessarily individually have major adverse effects, but they progressively consumed the site's capacity. Once the capacity limit is reached, as indicated by objectives and policies, density ratio criteria and the like, the adverse effects of further development are not simply linear, but are exponential. However one analyses it, we have the clear view that the adverse effects of this proposal are more than minor.

Conclusion

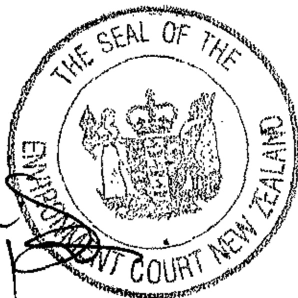
[34] That view is sufficient to prevent the proposal passing through the s105(2A) gateway, and if that is so, the appeal cannot succeed. But we record that had we gone on to consider the balance of s104, s105 and Part II issues, and the discretion in s105, we would not in any event have granted consent. The proposal, in our view, is in such conflict with the planning documents, and has such adverse effects, that to countenance it would plainly not be compatible with the purpose of sustainable management enshrined in s5.

[35] For those reasons the appeal is declined, and the decision of the Council to refuse consent is confirmed.

[36] Costs are reserved. If they cannot be agreed, any application should be made within 15 working days, and any response within a further 10 working days.

DATED at WELLINGTON this 12th day of March 2004

For the Court



C J Thompson
Environment Judge