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WHANGAREI DISTRICT COUNCIL

Report and decision of Hearings Commissioner Les Simmons. Whangarei District Council has delegated all the functions, powers and duties as provided under the Resource Management Act 1991 to the Commissioner to consider and decide the review of consent notice conditions under Section 221(3) (b) of the Resource Management Act 1991 on behalf of Council. The hearing was held in the May Bain Room, Whangarei Library on Tuesday 29 April 2014.

The Hearings Commissioner heard the application to review the consent notice conditions that had been imposed on a subdivision consent that had created two new lots on Whau Valley Road, Whangarei. The review under Section 221(3) (b) of the Resource Management Act 1991 ('the Act') was initiated by the Whangarei District Council and notice of the review had been served on the current owner of 286C Whau Valley Road, Lot 2 DP 424725, Mr Fred Morgan.

Present	**Hearings Commissioner** Les Simmons
Applicant	Whangarei District Council Sarah Shaw – Counsel Burnette O'Connor – Consultant Planner
Property Owner	Fred Morgan
Consent Authority	**Whangarei District Council**
In attendance	Linda Wheeler – Hearings Administrator

1 Background to the proposed review of consent notice conditions

The Council in a letter dated 14 February 2014 formally served notice on Mr Morgan that it was undertaking a review of conditions 3, 4 and 5 of the consent notice 8521790.2 registered against Lot 2 DP 424725.

A non-complying subdivision to create two lots had been granted consent by the Council on 28 February 2006. Mr Morgan was the applicant. He appealed against the conditions of consent that had been imposed. After hearings before the Environment Court and the High Court, a final decision from the Environment Court dated 4 July 2008 confirmed the grant of consent, subject to conditions. The conditions included one requiring a consent notice to be registered on *"the title(s) where the bush has been identified in accordance with condition 1(e) of this consent..."*

The bush referred to above had been removed by Mr Morgan before the Environment Court confirmed the final conditions of consent. In the absence of an application to vary the conditions proposed at that time, the Court confirmed the conditions unchanged.

In June 2009 Mr Morgan applied for a change to the conditions pursuant to Section 127 of the Act seeking to delete those conditions which could not be met following the removal of the bush/vegetation. Consent was granted to delete conditions 1(e) and (f), and 2 (d) and (e), and a new condition 2(f) was added. Condition 2(f) required that consent notices be registered on both Lots 1 and 2. The consent notices contained five conditions. The conditions required that all built development, excluding access ways to maintain a minimum setback of 15 metres from the road frontage; built coverage restrictions for each lot; a landscape mitigation plan; planting details in relation to the extent of planting and plant species; and the implementation timeframe and ongoing maintenance of the approved planting.

The reason stated for the review was that there was ambiguity in the wording of the consent notice, particularly in terms of:

- Condition 3, identifying which lot is subject to the requirement for a Landscape Mitigation Plan and whether the intention is for any building consent to trigger the requirement for such a Plan.
- Condition 3(b), clarifying the fact that there is an existing dwelling contained on Lot 1.

  Condition 5, providing clarity regarding the timing of implementation of the Plan.

It was the Council's position that the current wording of these conditions is not clear as to what actions are required in relation to Lots 1 and 2, nor is it clear as to when the planting is required or the timeframes for doing so.

The full wording of conditions 3, 4 and 5 with the above amendments tracked is set out below.

"3. *That a Landscape Mitigation Plan is to be prepared by a suitably qualified and experienced landscape architect and submitted to the satisfaction of the Resource Consents Manager. It is to be submitted at the time of seeking building consent for a dwelling on Lot 2. The plan shall include the following information; north point, graphic scale, numerical scale and sheet size. Any drawings which detail planted areas shall be at a scale of 1:200 or similar. The Plan shall also include details of stock sizes, species of plants, methods of staking plants, proposed mulching, planting programme and methodology and maintenance programme for the 3 year establishment period. Plant spacing shall be such that canopy closure is achieved within 3 years. The Plan shall be for the purposes of providing visual mitigation planting shall be for the following purposes:*

   a. *Providing visual separation from the existing building on Lot 1 to the north and from built development to the south.*
   b. *Providing screening of the future building development within Lot ~~1~~ 2 from views along Whau Valley Road to the north and south.*

4. *The planting area(s) shall be of an extent, and shall include plant species that will develop sufficient scale to that they fulfil the above purposes to the satisfaction of the Resource Consents Manager or his appointed representative.*
5. *Once approved, the Plan shall be implemented within ~~the first planting season~~ 12 months following substantial completion of the dwelling (defined as being completion of enclosure of the dwelling) and retained and maintained in perpetuity to the satisfaction of the Resource Consents Manager or his appointed representative."*

2 Notification and submissions received

Section 221(3A) of the Act states that Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under Section 221(3) of the Act.

