

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under clause 14 of the First
Schedule of the Act
BETWEEN N W DYER
(ENV-2020-AKL-000075)
Appellant
AND WHANGĀREI DISTRICT COUNCIL
Respondent

Court: Environment Judge J A Smith sitting alone pursuant to
section 279 of the Act

Date of Order: 15 March 2021

Date of Issue: 15 March 2021

CONSENT ORDER

A: Under section 279(1)(b) of the Resource Management Act 1991, the
Environment Court, by consent, orders that:

- (1) Lot 1 DP 197532 (NA 126D/247), Part Te Waiiti Block (NA 758/219),
and Section 24 Block XVI Purua SD (NA 1817/27), being the land
outlined in **Annexure 1**, be zoned Light Industry Zone;



- (2) The mapped Esplanade Priority Area along Te Waiti Stream be extended adjacent to the northern boundary of the site as shown in light blue on **Annexure 2**;
- (3) The appeal is otherwise dismissed.
- B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.

REASONS

Introduction

- [1] This consent order relates to the appeal by NW Dyer against the decision of the Whangārei District Council (**the Council**) on Plan Changes 88A, 88B, 88C, 88D, 88E, 88F, 88G, 88H, 88I and 115 to the Operative Whangarei District Plan (**the Plan**).
- [2] This appeal relates to the zoning of three properties owned by Mr Dyer to the south of Whangārei city off State Highway 1 and Toe Toe Road, comprised of Lot 1 DP 197532 (NA 126D/247), Part Te Waiti Block (NA 758/219), and Section 24 Block XVI Purua SD (NA 1817/27), as outlined in red in the plan at **Annexure 3 (the site)**. The site has a combined area of approximately 14.21 ha.
- [3] The site's northern boundary is adjacent to Te Waiti / Te Waiti Stream.
- [4] Te Waiti Stream is mapped in the Plan as an Esplanade Priority Area (**EPA**) in its lower reaches north of the site. The Plan records that Te Waiti Stream is considered to have high ecological values for the existing mapped extent of the EPA.
- [5] Under the Plan the site is zoned as Rural Production Environment.
- [6] In the Plan Changes the site was notified as Light Industrial Zone (**LIZ**).
- [7] Mr Dyer made a submission supporting the notified LIZ and provisions.

[8] The Council's decision on submissions to the Plan Changes zoned the site Rural Production Zone.

[9] Mr Dyer appealed the decision, seeking rezoning of the entire site to LIZ as notified in the Plan Changes.

[10] No parties have given notice of intention to become a party under section 274 of the Act.

Agreement reached

[11] Following direct discussion, the parties have reached agreement on a proposal to resolve the appeal.

[12] The parties have agreed to:

- (a) Zone the site LIZ; and
- (b) Extend the mapped EPA along Te Waiti Stream adjacent to the northern boundary of the site.

Section 32AA analysis

[13] The recent planning history of the site is complex and the appropriate zoning of the site has always been finely balance.

- The site was identified in the Otaika, Raumanga and Toe Toe Structure Plan (**the Structure Plan**), adopted by the Council in February 2009, as suitable to rezone to Business 2 Environment (light industrial);
- Mr Dyer's submission on the 2016 Rural plan changes, seeking to zone the site Rural (Urban Expansion) Environment with recognition of a Business 2 or Business 4 (heavy industrial) zoning, was rejected by the Council on the basis that the relief Mr Dyer was seeking was 'out of scope' for the 2016 Rural plan changes; but also that the site was identified for potential Business 2 zoning in the Structure Plan which would be addressed in a future Urban & Services plan change package;
- The site was notified in the Urban & Services plan changes as LIZ;

- The s42A report:
 - i) acknowledged that archaeological sites are identified in the general locality, but no archaeological sites or Sites of Significance to Māori are mapped in the Plan; but
 - ii) considered that there was a *potential risk* in relation to biodiversity and cultural effects if the site developed for light industrial activities.
- Ms Gregory (who made the submission opposing the rezoning to LIZ) did not appear at the hearing and did not present any evidence in support of her written submission;
- No other party presented any evidence about archaeological sites, cultural, or ecological values of the site;
- The Hearings Commissioners gave no reasons for rezoning the property to RPZ.

Suitability for LIZ zoning

[14] The district wide District Growth and Development chapter contains the RPZ zoning policy DGD-P22 (not subject to appeal). The following table assesses the site against DGD-P22.

