

IN THE MATTER of AN APPLICATION FOR SUBDIVISION CONSENT AND
LAND-USE CONSENT UNDER THE RESOURCE
MANAGEMENT ACT 1991

BETWEEN **SPRING HILL FARM HOLDINGS**

Applicant

A N D **CENTRAL HAWKE'S BAY DISTRICT COUNCIL**

Consent authority

OPENING SUBMISSIONS ON BEHALF OF THE APPLICANT

Hearing 17 and 18 May 2022



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May it please the Commissioners

1. This is an application by Springhill Farm Holdings for subdivision consent for a staged, 312 lot lifestyle residential subdivision (together with associated Road lots) of a block of land comprising 220.77 ha situated adjacent to the junction of State Highway 50 and Wakarara Road Ongaonga.
2. The properties are situated at 1080, 1152 and 1200 State Highway 50 and 604 and 612 Wakarara Road, Ongaonga. The land is held over three separate Records of Title, being that land legally described as Part Section 2 Block IV Ruataniwha Survey District held on Record of Title HBG1/1065 comprising an area of 176.1732ha; Section 10 Block IV Ruataniwha Survey District held on Record of Title HBA2/1134 comprising an area of 2,023m²; Lot 2 DP 395788 held on Record of Title 382377 comprising an area of 44.3915ha ("the subject property"). The parent properties therefore have a combined total area of 220.77ha. Copies of the relevant titles accompanied the application.
3. From the outset, it should be noted this is a controlled activity subdivision within the Rural Zone of the Central Hawke's Bay District Plan and that we concur with the recommendation of the reporting planner in his section 42A report, that consent must be granted and should be granted subject to conditions.
4. There is substantial agreement with the conditions proposed by the reporting officer with minor amendment. Those amendments are to the proposed lapse date for the subdivision consent and with the recommendation of the planning officer¹ suggesting the installation of street lighting throughout the entire subdivision as opposed to street lighting been installed at intersections as recommended by East Cape Consulting Ltd in the transportation assessment report prepared for the applicant and subsequent memorandum from that company dated 3 May 2022.
5. The former issue relating to the lapse period is dealt with later these submissions. The issue relating to street lighting has already been

¹ at paragraph 108 of his report

comprehensively addressed in the memorandum from East Cape consulting Ltd dated 3 May 2022 which concludes that:²

A rural approach to road lighting is considered to provide an appropriate level of traffic safety and amenity (for path users), in keeping with the rural residential nature and scale of the proposed subdivision.

6. Mr Eivers' conclusion is that street lighting should only be installed at Road intersections, cul-de-sac heads, low radius curves and points where foot paths cross roads.

The Proposal

7. The proposal is fully described in the Application and accompanying Assessment of Environmental Effects (AEE) dated 19 April 2021 and in the planning officer's s42A report.
8. Briefly, the proposal is for the development of a large lot lifestyle residential subdivision within the rural zone of the operative Central Hawke's Bay District Plan.
9. It is common ground that the application falls to be considered as a controlled activity.
10. In addition, consent is sought for land use consent under the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 ("NESCS").
11. The NES application has been the subject of a Detailed Site Investigation which identified soils impacted by residual contamination from historic farm activities in the vicinity of proposed Lots 198 – 201 (Stage 14) and Lots 176 – 179 (Stage 15). The contamination identified is in the vicinity of a former sheep dip and farm sheds. The application proposes the removal of the contaminated soils.

² see memorandum from East Cape consulting Ltd dated 3 May 2022.

12. The removal of contaminated soil is subject to Regulation 10 of the NESCS and requires Restricted Discretionary Activity resource consent for both 'soil disturbance' and 'subdivision' of a piece of land subject to the NESCS.
13. We concur with the analysis and recommendations of planning officer's report³ that the draft RAP and the Stantec peer review of both documents that "any adverse effects associated with the contaminated soils will be remedied and mitigated such that any effects on human health and the wider environment will be appropriately avoided, remedied, or mitigated" and that the conditions recommended will appropriately address the remaining assessment matters of NESCS Regulation 10(3).
14. The identification of contamination arising from sheep dips and associated farm shedding is commonplace and remedial the proposed remedial work will address that contamination.

