

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2007-404-003464

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an application to review a statutory
decision to grant resource consent on a non
notified basis under the Resource
Management Act 1991

BETWEEN AUCKLAND REGIONAL COUNCIL
Plaintiff

AND RODNEY DISTRICT COUNCIL
First Defendant

AND PARIHOA FARMS LTD
Second Defendant

Hearing: 6, 7 and 8 August 2007

Appearances: Robert Enright, Simone Fraser and Mark Casey for Plaintiff
William Loutit and James Hassall for First Defendant
Stephen Mills QC and Justin Graham for Second Defendant

Judgment: 24 August 2007

JUDGMENT OF HARRISON J

*In accordance with R540(4) I direct that the Registrar
endorse this judgment with the delivery time of
4.30 pm on 24 August 2007*

SOLICITORS

Kensington Swan (Auckland) for Plaintiff
Simpson Grierson (Auckland) for First Defendant
Chapman Tripp (Auckland) for Second Defendant

COUNSEL

SJ Mills QC

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Introduction

[1] In 2005 Rodney District Council (RDC), the local territorial authority, granted an application by Parihoa Farm Ltd for land use or resource consent to build a dwelling on its rural property south of Muriwai on Auckland's West Coast. In common with about 90% of such applications, RDC did not require Parihoa to notify it publicly or to possibly affected parties.

[2] The approved building site is remote, sitting on a ridgeline within a spectacular landscape which gradually descends to cliffs leading to the Tasman Sea. The site is visible only to users of a public walkway vested in the Crown, which is about 9 km in length and winds above the cliffs below between Muriwai and Te Henga beaches, and then only for a maximum of one minute in each direction. The Department of Conservation (DOC), which is responsible for administering the walkway, has known of the resource consent since it was granted but has taken no steps to challenge it.

[3] In early 2007 Parihoa started building a dwelling on the approved site and has since spent at least \$470,000, principally in architects fees and construction costs. In April a person using the walkway complained to the Auckland Regional Council (ARC) about the building platform. In June ARC applied to this Court for orders reviewing RDC's related decisions, first, not to notify Parihoa's application and, second, to grant the resource consent. ARC alleges that both decisions are invalid, and seeks an order quashing them together with a direction that Parihoa's application be reheard on notice.

[4] Determination of ARC's application requires constant maintenance of a degree of perspective. This case is about RDC's decisions on an application for consent to build a large, one level house – a discretionary activity under RDC's operative planning instruments. The decision cannot be compared with non-notified approvals to develop a discount retail outlet or a supermarket in a busy residential area, as emphasised by Mr Bill Loutit for RDC. And, as Mr Robert Enright for ARC

accepts, its challenge is not to RDC's decision to allow Parihoa to build a new house on its property as such, but to its approval of a location above the walkway.

[5] Mr Stephen Mills QC for Parihoa complains that ARC is pursuing a personal agenda against his client's principals. Whether he is correct is not for me to determine. But it can be safely observed that nobody could complain that ARC has left a pebble unturned in prosecuting this claim, has failed to commit all available resources to that end, or has failed to dissect RDC's decision from every conceivable angle. Saturation advocacy, requiring navigation of a mire of documents in an attempt to discern what is truly relevant to the issues, has presented its own challenges in writing this judgment under constraints of relative urgency.

Background

[6] Parihoa is beneficially owned by Alfred MacKay Storey, a solicitor. His wife, Anne Kerr-Taylor Storey, is the director.

[7] Parihoa acquired its 250 hectare property in August 1998 when it was in a rundown condition. The company has since operated it as a working beef and sheep farm and implemented an extensive programme for improvement.

[8] The Storeys and their four children have lived throughout in one dwelling on the property and the farm manager lives in a cottage nearby. Some years ago the Storeys decided to build a new family home. They identified many possible sites. Eventually they settled on an area which provided views of the Tasman Sea and of the farm but which was not too far distant from the existing buildings. That is the site which is now in dispute.

[9] The Storeys engaged an architect, Mr Andrew Patterson, in late 2003. They knew he had designed another residence at O'Neills Bay, to the south, which they admired as compatible with the landscape. His design, in accordance with the Storeys' brief, is for a large but simple one level home, to be constructed in wood and in neutral tones and with a pebble roof. Appropriate landscaping and planting is envisaged.

[10] When purchasing the property, the Storeys knew that its three titles were subject to an encumbrance imposed consequent upon an earlier subdivision of the property in about 1995. The encumbrance materially provided a covenant by the owner that:

No further subdivision will be undertaken of either parcel of land described in the Schedule unless such is specifically agreed to in the form of a written approval by [RDC] and the Department of Conservation [DOC].

[11] Parihoa applied to RDC in September 2004 for a resource consent for a proposed subdivision. The property comprised three titles. The Storeys wished to realign a boundary. Their purpose was to create two additional titles for each of their sons to own and live on in the future. The proposed building site would not be affected; it was to be constructed elsewhere and would proceed regardless of the fate of Parihoa's application for subdivisional approval.

[12] RDC granted Parihoa a resource consent to subdivide the property on a non-notified basis in April 2005. However, that was just the first stage. The encumbrance prohibited subdivision without written approval from both RDC and DOC. Those encumbrancers have since refused to give approval. The ARC has been involved in that process throughout. Its role and DOC's state of knowledge will be the subject of further consideration in the context of the question of relief.

Parihoa's Application

[13] The Storeys engaged a multidisciplinary planning firm, Cato Bolam Ltd, to prepare an application to RDC for a dwelling land use or resource consent for the proposed new home. The firm filed that application in October 2004, describing Parihoa's proposal as:

... to build a single level 641 square metre dwelling. The dwelling has been designed to fit in with its site. The likely external colours of the exterior of the building are pebble beach stone roof and natural timber sides ...

Also involved is the re-contouring of part of the building site area, to enable the dwelling and associated uses, such as parking, to fit in. Approximately 1800 m³ of earthworks will be involved.

The application also records that:

... There are a number of buildings on site including the farm dwelling and farm accessory buildings. These are located towards the northern end of the property.

[14] The application included: (a) application form 9: Resource Management Regulations 2003, prepared by Architects Patterson Ltd; (b) an application report by Cato Bolam setting out details of the site and application and including an assessment of effects on the environment including a reference to assessment criteria in the three district plans relevant to the assessment: s 104(1)(a) Resource Management Act 1991 (all subsequent statutory references are to that enactment) and Part II (purpose and principles); (c) a request that the application be non-notified: ss 93, 94 and 94D; (d) a further assessment of effects on the environment and comment on the issues: Schedule 4, prepared by the architects; (e) a site plan with contours and site boundary information, floor plan, and elevation; and (f) a copy of the certificate of title and deposited plan.

[15] In response to a request from RDC's contracted planner, Parihoa supplied additional reports and plans including an earthworks and settlement control report prepared by an engineer, a geo-technical report, and amended plans. And, again at RDC's request, the company provided an archaeological survey and assessment by an archaeologist.

[16] I should interpolate to observe that originally in this proceeding ARC alleged that RDC erred in law by treating the application as being for a discretionary rather than a non-complying activity. A good deal of evidence was directed to the question of the zoning and activity status of the proposal under the relevant three district planning instruments.

[17] ARC has now abandoned this allegation, which appeared diversionary. It is common ground that a consent was required, and the test is the same whether the activity is non-complying or discretionary. To the extent that it is material, I am satisfied that Parihoa's application was for a discretionary activity and that RDC correctly treated it as such: s 77B, Rule 7.9.4 Proposed District Plan. But ultimately

the issue is whether or not RDC's decision not to notify the application, regardless of the status of the activity, and to grant it, were correct.

[18] RDC engaged Connell Wagner Ltd, another multidisciplinary planning consultant, to process Parihoa's application. Initially it was handled by Mr Matthew Richards. He was succeeded by Ms Angelene Butler. She is a qualified planner who at the relevant time had five years practical experience. She has sworn an extensive affidavit in opposition to ARC's application.

[19] Ms Hester Gerber, who is and then was the team leader for resource consents employed by RDC, has also sworn an affidavit. She is an experienced planner. Acting under delegated authority, she granted Parihoa's land use consent to erect the dwelling in July 2005 (L37497). I shall return to both affidavits in the course of considering ARC's specific allegations of breach of duty.

[20] RDC granted Parihoa a building consent to erect the proposed dwelling in April 2006 (ABA 55914). The company commenced earthworks on the approved site in January 2007 and, following their completion, construction of the house in late February. Parihoa has since ceased building work pending this decision.

ARC's Challenge

[21] ARC's original and two amended statements of claim are extensive. Mr Enright's written synopsis of submissions introduced some focus. Four principal issues arise for determination:

- (1) Did RDC err in deciding not to notify Parihoa's application when satisfying itself that the relevant adverse effects of the activity on the environment would be no more than minor?
- (2) Did ARC err in its opinion that there were no persons who may be adversely affected by the activity?

- (3) Did RDC err in granting the resource consent by failing to have regard to relevant statutory considerations?
- (4) If any of the first three issues are answered affirmatively, should relief be granted to ARC, having regard to the relevant discretionary factors?

[22] These issues will be considered separately. However, I shall first summarise the material statutory provisions and principles applying compositely to the first two issues.

Statutory Provisions

[23] The Act allows a person to apply to the relevant local authority for a resource consent: s 88(1). An application must: s 88(2):

- (a) be made in the prescribed form and manner; and
- (b) include, in accordance with Schedule 4, an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

[24] Schedule 4 provides that:

Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 should include—

- (a) a description of the proposal;
- (b) where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking that activity; ...
- (d) an assessment of the actual or potential effect on the environment of the proposed activity.

[25] Schedule 4 further provides that:

Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider the following matters:

- (a) any effect on those in the neighbourhood and, where relevant, the wider community including any social or economic and cultural effects;
- (b) any physical effect on the locality, including any landscape and visual effects;
- (c) any effect on ecosystems ...
- (d) any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations.

[26] The local authority has power to seek further information if the application does not 'include an adequate assessment of environmental effects': s 88(3).

[27] A consent authority: s 93(1):

... must notify an application for a resource consent unless—

- (a) the application is for a controlled activity; or
- (b) the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.