<i>DGD-P22 – Rural Production Zone</i>	The site
<p><i>To identify areas as Rural Production Zone to provide for the protection of productive rural land resources to enable a diverse range of rural production activities and activities that support rural production activities and rural communities, and to maintain biodiversity and rural character, where:</i></p> <ol style="list-style-type: none"> 1. <i>There is a prevalence of:</i> <ol style="list-style-type: none"> a. <i>Existing production land use.</i> b. <i>Significant ecological and biodiversity values, such as indigenous bush and wetlands.</i> 2. <i>Larger land parcels are prevalent and the area is not compromised by significant clusters of rural living built development.</i> 3. <i>An area is not:</i> 	<p>1(a) While the site is mainly in grass and vegetation with some stock grazing, it is not actively used for larger scale rural production activities and productive land uses are not prevalent in the surrounding areas.</p> <p>1(b) The site is bounded to the north by Te Waiti Stream which presents ecological and biodiversity values as discussed in the sections below.</p> <p>2. The surrounding zoning pattern is a mixture of LIZ, RPZ, Rural (Urban Expansion) Zone (“RUEZ”) and Sport and Active Recreation Zone (“SARZ”). However, the site does not adjoin any other RPZ sites and is in proximity to clusters of urban development in the LIZ and RUEZ</p>

<p><i>a. Located on the fringe of Whangārei City between the urban and rural environments.</i></p> <p><i>b. Suitable to provide for the future reticulated expansion of the Whangārei City Residential Zones.</i></p>	<p>– that is, the site is ‘land locked’ by non-rural activities.</p> <p>3. The site is on the fringe of Whangārei City and is in close proximity to the reticulated three waters networks.</p> <p>Overall:</p> <ul style="list-style-type: none"> • The site fails to meet DGD-P22.1(a), but has the future potential to meet DGD-P22.1(b) with improved protection and management of the riparian corridor of the stream. • There is the potential for reverse sensitivity effects from the adjoining RUEZ, although the site is bounded by roads and Te Waiti Stream which provide buffers. • The site fails to meet DGD-P22.3.
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[15] The district wide Urban Form and Development chapter contains the LIZ zoning policy UFD-P8 (not subject to appeal). The following table assess the site against UFD-P8.

<i>UFD-P8 – Light Industrial Zone</i>	The site
<p><i>To provide for small scale industrial activities and larger scale trade retail activities by providing for the Light Industrial Zone in locations that:</i></p> <ol style="list-style-type: none"> <i>1. Contain an existing range of industrial and large scale retail activities.</i> <i>2. Are in proximity to major transport routes.</i> <i>3. Enable adverse effects on proximate Residential and Open and Recreation Zones to be avoided.</i> <i>4. Have minimal existing active frontages at ground floor.</i> <i>5. Have a supply of medium to large sized sites.</i> 	<ol style="list-style-type: none"> 1. There is an existing industrial activity on the western portion of the site. 2. The site has good access to SH1. 3. While the site is in proximity to SARZ sites, it is bounded by roads and Te Waiti Stream which provide buffers. 4. There are no active frontages present within the site. 5. The site comprises a large area with a combined area of approximately 14.21 ha. 6. The site is adjacent to SH1 and in proximity to the reticulated three waters networks. <p>Overall, the site is consistent with UFD-P8 apart from the fact that there is not an existing range of industrial and large scale retail activities. However, there is an existing industrial activity on site and the site is in proximity to other LIZ sites. The proposed light industrial development will be a continuation of the Rewa Rewa Road</p>

6. <i>Are in proximity to key resources and infrastructure.</i>	industrial development. The proposed LIZ meets the contiguous criteria, as it seeks to consolidate industrial activities in one area in a manner that is consistent with the Structure Plan, and will also act as a buffer between the Toe Toe residential area and some of the heavy industrial activities on Rewa Rewa Road.
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[16] Having assessed the site against the zoning criteria for RPZ and LIZ, and in light of the report from the Council's ecologist and assessment of esplanade values below (which was not available to the Hearings Commissioners), the Council agrees with Mr Dyer that the site is more appropriately zoned LIZ than RPZ.

Te Waiti Stream esplanade values

[17] The Council's consultant ecologist visited the site in August 2020 with the following brief:

To view the area of the site bordering the Te Waiti Stream and consider any ecological values that might be better protected or enhanced if an esplanade reserve were to be created along the stream as a consequence of rezoning.

[18] The ecologist's report following the site visit noted:

The appellant's property bounds the true right side of the Te Waiti Stream, a watercourse deemed [in the Plan] to have "high ecological values". It was good to see that stock are excluded from the [stream] by a single-wire electric fence. The section of stream that flows through the property is well-buffered by exotic vegetation along most of its true right side. Mature willows are common in upper reaches (closer to the SH1), while further downstream Chinese privet becomes dominant with localised patches of woolly nightshade. The understorey and ground tier are also dominated by exotic vegetation (e.g. English ivy and grasses), although indigenous sedges (*Carex* spp.) and cabbage tree are scattered throughout.