The controlled activity subdivision

15. As already noted, it is common ground that the application for subdivision consent falls to be considered as a controlled activity under the Central Hawke's Bay District Plan. The application is to be considered under section 104 of the RMA, the relevant provisions of which provide:

104 Consideration of applications

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to

Part 2 ~~[[and section 77M]], have regard to—~~

- (a) any actual and potential effects on the environment of allowing the activity; and*
- (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and]]*
- (b) any relevant provisions of—*
 - (i) a national environmental standard:*

³ 202-211 of thes42A Report

(ii) *other regulations:*

(iii) *a national policy statement:*

(iv) *a New Zealand coastal policy statement:*

(v) *a regional policy statement or proposed regional policy statement:*

(vi) *a plan or proposed plan; and]]*

(c) *any other matter the consent authority considers relevant and reasonably necessary to determine the application.*

...

16. With regard to the effects on the environment, the planning officer's report concludes that there are potential reverse sensitivity effects and effects on rural amenity arising from the subdivision but that as this application is for a controlled activity with limited matters of control under the District Plan, there are no conditions available to mitigate such potential effects.
17. With regard to the potential for reverse sensitivity effects, the applicant is proposing a no complaints covenant which will protect any lawfully established activities being undertaken lawfully in accordance with the district and regional plan requirements. This will avoid, remedy and mitigate any potential reverse sensitivity effects.
18. With regard to the potential for effects on rural character and amenity, it is submitted that while there will be a change in the rural character and amenity, that change is a change that is envisaged and provided for in the district plan which provides for this type of lifestyle subdivision as a controlled activity.
19. Ultimately, the Resource Management Act is not a "no change" regime. Sustainable management as defined in section 5 envisages both use and development of natural and physical resources, not simply their protection.

Section 104(1)(b)

20. The application prepared by Development Nous Ltd⁴ contains a comprehensive analysis of the relevant planning documents and this is

⁴ At pages 40-45 of the AEE

replicated in the planning officer's s42A report which concludes "Given the controlled activity status of the proposed subdivision, I consider that it follows that it achieves general consistency with the objectives and policies of the District Plan."⁵

21. We concur with that conclusion.
22. We also agree with the planning officer's assessment of the restricted discretionary land use activity⁶ and his conclusion that the requirements of the NESCS have been satisfactorily addressed.
23. For completeness, this application was lodged on 19 April 2021, six months prior to the proposed plan being notified in October 1991. As a result, the application does not include and was not required to include an assessment of the proposal against the provisions of the proposed district plan.
24. The reporting planner has undertaken an analysis of the proposed district plan provisions and we concur with his conclusion that:⁷

Although I have had regard to these objectives and policies, in terms of the weight that should be given to them, it is my opinion that they should be given limited weight in the decision on the subdivision application. Although they have legal effect, they are subject to submissions and may change through the hearing and appeals process. Further, the relevant rules do not have legal effect and, as such, the objectives and policies do not change controlled activity status of this application.

25. For the reasons that will be outlined later in the submissions, we disagree with the contention that the objectives and policies can be used as justification for imposing a five year lapse period.

Section 104A

26. We agree with the planning officer's interpretation of, and application of section 104 in light of section 104A. Section 104A provides:

104A Determination of applications for controlled activities

⁵ At para 253 of the s42A Report
⁶ at para 225 – 227 of the s42A report.
⁷ at paragraph 263 of the section 42A report

After considering an application for a resource consent for a controlled activity, a consent authority—

- (a) must grant the resource consent, unless it has insufficient information to determine whether or not the activity is a controlled activity; and
 - (b) may impose conditions on the consent under section 108 only for those matters—
 - (i) over which control is reserved in national environmental standards or other regulations; or
 - (ii) over which it has reserved its control in its plan or proposed plan.
27. As noted in the planning officers report⁸, for the purposes of section 104A(b)(i), there are no relevant controls reserved in National Environmental Standards or other regulations.
28. For the purposes of section 104A(b)(ii) the matters over which Council has reserved control and its district plan are detailed in sections 9.9.3 and 14.6 of the district plan. Those provisions provide:

CONTROLLED SUBDIVISION ACTIVITIES

Note: A subdivision consent need not be notified in accordance with section 103 of the Act, if the subdivision is a controlled activity. Any subdivision which complies with all Subdivision Performance Standards shall be a Controlled Activity. The Council's [sic] has reserved control over the following matters:

- (a) Lot Size
 - Lot size of subdivisions in the Business and Township Zones.
 - Lot size of subdivisions for access, utilities, reserves and roads.
- (b) Lot Dimension
 - Lot dimension of subdivisions for access, utilities, reserves and roads.
- (c) Subdivision Design
 - Relationship and orientation of lots.
 - The location of walkways and cycleways.
 - The provision and/or use of roads, open stormwater channels and wetland areas.

