

**Report and decision of Hearings Commissioner Richard Knott  
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 application on behalf  
of Council. The application was heard in the May Bain room,  
Whangarei Library on Thursday 8 February 2018.**

The Hearings Commissioner (Richard Knott) heard the resource consent application lodged by Jerome Luiten relating to 561 State Highway 1, RD 1 Kauri 0185. The application, made in accordance with the Resource Management Act 1991 ('the Act') was lodged with Whangarei District Council and referenced as SD1500115 (P123852)

<b>Present</b>	<b>Hearings Commissioner</b> Mr Richard Knott
<b>Applicant</b>	Mr Jerome Luiten Mr Jason Hewson – Hewson Planning
<b>Consent Authority</b>	<b>Whangarei District Council</b> Mr Ian McAlley – Reporting Planner Mr Vlad Rozov – Senior Development Engineer
<b>Submitters</b>	Mr Dean Chrystal – Fonterra Mr Mike Doesburg – Fonterra Mr Rowan Hartigan – Fonterra Mr Adrian Pyne - Fonterra
<b>In attendance</b>	Ms Natalie Dey - Whangarei District Council

## **1.0 Description of the proposal activity**

Jerome Luiten has applied to subdivide an existing 3.21 ha property located at 561 State Highway 1, RD1 Kauri (being Lot 2 DP 419817) into three lots being: Lot 1 (1.76 ha); Lot 2 (0.87 ha (0.69 ha net site area)); and Lot 3 (0.61 ha).

Mr Luiten currently lives on the property and operates his landscaping business from it. He confirmed at the hearing that it would be his intention to stay living on the land and to still operate his business from there (all from Lot 1). It was made clear by Mr Luiten at the hearing that the intention would be to construct a new house on each of the two additional Lots; one for each of his children.

The site fronts the western side of State Highway 1 immediately opposite the Fonterra Kauri Dairy Factory. The site is accessed via a shared crossing direct to SH1; this is used by three other properties, including one additional business use (Piano Hill Vets Ltd).

Access to the site would remain broadly as existing, although the crossing from State Highway 1 (SH1) would be upgraded to meet the requirements of the NZTA and an area immediately inside the front boundary of the site would be the subject of a covenant to ensure that it was planted and remains as highway mitigation screen planting (as shown on the subdivision plan submitted with the application).

## 2.0 Reasons for the Application -

### 2.1 Operative District Plan

The proposed activity does not comply with the following rules of the Operative Whangarei District Plan:

- Rule 73.3.1 Allotment Area provides for subdivision to be considered as a discretionary activity where the minimum average net site area of all proposed allotments is 4.0ha (for calculating average net site area, any proposed allotment with a net site area greater than 8.0ha will be deemed to have a net site area of 8.0ha). The average net site area of the lots proposed by this subdivision is 1.02 ha, being less than the 4-ha average net site area standard provided for as a discretionary activity. The proposal is therefore assessed to be a Non-Complying Activity.
- The proposal meets the relevant requirements for controlled activities under the additional relevant subdivision rules of the Countryside Environment.

Overall, under the Operative District Plan, the application is for a Non-Complying Activity.

### 2.2 'Rural Area Plan Changes'

On the 18th January 2018 the Council released decisions on the 'Rural Area Plan Changes':

- Plan Change 85 – Rural Area
- Plan Change 85A – Rural Countryside Environment
- Plan Change 85B – Strategic Rural Industries Environment.

In considering the proposed subdivision regard must be given to the objectives and policies of the Decisions Versions of the Plan Changes.

- Rule RCE.3.1.

Overall, under the 'Rural Area Plan Changes', the proposed subdivision does not require consent as a controlled or a discretionary activity and therefore is a non-complying activity in accordance with the Eligibility Rule RCE.3.1.

### 2.3 Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011

The Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NES) were gazetted on 13th October 2011 and took effect on 1st January 2012. WDC is required by law to implement this NES in accordance with the Resource Management Act 1991 (RMA). The standards are applicable if the land in question is, or has been, or is more likely than not to have been used for a hazardous activity or industry and the [RESCONS-1292122872-3995](https://www.nzta.govt.nz/roadworks/whangarei-1292122872-3995)

applicant proposes to subdivide or change the use of the land, or disturb the soil, or remove or replace a fuel storage system.

The WDC GIS system identifies the site as being a HAIL (Hazardous Activities and Industries List) Site. Specifically, the WDC HAIL Checklist provided by the applicant as Appendix 1 to the application specifically lists that “persistent pesticide bulk storage or use including sport turfs, market gardens, orchards, glasshouses or spray sheds” has occurred on the site. A preliminary site investigation report (PSI) included as Attachment 6 to the application concludes at (section 1.3):

- i. the site has not been contaminated from previous activity;
- ii. no further testing is required;
- iii. the report should satisfy the requirements of subdividing land or changing use; and
- iv. this activity should therefore be regarded as a permitted activity.

The Council’s consultants, Golder Associates, believe that the information provided is not sufficient to determine if the proposal achieves the permitted activity standard Regulation 8(4)(b) of the NES.

In addition:

- Golder have concluded the report does not meet the requirements of a PSI.
- The applicant has not applied for consent to undertake soil disturbance (required for subdivision works such as right-of-way construction) and as such the applicant should also consider the requirements of Regulation 8(3) of the NES.
- As there is no Detailed Site Investigation (DSI) the activity does not meet the requirements of Regulation 9(1)a (Controlled), or 10(2)a (Restricted Discretionary) of the NES.
- The applicant therefore needs to demonstrate compliance with the conditions of Regulation 8(3) of the NES or apply for a discretionary activity approval under Regulation 11.