The reporting planner, Ms O'Connor, had recommended that this review proceed on a non-notified basis pursuant to Sections 95A – 95F of the Act. The reasons for her recommendation were that:

1. The review of the condition specified in the consent notice relating to landscaping will not create any additional adverse effects beyond those considered when the original subdivision and conditions were granted.
2. No persons have been determined to be adversely affected by the proposal.
3. There are no special circumstances to warrant public notification.

She had reviewed and relied on a draft Section 42A report prepared by Mr Alister Hartstone, the Council's Manager – Resource Consents, in reaching her recommendation on notification.

Mr Morgan, the owner of 286C Whau Valley Road (Lot 2 DP 424725), had been notified of the proposed review. He had indicated that he had concerns regarding the review process and the validity of both the review and the conditions subject to the review. He had requested a hearing before an Independent Commissioner.

On the basis that this review only relates to the consent notice registered against Mr Morgan's property (Lot 2 DP 424725) I accept Ms O'Connor's recommendation that the review can proceed on a non-notified basis. It is noted that Mr Morgan did not oppose Ms O'Connor's recommendation.

3 Procedural matters

Mr Morgan was critical of the review process that had been followed by the Council. With respect to the procedure and process relevant to the review itself, this will be dealt with under the headings of "Principal Issues in Contention" and "Main Findings of Fact" below.

Mr Morgan was concerned that Mr Hartstone had a conflict of interest because of his previous involvement in relation to this property through his role as the Council's Manager of Resource Consents during the processing of the earlier resource consent applications, including the consent notice that is currently under review. Although Mr Hartstone had prepared a draft section 42A report that formed part of the agenda material, he did not attend the hearing. The Council appointed Ms O'Connor as an independent planning consultant and she had prepared her own section 42A report. She acknowledged that she had reviewed the Council's file and relevant background information, including the draft Section 42A report prepared by Mr Hartstone. She had also visited the site and the surrounding area before completing her own report.

The appointment of an independent planning consultant and the hearing of this review by an independent commissioner were at Mr Morgan's request. I accept Ms Shaw's legal submissions that any conflict of interest which may have arisen, which was denied by the Council, have been addressed.

With respect to allegations of misconduct, which are being considered by the Council, I also accept Ms Shaw's submission that they are not relevant to the hearing and my determination which has been based on the evidence placed before me by both Mr Morgan and the Council.

After hearing the evidence on behalf of the Council and Mr Morgan it was clear that there was very little, if any, common ground between the Council and Mr Morgan in relation to the proposed amendments to the wording of the consent notice. A short recess was taken in order for the parties to determine if there was any merit in them working together to see if any progress could be made before the hearing was closed. Ms Shaw on behalf of the Council indicated a willingness to meet with Mr Morgan for further discussions, however Mr Morgan preferred to table a written statement that the Council could then comment upon as part of the formal Reply. Mr Morgan agreed that his written statement would include his final position on the outcome of the review process and the wording of the consent notice conditions, in response to the matters that had arisen during the hearing.

The hearing was adjourned at 1pm to enable Mr Morgan to prepare his statement. I advised the parties that the hearing would not be formally closed until the Reply had been received.

I advised the parties that I would visit the site and the surrounding locality and did so immediately after the hearing had been adjourned on 29 April.

Mr Morgan provided his statement on 1 May. Ms Shaw filed her Reply on 12 May and the hearing was formally closed on 21 May.

4 Evidence heard

The following is a summary of the evidence heard at the hearing. This summary is brief and the most relevant aspects of the evidence and the legal submissions will be discussed in detail in the Main Findings of Fact section of the decision. In addition to the evidence presented at the hearing I was provided with the relevant Council file which I have read and taken into account in determining the outcome of this review.

