IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2008-441-253

	BETWEEN	ANTHONY JOHN MCKENNA AND JANICE DIANNE MCKENNA Appellants
	AND	HASTINGS DISTRICT COUNCIL Respondent

Hearing: 24 September 2008

Appearances: M Lawson for the appellants
J M von Dadelszen and R K Blunden for the respondent

Judgment: 15 January 2009 at 2.30 P.M.

JUDGMENT OF POTTER J

In accordance with r 540(4) High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 2.30 p.m. on 15 January 2009.

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TABLE OF CONTENTS

Introduction

[1] The appellants, Mr and Mrs McKenna, appeal against a decision of the Environment Court which declined an appeal against the decision of the Hastings District Council ("the Council") declining them a subdivision consent to enable them to subdivide into two lots, their property at 84 Middle Road, Havelock North: ENV-2007-WLG-000105 (Decision No. W106/2008) ("the decision").

Grounds of appeal

[2] The appellants contend that the Environment Court made an error of law in its application of s 104 of the Resource Management Act 1991 ("the Act").

[3] The grounds of appeal and questions of law for this Court are:

> 1. Whether the Court was correct in its interpretation and application of section 104 of the Resource Management Act 1991 to an activity that was acknowledged as having effects on the environment that were no more than minor.
>
> 2. Whether the Court has appropriately considered and applied the Court of Appeal decisions in *Smith Chilcott v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323.
>
> 3. Whether the Court has correctly interpreted and applied the permitted baseline arising from activities having the same or similar effects on the environment as the application before the Court.
>
> 4. Whether the decision of the Court has effectively transformed an activity identified by the Hastings District Plan as a non-complying activity, into a prohibited activity.

[4] A fifth ground of appeal stated in the notice of appeal was not pursued in submissions.

Background

[5] The property of the McKennas in issue is a former orchard comprising 2.9365 hectares. On the site is a principal dwelling, a smaller residential unit used as a home stay, and some ancillary buildings. The McKennas have restored the villa on the property and have developed and beautified the house garden. They want to remain on the property but to build a newer house for their own occupation. Accordingly, their proposal is to subdivide the land into two lots, one comprising 4,018 m^2 on which the house will be situated, and a balance site of a little more than 2.5 hectares. The balance site will have a designated 30x30 metres building platform protected by a registered consent notice.

[6] The Environment Court proceeded on the basis that it would be reasonable to allow 5,000 metres for the house and grounds including a driveway, leaving approximately 2 hectares available for some potentially productive land use.

[7] The McKennas also own an adjoining 2,428m^2 in a slightly irregularly shaped lot alongside the Herehere stream which runs along the eastern boundary of the site the subject of the subdivision consent application. The McKennas have made an offer to the Council to gift that land as a riparian area. The response of the Council was described as "lukewarm" in the decision of the Environment Court.

[8] The subject site is on the western boundary of suburban Havelock North. It is on the northern side of Middle Road leading out from the town centre. The land is described as flat with some occasional trees and shelter belts and comprising pasture of middling quality. There are no intensive uses such as orchards or vineyards. On the opposite (south) side of Middle Road, the suburban area of the town continues well past the McKenna property in a westerly direction. It is settled in medium density residential development.

Relevant provisions of the District plan ("the Plan")

[9] The proposed subdivision for which a resource consent is sought is a *non-complying* activity under the Plan because it does not create an amalgamated compliant balance lot.

[10] The site is in the *Plains* Zone. The Environment Court at [18] of the decision set out the relevant objectives and policies for that zone:

> *PL01. To maintain the life-supporting capacity of the unique resource balance of the Heretaunga Plains.*
>
> *PL03. To provide for the establishment of landholdings on the Plains which can accommodate a wider range of activities that can retain the life-supporting capacity of the Plains resources.*
>
> A supporting policy is to ensure that subdivision results in properties on the Heretaunga Plains capable of supporting a diverse range of activities that utilise the soil resource in a sustainable manner (PLP2).

