IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2007-441-1009

BETWEEN	HAVELOCK NORTH CITIZENS INCORPORATED Plaintiff
AND	HASTINGS DISTRICT COUNCIL Defendant

Hearing: 5 June and 15 August 2008

Appearances: Matthew Lawson and Emily Fackney for Plaintiff
Bruce Gilmour and Michael Wakefield for Defendant
Alison McEwan for Conrad Properties Ltd

Judgment: 10 September 2008

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 11:30 am on 10 September 2008

SOLICITORS
Willis Toomey Robinson (Napier) for Plaintiff
Bannister & von Dadelszen (Hastings) for Defendant
Langley Twigg (Napier) for Conrad Properties Ltd

Introduction

[1] Havelock North Citizens Incorporated (HNCI) represents a group of citizens who challenge the lawfulness of two certificates of compliance issued by the Hastings District Council to related companies (collectively Conrad Properties Ltd). The applications were for residential unit developments proposed at separate sites in Te Mata Road and Napier Road, Havelock North. The certificates have the legal status of resource consents.

[2] HNCI has applied to this Court for an order quashing Council's decisions to issue both certificates on the ground of four discrete errors. One alleged error is common to both certificates, two relate solely to Te Mata Rd and one solely to Napier Rd. Conrad has not applied for building consents to develop either site. In fact, the company has since sold the Napier Rd property to another party who uses it for its original purpose as a dairy.

Section 139 RMA

[3] Council issued the certificates of compliance in accordance with its powers under s 139 Resource Management Act 1991 (the RMA), which provides as follows:

> (1) Where an activity could be lawfully carried out without a resource consent, in respect of any particular location, the consent authority shall, upon request and payment of the appropriate administrative charge, issue to any person who so requests a certificate that a particular proposal or activity complies with the plan in relation to that location.
>
> (2) A consent authority may require an applicant for a certificate of compliance to provide further information relating to the request if, in the opinion of the consent authority, the information is necessary to determine whether the particular proposal or activity complies with the plan.
>
> (3) Subject to subsection (5), no certificate of compliance may be issued where a proposed plan has been notified and the proposal or activity is not a permitted activity, or could not lawfully be carried out without a resource consent, in relation to that location in the proposed plan.
>
> (4) A certificate of compliance shall describe the particular proposal or activity and the location concerned and be issued within 20 working

> days of the receipt by the consent authority of the request, or of further information requested under subsection (2), whichever is the later.
>
> (5) A certificate of compliance shall state that the particular proposal or activity was permitted, or could be lawfully carried out without a resource consent, on the date of receipt of the request by the consent authority.
>
> (6) Subject to sections 10, 10A, and 20A(2),a certificate of compliance shall be deemed to be an appropriate resource consent issued subject to any conditions specified in the plan, and the provisions of this Act shall apply accordingly, except that, with the exceptions of sections 120, 121, 122, 125, 134, 135, 136, and 137, this Part does not apply.
>
> (7) Sections 357A and 357C to 358 apply in relation to an application for a certificate of compliance.

[4] A certificate of compliance is a unique creation of planning law. A person may apply to a local authority for a certificate that an activity or proposal, which could be lawfully carried out at a particular location without a resource consent, complies with the operative district plan. The authority is required to undertake a point by point scrutiny of the proposal by reference to all the applicable district plan rules, given that the certificate is a representation that the proposal complies fully and in every respect: *Culpan v Vose* [1993] 2 NZRMA 380 (EC), applied by Panckhurst J in *Queenstown Casinos Ltd v Dunedin City Council* [1998] NZRMA 209.

[5] The s 139 procedure is unusual in two respects. One is that other parties who may be directly and adversely affected by the certificate have no rights of objection; there is no process of public participation. The other is that there are no rights of appeal to the Environment Court. The only means of challenge is through the limited jurisdictional route of judicial review: see *Pring v Wanganui District Council* [1999] NZRMA 519 (CA).