Overall, under the ‘Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 the application is for a Discretionary Activity.

Taken as a whole, the application will be considered as a **Non-Complying Activity**.

### 3.0 Notification and submissions received

The application was notified under Section 95 of the Act. Three submissions were received:

**VJ St John**, 385 Whangarei Heads Road.

- Supports the proposal and asked that Consent be Granted.
- Refusal to allow small properties to be subdivided for the sake of preserving rural production and protecting the character of an area is misguided and causing hardship to property owners.
- Small properties are no longer viable as commercial farms when competing with properties significantly larger, particularly if there are labour costs involved.
- Unproductive rural land does not make enough money to cover costs.

- The areas character is changing, the town is coming to meet small properties.
- The site is opposite a factory; if a factory can be allowed to blot the landscape, it seems unlikely a few houses will make it less appealing.
- To not be able to subdivide devalues these properties (uneconomic farming units) unfairly.
- Making small farms impossible to subdivide is not preserving rural production.
- Subdivision is one way that owners can realise some of their capital investment and it seems reasonable they should be able to do so, particularly where subdivision is increasingly in keeping with the neighbourhood.
- Consent should be granted and similar claims should not be subject to this process.

#### **New Zealand Fire Service**

- Seeks that if consent is granted that conditions be attached to the consent ensuring that sufficient access and water supply for firefighting purposes is provided for each new lot.

#### **Fonterra Limited**

- Opposes the proposal and asks that consent be declined.
- The proposal will have significant actual and potential adverse effects on the environment that cannot be avoided, remedied or mitigated.
- Is contrary to the provisions of the Whangarei District Plan and the notified plan changes to the Whangarei District Plan (plan changes 85-85D, 86A and 86B).
- Will not promote the sustainable management of resources, will not meet the reasonably foreseeable needs of future generations, particularly in respect of protecting existing activities from reverse sensitivity effects, will not enable social, economic and cultural wellbeing, does not represent efficient use and development of natural and physical resources, does not achieve the purpose and principles of the RMA and is contrary to Part 2 and other provisions of the RMA.
- Specific concerns are: reverse sensitivity effects on the Kauri site, including creating the potential for new sensitive receivers within the Kauri site's proposed noise control boundary, adverse traffic effects and adverse effects on the rural character of the surrounding environment.

## **4.0 Procedural matters**

### **4.1 Site Visits**

I visited the local area on the 7<sup>th</sup> February, prior to the Hearing. This included viewing the site from SH1, taking in the character and uses on the approaches from both the south and north, the relationship of the site to the urban fringe of Kamo/Whangarei to the south and Hikurangi to the north. I also drove Jordan Valley Road/Apotu Road, and Saleyards Road to gain further insights into the character of the area and to view the subdivisions along these.

I undertook a further site visit at 1pm on the 8<sup>th</sup> February 2018. This included a walkover of the site and I also viewed the application site from close to the gateway of the Fonterra Kauri site. The opportunity was also taken to again view the local area from SH1.

## 4.2 Adjournment

The Hearing was adjourned at 12.15pm on the 8<sup>th</sup> February to allow Mr Hewson to provide a copy the no-complaints covenant for Marsden Cove Ltd / Marsden Oil Refinery which had been discussed at the Hearing. This was circulated to parties by email later that day. A deadline was set of 5pm on the 15<sup>th</sup> February for the Council for submitters to provide comment on this. Fonterra provided comments on the 15<sup>th</sup> February and the Hearing was closed on the 16<sup>th</sup> February 2018, there being no questions arising from the comments received from Fonterra.

## 5.0 Evidence heard

Evidence was heard from the applicant, expert witnesses, submitters, and the Council's reporting officer. The following is a summary of the evidence heard at the hearing.

### 5.1 Applicant's evidence

The applicant was represented by Mr Hewson. As his evidence had been pre-circulated, Mr Hewson highlighted key points.

He outlined that the existing environment along SH1 contains a mix of industrial, commercial, horticultural, rural and rural residential living uses, which together with the State Highway gave the area an industrious character, despite there being some open pastoral areas within wider views.

The area is viewed primarily from SH1, at speed, such that an appreciation of the area encompasses the activity leading into the area. Visual character is as a result largely industrial/commercial with the horticultural activities playing a secondary visual role in terms of shelterbelt planting. Whilst there is a high intensity of rural residential living, this is not so visually evident from SH1 due to the integration of homes into bush and shelterbelts. He confirmed, in answer to a question, that he considered it appropriate to consider a reasonable distance of the State Highway Corridor when considering the character of the area.

He further confirmed that the 'average' lot size in the area was not of particular relevance and that there are a wide range of allotment sizes in the area, including many smaller than those proposed. This matter was explored further in response to questions, and he confirmed that Dalkeith Drive (off Apotu Road) and Richards Road (north of the site off State Highway 1) both exhibited similar lot sizes to those proposed, and whilst not visually connected to the site did represent a reasonable precedent.

There are already large shelterbelts in the area, and these would be a viable form of mitigation for the proposed lots.

