ORIGINAL

**BEFORE THE ENVIRONMENT COURT**

Decision No. C090/09

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|---|---|
| **IN THE MATTER** | of the Resource Management Act 1991 |
| **AND** | |
| **IN THE MATTER** | of an appeal pursuant to s 120 of the Act |
| **BETWEEN** | PETER KIRCHER and others named on page 2 |
| | (ENV-2007-CHC-000143) |
| | Appellants |
| **AND** | MARLBOROUGH DISTRICT COUNCIL |
| | Respondent |
| **AND** | HELEN M STRANG<br>and others named on page 2 |
| | Applicants |
| | (also Appellants in ENV-2007-CHC-000142) |

| | |
|---|---|
| Hearing at | Blenheim on 28-29 April, 1 and 4 May 2009 |
| Court: | Alternate Environment Judge FWM McElrea (presiding)<br>Environment Commissioner AJ Sutherland<br>Deputy Environment Commissioner D Kernohan |
| Counsel: | Mr CS Fowler for the appellants<br>Ms M Radich for the respondent<br>Mr NA McFadden and Ms VJ Chisnall for the applicants |

Decision issued: 5 October 2009

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**INTERIM DECISION OF THE ENVIRONMENT COURT**

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**Result:** A: The appeal by the Society as to subdivision will be allowed, unless further agreement is reached as to Lot 3. Subject thereto, the appeal by the applicants on roading contribution is allowed.

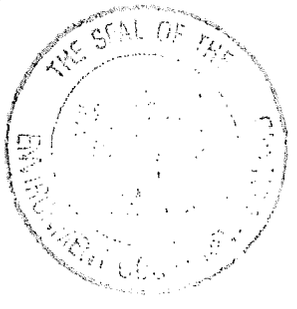
B: Costs reserved on both appeals

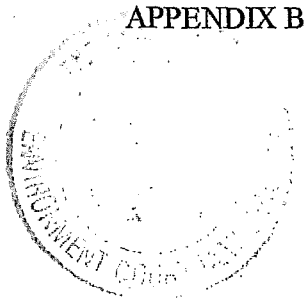
Names of appellants: PETER KIRCHER, ALISON KIRCHER, ERIC JORGENSEN, JOSIE SMITH, MICHAEL GILLOOLY, SUSAN RICH, MICHAEL KIRCHER, CHARLES DEANS, JANE DEANS, MARGARET MACBETH, MALCOLM DEJOUX, HELENE DEJOUX, DAVID LINDNER, JANE KIRCHER, CATHERINE KIRCHER, PETER PLATTS, LISA PLATTS (collectively known as the Ocean Bay Protection Society)

Names of applicants: (1) HELEN MARGARET STRANG, and (2) WILLIAM RICHIE STRANG, JILLIAN MARY STRANG and ROSCOE CAMERON TURNER as Trustees of the W R STRANG FAMILY TRUST

## INDEX TO DECISION







## REASONS FOR DECISION

PRELIMINARY MATTERS

### Introduction

[1] At issue in this proceeding is an application to subdivide land at Ocean Bay, Port Underwood, north of Cloudy Bay, Marlborough. This is a non-complying activity, because of the small area of land involved. The land is zoned Rural One in the Marlborough Sounds Resource Management Plan ("**the Plan**"), which is the operative planning document.

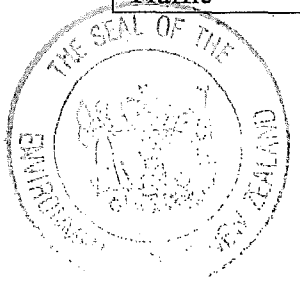
[2] The application is advanced by the owners of the subject property, being Helen Margaret Strang (as to one half) and the trustees of the W R Strang Family Trust named above as to the other half (all collectively called "**the applicants**"). The application is opposed by the appellants named above, collectively known as the Ocean Bay Protection Society ("**the Society**"). The Marlborough District Council ("**the Council**"), which had granted resource consent (U061263) to the subdivision application on 22 May 2007, appeared and supported its decision.

[3] The Court also in this hearing heard a cross-appeal by the applicants against a decision of the Council to require a roading contribution from the applicants in the sum of $23,400 plus GST.

### Witnesses

[4] The following table indicates the names of witnesses, their type of evidence, and by whom they were called.

| Evidence type, for: | The applicants | The Council | The Society |
|---|---|---|---|
| Planning | Jane Hilson | Rebecca Beals | Nicholas Boyes |
| Landscape | Rory Langbridge | | Jeremy Head |
| Archaeology | Michael Trotter | | Dr Reginald Nichol |
| Iwi | Joseph Stafford | | Tracey Williams |
| Local | | | Eric Jorgensen |
| Traffic | Donald Petrie | John Porter | |



**The context**

[5] As described by Ms Beals, Ocean Bay, situated on the western side of Port Underwood, is enclosed by the sea and ridgelines (including headlands to the north and south) and flatter areas near the head of the bay. The road enters the bay over the headland to the south from Rarangi, winds down the hill, runs along the foreshore area, then climbs back up the northern headland before dropping down towards Waipuna Bay.[1] We can add from other evidence that the headlands flanking the bay and the hills behind are mostly wooded, while the flat land at the head of the bay is mostly cleared. The predominant character of the cleared land is rural although a small number of homes or holiday dwellings, mostly in the northern corner, are also present.

**The subdivision proposal**

[6] The applicants propose a subdivision to create a total of three new lots, each with an indicated Building Location Area ("**BLA**"), out of four lots currently owned by the applicants in Ocean Bay. The four existing lots were created by a 1991 subdivision and do not give rise to an entitlement of one Certificate of Title per allotment – which is the object of the present application, as was clear from Mr McFadden's opening submissions for the applicants: "The application proposes a subdivision to create a total of 3 new Certificates of Title..."

[7] The new lots proposed are shown on the **subdivision plan attached** hereto, being:

- Existing Lots 1 and 2 amalgamated – 20.126 ha – this allotment includes some land adjoining the foreshore road but most of it is steep, forested slopes on the northern side of the Bay, inland and to the north of the existing dwellings. Lots 1 and 2 are currently separated by a "paper road". (We refer to the proposed amalgamated lot as Lot 1 in this decision.)

- Lot 3 – 3.600 ha – this allotment generally comprises the steep, wooded slopes on the northern side of the Bay out to and including the spur on the headland between Ocean Bay and Waipuna Bay (the next bay north). Lot 3 is largely

[1] Para 3.3 evidence-in-chief

covered in well-established, native vegetation with some wilding pines mostly towards the top of the ridge.

- Lot 4 – 1.512 ha – this allotment is physically separated from the rest of the applicants' property and is termed Lot 4 on the applicants' existing title. It is flatter land near the middle of the Bay adjoining the road reserve and is currently leased out for grazing.

**Amendments to the application**

[8] As part of the application to the Council a scheme plan identified building sites on each of the proposed new lots. Subsequent to the decision of the Council the applicants decided to reposition the building site for Lot 4 from the base of the spur (referred to below) to the flat paddock to the south of the spur. The amended survey plan showing the new building site for Lot 4 is Annexure 4 to the Statement of Evidence of Jane Hilson. Copies of the amended plan were supplied to the other parties as part of the applicants' evidence-in-chief. The new position of the building site on Lot 4 is said to ensure that any residential development is located well clear of the Māori pits on the spur, and from a landscape perspective, to be in a lower position when viewed from Port Underwood Road.

[9] Accordingly an application was made orally at the commencement of the hearing to amend the application in respect of Lot 4 in this manner, and also to substitute the names of the individual Trustees (William Richie Strang, Jillian Mary Strang and Roscoe Cameron Turner) for "the W R Strang Family Trust" which appears as one of the two applicants and appellants in the relevant documents.

[10] These applications were not opposed and were granted on 28 April 2009.

**History of the applicants' ownership of the property**

[11] None of the applicants gave evidence. However the record of the Council's decision[2] notes on page 6 that Mrs Strang told the Council that they bought the property in 1974 and the majority of this land is still being farmed. In 1990 the Strangs applied to

[2] Annexure 1 to Statement of Evidence of Jane Hilson.

have Lot 4 subdivided off a larger property of theirs fronting Port Underwood Road and amalgamated with Lots 1-3 which were held in a separate title. Although a building on Lot 4 was contemplated at that time, it was in conjunction with a forestry/farming use of the whole site (Lots 1-4) held in one title, which is obviously no longer desired.[3]

[12] The present Certificate of Title is identified by Ms Beals as being MB5A/24.[4] It was issued on 17 July 1991 and brought together the four lots currently owned by the applicants, being Lots 1 to 4 Deposited Plan 8337. It appears that this plan was deposited in order to place Lot 4 in the same title as the remaining land owned now by the applicants.

[13] Following the provision of a supplementary submission by Mr McFadden, it was common ground between counsel, and clearly the reason for this application, that without a new subdivision, separate certificates of title cannot be issued for the four allotments of the earlier subdivision.[5] From a practical point of view – eg in terms of providing legal ownership, or security to mortgagees – this is a major impediment to a separate development of the different lots. However, we note that it is consistent with the basis on which Lot 4 was linked with Lots 1-3 in 1991.

**Zoning, and status of the application**

[14] With dual responsibilities as a district and regional authority, the Council has integrated the management of the resources of the Marlborough Sounds by preparing the Plan, which is a combined Regional, District and Coastal Plan, which is fully operative for the purposes of these appeals.[6] In accordance with the Act, the Plan has been formulated to be consistent with, and give effect to, the policies within the Marlborough Regional Policy Statement.[7]

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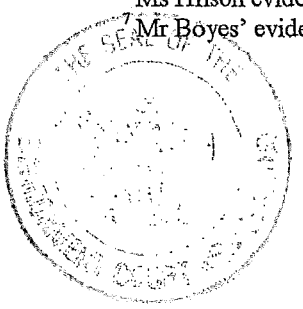
[3] See document 3 in Annexure 5 evidence-in-chief of Mr Jorgensen , as to the Strang's stated intentions. Ms Beals at para 5.19 of her evidence-in-chief confirms that the then-relevant District Plan provided for one dwelling per certificate of title.
[4] Brief of evidence para 2.1. A copy of the title is part of Annexure 2 to the evidence-in-chief of Mr Boyes.
[5] Mr McFadden referred to ss 11(1)(a), 218(1)(b) and 226(1)(a) RMA. Further, the existing title contains a memorandum recording that it is issued subject to s 308(4) Local Government Act 1974 which restricted the issue of separate titles.
[6] Ms Hilson evidence-in-chief para 3.2
[7] Mr Boyes' evidence-in-chief paras 62 and63.



[15] In the Rural One zone the minimum lot size is 30 ha. This land being only 25.238 ha in total, a subdivision into even smaller lots is a non-complying activity.

[16] Rule 36.1 of the Plan (Rural Zones One and Two) lists numerous permitted activities with this introductory comment:

> *The following activities shall be permitted without a resource consent where together with any relevant definition they conform to the conditions for Permitted Activities as well as the general rules:*
>
> ....
>
> - *Farming*
>
> ....
>
> - *Erection of buildings provided that only one dwellinghouse per allotment is allowed as a Permitted Activity*

SUNDRY LEGAL MATTERS

**Certificate of Compliance**

[17] Unfortunately, time and energy was spent by counsel and witnesses in what turns out to be a non-issue concerning a certificate of compliance. The applicants hold a certificate of compliance issued by the Council[8] and dated 31 October 2006 in respect of an "activity" of "construction of a dwelling on Lots 1, 3 and 4 DP 8337". The certificate states under the heading "Certification", somewhat confusingly:

> *Rule 36.1, Rural Zones One and Two Chapter, Vol 2 [of the Plan] states that erection of buildings provided that only one dwelling house per allotment is allowed as a permitted activity*

[18] The relevance of the Certificate of Compliance is that, although Mr McFadden disavowed any reliance on it in his closing submissions, his clients' planning witness relied on it in her evidence, especially in relation to the permitted baseline, and so we must address it. Further, the Council appears to have placed reliance, as we mention below.[9]

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[8] Annexure 2 of Mr Boyes' evidence-in-chief.

[9] The Certificate may however have originated with a different purpose, related to s 223 of the Act. A valid Certificate of Compliance for a subdivision might have led, via the sections Mr McFadden outlined, to separate titles issuing.

[19] A number of points need to be made about this certificate for the purpose of this decision. First it relates to a land use activity – "construction of a dwelling" – whereas the appeal before us relates to a subdivision application. Secondly the certificate is either referring to the construction of one dwelling on the three lots, or it treats three of the four lots on DP 8337 as separate lots, which flies in the face of a memorial on the Certificate of Title stating that the title is "Subject to Section 308(4) Local Government Act 1974".[10] Thirdly, it appears to merely restate one of the permitted activities in the zone.

[20] The record of that hearing shows that reliance was placed, first by Mr McFadden at page 4, and then by the Council, on the certificate of compliance. Although not mentioned in its reasons, the Council included this statement as one of its "main findings" on page 16:

> *The applicant holds a certificate of compliance stating that three buildings can be built on the existing property as of right.*

(In fact, the term "as of right" is not the term used in the certificate of compliance, and is problematic. It suggests that no resource consents are needed, when in fact consents may well be needed, depending on the development in question.)

[21] As Ms Beals noted in her evidence for the Council[11], the Certificate:

> *... appears to merely re-state the Permitted Activity standard of the Plan and thereby approve the concept of a dwelling on each allotment, rather than determining that a specific proposal was a permitted activity.*

[22] We agree with Ms Beals. It should be remembered that the purpose of a certificate of compliance is to be found in the legislative provision that created it, s 139 RMA. This provides that where an activity could be lawfully carried out without a resource consent at a particular location, any person may obtain a certificate "that a *particular proposal or activity* [our emphasis] complies with the plan in relation to that location". This is clearly meant to be a certificate that the particular (proposal) complies with the general (rule); subs (2) enables the Council to obtain further information about the specific proposal so as to be able to make that assessment before issuing the certificate.

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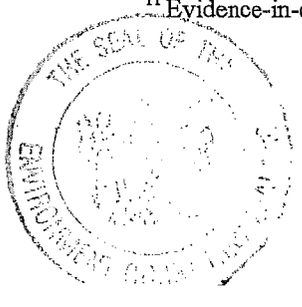
[10] Although the 1974 Act was repealed as from 1 October 1991, the applicants' certificate of title had already been issued ( on 17 July 1991) subject to this provision which Mr McFadden accepted prevented an application to the District Land Registrar for separate titles.

[11] Evidence-in-chief para 5.26



[23] A further problem is that the Certificate should be read in the light of the application for the certificate, in the same way as a resource consent is limited by the scope of its preceding application: ***Manners-Wood v Queenstown Lakes District Council***[12]. While the letter of application for the certificate[13] made reference to a report from Abacus Design, and this report defined proposed BLAs, the report itself was a geotechnical report which noted that resource consents may be required for excavations, and would be required for effluent discharges.

[24] It is no answer to say, as Ms Hilson does in defending the Council's action:[14]

> *While certain resource consents may be needed for activities ancillary to residential use ... (ie effluent disposal and crossing places), a pragmatic approach would on the evidence suggest that these can and would be addressed by resource consent.*

Section 139(1) is limited to activities that "could be lawfully carried out without a resource consent". This has to mean "without any resource consent whatsoever". The section in our opinion was not intended to result in a certificate that merely states what is a permitted activity as set out in the plan. In ***Waiwatai v Hamilton City Council*** (1996) 1 NZED 247 it was held that an applicant for a certificate of compliance has to satisfy the [Council] that *every aspect of the activity* (our emphasis) is in conformity with the relevant rules pertaining to it. This means that the particular activity requires no resource consents at all. Even Mr McFadden in his opening submissions para 5.18 acknowledged that "in terms of a dwelling on Lot 3 a resource consent is required for a new access".

[25] It may be for this reason – that resource consents would be required - that the Certificate issued by the Council failed to approve the specific building sites shown in the Abacus Design report. However, as the Council was not able to approve a specific proposal, it should not have issued the Certificate at all. It then compounded its error by giving credit for that certificate when the subdivision application was made. Contrary to Ms Beals' reading of the matter but consistent with that of Mr Boyes, the Council seemed to treat the certificate of compliance as something extra in the applicants' favour – a mistake possibly connected with its treating Mr McFadden as a witness, and his

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[12] Decision W77/2007.
[13] Second document in Mr Boyes' Annexure 2
[14] Para 4.27 of her evidence-in-chief.

submissions as "evidence".[15] For this and other reasons[16] we have regard to the Council decision as required by (s 290A RMA) but place no weight upon it.

[26] Finally, as far as Ms Hilson's evidence is concerned, contrary to the claim in her rebuttal evidence (para 5.1) that she had "in no way relied upon" the certificate of compliance, she had framed her evidence-in-chief so as to defend the Council's issuing of the certificate, and then to support its contents as part of a permitted baseline argument.[17] Other parties were then bound to respond.

[27] We agree with Ms Beals and we have grave doubts about the validity of the certificate of compliance

[28] Although we have no power to make a definite ruling on the validity of the Certificate – see ***Culpan v Vose***[18] - we agree with Mr Boyes (para 40) that the certificate is "meaningless" in the current context, and with Ms Beals that it is a "red herring" (transcript page 149).[19]

**Permitted baseline issues**

[29] Under s 104(2) of the Act we may disregard an adverse effect of the proposed subdivision on the environment if the plan permits an activity with that effect. We consider shortly the submissions and evidence on the activities permitted by the plan. Before doing so we deal with two introductory points.