[6] Both counsel addressed submissions on the approach to be adopted in construing rules in a district plan. But nothing turns on issues of interpretation. The meaning of the relevant rules and performance standards are clear. Context is provided, of course, by the plan objectives, policies and methods. The question is whether or not Council erred in its own construction of the rules when considering each of Conrad's applications.

Conrad's Applications

(1) 88 Te Mata Road

[7] On 25 May 2006 Conrad submitted an application to Council for a certificate of compliance for a proposed activity at 88 Te Mata Rd, Havelock North. The proposal was to construct 15 residential units on a site zoned suburban commercial. The Operative Hastings District Plan provided for three such zones in the township of Havelock North. All three comprise a single site or pocket within a predominantly residential zone. The purpose of the zone is to allow for retail and small business activities serving residential communities. As Mr Matthew Lawson for HNCI observed, these zones were probably introduced to recognise or rationalise existing uses. This property had been used as a dairy.

[8] Conrad's application was accompanied by a comprehensive planner's report comprising a number of appendices. Included were proposed development plans and a district plan assessment – that is, an assessment of the proposal against the relevant provisions of the plan. The development plans started with a sketch impression before moving to ground and first floor site plans and specific drawings of each unit, including elevations. The district plan assessment ran to three pages, focusing on the provisions relating to residential activities in a suburban commercial zone.

[9] Council considered the application promptly by following a process according to a standard form check sheet. Guidance was obtained from following a flowchart which was expressly included within the plan: R1.5.4. The contents of Council's checklist are not dissimilar to Conrad's own district plan assessment document. The checklist confirmed that the proposed residential activity was permitted under the plan: R9.7.4.1, before considering two discrete sets of relevant standards: R9.8.1-9.8.9 (general performance standards) and R14.1.8.1-14.2.9.4 (parking, loading and access requirements).

[10] On 14 August 2006 Mr Ian MacDonald, Council's environmental manager acting under delegated authority, approved the application. He issued a certificate to Conrad that the proposal was a permitted activity under the plan.

(2) 103 Napier Road, Havelock North

[11] On 13 September 2006 Conrad applied for a certificate of compliance for a proposed activity at 103 Napier Rd, Havelock North. The proposal was to construct 64 residential units or terraced houses over four levels 'plus basement carparking'. This site was also within the suburban commercial zone. Again the property had been used as a dairy. The development plans were also comprehensive, showing site, basement, floor and subsequent level plans together with profiles. The district plan assessment was included and, as with the first application, Council followed the same checklist, focusing on the standards provided in R9.8, 14.1 and 14.2. Council issued a certificate of compliance for the proposal to Conrad on 8 May 2007.

Challenges

(1) Building Envelope

(a) Rule 9.8.5(5)(a)

[12] First, Mr Lawson submits that the Te Mata Rd certificate contravened R9.8.5(5) which provides:

> **Suburban Commercial Zone**
>
> For sites adjoining Residentially Zoned land, the following standards shall apply:
>
> (a) Building Envelope
>
> Buildings on sites adjoining residential zoned land shall be contained within a building envelope constructed by recession planes from points 2.75m above residential zone boundaries. The angle of such recession planes shall be determined for each site by use of the recession plane indicator in Appendix 9.0-3.

[13] It is common ground that Conrad's recession plane measurements for the building envelope for the Te Mata Rd development were not taken from all four boundaries. The company's application stated:

> The proposed buildings comply with the relevant sunlight setback standards along the abutting (southern and western) residential boundaries.

Conrad did not calculate measurements from the northern and eastern boundaries which adjoin Te Mata Rd and Lindsay St respectively.

(b) Issue

[14] R9.8.5(5)(a) provides that a building on a site adjoining residential zoned land 'shall be contained within a building envelope' to be constructed by 'recession planes from points 2.75m above residential zone boundaries'. What then are 'residential zone boundaries'? Are they all four site boundaries, as Mr Lawson contends? Or are they restricted to those which physically adjoin the site to the south and west, as Mr Bruce Gilmour for council submits?