[11] The Court also referred at [19] to Policy PLP3:

> *Provide for the creation of Lifestyle Sites from existing, non-complying site(s), where the balance of the site(s) are amalgamated with one or more adjoining lots, to create new complying sites that can support a diverse range of activities that utilise the soil resource in a sustainable manner.*
>
> *Explanation*
>
> *There are presently a large number of smaller sites in the zone which are not suitable for sustained, independent production. Consequently these blocks are often developed as rural residential properties, for which there is considerable demand. This however reduces the potential and ability of the soil resource to be used in an economically sustainable manner. The District Plan will enable the subdivision of existing non-complying sites to create a Lifestyle Site, provided that the balance of the land is amalgamated with a adjoining site(s) to create a new title equivalent to or greater than the minimum site size (see Section 15.1 of the district Plan on subdivision and Land Development). The ability to subdivide Lifestyle Sites from substandard titles will in part address the demand for residential accommodation within the Plains Zone, by providing a housing resource for people working in the area, as well as for people who prefer to reside in the rural environment. It will also create balance sites that can support a diverse range of activities that enable the soil resource to be utilised in a sustainable manner.*

[12] The Environment Court referred to Rule 15.1.8.3 which provides for subdivision of a lifestyle block in the *Plains* Zone as a controlled activity where:

- the existing site is under 12 ha in area,
- the lifestyle block created contains an existing dwelling,
- the lifestyle block created has an area of between 2,500m² and 5,000m², and
- the balance of land is amalgamated with an adjoining site to create a site with a minimum area of 12ha.

Lifestyle sites utilising the above provision that are greater than 5,000m² or which do not result in the creation of a balance area of greater than 12ha, are *discretionary* activities.

[13] It can be seen that the McKennas' proposal, while complying with the first three of the above requirements, does not create a balance lot with a minimum area of twelve acres. The proposed balance lot of 2 to 2.5 hectares is in fact significantly below this required area. There is the potential to amalgamate the balance land with the adjoining site of about ten hectares to create a site exceeding twelve hectares in area. However, that is not part of the proposal ([22] of the decision).

Relevant provisions of the Resource Management Act 1991

[14] At the heart of this appeal are ss 104 and 104D of the Act. They are set out below, s 104D followed by s 104, because that is the sequence in which they fall for consideration.

S 104D Particular restrictions for non-complying activities

(1) Despite any decision made for the purpose of section 93 in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either -

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of -

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

S 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, 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.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

[15] Section 104D provides a threshold or gateway through which any resource consent for a non-complying activity must pass. The consent authority (be it the Council or the Environment Court) may only consider the application if it is satisfied that either, the adverse effects on the environment will be minor; or the activity will not be contrary to the objectives and policies of (in this case) the Plan of the Council.

[16] Once through the gateway under either of the options in s 104D, the consent authority *must* have regard to the matters in s 104 and to the provisions of Part 2 of the Act.

[17] Sections 104 and 104D were substituted and inserted from 1 August 2003 by the 2003 amendment to the Act. In the context of this appeal s 104D essentially mirrors the former s 105(2A) which was the gateway provision. Section 104 essentially re-enacts the previous s 104; s 104(1)(b)(iv) is the equivalent of paragraph (d) of subsection (1) of the previous s 104.

[18] The current provisions (s 104 and s 104D) of the Act apply to this case but the relevant comparisons are given because some of the cases which provide relevant authority were decided under the provisions prior to the 2003 amendment.

Environment Court decision

[19] The Environment Court recorded that it was common ground in terms of the Plan, operative since 2003, that the proposal is a *non-complying activity* because it does not create an amalgamated, compliant, balance lot.

[20] The Court recorded the agreed position of the planners that the effects of the proposal on the productive soil resource, including its cumulative effects, are not more than minor. The Court said it could be taken that the proposal is able to pass the s 104D threshold. It said the objects, policies and other plan provisions (being matters relevant to the second limb of s 104D(1)) could be discussed in the course of considering the s 104 factors.

[21] The Court stated at [9]:

> The real issue is whether allowing this application would be so contrary to the relevant objectives, policies and other provisions of the District Plan that it would harm its integrity and effectiveness as an instrument enabling the Council to avoid, rather than to remedy or mitigate, the adverse effects the Plan formation process has identified. We will return to this specific topic of Plan integrity in discussing s 104(1)(c) issues.