[30] First, we accept Ms Beals' view[20] that the Council decision was not based on acceptance of a permitted baseline. Amongst other reasons she gives for that view, the Council's own reporting officer Mr Heather had considered that the building of three dwellings on the property as of right was fanciful. He saw the idea of family flats also

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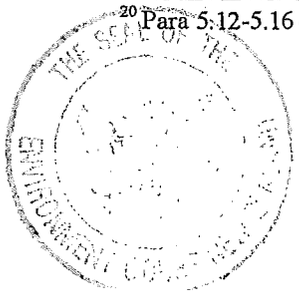
[15] See pages 3 and 4 of the record of the Council hearing.
[16] For example, Mr McFadden's incorrect advice, noted both at page 4 and at page 13 of the record, that "eight houses could be built as of right" – as to which see our reasoning below under "permitted baseline".
[17] See eg para 4.31-4.32 of her evidence-in-chief. In addition Ms Hilson assessed the application on the basis that the Court had a discretion to disregard the permitted baseline: see para 4.36.
[18] *Culpan v Vose* (1993) 2 NZRMA 380.
[19] If this had been recognised earlier, wasted time and energy could have been avoided both at the Council level and in this Court.
[20] Para 5.12-5.16 of her evidence-in-chief.



being constructed on each of the sites (hence the "eight houses" Mr McFadden had raised in his submissions to the Council) as even more fanciful. While we agree with that view, we are unaware of any such right as alleged by Mr McFadden to have one family flat - ie one extra dwelling - per allotment.[21]

[31] Secondly, the concept of permitted baseline we apply is that expressed by the Court of Appeal in ***Arrigato Investments Ltd v Auckland Regional Council*** [2001] MZRMA 481 at para 29 and in ***Queenstown Lakes District Council v Hawthorn Estate Ltd*** [2006] NZRMA 424 at paras 63-66. The permitted baseline is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. The consent authority is required to consider the effects of other activities that might be permitted on the subject land, whether by way of right as a permitted activity under the district plan, or whether pursuant to the [previous] grant of a resource consent. Activities that are theoretically possible but lacking in reality – ie fanciful activities - are not to be considered.[22]

[32] For the record, we too consider that it is fanciful, or lacking reality, to suggest that three dwellinghouses would be erected on these allotments without having separate titles available.[23] But there are also reasons for saying they are not able to be constructed as of right, as we come to shortly.

[33] Mr McFadden's opening submissions (paras 5.15-5.16) indicate that although the applicants' witnesses do not rely on the certificate of compliance concerning dwellings, nevertheless other activities are relevant to the permitted baseline. The applicants clearly have not abandoned hope in the permitted baseline and we now deal with it.

[34] It is common ground that there is no permitted baseline for the "activity" of subdivision, simply because subdivisions are not a permitted activity in the Plan.

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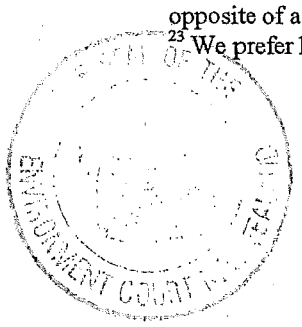
[21] The argument appears to rely on the peculiar definition of "residential unit" in the Plan, rather than a definition of "dwellinghouse", of which there is none.

[22] We understand "fanciful" to mean lacking in reality - existing in the imagination only, not in reality. Hence *New Shorter Oxford English Dictionary*: "2. Suggested by fancy; imaginary, unreal." It is the opposite of a reasonable possibility.

[23] We prefer here the evidence of Mr Boyes at paras 58-59 to that of the applicants' witnesses.



However, as the High Court made clear in ***Pukenamu Estates Ltd v Kapiti Environmental Action Incorporated***:[24]

> *[44] ... The actual and potential effects of a subdivision are well beyond the simple drawing of lines on a map. ...*
>
> *[46] ... The subdivision into smaller lots is to allow houses to be built so creation of new platforms is* ***inevitable*** *if the subdivision is approved. The earthworks themselves may require resource consent, but this cannot mean that the effect of the earthworks is not to be taken into account when considering the actual effects of the subdivision.* [our emphasis]

[35] Our view is that the Court must consider like with like, so that the permitted baseline exercise, if applied to a resource consent for a subdivision, requires consideration of the inevitable effects of building dwellinghouses, against the backdrop of activities permitted by the Plan or by existing resource consents. There are no relevant resource consents in this case, so the question becomes, what does the Plan permit?

[36] First Mr McFadden lists the removal of indigenous vegetation up to 2,000m$^2$ per annum.[25] With respect, the only allotment on which this is an issue is Lot 3, and we accept the evidence that the land is so steep that indigenous vegetation is not under any threat of clearance for farming or other purposes. This possibility is remote or fanciful.

[37] Next Mr McFadden refers to farming and cultivation on all four lots. Neither would be an adverse effect except on Lot 3 where, because of the steepness of the land it is again not a realistic possibility.

[38] Next mentioned is the erection of buildings up to a height of 10m and up to 15% coverage, which is said to be possible as of right on Lot 1 and potentially on Lot 4. Lot 3 is not included here, presumably because of the concession – rightly made in our view– that the proposed entrance point does not have 45m of sight distance to the south as required by Table 26.3 of the Plan [26] - even though the two traffic witnesses regarded it as

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[24] High Court, Wellington, AP106/02, 1 July 2003, Ronald Young J.
[25] See rule 36.1.5.4.1(g) of the Plan.
[26] Ms Hilson (para 4.26) states that reliance on Austroads standards rather than the table in the plan "may call into question the permitted status of building on Lot 3 in that location shown" – meaning access from the spur of the ridge, as proposed. Mr Boyes' para 27 is even firmer on the point. We agree with him.

safe. And there is a further problem – the access to clear wilding pines on Lot 3 does not seem to have been made according to any resource consent for land disturbance[27] but rather according to some sort of informal permission, and in our view should therefore be disregarded.

[39] In terms of Lot 1, it was argued that "land disturbance to establish [forestry] skid sites has been granted (U071199) and any of these could constitute the building platform for Lot 1".[28] However it is a far cry from this assertion to a conclusion that construction of a dwelling would not involve fresh land disturbance. How could we tell that, without evidence? What Ms Hilson actually says for the applicants at para 4.25 is that "access from Port Underwood Road to Lot 1 and for skid sites or cleared land which would ... provide for house sites on Lots 1 and 3 DP 8339 *have already been formed and do not* ***necessarily*** *require further consents*" (our emphasis).

[40] The careful language used here is significant. There is simply insufficient evidence upon which we could say that the land already cleared for forestry purposes could form a suitable access and building site without further land disturbance. And we are in no position to assume that no further land disturbance would be required – or, if required, that it would comply with the conditions of the Plan, as Mr Boyes pointed out for the Society.[29] Finally, there was no evidence as to the location of these already-approved cleared areas, so we cannot assess whether a building upon them would constitute an adverse effect as part of the permitted baseline.[30]

[41] Lot 4, which Mr McFadden argued was "potentially" able to have a building up to 10m high and covering 15% of the site (ie 2,268 m$^2$), is no better off from the applicants'

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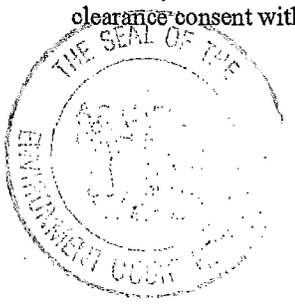
Table 26.3 sets out the "minimum" sight distances for speeds in bands that must mean "up to" 50 km/h (requiring 45m sight distance), 51-60 km/h (requiring 65m), and so on for each band. When calculating what can be done as of right, there is no justification for applying AUSTROADS figures for distances within those bands, especially when the Plan specifically states, "The visibilities shall be measured in accordance with Figure 26.8" - which in turn specifies Table 26.3. Mr Petrie's approach of "extrapolating" when dealing with speeds less than 50 km/h may have practical value in assessing safety but is a departure from what the Plan requires.

[27] See evidence-in-chief of Mr Boyes para 44.

[28] Mr McFadden opening submissions para 5.17. Counsel did not explain how this land disturbance consent, for "logging a commercial pine plantation" (see consent attached as Annexure 7 to Mr Boyes' evidence-in-chief), is consistent with the fact that commercial forestry is not a permitted activity in Rural zone 1. We trust there is an answer.

[29] Para 26 of his evidence-in-chief. This is a further reason (in addition to sight distance issues) not to treat building on Lot 3 as part of the permitted baseline.

[30] Mr Boyes' Annexure 7 contains the decision but not the application plans. Ms Hilson refers to the clearance consent without annexing the documents.



point of view. First, there is no evidence to show that such a building, or a lesser one for that matter, could be built without needing a resource consent for land disturbance. Secondly, the on-site discharge of domestic effluent from any residence would require a resource consent for a limited discretionary activity. Given that that there is no reticulated sewage system for Ocean Bay, residents must rely on septic tank or other form or local treatment of domestic effluent, for which a consent is needed.[31]

[42] Thus a usable dwellinghouse could not be a permitted activity, although a farm building such as a hay barn would be if it met the other requirements of a permitted activity. Even a hay barn or other non-residential building, while not "fanciful", must be unlikely so long as Lot 4 is in a separate title, and ownership, to the adjoining farmland; but if one was built it would at least be consistent with the rural nature of the present use of the Lot 4 and the land to the west and south of it.

[43] Additionally, there is

- the requirement in rule 36.1.3.2.2 for written iwi consent for land disturbance of "any identified site of iwi significance": that rule raises a number of issues[32] that we do not need to resolve in this context in view of the other barriers to a permitted use argument in respect of Lot 4; and

- the requirement that "all accesses must be designed and constructed so that heavy vehicles do not have to cross the road centre line when making a left turn" (rule 26.2.7.1). While we consider that the application of the rule is not restricted to sealed roads with a marked centre line, we do not agree with Mr Boyes that compliance with the rule is unlikely – it is a matter of design and construction, using if necessary part of the subject land,[33] though whether this could be done without land disturbance must be highly debatable.

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[31] Ms Hilson's response to this issue, in suggesting (para 4.27) that on a "pragmatic" approach such issues would be addressed by a resource consent, is not compatible with the legal test for the permitted baseline.
[32] Eg the extent of the "site", how "identified", and significant to how many iwi if there are more than one with manawhenua over the land?
[33] However, Ms Hilson's argument (para 2.43) that existing use rights would apply to the existing access point for Lot 4, which is simply a farm gate at the roadside, is erroneous. As Mr Boyes states (para 34), the effects of residential access would not be of the same or similar character, intensity and scale to those which exist currently. Existing use rights therefore would not assist the applicants.

[44] Mr McFadden made various references, almost in passing, to other permitted uses that might be considered as part of a permitted baseline, but none of his witnesses addressed them and in the absence of evidence we do not consider them realistic possibilities. Specifically he referred to rural rubbish disposal sites, and woodlots. There is no earthly reason why anyone would want to establish a rural rubbish dump in the middle of a beautiful, Port Underwood bay. This is not realistic. Woodlots involve small-scale growing of trees for firewood or planting; they would not be expected to produce effects comparable to dwellinghouses and their ancillary activities, and would be consistent with the rural nature of this part of Ocean Bay. They are unlikely to create adverse effects.

[45] While we find no relevant permitted baseline effects, there are restrictions on development offered by the applicants that are able to be considered as positive effects under s 104(1)(a) – such as having a lower building height than the 10m allowed in this zone. We return to such positive effects below.

**Conclusion as to permitted baseline**

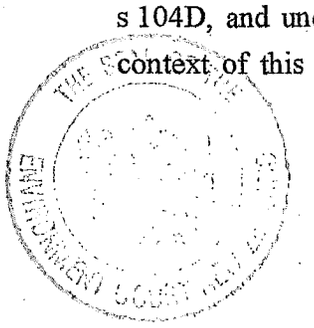
[46] We reject the approach, adopted by Ms Hilson, that other resource consents can be considered separately from a resource consent for subdivision. If resource consents are required as an inevitable result of establishing dwellinghouses on these lots then dwellinghouses cannot be considered as part of the permitted baseline.

[47] There is no evidence of any other activity permitted by the Plan, or under any existing resource consent, that has non-fanciful, consequential effects we are required to ignore in making an assessment of effects under ss 104(1) or 105(2A), assuming we applied a permitted baseline approach.

[48] While s 104(2) gives us a discretion to disregard effects of activities permitted by the Plan, we find there are no relevant activities that might assist the applicants in this case.

CONSIDERATION OF EFFECTS

[49] For a non-complying activity, as this subdivision is, effects on the environment are required to be considered at two different stages – as part of the first "gateway" test under s 104D, and under s 104(1) if the activity passes one of the two gateway tests. In the context of this case, the two "gateways" are that either (a) the adverse effects of the



activity on the environment will be minor, or (b) the activity will not be contrary to the objectives and policies of the Plan.

[50] Thus, while only adverse effects are to be considered at the first gateway, both positive and adverse effects (minor or otherwise) on the environment are relevant under s 104(1)(a). At both stages the enquiry is, as noted in other cases, "extremely broad"[34] – especially as "environment" is defined in s 2 of the Act to include people and communities, as well as natural and physical resources and amenity values.

**Scope of effects to be considered**

[51] We have referred above (para 34) to the High Court's decision in ***Pukenamu Estates*** as to the relevant effects of a subdivision. That decision has been cited without disagreement by Hugh Williams J in ***McKendry v Thames-Coromandel District Council***[35] and applied in this Court at least twice.[36] Although Mr McFadden sought to distinguish ***Pukenamu Estates*** on its facts he did not dispute its correctness at law.

[52] We accordingly proceed on the basis that, although this resource consent is sought for a subdivision only, we must consider the inevitable effects of building dwellinghouses on these three lots, and the effects of activities ancillary to residential activity.[37] In the former category we put the construction of dwellinghouses with attendant access from Port Underwood Road, and land disturbance for driveways, house construction and sewerage effluent systems. In the latter category are the usual concomitants of dwellings, including permanent features such as outdoor vehicle turning and/or parking areas, clothes lines, planted lawns and/or gardens, and intermittent features such as the parking of residents' or visitors' cars, the use of lights at night, mowing of lawns, use of power tools, and so on.

[53] Further, we are not to exclude any effects simply because they would be dealt with as part of separate and later resource consent applications. Indeed, if the contrary approach were adopted, then, as noted by the High Court in ***Pukenamu Estates*** (para 54):

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[34] See eg ***Pukenamu Estates*** at para 52.
[35] High Court, Auckland, CIV 2004-485-002430, 9 June 2004, Hugh Williams J.
[36] ***Roman Catholic Diocese of Auckland v Franklin District Council*** decision W28/2004 at para 10 and ***Horn v Marlborough District Council*** decision W30/2005 at para 137.
[37] This latter aspect is conceded at para 2.3.11 of the closing submissions for the applicants.

> *... this would potentially enable an applicant to manipulate what a local authority could take into account as an effect on* [sic] *an activity with the timing of its applications and provision of information. This is not what the act intends.*

[54] Based on the evidence and submissions in this case, there are two important types of effects to be considered, landscape effects and heritage and cultural effects.

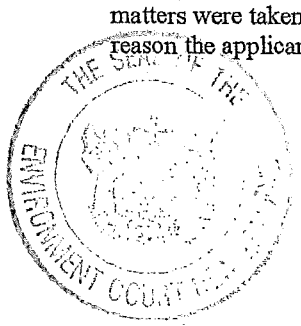
LANDSCAPE MATTERS

[55] Crucial to the decision in this case is the landscape assessment made by the expert witnesses, Mr Langbridge for the applicants and Mr Head for the Society. At times Mr Langbridge's assessment of visual impact seemed to rely on acceptance of a permitted baseline argument – eg para 9.6 of his evidence-in-chief. We were concerned also that Mr Langbridge, quite innocently no doubt, had in places failed to follow the approach to expert evidence required by the Code of Ethics for expert witnesses.[38] However in general terms we prefer the evidence of Mr Head for its thoroughness and reliability.

**Landscape context and description**

[56] Ocean Bay is situated on the western side of Port Underwood near its opening to Cloudy Bay. Its marine location is described as "Eastern Cook Strait and Outer Queen Charlotte Sound". With regards to the maritime influences the Plan refers to "large southerly swells [that] drive directly onto the exposed eastern shores, creating a very high energy coastline" (Appendix Two of the Plan, page 63). As is clear from the evidence and from our site inspection, it is the northern side of Ocean Bay, where Lot 3 is situated, that is exposed to this southerly swell. This will partly account for the rugged nature of this part of the coastline.

[38] For example, although stating at para 1.6 of his evidence-in-chief that his evidence was within his area of expertise, Mr Langbridge ventures opinions on matters of historic heritage (paras 9.13-9.14) and rural productivity (paras 9.2, 9.16 and 9.33). He also inserted in his rebuttal evidence (paras 20-27) a section dealing with the Plan's evaluation criteria which should have been part of his evidence-in-chief. (These matters were taken up by the Bench with Mr Langbridge at pages 65-69 of the transcript.) Perhaps for this reason the applicants' closing submissions did not place reliance on Mr Langbridge's evidence.



[57] The Ocean Bay landscape comprises a combination of sloping hills, spurs, headlands, valley floor and the broad sweeping beach closely behind which Port Underwood Road runs in a north-south direction.

[58] Ocean Bay has a moderately-steep to steep backdrop formed by the main ridge systems leading eastwards from the Robertson Range behind the bay. A mature mixed beech and podocarp forest covers much of the upper slopes, with the vegetation changing lower down to a regenerating mixed manuka/kanuka and broadleaf forest cover with the occasional wilding pine.

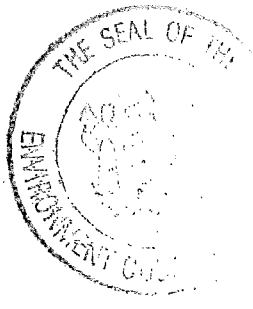
[59] Lower scrubby vegetated character is more prevalent on the drier north-facing slopes which have been traditionally cleared to higher elevations for farming purposes, allowing some gorse and broom to become established – although in places native vegetation is regenerating under this form of shelter. A high voltage transmission line runs essentially parallel to the shoreline across the landscape in the lower third of the valley behind Ocean Bay. The lower, easier, undulating toe slopes include the flatter valley floor extending to Port Underwood Road and the beach, and currently support a mixed land use.

[60] The valley is in some senses physically separated into two halves by a small central spur running down from the toe of the upper slopes and terminating within Lot 4, although at its northern end. Most rural activity is located south of this spur and most residential activity to its north.

[61] We accept Mr Head's opinion that this spur is an important landscape element that helps to define parts of the site, whereas the headlands that enclose the Bay play a much more dominant role in defining the wider landscape [para 24].