[28] If notification is not required under s 93(1), then: s 94(1):

... the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.

[29] When forming an opinion for the purpose of s 93: s 94A:

... as to whether the adverse effects of an activity on the environment will be minor or more than minor, a consent authority—

- (a) may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect; and
- (b) for a restricted discretionary activity, must disregard an adverse effect of the activity on the environment that does not relate to a matter specified in the plan or proposed plan as a matter for which discretion is restricted for the activity ...

[30] The 'environment' is defined as including: s 2:

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and

- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[31] ‘Amenity values’ are defined as: s 2:

... those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[32] An ‘effect’ is defined as including: s 3:

- (a) Any positive or adverse effect; and
- (b) Any temporary or permanent effect; and ...
- (e) Any potential effect of high probability; and
- (f) Any potential effect of low probability which has a high potential impact.

Legal Principles

[33] The statutory presumption favours of notification: *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 per Elias CJ at [25]:

... The decision not to notify an application is an exception to the general policy of the Act that better substantive decision making results from public participation. The requirement that the consent authority must be ‘satisfied’ that effects are minor before deciding not to notify a resource consent application to undertake a discretionary or non-complying activity is a requirement of caution. The consent authority must be clear that notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor.

[34] In *Discount Brands* the Supreme Court considered the predecessor to s 93, which was introduced on 1 August 2003: s 41 Resource Management Amendment Act 2003. The original s 93 required public service of an application for resource consent ‘once a consent authority is satisfied that it has received adequate information’. That threshold test, which was the subject of discussion by Blanchard and Tipping JJ in *Discount Brands*, has now gone. In its place are wider powers vested in a consent authority to require the applicant ‘to provide further information

relating to the application’: s 92(1), including power to commission a person to prepare a report: s 92(2).

[35] Also, s 88(3), introduced on 1 August 2003, substitutes the ‘adequate information’ preliminary requirement with a right to return an application if it ‘does not include an adequate assessment of environmental effects or the information required by regulations’. The objective remains, however, to ensure sufficiency of information to enable a consent authority to decide on notification: *Discount Brands* per Blanchard J at [106].

[36] The repealed s 94(2)(a) test for determining whether or not to notify is substantially preserved: s 93(1)(b), see *Discount Brands* per Elias CJ at [19]. Accordingly, the focus stays on the consent authority’s judgment. The authority is entitled to dispense with notification if ‘satisfied that the adverse effects of the activity on the environment will be minor’. These words require an authority to conduct an inquiry and make up its mind on the relevant evidence within the statutory framework. The authority must reach or arrive at a state of satisfaction that the grounds for not notifying are made out. Its evaluation is of an essentially factual nature, based upon an assessment of the extent to which the activity in question will have an adverse effect on the particular environment.

[37] As Keith J observed in *Discount Brands* at [52]:

Significant in the basic requirements stated ... are the double emphases on ‘satisfied’, the strongest decisional verb used in the Act, the etymology of ‘satisfy’ (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty.

[38] Some practical context is necessary, as Keith J acknowledged in *Discount Brands* at [53]. In answer to my request, Mr Loutit advised that RDC deals with over 90% of resource consent applications on a non-notified basis. The streamlining statutory discretion vested by s 93 is designed as a measure of protection for a local authority. Its activities would grind to a halt if it was bound to notify every application.

[39] *Discount Brands* itself illustrates the importance of context. Council's own officers advised that the information supplied by the applicant in that case was insufficient. Discount Brands planned to open a shopping centre predominantly containing discount stores, outside a current shopping centre recognised by the district plan. The proposal was bound by its very nature to be controversial and attract commercial opposition. Without a comprehensive assessment of the impact of the proposed retailing on shops and services offered at the nearby commercial centre, council's officers recommended public notification. The information relied on to support non-notification was 'highly contestable, even on its own terms': Elias CJ at [29].

[40] Nevertheless, hearing commissioners appointed by the council decided not to notify. The Supreme Court was unanimous in *Discount Brands* that, given the scope of the planned activity and the paucity of reliable information in support, the commissioners could not have satisfied themselves to the requisite standard that the adverse effects of the proposed activity on the environment would be minor. The information supplied at the threshold stage was, on its face, insufficiently reliable and comprehensive to justify non-notification.

[41] In *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72, Baragwanath J considered the new ss 93 and 94. While, of course, the adequacy of information test considered by the Supreme Court in *Discount Brands* is no longer directly relevant, the Judge undertook a careful analysis of the leading judgments. As a result he discerned a possible 'significant difference of approach': *Progressive Enterprises* at [69], justifying 'a need for close appraisal by this Court' when reviewing a s 93 decision not to notify, given '... its responsibility to protect the community from unacceptable risk of unsound decision making': at [73].

[42] With respect, I do not discern the same degree of divergence in *Discount Brands* as did Baragwanath J. In particular, I do not construe Tipping J's remarks at [144] and [145] as being 'consistent with the hard look approach': *Progressive Enterprises* at [69]. The so-called 'hard look approach' has a well known rationale in areas of judicial review where life or liberty are at risk.

[43] I do not agree that the aims and principles of the Resource Management Act generally justify a more intensive or invasive power to review a consent authority's non-notification decision than would otherwise be appropriate for this Court in exercising its supervisory function. Mr Enright did not advocate adoption of the 'hard look approach'. As Baragwanath J himself acknowledged, the High Court's function is restricted to determining whether the consent authority acted lawfully: *Progressive Enterprises* at [72].

[44] What has been said many times before in this context merits repetition. The High Court does not exercise an appellate function on review. It is the decision making process followed by the consent authority and its lawfulness, not the decision itself, which is under consideration.

[45] The essential elements of this Court's approach on judicial review in the resource management context were reinforced in *Pring v Wanganui District Council* [1999] NZRMA 519 (CA) (applied by Lang J in *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 at 170) in this way at 523:

It is well established that in judicial review [proceedings] the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant considerations were taken into account, and **whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made.** Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been some material capable of supporting the decision...

[Emphasis added]

[46] In my judgment the test propounded by Blanchard J in *Discount Brands* at [116] remains apposite, subject to exclusion of the parenthetical statement based upon the repealed s 93:

Because the consequence of a decision not to notify an application is to shut out from participation in the process those who might have sought to oppose it, the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based **in order to determine whether the authority could reasonably have been satisfied** [that in the circumstances the information was adequate in the various respects discussed above].

[Emphasis added]

[47] A similar test was articulated by Tipping J at [145]:

The statutory policy inherent in the non-notification regime involves a balance between the interests of applicants and the public in having uncontroversial applications dealt with promptly and without the additional expense of notification, and the rights of public participation which the Act prima facie affords. Reconciliation of the competing interests in harmony with the policy of the Act **suggests that in cases of any real doubt the application should be notified.**

[Emphasis added]

[48] The facts of *Discount Brands* only serve to reinforce that message. By analogy, was there in this case anything in the district planning instruments, or in the material supplied by Parihoa in support of its application, to raise a real doubt or put RDC on notice that the adverse effects of this discretionary activity – building a house on the site – might be more than minor? The test is one of reasonableness, in a contextual and circumstantial setting, not what this Court or ARC believes ought to have happened. Ultimately, as Mr Enright accepts, it is a judgment call by the consent authority, and, in making that call on adverse effects the scope of the activity for which consent is sought is critical: *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576-577.

RDC's Resource Consent

[49] RDC follows a settled process for determining whether or not to notify an application for resource consent. The initial step is for the reporting planner to review the application and assess it in terms of the district plan's requirements. Once its activity status is assessed, and a visit is made to the site, a decision is then made on whether to proceed with or without notice. To assist in this evaluation RDC has developed report templates.

[50] RDC's report on Parihoa's application itself contained a detailed assessment for the purposes of ss 93 and 94. It described the site in these terms:

The proposed dwelling is to be located on a recently subdivided property at Constable Road, Muriwai Beach. The site is a large rural property located at the end of Constable Road.

The subdivision was recently approved for a boundary relocation to form three lots on the site and to subdivide a smaller lot of 6100m² for the existing farm dwelling.

The land is bordered to its elevated southern boundary by the descending topography and cliff line to the Tasman sea. The building platform forms part of a ridgeline however, is located in an area that is relatively flat in topography. In order to establish the building platform, some earthworks of approximately 1800m³ are required to establish a practical and level building platform.

The site is large in area, some 235.5130ha and is largely covered in pasture and some areas of bush and wetland.

The property is contained within Certificate of Title 120A/456 and is not subject to any legal restrictions to build on this location.

[51] The report provided expressly for an analysis of the adverse effects of the application on the environment: s 94A. Three specific questions were answered. The first was directed to identifying the appropriate permitted baseline in relation to the adverse effects of the environment. The second was directed to whether the effects on the environment were greater or less than permitted as of right (the answer was affirmative). The third was an express inquiry within the words of s 94A – ‘are you satisfied that the adverse effects of the activity on the environment will be minor?’

[52] RDC’s report returned to Parihoa’s proposal and the statutory instruments before providing expressly for an assessment of environmental effects, divided into environmental and landscape values, natural ecosystems, character and visual and cultural heritage. Mr Enright’s challenge is limited to the character and visual assessment which was undertaken expressly according to the criteria provided separately in Plan Change 55 and Proposed District Plan 2000.

[53] By reference to Plan Change 55, the report noted:

- With the imposition of conditions the colour and materials used in the building will complement the low intensity landscape character of the area. The building site, although located on a ridgeline will not dominate the skyline or detract from the amenity of the surrounding rural area or the coastline.

- It is noted that proposed building will sit below the ridgeline and will be excavated and constructed into the slope of the site to ensure that the structure does not detract and will be less visible from the surrounding area.
- The bulk and scale of the proposed dwelling is low in profile and will be below the highest point of the ridgeline therefore will not appear to be a dominant structure within the coastal landscape.
- Although the proposed dwelling will exceed the maximum height of 4m under the Proposed Plan, the effects of a single levelled structure however is significantly less than 7m under Plan Change 55 (Rural). It is considered that the design of the dwelling is sympathetic to the landscape and earthworks to essentially build the dwelling into the slope will ensure that the height of the structure is generally complimentary to the landscape.