In relation to Reverse Sensitivity effects, he noted that the 'Rural Plan Changes' now mean that it would not be possible to decommission the existing dwelling on the land and construct a single new dwelling close to the SH1 frontage of the site as had previously been possible. He therefore asked for the relevant paragraph of his evidence to be deleted.

Mr Hewson reiterated that he did not expect the proposed subdivision to introduce undue pressures in terms of reverse sensitivity. He confirmed that he remains of the view that the application proposes very little change to the environment relative to the existing mix of uses, and that SH1 already provides a significant low amenity buffer between the application site and the Business 4 zoned dairy factory. He indicated that any party looking to purchase one of the Lots in the future would be well aware of the location of the Fonterra Factory and additionally a consent notice could be placed on the titles of the proposed allotments, inhibiting the ability of lot owners to object to permitted or legally established activities on neighbouring sites containing lower amenity activities (including the Dairy Factory). In response to a question Mr Hewson indicated that a similar consent order approach had been used at Marsden oil refinery. He later provided a copy of the relevant consent order and this was circulated to parties for comment.

In relation to this, the applicant, Mr Luiten, pointed out that he has been living on the site, opposite Fonterra, for 25 years and that he has worked with them to resolve any issues and has a strong relationship with them. He experiences greater noise disturbance from SH1 than he experiences from the Dairy Factory.

Regarding precedent, he suggested that the proposal would not result in a density which is inconsistent with the area, and would consolidate an existing development pattern. Further he indicated that the site was unusual in regard to its proximity to commercial/industrial activity, a heavy transport route and existing intensive rural residential development. As a result of this combination of factors, the application would not set a precedent.

He also drew attention to the positive effects of the development; namely applying the no-complaint covenant to the existing dwelling as well as the new lots, and the upgrade of the vehicular entrance from SH1 for the benefit of all users (i.e. those also accessing existing lots). In response to a question, he agreed that these positive effects were not a matter which could be taken account of in consideration of the Gateway Test.

In response to questions, he recognised that the site was a HAIL site under the NES and put forward that whilst there was some disagreement between experts, it was acceptable to make this a matter of a condition if consent was granted. He indicated that this approach had been taken on other sites and was an approach agreed by the Council.

Later, in closing, Mr Hewson pointed out that all of the assessments against the objectives and policies tended to refer to how the Plan 'sees the environment' rather than to the existing environment. The area is predominantly rural residential, and its values have already been compromised. PC85 seeks to consolidate development where areas have already been compromised. On the basis of the existing environment, the proposed development would not compromise the values of the area beyond the existing situation. He reiterated that, for this assessment, he believed that the existing environment, as experienced, should be considered without consideration of zoning.

Mr Hewson also confirmed that there is a clear precedent in the area to allow the proposed subdivision. The site is sandwiched between SH1, The Fonterra Dairy Factory and subdivided land. To allow the development will only be consolidating an existing pattern, rather than changing expectations for the more rural areas.

In relation to reverse sensitivity, he believes that the suggested no complaints notice would lessen the possibility of complaints, and that it is reasonable to still allow owners to submit if Fonterra were to apply for new consents. In addition, SH1 provides a significant buffer.

PC85 requires consent for dwellings and it is likely that acoustic mitigation would be required as part of this process. Overall, the effects will not go away but complaints will be lessened.

He further emphasised the positive benefits of the development, as set out above, as mitigation to offset the adverse effects for the two new allotments.

## 5.2 Submitters' evidence

Mr Doesburg presented legal submissions on behalf of Fonterra. Fonterra support the findings of the Council's S42A report and the supplementary S42A report and agree that the proposal fails both S104D Gateway Tests, and even if assessed under S104 it should be declined.

He focused on the fact that the subdivision would create two additional rural residential allotments within close proximity to Fonterra's rural industrial activities, within their sites Noise Control Boundary and that there would as a result be potential significant reverse sensitivity effects. Fonterra consider that potential future complaints could impact on their operations.

He indicated that the application was clearly contrary to the District Plan and to the 'Rural Area Plan Changes'. He noted that the Plan contains a number of objectives and policies which seek to ensure that activities do not result in reverse sensitivity effects on existing land uses and that the application is inconsistent with these. The notification of the decisions on the 'Rural Area Plan Changes' on the 18<sup>th</sup> January 2018 means that these now have legal effect and provide even stronger protection against reverse sensitivity than the Operative District Plan. As there is general consistency between the Operative Plan and the Rural Area Plan Changes, there is little need to consider what weight should be given to each plan.

Under the 'Rural Area Plan Changes', the Fonterra Kauri site is zoned Strategic Rural Industry Environment and there are a range of objectives, policies and rules which seek to protect the site from reverse sensitivity effects; in particular Objective 4 of the SRIE Zone and Policy 3 of the Rural Countryside Environment zone.

In relation to the consent notices proposed by Mr Hewson, he confirmed that he does not believe that this is an appropriate mechanism; the Environment Court has held that no complaints covenants do not avoid, remedy or mitigate the reverse sensitivity effects as nothing becomes quieter, less smelly as a result of the covenant. The suggested covenant does not provide assurance that future owners of the proposed

lots will not complain, oppose or submit against future consents at the Fonterra site as it only relates to permitted or legally establish activities at the Kauri site.

In summary, Mr Doesburg confirmed that Fonterra believe that the application will have more than minor reserve sensitivity effect on Fonterra's operations at the Kauri site and would be inconsistent with the provisions of the relevant plans and fails to meet he S104D gateway tests.