4.1 Applicant's evidence

It was agreed that the Council was in effect the applicant in relation to this review and Ms Shaw presented written legal submissions. She set out a summary of the original subdivision consent and the appeals that flowed from the Council's decision to grant consent subject to conditions, the 2009 Section 127 application and the wording of the consent notice as it currently stands. She set out the Section 221(3) review process

and the procedure that had been adopted by the Council under Section 221(3A). She responded to the evidence that had been pre circulated by Mr Morgan.

Ms O'Connor had prepared a brief Section 42A report that concluded that: *"Having reviewed the draft staff report I concur with the assessment, conclusions and reasons set out in that report."*

4.2 Mr Morgan's evidence

Mr Morgan had pre circulated his evidence in which he responded to the report prepared by Ms O'Connor and the material that had been included in the hearing agenda. Mr Morgan advised that he had *"a degree in law, a degree in applied science, majoring in natural resource management and a post graduate diploma in environmental health science."* He stated that he had *"approximately eleven years experience as a public servant in environmental positions relating to compliance, consents/applications processing, and policy/plan development."* His statement was identified as being his *"Brief of evidence"* however I have interpreted it to be in part submissions and in part evidence, given his legal and resource management qualifications and related experience.

I have noted the Environment Court's comments at paragraph [82] of its decision A021/2007 when Mr Morgan was considered to be *"...too close to the action." "...in purporting to give expert evidence on his own behalf."* The Court stated that *"... in areas where there was conflict between the parties' witnesses on profession matters, we were inclined to prefer the evidence of the council witnesses, subject to careful consideration by us of the accuracy of the evidence and impressions gained by our own inspection of the site and the locality after prior consultation about that with the parties."*

I have accepted the comments of the Court on these matters. In particular my site visit was particularly helpful in putting the evidence of Mr Morgan, Ms O'Connor and Mr Cocker in context.

Mr Morgan's evidence essentially related to two issues. Firstly the process that the Council had followed. It was his submission that the Council had not correctly interpreted the provisions of Section 221 of the Act. The specific provisions he identified where there is disagreement between him and the Council were the application of sections 128 and 132 in relation to a consent notice review. In summary he submitted that the review had not 'lawfully' commenced and that the Council does not have the power to vary the conditions as has been proposed.

The second aspect of his evidence related to the outcome of the review process. This was most clearly set out in his additional statement that was filed on 1 May. He identified three desired outcomes, in decreasing order of preference. His first preference was that conditions remained unchanged. It was his opinion that Lot 1 needs to comply with the conditions as they are currently worded and not Lot 2. If he is wrong in this regard he stated that the Council should seek a declaration from the Environment Court or should apply for an enforcement order when he does not submit a landscape management plan.

His second preference was that conditions 3 to 5 should be cancelled. He submitted that their current form, the conditions delegate discretion of what needs to be complied with (i.e. how much 'screening' or 'visual separation') to a later date after any appeal rights have expired. He also considered the delegation of discretion to a landscape architect is unreasonable and the conditions themselves should be certain as to the intended outcomes.

His third preference was that any variation to the conditions should be to restrict built form as this is a better practical option to implement on Lot 2 and directly relates to the buildings that are of concern. He stated that a practicable consent notice condition would be *"the height of any building (as defined in the District Plan) on Lot 2 should not exceed 8m."*

4.3 Council's Reply

Ms Shaw's written Reply clearly identified that Section 128 of the Act is relevant but only as a subordinate consideration insofar as sections 127(4) to 132 apply with all necessary modifications to a review conducted under Section 221(3)(b) of the Act.

With respect to the three preferences identified by Mr Morgan, the Council requested that the conditions be varied as set out below.

*"1. Any buildings constructed on **Lot 2** shall not exceed a maximum height of 8 metres.*

*2. Any buildings constructed on **Lot 2** shall have exterior walls and roofing (excluding joinery) that is coloured or painted in a recessive colour having a reflective value of 30% or lower. Full details of the proposed colour scheme shall be submitted with the building consent application for approval by Council's Team Leader Compliance. The building is to be completed in the approved colour scheme prior to occupation, and that colour scheme is to be maintained for the life of the building, unless further consent is obtained in writing from Council.*

*3. At the time of application for a building consent for any building on **Lot 2,** a landscape planting, implementation and maintenance plan shall be submitted with the application for building consent. The plan shall provide for landscape planting designed to minimise the visual dominance of buildings on Lot 2 and to integrate buildings on Lot 2 into the surrounding landscape.*

The required plan shall be prepared by a suitably qualified / experienced landscape architect and shall include:
- *A north point,*
- *Graphic scale of 1:200 or similar,*
- *Detail of stock sizes, species of plants,*
- *Details for ongoing maintenance such as methods of staking, mulching and spraying, replacement planting as necessary etc*

The approved plan shall be implemented within 12 months following substantial completion of the building (defined as being completion of the enclosure of the building) and shall be maintained in perpetuity."