[54] By reference to Proposed District Plan 2000, the report stated:

- The proposal is for one single residential dwelling on a site of 235.5130ha. The dwelling will have an area of 641m² that exceeds the maximum area of 200m² for a controlled activity. It is considered that the size of the proposed dwelling will not impact the rural character of the site or the surrounding rural/coastal environment and structures will only take up 0.27% of the site.
- The proposed dwelling is considered to be of a size and bulk that will not impact on the spacious character of the rural environment. The proposed dwelling will not result in dominating effects in terms of scale and form or impact on any view or vista.
- The impact of earthworks for the proposal are considered to be minimal as they can be controlled by conditions on silt and sediment control measures, will occur over a relatively small area, will occur for a short duration of time and will not alter the appearance of the ridgeline and landform.
- No archaeological feature, significant natural area or vegetation will be affected as a result of this application.
- The dwelling is to be located a considerable distance from any other residential site and will not be visible from the road. When viewed from the coastline, the dwelling will not protrude over the dominant ridgeline and will be low and discrete in profile and form. All materials will be neutral in colour as the house is to be constructed of block and natural wood.
- The proposal involves landscaping that will soften the appearance of the dwelling when viewed against the backdrop of the landscape and this proposed

- Landscaping will be to the satisfaction of Council and will emulate the natural vegetation that exists on the site and within the surrounding landscape.
- The impact of the activity in terms of residential intensity is that anticipated under the Plan whereby one residential site on a rural property is permitted and that the dwelling will not generate those effects likely to develop where multiple dwellings are proposed. The traffic effects are those anticipated within the plan and will not have an adverse impact on the surrounding road network, in particular, Constable Road...
- The subject site is listed on the Planning Maps as containing various sites of cultural heritage (H 473). These sites are defined as Piriaupi, defensive scarps damaged by stock.
- The proposed activity to establish the dwelling is a discretionary activity due to earthworks exceeding the permitted quantities and having a floor area greater than 200m².
- The applicant has supplied an archaeologist report in support of the application subject to the listing of the site on the Planning Maps. This report determines that the survey of the site that was carried out will not affect any known feature; therefore this application does not seek to modify any such feature against the above rule. The archaeological report was then reviewed by the Heritage Division of ARC and no further issues were raised. It is recommended that should the applicant encounter any feature or item during the earthworks for the building platform and access to the platform, work shall stop and an investigation is undertaken. From the tests taken of the building site, there was no surface or subsoil evidence of any archaeological feature.
- The proposed building platform is located a considerable distance from any Significant Natural Area of vegetation defined on the Planning Maps.

[55] The report concluded with these reasons for processing the application without notice:

1. It is considered that the proposal is generally consistent with the objectives and policies of the Operative District Plan and the Proposed District Plan, and Part II of the Resource Management Act.
2. Overall it is considered that with the addition of conditions, adverse effects created by this application will be no more than minor.
3. In particular, the earthworks associated with the building platform and the vehicle manoeuvring areas will be contained within the site, and will occur over a short duration period. All earthworks will be in accordance with TP90 and will be undertaken with silt and sediment control measures in place and engineered to the specification of the geotechnical reports supporting the proposal.

4. Relevant conditions of consent have been attached (as recommended by Council's Development Engineer) to mitigate any adverse environmental effects that may come about from the proposed works.
5. The proposed dwelling is considered to be in keeping with the rural character and will not detract from the special character of the landscape or limit the farming or pastoral use of the land.
6. No person or party are considered to be adversely affected in more than a *de minimis* manner based on the size of the site, its remote location and the discrete location of the dwelling within the site, the scale and materials used for the dwelling together with proposed landscaping.
7. The relevant iwi (Ngati Whatua) have viewed this file and have raised no concerns relating to sites of archaeological or cultural significance that are recorded on the site, however, not located within the specific area of the proposed works.

Issues

(1) Non-Notification

[56] Mr Enright submits that RDC failed to consider or gave insufficient consideration to the visual and character impacts of the proposed dwelling in five respects.

(a) Site Visit

[57] First, Mr Enright submits the reporting officer and decision maker failed to undertake a site visit to view the building platform in surrounding context and did not assess the impact of the dwelling upon the Te Henga walkway and users of the walkway, the statutory purpose of the walkway, the RDC scenic reserve, and public views of the dwelling from Bethells/Te Henga Road. He emphasises the statutory purpose of the New Zealand Walkways Act 1990 of:

... establishing walking tracks over public and private land so that the people of New Zealand shall have safe, unimpeded foot access to the countryside for the benefit of physical recreation as well as for the enjoyment of the outdoor environment and the natural and pastoral beauty and historical and cultural qualities of the areas they pass through ...

[58] ARC relies primarily on the evidence of Ms Karen Blair, an experienced planner who is in private practice in Auckland as a director of Burton Planning Consultants Ltd. She has provided a detailed and adverse critique of RDC's report. She takes particular issue with a statement that the proposed dwelling will not 'impact on any view or vista'. A good deal of her evidence is devoted to the relationship between the proposed dwelling and the walkway.

[59] The walkway is, as Ms Blair says, 'the only elevated coastal walkway on the west coast that offers that expansive and panoramic views of the West Coast and the Tasman Sea from an open and pastoral setting' and it 'exhibits a high degree of naturalness and a high natural character'. I can confirm that the landscape is outstanding, and the natural environment is grand and open.

[60] Walking from the Muriwai end, the track first passes through steep open land, most of it used for farming. A number of dwellings are visible both below and on the skyline. After about 1.5 km the typography changes from steep to undulating, and the track starts to follow the coastline. While the track runs through areas of original and regenerating bush, areas of farmland and some fencing and stock are visible from time to time on the skyline.

[61] At about 3 km south the building platform comes suddenly into view as a walker rounds a spur before the gully below the site. I agree with Ms Blair that the platform is visible for a walking area of about 50-60 metres, and that short glimpses are available until it returns to view during the descent into the gully. It comes into view again for about 20 metres before the bridge is crossed. By my assessment the building will not be visible from the track for a total of more than one minute. The building will not be seen again because it is then behind a walker travelling south.

[62] Travelling in a northerly direction, the site comes suddenly into view as the walker rounds a spur in open country, and remains visible for a distance of about 100 metres until reaching the bridge at the bottom of the gully. Again the viewing duration would be a maximum of one minute. I accept, as Ms Blair says, that it is the first evidence of residential development after leaving the Bethells end of the track, and after passing through 'a landscape unit of high natural character along

exposed, narrow, windy paths and steep sided cliff tops'. There is no doubt that the house will present a contrast, albeit brief, to this area.

[63] The essence of the complaint of Ms Blair and others is that:

... the proposed dwelling will form a substantial block on the ridge ... which is accentuated by its position within an otherwise open, largely pastoral coastal escarpment where the only other built aspect is a post and wire fence.

[64] Mr Vernon Warren, an experienced planning consultant engaged by Parihoa, confirms the outstanding natural features of the walkway. However, he makes the point that the quality and type of landscape varies along its length, and that there are signs of human habitation including dwellings for about 2 km at either end. In his opinion, taking into account the context of the whole landscape and experience of a walkway of 8 km to 9 km length, the effects of this house, 30 metres back from Parihoa's boundary, on the environment will be negligible.

[65] I think Mr Enright's argument is misconceived. His submission that a site visit is 'a minimum expectation for an independent consent authority evaluation' does not advance ARC's case. The question is whether or not, for the purpose of deciding about the adverse effects of the house on the environment, RDC reasonably took into account the impact of the dwelling upon the Te Henga walkway and its users. This is an essentially factual question.

[66] Connell Wagner's records show that Mr Richards visited the site for an hour. But, more importantly, Ms Butler was very familiar with the landscape of the area and with the site itself. She was raised in Muriwai. She knew the previous land owners prior to the initial subdivision. Ms Butler had walked the Te Henga track on numerous occasions. And she was familiar with the landscape variations experienced when traversing the track from Constable Road to the more remote and distant headland areas towards Bethells beach.

[67] In evidence Ms Butler said:

Having identified the accurate location of the proposed dwelling in relation to the subdivision scheme plan and the plans of the resource consent application, I could properly evaluate its siting in relation to boundaries, the

scenic reserve, the walkway, the coastline, Constable Road, the farm tracks and the existing structures on the existing farm site ...

The physical relationships of the site are such that it is located adjacent to the RDC scenic reserve. The Te Henga walkway is situated on steep coastal land beyond this reserve. Beyond the walkway towards the coast is a Crown owned marginal strip. Part of the Te Henga walkway runs through the reserve that is located adjacent to the site and a further distance from the house site.

[68] Ms Butler's also said:

I did not consider that the users of the Te Henga walkway would be affected given the separation distance between the house site and the walking track itself. There are other buildings in this landscape (all accessed off Constable Road) which are also visible to the walkers of the Te Henga track in this area. I did not consider that the proposed house would affect the overall walk experience for any people using the track.

[69] Ms Gerber, who made the final decision, did not visit the site. She was satisfied a visit was unnecessary given the information already provided. She was also fully aware of the different landscapes in the Rodney District, and that the proposed dwelling was within a landscape protection area.

[70] Ms Gerber was independently satisfied that the adverse effects resulting from the activity on the environment would be minor. She took a number of distinct steps in coming to that conclusion. She did not herself, however, independently take into account or consider the effect of the proposed dwelling on the Te Henga walkway.

[71] Ms Butler's report corroborates her evidence. She was plainly aware of the location of the building platform. She consistently described it as 'forming part of the ridgeline'. The ridgeline is visible only from the sea or from the walking track. Her report also notes that the proposed building:

... will sit below the ridgeline and will be excavated and constructed into the slope of the site to ensure that the structure does not detract and will be less visible from the surrounding area.

[72] Ms Butler's reasons record:

The ridgeline will continue to be the feature that dominates the landscape when viewed within the surrounding environment.

The only viewing area ‘within the surrounding environment’ was from the walkway itself.

[73] Mr Enright seeks to impugn Ms Butler’s affidavit evidence. He relies on its absence from the report. He submits that the Court should not receive material extraneous to the contents of the document, which speaks exclusively for itself. He characterises Ms Butler’s account as ex post facto or irrelevant. In support he cites *Heaney v Rodney District Council* HC AK CIV-2003-404-003480 16 March 2005, Gendall J at [27]-[30].