He also provided submissions on rural amenity and character, noting that the applicant has not called any expert visual, landscape or urban design evidence. He confirmed that the District Plan included a number of key objectives and policies to safeguard the high rural amenity values, and that these have been reconfirmed in the 'Rural Area Plan Changes'. He also confirmed that the fact that other subdivisions have taken place does not warrant the grant of consent in this case, and that some of these such as Dalkeith Drive (referred to by Mr Hewson) had been rezoned to Rural Urban Expansion Environment or Rural Living Environment in the 'Rural Area Plan Changes', in recognition of their current character. He believes that this is a further signal that other areas (including the application site) should be maintained and protected. He submitted that the application was contrary to the objectives and policies of the District Plan and Rural Area Plan Changes.

Mr Doesburg indicated that granting the consent could create a precedent for similar future subdivisions, in the same way that Mr Hewson is currently suggesting that the application should be granted as other similar applications have been approved nearby in the past, and that future owners may seek to further subdivide by way of plan changes and reviews seeking rezoning. The potential precedent and impact on the integrity of the Plan provides a further rationale for declining the application.

He concluded that the subdivision would have more than minor adverse effects in term of rural character and reverse sensitivity, is contrary to the objectives and policies of the Operative Plan and recently approved 'Rural Area Plan Changes', and that if it were deemed to meet the Gateway Tests it should still be declined under S104(1).

Mr Hartigan provided corporate evidence on behalf of Fonterra. He outlined the operations carried out at the site and that the site employs 380 people. He confirmed that Fonterra's primary concern was reverse sensitivity issues, and the potential limitations on their existing operations and future expansion. He provided information within his written evidence and in response to questions regarding complaints received at other Fonterra sites. He was particularly concerned that the proposed two new Lots would be within the Fonterra site's noise control boundary and could be subject to greater levels of noise than expected at or beyond the Noise Control Boundary. The two proposed sites would be the closest residential lots to the Fonterra site. He requested that the application be declined.

Mr Crystal provided planning evidence for Fonterra. He has experience of a number of Fonterra site development projects. He confirmed that he considers that the proposal has the potential to create reverse sensitivity effects on Frontera's plant, and is contrary to a range of objectives and policies which warrant the application being declined in relation to the S104D threshold test. In addition, he considers that the proposal has the real potential to establish a precedent, and impact upon the integrity of the

planning documents. He set out that the act of subdivision itself has few actual effects, but the subdivision would come with the expectation that a house would be built on each Lot. It is these outcomes which represent a potential effect in terms of S104(1)(a). This includes reverse sensitivity effects, which the Operative Plan seeks to control through density controls. In addition, the 'Rural Area Plan Change' brings forward a 500m setback for sensitive activities and a Noise Control Boundary. In the case of the latter sensitive activities (such as the dwellings which would result from the subdivision) are allowed providing they meet internal acoustic standards. Occupiers of any new dwellings would have expectations regarding their environment and this can result in complaints. Mr Hewson's suggested consent notice is noted but would not actually address the effects.

The proposal is contrary to a number of provisions of the Operative Plan, and otherwise inconsistent with others. The Rural Area Plan Changes are more directive than the Operative Plan and have taken a strong stance against subdivision as proposed and the proposal is contrary to their intent.

Mr Crystal confirmed that precedent is a matter which can be taken into account under S104(1)(c). He considers the proposal is not sufficiently unique or unusual so as to adequately distinguish it from other rural subdivision proposals such that granting the consent would not create a precedent and not undermine the integrity of the Plan.

Mr Doesburg provided written feedback on the circulated non-complaints covenant by way of his memorandum dated 15<sup>th</sup> February 2018. This was circulated to all parties for comment. He confirmed that Fonterra's position remains that the consent notice offered by Mr Hewson on behalf of the Applicant, even if amended to the form of the Example Covenant, would not avoid reverse sensitivity effects on the Fonterra site, nor would it ensure that the proposed subdivision is not contrary to the relevant planning documents.

In detail he pointed out that no evidence had been provided regarding the effectiveness of the circulated example covenant, Fonterra remain of the view that covenants alone do not avoid, remedy or mitigate effects and are not a panacea for reverse sensitivity issues. Additionally, he considers the circumstances of the Marsden Cove site and the application site to be very different and the Example Covenant is therefore not a useful comparison.

The effectiveness of the covenant or consent notice is restricted by enforceability. There would be significant costs for Fonterra in either case and practically the only benefit is to deter complaints rather than guaranteeing they will not occur.

The proposed development would remain inconsistent with the objectives and policies. Both the Operative District Plan and 'Rural Area Plan Changes' expressly direct that reverse sensitivity effects are to be avoided in the vicinity of industrial activities like those at the Kauri Site. As such, despite any proposed consent notice or restrictive covenant, the establishment of two new rural residential lots would still be inconsistent with the objectives and policies of the District Plan and the Rural Plan Changes. The Council's section 42A report agrees with this view.

### 5.3 Council's reporting officer's report and evidence

[RESCONS-1292122872-3995](#)

8 February 2018

## **Actual and Potential Effects on the Environment**

In the S42A report Mr McAlley considered the Actual and Potential Effects on the Environment, and specifically found that:

### *Permitted Baseline*

The proposed lot sizes are too far from the subdivision standards that apply in the Countryside Environment for any form of permitted baseline assessment to be of assistance.

