

# Subdivision and the Resource Management Act

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**A** most important development in land use which occurred on the passing of the Resource Management Act 1991, was the inclusion of the entire subdivision consent process within the Act, by contrast to the previous process of Scheme Plan approval under the Local Government Act.

With the emphasis in the Act on addressing the effects of activities, rather than directing and controlling development, in my view a different approach to the subdivision of land is called for.

Important to treating subdivision as a land use activity capable of generating adverse - or indeed positive - effects, is the need to link subdivision with land use activities, rather than see it as a stand alone consent procedure, as has tended to be the case in the past. In both the urban and rural context, it is hard to conceive of assessing the effects of a subdivision consent without addressing the associated land use activity. Indeed, in most instances, consent to subdivision should be seen as consequent upon or at least proceeding in conjunction with a land use activity which itself has been assessed against and met the tests laid out by the Act.

The most important of these is, of course, Part II of the Act, central to which is the concept of sustainable resource management. The importance of the Part II provisions of the Act when dealing with subdivisions was recently addressed by the Environment Court in *Di Andre Estates Ltd v Rodney District Council*, D No. W187/96.

Rodney's Transitional District Plan provides for subdivision of sites suitable for horticulture, pastoral farming, hill country pastoral farming and forestry, horse-training, sites for the protection of significant stands of native forest or significant natural features (commonly called bush lots), and sites for rural residential dwellings.

Typically the subdivision opportunities specify a minimum lot size and requirements to verify that the land is suitable for the proposed use. Taking pastoral farming as an example, a site deemed by the Plan to be available for subdivision for pastoral farming required a site area of not less than 40 hectares containing a minimum of 20 hectares "useable area", defined as being not steeper than 15° and comprised of soils of class IV or better, and being land already in pasture.

Bush lot subdivision opportunities in Rodney District were established for the laudable motive of protecting significant stands of native forest or other significant natural features. As well as a minimum site area (2.2 hectares) with a minimum balance area of 1 hectare, covenants to protect the existing native bush in perpetuity and controls on building development are required.

This approach has been continued in Proposed Plan Change 55, prepared under RMA with these "bush lots" permitted in a range of rural zones including the so-called special activity areas.

The subdivision proposal in the *Di Andre Estates* appeal involved a property containing some 59.300 ha on the coastline near Matakana, that lot having been created through a subdivision under the Transitional Plan on the basis that the property comprised a "pastoral lot". Interestingly enough, evidence from a qualified farm consultant and valuer at the hearing made it plain that the farm had no useful productive purpose, and indeed pastoral farming of the property could not even generate sufficient income to pay a manager's wages.

The subdivision application declined by the Council had been prepared by the appellant's surveyor and was based on a bush lot subdivision by reference to the provisions of the Transitional Plan. Although the Council decided the application did not need to be notified,

it declined the application on the basis, inter alia, that the proposal failed to recognise and provide for matters identified in ss.6 & 7 of the Act.

Aerial photographs produced at the appeal hearing, dating back to the 1950s identified small pockets of native vegetation tonguing into the subject site from the foreshore, which had been established as an esplanade reserve at the earlier subdivision stage. These areas of bush were generally in poor condition due to possum predation and stock grazing. For consent to a bush lot subdivision the Plan required that the bush be to a standard assessed by reference to set criteria which the Council alleged were not met.

To pursue an appeal, a completely different approach to the application was taken, involving D J Scott & Associates reassessing the subdivisional potential of the land in question. Denis Scott concluded that merely to protect the existing pockets of native vegetation or replant them was not enough, and he produced a land development concept plan showing not only replanting and enhancement of the existing native vegetation, but extensive replantings of the whole property in native vegetation, particularly on slopes facing towards the nearby Omaha Beach and residential settlement area. He relocated the house sites to not only take advantage of these re-plantings, but to enable residents to manage the re-plantings with particular regard to the possum infestation.