The stream was running clear during the site visit and there is plenty of stable in-stream habitat to support fish and invertebrate species.

There is localised slumping and bank collapse on the opposite side of the stream, noting that the soil appears quite friable. There is considerably less riparian vegetation on the true left side, which has no doubt exacerbated the slumping, noting that [the true left] side of the stream is currently within an Esplanade Reserve. I support the

vesting of an Esplanade Reserve on the southern side of the stream, and there is an excellent opportunity to undertaking restoration works along its entire length.

[19] Relevant objectives in Chapter 11 of the Plan with respect to riparian and esplanade values include:

11.3.1 Preservation of the natural character of riparian margins and the coastal environment.

11.3.2 Protection of Significant Ecological Areas, Built Heritage, Sites of Significance to Māori, riparian habitats and Outstanding Landscapes and natural features, within the coastal environment and alongside rivers and streams.

11.3.3 Maintain and enhance public access, where appropriate, to and along the coast and rivers.

[20] Relevant policies in Chapter 11 of the Plan with respect to riparian and esplanade values include:

11.4.1 Riparian Management

To avoid the adverse effects of land use activities on the natural character and functioning of riparian margins of water bodies and the coast.

11.4.2 Separation Distances

To ensure that land use activities avoid, remedy or mitigate adverse effects on water quality, by means which may include separating land use activities from water bodies and coastal waters and by encouraging the retention and enhancement of riparian vegetation as buffer areas.

11.4.3 Esplanade Priority Areas

To identify esplanade priority areas within the coastal environment and alongside particular rivers, where the land involved will serve one or more of the purposes of esplanade reserves or esplanade strips set out in section 229 of the Resource Management Act 1991.

11.4.9 Cultural Protection

To set aside esplanade reserves and to create esplanade strips to protect areas of significance to Māori.

[21] Currently stock are able to graze very close to the banks of Te Waiti Stream. Stock grazing in proximity to the stream would continue as a permitted activity under the RPZ zoning. While stock do not currently have direct access to the stream itself, the proximity increases the risk of farm runoff (nutrients and faecal matter) into the water.

[22] The Plan requires (irrespective of zone) that where any allotment of less than 4 ha in area is created, an esplanade reserve or esplanade strip of minimum 20.0m in width is set aside along the bank of any river whose bed had a width of 3.0m or more.¹

[23] Where a proposed subdivision has lots which have areas greater than 4 ha but located adjacent to a mapped EPA, the Council may seek to negotiate the purchase of an esplanade reserve or strip.²

[24] The minimum lot size in the RPZ is 20 ha.³ Under the RPZ rules any subdivision of the 14 ha site would be a non-complying activity, limiting the opportunity to protect the stream by the creation of esplanade reserves upon subdivision.

[25] The minimum lot size in the LIZ is 500m².⁴

[26] In both the RPZ and the LIZ, buildings and major structures are required to be set back 27 m from the top of the bank of any river that has a width exceeding 3m.⁵

[27] Upon rezoning the subject site to LIZ, together with an extension of the EPA:

- any subdivision of the site below 4 ha will require the creation of a 20 m wide esplanade reserve which would be vested in the Council; and
- any subdivision of the site above 4 ha will trigger consideration of a negotiated purchase of an esplanade reserve.

¹ Operative Plan, rule 63.1.1

² Operative Plan, note below rule 63.1.1

³ Operative Plan, rule RPZ 3.3.1

⁴ Decision rule SUB-R9

⁵ Decision rule LIZ-R4

[28] A 20m wide esplanade reserve exists along the northern side of Te Waiti Stream, established as a result of the subdivision of the adjacent land to the north through its zoning as Business 2 and Business 4. Creation of an equivalent 20 m wide esplanade reserve on the southern side of Te Waiti Stream adjacent to the site would double the riparian corridor within which ecological values (and cultural values should they exist) would be afforded improved protection, both parties agree this is a significant positive effect of rezoning.

[29] Mapping of the extended EPA will also ensure that stream values are considered should any land use consent be sought to locate buildings inside the 27 m permitted activity stream setback.

[30] An esplanade reserve would ensure improved protection, and most likely enhancement, of the ecological and cultural values that currently exist along the margins of, and within, Te Waiti Stream.

Consideration

[31] In making this order the Court has read and considered the appeal and the joint memorandum of the parties dated 4 March 2021.

[32] The Court is making this order under section 279(1) of the Act, such order being by consent, rather than representing a decision or determination on the merits pursuant to section 297. The Court understands for present purposes that:

- (a) all parties to the proceedings have executed the memorandum requesting this order;
- (b) all parties agree that the agreed amendments resolve the appeal in full;
and
- (c) all parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the relevant requirements and objectives of the Act including, in particular, Part 2.