⁸ at paragraphs 223 – 237

- The environmental effects as a result of earthworks and the rehabilitation of the area. Subdivision Rules 124 Central Hawke's Bay District Plan
 - The location and relationship to areas of significant nature conservation value as identified on the planning maps.
- (d) Property Access
- The location, alignment and pattern of roading or service lanes.
 - The location and provision of access to lots for vehicles, cycles and pedestrians.
 - Any financial contributions to be made by the applicant.
 - Road reserves and provision for future subdivision on adjoining land.
 - The standard of construction required for property access, other than as required by Rule 9.10 (h).
 - Street lighting.
 - Naming of private vehicular access.
- (e) Natural Hazards Provision of works, the location and type of services, building location, and location, degree of compaction, type and quantity of filling and earthworks that could be affected by the following natural hazards or which could affect the impact of those natural hazards on the site or other land in the vicinity:
- Coastal Erosion
 - Flooding
 - Erosion\Land Instability (including rockfall, alluvion and avulsion)
 - Storm Surges
 - Tsunamis
 - Vulcanism
 - Seismic Activity (Earthquakes)
 - Wind
 - Wild Fire
- (f) Water Supply
- The supply of water, other than from a Council reticulated system.
 - Water supplies for fire fighting purposes.
 - The standard of water supply infrastructure installed in subdivisions, and the adequacy of existing supply systems outside the subdivision.
 - Any financial contributions required in respect of water supply.
- (g) Stormwater Disposal
- The capacity of existing and proposed stormwater infrastructure and disposal systems.
 - The effectiveness and environmental impacts of any measures proposed for mitigating the effects of stormwater run-off, including the control of water-borne contaminants, litter, debris and sediments.

- The location, scale and construction of stormwater infrastructure.
 - Any financial contributions required in respect of stormwater disposal.
- (h) Sanitary Sewage Disposal
- The method of sewage disposal where a public reticulation and treatment system is not available.
 - The capacity of, and impacts on, the existing reticulated sewage disposal system.
 - The location and environmental effects of the proposed sanitary sewage system.
 - Any financial contributions that may be required in respect of sanitary sewage provision.
- (i) Trade Waste Disposal
- Disposal of trade waste within Business Zones.
 - Any financial contributions required in respect of trade waste disposal. Part 9: Subdivision and Financial Contributions May 2010 125
- (j) Vegetation and Landscape
- The protection of significant indigenous vegetation, habitat and landscape.
- (k) Easements
- The need to create easements for any purpose.
- (l) Building Location
- The location of buildings.
29. These matters are in turn substantially replicated and expanded upon in section 14.6 of the operative District plan
30. All of the relevant matters over which control is reserved are comprehensively addressed in the application, AEE and supporting reports. In addition, the officer's report contains a detailed analysis⁹ of the matters over which control has been reserved, the information contained in the application and matters raised by submitters. The reporting officer has proposed conditions in respect of each relevant matter of control.
31. We agree with that analysis and as indicated by the substantive agreement on conditions, we agree with the proposed conditions of consent with minor amendment.
32. The NESCS application has also been comprehensively detailed in the application and properly assessed in the officer's report. That application

⁹ paragraphs 67 – 196 of the officers report

is to be considered as a restricted discretionary activity under section 104 and 104C of the RMA. Section 104C provides:

104C Determination of applications for restricted discretionary activities

(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

(2) The consent authority may grant or refuse the application.

(3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion and its plan or proposed plan

33. The matters over which discretion is restricted are set out in regulation 10(3) of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011. That regulation provides:

10 Restricted discretionary activities

...

(3) The matters over which discretion is restricted are as follows:

(a) the adequacy of the detailed site investigation, including—

(i) site sampling:

(ii) laboratory analysis:

(iii) risk assessment:

(b) the suitability of the piece of land for the proposed activity, given the amount and kind of soil contamination:

(c) the approach to the remediation or ongoing management of the piece of land, including—

(i) the remediation or management methods to address the risk posed by the contaminants to human health:

(ii) the timing of the remediation:

(iii) the standard of the remediation on completion:

(iv) the mitigation methods to address the risk posed by the contaminants to human health:

(v) the mitigation measures for the piece of land, including the frequency and location of monitoring of specified contaminants:

- (d) the adequacy of the site management plan or the site validation report or both, as applicable:
- (e) the transport, disposal, and tracking of soil and other materials taken away in the course of the activity:
- (f) the requirement for and conditions of a financial bond:
- (g) the timing and nature of the review of the conditions in the resource consent:
- (h) the duration of the resource consent.