5 Principal issues in contention

The principal issues that were in contention were:

a Issue 1 – Did the Council follow the provisions of Section 221 correctly in undertaking the review of the consent notice conditions?

b Issue 2 – What changes, if any should be made to the conditions of the consent notice?

6 Main findings of fact

The following are the main findings on the principal issues that were in contention relating to this review:

a Did the Council follow the provisions of Section 221 correctly in undertaking the review of the consent notice conditions?

I have carefully considered the extensive legal submissions from Ms Shaw and Mr Morgan and the case law they referred me to. By the time they had both provided me with the final written submissions on the process that is required to be followed under section 221 of the Act, the key difference between them came down to what extent Sections 127(4) to 132 should be modified in relation to this review under Section 221(3) of the Act.

Ms Shaw's submission at paragraphs 1.3 and 1.4 of her Reply was that:

> *"The Council accepts that section 128 of the Act is relevant only as a subordinate consideration insofar as section 221(3A) provides that sections 127(4) to 132 apply **with all necessary modifications** to a review conducted under section 221(3)(b). [Morgan reply: para 4]*

> *Section 221(3) had previously provided a power to amend a condition specified in a consent notice, by agreement between the Council and the land owner. The RMAmA05 specifically amended that provision to provide for either an application to amend the condition or a review of the condition by the Council. The amendment could have simply made s221 subject to section 128, if the intention had been to make the review process identical to (or subordinate to) the section 128 process. It did not – the section 128 review procedure applies "with all necessary modifications" to the specific power in s221(3) to review a condition."*

Mr Morgan in his additional comments received on 1 May at paragraph 4 stated that:
"Paragraph 6.2 of Council's legal submission appears to identify that s128 does apply. Both parties now appear to be in agreement that this review was commenced by the service of notice under s.128. However it is still unclear: how the Council would read into s.128 another circumstance which would enable them to serve notice; and, how s.132(1) should be dealt with."

Section 221(3) of the Act clearly provides for the review any conditions specified in a consent notice and section 221(3A) provides for sections 88 to 121 and 127(4) to 132 to apply, with all necessary modifications, to such a review.

For the first group of sections, from section 88 to 121 of the Act, these sections relate to the resource consent process beginning with the provisions relevant to applying for a resource consent, the notification procedures, submissions, hearings, decisions and appeals. The Contents section of the Act sets out in full how these sections of the Act are grouped under various headings. The same approach follows for sections 127(4) to 132 with most of these sections listed under the heading 'Review of consent conditions by consent authority.'

The "with all necessary modifications" is a wide reaching qualification and I have interpreted it that the decision maker needs to determine what modifications should be made to the normal process associated with an application for a resource consent, when a review of consent notice conditions is being undertaken.

Sections 129 and 130 are applicable to the notification process in relation to a review and the Council served notice on Mr Morgan in accordance with section 129 by way of a letter dated 23 January 2014. Mr Morgan's submission was that the Council also needed to comply with section 128(1) and that this section specifically limits the circumstances that the Council can serve notice. As I understood it Mr Morgan's submission was that because his resource consent does not include a 'review condition' the Council had not lawfully commenced the review process. His concern with section 132(1) was that a review can only take place if one or more of the circumstances specified in section 128 applies.

It was Ms Shaw's submission that section 221(3) and (3A) provides the specific power to undertake this review and that there is no need to find any requirement for an originating power under section 128.

I note that section 128(1) provides a discretion in that a consent authority may in accordance with section 129 serve notice on a consent holder of its intention to undertake a review of conditions. Section 128 (2) requires that notice must be served if required by an order made under section 339(5)(b) of the Act.