### *Amenity Values*

The District Plan requires an assessment of amenity effects both in the context of the immediate/adjacent development and in the wider context. Subject to the shelterbelt screen planting staying in place, the proposal is not likely to have adverse effects on the amenity values of the immediate visual environment but will have adverse effects on the wider context most particularly in relation to the development pattern promoted in the Countryside Environment by the Operative District Plan, being incongruent with the wider context and surroundings, not in keeping with the expected outcomes in the Countryside Environment, increased density, fragmenting the area which is on average significantly below the controlled activity and discretionary activity standards.

### *Cultural Values*

Has not effects.

### *Contamination Effects*

The Council's consultants consider that the preliminary site investigation submitted with the application is not prepared to a sufficient standard, and it is therefore not possible to assess the potential contamination effects of the proposal. He noted that he expected this matter would be addressed by the applicant in their evidence to the Hearing

### *Infrastructure and Servicing;*

Any potential effects from infrastructure and servicing are less than minor.

### *Traffic Effects;*

The applicant has received approval from the NZTA subject to the upgrade of the site entrance and it has been confirmed that this can be successfully undertaken. The Senior Environmental Engineering Office (SEEO) has concluded that the potential traffic effects will be less than minor.

### *Reverse Sensitivity;*

The proposed subdivision would enable construction of dwellings on proposed Lots 2 and 3. There is therefore the potential that the current operations at the Fonterra Dairy Factory could be constrained in terms of noise emissions. The applicants statement that the proposal is not '*anticipated to introduce undue pressures in terms of reverse sensitivity*' is not substantiated.

### *Cumulative Effects;*

Granting this application would decrease the average lot size, and increase the density, in the Countryside zoned land in the locality, leading to continued and permanent change in the local

environment which is incongruent with the planning framework. The cumulative effects will be more than minor.

Overall, the adverse effects of the proposal on the environment will be more than minor.

### **Relevant Policy Statements, Plans or Proposed Plans**

The S42A report considered the objectives and policies of the Operative Regional Policy Statement for Northland, the Regional Soil and Water Plan for Northland and the Operative Whangarei District Plan, and the supplementary report considered the 'Rural Area Plan Changes', with the following findings:

S42A Report:

#### *Regional Policy Statement:*

The proposal is contrary to Policies 5.1.1(c), (f) and (g) relating to the requirement for subdivisions, use and development to be located, designed and built in a planned and coordinated manner, which (for this site) recognises and addresses cumulative effects, does not reduce the potential for soil based primary production and maintain or enhance the sense of place and character of the surrounding environment.

#### *Regional Soil and Water Plan for Northland*

It is concluded that the proposal will be in accordance with the environmental outcomes sought by the Plan.

#### *Operative Whangarei District Plan*

The proposed subdivision is contrary with the overarching intent of many of the relevant objectives and policies, specifically:

- Objectives 5.3.1, 5.3.5 and Policies 5.4.5, 5.4.7 which seek to maintain the amenity of localities and avoid/prevent inappropriate subdivision throughout the District. Subdividing to an average lot size less than that existing in the environment will alter the character of the area which in turn will affect the amenity of the area.
- Objective 6.3.2 and Policies 6.4.2 and 6.4.18 which seek to consolidate development and avoid sprawling or sporadic subdivision and development. The proposed subdivision does not support these outcomes because the resultant lots will be small, will incrementally fragment the rural area and are located away from urban areas or rural settlements.
- Objectives 8.3.1, 8.3.2, 8.3.4, 8.3.7 and Policies 8.4.3, 8.4.4, 8.4.5, 8.4.7, 8.4.12 seek to ensure subdivision achieves the sustainable management of natural and physical resources by avoiding cumulative and reverse sensitivity effects via the appropriate design and location of subdivision. The proposed subdivision is a non-complying activity and it is proposing an outcome not anticipated in the Countryside Environment.

As such, he confirms that he considers that the second gateway test under section 104D(1)(b) is not met.

Supplementary S42A Report:

#### *Rural Area Plan Change*

Whilst the notified versions of the 'Rural Area Plan Changes' were considered in the S42A report, a supplementary report was provided by Mr McAlley which considers the Decision Versions of the 'Rural

Area Plan Changes'; PC85, Rural Area, PC85A Rural Countryside Environment and PC85B Strategic Rural Industries.

He confirms that overall, the proposal is contrary to the relevant objectives and policies of the Decision Versions of the 'Rural Area Plan Changes', specifically:

PC85 -Rural Area

- Objectives RA.1.2.2 and RA.1.2.3. The proposed subdivision does not enable rural production activities and is not for the purpose of the protection of significant ecological and/or biodiversity values
- Objective RA.1.2.4. Whilst the proposal will provide for rural residential/rural lifestyle activities the 'Rural Area Plan Changes' provide eight different rural environments designed to cater for different types of rural land use. The proposal is assessed to be a non-complying activity and there are other newly formed Environments which better cater for the type of subdivision proposed.
- Objectives RA.1.2.5. The proposal would create reverse sensitivity effects upon a strategic rural industry.
- Objective 1.2.6. The proposal would create an ad hoc residential subdivision which would not support the productive functions of rural land.
- Objective RA 1.2.9. The proposal could be considered in part to achieve this by consolidating rural living subdivision in an area where rural production activities have been compromised, but overall the proposal has the potential to create other adverse effects on the environment.
- Objective RA.1.2.10. The proposal would not be providing for rural residential development on the fringe of Whangarei City.
- Policy RA.1.3.1. The proposed lot sizes are not in keeping with the rural character and amenity values proposed to be established/maintained by the minimum lot size provisions of the Rural Countryside Environment.
- Policy RA.1.3.10. The proposal will not achieve the stated Expectations for the Rural Countryside Environment as the proposed subdivision lot sizes are significantly smaller than the minimum stated in the rules and does not appear to be for the purpose of enabling rural production activities.
- Policy RA.1.3.11. The no complaints covenant proposed in the Applicant's evidence would be ineffective in managing reverse sensitivity effects with a potential impact on the operation of the Kauri Dairy Factory (a Strategic Rural Industry) and would therefore not avoid potential conflicts between incompatible land uses.

PC 85A – Rural Countryside Environment

- Objectives RCE.1.2.1, 1.2.2 and 1.2.3. The proposal will not protect productive rural land resources for a diverse range of rural production activities, will not enable a wide range of rural production activities, nor provide for commercial and industrial activities that support rural production activities, is not proposed for recreational or tourist based activities to establish and

operate to contribute to the District's economy, nor recognise, maintain and where appropriate protect the rural character and amenity of the Rural Countryside Environment.

- Objective RCE.1.2.4. The proposal would be ad hoc subdivision in the Rural Countryside Environment.
- Objective RCE.1.2.5. The proposal will not minimise fragmentation of rural land and does not promote allotment sizes that facilitate rural production activities.
- Policy RCE.1.3.3. The proposal does not avoid reverse sensitivity effects by preventing sensitive activities within close proximity to Strategic Rural Industries, notwithstanding the no complaints covenant proposed.
- Policy RCE.1.3.7. The subdivision does not create rural allotments of 20 ha or more.
- Policy RCE.1.3.8. The proposal is contrary because the proposed subdivision is primarily for the purpose of creating rural residential/rural lifestyle allotments.

PC 85B - Strategic Rural Industries Environment

- Objective SRIE.1.2.4. Notwithstanding the proposal to implement a no complaints covenant, the proposal will not maintain rural amenity and avoid reverse sensitivity effects in the vicinity of a Strategic Rural Industry.

## 6.0 Principal issues

Whilst there was some detailed discussion regarding other matters, including the assessment of the application under S104(1), the principal issue to in this case is whether the proposal meets the Statutory Gateway Test of Section 104D(1).

The matters under S104(1) only need to be considered if it is found that the proposal passes the 'Gateway Test'. These matters will therefore not be addressed unless that it is the case.

The Principal issues in that case are therefore, in summary:

- (a) Whether the adverse effects of the activity on the environment will be minor; or
- (b) Whether the application is for an activity that will not be contrary to the objectives and policies of (in this case) the relevant plans, including the decisions version of the 'Rural Plan Changes'.

## 7.0 Main findings of fact

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

### **(a) Whether the adverse effects of the activity on the environment will be minor**

Informed by my site visits, I concur with the evidence of Mr Hewson that the application site is seen within the context a mix of uses along SH1 when considered at speed along SH1. However, my site visits also

showed that when within the immediate vicinity of the site this is not the case, and a more limited range of uses (mainly rural residential and horticulture) are more dominant on the western side of SH1.

I also agree with Mr Hewson, from the evidence provided and from my site visit, that there are a wide range of lot sizes within the local area, some of which are of a not dissimilar size to those proposed by the application. In relation to this, Mr Hewson pointed towards the areas of Dalkeith Drive/Apotu Road and Richards Road (north of the site off State Highway 1) as areas which exhibited similar lot sizes to those proposed, and whilst not visually connected to the site did represent a reasonable precedent.

However, as highlighted in the S42A report, the 'Rural Area Plan Changes' have recognised these differences and provided new zonings across the local area. In particular the area around Apotu Road has been rezoned Rural Living and the Fonterra dairy factory and land to the south have been rezoned Strategic Rural Industries Environment, recognising their existing uses. It is significant to note that the site and land to the immediate south and north of the site (on the western side of SH1), including the residential uses along Richard Road have been retained as Rural Countryside Environment.

I understand from the descriptions given at the hearing that the Rural Countryside Environment zoning is effectively a continuation of the previous zoning. I agree with Mr McAlley that utilising this zoning over the land shows a clear intent by Council that this is not an area where further subdivision, of the scale applied for, is being encouraged. Additionally, I believe that this highlights that, notwithstanding Mr Hewson's description of the character of the surrounding area, we should limit our consideration of the 'context of the site' to that land which is similarly zoned and not be distracted by land which is in a different zone.

I accept the view of Mr Hewson that the integration of homes into bush and the location of shelterbelts in the area means that these dwelling are not visually evident from SH1. On my site visit I saw, for example, that the existing shelter belts and other planting limit views of the existing dwelling on the proposed Lot 1 from SH1. Given this, I accept Mr McAlley's position that, subject to the shelterbelt screen staying in place, the proposed subdivision is not likely to have adverse effects on the amenity values of the immediate visual environment.