[22] The Court then turned to consider the permitted baseline and noted that the District Plan does not allow subdivision in the *Plains* Zone as a permitted activity, so there is no subdivision permitted baseline. The Court referred to s 104(2) and noted that this provision allows the Court when forming an opinion as to any actual and potential effects on the environment of allowing the activity, to disregard an adverse

effect "… *if the plan permits an activity with that effect*". The Court noted that there were some activities permitted by the plan which might have a similar adverse effect of removing part of the proposed balance lot from productive use, for example buildings of up to 2500m^2 for the processing, storage and processing of crops and produce, which the Court estimated with accessways, manoeuvring area, yards and so on, could occupy an area comparable with the 5000m^2 allowance for a new house and curtilage. The Court concluded at [10]:

> But given the view we believe we must come to about effects – ie that they are not the decisive factor in this appeal, then adopting the factors discussed in *Lyttleton Harbour LPA v Christchurch CC* [2006] NZRMA 559, the permitted baseline really is of little relevance.

[23] The Court next turned to the considerations under s 104(1)(a): any actual and potential effects on the environment of allowing the activity. The Court referred to the conclusion already recorded in relation to the s 104D threshold, that the planners agreed the effects were not significant.

[24] As to s 104(1)(b), the Court noted there was no relevant national policy statement, regional policy statement or regional plan drawn to the attention of the Court.

[25] The Court next considered the provisions of the Plan under s 104(1)(b)(iv).

[26] The Court referred to objectives of the Plan related to the sustainable supply of residential land to meet current and future demands (UDO1), policies on an urban development strategy to avoid pressure on ad hoc land zoning (UDP1), a diverse range of residential development opportunities (UDP2), minimisation of the expansion of urban activity on to the versatile soils of the Heretaunga Plains (UDO2) and the policy in UDP4 to manage the extent and effect of expansion of the rural-urban interface. The Court noted that the current intention of the Plan was that the land in issue remains rural as it has not been identified as a "*proposed new urban development area*" in s 2.4 of the Plan.

[27] The Court then referred to the objectives and policies for the *Plains* Zone as summarised in [10]-[12] above.

[28] The Court said at [25] and [26]:

> This proposal would not encourage an amalgamation that would allow a range of activities involving the sustainable use of the soil resource. The additional house, with its curtilage and driveway, would result in the removal of approximately 0.5ha from potential productive use of the soil resource, with no compensatory amalgamation to bolster the productive potential of neighbouring land.
>
> Under the Subdivision and Land Development section of the Plan there is an objective to provide for the subdivision of land which supports the overall Objectives and Policies for the various Zones, and promotes the sustainable management of natural and physical resources, while avoiding, remedying, or mitigating any adverse effects on the environment.

[29] At [27] the Court concluded:

> … We find that the proposal is not only contrary to Policy PLP3 but also the overall thrust of the objectives, policies and other provisions of the District Plan. Those provisions aim to promote the sustainable management of the Heretaunga Plains land resource, finite in nature and with a productive and life-supporting capacity not just for present, but also for future generations. The type of ad hoc subdivision and associated residential development of the land resource that is proposed would run directly counter to those provisions. As already concluded the residential use proposed would remove soil resource from the possibility of productive use. The subdivision proposal would not result in a landholding that could accommodate a wider range of activities that can retain the life-supporting capacity of the Plains resources. In addition, the cutting off of the existing villa would result in an urban land use and is therefore contrary to the intention to retain the land in rural rather than urban use. That urban land use would be close to the urban area of Havelock North, involving a conversion to activities that would adversely affect the sustainability of the rural resource base.

[30] The Court next considered other relevant matters under s 104(1)(c). In addressing the Plan integrity the Court referred to two previous decisions of the Court in relation to the Plan where resource consents had been granted for non-complying uses. The Court said those cases reinforced the view that each proposition has to be considered on its own merits: *Dye v Auckland Regional Council* [2002] 1 NZLR 337.