In terms of this review process the Council has correctly followed the provisions of sections 129 and 130 and Mr Morgan was informed of the reasons for the review and he ultimately ended up presenting submissions and evidence at the hearing. The circumstances under section 128 are not relevant limitations with respect to a section 221(3) and (3A) review and Ms Shaw's submissions have been accepted in this regard.

b What changes, if any should be made to the conditions of the consent notice?

Before considering the changes that should be made to the conditions of the consent notice it is relevant to note that the conditions under review need to be read in conjunction with the other existing conditions which are to remain unchanged. Condition 1 requires that all built development on Lot 2 is setback at least 15

metres from the road frontage and condition 2 restricts building coverage on Lot 1 to 171m² and on Lot 2 to 329m². The effect of condition 2 is that the combined building coverage on both lots is limited to 500m², being the maximum permitted on any single lot within the Countryside Environment.

The amendments sought by the Council

Condition 3 at present requires that a landscape mitigation plan be prepared and it is to be submitted to the Council at the *"time of seeking building consents."* In seeking to vary this condition the Council sought the wording to be amended to read *"at the time of seeking building consent for a dwelling on Lot 2."*

Condition 3 (b) currently identifies the purpose of the planting as being *"Providing screening of the future building development within Lot 1 from views along Whau Valley Road to the north and south."* The Council sought that the Lot 1 reference be replaced with reference to Lot 2.

Condition 5 currently requires the approved landscape mitigation plan to be implemented within *"the first planting season."* The Council sought that the planting season reference be deleted and new wording be provide to require implementation within *"12 months following substantial completion of the dwelling (defined as being completion of enclosure of the dwelling) ..."*

The Council had amended its position by the end of the hearing, largely in response to Mr Morgan's least preferred option which was that conditions should be to restrict the building form. The Council's final position as set out previously was to delete the original conditions 3, 4 and 5 and replace them with three new conditions. The new conditions relate to the maximum height of <u>any</u> new buildings, the colour of exterior walls and roofing and thirdly a landscaping plan.

Changing circumstances since the original consent to create Lots 1 and 2.

Firstly, the original conditions were based upon the covenanting of the native vegetation on the land, which was subsequently removed.

Secondly, a section 127 consent was granted in 2009 that varied the consent conditions. It was acknowledged by the Council that the wording of the 2009 conditions was ambiguous and need to be clarified.

Thirdly, a new building has now been constructed on Lot 2, near the road frontage of Mr Morgan's land. I note from Mr Cocker's landscape assessment at the time of the section 127 application that Mr Cocker appeared to be primarily concerned about the construction of a building on Lot 2 *"...in close proximity to the road corridor..."* Ms Shaw identified the most relevant portion of Mr Cocker's assessment at paragraph 2.3 of her Reply and I repeat that paragraph in full below.

"2.3 *In the present case the information which assists to determine the intention and meaning of the words in the consent conditions is found in the report and decision on the section 127 application. The report includes a detailed discussion of Mr Cocker's landscape assessment of the application and the concerns sought to be addressed by the proposed conditions. The most relevant portion (para 5, bottom of page 3 of the report) states:*

> *"The removal of this vegetation has detracted from the rural character of the local landscape character to some degree, and reduces the ability of the remaining vegetation to assist with the integration of development. Having said this, Simon believes that the subject site and its context can accommodate the additional proposed dwelling, given the existing character of the 'cluster'. Simon believes, however, that the construction of a building in close proximity to the road corridor has the potential to further erode the remaining rural character of the area and will thus result in cumulative effects.*

... with respect to further built development in this area Simon recommends an approach that would seek to avoid the further suburbanisation of the environment, recognising that the rural character of the landscape within the clusters has been compromised to some degree. As such Simon recommends that built development be set back from the road where possible. In addition, that some form of mitigation planting be considered to assist with the creation of separation between neighbouring buildings and / or softening of the built environment."

After reading the relevant Council file it is clear that the new building has been granted building consent on the basis that it is a shed. The building that I observed on my site visit appeared to be a 'rather substantial shed' consisting of ground and upper floor levels and a number of large windows on both levels. Mr Morgan has been advised by the Council that no landscape plan was required because the building was not a proposed dwelling.

By way of a letter dated 31 March 2014 Mr Cocker stated the following.