[74] With respect, I do not read Gendall J’s comments in *Heaney* as providing a foundation for Mr Enright’s principle. The Judge was simply rejecting a ‘distant historical recollection of what was the mental process of the decision maker’ at [30], who had no record of a decision made eight years earlier and was attempting to reconstruct his reasoning process. It is hardly surprising that Gendall J gave that evidence little weight. This case is in a different league.

[75] There is no reason in principle or logic why a Court cannot receive evidence extraneous to the report which bears upon RDC’s evaluative process. It is a question of probative value and weight. Here Mr Enright does not challenge the veracity or reliability of Ms Butler’s account, and I accept it. And, if there was any doubt about the admissibility of extraneous evidence, it is answered by the approach followed in *Bayley* at 578-579.

[76] Ms Butler plainly took into account and gave weight to the visual and natural character impact of the proposed dwelling upon the Te Henga walkway and its users. She was uniquely placed to make that assessment. A site visit was not necessary. Mr Enright does not suggest that Ms Gerber was not entitled to reply on Ms Butler’s evaluation, which she confirms. Ms Butler’s evidence provides a decisive response to Mr Enright’s submission.

(b) *Landscape Assessment*

[77] Second, Mr Enright submits that RDC failed to require a specialist landscape assessment, despite the fact that the dwelling falls within a landscape protection zone under the district plan and an outstanding or regionally significant landscape under the regional planning instruments, and neither the reporting officer nor the decision maker held relevant qualifications in landscape.

[78] Mr Enright relies upon a lengthy affidavit from Ms Diane Lucas, a highly qualified landscape architect with wide experience. She has carried out an independent landscape and natural character assessment of the development. In her opinion the building would disrupt the naturalness of the landscape and degrade its integrity as a whole, and would inappropriately disrupt the natural ridge landform.

[79] Ms Lucas says the building ‘has the potential to undermine the wild and remote qualities of this area, which the district plans seek to protect’. However, RDC undertook that inquiry, precisely within the protection requirement of the district plan. Whether Ms Lucas considers the inquiry was inadequate is not the issue. Furthermore, she says:

[The proposed building] is to be located in a part of the property where no buildings currently exist and visually separate it from the existing cluster of development at the end of Constable Road. It will be seen by a diverse range of audiences both close to and from further away. As a result it will have more than minor adverse landscape and visual effect.

[80] Ms Lucas identified only two possible viewing audiences. One was from Te Henga Road, some 2.5 km away as the crow flies. She said that the silhouette would be seen from there. This overstatement undermined the weight I give to her evidence.

[81] The other viewing area was from the walkway. In this sense Ms Lucas’ evidence assumes a circularity. In common with much of the rest of ARC’s evidence, it comes back to the same essential point: to an opinion about the visual effects, or alternatively the impact on the area’s natural character, of the proposed activity – construction of a house. I have already referred to Ms Butler’s assessment of the visual effects of the building for walkers. It must also be remembered that the track has a recreational purpose, and is not heavily used.

[82] I must confess to finding difficulty in understanding Mr Enright's argument. This question is also of a factual nature. RDC knew that the building platform was within a landscape protection area. Its report expressly noted as follows:

The effects on the environment are greater than that permitted as of right and those effects that are to be controlled under the District Plan. The effects of building a dwelling and undertaking earthworks in a landscape protection area and within a site that is identified for Heritage Protection are related to visual amenity, character, and run-off, stability and effects relating to cultural and heritage values and archaeological significance.

Household units are not permitted as of right within the Landscape Protection Area. The effects of building a house on a site within a Landscape Protection Area are related to design and external appearance. The building should complement the natural landscape and building profiles should reflect the contours of the surrounding landscape. Buildings should not be located on prominent ridges or require the clearance of native bush and other vegetation, which contributes to the amenity of the site.

The effects of carrying out earthworks and building a dwelling on a cultural heritage site are related to whether or not the proposed development will have an adverse effect on the heritage values of the listed item; its contribution to the amenity values of the neighbourhood and any association with the listed with past people or events.

The adverse effects on the environment are greater than what is permitted. Effects that may result from importing cutting and filling for the building platform and vehicle manoeuvring area on the site are related to visual amenity and stability. Adverse effects may come about in the form of the visual quality of the landscape and the natural landform of the ridgeline or visually prominent areas. Further, the earthworks may result in ground or soil instability or may result in changes to the surface run-off and overland flow paths.

[83] RDC then undertook an assessment of landscape values by reference both to the plan change and the proposed district plan. The provisions of district or proposed district plans are relevant when considering whether or not to notify under s 94, and in particular 'in identifying the Council's view about the importance or significance of adverse effects on the environment and the approach to be taken where there is potential for the kind of adverse effects identified': *Northcote Mainstreet Inc v North Shore City Council* HC AK CIV-2003-404-5292 5 February 2004, Randerson J.

[84] To the same authoritative effect: see *Discount Brands* per Elias CJ at [10]:

The district plan is key to the Act's purpose of enabling 'people and communities to provide for their social, economic, and cultural well being'. It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance... **A district plan is a frame within which resource consent has to be assessed.**

[Emphasis added]

[85] Again, the question here is whether or not, on the material available to it, the RDC could have reasonably satisfied itself that the adverse effect of the activity on the landscape environment would be minor. RDC took account of the landscape protection designation. The fact that it was also within an outstanding or regionally significant landscape under the regional planning instruments would not of itself show a legal error or unreasonableness by RDC in not deciding to obtain a specialist landscape assessment. That was entirely a matter of judgment.

[86] RDC appreciated that the building may have an adverse effect on the landscape. But it was satisfied that, with the conditions imposed, such an effect would be minor. Mr Enright has failed to show that that decision was unreasonable in any reviewable sense.

(c) *Regional and National Planning Framework*

[87] Third, Mr Enright says RDC failed to evaluate the impacts on the environment in the light of the regional and national planning framework, requiring a precautionary approach to development in the proposed location and assigning regional significance to the natural character, landscape, heritage, coastal and cultural values.

[88] Mr Enright categorises the regional and national planning framework as being of a 'higher order' than the district plan. He relies upon the location of the site within the Auckland Regional Policy Statement's (ARPS) designation of an outstanding landscape (sensitivity rating 6) or of reasonably significant landscape value (sensitivity rating 5). The distinction is not important. Whatever classification is adopted, the area obviously has a unique landscape value.

[89] Mr Enright says that, if RDC had taken account of the ARPS, it would have learned of this special zoning, and adopted a much more careful approach. This knowledge would, he submits, have put the decision maker on inquiry that the issue merited more detailed consideration.

[90] Mr Enright emphasises certain provisions of the ARPS, advocating a 'precautionary approach' to resource management decision making (but on analysis that dictum comes within advice to a local authority when it is not in a position to fully assess the adverse effects of a proposed activity 'due to inadequate information or understanding of these effects on the environment'). The policy emphasises the importance of controlling 'subdivision, use and development of land': first, to protect landscapes with a sensitivity rating of 6 or 7 'by avoiding subdivision, use and development which cannot be visually accommodated within the landscape without adversely effecting the character, aesthetic value and integrity of the landscape unit as a whole'; and, second, those with a sensitivity rating of 5 are protected by ensuring that use and development can be visually accommodated without adverse effects: para 6.4.19.

[91] The ARPS further provides: para 6.4.21:

The intention of the policies is to protect the aesthetic and visual quality, character and value of the major and unique landscapes from inappropriate subdivision, use and development.

[92] The ARPS also sets out policies for preserving the natural character of the coastal environment, and protection from inappropriate subdivision, use and development, also by avoiding adverse effects on the environment in the areas of high natural character; and for the purpose of preserving and protecting outstanding regionally significant landscapes accordingly: paras 7.4.4 and 7.4.7.

[93] Mr Enright says these instruments required RDC to 'change its lens' from the district plan focus. While he concedes the result may not necessarily be different from an evaluation of district planning instruments, it may lead to a different inquiry encompassing different considerations. Mr Enright says that reference to the ARPS requirements to 'avoid' inappropriate locations and 'preserve' landscape values would have put RDC on notice of the need to evaluate alternative locations on the

235 hectare site which would not effect these values, or alternatively effect them to a lesser extent. The emphasis must shift, Mr Enright says, from local to regional interests and values.

[94] While acknowledging that RDC's report and notification decision made some reference to visual impact, Mr Enright characterised it as 'limited to district plan criteria' and a 'micro-focus' within that framework, whereas the regional instruments required a different type of assessment – one designed to consider the impact on the 'regional environment values at stake'.

[95] Mr Enright's detailed submission begs the question of why it was unreasonable, or of why there was an error of process, for RDC not to take the higher order instruments into account when deciding on notification. It was not until closing that he attempted to articulate the statutory genesis of an obligation on the consent authority. In answer to my inquiry, Mr Enright identified the requirement in Schedule 4, which specifies the requirements for an application for resource consent, for an assessment of environmental effects 'subject to the provisions of any policy statement or plan'.

[96] However, I read that phrase 'subject to the provisions of any policy statement or plan' as qualifying or modifying the mandatory obligation for the applicant's assessment of effects to include certain information. The assessment is to be made by the applicant within the prescribed form. Its purpose is to provide 'an assessment of environmental effects in such detail as corresponds with the scale and significance of the effects that the activity may have on the environment': s 88(2)(b). The requirement does not separately or reciprocally oblige the consenting authority to take account of 'the provisions of any policy statement or plan' when deciding on notification.

[97] In this respect Schedule 4 serves to identify what is required in terms of assessing 'the effect of the activity on the environment'. The words 'effect' and 'environment', including 'amenity values', are defined. The consent authority's inquiry, when deciding on notification, is directed towards satisfaction 'that the adverse effects of the activity on the environment will be minor'. That inquiry is

unaffected by regional policy statements or plans. The ‘environment’ comprises the defined resources, values, conditions and qualities, all of which are addressed in the district planning instruments.