[62] The following description we adopt from Mr Head's evidence-in-chief:

> *[26] ... On the south side of this spur and located on the rear half of lot 4 is a small wetland area.*
>
> *[27] On the south side of the valley there is a meandering stream with vegetated margins that discharges into the bay creating a small stony delta.*



*[28] South of this central dividing spur and landward of Port Underwood Road, the area has what can be described as a distinctive Marlborough Sounds rural character. This area retains a group of large mixed exotic trees...originally planted to protect a horticultural operation from salt-laden winds, and now provides shelter for lambing paddocks.*

*[29] An older two-storey farm homestead and established garden sits well back from the beach. Farm outbuildings are located both near the homestead, and also adjacent to Port Underwood Road (Jorgensen Farm).*

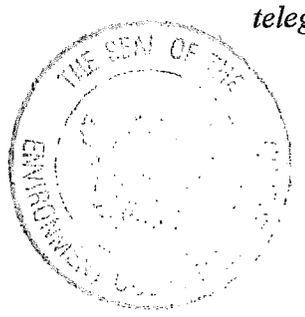
*[30] There are two dwellings and their gardens on existing Lots 3 and 4. These small-scaled dwellings sit down low in the landscape and have the appearance of "farm-workers" type accommodation, "reading" as part of the larger Jorgensen Farm property due to their close proximity to the main farmhouse. As I understand it, these buildings were originally part of the farm, leased out to holidaymakers. According to Mr Jorgensen these two cottages are approximately 30 years old rather than only 5 years old as one is claimed to be by Mr Langbridge in his attachments, under Photo 8.*

*[31] North of the central dividing spur, the area has a rural-residential character comprising a small enclave of smaller single storey dwellings set largely within a framework of native vegetation. The toe of the slope to the north behind these dwellings is grazed pasture together with stockyards and a larger farm-shed like dwelling.*

*[32] The northern and southern arms of Ocean Bay extending out into Port Underwood have markedly differing landscape characters with respect to land use and land cover.*

*[33] The natural character of the southern headland extending to Ocean Point is being significantly modified. The house on the ridgeline and the vegetation cover on this dry north-facing slope is predominantly in wilding pines, gorse and broom interspersed with young regenerating native vegetation.*

*[34] On the opposite side of the bay, the part of the headland facing into Ocean Bay is south facing, cooler and wetter and consequently much of it is covered in semi-mature mixed native broadleaf forest that extends down to the low sea cliffs and rocky reefs. There are also a few large, solitary wilding pines. The vegetation on the area that includes Lot 3 was deemed worthy of assessment and was surveyed by the Wellington Botanical Society in 1995; a vascular plant species list prepared by the society is attached. Apart from the Port Underwood Road and its associated telegraph lines, this headland is unbuilt.*



...

*[39] Between the headlands, and in the more sheltered waters of the Bay is the broad crescent of Ocean Bay beach. This beach is stony above [mean high water] and sandy between [mean high water] and [mean low water]. The bay is gently sloping and has a broad tidal range... There is a small change in elevation between Port Underwood Road and the beach and the area is mostly in grass.*

**Settlement pattern and present context**

[63] Again this is well described by Mr Head, who starts with the general statement that the history of the settlement in Ocean Bay has largely defined the present patterns of built and unbuilt development, a pattern that has evolved in response to topography.

[64] After noting the importance of the pre-European history of Port Underwood and in particular Ocean Bay (to which we return below) Mr Head notes that due to its easy sea access during the early 1800s, Ocean Bay was used as a shore-based whaling station and soon after the valley floor and lower slopes were cleared for farming. Reference is then made to ***Pigeon Bay Aquaculture Limited v Canterbury Regional Council*** (Decision C32/1999) where the Court held that the historical association of an area was important in assessing the significance of a landscape. Mr Head continues:

*[45] As I understand it, the single farmed block that dates back to the 1800s was first subdivided in 1982 by the Strangs, and has been subdivided several times since then. Lot 4 was divided off from the main block in 1991.*

*[46] With the improvement of Port Underwood Road during the 1950s, offering improved accessibility, the "holiday home" has come to Ocean Bay. Several more recent dwellings have been built on lots subdivided off from the main farm block and are located on the north side of the central dividing spur.*

...

*[48] The flatter area to the south of the central dividing spur could be described as a typical Marlborough Sounds pastoral setting featuring the main farm "homestead" with ancillary farm outbuildings. Two small buildings...[nearby] have the appearance of (but are not) farm-workers "cottages" associated with the main homestead.*

*[49] At the south end of Ocean Bay beach, and sited just above it, outside the main "farmed" area is a smaller-scaled contemporary styled dwelling (Platt house).*

*[50] At the top of the headland that encloses Ocean Bay to the south, and at its seaward end is a larger, modern-looking and relatively new dwelling with some associated outbuildings.*

*[51] Ocean Bay is a 50 minute drive directly from Blenheim or a little shorter if travelling from Picton via Waikawa Bay. For this reason, it is an accessible recreational resource from either of these main centres.*

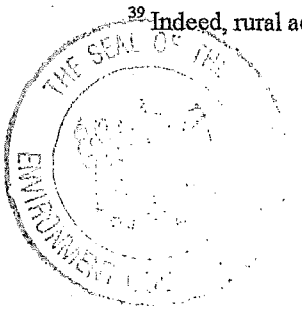
*[52] Robin Hood Bay to the south is a closer, easier drive from Blenheim and therefore attracts a wider cross-section of visitors; while Ocean Bay is just far enough on to have retained its focus as a quieter and slightly more remote location. Picnics, fishing, shore-based diving and boating are popular as the beach affords an easy boat launch. The beach is usable for 5-6 hours each day and is popular for children to paddle and hunt for cockles. Nearby trees provide shade.*

[65] Ms Beals seeks to draw some comfort for the applicants from the long history of occupation of the site. She states

> *Each occupation of the site, being iwi, whalers, farmers and current occupants, have all in some way modified the site. The Plan seeks preservation of areas. This is not a complete prohibition on any form of development. Recognition of the history of the bay and its development is relevant in determining the impact of the proposal on the landscape of the bay, irrespective of whether this landscape is considered outstanding or not.*

[66] Each of these propositions is correct in itself, but the fact remains that the impact of iwi and of whaling is no longer visually noticeable, except perhaps as cleared land, and what is left are the current uses – farming and residential activity. Farming activity can be, and is here, part of the spectrum of naturalness.[39] Further residential development can alter significantly the existing character of Ocean Bay.

[39] Indeed, rural activity can be part of an outstanding natural landscape.



**Landscape effects of the proposal**

[67] Although Ocean Bay is not itself categorised under the Plan as an "Outstanding Natural Landscape" (ONL), Mr Head refers to a number of objectives and policies of the plan bearing on a landscape assessment of this proposal. Some of the extracts which he cites are these:

- From para 5.1 of the Plan:

*The Marlborough Sounds has landscapes which are unique in New Zealand and are valued for their semi-wilderness aspects, scenic beauty, recreational capability and their social, economic and cultural utility.*

- From 5.1.1 (Identification of Outstanding Natural Features and Landscapes):

*In its entirety, the landscape of the Marlborough Sounds Plan has outstanding visual values. Its displays a broad range of types of visual landscapes and features which are often of greater value for their collective contribution than for their individual value. ...*

*Some of the visual features of the Sounds which contribute significantly to its outstanding character are:*

- *The curving coastline with a range of tidal estuaries and sandy and rocky beaches;*

...

- *Highly weathered coastal cliffs;*
- *Rolling ridgelines along the skyline;*
- *A complex mosaic of vegetation patterns which gives rise to a range of textures and colours in the landscape; and*
- *Uninterrupted sequence from hilltop to seafloor.*

- From 5.2

*The landscape of the Sounds has been host to over 150 years of farming, feral grazing, fire, forestry, fishing and coastal settlements. The Sounds landscape*

*overall is therefore highly modified and is constantly changing with the cycles of land use patterns.*

[68] We now quote from para 5.2 of the Plan rather more fully than does Mr Head as it provides important guidance in this case. After noting that, overall, the Sounds' landscape is a highly modified one it continues:

> *Within the overall issue stated above [the adverse effects of inappropriate subdivision, use or development on Outstanding Natural Features and Landscapes] it is important to attempt to define the types of subdivision, use and development which would be "inappropriate" and could adversely affect landscape values.* ***In respect of both the areas of outstanding landscape identified and any other area valued for landscape or visual reasons*** [our emphasis] *inappropriate subdivision, use and development may include:*
>
> *5.2.1 Structures on land*
>
> *In the coastal environment in particular, buildings and other structures that have the potential to intrude and compromise the natural quality of the landscape. In some landscape contexts the siting, bulk and design and contrasting colours of buildings can be inappropriate. ...*
>
> *5.2.3 Land disturbance*
>
> *Roads and tracks can be highly visible within the landscape where they cut across the face of hills or where their construction requires substantial earthworks and landform change. ...*
>
> *Similarly the earthworks associated with creating building platforms can be highly visible within the landscape. ...*
>
> *5.2.5 Subdivision*
>
> *The visual effects of human settlement are the intrusion of structures and land disturbance mentioned above. The act of subdivision of land is instrumental in determining where new building development and roading is to be located. Although the legal process of subdivision itself does not cause direct visual effects, the activities and patterns of development which follow it can be significant (new boundary fencing, new land management practices, new buildings, roads and jetties).*

[69] The relevance of the above quotations from para 5.2 of the Plan is that although Ocean Bay is not identified in the Planning Maps as an area of "outstanding landscape value" the guidance given by para 5.2 applies also to "any other area valued for landscape or visual reasons". In our view there can be no doubt that Ocean Bay falls into that category.

**Landscapes – outstanding or otherwise**

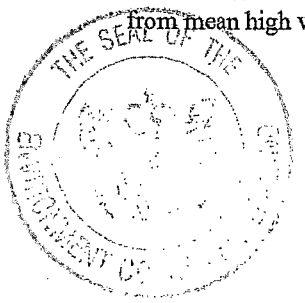
[70] Care is needed in this case to distinguish between different ways in which the word "outstanding" is applied to landscapes. Several different versions are found in chapter 5 of the Plan, entitled "Landscape".

[71] Para 5.1 (Introduction) starts by quoting s 6(b) of the Act, which lists as a matter of national importance "the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development". However, while parts of chapter 5 are framed in terms of "outstanding natural landscapes", other parts use other terminology. Thus:

- The Plan's maps show, by means of hatching in magenta colour, "areas of Outstanding Landscape Value". (Ocean Bay is not included in such an area.)[40] This expression is not limited by the word "natural", as in s 6(b), and may reflect the fact that much of the Sounds landscape has been extensively modified by human intervention.

- "Many outstanding features and landscape components are also areas of high natural character." (para 5.1) This makes clear that outstanding landscape values are not limited to high natural character.

[40] In this part of the Sounds the hatching covers the seaward side of the peninsula which forms the outer or eastern side of Port Underwood, coming down as far as the entrance to Port Underwood but not within it. Thus no part of Port Underwood is, in terms of the Plan, an "area of Outstanding Natural Value" (although the western side of Port Underwood, down to and including Ocean Bay, is shown as Coastal Marine Zone 1 from mean high water springs outwards).



- "In its entirety, the landscape of the Marlborough Sounds Plan area has outstanding visual values. It displays a broad range of types of visual landscapes and features ..." (para 5.1.1)

- "Some of the visual features of the Sounds which contribute to its outstanding character are" ... [as listed above]. (para 5.1.1) This refers to "the Sounds" – a very wide area – as having "outstanding character".

- In the same section we find this: "Within the overall landscape of the Marlborough Sounds there are some parts which can be described as individually outstanding such as coastal cliffs ... Other outstanding features and landscape components can be identified" – the examples given including headlands, spurs and steep hillsides, skylines, shorelines and small coves, and indigenous forests.

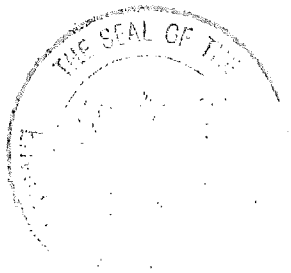
- The Plan's Appendix One contains criteria for selection of areas of "Outstanding Landscape Value". At page 3 of that Appendix it is said that:

*... Outstanding landscapes are those which equate with those needing extreme control and preservation management and are at one high end of the scale.*

[72] Thus within the Plan are competing and at times confusing concepts of the "outstanding character" and "visual values" of the Sounds, "outstanding landscapes", "outstanding natural landscapes", "areas of Outstanding Landscape Value", and "outstanding features and landscape components".

[73] Nevertheless, the objective towards which the discussion in chapter 5 of the Plan leads is wider than "outstanding natural landscapes". The only objective in chapter 5 is "Management of the visual quality of the Sounds ***and*** the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development."

[74] We have emphasised "and", which provides two distinct parts of this objective. It includes the terms of s 6(b) but is wider than the statutory provision. The additional factor in this objective – management of the visual quality of the Sounds – is relevant in our assessment of this case, for both Lot 3 and Lot 4.



[75] The Plan defines "Outstanding Landscapes" as those exhibiting high quality in "one or more indicators [vulnerability, importance and visibleness being the key indicators of quality] which might be expressed as landscapes which have the following characteristics" – page 3 of Appendix One then lists several characteristics, on the basis of some of which Mr Head concludes (para 63) that "in landscape terms, Lot 3 meets the criteria above under the MDC Plan as an outstanding landscape".

[76] We do not agree with this assessment because Lot 3 is but one element in a landscape – albeit a very important one. According to *The New Shorter Oxford English Dictionary* the ordinary meanings of the noun "landscape" include:

*1 A picture of natural (esp. inland) scenery (cf. seascape) ... **3a** (A view presented by) an expanse of terrain or district which is visible from a particular place or direction.*

Common to these definitions is the notion of a whole or wide view – whether in a picture or as an expanse visible from a certain place or direction. The northern headland of Ocean Bay could only form a whole or wide view from somewhere close up, eg upon the water on the northern side of the bay. While some people will occasionally view that headland from that position, it is not the most important or common view likely to be experienced.

[77] We consider that the relevant perspective for landscape purposes in this location is that which will commonly be experienced by residents in or visitors to Ocean Bay, namely the view from Port Underwood Road, the beach and properties west of the road. From those positions the headland that contains Lot 3 can only be part of or a component in a wider landscape. The same is true of views of Lot 3 from the water in the southern side of the bay, or out near the mouth of the bay.

[78] Nevertheless, the Plan's indicators of outstanding quality of landscape in Appendix One, as listed at para 62 of Mr Head's evidence, do in our view justify the high value which he attaches to Lot 3, whether or not Lot 3 is accepted as being a landscape or simply one element in a landscape.

[79] At para 66 Mr Head accepts that even though Ocean Bay is not recognised in the Plan as an Outstanding Natural Landscape, "there are areas identified within the bay that

are important, including the headland on Lot 3 which I consider to be outstanding, and vulnerable to change." For the reasons that he gives, we agree.

[80] Mr Langbridge very fairly says in respect of landscape that "the bay forms a part of an attractive and typical Sounds experience, the aesthetic value of which is ... enjoyed all year round" (para 3.13). And at para 5.12 he accepts that the "natural character values" of the bay are "high". We agree with this view, based on our assessment of Ocean Bay's many components – the sheltered water, the forested hills behind the bay, the horse-shoe shape of the bay, the prominence of the two headlands in contrast with the flatter area at the head of the bay, the high quality of the indigenous bush on Lot 3, the beach fringing the head of the bay, the outlook from within the bay across the waters of Port Underwood, and the rural atmosphere that dominates the settled part of the bay.

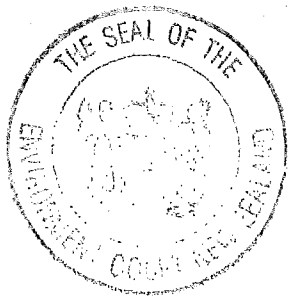
[81] Finally, we accept Mr Head's opinion expressed at para 65:

> *From my knowledge and work throughout the Marlborough Sounds, I consider that Ocean Bay is currently a good example of a visually cohesive Sounds' landscape with its combination of working farm and compact settled pattern set within a "clearing". It is an easily recognisable and distinctive Sounds' landscape.*

**General conclusions as to landscape matters**

[82] Bringing these different threads together our conclusion is three-fold:

- Ocean Bay is an easily recognisable and distinctive Sounds' landscape.
- As a whole Ocean Bay has high natural character values and outstanding visual values that contribute to the outstanding character of the Sounds, but it does not itself comprise an Outstanding Natural Landscape, as referred to in s 6 of the Act.
- Lot 3 does not meet the Plan's criteria as an outstanding landscape because it is not large enough to be itself a landscape – rather it is one very important element in a high-quality visual landscape with many strong natural characteristics.



**Effect of proposed Lot 3 Residential Development on the Landscape**

[83] While, as Mr Langbridge states (para 19, Rebuttal evidence), the scale of a structure on Lot 3 will be small in the context of the wider landscape, the change which that structure will make to the landscape is in our view significant. As Mr Head's attachment 10 illustrates, the revised application would allow a dwelling on the ridge line and skyline.

[84] This result appears to be contrary to the Council's assumptions at the time of granting consent to the subdivision,[41] and to Ms Beals' understanding.[42] In this location a dwelling is likely to be visible from Ocean Bay. Even Ms Beals evidence (para 5.29) assumes that the location of a BLA should be "below the ridgeline to avoid visual intrusion of the dwelling". This is not achieved by this BLA, as Mr Head has demonstrated.

[85] We do not agree with Mr Langbridge's reliance on existing wilding pines as preventing views of the dwelling from the bay and providing a visual "backdrop" and wind buffer for the dwelling area.[43] First, wilding pines are commonly sought to be removed, not retained, in areas of native vegetation; at the very least they are not protected. Secondly, subsequent owners of a dwelling near the ridgeline of Lot 3 may well sacrifice shelter from the wind for views to the north and east, in Port Underwood, and better views of Ocean Bay itself. Lastly on this point, at least some of the trees relied on as "backdrop" are on a neighbour's land and their future cannot be relied on.