"The intent of my recommendation, as detailed in my transcribed comments above, was that future development within <u>Lot 2</u> (Lot 1 already containing a dwelling) should, in addition to a setback from the road frontage, incorporate mitigation planting on its northern, and possibly southern boundaries that would provide softening and separation between a future building within Lot two, and built development on neighbouring properties. I would envisage that any planting would include tree species that would attain a significant scale given time.

It was my intention that the condition should apply to any built development that required building consent since the potential for adverse effects generated by buildings or structures would be generally similar regardless of the use of the building."

The Council's position, as set out in the draft section 42A report was that the conditions relating to the preparation of a landscape plan should be triggered by the construction of a new dwelling on Lot 2. In the Reply Ms Shaw and Ms O'Connor on behalf the Council sought that the conditions be modified to apply to any buildings constructed on Lot 2.

The fact that building consent has been granted and a new building constructed on Lot 2 complicates matters. Mr Morgan has consent for a building on Lot 2, near the road frontage, in the position where Mr Cocker was most concerned about the visual impact of development. The Council has as part of the processing of the building consent for this building advised Mr Morgan that no landscape plan was required as part of that building consent. He has built his shed and no landscaping mitigation has been able to be imposed under the existing conditions of the consent notice. It would seem that in effect a permitted baseline has been established in relation to the visual impacts that Mr Cocker was primarily concerned with.

As discussed with the parties at the hearing I have taken the approach that I have the scope under this review only in relation to the three conditions the Council has asked to be reviewed, however the range of options before me extends from deletion of the conditions through to the full replacement of each condition with new conditions. Both Mr Morgan and Ms Shaw on behalf of the Council agreed that these options are available to me.

Findings on the options presented to vary the conditions.

In relation to Mr Morgan's request that the conditions remain unchanged, I do not accept this as a reasonable and appropriate outcome. The status quo does not deal with the differences that have arisen over the interpretation of the current conditions. The review process should in my opinion, at the very least, reduce and preferably remove, rather than continue the need for debate on what the conditions actually require to be undertaken, and when, in relation to the landscaping requirements. Both parties have taken the time to present their respective cases on the merits of the current conditions. While Mr Morgan states that the owners of Lot 1 are currently required to comply with the conditions, I accept that the reference to Lot 1 was in error, for the reasons set out on behalf of the Council. In addition Mr Morgan has signalled that if the

current wording remains then the option of a declaration or an enforcement order from the Environment Court could be pursued.

The purpose of this review is to resolve the ambiguity in the current wording and I have accepted the Council's submissions that changes do need to be made to the current conditions. In brief the current conditions do not provide clear and enforceable controls as envisaged by the 2009 section 127 decision.

Mr Morgan's first preference is therefore not supported.

With respect to his second preference, that the conditions be cancelled, there appears to be greater merit in considering this option, in conjunction with his third preference, particularly as the Council's final position in Ms Shaw's Reply was that the current conditions be replaced by a new set of conditions.

By the time the hearing was completed there was also a degree of agreement that controls on the built form of development are appropriate. Mr Morgan in his third preference suggested a condition to limit the height of any building. In his earlier written evidence he identified what he described as *"...other more cost-effective and practicable mitigation measures."* In addition to the height restriction he identified a further reduction in building coverage, reducing the colour options for buildings, and in relation to landscaping, suggested wording based on Rule 38.4.8 which applies to commercial buildings in the Countryside Environment. Mr Morgan suggested that land within 6 metres of the road boundary, other than parking and access, could be planted in pasture, trees or shrubs, with the planting to be completed within 18 months of the occupation of the building.

As stated early, Ms Shaw in her Reply sought conditions limiting the height of buildings and the colour of the exterior walls and roofing. Ms Shaw's third condition in relation to landscape planting remains as what I have considered to be the main outstanding issue for me to determine.