[15] Mr Lawson emphasises Mr MacDonald's 'personal opinion' expressed in an affidavit sworn in this proceeding that the scale of Conrad's proposal was not what was envisaged by the suburban commercial zone. Mr Lawson observes that the intensity of Conrad's proposed development, a three storey, multi-unit, residential building of up to 10 metres high, is fundamentally incompatible with the existing residential development in the adjacent area, reinforcing the importance of Council undertaking a strict and rigorous assessment of the proposal against the relevant provisions of the district plan. Mr Lawson says that, in an attempt to take advantage of a perceived anomaly in the plan, Conrad proposed that the northern and eastern sides of the building would be flush with the road boundaries on Te Mata Rd and Lindsay St. As a result, there will be no building envelope or setback from those boundaries.

[16] Mr Gilmour advances two principal arguments in answer. First, he submits that R9.8.5(5)(a) does not apply to the roadside site boundaries because they do not 'adjoin' land within a residential zone; the land which 'adjoins' the site, within the

meaning of the rule, is limited to the southern and western boundaries. Mr Gilmour submits that Conrad and Council correctly limited the district plan assessment to consideration of relevant sunlight setback standards along the 'adjoining' southern and western residential boundaries.

[17] Second, Mr Gilmour says that the northern and eastern boundaries are not 'residential zone boundaries' in any event but are roads. He relies on R16.4 which provides that:

> These Objectives and Policies will be implemented through the following methods …
>
> **Existing Roads**
>
> All existing roads and State Highways are deemed to be designated for roading purposes and shall have an underlying zoning which is the same as that applying to adjoining land. Where more than one zone adjoins a road or State Highway, **the boundary** between these zones for the purpose of the underlying zoning, **shall be the centre line of the road**. The provisions of the underlying zone shall only be applicable for the purposes of Section 176(2) of the Resource Management Act 1991, or when part of or all of a designation for road is uplifted.

[18] Mr Gilmour submits that, as both Te Mata Rd and Lindsay St are designated in accordance with R16.4, the boundaries of the suburban commercial zone do thus not adjoin a residential zone at that street frontage. Further, the recession plane if applicable should be taken from the middle of the road, some 10 metres further away from the roadside boundary, and thus the proposed building fits within the required recession plane at the residential zone boundaries in any event.

(c) Conclusion

[19] It is appropriate, as Mr Lawson submits, to start this inquiry with a reference to the plan objectives for the suburban commercial zone (CZ010):

> To provide for commercial activities in the suburbs of … Havelock North … which … are complimentary and compatible with adjacent and adjoining residential activities.

[20] The reference to 'commercial activities', and the objective which it prescribes for each relevant site, must apply equally to a residential activity which is also

permitted. The purpose is plain. The zone is specially created within a residential area to meet commercial needs of the local community. The assumption underlying CZ010 is that, whatever development occurs there, it should be 'complimentary and compatible with adjacent or adjoining residential activities', and R9.8.5(5)(a) must be construed in that context.

[21] I agree with Mr Gilmour that the northern and eastern 'residential zone boundaries' of the Te Mata Rd site are not its roadside frontages. The site is itself a self-contained suburban commercial zone. The unambiguous effect of R16.4 is that the northern and eastern 'residential zone boundaries' are defined by a continuous line running along the centre points of Te Mata Rd and Lindsay St.

[22] However, I reject Mr Gilmour's principal submission that the phrase 'residential zone boundaries' refers only to the site's southern and western boundaries. There is no warrant for reading down the performance standard prescribed by R9.8.5(5)(a) in this way on the ground that they are the only two boundaries physically abutting land which is used for a residential purpose. If Mr Gilmour was correct, the rule would be worded to the effect that recession planes are to be calculated from points 'above the boundaries physically adjoining a residential site'.