[86] Nor do we accept the argument that the proposed development on Lot 3 will be occurring "within an area that has already been disturbed by activities independent of this application" (para 19, Mr Langbridge Rebuttal). This refers to the clearance of some of the upper part of Lot 3, purportedly in order to remove some wilding pines – which as Mr Head notes, could well have been removed with less damage to indigenous vegetation

[41] See Decision of 22 May 2007, Reasons for Decision para 4: " ... and provided any building was sited below the ridgeline, then the effect on the environment would be no more than minor."
[42] Ms Beals refers to BLA "below the ridgeline so as to mitigate any effect [of] future development": see para 6.2 evidence-in-chief. Clearly, that is not achieved in this location.
[43] See paras 8.7 and 8.9 of his evidence-in-chief and his photograph 16 with typed comment.

if the pines had simply been poisoned and left to die. Be that as it may, natural regeneration of the cleared area will already be occurring and in the medium term must be capable of remedying that damage.

[87] By contrast the construction of a dwelling house will affect the landscape values in the short, medium and long term. This is because the dwelling will be visible from at least some parts of the Bay, if it is to have a viewshaft down into the Bay, and will have prominence by being at or near the top of the spur running down the headland and thus on the skyline as seen from different parts of the Bay.

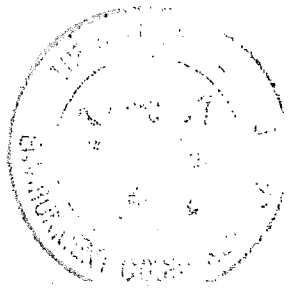
[88] We agree with Mr Head (para 125) that the recent house on the southern headland of Ocean Bay is inconsistent with the traditional cultural character of the bay and should not be used as a precedent for further development well outside of the built enclave. (We add also that the southern headland has less landscape value in view of the removal of established vegetation and the large amount of gorse or broom that has grown up.)

[89] We are not suggesting that the visibility of a house within a landscape setting is "in and of itself an adverse impact", as Mr Langbridge puts it. Instead we recognise that within the overall landscape of Ocean Bay, Lot 3 has a highly prominent and distinctive role as the one remaining area of virtually undisturbed vegetation, bounded by the sea below and the sky above and uncluttered by any structures whatsoever. Given the importance of Lot 3 to the wider landscape, these values deserve to be protected by attention to the law's requirements for proposed, non-complying activities.

**Possibility of another site on Lot 3**

[90] In cross-examination of Mr Head (transcript p369), Ms Chisnall obtained what initially appeared to be an important concession from him, namely that his concerns under s 6(c) RMA,[44] referring to the protection of areas of significant indigenous vegetation, would be satisfied by a BLA location on Lot 3 off the ridgeline, a limitation of 200m$^2$ for a dwelling footprint and another 100m$^2$ for vegetation clearance, an access

[44] The transcript at page 369, line 39 actually refers to "section 6(a)" but that appears to be an incorrect reference. At page 368, line 39 the transcript records the question "does that change your view in terms of its being contrary to section 6(c)?" Even so, both paragraph (a) – dealing with the natural character of the coastal environment – and paragraph (c) – areas of significant indigenous vegetation - may be relevant.



road of limited width, and the eradication of wilding pines without further damage to indigenous vegetation (eg by poisoning). Mr Head accepted in addition that such conditions would provide better protection than does the District Plan at present.

[91] However Mr Head's cross-examination must be read as a whole and it is significant that he never actually accepted that there was an alternative site away from the ridgeline. The following excerpts from the transcript are relevant:

> *Ms Chisnall: So in this context, with Lot 3, if we put in a condition that the building site was dropped down below the ridgeline so that no part of the dwelling or the roof broke the ridgeline, would that go some way to alleviating your concerns?*
>
> *Mr Head: From whereabouts? It is dependent on where the viewpoint is whether it breaks the ridgeline or not.* [transcript p363, lines 18-24]
>
> *Ms Chisnall: So there are sites on Lot 3, I think you have said that you could limit exposure or visibility by dropping it off ridgelines?*
>
> *Mr Head: Yes, possibly. Although, like I said, I have not tested anything myself...I am not sure whether that means that there is not another opportunity, whether this may be the only place for it.* [transcript p364, lines 16-24]

[92] Ms Chisnall (page 363, 364) clarified that the viewpoints she was asking about were "the waters of the bay, coming into the bay itself", and standing in the bay itself on the land. While Mr Head seemed to consider that views from the sea were more important, he was contrasting this with "existing private residences' outlook" (p364, line 12) whereas we would have thought that the more important landward viewpoint was the public road and beach area at the head of the bay.

[93] Consequently Mr Head nowhere accepted that there was an alternative building site on Lot 3 that would satisfy his concerns.

[94] In his closing submissions Mr Fowler argued that any conditions about an alternative site were not before the Court or Mr Head for proper consideration. We agree with that, particularly as Mr Head was one of the last witnesses to be called, so that neither Mr Jorgensen nor any of the planning witnesses had a chance to comment on this proposal. As a result the Court in this decision cannot make any determination about another possible site on Lot 3.

[95] Mr Fowler also pointed out that only the BLA before the Court had been the subject of the geo-technical report prepared by Abacus Design dated May 2006 (refer Annexure 2 Mr Boyes' evidence), and further that relocating BLA on Lot 3 might also mean relocating the effluent disposal area shown on the Abacus Design Report.

[96] Finally Mr Fowler questioned whether the dwelling could in fact be moved off the ridgeline, based on the evidence before the Court. This may be so, but judging from Mr Langbridge's photographs (although without the benefit of a contour map) there may be an alternative site beyond the brow of the cleared area as seen in his photo 15 - possibly behind the slope to the right of the proposed BLA in the enlarged portion of photograph 16. Such a site further out on the headland and on the applicants' northern boundary of Lot 3 may not be visible from the southern end of the beach near the Platt house – the point from which photo 16 was taken – and its "viewshaft" would presumably be across the waters to the eastern side of Port Underwood rather than down into Ocean Bay itself. However this is only speculation based on the photographs, and not on any evidence or observations made during our site visit.

[97] We accept that even at such a location the headland would deserve the protection of the type of conditions discussed in cross-examination of Mr Head by Ms Chisnall – so that any dwelling was limited in size and height, used recessive colours and had limited reflectivity, was partly hidden by vegetation even within its own viewshaft and had an access way of limited width and visibility.

[98] Should such a site exist then in our view the positive effects from prohibiting any built development on Lot 4 and protecting vegetation on Lot 3 could outweigh the adverse effects of a dwelling in this location. For this reason we will give the parties the opportunity to consider this issue before issuing a final decision.

**Effect of Lot 4 Residential Development on the Landscape**

[99] Lot 4 is also very important in the wider Ocean Bay landscape. It sits in a fairly central position beside the road and at present contributes strongly to the rural character of the bay, given its present use for grazing animals. The proposed location for a dwelling, just south of the small spur, is almost exactly in the middle of the bay as seen

from two aerial photographs.[45] It is close by the wool shed and sheep/cattle yards that flag this as "farmland": see viewpoint 2 in Mr Head's attachment 8. The spur in the northern portion of Lot 4 provides a link between the flatter grazing area and the hills behind: see viewpoints 3 and 4 in Mr Head's attachment 8.

[100] Mr Langbridge acknowledges that the development of Lot 4 as now proposed would see a "low profile house being erected low within this landscape and visible from the Port Underwood Road" (para 8.11). He expresses the view (para 8.15) that "overt residential development is clearly visible within the landscape on adjacent sites nearby", leading to the conclusion that the overall impact on the rural and coastal character of Ocean Bay will be "less than minor".

[101] We do not agree with his assessment that "residential development is clearly visible within the landscape on adjacent sites nearby". Mr Langbridge's own photographs 8 and 9 paint a different picture.[46] We agree with Mr Head's assessment that the farm homestead "has kept tradition and for practical reasons is sited well inland" (para 115), and that the "two small cottages" nearby appear to be, but are not, part of the Jorgensen farm.

[102] To the north of the central spur is an enclave of small holiday homes set amongst exotic and coastal native vegetation. Both the photographs and our site inspection showed that these holiday homes are in a distinct corner of Ocean Bay, partly "tucked in" under the hills behind and physically separated from the rural area by the central dividing spur on Lot 4. What is now proposed would mean a dwelling in a very prominent, central position, on the opposite side of the dividing spur, indeed, right in the middle of the bay. It would be seen as a residential rather than a rural addition to the landscape. It would not be possible to pick a more prominent location for a dwelling, very evident both to residents and to all visitors to the bay whether coming by road or by water.

[103] Ms Beals argues from "the existing mixed use character of the bay" to say that this is not changed by adding more residences. (Elsewhere she states that the existing

[45] Mr Head's Attachment 3 and Mr Langbridge's Appendix A
[46] Incidentally, at the hearing Mr Langbridge acknowledged that his written comment on Photo 8 concerning a cottage "built within the last five years" is in error.

character and amenity of Ocean Bay is not "inherently rural".)[47] We regard this as simplistic in that it overlooks the predominantly rural and natural character of Ocean Bay including Lot 4.

[104] For these reasons we can agree with Mr Jorgensen's view (para 61) that a residential development of Lot 4 will create a dominance of residential activity over a rural outlook, which in our view is a substantial adverse effect.

**Effect of Lot 1 Residential Development on the Landscape**

[105] By contrast to both Lots 3 and 4, Lot 1 can (with suitable conditions) accommodate a residential development as proposed. Mr Head acknowledges (para 69):

> *... another dwelling here, would appear as a logical extension of the present built enclave. With appropriate height controls, reflectivity guidelines, and planting to integrate with the existing vegetation pattern, a dwelling here would be acceptable in terms of landscape and visual effects, causing no more than minor effects.*

**Overall conclusion as to landscape matters**

[106] We consider that the effects of the proposed subdivision in landscape terms will be significant, and certainly more than minor, in respect of Lot 4, and (with the present BLA) Lot 3, but not Lot 1. We say this having considered the various landscape effects as mitigated by the proposed conditions of consent – eg the offer to move the BLA on Lot 4 away from the central spur, and to protect the remaining native bush on Lot 3. Even so, the net effect in landscape terms is significantly negative.

HERITAGE AND CULTURAL MATTERS

**Ocean Bay as a heritage site**

[107] The debate under this heading focuses primarily on Lot 4 because of its central position in the bay and its proximity to archaeological and cultural features. For the

[47] Paras 4.7 and 6.32 respectively of her evidence-in-chief.

record, we consider that heritage issues are not relevant to Lot 3, and are relevant to Lot 1 only in terms of the exact siting of any development.

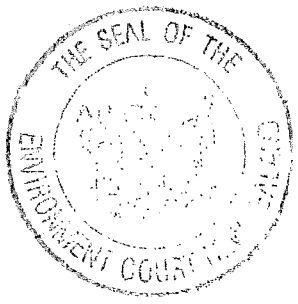
[108] It is helpful to start by stating some matters of evidence that are not in serious dispute. These can be summarised as follows, and the evidence for such propositions can be found in Appendix A to this decision.

- There was pre-European Maori occupation of Ocean Bay.
- There was early European whaling activity in Ocean Bay.
- Ocean Bay has close association with events that preceded the Wairau affair of 1843.
- There were early landings of cattle and sheep at Ocean Bay.
- After whaling operations ceased the Bay was used for farming through into the 1980s. There was however an early schoolhouse there.

[109] The applicants and their witnesses acknowledged that Lot 4 is "an allotment which has on it Maori and archaeological items and therefore values and as a result requires careful consideration". (Mr McFadden, opening submissions para 6.4.1)

[110] Uncontested evidence was provided that:

- *... three pits have been located and recorded (Trotter and Mathews 1975, Trotter 2006 and 2008) within the proposed Lot 4 on the spur that separates the bay in two..... A midden has also been located (Trotter 2006).* (Mr Head para 42)
- *I also located a previously unknown archaeological site* [a midden] *at the base of a low roadside bank which I recorded and filed as P27/319.* (Mr Trotter para 3.9) This midden is adjacent to the sea end of the 'wall'.
- *There is a possibility that the northern extension of site P27/143 (European occupation)* [whaling station] *and the newly discovered P27/319 (midden) could extend through the roadside fenceline into Lot 4.* (Mr Trotter para 4.4)



- *Protection for the pits on the ridge of Lot 4 has been covered by both the New Zealand Historic Places Trust [NZHPT] and Marlborough District Council [MDC]* (Mr Trotter rebuttal para 2.18)

[111] A number of other features and attributes of Lot 4 were ascribed with different interpretations by expert witnesses. The evidence concerning these differences is attached as Appendix B, but the issues may be summarised as:

- Whether Lot 4 has been the site of a Maori pa
- Whether identifiable depressions on the site were indications of either Maori or Pakeha inhabitation or both
- Whether the identified 'wall' was part of an historic Maori garden.
- The nature of depressions on Lot 1.

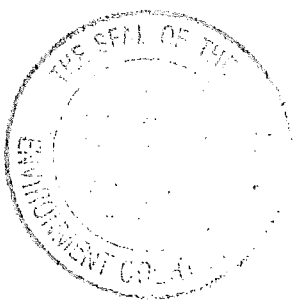
**Whether Lot 4 has been the site of a Maori Pa**

[112] On the first topic, the quotations in Appendix B give the flavour of the debate. In the end the answer may be one of terminology. What is a pa? As Dr Nichol said in cross-examination (p 279, transcript):

> *... there is a great deal of imprecision in the use of some of these terms. An archaeologist regards a pa as being a site with artificial defences. ... It is a fortification. But its common use, for pa, means a Maori settlement. ...I do not believe this is a fortified site, and therefore, on the strict definition of a pa, this is not a pa.*

[113] It became clear that Maori did not necessarily use the word "pa" in the strict sense referred to by Dr Nichol. In answer to a question from the Bench, Ms Williams, giving evidence for Ngati Toarangitira, said (p 401 of transcript):

> *I believe that a pa does not necessarily need to be fortified. There are other evidence of pa within the top of the South, if I can draw your attention to a pa down on the Clarence Peninsula called Pekete* [sp?] *Pa, and that is a huge pa, and that was also unfortified, but it is still a pa. We refer to that as a pa, by Ngai Tahu.*



Thus Ms Williams may not have been referring to a fortified site when she said (para 45) that Lot 4 "is a pre 1900 Pa site". We take her to mean a site of permanent, as distinct from seasonal, occupation.[48]

[114] We are happy to accept the opinion of both archaeologists that there is no evidence of a pa, in the strict archaeology sense, having been on Lot 4. However this does not mean that there was not substantial Maori occupation of Ocean Bay. Ms Williams says of the Maori history (paras 11-14):

> *... our kainga (villages) were located throughout the eastern and western areas of Whanganui [Port Underwood] ... Ohienga or Ocean Bay as it is known today was another densely populated area by both cultures. ... There is evidence to show that Ohienga was a base for the Ngati Toa Rangatira paramount Chief Te Rauparaha ...*

[115] Further, there is no reason to think that Maori occupation, whether by way of kainga or of "semi-permanent camps",[49] would have *avoided* the area that is now Lot 4 in the middle of the bay. There would be, as Ms Williams confirmed (transcript p 401), some form of housing and of cultivation of crops, and the pits on the spur on Lot 4 attest to Maori occupation of the area. Indeed, Mr Trotter did not know of any reason for Maori occupation of Ocean Bay to avoid the area referred to as Lot 4. (Transcript p 136)

[116] Our conclusion is that land behind the beach, including Lot 4, will have been occupied by Maori as a permanent settlement both in pre-European times and during the whaling days, and was thus a "pa" in the common use of that word identified by Dr Nichol - but not a fortified pa.

**Whether identifiable depressions on the site were indications of either Maori or Pakeha inhabitation or both**

[117] The arguments between the experts are traversed in Appendix B. In our view Mr Trotter misunderstands Dr Nichol's statement (para 35) that he "did not notice [these depressions] on the ground", as meaning that they were not able to be seen. We take his

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[48] At para 22 of her evidence-in-chief Ms Williams contrasts the seasonal sites of occupation on the eastern side of Port Underwood with "the site in Ocean Bay which would have been habitable all year round due to the warming morning sunshine hours, especially over the summer months for kumara cultivation/storage."

[49] This is Mr Trotter's term, from p 135 of the transcript

evidence to mean that he had not noticed them when he visited the site but picked them up clearly in the Brayshaw photograph of 1964. Our site inspection revealed depressions approximately in the locations shown as features 10 and 11 on Dr Nichol's figure 31, and as seen in the old photograph, and we accept his opinion that they are likely to be sites of previous houses of some sort.

**Whether the identified 'wall' was part of an historic Maori garden**

[118] The evidence on this issue is far from clear, except that no witness claimed the wall had been part of the fortifications of a pa. Dr Nichol did not dispute Mr Trotter's comments in his Site Record Form (P27/76) – applicants' exhibit 4 – that "this artificial structure appears to have been constructed to lessen the slope of the ground to the north of it". However while Mr Trotter considered the structure "firmly dated to the twentieth century", Dr Nichol remained of the view that it could have been a Maori "garden line" similar to what has been observed at nearby Robin Hood Bay.

[119] Mr Trotter's view has the benefit of being supported by his digging in the area of the wall at test hole 13 and finding relatively un-compacted soil, consistent with more recent work, and a piece of glass which he considered to be of a "modern type".[50]

[120] On the evidence available to us the issue is, as Dr Nichol accepts, "problematic". While we think the wall is likely to be a post-European construction, but we do not rule out the possibility of it having been part of a Maori garden. Even if it is of Pakeha construction there is likely to have been cultivation of kumara on this flat area of Lot 4, associated with the pits on the spur.

**Depressions on the slopes of Lot 1**

[121] Dr Nichol also gave evidence of four small depressions or terraces on the higher part of Lot 1 which he considered to be caused by earlier human occupation.[51] The terrace which is furthest inland overlaps with the proposed dwelling site on Lot 1. The other three are on the paper road and the existing Lot 2.[52]

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[50] See para 5.1 of Mr Trotter's 2008 archaeological assessment (attachment 2 to his rebuttal evidence).
[51] These are the subject of his Site Record Form P27/378 in the Appendix to his evidence-in-chief.
[52] For exact locations see Dr Nichol's Figure 30.