Before going further it is relevant to state that my site visit was of particular significance in putting all of the evidence in context. Although zoned Countryside Environment and the relevant subdivision standards providing for 20 hectare sites as a controlled activity and 4 hectare sites as a discretionary activity, the land in the vicinity of Mr Morgan's property has been subdivided with many sites between 0.2 hectares and 2 hectares in size. The size of the two lots created by Mr Morgan's subdivision was never an issue at previous hearings because the proposal resulted in similar sized lots to those existing and that the locality was a changing environment. Presumably from larger lots to smaller lots. The Environment Court commented in paragraph [91] of its decision A021/2007 that, *"We are left seriously wondering about the integrity of the zoning in the locality, but that is a plan review or change matter."*

The site visit revealed the visual impact of the new shed that Mr Morgan has constructed particularly in relation to its location on the flatter portion of the site near the road frontage. Mr Morgan stated that his proposed residential dwelling would be located to the rear of the shed, on the steeper land that rises towards the rear boundary of the property. The site visit also enabled me to see the nature of the surrounding environment. While buildings are dominant features, as I had expected from Mr Cocker's landscape assessments, I had not fully appreciated the extent of vegetation, particularly mature vegetation on the immediately surrounding properties in proximity to where Mr Morgan plans to construct his new dwelling.

With Mr Cocker's primary concerns identified as being in relation to the building site now occupied by Mr Morgan's new shed, Ms Shaw's Reply condition relating to landscaping has its stated purpose to *"provide for landscape planting designed to minimise the visual dominance of buildings on Lot 2 and to integrate buildings on Lot 2 into the surrounding landscape."* Her submissions in paragraph 3.5 of her Reply state that; *"In formulating these proposed conditions Counsel and Ms O'Connor have referred back to Mr Cocker's statements in the section 127 report, and in particular his concerns about integration of development and softening of the built environment in the rural landscape (concerns about cumulative effects of suburbanisation and eroding character)."*

Having closely read Mr Cocker's 2009 assessment and his 2014 updated assessment. I have placed considerable weight on his March 2014 comments because his latest assessment specifically identifies the intent of his recommendations, as I have set out earlier in this decision. He was very clear that he intended for mitigation planting on the northern site boundary and possibly the southern boundary. The northern boundary, from my understanding of the site, is the boundary between Lot 2 and Lot 1 and the southern boundary is the boundary between Lot 2 and the access way that serves the rear lot at 288 Whau Valley Road. The nearest dwelling to the south is at 290 Whau Valley Road. The 15 metre setback of any new

building from the road frontage was the primary mitigation measure in relation to Whau Valley Road and a screen of planting along the road frontage was discouraged by Mr Cocker.

Taking all of these matters into account, including the design and location of the new shed and the fact no mitigation planting was required in relation to that building, I have some difficulty with respect to the need for any landscape planting in relation to a new building behind the new shed, the location proposed by Mr Morgan.

From my site visit I would expect that any new building would need to be physically located behind the new shed as Mr Morgan has limited options in that regard. Depending on any geotechnical constraints due to the topography which rises steeply to the rear boundary, the only question is how far up the slope a new building could be sited. Given the existing slope of the land, which will provide a grassed and or vegetated back drop if the current mature trees are retained along the site boundaries on neighbouring properties, the only opportunity to minimise the visual dominance of buildings on Lot 2 would essentially be limited to new planting in front of any new building. To be effective this planting would need to be reasonably substantial in height given the topography. In the context of the established surrounding built environment, I agree with Mr Morgan that there is a question if the original need for the proposed landscaping remains.

In the context of a comprehensive package of conditions that manage the development of buildings on, in particular Lot 2 and in conjunction with the conditions on Lot 1, when compared to the planning restrictions on surrounding sites, that appear to be the standard development controls of the zone, I find that most of Mr Cocker's concerns have been reasonably well satisfied. Of course he envisaged that a new residential building would be constructed where the new shed has been built, and the Council specifically issued a building consent for the shed, without the need for the landscaping measures contemplated by Mr Cocker. Overall I find that conditions that include the 15 metre setback, the limitation on building coverage, a new maximum building height (as agreed by the parties) and a restriction on the colour of the exterior walls and roofing (as sought by the Council and identified as an option by Mr Morgan) are reasonable in the circumstances that now exist on Lot 2.

With respect to the Council's concern expressed by Ms Shaw as including *"the cumulative effects of suburbanisation and eroding rural character"* I have concluded that any buildings that may be constructed on Lot 2 in the future (while meeting the consent notice conditions as amended by this decision), will contribute only in a minor way to the effects of suburbanisation and the erosion of rural character in this locality.