[98] Alternatively, assuming for these purposes that the phrase ‘any policy statement or plan’ includes both regional and district plans, it links logically to s 9. That provision expressly proscribes contravention of a rule in a district plan, unless expressly allowed by a resource consent granted by the territorial authority: s 9(1); or, similarly contravention of a rule in a regional plan, unless expressly allowed by a resource consent granted by the regional council: s 9(3). Logically, the Schedule 4 reference to ‘the provisions of any policy statement or plan’ would relate or link back to the type of application for resource consent, whether under a district plan or under a regional plan. The distinction is verified by subsequent provisions – e.g. ss 12, 13, 14 and 15 – to which Mr Loutit refers; all relate to prohibited activities which require a resource consent under a regional plan.

[99] I am not satisfied that RDC erred in law by not taking account of the regional planning instruments when satisfying itself that the effects of the proposed activity on the environment would be minor.

[100] Also, Mr Enright says that RDC did not sufficiently consider relevant Part II values. He cited a number of general statutory provisions: ss 5, 6(a), 6(b), 6(e), 6(f), 7(a), 7(c), 7(f) and 8. With respect to Mr Enright, these provisions are general statements of values which are specifically addressed later in the district planning instruments. RDC’s decision gave them express consideration, in any event. This argument, at best one of degree, does not advance ARC’s case.

(d) *Mitigation Planting*

[101] Fourth, Mr Enright submits that RDC failed to evaluate whether mitigation planting could lawfully be undertaken without the prior approval of a third party such as DOC and failed to set enforceable planting performance standards, failed to assess the short to medium term effects of the dwelling during the timeframe required for planting to establish itself, and failed to turn its mind to whether

mitigation planting should be established prior to construction of the dwelling. He notes that RDC's decision identified that mitigation planting was necessary to ensure the effects were de minimus. But he says RDC did not turn its mind to whether mitigation planting which will fill its intended role – there was no timeframe relating to when planting was to be completed or performance standards.

[102] This was an attempt by ARC to impose a duty on RDC to consult with DOC, through the side-wind of obtaining approval for mitigation planting. But DOC's approval was irrelevant in this context.

[103] The argument must fail as a matter of fact. Condition 11 of RDC's consent provides:

The consent holder shall prepare a landscaping plan (to be prepared by a suitably qualified landscape architect) and submit the plan to council's compliance monitoring team for approval. The landscaping plan shall supply details identifying species, location and height of specimens in order to ensure that all landscaping complements the existing landscape, and will not detract from any significant natural area identified on the planning maps and will adequately provide a natural visual buffer to the dwelling when viewed from within the surrounding area.

[104] Also, when concluding that the adverse effects on the viewing audience would be de minimus, Ms Gerber took account of Ms Butler's opinion that the species and height of vegetation will provide a visual buffer to the dwelling 'so that it will not detract from the existing vegetation within the rural environment or the character of the area'.

[105] RDC is entitled to take account of mitigation when deciding that 'the adverse effects of the activity on the environment will be minor': *Bayley* at 580. It is also entitled to impose a condition to ensure appropriate mitigation and a requirement to present a satisfactory landscaping plan was within RDC's jurisdiction. RDC has retained the ultimate right of approval. In carrying out that exercise it may take account of the views expressed by ARC and its experts. But the absence of a plan before approving construction could hardly support an argument of unlawfulness.

[106] I agree with Mr Loutit. It is beyond argument that both Ms Butler and Ms Gerber turned their minds to the landscape and visual effects of this application,

and the extent to which any adverse effects were to be mitigated by planting. This argument must also fail as a matter of fact.

(e) *Tangata Whenua*

[107] Fifth and finally, Mr Enright says RDC did not consider or did not sufficiently consider the impact of the proposed dwelling on tangata whenua, including both Ngati Whatua and Te Kawerau a Maki iwi. Instead it limited its consideration to the absence of comment by Ngati Whatua on the partial information provided to it on the consent application, and whether the development would impact upon archaeological sites of cultural significance registered with the ARC. He says RDC was on notice from an archaeologist that tangata whenua be consulted 'regarding the Māori values of this area and the recommendations in this report...'.

[108] Some factual context is necessary here. Ms Butler was cautious about the possible effects of Parihoa's application on cultural heritage. She required the company to commission a report from an archaeologist, Mr Don Prince of Time Depth Enterprises. He concluded that:

No archaeological features or deposits are located on or in the immediate vicinity of the proposed works and the possibility that sub-surface archaeological features remain undetected is low.

It should be noted that archaeological survey techniques (visual inspection and minor sub-surface testing) cannot always detect all sub-surface features or detect wahi tapu and other sites of traditional significance to Māori, especially where these have no physical evidence. **The tangata whenua should therefore be consulted regarding the possible existence of such sites.**

[Emphasis added]

[109] At the time RDC had a protocol for forwarding a summary report of all applications received in the western part of Rodney district, including Muriwai, to a representative of Ngati Whatua Ngä Rima o Kaipara. That tribe was the primary point of contact for all resource consent applications in the area. In accordance with that protocol, and with Mr Prince's advice, RDC sent a copy of the application to Ngati Whatua on 4 November 2004. However, it did not take any steps.

[110] Ngati Whatua's chief executive officer, Ms Mary Sherard, has sworn an affidavit in support of ARC's application. She now says that construction of the proposed dwelling has an adverse effect on Ngati Whatua's cultural and ancestral connection to the site and the surrounding environment. She says 'the location is highly inappropriate'. On analysis, though, Ms Sherard's objection seems to relate to the property as a whole, without being specific to the approved location. Her evidence is not of assistance.

[111] RDC now acknowledges that Te Kawerau a Maki has co-extensive rohe or jurisdiction over the site. One of the iwi's representatives, Mr Te Warena Taua, has also sworn an affidavit in support of ARC's application. His affidavit is balanced and moderate. Te Kawerau wishes to develop and maintain a good relationship with Parihoa. Mr Taua relies on a 2006 Waitangi Tribunal report into Kaipara, acknowledging that Te Kawerau are tangata whenua in the coastline area between Muriwai and Te Henga.

[112] Mr Taua says this:

The proposed dwelling is located in an area of considerable ancestral significance to Te Kawerau a Maki. To state the obvious, these are all considered to be wahi tapu to Te Kawerau a Maki. The proposed location compromises our ancestral relationship with this important part of our ancestral land, and its physical and visual presence will be intrusive to our appreciation of these wahi tapu areas.

[113] In support of his argument that RDC erred, Mr Enright refers to the Environment Court's decision in *Serenella Holdings Ltd v Rodney District Council* (Decision No. A100/2004, 30 July 2004) at [113]. The Court there recited evidence from a civil engineer, in support of an application for a resource consent to extract sand from a basin on property adjacent to the eastern end of the Kaipara Harbour; that is, considerably north of this site. In his evidence the engineer noted that three iwi or hapu groups expressed an interest in the proposal. One of them was Kawerau a Maki Trust.

[114] Otherwise, Mr Enright does not point to any material to show RDC knew or ought to have known of Te Kawerau a Maki's interest in this location. A reference to the iwi in one sentence of a lengthy Environment Court decision in 2004 was not

enough to put it on notice. And Mr Taua himself does not suggest that his iwi put RDC on notice before receipt of the Waitangi Tribunal's report in 2006, well after the resource consent was granted. Te Kawerau a Maki's interest was apparently generated by ARC when seeking support for this application. Mr Storey says that none of its representatives have ever approached him for access to Parihoa's land.

[115] Also, I note that Ngati Whatua, which would be expected to have a detailed knowledge of other interested iwi, did not recommend that RDC refer the application to Te Kawerau a Maki.

[116] Ultimately RDC was satisfied that the effect of this building on the cultural values within the environment would be minor. It relied upon Mr Prince's report and an established protocol of consultation with Ngati Whatua. He suggested consultation out of caution, to meet the contingency that something more might be present than was physically visible. RDC was not under a separate statutory duty to consult.

[117] I agree with Messrs Loutit and Mills. RDC made available to Ngati Whatua a copy of its file including Mr Prince's report. The evidence available to its planner was that Ngati Whatua had reviewed the file but decided to take no steps. It was reasonable of RDC to infer from the iwi's silence over the intervening eight months before deciding not to notify that the proposal would not have an adverse effect on cultural values. It could properly conclude that formal notification would not elicit information or perspectives which would or might cause it to view the effects of the activity on cultural heritage as more than minor: see *Discount Brands* at [25].

[118] RDC did not act unreasonably in failing to take account of the interests of another iwi of which it was unaware within its wider consideration of cultural values. The position may have been otherwise if RDC knew of Te Kawerau's jurisdiction but decided to ignore it.

(f) *Conclusion*

[119] ARC has failed by a considerable margin to show that RDC's decision was unreasonable; that is, it was a decision which a reasonable decision-maker could not have made. There was nothing in the application or the information supplied in support, when considered in terms of the district planning instruments, to put RDC on notice or raise a real doubt that the adverse effects of the proposed activity on the environment would be more than minor.

[120] The scope of the proposed activity is critical. I repeat again that Parihoa applied for consent to build a house, a discretionary activity under the planning instruments. Context, as Mr Loutit says, is everything. So, I repeat, is a sense of perspective.

(2) *Evaluation of Affected Persons: s 94(2)*

(a) *Introduction*

[121] If the consent authority does not require notification under s 93(1), it: s 94(1):

... must serve notice of the application on all persons who, **in the opinion of the consent authority**, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.

[Emphasis added]

[122] This is the second evaluative step which RDC was required to undertake in the notification process once it was satisfied that the effects of the proposed activity were no more than minor. I respectfully adopt the observations of Blanchard J in *Discount Brands* as follows:

[108] ... If, on the other hand, the authority concludes that the adverse effect of the activity will be, at most, minor, it must make a second determination, under [s 94(1)], about whether any person nevertheless may suffer some adverse effect going beyond the effect on the environment generally – not being de minimis or merely a remote possibility.

[109] ... But [s 94(1)] must be read in its statutory context. It is intended to operate only when the consent authority is already satisfied that the proposed activity will have, at most, a minor effect on the environment...

[110] Therefore [s 94(1)] requires written approval from persons who may suffer adverse environmental effects which are no more than minor. It does so because Parliament has recognised that an activity which has only a minor effect on the environment generally may have a special significance for persons who may be directly affected by it...