[122] Mr Trotter suggested the terraces were possibly signs of "the well-known natural process of backward-rotating slumping", rather than being former house sites. He disputed Dr Nichol's reasoning based on a Mein-Smith map and questioned why "anyone, Maori or European, would go to the trouble of cutting terraces into the hillside to make house sites when there was ample flat land available in the Bay." (See Trotter Rebuttal paras 2.19 - 2.25.)

[123] We consider that the old sketches and maps are inconclusive as historical evidence but since Mr Trotter did not visit Lot 1 to inspect these terraces before writing his rebuttal evidence we prefer Dr Nichol's evidence on these features. At least as a matter of precaution, any building or excavation on Lot 1 should avoid these terraces unless the New Zealand Historic Places Trust first confirms that they are not of historical significance.

**Assessment of heritage effects – Lot 4**

[124] In our view the adverse effects of a residential development on Lot 4 on the heritage attributes of the Ocean Bay would be very considerable.

[125] First, there is the additional information provided by Mr Trotter in 2006 in respect of site No. P27/143. His site record form refers to an area of "heat-fractured beach stones, fragments of blue-patterned white crockery, thick patinated bottle-glass, charcoal, hoop iron, and a piece of a small brick" – located "in a roadside ditch" the position of which, according to the attached sketch plan, would place it just outside legal boundary of Lot 4 near the proposed entrance way. We note that the attrition saw (a flake of abrasive stone) was found in Mr Trotter's test hole 25 about 10m inland from this site, within Lot 4.[53]

[126] Next, Mr Trotter's site record form also refers to a midden at the roadside end of the "disputed" wall (P27/319). This is also shown just outside the legal boundary of Lot

[53] See paras 4.1, 4.2 of Attachment 2 to Mr Trotter's rebuttal evidence. We have used the scale in figure 5 to estimate this distance.

4, but it full extent is not known.[54] Mr Trotter stated (para 4.4) that both this feature and the previous one might extend into Lot 4.

[127] Then there are the three pits on the central spur already mentioned. In cross-examination (transcript p 91) Mr Trotter said these were "quite likely" to have been associated with Maori occupation between 1600 and 1800, but he could not be firm about the time period.[55]

[128] Also on Lot 4 are the depressions already described which are features 10 and 11 on Dr Nichol's Figure 31 – each referred to as "probable house site" in Dr Nichol's site record form P27/379. Mr Trotter had not returned to inspect these after reading Dr Nichol's evidence so could neither confirm nor deny their existence.

[129] In addition to this information it must be remembered that Lot 4 itself is in the centre of a bay which was the scene of early Maori and European occupation. Mr Trotter's 2006 site record form P27/143 refers to various items found under the Macrocarpa trees south of the wool shed, including an argillite drill-point "of a type usually seen on sites dating back several centuries".[56] In terms of Pakeha involvement, it is not disputed that there was at least one whaling station at Ocean Bay, when a considerable number of Maori as well as some Pakeha lived there, with farming of the land subsequently being a prominent feature.

[130] The early landing of cattle and sheep is also significant, although this may be connected more with the use of Ocean Bay as a "port" than for its own farming purposes.

[131] The applicants relied on the fact that New Zealand Historic Places Trust ("NZHPT") does not oppose the proposed subdivision. However Dr Nichol's evidence is

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[54] Mr Trotter explained to the Court that it was "just a little midden in the road banks. I do not know how big it is, I know how long it is. But whether that really indicates people living there or whether it was just a little picnic type camp or what it was, I do not know."

[55] Two other pits shown on Dr Nichol's Figure 31 on or near the spur – pits 1 and 5 on Figure 31 – are claimed by Mr Trotter to be of recent origin, although one of them had previously been reported in 1976 by B J Brailsford: see site record form S22/15.

[56] We accept however that the drill point may have been made and used elsewhere and later brought to Ocean Bay, so that its presence here does not prove Maori occupation of the bay for several centuries.

that this decision was on the basis of "the previous level of knowledge of the sites". He summarises the changed position as follows:

> *When this project began there were three sites: the pits and terraces P27/76; the whaling station P27/143, and the little midden P27/319. There are now, in addition the early garden line* [the disputed wall] *P27/273, the early find spot P27/382, a second whaling station P27/381, two pre-1850 occupation sites P27/378 and P27/379, and the "pioneer track" to Kakapo Bay P27/377. Of less relevance to the subdivision but adding to knowledge all the same, there are now also the Aldridge Cemetery P27/380, the Aldridge Homestead P27/376, and the School P27/375.*

[132] Dr Nichol's view, which we have no reason to disregard, is that if the NZHPT had the chance to reconsider its position on the basis of the fuller record now available, it might come to a different conclusion. We therefore place no particular weight on the absence of opposition from NZHPT, and remain of the view that the adverse effects of the subdivision on the environment are, in respect of heritage matters, more than minor.[57]

**Significance of Ocean Bay to Maori**

[133] Ms Tracey Williams on behalf of Ngati Toa Rangatira strongly recommended that Lot 4 not be developed in any form. She advised:

> *Ngati Toarangatira Manawhenua ki Te Tau Ihu Trust supported the opposition of the original application (UO61623) on the grounds that Lot 4 is a waahi tapu site to our iwi and concurred with Mr Keith Heather (Resource Officer, Marlborough District Council) that Lot 4 should not be developed.*

[134] There are three Manawhenua iwi in Port Underwood – Ngati Toa Rangatira, Ngati Rarua and Rangitane. Representatives of the first two gave evidence in this case.

[135] Ms Williams had prepared evidence on behalf of Ngati Rarua Iwi Trust opposing the subdivision and supporting the position of the Society. At the time of filing that evidence she was employed by that Trust and we find that she was authorised to give that evidence.[58]

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[57] We treat heritage as part of a people's social and cultural conditions, and so part of the environment as defined in s 3.

[58] While Mr Stafford questioned whether Ms Williams had submitted her evidence for Ngati Rarua to the appropriate people, this is inconsistent with Ms Williams' detailed evidence at pages 321 and 322 of the

[136] Ms Williams is descended from all three iwi just named, as well as from Ngai Tahu and Te Atiawa. Shortly before the hearing of this appeal she changed her employment and became the Iwi Development Officer for Ngati Toarangatira ke Te Tau Ihu Trust Board. At that stage she believed she still had approval to give the evidence she had prepared on behalf of Ngati Rarua, but after the hearing commenced her authority to give that evidence was withdrawn by Mr Stafford of Ngati Rarua.[59]

[137] Ms Williams was then authorised by her new employer to give similar evidence on behalf of Ngati Toa Rangatira. This must have been prepared over the weekend which fell in the middle of our hearing. Her revised evidence, given by leave of the Court over the opposition of the applicants, was presented in the presence of Mr Rangi Joseph, Chairperson of her Trust Board.

**Mr Stafford's evidence**

[138] There is no dispute that Ngati Toa Rangatira's support for the Society's appeal was genuine and in fact predated Ngati Rarua's last minute change of stance: see Society exhibit 5, a letter of Mr Joseph dated 28 November 2008 confirming that:

> *Ngati Toa supports Ms Williams' evidence and can advise, that Ngati Toa Rangatira kë Te Tau Ihu Trust, like Ngati Rarua Iwi Trust, is opposed to the proposed subdivision and any subsequent residential development on Lot 4.*

[139] Mr McFadden was given leave to call belated evidence from Mr Stafford. He stated that, in view of an offer of the applicants (made during the hearing) to vest in the Council the part of Lot 4 containing the terrace pits on the spur, his Trust Board no longer opposed the subdivision.[60] He denied that the Ngati Rarua change in stance was the result of threats about costs made on behalf of the applicants. While we accept that no threat of costs had been made by Mr McFadden against Ngati Rarua, costs may well have been mentioned, and the fact remains that a concern about a possible liability for costs

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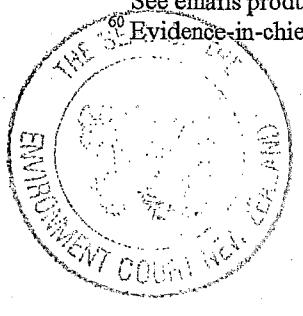
transcript as to how her evidence was prepared by her and authorised by Ngati Rarua. We accept her word completely in this regard.

[59] See emails produced as Society exhibit 6.

[60] Evidence-in-chief para 6



(even though the Iwi was not a party to the appeal) was clearly stated in Mr Stafford's correspondence to Ms Williams.[61]

[140] Additionally, there was a strong strand in Mr Stafford's evidence of concern with the mana of Ngati Rarua - he explained that it was "not the style nor practice of Ngati Rarua to support or validate appeals by others". This was because "we would always be the driver of any appeal if that issue warranted the Court to bear witness to our mana".[62] Overall, we found Mr Stafford's various explanations for Ngati Rarua's change of stance confusing and unconvincing.

[141] We note also that Mr Stafford's emails at the time did not suggest any lack of approval from Ngati Rarua, and made no complaint about the content of Ms Williams' brief of evidence. More importantly, in answer to questions from the Bench (transcript p 429), Mr Stafford confirmed that the matters Ms Williams had said were of concern to Ngati Toa Rangatira were also of concern to other iwi, and that these should be considered carefully. We proceed on that basis.

**Ms Williams' evidence**

[142] Ms Williams explained (para 16) that prior to European settlement, Ngati Toa Rangatira were the predominant iwi of this rohe (area). Further:

> *The Whanganui region [Port Underwood] has always been utilised by the iwi of Ngati Toa Rangatira and still is to this day, specifically for the abundance of fish, shellfish, rongoa (Mäori medicine), birding and as a hunting ground to sustain our marae and our people.* (para 15)

[143] At para 11 of her evidence Ms Williams described the Ngati Toa Rangatira involvement in terms of settlement and the "abundant commercial opportunities" that arose during the 1830s when whaling stations were located throughout Whanganui:

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[61] In his email of 29 April 2009 Mr Stafford apologised for "bombing you... with this new position from us but we always had to mitigate our risk in this matter..." – a risk which in cross-examination he agreed meant a risk of costs to the applicant. (See transcript p 425.)

[62] See page 427 of transcript

> *Ngati Toa Rangatira traded shellfish, fish, vegetables and other resources accordingly. Our kainga (villages) were located throughout the eastern and western shores of Whanganui with the largest village located at Waikutakuta also known as Robin Hood Bay".*

[144] Ocean Bay was another "densely populated area" and she referred to evidence that Ocean Bay was a base for Ngati Toa Rangatira Paramount Chief, Te Rauparaha.

[145] As well as stating her belief on behalf of Ngati Toa Rangatira that "this is a pre-1900 Pa site and as such, we believe there will be an Urupa (burial ground) located on or around Lot 4" (evidence-in-chief para 45), Ms Williams advised the Court (para 7):

> *We cannot over emphasise the cultural and spiritual significance of this waahi tapu site in terms of our Iwi. Presentations to the Waitangi Tribunal as well as the Marlborough District Council, clearly identify and articulate our concerns.*

[146] While further protection was said to be provided by an archaeological assessment prior to any development taking place on Lot 4, which we understand Mr Trotter has done as part of his rebuttal evidence, and the ability to apply NZHPT's Accidental Discovery Protocol,[63] Ms Williams did not accept that such conditions would satisfy their concerns as "it is still quite clearly the visible sites that everyone is concentrating on" (transcript p 393). We think it very likely that not all archaeological or heritage features of the bay (including Lot 4) have yet been identified.

[147] Although Ms Williams was not able to give any recent instance of Ngati Toa Rangatira exercising their kaitiakitanga on this site[64] we accept nevertheless that the site is one of "huge...significance to Ngati Toa" (transcript p 394) dating back to "the 1830s to 1840 history, when Ngati Toa were residing here on this pa site" (transcript p 397).

[148] In her summary (para 17) Ms Williams' evidence was that Ohienga (Ocean Bay) was viewed by her iwi as a site of significance due to settlement and occupation, being a traditional Mahinga kai area, with cultural and spiritual connection and with historical and contemporary uses.

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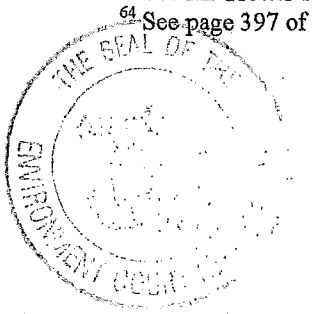
[63] See Mr Trotter's rebuttal evidence, para 2.3 and attachment 2 para 7.2.
[64] See page 397 of transcript.



[149] Except for the question of a urupa on or around Lot 4, Ms Williams' evidence set out here was unchallenged.

**Conclusions as to Maori cultural values**

[150] Ms Beals (Rebuttal para 2.3) notes that the evidence before the Court concerning cultural significance is significantly greater than was before the Council, and accepts that the Court may come to a different conclusion on such matters than did the Council. Our conclusions at this point are:

(1) The lack of opposition to the subdivision from NZHPT should be regarded with caution for the reasons given by Dr Nichol concerning more recent discoveries.

(2) We accept Ms Williams' evidence that Ocean Bay and in particular Lot 4 has considerable significance to Ngati Toa Rangatira as a waahi tapu site, being the site of an earlier (unfortified) pa and used over a considerable period, habitable all year round and able to support kumara cultivation/storage. Those concerns are likely to be shared by other iwi.

(3) Ocean Bay also has considerable cultural significance to Mäori in terms of its connection with the settlement of the Wairoa Plains and the "Wairoa incident" of 1843, which led to the dispersal of the Ngati Toa Rangatira community when it broke up and fled to the North Island.

(4) For the reasons previously canvassed, residential development on Lot 4 would have significant adverse effects on Maori cultural values and thus on the environment.

TRAFFIC MATTERS

[151] Two experts presented traffic evidence: Mr Donald Petrie, a Senior Associate with the Traffic Design Group, for the applicants, and Mr John Porter, the Manager of Marlborough Roads, for the Council. The Society produced no traffic evidence. Mr Fowler in his closing submission explained (para 2) that the reason for this was that Mr Petrie's evidence confirmed the Society's view that "sight distances in respect of the

access to Lot 3 did not comply with relevant provisions of the District Plan." We infer that the Society has no other concerns about traffic issues.

[152] Five issues were raised by the experts, namely, the existing traffic volumes, traffic generation associated with the proposal, the physical state of the Port Underwood Road, access to each of the three proposed lots, and the possibility of a roading contribution by the applicants to the Council.

**Traffic Volumes**

[153] Traffic Design Group undertook week long traffic surveys at eleven points along Port Underwood Road between July 2005 and December 2007. Results from six of these surveys presented by Mr Petrie showed average daily traffic volumes in the vicinity of Ocean Bay ranged from 13 to 39 vehicle movements per day (vm/d) while at Robin Hood Bay the range was 23 to 56 vm/d. Mr Porter gave his assessment of annual average daily traffic between Robin Hood Bay and Ocean Bay of 25 vm/d with a range of 20 to 50 vm/d. No basis for this assessment was given.

[154] We accept that traffic volumes between Robin Hood Bay and Ocean Bay presently range from 13 to 56 vm/d, reflecting the significant difference between summer and winter volumes.

**Traffic Generation**

[155] The experts agreed the traffic that would be generated by the proposal would be 2 vm/d for each lot making a total of 6 vm/d. The majority would be to and from the south with perhaps 2 vm/d being to and from the north.

**Port Underwood Road**

[156] The Port Underwood Road is winding and unsealed for most of its length except where it passes through small settled bays where it is sealed. It is designated as a local road and from Ocean Bay to Rarangi there is a posted speed limit of 50 kph. Mr Porter presented data showing road widths decreased from just over 6m at Rarangi to 4.5m at Ocean Bay. Table 28.1 of the Plan recommends a carriageway width of 3.5m for rural roads with fewer than 200 vm/d. The experts agree that traffic volumes on Port

Underwood Road will remain well below this figure in the event of the proposed subdivision.

[157] Mr Porter suggested that the Plan provisions with respect to road widths are not adequate considering NZ Standard 4404:2004 which recommends a carriageway width of 6m as best practice. Mr Petrie considered that this standard was not developed to apply to existing unsealed roads through remote areas, and that the applicants are entitled to rely on the Plan provisions. We agree and thus see no need for any road widening should the subdivision proceed.

**Access to Lots**

[158] Access ways would need to be constructed for each of the three lots proposed. They would need to conform to the standards set out in the Plan with respect to geometry and sealing requirements. Sight distances and location will also be important. Mr Petrie and Mr Porter agree that there are no issues with access to Lots 1 and 4.

[159] For Lot 3 there is a problem we have already raised at para 38 above, in that the minimum sight distance in Table 26.3 of the Plan is 45m for a private access, whereas the available sight distance for uphill traffic is only 33m.

[160] While we have agreed with the view of Mr Boyes and said that a dwelling on Lot 3 would not be a permitted activity for this reason, we accept the view of both traffic witnesses that the access may nevertheless be safe. This is because the anticipated speed of vehicles approaching Lot 3 from the south will be below the lowest speed level dealt with in Table 26.3 (50 kph) – indeed on Mr Petrie's evidence traffic which will have come uphill at 36 – 45 kph will have slowed to 20 – 25 kph to negotiate the bend.[65] Mr Petrie concluded that *"....safe and practicable access to Lot 3 is able to be achieved in accordance with recognised good practice (ie Austroads)."* Mr Porter's conclusion was that *"...the proposed access to lot 3 will provide a safe situation."*

[65] The Austroads standard, which does cover speeds below 50 kph, requires a minimum sight distance of 25m – 32m for an 85th percentile uphill speed of 35 – 40 kph.

[161] The experts' conclusions are thus that all lots can have safe access. We however have one concern about Lot 3. This arises from the location of the proposed access on a sharp bend and relates to traffic from the south that needs to turn right to enter Lot 3. This turn has to be made across any oncoming traffic from the north. Traffic in each direction will necessarily be moving slowly and those turning into Lot three from the south would be well advised to slow right up or even stop.

[162] Such situations are normally resolved by the erection and maintenance of a convex mirror mounted so as to provide adequate visibility for all traffic. Any consent granted for Lot 3 would have to be subject to a condition that such a mirror be erected and maintained at all times by the applicant.