[23] An analysis of the first sentence in R9.8.5(5)(a) highlights the flaw in Mr Gilmour's argument. The rule provides for two distinct steps. The first is directed to whether a building is to be constructed on a site 'adjoining residential zoned land'. The word 'adjoining' serves the purpose of describing the location of the site. If the site satisfies this requirement, then R9.8.5(5)(a) prescribes the second step for calculating the building envelope – that is, by using recession planes from points fixed 'above residential zone boundaries'. The fact that the site physically adjoins 'residential zoned land' is irrelevant to the constitution of its boundaries for the purpose of calculating the building envelope. The natural meaning of the phrase 'residential zone boundaries' is that it includes all, not some, boundaries within the residential zone. They are, for the Te Mata Rd site, its southern and western frontages and along the centre lines of Te Mata Rd and Lindsay St.

[24] Conrad's application including its plans failed to calculate the building envelope by taking recession planes from the northern and eastern boundaries being the centre points of Te Mata Rd and Lindsay St. There was no information whatsoever before Council to enable it to certify compliance with this important aspect of the plan. Conrad carried the onus of establishing the accuracy of compliance by this particular proposed activity with the plan: *Mawhinney v Waitakere City Council* HC AK CIV 2006-485-000627 19 December 2007, Venning J, at [16]. HCNI has discharged its burden on review of proving that Council erred in law in issuing the certificate by showing that it had no information on which to certify compliance with all aspects of R9.8.5(5): *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [60]-[66].

[25] I am satisfied that Conrad's proposal breached the performance standard relating to construction of the building envelope for the Te Mata Rd site by failing to calculate recession planes from the fixed points above all four site boundaries. Accordingly the certificate issued by Council to Conrad for the Te Mata Rd development is unlawful.

(2) Gross Floor Areas

(a) Rule 9.8.9

[26] Second, Mr Lawson submits that both the Te Mata Rd and Napier Rd proposals contravene R9.8.9 which materially provides the following performance standard:

> **CONTROL OF SCALE**
>
> **(1) Suburban Commercial Zone**
>
> (a) The maximum gross floor area for **individual Suburban Commercial activities** (excluding supermarkets) shall be 250m² …
>
> [Emphasis added]

The marginal notation to R9.8.9 states:

Outcome

> The scale of commercial activities will be compatible with the character and amenity values of adjoining residential activities.

[27] It is common ground that the maximum gross floor areas for both buildings proposed by Conrad significantly exceeds 250m².

(b) Issue

[28] The issue is whether, as Mr Lawson submits, the words 'suburban commercial activities' refer to all activities which may be undertaken in the zone, including those of a residential nature; or whether, as Mr Gilmour submits, the words refer only to activity of a truly commercial nature. Mr Gilmour relies on the plan's definition of commercial activity as:

> The use of land or buildings for the display, offering, provision, sale, repair or hire of goods, equipment or services and includes education facilities…

He contrasts this definition with the plan's definition of residential activity as:

> The use of land and buildings by people for the purpose of permanent living accommodation, and includes, residential buildings, residential units buildings, secondary residential buildings and associated accessory buildings.

(c) Conclusion

[29] I agree with Mr Lawson. The governing word in R9.8.9(1)(a) is 'individual'. This is a direct reference to 'suburban commercial activities'. Those individual activities are the following three 'Permitted Activities' found in the 'Suburban Commercial Zone' definition: R9.7.4:

- COMMERCIAL ACTIVITIES EXCEPT PREMISES USED FOR THE SALE OF LIQUOR
- RESIDENTIAL ACTIVITIES
- ACTIVITIES ANCILLARY TO ANY PERMITTED ACTIVITY WHICH COMPLY WITH THE GENERAL PERFORMANCE STANDARDS AND TERMS IN SECTION 9.8 AND ANY RELEVANT SPECIFIC PERFORMANCE STANDARDS AND TERMS IN SECTION 9.9.