At the time of subdivision a key issue for the Council was the retention of the existing vegetation towards the rear of the land, however this was not protected by the District Plan rules and was removed prior to the subdivision gaining consent by way of a decision of the Environment Court. The 2009 consent to vary the consent conditions resulted in a package of conditions, including landscaping requirements based on the landscape assessment of Mr Cocker, primarily concerned with the visual impact of a new building on Lot 2 near the road frontage. Given the construction of the new shed in this location, without any landscaping being required, the primary effects of concern that had been identified by Mr Cocker, cannot no longer be avoided, remedied or mitigated, in terms of the consent notice conditions, either in their existing form, or in the revised wording being sought by the Council.

Overall therefore I have determined that the existing consent notice conditions 3, 4 and 5 be deleted. New conditions 3 and 4 are imposed using the wording of the first two conditions sought in Ms Shaw's Reply, that relate to maximum building height and the colour of the exterior walls and roofing of any new buildings on Lot 2.

7 Relevant statutory provisions

7.1 Plan provisions and other matters considered relevant

In considering this application, the Commissioner has had regard to the matters outlined in Section 104 of the Act. In particular, the Commissioner has had regard to the relevant provisions of the Operative Whangarei District Plan and the relevant sections of the Act that are applicable to a review of consent notice conditions in terms of sections 221(3) and (3A).

7.2 Part 2 matters

In considering this application, I have taken into account the overall the purpose of the Act as presented in Section 5 which is to promote the sustainable management of natural and physical resources while avoiding, remedying or mitigating any adverse effects of activities on the environment.

In this case two new lots have been created and these two lots are consistent in size with the pattern of subdivision and development that has emerged in the surrounding environment. In the circumstances that exist in the immediate locality, given the existing consented development on Lot 2, the topography of Lot 2 and the options available for the location of a new residential building, the topography of the surrounding land, the extent of mature vegetation within the surrounding environment, the established pattern of subdivision and built development in close proximity to Lot 2 and the wider environment, the amended consent notice conditions will sustainably manage both the natural and the physical resources while avoiding any more than a minor impact on the amenity values and the quality of the surrounding environment. In terms of Section 7 any future development will maintain and enhance the established amenity values and the quality of the environment currently enjoyed along this portion of Whau Valley Road.

8 Decision

A: That pursuant to Sections 95A- 95F of the Act, this application has been determined on a non-notified basis because:

1 The review of the condition specified in the consent notice relating to landscaping will not create any additional adverse effects beyond those considered when the original subdivision and conditions were granted.

2 No persons have been determined to be adversely affected by the proposal.

3 There are no special circumstances to warrant public notification.

B: That pursuant to Sections 221(3)(b) and 132, clauses 3, 4, and 5 of the consent notice registered against Lot 2 DP 424725 be deleted.

C: That pursuant to Sections 221(3)(b) and 132 new clauses 3 and 4 of the consent notice registered against Lot 2 DP 424725 be added.

3. Any buildings constructed on **Lot 2** shall not exceed a maximum height of 8 metres.

4. Any buildings constructed on **Lot 2** shall have exterior walls and roofing (excluding joinery) that is coloured or painted in a recessive colour having a reflective value of 30% or lower. Full details of the proposed colour scheme shall be submitted with the building consent application for approval by Council's Team Leader Compliance. The building is to be completed in the approved colour scheme prior to occupation, and that colour scheme is to be maintained for the life of the building, unless further consent is obtained in writing from Council.

9 Reasons for the decision

(a) The consent notice conditions as currently worded are ambiguous and I have accepted the Council's submissions that changes do need to be made to the current conditions.

(b) The deletion of conditions 3, 4 and 5 and the imposition of the new conditions 3 and 4, in conjunction with the existing conditions 1 and 2, will appropriately avoid, remedy or mitigate any adverse effects associated with any new buildings being constructed on Lot 2 DP 424725.

(c) In the circumstances that exist in the immediate locality, given the existing consented development on Lot 2, the topography of Lot 2 and the options available for the location of a new residential building, the topography of the surrounding land, the extent of mature vegetation within the surrounding environment, the established pattern of subdivision and built development in close

proximity to Lot 2 and the wider environment, the amended consent notice conditions will sustainably manage both the natural and the physical resources while avoiding any more than a minor impact on the amenity values and the quality of the surrounding environment.

(d) In terms of Section 7 of Part 2 any future development will maintain and enhance the established amenity values and the quality of the environment currently enjoyed along this portion of Whau Valley Road.

Issued this 6th day of June 2014

Hearings Commissioner