[31] The Court referred at [31] to the principal submission for the McKennas and said:

> For Mr and Mrs McKenna, Mr Lawson submits that what differentiates this proposal from many is the consensus that its adverse effects are not significant. We accept the logic of his ensuing submission that if a *non-*

> *complying* proposal has insignificant adverse effects on the environment it should, in the absence of a strong countervailing factor, have sound prospects of being favourably considered.

[32] The Court said at [32] that why the adverse effects of the proposal were not significant is because the area of land removed from the pool of *Plains* productive soils is, percentage-wise, rather insignificant, but that was an argument that could be mounted in support of an application to subdivide off a 4000-5000m^2 house site from any *Plains* zone horticultural lot, of which there are any number. The Court said the feature that the McKennas' property is hard against the border of the Havelock North residential area, was not something that was favourable to the proposal. It meant that:

> … if there was to be an insidious movement towards the non-complying subdivision of such lots, that is where it would logically start, and that would be directly contrary to the intent of policy RP5 (at [32]).

[33] The Court then explained at [34]:

> Although we have dealt with Plan integrity separately, we emphasise that we do not see it as a discrete topic. It exists only because the proposal, as we have discussed, irreconcilably conflicts with the provisions of the Plan relating to the soil resource of the *Plains* zone. If it did not do so, the integrity of the Plan would not be in question.

[34] The Court turned to Part 2 matters, finding they were subsumed in the Court's discussion of the Plan provisions.

[35] The Court then considered the Council's decision as required by s 290A of the Act, and said it differed from the Council's view that the effects on the environment would be more than minor, though reaching the same end result as the Council in respect of the application.

[36] Finally, under s 5 of the Act the Court stood back and considered the application on an overall basis. The Court said at [37]:

> … we are conscious too that s 104(1) requires a decision-maker to have regard not just to effects, but to national and regional planning documents, the District Plan, and other relevant matters. Things do not begin and end with effects, but it must be the case that on occasion, the terms of a planning document may prevail, even if adverse effects are not decisive. We are sympathetic to Mr and Mrs McKenna's position but have the clear view

> nevertheless that this is a situation where the plain terms of the Plan should prevail, and that to hold otherwise would not promote the sustainable management of the resource in question. For those reasons, the appeal is declined.

Appellants' submissions

[37] The principal thrust of the appellants' submissions was that the Environment Court erred in its application of s 104D and s 104; that the Court failed to have regard to the relevant provisions of the Plan as they related to the *effects* of the proposed activity on the environment. Instead the Court purported to have regard to the objectives and policies of the Plan as they relate to the generic activity of subdivision and thereby concluded that such subdivision has an effect on the sustainability of the rural resource base. Such a conclusion, it was submitted, runs counter to the finding that the effects of the proposed activity would be no more than minor. Mr Lawson submitted that the Environment Court's approach effectively applies both tests of s 104D by requiring not only that the effects are no more than minor but also that the proposal is not contrary to the objectives and policies of the Plan.

[38] Counsel submitted the effect of this approach is that an activity described as a non-complying activity effectively becomes prohibited. He posed the rhetorical question: "If a non-complying activity acknowledged as having no more than minor effects on the environment cannot be granted resource consent, it is difficult to envisage a non-complying activity that could be granted, based on this type of analysis?

[39] The appellants submitted that the Environment Court failed to apply the approach to the relationship between s 104(1)(a) and (b)(iv) as laid down by the Court of Appeal in *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 and *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 in conducting the mandatory consideration of the s 104 factors. Counsel cited from [31] from the *Smith Chilcott* judgment:

> The matter can be put this way. Paragraph (d) of s 104(1) [now s 104(1)(b)(iv)] does not limit para (a) and comes into play only if the

> objectives, policies or other provisions of a plan or proposed plan are relevant to the effect on the environment of allowing the activity in question.

[40] This, it was submitted, supports the appellants' contention that s 104 does not require the consideration of a proposal "in a vacuum" and its comparison with the objectives and policies and other provisions of the Plan. Accordingly, if there are effects on the environment that are no more than minor as in the case of the McKennas' application, the relevance (if any) of the objectives and policies of the Plan are related only to those effects that are no more than minor. Counsel also cited from *Arrigato* as affirming the approach in *Smith Chilcott*, at [6]:

> The link between paras (a) and (d) of s 104(1) is that objectives and policies in a plan are to be taken into account to the extent they are relevant; that means relevant to the effects spoken of in para (a): see *Smith Chilcott* at para [31].