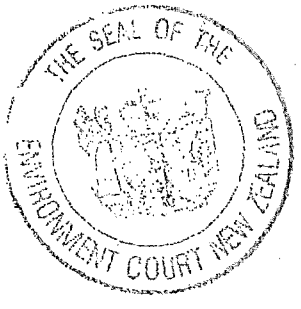
[163] We accept that with the imposition of the condition of consent just mentioned, safe access can be provided for each proposed lot.

**Conclusion as to traffic matters**

[164] There will be no adverse traffic effects on the environment if the right conditions of consent are imposed. The issue of the requested roading contribution is dealt with separately at the end of this decision.

**Conclusion as to first gateway test**

[165] There would significant adverse effects of the subdivision measured in terms of landscape, heritage and Maori cultural values. Subject to the right conditions there would be no adverse traffic effects, and other matters such as erosion or pollution from earthworks can also be dealt with satisfactorily by conditions. Looking at the effects of the proposed activity overall, we are not satisfied they would be only minor, except for Lot 1. The proposal there fails to pass through the first gateway.



RELEVANT OBJECTIVES AND POLICIES OF THE PLAN

[166] The relevant objectives and policies are next considered in the order in which they appear in the Plan. These are fully dealt with by Mr Boyes, but somewhat surprisingly not by Ms Hilson as part of a second gateway test.[66]

**Natural character**

[167] Objective 1 (in fact the only objective relating to natural character) is as follows:

> *The preservation of the natural character of the coastal environment, wetlands, lakes and rivers and their margins and the protection of them from inappropriate subdivision, use and development.*

[168] The proposal represents inappropriate development on Lot 3, contrary to policy 1.1, but involves appropriate development on Lot 1 in accordance with policy 1.2. We say this because we agree with Mr Boyes (para 69) that the proposed development on Lot 3 would result in significant adverse effects on the present natural character of the headland and sea to skyline sequence in this part of Ocean Bay, so that the proposal represents inappropriate development contrary to objective 1. We also agree with him that only Lot 3 is an area of the coastal environment predominantly in its natural state, so that the development of Lots 1 or 4 does not offend policy 1.1 or 1.2.

[169] We accept also Mr Boyes' opinion that the proposal is not in accordance with policy 1.5 which promotes "an integrated approach to preservation of the natural character". By contrast this can be described as "an incremental approach".

[170] On the other hand policy 1.6 works partly for and partly against the applicants. This requires consideration of the "ability to restore or rehabilitate natural character to the area subject to the proposal". A covenant or notice protecting native vegetation on Lot 3 is in accordance with this policy, although the damage to the natural character of the headland caused by the proposed development is contrary to the policy.

[66] See paras 5.8-5.10 of her evidence-in-chief where she relies solely on the first gateway, perhaps aware that the second was fraught with problems.

[171] Other policies under objective 1 are either not applicable or covered elsewhere. Overall we find the proposed subdivision to be contrary to the objective and policies concerning natural character.

**Indigenous vegetation and habitats of indigenous fauna**

[172] Although the native vegetation on Lot 3 is relevant in terms of the protection of amenity values and of the natural environment, as Mr Boyes concedes (para 75) Ocean Bay and the application site are not identified as a site of significant ecological value in the plan so the plan's policy under the above heading is not infringed – it relates only to identified areas of significant ecological value.

**Landscape**

[173] The general provisions of Chapter 5 dealing with landscape have already been set out earlier in this decision and are not now repeated. We have concluded (para 69 above) the guidance given by para 5.2 of the Plan applies not only to areas identified in the planning maps as being of "outstanding landscape value" but also to "any other area valued for landscape or visual reasons", as Ocean Bay is.

[174] As already noted the objective stated in Chapter 5 (landscape) covers *both* "management of the visual quality of the Sounds" *and* "protection of outstanding natural features and landscapes from inappropriate subdivision, use and development." We have already said why the second part of this objective does not apply and confirm that the first part is relevant in this case, and we agree with Mr Boyes' conclusion (para 82) that the proposed subdivision and resulted development of Lot 3 is not consistent with the objectives and policies relating to landscape set out in Chapter 5.[67]

**Tangata whenua and heritage**

[175] Matters significant to this topic have already been addressed in detail. It remains now to note the application of the objective and policies stated in Chapter 6.

[67] Mr Boyes is of course dependant on Mr Head's assessment of landscape matters, and this is acknowledged by him.

[176] The objective set out at 6.1.2 is as follows:

> *Recognition and provision for the relationship of Marlborough's Mäori to their culture and traditions with their ancestral lands, waters, sites, waahi tapu and other taonga.*

On the evidence before us only Lot 4 is affected by this objective.

[177] We consider that the proposed development of Lot 4 offends against policy 1.1 in that it fails to adequately "recognise and protect" a site of significance to tangata whenua, for reasons canvassed by Ms Williams.

[178] Policy 1.2 ("recognise values important to tangata whenua", including mauri, mana, and makaakitanga) may be marginally infringed, but not in a way complained about by Ms Williams so we treat this element as neutral.

[179] Policy 1.3 (recognise the role of tangata whenua as kaitiaki in the coastal marine area) is not engaged by this appeal as the evidence of Ms Williams related to Lot 4, not to the coastal marine area.

[180] Policy 1.4 (recognise and provide for continued tangata whenua access to and use of traditional coastal resources) is not affected by the proposed subdivision, or at least on the evidence that we heard.

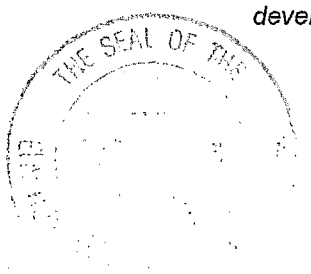
[181] Policy 1.5 (communication with iwi representatives) was a subject of complaint by Ms Williams (alleged lack of consultation) but this is a matter of process rather than the merits of this appeal.

[182] A separate objective relating to heritage matters is found at 6.2.2:

> *The preservation of the Plan area heritage resources including: historic buildings, places and sites, waahi tapu, archaeological sites and areas, and heritage trees.*

The policies under this objective mainly relate to heritage resources identified in the Plan by way of inclusion in Appendix A of the Plan. This contains entries such as "Cob Cottage, Robin Hood Bay", but Ocean Bay does not feature at present. However policy 1.5 is relevant and is not met in this proposed subdivision:

> *Ensure that regard is had for heritage preservation with all subdivision, use and development in the plan area.*



[183] While we do not agree entirely with Mr Boyes' reasoning[68] we nevertheless agree (based on the evidence of Dr Nicholl and Ms Williams) that development of Lot 4 is contrary to the stated objective concerning heritage.

**Rural environment**

[184] Chapter 11 deals with the rural environment, and its introduction makes clear that the sustainable management of rural resources is the overall objective. Those resources are said to result from "the interaction of climate, topography and soil type", and are relevant to primary production, ancillary industrial activities, intensive farming and tourism/ recreational activities. (See para 11.1) "Farming" is a permitted activity in the Rural One zone, and farm land in Ocean Bay is clearly a "rural resource".

[185] The sole objective in this chapter seeks:

> *Sustainable management of rural resources and integrated resource use to protect the character and amenity of rural areas and avoid, remedy or mitigate adverse effects of activities.*

[186] Far from managing rural resources, this subdivision would use farm land for non-farming, residential development. We accept Mr Boyes' opinion (para 103) that development as proposed on Lots 3 and 4 would probably be used for short-term holiday accommodation; certainly, there is no evidence of any farming or other rural need or purpose for the subdivision. We also agree with him that the avoidance of adverse effects as intended by policy 1.2 – "avoiding ... developments on headlands [and] skylines" is infringed at proposed Lot 3, and more generally (para 105) that the natural character and amenity values of Ocean Bay would be adversely affected, contrary to this objective.

[187] Ms Hilson points out (para 4.77) that the rural land in Ocean Bay is fragmented to a certain extent by two pockets of Sounds Residential zoning. The larger pocket comprises three sections and is in the residential corner to the north of Lot 4, but not contiguous with it. The smaller pocket comprises two small sections immediately south of Lot 4, and appears to us to be a classic case of "spot zoning".

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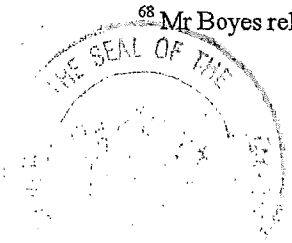
[68] Mr Boyes relies on policy 1.1 which we consider applies only to defined areas.



[188] However, the larger pocket is consistent with the residential nature of that corner of the bay, while the smaller pocket has the two "small-scaled dwellings [that] sit down low in the landscape and have the appearance of "farm-workers" type accommodation, 'reading' as part of the larger Jorgensen Farm", as Mr Head described them.[69] We do not accept that this limited degree of fragmentation is a reason to further break up rural land, or that "lifestyle needs of existing and future generations"[70] should be met in an *ad hoc* way that is inconsistent with the Plan.

**Subdivision and development**

[189] Chapter 23 of the Plan deals with this topic. Its Introduction acknowledges (para 23.1) that subdivision, while not a land use by itself, is a "legal process which produces a land tenure pattern to facilitate the subsequent development of land for various activities".

[190] Objective 1 reads as follows:

> *Provision for the subdivision of land in a manner which recognises and is appropriate to the natural form and environmental characteristics of the plan area.*

Under this objective policy 1.3 is clearly infringed in respect of both Lots 3 and 4. This policy provides for the creation of allotments "which protect the natural environment including bush, riparian lands, wetlands, headlands, heritage features, ridges and hazard areas, and archaeological and cultural heritage sites

[191] Policy 1.4 would also be in conflict with the proposed subdivision, because policy 1.4 calls for "appropriate subdivision that avoids, or remedies or mitigates adverse effects on the natural character of the coastal environment…".

[192] Rural character and amenities are intended to be protected by policy 1.7 and for reasons already canvassed we consider that cannot apply in this case.

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[69] Para 30 of his evidence-in-chief, more fully cited at para 62 above.
[70] Ms Hilson para 4.79

[193] Other policies under objective 1 are either infringed (but in less clear ways) or neutral in respect of this application. Overall objective 1 and its policies is in conflict with this application.

[194] Objective 2 relates to the protection of the environment from the adverse effects of site works associated with subdivision. We agree with Mr Boyes' complaint (para 112) that the application provides insufficient information from which to measure the application of this objective.

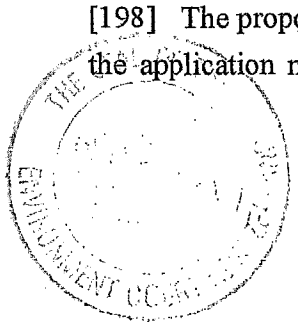
[195] Objective 3 concerning the acquisition of reserves and financial contributions to achieve (inter alia) "protection of enhancement of...archaeological or iwi values" would be met on part by the offer to transfer part of Lot 4 containing the three pits on the spur to the Council as a reserve. Other aspects of the objective – eg relating to reserves and financial contributions protecting riparian margins, wetlands or landscape values, are not engaged by this application, except for the proposed contribution for roading purposes (dealt with below).

**Conclusion as to objectives and policies of the Plan**

[196] The infringement of the 30ha minimum lot size requirement of the Plan is not just a technical infringement. It reflects a subdivision at odds with objectives and policies aimed at preserving the natural character of the coastal environment, protecting areas valued for landscape or visual reasons, recognising and protecting sites of significance to tangata whenua, preserving heritage resources, managing rural resources sustainably, protecting the character and amenity of rural areas, and encouraging subdivisions that are appropriate to the natural form and environmental characteristics of the plan area.

[197] In our view there is considerable friction between the nature of this proposed subdivision and the objectives and policies of the Plan, to the point that the subdivision would be contrary to those objectives and policies. We have reached this view after a detailed consideration of individual objectives and policies as set out above, but also by standing back and considering the overall purpose and scheme of the Plan, especially as it relates to rural land in the coastal areas.

[198] The proposed subdivision therefore also fails the second gateway test. As a result the application must fail. However, in case we are wrong in our assessment at either



gateway, we will go on to explain why the application would have failed anyway in the exercise of our discretion under s 104.[71]

OTHER EFFECTS – S 104 (1)(a)

**Positive effects**

[199] Section 104(1)(a) requires us to consider the actual and potential effects on the environment of allowing the subdivision. The effects seen as important by the parties have largely been considered already. In addition however, there are positive effects of the subdivision as proposed. The protection of indigenous vegetation on Lot 3 would have some value, even though that value is lessened by the steep nature of most of the land making development unlikely as a matter of fact. The creation of a reserve on Lot 4 to protect the pits on the spur, is also a beneficial outcome, although not one of unarguable strength, given the view of Mr Trotter[72] that light grazing of the land (by sheep or goats) was probably the best means of protection, for at least this will keep down trees that could otherwise grow and damage the pits. Finally, a restriction on further dwellings on each lot, and on building heights, BLA dimensions and other details, does offer a better environmental outcome than what might be possible under the Plan if a dwelling was allowed on the existing certificate of title.

[200] These positive effects go into the balance in the applicants' favour. However they are outweighed collectively by the adverse effects already canvassed, so that the effects looked at overall are adverse.

OTHER PROVISIONS OF THE PLAN

[201] Section 104(1)(b)(iv) brings in to play all relevant provisions of the Plan, not just the objectives and policies. Important amongst these other provisions are the subdivision rules found in Chapter 27.

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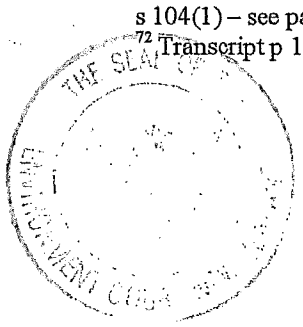
[71] For some unknown reason Ms Beals considered the two gateway tests, and Part 2 matters, but not s 104(1) – see para 6.34.

[72] Transcript p 137



[202] These rules provide assessment criteria for different types of activities. We now set out those that are relevant to non-complying subdivision activities, with a brief finding on each.

> *27.2.4.5.1 [ ... the likely effects of the proposal] on the locality and the wider community and in particular:*
>
> *(a) Whether the proposal will maintain or enhance the amenity values of the surrounding area;*

[203] Based on Mr Head's evidence, we consider that the proposal will detract from those amenity values especially landscape values.

> *(b) Whether the proposal creates any demand for services or infrastructure at a cost to the wider community;*

[204] With suitable conditions the proposal would not have any such effect.

> *(c) Whether the proposal adversely affects water supply, increases fire risk, or reduces access to the coast.*

[205] None of these issues should arise.

> *27.2.4.5.2 [ ... the likely effects of the proposal] on the amenities of the surrounding area, and in particular, whether the end result of the proposed subdivision will:*
>
> *(a) Adversely affect the natural quality of any tree, or bush, or group of trees which makes a significant contribution to the visual qualities of [the] surrounding area;*

[206] There is no particular tree or group of trees to which this factor applies – the native vegetation on Lot 3 is much more than a "group of trees".

> *(b) Visually intrude on any significant ridgeline or skyline or significant landscape;*

[207] For reasons already outlined we consider that a dwelling at the proposed location on Lot 3 would visually intrude on a significant ridgeline, and one on Lot 4 would visually intrude on a significant element in the rural landscape.

> *(c) Detract from any view or vista which contributes to the aesthetic coherence of a locality.*

[208] Dwellings on Lot 4 and (as proposed) Lot 3 would detract from views contributing to the aesthetic coherence of Ocean Bay, given the important parts which those areas play in the present coherence of Ocean Bay.

27.2.4.5.3 Not applicable (habitats and maritime ecosystems)

27.2.4.5.4 *[ ... the likely effects of the proposal] on natural and physical resources such that any proposed subdivision:*

*(e) Does not result in an adverse effect on the relationship of Mäori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga;*

[209] There will be a significant adverse effect of that nature on land (a natural and physical resource) - namely on Lot 4 .

*(f) Does not result in an adverse effect on any archaeological site registered by the NZ Historic Places Trust.*

[210] We are not aware of any site "registered" by the NZHPT on Lot 4, and so do not treat this rule itself as preventing development of Lot 4.[73]

*27.2.4.5.8 [ ... the likely effects of the proposal] on the compatibility of the proposed allotments with the pattern of the adjoining subdivision, land use activities, servicing and access arrangements, and amenity values.*

[211] The adjoining subdivision and land use activities comprise relatively small, residential allotments mostly in the northern corner of the bay, with rural allotments south of that. Proposed Lots 3 and 4 are not compatible with that pattern.[74] (Amenity values have already been dealt with.)

STATUTORY POLICY STATEMENTS

[212] Section 104(1)(b)(ii) refers to "a New Zealand coastal policy statement". This document is in two forms, both of which we now consider.

[73] The site is recorded under the Site Recording Scheme of the New Zealand Archaeological Association but not, on the evidence before us, registered by or with the NZHPT. (The distinction between these two procedures is implicit in para 2.1 of Attachment 2 to Mr Trotter's rebuttal evidence.)

[74] Subdivision is of course not, as such, inappropriate, as the plan's commentary following policies 1.1 – 1.8 makes clear.

**Operative NZ Coastal Policy Statement**

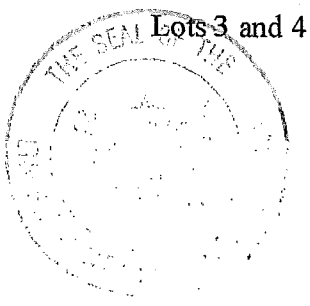
[213] To the extent that this document is relevant it supports the arguments relied on by witnesses for the Society. This document of course starts from the provisions of s 6(a) of the Act – "the preservation of the natural character of the coastal environment...". Policy 1.1.1 is to encourage appropriate subdivision in areas where the natural character has already been compromised and avoiding "sprawling or sporadic subdivision..." in the coastal environment.

[214] Mr Boyes argues on the basis of Mr Head's assessment that the natural character of the northern headland (Lot 3) has not already been compromised. Development of that lot should therefore not be encouraged. Ms Hilson looks more widely to the natural character of Ocean Bay itself, to argue that the natural character of Ocean Bay is already "influenced" (she does not say "compromised") by existing land uses and development, and can absorb development without affecting its "overall natural character" (para 4.62).