However, I also accept Mr McAlley's view that the proposed subdivision will have adverse effects on the wider context, most particularly in relation to the development pattern promoted by the Operative Plan and Decisions Version of the 'Rural Area Plan Changes', and that it would be incongruent with the wider context and surroundings. It would not be in keeping with the expected outcomes in the relevant Zones (both Operative and 'Rural Area Plan Change'), fragmenting the area which is on average already significantly below the controlled activity and discretionary activity standards.

I believe that this is linked to the matter of cumulative effects and accept the view of Mr McAlley that reducing the average lot sizes and increasing the density in the area will lead to continued and permanent change in the local environment which is incongruent with the planning framework.

Mr Doesburg, Mr Hartigan and Mr Crystal, for Fonterra, provided very clear submissions and evidence regarding the potential reverse sensitivity effects. I accept their view that the reverse sensitivity covenant

put forward by Mr Hewson would not in any way avoid, remedy or mitigate the reserve sensitivity effects and that in the form suggested would not protect Fonterra from potential limitations on their existing operations or future expansion. I therefore agree with them, and the Council, that the proposal would create unacceptable reverse sensitivity effects.

In relation to contamination effects, I note that that Mr McAlley confirmed that the Council's consultants consider that the preliminary site investigation submitted with the application is not sufficient to assess the potential contamination effects of the proposal.

Whilst Mr McAlley was expecting further evidence from the applicant on this matter, there was no additional technical evidence provided to me on behalf of the applicant. However, Mr Hewson did confirm that in his view the samples and testing undertaken on behalf of the applicant were sufficient to determine with a reasonable level of certainty that the site is not likely to be contaminated, and if it is contaminated this is likely to be at a level that can be adequately remedied. He further confirmed that he believed that it was appropriate to add a condition to any consent granted to address the Council's requirements. This approach has been used on other site and was an approach agreed by the Council. Mr McAlley agreed that this was an acceptable way forward for this matter. Given this I believe that any contamination effects could be appropriately avoided, remedied or mitigated by way of a condition on any consent were the proposal to subdivide the site be granted.

There was little dispute between the applicant, submitters and the Council on other potential adverse effects, and I will therefore not address them here.

In view of the above, I consider that taken as a whole the adverse effects of the proposal will be more than minor and the proposal fails to meet the first gateway test of S104D.

**(b) Whether the application is for an activity that will not be contrary to the objectives and policies of (in this case) the relevant plans, including the decisions version of the 'Rural Area Plan Changes'.**

I note that both Mr McAlley and Mr Crystal carried out an assessment of the proposal against relevant objectives and policies of both the Operative District Plan and the 'Rural Area Plan Changes' and have come to a similar conclusion that the proposed subdivision is contrary to the overarching intent of many of the relevant objectives and policies of both plans. Whilst I note that Mr Hewson is of a different view, I accept the view of Mr McAlley and Mr Crystal in respect of this.

I also recognise that there are conflicting views between Mr McAlley and Mr Hewson regarding the degree of alignment with the relevant policies of the Regional Policy Statement. However, as noted by Mr McAlley in the S42A report, it is a requirement that the district plans 'give effect to' and are not 'inconsistent' with a Regional Policy Statement. Given that I have already accepted that the proposal is contrary to the intent of the relevant objectives and policies of the Operative District Plan and the 'Rural Area Plan Changes', I believe that this also highlights that the application must also be out of alignment with the Regional Policy Statement.

Overall, the proposal is contrary to the objectives and policies of the relevant plans and fails the second gateway test of S104D.

### **Conclusion – Main Findings of Fact**

1. The proposal will result in adverse effects on the amenity values and rural character of the surrounding environment that are more than minor.
2. The proposal is contrary to the overarching intent of the relevant objectives and policies, particularly those seeking to avoid inappropriate, sporadic and unconsolidated subdivision, adverse effects on amenity and character and which seek to avoid reverse sensitivity effects in the vicinity of a Strategic Rural Industry.
3. In light of the above, Consent cannot be granted for the proposed subdivision as the proposal has failed to satisfy the requirements of either of the ‘gateway’ tests set out in S104D(1) of the Resource Management Act.

## **8.0 Relevant statutory provisions**

### **8.1 Policy statements and plan provisions**

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 following planning documents:

- ii the Northland Regional Policy Statement (RPS)
- iii the Northland Regional Water and Soil Plan
- iv the Operative Whangarei District Plan
- v. the ‘Rural Area Plan Changes’; Plan Change 85 – Rural Area, Plan Change 85A – Rural Countryside Environment and Plan Change 85B – Strategic Rural Industries Environment.

### **8.2 Part 2 matters**

In considering this application, the Commissioner has taken into account the relevant principles outlined in Sections 6, 7 and 8 of the Act as well as the overall the purpose of the Act as presented in Section 5.

## **9.0 Decision**

Pursuant to Section 104 of the Act, the Commissioner **REFUSES CONSENT**.