[30] The plan permits three types of individual activities within the suburban commercial zone: (1) commercial activities (defined elsewhere); (2) residential activities (also defined elsewhere); and (3) ancillary activities. The general performance standards and terms found in R9.8 including R9.8.9(1)(a) must apply to all. The heading to R9.8.9 reinforces that its purpose is to control the scale of all development in the three commercial suburban zones in Havelock North.

[31] When read in combination, as Mr Lawson submits, R9.7.4.1 and R9.8.9(1)(a) impose an absolute prohibition of 250m² on the maximum gross floor area for any of the three permitted activities, including a residential activity. Contrary to Mr Gilmour's submission, it is irrelevant whether the activity falls within the plan definition of commercial or residential activity. Either activity is a suburban commercial activity, and must meet the relevant performance standards including the maximum gross floor area.

[32] Mr Gilmour relies upon the outcome notation reference to 'the scale of commercial activities' being compatible with adjoining residential activities. However, this notation is descriptive of the desired purpose of the performance standard, and the reference to 'commercial activities' does not operate to limit the reach of the rule itself to the individual permitted activities. As Mr Lawson submits, it would be anomalous to restrict the application of the 'suburban commercial activities' to commercial activities alone when such a building, having the same effect on the area's amenity and residential character, would not be allowed in the immediately adjacent residential zone with which buildings in the commercial suburban zone are supposed to be compatible.

[33] As a variant of this argument, Mr Gilmour submits that policy CZP19, consistent with the outcome notation, provides that performance standards included within the suburban commercial zone 'will ensure that commercial activities are restricted to a bulk and scale compatible with the current residential development'. While that is the relevant statement of purpose, residential activities, as noted, are expressly permitted within this zone. Council has allowed for the prospect of a future development in one of the three existing zones in Havelock North being for residential activities. The explanatory note to the policy provision reinforces

Council's requirement that all permitted activities in this zone are 'compatible with the current residential development'.

[34] I am satisfied that Conrad's proposals breached the performance standard limiting the maximum gross floor for both buildings to 250m². Accordingly, the certificates issued by Council for the Te Mata and Napier Rd sites are unlawful on this ground also.

(3) Earthworks

(a) Section 13.4

[35] Third, Mr Lawson submits that the Napier Rd proposal does not comply with the earthworks provisions of the plan, section 13.4. It is common ground that the proposal, for a development of five storeys of which two will be below ground level, will require extensive earthworks, and removal of substantially more than 25 cubic metres of earth per annum.

[36] Section 13.4 is headed 'EARTHWORKS DISTRICT WIDE ACTIVITY'. The introduction, R13.4.1, provides:

> Earthworks involve the disturbance of land by moving, removing, placing or replacing earth, or by excavation, cutting, scraping, filling or backfilling.
>
> Earthworks are an essential part of the on-going utilisation and management of the land resource in the District. It can include, for example, **the creation of building platforms for housing**, the creation of vehicle access onto sites…
>
> When land contours are disturbed or altered through earthworks, this can have significant environmental effects on the surface drainage patterns of land, visual amenity values, soil erosion potential, the life-sustaining capacity of soils, and the disturbance of ecosystems, watercourses and waterbodies, and areas of natural, cultural and heritage values. Earthworks may also create a potential hazard to the safety of people and the community where they cause subsidence, slippage or inundation of land.
>
> The rules in this section of the District Plan are intended to address these potential effects. It is acknowledged, however, that in many cases earthworks are undertaken in conjunction with subdivision and development, Network Utility Operations, Natural Hazard Mitigation Activities (such as

> the construction of stopbanks) or with works carried out under the designation procedures of the Resource Management Act. **These rules do not address earthworks associated with, and approved as part of, subdivision or building consents** (see Section 15.1 of the District Plan for rules on earthworks associated with subdivision), Network Utility Operations (see Section 13.3 of the District Plan for rules relating to Network Utilities), Designations (see Section 16.0 for rules on Designations), and Mining (see Section 13.2 on Mineral, Aggregate and Hydrocarbon Extraction). **The rules of this section of the District Plan deal with earthworks on land which are unrelated to these activities**.
>
> [Emphasis added]