[111] ... It seems to have been intended to protect landowners and occupiers who might particularly suffer from the proposed activity. For example, a proposed building might be non-complying only because it would cast a shadow on part of an adjacent property. There would, at most, be a minor effect on the environment generally but there might be a direct adverse effect on the neighbour...

[112] This interpretation may be said to read down the language of [s 94(1)]. But to give that paragraph a literal interpretation and extend 'every person' beyond landowners and occupiers who may suffer direct (minor) environmental effects would present applicants and consent authorities with very real difficulties in identifying those who might possibly be adversely affected. It could lead to a major increase in the number of applications which would require notification without any corresponding social benefit, for it is hard to imagine an environmental effect on a person other than in his or her land-owning or occupying capacity which would not also be an effect which was more than minor, so that processing of the application on a non-notified basis would already be prevented by [s 94(1)].

[123] ARC alleges that RDC failed separately in its evaluation of affected persons. While Mr Enright identifies three 'persons' whom RDC should have considered, he did not address what I regard as a critical threshold question. The words 'in the opinion of the consent authority' assume a particular importance. The relevant provision, s 94(1), has material similarities to s 97 Commerce Act 1975 (now repealed). That provision imposed a duty on the Secretary of Energy, when determining prices, to 'ensure that the applicant and such other persons as in his opinion have a direct interest in the matter are given [a reasonable opportunity to be heard]'

[124] Section 97 fell for consideration in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA). Cooke J, delivering the leading judgment, said this at 136:

The principle that the Courts of general jurisdiction have ultimately the function of interpreting Acts of Parliament will prevail only in so far as the material expression used in the Act in question – here 'direct interest in the matter' – is to be interpreted as posing an ascertainable test. To the extent that there remains legitimate room for judgment in applying the test, the Secretary's opinion is made the statutory criterion. If he addresses himself to the correct test and the relevant facts (see on this *Daganayasi v Minister of*

Immigration [1980] 2 NZLR 130) his decision will stand unless it can be put in the extreme category of a decision at which no reasonable authority in his position could have arrived. By the use of the words ‘in his opinion’ the legislature has indicated that there may be a grey area where there is truly room for discretion as to whether or not the direct interest test is satisfied. In that area the Secretary’s opinion will prevail.

[125] Applying that test here, ARC must show that RDC’s decision under s 94(1) was in that extreme category where no reasonable authority in its position could have reached an opinion that no person ‘may be adversely affected by the activity’.

(b) *Auckland Regional Authority*

[126] First, Mr Enright submits that RDC failed to consider whether ARC was an affected person and gave no consideration to the regional planning framework which ARC administers on behalf of the region and which is relevant to the assessment of effects of the proposed dwelling; and that RDC failed to consider or evaluate that the proposed dwelling was to be located in an area classified as a regionally significant or outstanding natural landscape under the Auckland Regional Policy Statement.

[127] In support, Mr Enright relies on statements by Ms Blair and on ARC’s core function of integrated management: s 30, 59-70B – meaning that ARC can be affected in relation to land issues which trigger regional concerns, as articulated in regional instruments. He also cites the authority of *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 (CA). But that decision is of no assistance to ARC’s case whatsoever. It serves to confirm what is obvious from the statute. In certain circumstances, the jurisdiction of regional and territorial authorities overlaps.

[128] I can deal with Mr Enright’s argument shortly. It is common ground that, when forming its statutory opinion on all persons who ‘may be adversely affected by the activity’, RDC did not take account of ARC. At best ARC is the regional authority, responsible for implementing and enforcing a regional plan. Otherwise it has no particular, special or direct interest in an application for a resource consent under district planning instruments.

[129] Taken to its logical conclusion, Mr Enright's argument would require service upon ARC of all applications for land use consent to a territorial authority. Both authorities have discrete functions, powers and duties: ss 30 and 31. The territorial authority has full authority relating to the matters set out in s 31, including of course the control, development or protection of land within its district: *Canterbury Regional Council* at 194. I agree with Mr Loutit. There was nothing to show that, in relation to this particular application, ARC had an interest beyond its statutory function.

[130] Mr Enright argues that ARC had 'an interest greater than the public generally'. But, as Mr Loutit submits, this is the test for an entitlement to become involved in proceedings before the Environment Court: s 274; it is not the test for determining whether or not to notify. Also, in general terms a person is only likely to be adversely affected by a proposed activity because he or she lives or carries on activity on land proximate to the proposed activity: *Northcote Mainstreet Inc* at [188], Lang J. ARC did not have a special, particular, or direct environmental interest in Parihoa's proposed activity.

(c) *Department of Conservation*

[131] Second, Mr Enright submits that RDC failed to evaluate whether DOC was an affected person, and to evaluate the impact of the proposed dwelling on the walkway and its users, including the visibility of the dwelling at elevation and footprint.

[132] Again, it is common ground that RDC did not expressly identify DOC as a potentially affected party. However, it took express account of the impact of the proposed dwelling on the walkway and its users. The relevant evidence and my findings on ARC's first ground of challenge to the non-notification decision applies here.

[133] Arguably, though, Ms Butler or Ms Gerber should have taken account of DOC's interest as the body responsible for administering the walkway. Given that the new building would be visible only from that thoroughfare, DOC should have

been given a formal opportunity to represent the interests of walkers. They were a group who, in terms of Blanchard J's observations in *Discount Brands*, 'might particularly suffer from the proposed activity': at [111].

[134] However, the issue is now of academic importance. By 25 July 2005 a DOC employee was aware that the land use consent had been granted four days earlier. She asked for a copy of the consent but took no further steps.

[135] Then, in September 2006 a landscape architect, jointly engaged by RDC and DOC to evaluate Parihoa's application for subdivisional consent under the encumbrance, prepared a comprehensive report. The architect advised both parties that 'publicly accessible areas within the visual catchment ... of the consented house site' would be visible from 'a very short stretch' of the walkway. It expressly recited a statement in its brief that 'the newly approved house will not be challenged'.

[136] The architect's brief was not produced but it must have had DOC's endorsement. DOC would have been the only one of the two principals with a possible interest in challenging the consent granted by the other. By then DOC had express knowledge of the approximate location of the approved site. Again it took no steps.

[137] Mr Matthew Ward, a senior DOC employee, has sworn an affidavit in support of ARC's application. He says that, if given notice, DOC 'would have certainly given a high degree of consideration and a strong submission in respect of the land use consent'. This statement is a carefully worded exercise in reconstruction. Its equivocality is telling. Mr Ward does not assert, presumably because he does not have the requisite knowledge or authority, that DOC would have opposed the application if given notice in 2004 or 2005.

[138] Also, I note that Mr Ward expresses his opinion that the building site 'is visually intrusive and deprives the walkway of a significant piece of its natural coastal and rural beauty'. He does not, of course, state that DOC itself would oppose. Mr Ward also says that DOC 'supports the relief sought by the ARC in this judicial review proceeding'. If that is so, it is significant that DOC has not been

joined, to seek relief in its own right, or sought joinder as a party in this proceeding. Had that step been taken, it would have been subject to the traditional obligations on discovery. And DOC would have been expected to explain its inactivity for nearly two years from July 2005 given its state of knowledge.

[139] Based on the available contemporaneous evidence, I infer from the circumstances that DOC would not have opposed Parihoa's application if given formal notice in 2004 or 2005.

(d) *Tangata Whenua*

[140] Third, Mr Enright submits that, having identified Ngati Whatua as a potentially affected person, RDC was on notice that it should make inquiries into the impact of the proposed dwelling on tangata whenua; and that the absence of any directly affected recorded archaeological site did not equate to the absence of cultural heritage, kaitiaki or other iwi related issues of concern.

[141] Mr Enright says RDC failed to make sufficient inquiry into Ngati Whatua's position, failed to provide Ngati Whatua with sufficient information on the application, did not provide it with ongoing information received on the application, particularly the archaeological report, and wrongly assumed that the absence of response from Ngati Whatua meant that it could disregard that interest. He also repeats his argument relating to Te Kawerau a Maki.

[142] This argument is essentially a restatement of Mr Enright's proposition about the relevance of Māori interests in the first or threshold step in deciding not to notify. Once RDC had concluded that the effects of Parihoa's proposed activity on cultural or heritage values were no more than minor, it was under no obligation in my view to carry out the same exercise at this second stage.

(3) *Resource Consent*

[143] When considering an application for a resource consent, RDC must: s 104(1):

... have regard to—

- (a) any actual and potential effects on the environment of allowing the activity; and
- (b) any relevant provisions of—
 - (i) a national policy statement;
 - (ii) a New Zealand coastal policy statement;
 - (iii) a regional policy statement or proposed regional policy statement;
 - (iv) a plan or proposed plan; and
- (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[144] Mr Enright challenges RDC's decision on two grounds. First, he says that RDC failed to give reasons to support its substantive decision to grant consent under s 104(1)(a) or alternatively relied on the same reasons as founded its decision on notification; he says the notification decision involves a different type of evaluative judgment and legal test to that in s 104(1)(a). Second, he says that RDC failed to consider the three mandatory instruments listed in s 104(1)(b)(i), (ii) and (iii).

[145] Ms Gerber's evidence answers the first ground; I am satisfied she undertook the different evaluative process postulated by Mr Enright: compare *Discount Brands* at [28]. Nevertheless, as Mr Loutit concedes, she did not have express regard to the national policy statement, the coastal policy statement and the regional policy statement: s 104(1)(b)(i), (ii) and (iii). Ms Gerber believed that the three district planning instruments administered by RDC were consistent with the three higher order plans; and as Parihoa's application satisfied Rodney's requirements, it would meet the terms of the other instruments.

[146] That concession does not, however, spell the end of the argument or dictate a finding of invalidity. Mr Loutit subjected the district planning instruments to careful analysis. For example, objective 10B(4)(a) of the operative district plan is 'to preserve the landscape qualities of open space and remoteness in coastal and rural areas'. Policy 10B(4)(e) is to the same effect, to preserve the natural character of the coastal environment by prohibiting the obstructive location of buildings, by limiting their height and bulk, and by controlling their design and external appearance.