[41] Counsel was critical that in spite of both these judgments being cited to the Environment Court, neither was referred to in the decision and said that the Court failed to consider the relevance of the objectives and policies of the District Plan as related to the effects of allowing the activity under s 104(1)(a). It was submitted that instead, the Court's approach applied the objectives and policies of the Plan as if they were significant effects on the environment when it had already determined those effects were no more than minor.

[42] It was further submitted that the error in failing to apply the approach to the application of s 104 as stipulated by *Smith Chilcott* and *Arrigato*, flowed through to the consideration of the permitted baseline. It was submitted that the Court's dismissal of the relevance of the permitted baseline flowed from its determination that the effects on the environment were not the decisive factor in this appeal, whereas counsel submitted it is a relevant consideration that other activities allowed by the Plan, e.g. a building of up to 2,500m^2 for processing, storage etc will have as great if not greater effects on the environment, as would the appellants' proposal.

[43] Counsel said it was difficult to envisage a more basic subdivision than the one proposed. The simplicity of the subdivision and the limiting of the area that would be developed, resulted in a common position by the planners that there were no more than minor effects on the environment including effects on the soil resource.

Mr Lawson suggested that if this proposal was not worthy of consent then it was tantamount to making subdivision a prohibited activity in the *Plains* zone.

Respondent's submissions

[44] The Council submitted that the approach advocated by the appellants would result in s 104 generally and s 104(1)(b)(iv) in particular being redundant, which cannot have been the intent of Parliament. Mr von Dadelszen submitted that in considering the threshold provisions of s 104D and in particular s 104D(1)(a) the Court focuses on the "micro impacts" of the proposal. Here the Court considered the appellants' proposal – the subdivision of a single substandard site into two smaller substandard sites – and concluded that the adverse effects of the activity on the environment would be no more than minor. Consequently the threshold was reached. But then in considering the s 104 factors, and in particular in relation to the Plan, the Court properly considered the "macro" effects of the proposal.

[45] Counsel referred to the use of the word "may" in s 104D. While a consent authority *may* grant a resource consent for a non-complying activity only if it is satisfied that one of the gateways in s 104D has been passed, the Court is not obliged to grant consent once the s 104D threshold is passed. The consent authority retains a residual discretion under s 104 whether or not to grant the consent and in exercising that residual discretion the consent authority *must* have regard to the factors in s 104. Counsel cited from *Arrigato* at [17] and [18]:

> A non-complying activity is defined as an activity which is provided for in the plan as a non-complying activity or one which contravenes a rule in the plan. In both respects a resource consent is required and may be granted only if the application satisfies the gateway criteria in s 105(2A), the more general criteria in s 104 and is otherwise one which the consent authority considers should be allowed.
>
> The issue in this case was not whether the plan supported the activity but rather, given that it did not, whether it was nevertheless appropriate to allow it. Indeed gateway (b) in s 105(2A) recognises that a non-complying activity will not be permitted by the plan, yet it may be granted provided it will not be contrary to the objectives and policies of the plan.

[46] Mr von Dadelszen submitted that the approach mandated in *Arrigato* is contrary to the thrust of the submissions advanced for the appellants that if the

effects of the proposal are found to be not more than minor then the proposal should be granted, which he said, excludes consideration of the more general criteria in s 104 and the discretion vested in the consent authority under s 104(1)(c).