[37] Permitted Activities within section 13.4 are described as 'Earthworks'. The earthworks proposed for the Napier Rd site, if considered as a discrete activity, appear to fall squarely within the definition found in the first two sentences of section 13.4. The relevant general performance standard applying to the section 13.4 permitted activities includes, in an urban zone, a prohibition on removal of more than 25 cubic metres per property per annum (suburban commercial zones are treated as urban zones for the purpose of this rule and performance standard). All other earthworks activities require a consent. Section 13.4 applies to all earthworks activities carried out, 'irrespective of the zones' and, on its face, governs Conrad's application.

(b) Council's Case

[38] However, Council raises a number of arguments to the contrary. First, Mr Gilmour accepts that neither Conrad nor Council addressed the earthworks issue for the Napier Rd proposal. He submits, however, that the provisions of the plan governing removal of earthworks on a property do not apply to an activity specified in its own right, within the suburban commercial zone, such as residential activity. He says that the section 13 rules and performance standards only apply when the activity proposed is an earthworks activity in its own right.

[39] Mr Gilmour's argument is to the effect that, because Conrad described the proposed development as a residential activity, it necessarily excludes consideration of any other activity. On this basis, the description adopted by the applicant is decisive, and Council does not need to concern itself with whether the proposal is in

fact composite – that is, including a discrete activity additional to that described in the application.

[40] This distinction, based upon a narrow construction of the word 'activity', cannot be maintained. A 'residential' activity can plainly include as a matter of fact an 'earthworks' activity; as Mr Lawson submits, the latter is an integral part of the former in Conrad's proposal. There is no reason, in principle or logic, for requiring a resource consent for earthworks proposed as a stand-alone activity while exempting from that rigorous process earthworks of the same or a greater nature and extent, to be undertaken as part of a residential development or activity, even though the effect on the natural and physical resources will prospectively be the same. The nomination of one activity cannot be determinative of whether another is also proposed in fact.

[41] Second, Mr Gilmour relies on the reference in section 13.4.1 to earthworks associated with, and approved as part of, subdivision or building consents. He says R13.4.7 recognises that any earthworks associated with building are managed through the building consent process. So, here, once the certificate of compliance is issued, the local authority will resolve any earthworks requirements if and when Conrad applies for a building consent. By contrast, Mr Gilmour says, the purpose of an application for a certificate of compliance is primarily to confirm the permitted activity status of a proposed activity or building which will require a consent in due course. Thus it is illogical to read the plan in a way that requires an applicant wishing to undertake building work involving the removal of earthworks exceeding 25 cubic metres per annum to apply first for a resource consent.

[42] Apart from observing that the plain words of R13.4.7 are to the contrary, I disagree with Mr Gilmour that the result is illogical. Rather, it appears to accord with the statutory framework. The RMA and the plans made under it and the Building Act 2004 and its regulations serve very different functions and purposes: see *Christchurch International Airport Ltd v Christchurch City Council* [1997] NZRMA 145 at 148, Tipping J:

> … Reduced to the simplest level relevant to the present case, the Building Act allows a council to control building work in the interests of ensuring the

> safety and integrity of the structure, whereas the Resource Management Act allows the council to impose controls from the point of view of the activity to be carried out within the structure and the effect of that activity on the environment and of the environment on that activity.

[43] The RMA's well known purpose is to promote the sustainable management of natural and physical resources including their use, development and protection: s 5. Specific restrictions are imposed on the use of land, including excavation or other disturbance of the land, in a manner which contravenes a rule in a district plan unless the activity is expressly allowed by a resource consent: s 9(1). The term 'resource consent' includes land use consents and subdivision consents which are separately defined: s 87. A proposal to remove substantial amounts of earth by way of excavation undoubtedly falls within the meaning of land use.