[147] Plan Change 55 is even more specific. It is what Mr Loutit calls ‘a more fine grained analysis’ of what is special to this particular district. Objective 5.1 is designed ‘to protect and retain the rugged and remote non-urban character of the coast between Muriwai and Te Henga and of the steep and rolling bush layered rural land extending inland’. The policies of Plan Change 55 are to the same effect. And the proposed district plan, some of which relates to the landscape protection rural zone in which this land is located, repeat the same values, including that ‘the location, nature and scale of buildings should not adversely affect the high quality landscape within the zone’.

[148] I agree with Mr Loutit. The values, objectives or policies of the higher order planning documents were materially the same as or similar to the district instruments insofar as they applied to Parihoa’s application. Each affirmed the importance of preserving the natural qualities of this area.

[149] Mr Enright strives to identify a difference. He says the district plan did not ‘red flag’ the location of the proposed dwelling as being in an area of regional or outstanding natural character. Thus, he argues, there was a conflict on the status of the location of the dwelling between the district and regional planning framework, with a higher degree of protection required under the latter. While RDC had denoted part of the coastline as a moderately high ‘significant natural area’, the proposed house site did not fall within it. There exists, he says, a ‘paradigm gap’.

[150] I have given Mr Enright’s submission the careful consideration which it merits. On reflection I am not satisfied there is a material distinction between the two sets of instruments. Mr James Hassall, RDC’s junior counsel, prepared a comparative schedule of the district planning instruments, the ARPS, the New Zealand Coastal Statement, the Auckland Regional Plan Coastal and Part II of the Act. It confirms the nature and extent to which the planning instruments overlap at all levels, and reflect the ss 6 and 7 values.

[151] In my judgment all the instruments expound the same essential message but in different language. Parihoa’s land sits within an area of high natural quality. Plan Change 55, for the Muriwai/Bethells Special Character Area, directs that no building

or structure should detract from any view ‘of natural features obtained from any ... other public place including the sea’: para 10.1(iv).

[152] Proposed District Plan 2000 created strict assessment criteria to the same effect. For example, ‘whether the activity will adversely affect the visual and landscape values of the surrounding area’: 7.13.1(g), or ‘whether buildings ... visually intrude on any significant ridgeline ... and adversely affect landscape values when viewed ...’: 7.13.2(f).

[153] RDC expressly considered and applied these rules and criteria. Its decision, read as a whole, displays a high degree of appreciation of the natural qualities of this area and of the location in particular, and of its evaluation that Parihoa’s proposed building would not interfere with or detract from the critical environmental elements, whether singularly or together. It took account of the essential requirements of the higher order planning instruments, in substance if not in name.

[154] In my judgment the result would have been no different if RDC had specifically addressed the national and regional documents. While RDC erred in law in failing to have regard to the relevant provisions of the s 104(1)(b) statements, its error does not of itself invalidate its decision to grant consent made under s 104B.

[155] I will now address that question of invalidity within the third and critical issue of whether or not, given RDC’s error, relief should be granted in the terms sought by ARC.

(4) *Relief*

(a) *Introduction*

[156] Mr Enright says that the error or errors which RDC allegedly committed go to the heart of its processes. They strike at the core of the validity of its decisions not to notify and to grant consent. On this basis, he says the decisions are fundamentally flawed; and they should be set aside from the beginning unless other

factors require a different result: *Murray v Whakatane District Council* [1999] 3 NZLR 276, Elias J at 320 (upheld on appeal).

[157] It is well settled that an error committed by a statutory body does not of itself render a decision void from the outset. Old arguments about whether a decision, made in breach of a statutory obligation, is void or voidable no longer apply. The decisions in question are recognised as operative unless set aside, except in the ‘comparatively rare cases of flagrant invalidity’: *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) per Cooke J at 4. This is now the starting point. An overall evaluation is required to decide whether or not relief is to be granted, consistent with the discretionary nature of judicial remedies.

[158] Within that broad framework there are a number of factors apart from the gravity of the error. Mr Mills, supported by Mr Loutit, submits that, even if RDC erred, ARC’s claim for relief, for orders quashing the decisions and directing a rehearing of Parihoa’s application, should be dismissed. He relies on the grounds that: (1) ARC has delayed in bringing this proceeding and has acted unfairly and inconsistently; (2) Parihoa is an innocent third party and will suffer serious and in some cases irreparable harm if relief is granted; and (3) granting relief would be futile, as any redetermination sought by ARC would likely lead to the same decision.

[159] In this context, Mr Mills also cites, and I respectfully adopt, the proportionality principle formulated by Asher J in *Diagnostic Medlab Ltd v Auckland District Health Board* HC AK CIV-2006-404-4724 20 March 2007 at [375]:

... [the question] is whether the seriousness of the error identified in the successful judicial review application ... [is] proportionate to the consequences of relief being granted.

(i) *Nature of Error*

[160] First, on the gravity factor, I already found that RDC’s error in granting Parihoa’s resource consent without taking account of the s 104(b)(i), (ii) and (iii) instruments was nominal rather than substantial. However, I shall assume for these

purposes that Mr Enright is correct, and that RDC erred in not deciding to formally notify Ngati Whatua, DOC and Te Kawerau a Maki. Ngati Whatua was consulted in accordance with an agreed protocol, at least eight months before RDC made its decisions. It gave no notice of challenge or objection. DOC knew of the decisions within five days, and by September 2006 in a brief jointly given to a professional, affirmatively advised that it did not wish to challenge the consent.

[161] I repeat the inferences I have drawn earlier from these events. Both Ngati Whatua and DOC would not have opposed Parihoa's application if given formal notice. Attempts made by their representatives in this proceeding to suggest otherwise carry no weight. Also, I repeat that Ngati Whatua's currently stated ground of objection is broad, and not directed to this particular site.

[162] What is decisive is the contemporaneous conduct of each entity. Its combined practical effect was to allow a particular state of affairs to come into existence and to continue over a lengthy period, and on which Parihoa was entitled to rely. Any errors in failing to direct service on these two parties do not strike at the core of the consent process.

[163] Te Kawerau a Maki is in a different category. I agree with Mr Enright. An iwi's intrinsic values cannot be remedied by financial or other means; and Parihoa's ownership rights do not trump Te Kawerau a Maki's interest. Against that factor, I note Mr Taua's evidence is that the proposed dwelling is located within 'the locality' of an area of great ancestral and cultural significance to Te Kawerau extending to Kumeu, many kilometres away. He has not identified any particular significance attaching to this site. As Hammond J emphasised in *TV3 Network Services Ltd v Waikato District Council* [1997] NZRMA 539 at 548, the question is whether the particular kind of activity, in this case building a house on private land, 'is intrinsically offensive to an established wahi tapu, or other cultural considerations'.

[164] However, assuming for these purposes that RDC erred in not giving Te Kawerau notice, that factor would not of itself oust my discretion. The iwi's rights fall for consideration within the general framework of relevant interests which must be balanced.

(ii) *ARC's Knowledge and Conduct*

[165] Second, what is the effect if any of ARC's knowledge and conduct? This was a central focus of Mr Mills' submissions. He relies upon ARC's participation in and knowledge of the process of obtaining the joint consent of RDC and DOC to Parihoa's application for subdivisional consent – a subject which apparently generated a good deal of public debate.

[166] While the process of obtaining approval to Parihoa's application from the encumbrancers was ongoing, Mr Hugh Jarvis, ARC's manager of strategic planning, learned from an employee on 31 January 2006 that 'RDC had already granted approval to the development of one house'. In a letter produced by consent at this hearing Mr Jarvis said this:

At the time of my involvement in the boundary adjustment subdivision and encumbrance matter, through discussions with DOC, I was aware that RDC had granted **building** consent for a dwelling on the larger parent lot [this is the consent which is the subject of this proceeding]. I was, however, not aware of further details and did not pursue the matter as ARC's focus was on the encumbrance issues. ARC's focus on the encumbrance reflected the view that if RDC and DOC refused approval under the encumbrance then no further residential development could take place without requiring **resource** consent, and that any such consent would be likely to be non-complying and hence unlikely to be granted/likely to be notified. Hence ARC focused its resources on the encumbrance issue.

[Mr Jarvis' emphasis]

[167] ARC's Deputy Chair, Ms Christine Rose, attended a public meeting at the Huapai Service Centre on 4 October 2006. Also there was Mr Brian Moorhead. He owns a property near Parihoa's, and emerged as a vocal opponent of the company's application for subdivisional approval. Three other neighbours or former neighbours were present, along with two consultants. The purpose of the meeting was to discuss Parihoa's application to subdivide.

[168] Notes of the meeting record the statement by another neighbour that 'the building of the new house on proposed Lot 1 is to start soon'. Ms Rose had by then left. However, she accepts she may have received a copy of the notes. Shortly afterwards Ms Rose wrote a lengthy letter to Enfocus Planning Ltd, engaged jointly

as consultant by RDC and DOC to advise on the encumbrance issue. Her letter alleged bad faith both by Mr Storey and RDC, and accused him of participating in a 'mistaken, disingenuous and illegitimate process'. Ms Rose urged RDC's intervention.

[169] On 11 October 2006 Mr Moorhead sent an email to Mr Gary Taylor, President of the Environmental Protection Society, complaining about RDC's decision to grant subdivisional consent and stating:

Are you aware that RDC have granted a building consent on the back lot above the cliffs overlooking the ocean? Not notified and secret too.

[170] Mr Taylor sent a copy of that email, and of his email in reply, to Ms Rose on 31 October 2006. His letter discussed strategy and in particular the right to seek judicial review of RDC's subdivisional approval, and opined:

If [Mr Storey] sought review [of the subdivisional approval], we [and potentially the ARC] could then seek to join those proceedings and that would be the time to look at a counterclaim on the original consents issue... So it's a wait and see scenario at this stage unless anyone comes up with some approach that we haven't thought of.

[171] In the meantime, on 20 October 2006, Simpson Grierson, RDC's solicitors, wrote to Parihoa's legal advisor, stating as follows:

We understand that building works have commenced on Mr and Mrs Storey's property at 223 Constable Road, Muriwai in reliance on land use consent L37497 which was granted by the council on 21 July 2005.