34. Again, there is substantial agreement between the applicant and the officers report on the exercise of these matters of discretion and we concur with the conclusions and recommended conditions detailed in the officers report at paragraph 209 – 211.

The Lapse period

35. There is no agreement on this matter.
36. The Applicant has sought a 15-year lapse period. The reporting officer recommends a 5-year period.
37. This is an application for a 16-stage subdivision consent comprising some 312 lifestyle residential sites. The applicant's vision for the site is a comprehensive large lot lifestyle residential development which envisages the supply of sections to the market over an extended period of time.
38. As a result, a lapse date of 15 years is sought in accordance with section 125 of the Resource Management Act. This will allow stages to be developed in a progressive manner to meet demand but also ensures that until such time as a stage is implemented, the balance of land will be available for continued rural land uses.
39. The rationale for imposing a lapse date is clear. There are strong policy reasons why a resource consent should not subsist for a lengthy period of time before being put into effect.¹⁰ However, there is no question that the consent will be commenced well within the five-year period and indeed that stages will be completed within the default lapse period envisaged by section 125.

¹⁰ see for example *Katz v Auckland CC* (1987) 12 NZTPA 211, *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513

40. In *Crest Energy Kaipara Ltd V Northland RC*¹¹ the Environment Court dealt with an appeal requesting the reduction of the 10 year lapse date to 5 years. In upholding the longer period, the Court accepted the submissions on behalf of Crest Energy regarding the scale and importance of the proposed development and the fact that there were significant steps to be taken between stages to uphold a longer lapse.
41. While not a matter of national importance, the provision of housing opportunities is a significant issue both nationwide and within Hawkes Bay. It is important for development to occur in a progressive and coordinated manner and this is precisely why consents are sought on a staged consenting basis. This allows development of the entire vision to occur in an orderly and planned way.
42. This is not a situation where this consent will subsist unimplemented for a lengthy period of time. If that is the concern then there is no issue with the first stages of the consent receiving a lapse period of five years, the middle stages of the proposed consent a lapse period of 10 years in the latter stages a lapse period of 15 years with the proviso that if those lapse periods are not met, then the balance of the consent will lapse.
43. In his officers report the rationale given for declining a 15-year lapse period is due to the objectives and policies of the not yet operative Proposed District Plan and the contention that the proposal would be contrary to those objectives and policies. This position is taken notwithstanding the candid acknowledgement that those objectives and policies are not yet operative and may be subject to change. It also has the effect of giving the proposed plan retrospective effect to an application made six months prior to the proposed plan even been notified. There are strong policy considerations as to why legislation including subordinate legislation such as district plans should not be given retrospective effect.
44. The officers position is further explained and indeed exacerbated by the supporting rationale

“...that it would not be appropriate to grant an extension of the five year lapse date as sought in the Application as doing so would be

¹¹ [2011] NZEnvC 26

providing additional time to enable the full extent of the subdivision to be completed.”¹²

45. It is submitted that the intent behind the refusal to extend the lapse period is effectively an attempt to frustrate the consent by making the staged implementation of the consent unworkable. As a matter of law, conditions (to which a lapse period is akin) and the terms of resource consent cannot operate so as to frustrate or negate the terms of the consent granted.¹³
46. It is clear that the rationale for the recommendation for declining a 15-year term is to frustrate the ability to enable the full extent of the subdivision to be completed. Such an approach is unreasonable and ultra vires.
47. A lapse period of 15 years is sought. If necessary, that can be refined such that the lapse period for stages 1 to 5 is five years, 6 to 10 is 10 years in 10 to 16 is 15 years. It is submitted that this gives the necessary commitment to ensure that the consent is implemented while allowing sufficient time for that implementation.

Conclusion

48. It is submitted that this application must be granted and that it should be granted as proposed with a lapse period of 15 years.



M B Lawson
Counsel for the Applicant

¹² at paragraph 280 of the s42A report

¹³ see *Residential Management Ltd v Papatoetoe City A62/86(PT)*, *Taranaki regional Council v Willan EnvC W150/96* and *Ravensdown Growing Media Ltd v Southland Regional Council EnvC c194/100*