[44] The Building Act has a different but compatible statutory purpose. It is 'to provide for the resolution of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings: s 3. Its focus or function is upon the standard and quality of building work – that is, work 'for, or in connection with, the construction, alteration, demolition or removal of a building … including site work': s 7. A building consent relates to 'the proposed building work': s 44. And the issue of a building consent does not relieve the owner of the proposed building from any duty or responsibility under any other Act relating to the proposed building: s 51.

[45] There is nothing illogical in requiring a party which intends to undertake substantial earthworks on a site, that is by excavation or disturbance of the land, to first obtain a land use consent to interfere with the site's natural and physical resources before seeking a building consent for the consequential purpose of actual development by constructing a building. In accordance with that regime, the district plan recognises that earthworks constitute a discrete activity for RMA purposes and, by applying general performance standards and terms, fixes a permitted level of removal for various zones. The outcome attributable to this permitted extent of earthworks is that it will avoid 'any significant adverse effects of earthworks on people, property and the environment …', consistent with the purposes provided by s 5 RMA.

[46] Within that framework, the section 13.4 provisions expressly exclude earthworks associated with and approved as part of subdivision or building consents. I agree with Mr Lawson that the purpose of this exception is to avoid duplication and potential inconsistency. A subdivision consent falls for determination within the discrete provisions of the RMA including appropriate conditions, some of which expressly relate to earthworks: s 220(1)(d) and (e). Similarly a building includes site works which might be the subject of certain conditions. In this respect the Building Code makes clear that site works, including earthworks preparatory to construction of a building, are to be carried out for the objective of providing stability of construction on the site and avoiding the likelihood of damage to other property (Clause B1), confirming the relatively limited scope of a building consent in relation to the wide environmental effects of earthworks on a scale which exceeds a fixed performance standard.

[47] Third, Mr Gilmour submits that the plan itself provides a flowchart for assessing whether an application for a compliance certificate complies with the plan. I do not see how this assists. The first question provided by the flowchart is to decide whether or not the activity is permitted as a district wide activity by express reference to s 13.1-13.10. Earthworks is a district wide activity and Council erred in expressly reaching the opposite conclusion.

[48] Fourth, Mr Gilmour submits that the activity is permitted by R13.2.7, relating to excavation or removal of earth from any site in any residential or commercial zone for building construction purposes. However, I agree with Mr Lawson that this provision relates to the resource management issues raised by R13.2.2 relating discretely to prospecting and mineral activities.

(c) Conclusion

[49] In my judgment Council erred in this way. Its assessment was immediately limited by Conrad's description of its proposal as a residential activity. Its sole concern was whether a proposed activity of that status was permitted. It confined itself to asking whether or not the particular proposal complied with the suburban commercial zone requirements of the district plan. Its standard form checklist

confirms Council's failure to ask itself the wider question: what is the factual substance of the activity which is the subject of the proposal? It failed to inquire whether the proposal as a whole, including the critical activity of earthworks, met all relevant requirements of the district plan. Its inquiry was unnecessarily inhibited from the outset.

[50] The nature of Council's error is best exemplified by Mr Gilmour's justification for its approach that:

> The application for the certificate of compliance was made in relation to a residential activity within the suburban commercial zone rules to be considered. The proposals were not for an activity that falls within the specific district wide activities mentioned in section 13. As a result no reference was required to be made to that section and those rules are therefore irrelevant.

[51] The district plan identifies specific resource management issues arising from earthworks, describing their potential significant adverse effects in terms consistent with the RMA on people and the natural and physical environment and potential detraction from the character, visual amenity and cultural or heritage value of an area where they occur: R13.4.2. The policies include standards to limit the volume of earthworks that can be undertaken at any one time: R13.4.4.

[52] Furthermore, section 13.4 provides that the earthworks objectives and policies will be implemented through six distinct methods. The first and principal method is through performance standards applying to earthworks as a district wide activity, to mitigate the effects of earthworks on the environment: R13.4.5. They include, as noted, a prohibition on removing more than 25 cubic metres of earth per annum. Conrad's proposal does not fall within any of the other five nominated methods. The specified general performance standards and terms relating to the first method must apply to it.