As we have advised in previous conversations, **the council considers that the land use consent granted for the new dwelling is contingent on a subdivision**, which has not yet been approved under the encumbrance registered on the title. Accordingly, the council considers it to be inappropriate for your clients to construct the dwelling in advance of the subdivision being approved.

In the event that the approval from [DOC and/or RDC] (under the encumbrance) is not forthcoming, it is likely your clients will need to apply for consent to erect an additional household unit on a site over 40 hectares that is used for farming. This is because the **existing consent was assessed and considered as an application for a single household unit on a newly created title** [Mr Loutit accepts that this statement is incorrect]. Even if the approvals are given under the encumbrance, there remains a real risk of judicial review proceedings being commenced to challenge the subdivision consent.

In the absence of either a completed subdivision or a land use consent for an additional household unit, the council considers that the building currently being constructed by your clients may not be lawfully established.

We trust you will discuss this matter with your clients, and advise them of the potential risks involved in proceeding in reliance on the consent referenced as L37497.

[Emphasis added]

[172] Mr Enright seeks to rely upon Simpson Grierson's letter as a factor decisively adverse to Parihoa within the discretionary mix. He says it constitutes notice to the company from October 2006 that its land use consent could not be lawfully exercised; and that it would commence construction at its risk.

[173] I disagree. Simpson Grierson's letter plainly confused two distinct legal rights. Mr Loutit accepts that its assertions were wrong. The validity or otherwise of RDC's subdivisional approval, to which the encumbrancer's consent was necessary, was irrelevant to Parihoa's rights under a different land use consent, granted on a different application, some months later. Simpson Grierson's letter echoes the legal misconception which underpinned ARC's mistaken belief, outlined by Mr Jarvis and confirmed in Ms Rose's correspondence, about the encumbrance's legal effect and, in the absence of evidence to the contrary, I infer that it was generated in direct response to Ms Rose's correspondence on ARC's behalf.

[174] I agree with Mr Mills; ARC's strategy was to prevent Parihoa from exercising its rights under the land use consent, by applying pressure on RDC and DOC to withhold consent under the encumbrance. ARC did not understand that the encumbrance did nothing more than require consent to any further subdivision. It apparently assumed that, if subdivisional approval was refused, Parihoa would be forced to apply for a new consent to build on the main title of 235 hectares; and that that would be a non-complying activity because there would be more than one building on the site, thereby preventing the company from acting in accordance with its existing consent.

[175] In early May 2007 ARC's chair, Mr Michael Lee, requested its solicitor, Mr John Burns, to liaise with RDC. His purpose was to encourage RDC to issue an abatement notice to Parihoa. Indeed, on 4 May 2007 RDC issued such a notice,

requiring all construction to cease by 8 May. It was based upon a new ground which could never be upheld and was withdrawn on 22 May. In an email sent on 29 May Mr Lee expressed his dissatisfaction with RDC's cancellation.

[176] Instead of supporting Mr Enright's submission of disqualifying conduct by Parihoa, I am satisfied that events leading to and following Simpson Grierson's letter have a material effect the other way. By late October 2006 Ms Rose knew RDC had granted Parihoa a land use consent to build a new dwelling 'on the back lot above the cliffs overlooking the ocean'. Mr Enright is correct that her state of knowledge is not to be attributed to ARC in the corporate sense. Formal service of a copy of Parihoa's application on ARC would be necessary to constitute institutional notice.

[177] Nevertheless, I agree with Mr Mills. Ms Rose's conduct remains directly material. Throughout, she had an intense, and at times personal, interest in Parihoa's activities. She acted for some time under ARC's delegated authority for the purpose of liaising with RDC and DOC about the issue of encumbrance consent. She was in a position of influence which she used whenever appropriate.

[178] Ms Rose's silence from late October 2006, when she was on express notice of the existence of the non-notified consent and of the general location of the proposed building site, leads to the inference that, as ARC's elected representative for the area, she did not consider the issue of sufficient importance to require immediate and direct intervention. Instead she relied upon a mistaken understanding that RDC could achieve its objective through opposing Parihoa's request for subdivisional approval under the encumbrance. While Ms Rose was not under a duty to take any steps, her inactivity contributed significantly to Parihoa's assumption that its consent was not under challenge and that it could act accordingly: see *Turner v Allison* [1971] NZLR 833 (CA) per Turner J at 853.

[179] Based on its mistaken view of the law, held at least by Ms Rose and by Mr Jarvis, who was in a senior management position and who has represented ARC in this proceeding, and that that view would ultimately prohibit Parihoa from exercising its land use consent, ARC did not intervene. It could have taken the same step of issuing proceedings in November 2006 that it took in June 2007 but instead it

stood by. All that happened in the interim was receipt of a complaint from a person using the Te Henga walkway. The only change in its state of knowledge of the consent through that period was the precise location of the site.

[180] Mr Enright says ARC ‘adopted a reasonably defensible position’ in assuming between December 2005 and December 2006 that Parihoa would be unable to develop a residence on the main title without the prior issue of a non-complying resource consent. By the end of the hearing, Mr Enright did not attempt to defend ARC’s legal position. It was plainly wrong and indefensible.

(iii) *Parihoa*

[181] Third, there is the position of Parihoa and other third parties. There can be no doubt that Parihoa and its contractors will suffer serious prejudice if relief of any form is granted. Parihoa has spent over \$470,000 on this project, principally in architectural and construction fees. All work came to a halt in June when ARC issued this proceeding.

[182] I agree with Mr Mills; even if RDC’s decision is set aside and a rehearing directed subject to conditions, such as provision of notice to truly affected persons, construction will be delayed indefinitely. I am satisfied that ARC would act through the proxy of such a party; and by this means it would take all legally available steps to ensure that a land use consent was not granted, either by resorting to rights of challenge at local authority level and on appeal before the Environment Court. Mr Mills’ submission finds support in ARC’s separate application to the Environment Court for a demolition order.

[183] In opening, Mr Enright raised a technical argument, designed to show that Parihoa was on notice at least until 23 May 2007 that its land use consent was ineffective and that it commenced building at its risk. He argues that the land use consent was granted for a single household unit on the title; and it could not be lawfully exercised, at least prior to 23 May, when Parihoa entered into a deed of undertaking with RDC to remove the other dwellings upon completion of its house which was then being built. Mr Enright characterises this as a breach of s 9, in

undertaking construction prior to receipt of lawful authority. Accordingly, the company could not complain about prejudice suffered before 23 May. He said Parihoa was acting 'with unclean hands'.

[184] This approach only serves to validate Mr Mills' criticisms of ARC. Mr Enright's argument depends upon reading into the resource consent a condition that approval 'to construct a single household unit' must be subject to a further condition – that the consent is ineffective unless and until Parihoa either removes or agrees to remove other dwellings on the property. Whatever views planners may have about this arcane question, I am in no doubt that no such condition can be read into the consent. But, even if it could have been, Parihoa was able to give the undertaking it proffered on 23 May 2007 at any time previously, if requested.

[185] Mr Enright fairly acknowledges that Parihoa is at risk of substantial financial loss from sunk costs. He says, though, that it may have civil remedies available to recoup some or all of this expenditure, either from its consultants or RDC. He does not identify the legal or factual foundation for this proposition. The decision in *Bella Vista Resort Ltd v Western Bay of Plenty District Council* CA233/05 [2007] NZCA 33, 1 March 2007, is emphatic authority to the contrary.

[186] Mr Enright says, alternatively, that Parihoa may ultimately secure consent if RDC has to reconsider its decisions; and it is thus uncertain that all expenditure will be wasted. That result is a possibility, but if ARC has its way, as Mr Enright says it should, it will never eventuate, and Parihoa will have to pay a further \$138,000 to meet demolition costs. Whatever happens, it will be many months if not years before Parihoa, if successful, is able to resume construction.

[187] There is another factor. Mr Enright accepts that Mr and Mrs Storey have invested a great amount of personal energy and effort into this project, and suffered stress and trauma as a result of this proceeding. That factor cannot be discounted in the overall evaluation.

(iv) *Conclusion*

[188] Balancing all relevant factors, I am in no doubt that the merits, within this discretionary inquiry, favour validation of RDC's decisions to grant resource consent, and of its decision not to identify and notify DOC, Ngati Whatua and Te Kawerau a Maki as affected persons if that was also wrong in law.

[189] Unlike *Murray's* case, RDC's errors do not strike at the core of its decisions. I take account of Ngati Whatua's failure to object during the consultative process, and DOC's failure to object immediately after the land use consent was granted – indeed its affirmative advice in September 2006 that the consent would not be challenged. Te Kawerau a Maki's interest was not known to RDC at the material times and, in any event, like Ngati Whatua, its interest in the area is more general than localised to the approved site.

[190] But the two interrelated factors of decisive relevance are ARC's conduct, in failing to take steps when it knew or ought to have known of the consent, and Parihoa's reliance on the consent's validity, and the loss it will suffer if relief is granted.

[191] It is relevant also in this respect that, if I granted relief on the resource consent issue, the application would be remitted for a non-notified rehearing according to the same criteria applied by RDC originally; and I am satisfied that its conclusion would be unchanged.

[192] In my judgment the consequences for Parihoa of granting any relief to ARC would be grossly disproportionate to the seriousness of RDC's error or errors, either in deciding not to notify or to grant consent.

Result

[193] ARC's application for relief is dismissed.

[194] In my provisional view each party should bear their own costs. While ARC's case has been over-resourced, to say the least, it has established an error in RDC's decision to grant a resource consent. Its application failed because I have exercised

my discretion not to allow relief. Accordingly, costs should lie where they fall, and I will require extremely persuasive argument if I am to find to the contrary. However, I reserve leave to either party to apply for costs by filing a memorandum (of no more than 10 pages long) within 28 days, with other parties to file memoranda in answer (again limited to a maximum of 10 pages) within a further 14 days. If necessary, I will then hear counsel.

[195] I wish to acknowledge the quality of the oral submissions made by Mr Enright on ARC's behalf (no doubt well assisted by Ms Fraser and Mr Casey); its case could not have been advanced more forcibly or fully. I also wish to make the same acknowledgement to Messrs Loutit and Mills and their respective juniors, Mr Hassall and Mr Graham.

Rhys Harrison J