[33] I am satisfied that an appropriate outcome has resulted. Overall, I consider the purposes of the Act are broadly met.

Orders

[34] Therefore the Court orders by consent, that:

- (a) Lot 1 DP 197532 (NA 126D/247), Part Te Waiti Block (NA 758/219), and Section 24 Block XVI Purua SD (NA 1817/27), being the land outlined in **Annexure 1**, be zoned Light Industry Zone;
- (b) The mapped Esplanade Priority Area along Te Waiti Stream be extended adjacent to the northern boundary of the site as shown in light blue on **Annexure 2**; and
- (c) The appeal is otherwise dismissed.

[35] There is no order as to costs.



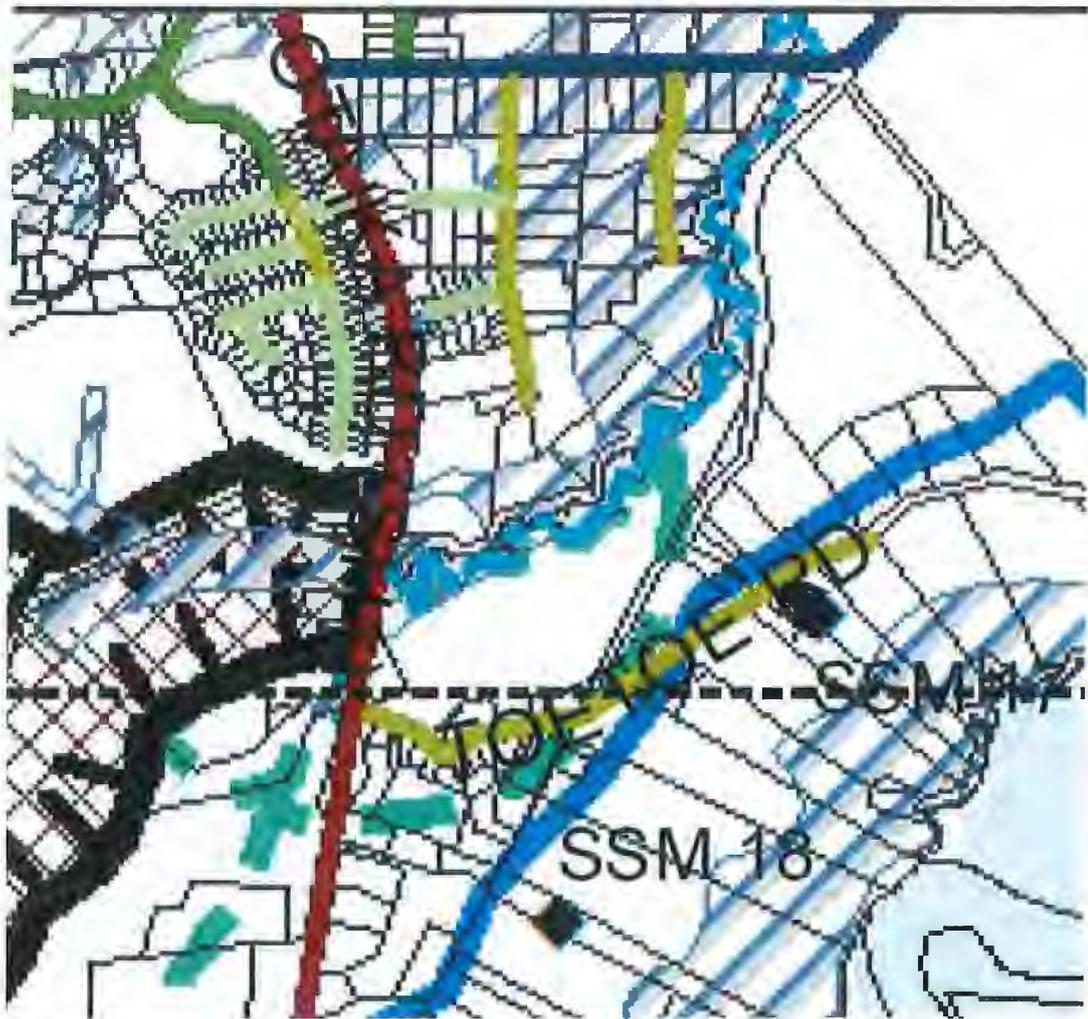
J A Smith
Environment Judge

The seal of the Environment Court of New Zealand is circular, featuring the coat of arms of New Zealand in the center. The text "THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND" is inscribed around the perimeter. A signature, which appears to be "J A Smith", is written over the seal. A horizontal line is drawn across the signature, and a large, scribbled-out mark is present above it.

Annexure 1



Annexure 2



Annexure 3