## **10.0 Reasons for the decision**

The proposed non-complying subdivision of the existing 3.21 ha property located at 561 State Highway 1, RD1 Kauri (being Lot 2 DP 419817) into three lots being: Lot 1 (1.76 ha); Lot 2 (0.87 ha (0.69 ha net site area)); and Lot 3 (0.61 ha) cannot be granted, as it has failed to satisfy the requirements of either of the ‘gateway’ tests set out in S104D(1) of the Resource Management Act:

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(a) Whilst no adverse effects have been identified in servicing the lots, the following actual, potential and cumulative effects were assessed, on balance, to be more than minor:

- The intensity of development in the surrounding environment will increase, fragmenting the area which is on average already significantly below the controlled activity and discretionary activity standards, negatively affecting the rural character of the surrounding environment.
- Reducing the average lot sizes and increasing the density in the area will lead to resultant cumulative effects which will bring continued and permanent change in the local environment negatively affecting the rural character of the surrounding environment.
- The proposal would create unacceptable reverse sensitivity effects upon the Fonterra Kauri Dairy Factory which will place limitations on their existing operations and future expansion/operations.
- Open landscapes and views could be affected by new development on proposed Lots 2 and 3 if the shelterbelt planting is not protected in perpetuity;

(b) The proposal is contrary to the relevant objectives and policies of the Operative District Plan and the 'Rural Area Plan Changes' for the following reasons:

#### Operative District Plan

- Objectives 5.3.1, 5.3.5 and Policies 5.4.5, 5.4.7. Subdividing to an average lot size less than that existing in the environment will alter the character of the area which in turn will affect the amenity of the area.
- Objective 6.3.2 and Policies 6.4.2 and 6.4.18. The proposed subdivision does not consolidate development and avoid sprawling or sporadic subdivision and development as the resultant lots will be small, will incrementally fragment the rural area and are located away from urban areas or rural settlements.
- Objectives 8.3.1, 8.3.2, 8.3.4, 8.3.7 and Policies 8.4.3, 8.4.4, 8.4.5, 8.4.7, 8.4.12. The proposed subdivision is a non-complying activity and is proposing an outcome not anticipated in the Countryside Environment. It would not achieve the sustainable management of natural and physical resources by avoiding cumulative and reverse sensitivity effects via the appropriate design and location of subdivision.

#### PC85 -Rural Area

- Objectives RA.1.2.2 and RA.1.2.3. The proposed subdivision does not enable rural production activities and is not for the purpose of the protection of significant ecological and/or biodiversity values
- Objective RA.1.2.4. Whilst the proposal will provide for rural residential/rural lifestyle activities the 'Rural Area Plan Changes' provide eight different rural environments designed to cater for different types of rural land use. The proposal is assessed to be a non-complying activity and there are other newly formed Environments which better cater for the type of subdivision proposed.
- Objectives RA.1.2.5. The proposal would create reverse sensitivity effects upon a strategic rural industry.

- Objective 1.2.6. The proposal would create an ad hoc rural residential subdivision which would not support the productive functions of rural land.
- Objective RA 1.2.9. The proposal could be considered in part to achieve this by consolidating rural living subdivision in an area where rural production activities have been compromised, but overall the proposal has the potential to create other adverse effects on the environment.
- Objective RA.1.2.10. The proposal would not be providing for rural residential development on the fringe of Whangarei City.
- Policy RA.1.3.1. The proposed lot sizes are not in keeping with the rural character and amenity values proposed to be established/maintained by the minimum lot size provisions of the Rural Countryside Environment.
- Policy RA.1.3.10. The proposal will not achieve the stated Expectations for the Rural Countryside Environment as the proposed subdivision lot sizes are significantly smaller than the minimum stated in the rules and does not appear to be for the purpose of enabling rural production activities.
- Policy RA.1.3.11. The no complaints covenant proposed in the Applicant's evidence would be ineffective in managing reverse sensitivity effects with a potential impact on the operation of the Kauri Dairy Factory (a Strategic Rural Industry) and would therefore not avoid potential conflicts between incompatible land uses.

#### PC 85A – Rural Countryside Environment

- Objectives RCE.1.2.1, 1.2.2 and 1.2.3. The proposal will not protect productive rural land resources for a diverse range of rural production activities, will not enable a wide range of rural production activities, nor provide for commercial and industrial activities that support rural production activities, is not proposed for recreational or tourist based activities to establish and operate to contribute to the District's economy, nor recognise, maintain and where appropriate protect the rural character and amenity of the Rural Countryside Environment.
- Objective RCE.1.2.4. The proposal would be ad hoc subdivision in the Rural Countryside Environment.
- Objective RCE.1.2.5. The proposal will not minimise fragmentation of rural land and does not promote allotment sizes that facilitate rural production activities.
- Policy RCE.1.3.3. The proposal does not avoid reverse sensitivity effects by preventing sensitive activities within close proximity to Strategic Rural Industries, notwithstanding the no complaints covenant proposed.
- Policy RCE.1.3.7. The subdivision does not create rural allotments of 20 ha or more.
- Policy RCE.1.3.8. The proposal is contrary to this policy because the proposed subdivision is primarily for the purpose of creating rural residential/rural lifestyle allotments.

#### PC 85B - Strategic Rural Industries Environment

- Objective SRIE.1.2.4. Notwithstanding the proposal to implement a no complaints covenant, the proposal will not maintain rural amenity and avoid reverse sensitivity effects in the vicinity of a Strategic Rural Industry.

Advice Notes

1 The applicant shall pay all charges set by Council under Section 36 of the Resource Management Act 1991. The applicant will be advised of the charges as they fall.

2 Section 120 of the Resource Management Act 1991 provides a right of appeal to this decision. Appeals must be in writing, setting out the reasons for the appeal, and lodged with the Environment Court within 15 working days after the decision has been notified to you. Appellants are also required to ensure that a copy of the notice of appeal is served on all other relevant parties.

Issued this 9th day of March 2018



**Richard Knott**

**Hearings Commissioner**