[215] In the applicants' closing submissions much weight is placed on the planning evidence of Ms Hilson, with little or no reliance on the landscape evidence of Mr Langbridge. While expressing her own views Ms Hilson relied extensively on the landscape assessment of Mr Langbridge, both in this part of her evidence and elsewhere, just as Mr Boyes had relied on that of Mr Head. For reasons already given we prefer the evidence of Mr Head to that of Mr Langbridge or Ms Hilson on landscape matters, and find Ms Hilson's evidence of less assistance in those areas.

[216] Chapter 2 of this document deals with the protection of the characteristics of the coastal environment of special value to tangata whenua. However we do not agree with Mr Boyes that the proposed subdivision would be contrary to the policies stated under this heading as they appear to relate a *process* of identification of such characteristics and it is not clear that such a process has been followed.

[217] However Chapter 3 (activities involving the subdivision, use or development of areas of the coastal environment) does have relevant policies concerning the maintenance and enhancement of amenity values and the avoidance of adverse effect of subdivision where practicable. There is also a policy (3.2.5) concerning the disposal of wastes. We agree with Mr Boyes' comment (para [125]) that the appropriate disposal of effluent on Lots 3 and 4 should be considered at the time of subdivision, in order to assess all actual



and potential effects on the environment of the development proposal. Unless this is done it cannot be established that this coastal policy element is met.

[218] Overall we consider that the proposed subdivision in respect of Lots 3 and 4 does not accord with the outcomes sought by the operative NZCPS.

**Proposed New Zealand Coastal Policy Statement**

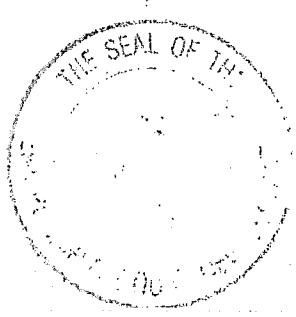
[219] This document was published by the Department of Conservation in March 2008 and has been the subject of submissions to a Board of Inquiry. Its status at present remains as a proposed NZCPS. We accept Mr Boyes' view that the policy framework in the proposed NZCPS strengthens the protection of the coastal environment and provides clearer guidance on what is appropriate development.

[220] Objective 2 relates to the management of subdivision to ensure that it occurs "in places, in forms and within limits consistent with sustainable management." Objective 3 seeks the preservation of the natural character of the coastal environment. Objective 4 concerns the principles of the Treaty of Waitangi and the role of tangata whenua as kaitiaki. Objective 9 concerns the protection of historic heritage in the coastal environment. To a certain extent these objectives reflect the matters of national importance listed in s 6 of the Act. The supporting policies require local authorities to identify areas for appropriate subdivision and (policy 14(d)) to "generally setback subdivision, use or development from the coastal marine area and other water bodies, to protect the open space character of the coast, its natural character, and its amenity values...".

[221] As with the operative NZCPS, the proposed NZCPS does not assist the applicants in this case.

**Regional policy statement**

[222] Section 104(1)(b)(iii) requires us to consider the Marlborough Regional Policy Statement. We accept Mr Boyes' evidence that the Plan has been formulated to be consistent with, and give effect to, the policies within the Marlborough Regional Policy



Statement. They are set out in the evidence of Ms Beals[75] and will not be repeated here. They are supportive of the Society's position in this appeal.

PART 2 CONSIDERATION AND CONCLUSION

[223] All of our consideration under s 104 is subject to the purpose and principles of the Act as set out in its Part 2.

[224] The broad purpose of the Act, as set out in s 5, is the sustainable management of natural and physical resources. Looking at the meaning of "sustainable management" as defined in s 5, it is clear that this application must fail. The proposal does not enable people and communities to provide for their social, economic and cultural wellbeing, or adequately avoid, remedy or mitigate adverse effects on the environment.

[225] Three matters of national importance are at issue in this case, and the proposal fails on all three counts. They are the preservation of the natural character of the coastal environment , the relationship of Maori and their culture and traditions with waahi tapu, and the protection of historic heritage from inappropriate subdivision, use and development.

[226] Finally, some "other matters" listed in s 7 are also relevant and count against the applicants, in particular the maintenance and enhancement of amenity values and of the quality of the environment. One other factor, "the efficient use and development of natural and physical resources", is neutral – the efficiency gained by siting three new dwellings on this land is counterbalanced by the loss of those areas for primary production or other rural activity.

[227] Overall then, even if the proposal had passed one of the gateway tests so that we had jurisdiction to consider it, we would not in our discretion have approved the application. It is opportunist in nature and flies in the face of both the provisions of the Plan and the purpose and principles of the Act. We do not believe it would have had the support of the Council if that body had had all the information before us.

[75] Evidence-in-chief paras 6.12-6.18.

[228] As Mr McFadden accepted in his closing submissions, the evidence for the applicants and the evidence for the Society is "diametrically opposed". For the detailed reasons we have given, we prefer the evidence for the Society in most respects, and come to a conclusion supportive of their appeal.

[229] While a dwelling on Lot 1 would not itself be a problem, in that the adverse effects on the environment would be only minor, a subdivision is not needed to allow a dwelling there - one dwelling on the applicants' land is a permitted activity already. Were we to allow Lot 1 to be subdivided off from the parent title, then the applicants would have two titles each able to accommodate one dwelling, contrary to our view of the evidence.

**A possible compromise**

[230] We have not ruled out the possibility of another position on Lot 3 that would have only minor effects on the environment and be able to be supported as part of an overall package: see our comments at paras 90-98 above. We propose to give the parties time to consider that option and if applicants and the Society both wish to pursue it, and can identify a site that is within our jurisdiction to consider, we may be able to make a final decision that allowed a dwelling on Lot 1 and at a different location on Lot 3, but not on Lot 4. We commend this possibility to the parties for their serious consideration, as having potential benefits to both sides.[76] It does however assume that an appropriate site is available on Lot 3.

[231] Unless all parties advise the Court within one month that they wish to consider this option, we will issue the remainder of this decision as a final decision. If such advice was received from all parties within that month, we would allow a further period for them to formulate a joint proposal, together with conditions of consent. That period would be two months, but with leave reserved to seek a further extension and/or any other directions that may be needed.

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[76] The applicants would have two Lots able to accommodate a dwelling, subject to other provisions of the Plan, and would still have Lot 4 able to be used in accordance with its Rural One zoning, either in their ownership or that of the adjoining farm. The Society would have gained greater protection of the rural nature of Lot 4 and the natural character of Lot 3 (as seen from Ocean Bay) than is currently provided by the Plan.

ROADING CONTRIBUTION APPEAL

[232] If in our final decision the Society's appeal is allowed in full, then it will be unnecessary to consider the disputed condition of consent regarding a roading contribution, as the consent itself will be cancelled. However, the parties are entitled to know our view of that condition of consent, as it will be relevant to any agreement they may reach as to Lot 3.

[233] Rule 28.1.27.1.4 of the Plan states:

> *..where as a result of subdivision, the Council..... expects to have to upgrade or extend, any existing road or road formation the Council may, as a condition of subdivision consent, require the developer to.....(b) Pay to the Council up to 75% of the cost of upgrading the road where this is required as a result of the subdivision.*

Based on this provision the Council has required the applicants to pay $23,400 plus GST as a roading contribution, a decision which the applicants have appealed.

[234] We have two concerns about this roading levy, first as to the lack of any evidence that the Council expects to upgrade the Port Underwood Road, and secondly as to the correctness of referring to other possible subdivisions in justifying an upgrading contribution.

[235] Mr Porter is Manager Marlborough Roads, a Division of the New Zealand Transport Agency. In presenting evidence on behalf of the Council he expressed *his* view that for Port Underwood Road to meet the standards required for increased residential use it will have to be upgraded. His proposal includes widening and/or realigning some 13 sections of road between Whites Bay and Ocean Bay and sealing the section from Whites Bay to Robin Hood Bay. He did not tell us whether the Council expects to adopt his or any other proposal. Ms Raddich did not address this issue in her submissions, and in any event was not in a position to give evidence. No witness was called from the Council on this point. We thus have no evidence that the Council expects to upgrade the Port Underwood Road as a result of this or any future subdivision.

[236] Accordingly we find that there is no ground for Rule 28.1.27.1.4 to be applied in this case. For completeness, however, we now discuss our second concern.

[237] It is our view that the legal obligation created by Rule 28.1.27.1.4 is limited by the words in paragraph (b) and thus the need to upgrade a road must be a result of "the subdivision". Ms Raddich in her closing submission argued that the test for Rule 28.1.27.1.4 is "as a result of subdivision", not as "the result of this subdivision". With respect we disagree with that interpretation. The words used in para (b) are "the subdivision"; this cannot mean "the one now proposed and others likely in the future". It must mean "the subdivision for which consent is sought", in this case, the applicants' subdivision. This follows from the usual meaning of "the", as referring to an individual instance. It is supported by other uses of "the subdivision" in the same rule (28.1.27.1.4), where the context makes it even clearer.[77]

[238] Mr Porter's evidence was equivocal as to whether he was saying that the upgrading of Port Underwood Road was required as a result of *this* subdivision, or *this and other* subdivisions. Under cross-examination by Mr McFadden, Mr Porter was emphatic in stating that it was this subdivision in particular that resulted in the necessity for the upgrade.[78] However twice in his preceding answers he stated that the need was based on an "incremental" increase in traffic – "it is the incremental nature of this subdivision and the opportunity for future subdivision and the increased traffic that causes – will place additional demands on the road …".[79]

[239] As a result we were not clear that Mr Porter's later denial of an "incremental" approach expressed his complete opinion on the matter. By contrast Mr Petrie was clear that the traffic data does not support a need for Council to upgrade the road. [80]

[240] Our interpretation of the rules is supported by the policies relating to objective 3 (the acquisition of reserves and financial contributions) under Chapter 23 of the Plan (Subdivision and Development). Policy 3.3. is to "ensure that all contributions are directly related to the public costs likely to be generated by the subdivision or development." This can only refer to "the subdivision" which is the subject of the application – not that subdivision and other possible future ones. Policy 3.4 ("administer financial contributions in a transparent and effective way") is also relevant. The

[77] Examples include "the frontage of the subdivision" and "individual sections in the subdivision".
[78] See Transcript p 192 lines 11-26
[79] See Transcript p 191 line 31 to p 192 line 5
[80] See eg para 10 of his rebuttal evidence.

"incremental" approach underlying Mr Porter's evidence is not a transparent approach to the issue. Finally, policy 3.5 ("ensure that financial contributions are generally used to benefit the area within which the development or subdivision is located") is hard to reconcile with the intention that the applicants' contribution would be used to upgrade roads much further south than Ocean Bay.

[241] Above we reached the conclusion that road widening was unnecessary since, if the subdivision proceeded, the traffic volumes would remain well below the widening threshold set by the Plan. It may be that some realignment work is necessary but we have no evidence to this effect other than Mr Porter's Appendix 8 which we see as insufficient for us to insist the work be done or to say who should pay for it. We thus agree with Mr Petrie's view that there is no case for road improvements as a result of this subdivision.

[242] Equally we see no case for the sealing extensions proposed by Mr Porter. His figures for traffic volumes on the Whites Bay to Robin Hood Bay section of Port Underwood Road (the section proposed for sealing) are 50 vm/d on average with a range of 30 – 100 vm/d. When questioned by the Court Mr Porter stated: "In the Sounds environment, we have generally been performing set [seal] extensions when you get substantially over a hundred vehicles per day".[81] Even adding the movements due to the proposed subdivision of 4vm/d (being that portion assumed to be moving south of the site) does not bring the average value nor the maximum value to a level substantially above 100 vm/d. It would require, at 2 vm/d per lot, over thirty new lots to raise the average traffic volume to substantially more than the 100 vm/d required for sealing.

[243] Each of our concerns over Rule 28.1.27.1.4 has led us to conclude there is no case for the road upgrading proposed by the Council. While the parties during the course of the hearing reached a settlement of the applicants' appeal over the roading contribution, the un-stated premise of that settlement was that there would be a subdivision approved for three lots. That premise not having been fulfilled, we need to deal with this appeal and we do so by allowing the appeal and setting aside the requirement of a roading contribution.

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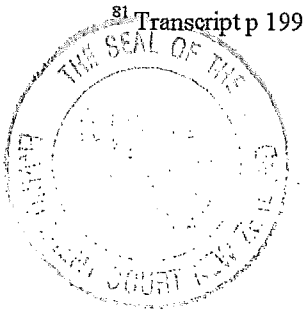
[81] Transcript p 199 line 21



COSTS

[244] Costs are reserved pending a final decision in this matter.

**Dated** at Auckland this 5th day of October 2009

For the Court:

**FWM McElrea**
Alternate Environment Judge

## APPENDIX A – heritage matters not in dispute

**1. There was pre-European Maori occupation of Ocean Bay.**

- There are two pre-European archaeological sites recorded from Ocean Bay – specifically:

  **Site P27/76 – Maori Pits:**

  - *"The first archaeological site to be recorded in Ocean Bay was located during a wide- ranging exploration of bays in Port Underwood, carried out in 1975 by a party led by Michael Trotter (Trotter 1975). The only Ocean Bay site recorded at that time comprised the group of pits on the little ridge in the middle of the bay, now within Lot 4 of the Strang subdivision. Recorded as Site S22/15 in the N.Z. Archaeological Association site recording scheme, this site became P27/76 when the N.Z.A.A. site records were carried across to the new metric maps."* (Dr Nichol para 11).

  - *"Lot 4 – the original 1975 site record for what is known as P27/76, being three rounded rectangular pits on a low ridge, is re-affirmed."* (Mr Trotter para 3.11)

  - *"Protection for the pits on the ridge of Lot 4 has been covered by both the New Zealand Historic Places Trust [NZHPT] and Marlborough District Council [MDC]."* (Mr Trotter rebuttal para 2.18)

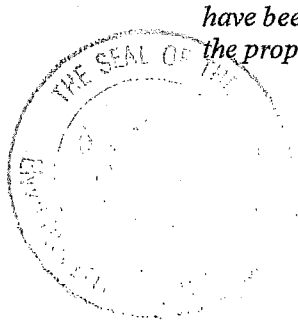
  **Site P27/319 – Midden:**

  - *"I also located a previously unknown archaeological site at the base of a low roadside bank which I recorded and filed as P27/319. A copy of the Site Record for P27/319 is annexed to my evidence as Annexure 6.* (Mr Trotter para 3.9).

  - *"I find it interesting that the midden visible in section in the ditch is immediately adjacent to this feature* [the"wall"] *)."* (Dr Nichol para 35).

- In pre-European times, Port Underwood had long been a lived in place... *"The area of Port Underwood had been settled by a succession of tribes dating back 67 generations to the Waitaha peoples who came and created the first gardens, taking advantage of the abundant sunshine to grow the kumara, but also tapping into the valuable sea resources for their kaimoana"*. :Brailsford, B; The Tattooed Land; 1997; A.H. & A.W. Reed Ltd. (Mr Head para 41)

- *"It is widely accepted that there was pre-European occupation in Ocean Bay, and three pits have been located and recorded (Trotter and Mathews 1975, Trotter 2006 and 2008) within the proposed Lot 4 on the spur that separates the bay in two. Prior to 2006 and after 1975*



*the site was re-identified as a pa, based on the pits, accessible water, and the suggestion of a wall (Brailsford 1981 and 1997).*" (Mr Head para 42)

- " *... it is uncertain just where the Maori were living and which features relate to their presence. One possibility is that they were living on the terraces recorded as Feature 9, P27/378 ... I simply cannot believe that Mein Smith would have noticed, or would have been interested in, a few vague terraces on a hillside. Therefore the marks shown at the north of the bay can only represent actual occupation in that area at the time of his visit... On the other hand it is quite likely that the Maori followed their usual practice of occupying the warmer parts of their territories, in which case their dwellings will have been further south, perhaps close to the tryworks, while the terraces at the northern end of the bay were occupied by Europeans ...*" (Dr Nichol paras 31-32).

- "*Further evidence for very early structures in the middle of the bay is provided by a panoramic pencil drawing of Ocean Bay produced in June 1848 by Walter Mantell (National Library Ref C-103-017-1*" (Dr Nichol para 33)

**2. There was early European whaling activity in Ocean Bay**

- *"A deposit of 'hard black whale-oil residue' at the back of Ocean Bay beach was identified by Nigel Prickett in 2000 as marking a tryworks ... P27/143"* ( Mr Trotter para 3.7)

- *"Several historic sources agree that there were two whaling stations in Ocean Bay in the late 1830s and early 1840s... and site P27/143 recorded by Nigel Prickett... looks to be a very good candidate for one of these sites."* (Dr Nichol para 37)

- *"First hand descriptions of the shore whaling occupation in Ocean Bay in 1839 have been given separately by Ernest Dieffenbach (1842) and Edward Jeremy Wakefield (1845)...* [Dieffenbach wrote:] *Here are two whaling establishments. The number of Europeans is thirty and of natives about one hundred"* (Mr Trotter para 3.8)

- *"In 1840 Ocean Bay's population comprised some Maoris and about 5 whaling gangs, most of whom had landed there from Canada, America, France, England and Sydney. Houses built of reeds and rushes by the Maoris were equipped with our families own pots, pans, tin and crockery dishes."* (Josie Smith, in Society exhibit 4 quoting Joyce Thompson, "Pioneers of Port Underwood" in *Journal of the Nelson and Marlborough Historical Societies Inc.*, Issue 2/4, 1990, p17)

- *"There is a possibility that the northern extension of site P27/143 (European occupation) and the newly discovered P27/319 (midden) could extend through the fenceline into Lot 4."* (Mr Trotter para 4.4)

**3. Ocean Bay has close association with events that preceded the Wairau affair of June 1843**

- *"Heni te Hua Hua, daughter of Te Kauwhata (a leading Ngati Rarua chief) married John Blenkinsopp, an entrepreneur who was involved in the shipping and whaling industry. Other historical accounts advise that Heni te Hua Hua was actually the daughter of Te Peehi (a Paramount Chief of Ngati Toa Rangatira). John Blenkinsopp resided within*

*Whanganui* [Port Underwood] *where history recalls him at Ocean Bay."* (Ms Williams para 13)

- Annexures B and C to Ms Williams' evidence relate the story of Blenkinsopp's false 'purchase' of the Wairau Plain from Te Rauparaha. Te Rauparaha's understanding was that he was helping stock Blenkinsopp's ship with wood and water. However, Blenkinsopp had worded the document such that "*he assumed the ownership of the whole of Wairau Plain*" (Annexure B p1). In addition, the price of the purchase was a ship's cannon which Blenkinsopp 'spiked' before delivery. This also annoyed Te Rauparaha. The ship's cannon is now resident outside Marlborough District Council offices in Blenheim)

- *"The Hope reached Cloudy Bay in June 1840, but Te Rauparaha and the other chiefs, once they saw the party ready to take possession of the plain, entirely repudiated the document. Te Rauparaha declared that Peringatapu (Blenkinsopp) had secured the signatures by fraud and the gun had been given to him in payment for Te Pehi's daughter, and for the privilege of securing wood and water for his ship".* (Josie Smith, in Society exhibit 4, quoting (we deduce) C.A. Macdonald *Pages from the Past* p96)

**4. There were early landings of sheep and cattle at Ocean Bay**

- Mr Jorgenson, in his 'Clarification of Evidence' (Society exhibit 7), provides references to show that cattle were landed at Ocean Bay in June 1840 and sheep in August 1847. He had claimed that these were the first such landings in the South Island (evidence-in-chief para31), but his evidence in Society exhibit 7 does not go that far.