The Court found that the re-positioning of house sites was done for the purpose of environmental enhancement, not for the purpose of subdivisional benefit. In relation to the four house sites proposed, the Court found by reference to the permitted and controlled activity provisions of the Plan, that the same number of buildings or structures could be established as farm buildings and accessory buildings associated with the farming activities permitted as of right on the site. Those buildings of course would have established without the re-vegetation and house siting conditions proposed as part of the subdivisional consent.

To re-work the subdivision proposal in this manner achieved a result quite

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different in terms of location of lot boundaries and lot sizes from that that had been put to the Council and rejected in its original decision.

An initial concern for the Court was whether the amended plan should be re-notified, but by reference to the purpose of the RMA, which is to address the effects of proposals, the Court found that:

“The main purpose of the large allotment exercise is to facilitate the extensive replanting of native vegetation now envisaged as part of the total concept as a result of the work of Mr Scott. For our part we consider the extensive re-vegetation proposal a vast improvement to the landscape qualities of Omaha Bay and cannot understand why the Council did not welcome this innovative enhancement approach with a degree of enthusiasm rather than the negative attitude exhibited before this Court where every point possible was raised in opposition, even to the extent of challenging the power of the Court to impose conditions to achieve environmental enhancement, conditions welcomed by and asked for by the appellant.”

The Court concluded that it could deal with the new subdivision proposal on the basis that the original concept had had minor amendments, designed to meet the concerns of Council and to create a better environment within which houses could be constructed. The Court found that the amended subdivision proposal, albeit with completely different lot sizes and re-drawn site boundaries, did not increase the intensity of the subdivision and its effects upon the character of the neighbour-

hood and was superior to the first suggestion. The proposal was dealt with by the Court on the basis that it required a non-complying activity consent.

The decision outlines Denis Scott's background and experience in landscape restoration and repair and refers to his designs for coastal subdivision with particular emphasis on the Hauraki Gulf Islands and Northland Coast. The decision refers to “an immediate rift between the Transitional and Proposed Plan on the one hand, and the Scott concept on the other”. The Court went on:

“The Plan seeks to preserve existing stands of native forest which are considered to be of significance. These are haphazardly scattered throughout the district and the particular positioning does not necessarily indicate a suitable location for a house merely because it is aligned to a subdivision for bush lot purposes. The Scott concept on the other hand considers the pastoral landscape; sets in place a replanting programme for the purpose of creating future stands of native forest; and then locates residences within that enhanced environment. In respect of existing stands which have suffered damage, re-planting is planned. As well as replantings it is intended that the areas be fenced off and retired from undergrazing. Continuation of pastoral grazing as permitted by the Council's Plans is clearly deleterious to bush conservation.”

The Court referred to the Scott subdivision methods as based on a “design philosophy for subdivisions intended to derive sustainable management solutions from a catchment management approach and to attack the matter from

an effects based approach based on development and protection of natural and physical resources”.

What the Court described as the “Scott concept” first assessed whether the present use of the property for pastoral farming was inappropriate leading to a degraded landscape of reduced economic yield. Denis Scott concluded that the property had been developed for pastoral purposes with considerable loss to the natural environment and that the Council, or on appeal the Environment Court, in terms of the RMA could address its attention to the best way to rectify the particular concern. The Court recorded:

“The Scott concept works on the basis that the sustainable management of natural and physical resources if possible should be associated with the opportunity to repair and enhance landscapes and to maintain such landscapes for the future. This underlying philosophy which forms the basis for establishing the lot layout and lot size was supported by the Appellant.”

The decision goes on to refer in some detail to the way in which a fresh proposal for development of this site by subdivision for rural-residential purposes was developed by Denis Scott based on sustainable management principles.

It records Denis Scott's evidence as:

“The essence of the technique therefore is to identify the critical landscape elements within any catchment that require protection and enhancement. The values that relate to these critical elements include: scenic protection, vegetation conservation, erosion control, water qual-

ity and habitat protection...

Put simply, the technique identifies these elements and a line is drawn around them. A pattern emerges that is continuous in nature, containing and enclosing areas of land suitable to human activities and development. "

The subdivision as presented on appeal was based on assessing effects and recognising and applying the provisions of Part 11 of the Act. The subdivision lot boundaries identified are logical straightforward lines following land contours, catchment and identity area boundaries, with the surveyed lot boundaries being regarded as of much less importance than the proposed landscape pattern.