[53] There can be no argument that the excavation or removal of earth to create two basement floors on a 64 unit residential development would constitute a disturbance of land falling plainly within the meaning of 'earthworks' found in section 13.4. By extending the description of earthworks to 'the creation of building platforms for housing' the section plainly contemplates that a proposed residential

activity ‘irrespective of the zones’ may also in fact constitute or include an earthworks activity. The excavation or removal of the earth will be a ‘use … or other disturbance of the land’: s 9(4)(b) RMA. I am in no doubt that the proposed work will be a district wide earthworks ‘activity’ as defined by section 13.4 and, as such, Conrad required a resource consent to carry it out.

[54] The earthworks proposed by Conrad for the Napier Rd development exceed the removal of 25m³ per annum and are in breach of the performance standards in R13.4.8.1. Accordingly, the certificate issued by Council for the Napier Rd proposal is unlawful on this ground also.

(4) Access

[55] Fourth, Mr Lawson submits that the Te Mata Rd proposal does not comply with the relevant access rules. He relies on R14.1.8.1 which materially provides the following general performance standard:

> **(1) Access to Property**
>
> Every owner or occupier shall provide safe and effective vehicular access to activities undertaken on a site, and required parking or loading areas from an existing, formed road, over their land or by mutual right of way or service lane … to enable vehicles to enter the site…

[56] He submits that this provision is qualitative, and is supplemented by the quantitative parts of R14.1.8.1 providing a series of minimum legal widths for private access. Here, he says, Conrad proposes a one-way system of approximately three metres wide, whereas the quantitative provisions of R14.1.8.1 require a four metre access way for commercial zone, without reference to the number of sites. He says that Council limited its consideration only to vehicular movements on and off the site from the roadway, without taking the further step of considering the safety and efficacy of vehicular movement within the site associated with a 15 unit development.

[57] However, it is unnecessary for me to determine this argument in view of my previous conclusions that each certificate was issued erroneously on two discrete grounds.

Result

[58] It follows that the Te Mata Rd certificate was issued unlawfully in that, first, there was no information before Council on which to certify that the construction of the building envelope complied with R9.8.5(5) and, second, the gross floor area of the proposed development exceeded 250m² in contravention of R9.8.9. The Napier Rd certificate was issued unlawfully, first, in breach of R9.8.9 and, second, because it included an earthworks activity which required a resource consent under section 13.4.

[59] Ms Alison McEwan who appeared for Conrad advanced a brief submission that, even if I found the certificates were unlawfully issued, I should nevertheless exercise my discretion to dismiss HNCI's application for judicial review on the ground of its delay in filing this proceeding, causing prejudice to Conrad. Ms McEwan submitted without any supporting evidence that Conrad forbore from lodging an objection to a subsequent plan change in reliance on its assumption that the certificates were valid in circumstances where HNCI had not acted in a timely manner to raise a formal challenge. It was not until pressed that Ms McEwan acknowledged that Conrad had sold the Napier Rd property. The company thus had no ongoing interest in upholding that certificate and could not possibly sustain a prejudice argument. I do not find Ms McEwan's submissions of assistance and I reject them.

[60] Accordingly, I grant HNCI's application and set aside the certificates issued by Council to Conrad on 14 August 2006 and 8 May 2007 for the Te Mata Rd and Napier Rd proposals respectively.

[61] Costs should follow the event. Council must pay HNCI's costs. I am satisfied that they should be fixed according to category 2B for two counsel. I trust that counsel are able to agree and that a formal order will not be necessary.

Nevertheless, if Council wishes to challenge either the award of costs or proposed scale, it should file a synopsis of submissions by 4 pm on 13 October 2008. HNCI is to file a synopsis of submissions in reply by 4 pm on 27 October 2008.

[62] I wish to express my appreciation to Messrs Lawson and Gilmour and their juniors for the skilful and informed presentations of the respective cases.

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Rhys Harrison J