[47] Counsel provided the following analysis in response to the question posed by counsel for the appellants in submissions: how an activity that has no more than minor effects on the environment can be contrary to the objectives and policy of a plan aimed at managing the effects?

a) By definition a non-complying activity will not "find direct support from any specific provision of the Plan": *Arrigato* at [17]. Otherwise it would be a discretionary, restricted discretionary, controlled or permitted activity.

b) An activity with no more than minor adverse effects on the environment (in which case it would pass the s 104D(1)(a) gateway test) may still be "contrary" to ("as in" "opposed to" or "repugnant to") the objectives and policies of the District Plan.

c) An activity with more than minor adverse effects on the environment may not be "contrary" to ("as in" "opposed to" or "repugnant to") the objectives and policies of the District Plan (in which case it would pass the s 104D(1)(b) gateway test).

d) An activity with no more than minor adverse effects on the environment and which may not be "contrary" to ("as in" "opposed to" or "repugnant to") the objectives and policies of the District Plan may get consent when considered under s 104.

e) An activity with no more than minor adverse effects on the environment and which may not be "contrary" to ("as in" "opposed to" or "repugnant to") the objectives and policies of the District Plan but nevertheless:

i) May not be consistent ("compatible" or "in harmony") with those objectives and policies under s 104(1)(b)(iv); and/or

ii) May not accord with the Part 2 principles under s 104(1) and therefore in the consent authority's discretion, could still be denied consent under s 104.

[48] It was submitted that in this case the Environment Court proceeded exactly in accordance with (b) above, i.e. it considered an activity which it found had no more than minor adverse effects on the environment but also found that it was still "contrary" to the objectives and policies of the Plan.

[49] Counsel submitted that the Environment Court proceeded correctly in applying the s 104D gateway test and the s 104 factors. Once the gateway questions under s 104D(1) have been addressed and a finding made that the gateway has been passed the consent authority, in this case the Environment Court, pursuant to s 104(1) and subject to Part 2 *must have regard to*:

a) any actual and potential effects on the environment (adverse or positive); and

b) any relevant provisions of a national policy statement, a coastal policy statement, a regional policy statement and a District Plan; and

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

[50] Counsel submitted that the appellants' argument based on *Smith Chilcott* and *Arrigato* is misconceived because it requires one and possibly two glosses to be placed on those decisions: first that "any actual and potential effects on the environment of allowing the activity" in s 104(1) *excludes* consideration of "the adverse effects of the activity on the environment … [that] will be minor"; whereas s 104(1)(a) requires consideration of "**any** actual and potential effects on the environment of allowing the activity". Second, *Smith Chilcott* and *Arrigato* deal

with the inter-relationship between what is now s 104(1)(a) and s 104(1)(b). The decisions do not deal with the inter-relationship between what is now s 104(1) and s 104D(1). (I interpose that counsel for the appellants accepted this is so, but argued that those two Court of Appeal decisions require s 104(1)(b) to be approached through the lens of a "not more than minor effects" finding under s 104(1)(a)).

[51] It was further submitted that "potential effects on the environment of allowing the activity" are often dealt with in the objectives and policies of the District Plan. Accordingly a consent authority needs to have regard to those objectives and policies before making a decision whether or not to grant consent to the application. Counsel submitted this is exactly what the Environment Court did in formulating the issue at [9] of its decision (refer [21] above), in its decision as articulated at [27] (refer [29] above) and in the conclusion at [34] of the decision (refer [33] above) that:

> … the proposal … irreconcilably conflicts with the provisions of the Plan relating to the soil resource of the *Plains* zone. If it did not do so, the integrity of the Plan would not be in question.

Also at [37] of the decision when, pursuant to s 5 of the Act, it considered the purpose of the Act, to promote the sustainable management of natural and physical resources (refer [36] above).

[52] The Environment Court held that while the effects of the proposed subdivision would be not more than minor, to allow the proposal would be contrary to the policy and objectives of the Plan. In short, the Environment Court concluded that if the application was granted, the Plan would be compromised. The Plan provisions clearly require protection of the soils in the *Plains* zone, and while the effects of this proposal would be minor in the broader scheme of things it was contrary to the policy and imperatives of the Plan.

[53] In submissions, counsel referred to *Dye v Auckland Regional Council* at [5]:

> As Mr Dye's application was for consent to a non-complying activity, it had to pass through one or other of the gateways referred to in paras (a) and (b) of the Resource Management Act 1991 (the Act). If neither gateway was satisfied the application would fail. If the application passed through either gateway Mr Dye then had to satisfy the consent authority that the application

> should be granted, bearing in mind the matters referred to in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c) of the Act.