    - "*Captain John Blenkinsopp, of the schooner Caroline, commenced whale trading in Cloudy Bay in 1830 and married a daughter of Te Pehi Kupe, the paramount chief of the Ngatitoa until his death passed the mantle to his nephew, Te Rauparaha".* (Society exhibit 7, Attachment 1, *Marlborough: A Provinicial History* edited by A.D. McIntosh, 1940, p49)

    - George Unwin was a Sydney solicitor who had after Blenkinsopp's death asserted a claim to the supposed Wairau estate as Blenkinsopp's mortgagor. (ibid p51)

    - *"The barque 'Hope' was chartered, a number of cattle were put on board and the* [Unwin] *party, with their wives and families ... set sail from Sydney. A landing was made at Ocean Bay, but the Maoris refused to allow the cattle to be driven on to the [Wairau] Plain and they were eventually driven over into the Sounds. ... Although the natives repudiated the validity of the Blenkinsopp deed, the men of the Unwin party proceeded by boat up the Wairau River ... "* (ibid, p53)

    - *"Frederick Aloysius Weld, famous as a colonist and explorer, as a New Zealand statesman and a Premier and later as the Governor of West Australia, Tasmania and the Straits Settlements ... had stocked in the Wairarapa the first real sheep station in New Zealand. Within two years they were looking for a larger property ...* [and heard of the Wairau area]. *Following upon a closer inspection of the property by Weld at the end of 1846, Clifford crossed to Sydney and purchased 3,000 of the best sheep procurable in New South Wales. These were landed at Port Underwood in August 1847 – the first lot of sheep ever driven from Port Underwood to Wairau. "Storm and rain, a killing night, arrived at Robin Hood's*

*Bay half dead. Sheep ditto. Camped out with them, being afraid of native dogs. Clifford followed with more sheep next day". Thus does Weld's diary record the event."* (ibid p92)

- In his 'Clarification of Evidence' (Society exhibit 7), Mr Jorgenson states "*The arrival of 2500 sheep at Ocean Bay, as recorded on the plaque on the trypot on the foreshore of Ocean Bay, were for Clifford and Weld and were the first lot of sheep driven from Port Underwood to the Wairau...The trypot and plaque were installed by the Marlborough Historical Society*". This is not a correct reference to the plaque, which instead states: "Frederick Weld landed 2500 merino sheep here in August 1847. He drove them south to his Flaxbourne Station, today known as Ward, a journey taking some 19 days to complete." While correcting Mr Jorgensen on this point we note that historical plaques are not able to be treated as reliable evidence given that their authorship and sources are generally unknown. (We could find no reference to the Marlborough Historical Society on the plaque or near the trypot, but accept that the plaque may well have been installed by the Society.)

- *"After Kakapo Bay the road climbs over to Ocean Bay where Marlborough's first sheep were landed. At that time a bridle track linked the Port Underwood bays to the Wairau Plain. The track was very important because there was nowhere to site a port along the exposed Cloudy Bay coast."* (*The Treasured Pathway*, Simon Noble, Nikau Press, p28). It is to be noted that this reference also does not quote a source.

**5. After whaling operations ceased the Bay had been used for farming through into the 1980s. There was however an early schoolhouse there.**

- *"Due to its easy sea access during the early 1800s Ocean Bay was used as a shore-based whaling station (Prickett 2000) and soon after, the valley floor and lower slopes were cleared for farming. Ocean Bay has traditionally been a farmed place ..."* (Mr Head para 43)

- *"Michael Aldridge (1820 – 1901) was probably the central personality in the early farming industry in Ocean Bay. ... In 1849 he had a had a dwelling house at the bay, built of earth with a thatched roof, and he took up a Crown Grant on Section 3 in Ocean Bay comprising 33 acres 2 roods in October 1857".* (Dr Nichols para 41 citing M Jurgens (2006)).

- *School started by Crump family in 1909. History of school written by Jonathan Harlan in 1987: 'The School at Ocean Bay'"* ... See site record form P27/375 attached to Dr Nichol's evidence-in-chief, which also contains a very good photograph of the school "about 1912". Remains of a chimney base from the school are seen in Dr Nichol's fig. 11 of attachment 3.

- *Every morning the boys assembled outdoors where the flag was raised and prayers said. On the right hand side, facing the school, there used to be a stream. By poking about with sticks on the banks of the stream the boys sometimes unearthed pieces of greenstone and other Maori relics.* ("Ocean Bay Anecdotes - about 1920", written 1982 by Nola Barsanti: see Society exhibit 3)

- *As I understand it, the single farmed block that dates back to the 1800s was first subdivided in 1982 by the Strangs, and has been subdivided several times since then. Lot 4 was divided off from the main block in 1991.* (Mr Head para 45).

## APPENDIX B – disputed heritage aspects of Lot 4

### 1. Whether Lot 4 had been the site of a Maori Pa.

- *"Ngati Toarangatira Manawhenua Ki Te Ihu Trust cannot stress strongly enough that this is a pre-1900 Pa site and as such, we believe that there may be an Urupa* [burial ground] *located on or around Lot 4..."* (Ms Williams para 45).

- *"Prior to 2006 and after 1975 the site was re-identified as a pa, based on the pits, accessible water, and the suggestion of a wall (Brailsford 1981 and 1997).* (Mr Head para 42). Mr Head's Attachment 14 includes a copy of page 78 of *The Tattooed Land* by Barry Brailsford (1997) where the heading reads "*OCEAN BAY PA*". As Mr McFadden pointed out, the text does state: "*It is difficult to confirm this as a fortified pa site. It lacks strong natural obstacles to deter attackers ...*" However the sketch clearly shows an area (whether fortified or not) marked "PA" and is listed as "Map 36. Ocean Bay Pa"

- This is challenged by Mr Trotter (para 4.2): "*In Lot 4 the group of three pits recorded as site P27/76 is confirmed as an archaeological site of Maori origin but the identification of this site as a pa by Brailsford cannot be sustained. The 'wall' recorded by him is an artificial structure but it is of relatively recent origin".*

- In his rebuttal evidence (Attachment 2), after detailing his field survey of 2008 which involved digging 25 test holes, Mr Trotter concludes (para 7.1): "*Apart from the pits (site P27/76) and the isolated attrition saw* [found at test hole 25], *no archeological evidence of early occupation was found on Lot 4. I confirm my earlier conclusion that there is no evidence of a Maori Pa on Lot 4."*

- *"There is clear evidence for early historic period Maori occupation in the bay.* (Dr Nichol para 30) ... *However it is uncertain just where the Maori were living [within Ocean Bay] and which features relate to their presence* (para 31) ... *Further evidence for very early structures in the middle of the bay is provided by a panoramic pencil drawing of Ocean Bay produced in June 1848 by Walter Mantell."* (para 33)

- Although Dr Nichol produces evidence of occupation in the middle of the bay as well as at its northern and (probably) southern ends, he does not assert the presence of a "Maori pa".

### 2. Whether identifiable depressions on the site were indications of either Maori or Pakeha inhabitation or both

- For Lot 4, Dr Nichol (para 35) makes reference to "*the two very clear depressions visible in Fig 1 of Attachment 4".* (These are features 10 and 11 on his figure 31.) He refers also to *"two or three much fainter but otherwise very similar features just visible in the aerial photo* (Brayshaw 1964) *around the edges of the flats*".

- Dr Nichol makes no definitive statement about the origins of these depressions but suggests they could be variously remnants of Maori and/or Pakeha inhabitation. In his Site Record Form (P27/379) he refers to both features 10 and 11 [depression "b" and depression "c"] as a "*probable house site*", and in his evidence (para 36) he suggests such structures may have

been built in the period 1842-1848, which of course would mean they could have been used for either Maori or Pakeha dwellings.

- Mr Trotter in his rebuttal evidence (para 2.15) was "*unable to say much about*" these features but disputes reliance on a Walter Mantell drawing of 1848 as suggesting "*several sizeable structures*" (Dr Nichol para 34) south of the dividing spur in Lot 4. Mr Trotter also says (para 2.17) that his later field survey revealed no evidence of occupational remains in the area of the proposed dwelling on Lot 4. This evidence is however not inconsistent with Dr Nichol's "depressions", as a comparison of Dr Nichol's figure 31 and Mr Trotter's rebuttal figure 5 indicates that the two depressions were not in the area where Mr Trotter located his test bores.

## 3. Whether the identified 'wall' was part of an historic Maori garden.

- "*This feature has had various interpretations over the years but my response after first seeing it for myself, during the fibre optic cable survey in 1996, was that it was very similar in character to the garden lines present at Robin Hood Bay, just down the Port Underwood coast... and an aerial photo taken by Marlborough historian Norman Brayshaw in 1964 gives what I consider to be very strong confirmation of this view*". (Dr Nichol paras 21-24)

- Dr Nichol accepts that: "*the 'wall'... is slightly more problematic*". (para 21)

    - "S*everal features of archaeological interest are visible in this photo (*Figure 1 of Attachment 4*) including the wall and the pit features 10 and 11. From the point of view of dating the wall, the most important element is a plough line from 'ridge and furrow' ploughing, which extends straight across the wall."* (para 24)

    - *The plough-ridge is also visible on the ground, most clearly where it has left a distinct notch as it crossed the wall."*(para 26)

    - He considers that "*the wall was already in existence when the ground was ploughed for the first and only time."* (para 27)

- Ms Williams, speaking on behalf of Ngati Toa Rangitira, states: "*In terms of the 'wall' we disagree that this is of European origin – we believe it was built by our tupuna for a specific purpose"*. (para 29)

- Mr Trotter states the wall recorded by him is an artificial structure but it is of relatively recent origin... "*Subsequently, Barry Brailsford re-identified the site as a pa, largely on the evidence of a wall he recorded on an adjacent lower flat... I had no doubts the "wall" was not of Maori origin ... (Walls of prehistoric Maori construction usually contain layers of midden material, charcoal, used fire-stones etc.)*" (paras 3.4-3.6)

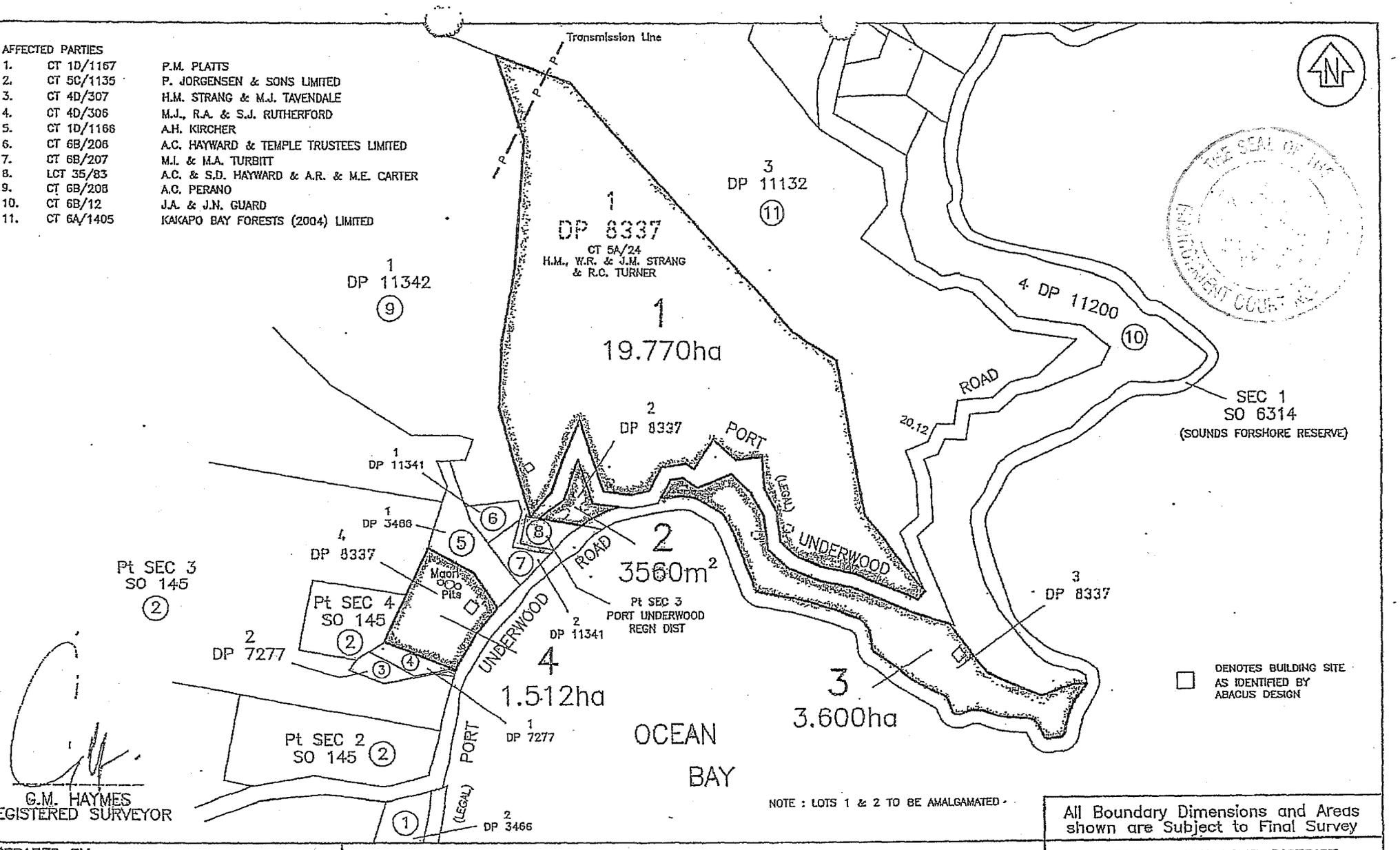
- Mr Trotter adds further: "*On the lower flat, which is actually a gentle slope that dips towards a watercourse 50 metres to the south, is the 'wall' recorded by Brailsford in 1976. This is an artificial feature, 32 metres long from the fence line, which appears to have been constructed to lessen the slope of the ground to the north of it. It is firmly dated to the 20th century by the presence of a "modern" brown bottle glass, thinly moulded and unpatinated, found in situ at a depth of 70 centimetres"* (para 3.13).

- Questioned by Mr McFadden about the possibility of an urupa being located on Lot 4, assuming Lot 4 to be a place of inhabitation, Mr Stafford said: "*It is highly unlikely from a*

*Ngati Rarua perspective that we would inhabit anywhere near our urupa*". (Transcript p 424.) However, in his closing submissions Mr Fowler pointed out (para 37) that Ms Williams' contrary point of view is supported by Mr Trotter and Beverley McCulloch in their text, "*Digging Up the Past*", p 94: "*An interesting aspect of ground burials is that most of the graves for which we have good records are in the immediate vicinity of where people were living*".

AFFECTED PARTIES

| | | |
|---|---|---|
| 1. | CT 1D/1167 | P.M. PLATTS |
| 2. | CT 5C/1135 | P. JORGENSEN & SONS LIMITED |
| 3. | CT 4D/307 | H.M. STRANG & M.J. TAVENDALE |
| 4. | CT 4D/306 | M.J., R.A. & S.J. RUTHERFORD |
| 5. | CT 1D/1166 | A.H. KIRCHER |
| 6. | CT 6B/206 | A.C. HAYWARD & TEMPLE TRUSTEES LIMITED |
| 7. | CT 6B/207 | M.I. & M.A. TURBITT |
| 8. | LCT 35/83 | A.C. & S.D. HAYWARD & A.R. & M.E. CARTER |
| 9. | CT 6B/208 | A.C. PERANO |
| 10. | CT 6B/12 | J.A. & J.N. GUARD |
| 11. | CT 6A/1405 | KAIKAPO BAY FORESTS (2004) LIMITED |




THE SEAL OF THE ENVIRONMENT COURT

G.M. HAYMES
REGISTERED SURVEYOR

NOTE : LOTS 1 & 2 TO BE AMALGAMATED

All Boundary Dimensions and Areas shown are Subject to Final Survey


PREPARED BY:
GILBERT, HAYMES & ASSOCIATES LTD
REGISTERED SURVEYORS
P.O.BOX 380 – 14 QUEEN STREET – BLENHEIM
PHONE (03)5787984 – FAX (03)5787709
E-MAIL gh_assoc@xtra.co.nz


# PROPOSED SUBDN OF LOTS 1 – 4 DP 8337

MARLBOROUGH LAND DISTRICT
MARLBOROUGH DISTRICT COUNCIL

SCALE 1:5000

DATE 13 JUL 2006

JOB REF. 7490 JOB ID. 12K