This approach to subdivision, endorsed by the Court in the *Di Andre* decision, in my view calls for a reassessment of the "traditional" approach to subdivision and development, and reinforces the argument that provision for rural-residential or countryside living ought to be provided for throughout rural districts as a discretionary activity, subject to appropriate criteria and justifications, rather than in pre-determined defined locations zoned for the purpose.

As things stand at present, most District Plans will require a subdivision proposal such as that advanced on appeal in *Di Andre Estates*, to be addressed as non-complying because it does not fit the subdivisional standards or rules. In my opinion, an important outcome of the appeal decision is that it reinforces the primacy of the Part 11 provisions of the Act so that where a proposal can be demonstrated to fully accord with and advance the purpose and principles of the Act (s.5), and the matters of importance referenced in ss.6, 7 and 8, then it should receive consent. In this case the Court said:

"It [the subdivision proposal] is however not in accordance with the rules of either the Transitional or Proposed Plan change, but in that regard if the rules seek to prevent a result encouraged by Part II of the Act, then the Council should certainly redress the omission. In particular we refer again to s. 7 in which subclauses (w) and (f) refers to enhancement of community values and the environment. This present subdivision seeks to further

the sustainable management principles of the Act and its purposes in a most positive, imaginative and practical way... We therefore consider the proposal passes both the threshold tests of s. 105. Turning to s. 104 it will be noted that that section is subject to Part II of the Act and we have already held that this proposal is fully in accordance with that part of the Act therefore if any of the other matters in s. 104 such as rules in a plan or proposed plan change indicate that the proposal is not acceptable then in such case the rule would not prevail being subservient to Part II. "

These pronouncements by the Environment Court reinforce the importance of the Part 11 evaluation for any resource consent application, by contrast to referencing a particular application against rules permitting activities and controlling development.

Yet in reports prepared for consent hearings, how often does one see a modest section of the report evaluating a proposal against Part 11 of the Act, with the majority of the report addressing the proposal by reference to District Plan objectives, policies and rules? The result is that consent authorities often place too much emphasis on compliance with their Plan provisions at the expense of considering whether or not proposals accord with Part 11.

The conditions of consent offered by the applicant were recently approved by the Court. They include:

- Covenantee in perpetuity the existing regenerating indigenous vegetation, wetland areas or streams and their riparian margins, and the re-vegetation areas identified on the Land Development Concept Plan. These covenants require first that re-vegetation occurs on those areas and in accordance with the planting and re-vegetation programme for each lot, and secondly, that the existing and new vegetation, the subject of the covenants is protected and remains undisturbed.
- A detailed planting and re-vegetation programme for each lot designed to achieve a total survival density of at least 5,000 stems per hectare and comprising appropriate indigenous species.

- Compliance with the re-planting/re-vegetation programme is secured by individual bonds over each lot, with provision for a sequential reduction of the bond as planting is completed.

- At least 75% of the planting and re-vegetation programme must be established on each lot in the subdivision prior to Council issuing a building consent.

- All electricity, telecommunication, water pipe lines and other utility services to be underground.

- An effective possum control programme being established for each lot in the subdivision and thereafter maintained by or on behalf of the owners in order to minimise damage to existing and regenerating indigenous vegetation.

- Consent notices to secure important conditions against the titles.

- A final condition of consent, as suggested by the Court reading:

"The conditions relating to this subdivisional consent are a composite whole, none being severable from the other and are accepted by the Applicant. This condition is not to be read so as to affect the statutory rights of application under Part VI of the Act."

This condition is intended to operate as a form of estoppel against the cancellation or change of important conditions which underpinned the grant of consent, by reference to *Augier v. Secretary of State for the Environment* 1978 QB 219. See also *Hearthstone Properties Ltd v. Waitakere City Council* (1991) 15 NZTPA 93, and *Mora v. Te Kohanga Reo Trust*[1996] NZRMA 556.

(Richard Brabant was counsel for the Appellant in *Di Andre Estates Ltd v. Rodney District Council.* )