[54] Counsel submitted that in the same way, Mr and Mrs McKenna, if the application passed through either gateway (which it did), then had to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s 104(1) and in terms of the overall discretion inherent in s 104B of the Act (which provides that a consent authority may grant or refuse the application and may impose conditions if the application is granted).

[55] As to the argument for the appellants that the approach of the Environment Court was in effect to convert a non-complying activity into a prohibited activity, the Council referred to *Arrigato* at [17]:

> There is a clear conceptual difference between a prohibited activity and a non-complying one. Consent may be granted for the latter but not for the former. A non-complying activity is defined as an activity which is provided for in the plan as a non-complying activity or one which contravenes a rule in the plan.

[56] Counsel referred in this context to two recent decisions of the Environment Court: *Lightening Ridge Partnership Ltd v The Hastings District Council* Decision No. W049/2007 and *Pencarrow Hills Ltd v The Hastings District Council* Decision No. W010/2005 which have been granted resource consents by the Environment Court, in situations where the particular proposals, while non-complying, were not contrary to (repugnant to … or opposed to …) the objective and policies of the Plan considered as a whole: *Monowai Properties Ltd v Rodney District Council* (A215/03).

[57] As to the permitted baseline, the Council submitted that it is for the Environment Court as a specialist court to determine whether or not to exercise its discretion under s 104(2) of the Act and the weight to be given to an adverse effect is a matter of judgment and discretion for the Environment Court. It was submitted that in this case the Environment Court clearly gave appropriate consideration to the permitted baseline and exercised its discretion appropriately.

[58] In conclusion, the Council submitted that the Environment Court was able pursuant to ss 104 and 104B of the Act, after finding that the application passed one of the threshold tests in s 104D, to consider any actual effects on the environment *and* relevant provisions of the Plan. It was submitted that the Environment Court did not err in law in determining not to grant a subdivision consent to the appellants; the complaint of the appellants is about the merits of the Environment Court's decision dressed up as an error of law on the basis of the alleged failure of the Environment Court in application of the principles in *Arrigato* and *Smith Chilcott*.

Discussion

[59] There is, I consider, a fundamental flaw in the appellants' argument which is demonstrated in the rhetorical question posed in submissions: If a non-complying activity acknowledged as having no more than minor effects on the environment cannot be granted resource consent, what sort of non-complying activity would be worthy of consent?

[60] The approach of the Court of Appeal in *Arrigato* and *Smith Chilcott* is to require consideration of any relevant provisions of the District Plan under s 104(1)(b)(iv), through the lens of a determination that the proposal has no more than minor effects under s 104(1)(a) and s 104D(1)(a). But to say that is the end of the matter, as the appellants submit, is to deny the overall broad discretion of the consent authority to consider those actual and potential effects, not more than minor as they may be, in the overall context of the Plan, and also under s 104(1)(c) to consider any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[61] Following [31] in *Smith Chilcott* upon which the appellants rely (refer [39] above), is [32] which states:

> The Environment Court is given broad powers under s 104(1). Like the consent authority it is required to make a broad assessment. Looking at the matter in a practical way the density rule, whatever its particular purpose, may well have an effect on the environment beyond its immediate purpose. That is the broad assessment that the Environment Court made. That

> assessment was open to it. It is not one which can be challenged as involving an error of law.

[62] Similarly in *Arrigato* at [24]:

> Whether a particular proposal is consistent with or contrary to the objectives and policies [of the District Plan]; in other words, whether it comes within the very limited circumstances contemplated as acceptable, is a matter of assessment on a case-by-case basis. That assessment is the province of the Environment Court … when all the particular features of Arrigato's proposal were taken into account it was consistent with the relevant objectives and policies.

[63] I refer also to *Dye* at [5]:

> … If the application passed through either gateway Mr Dye then had to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c) **[**now s 104B**]** of the Act.

[64] The approach advocated by the appellants seeks to deny the proper exercise by the Environment Court of the discretion vested in it by s 104(1)(c) after the application has been found to pass one of the gateways in s 104D. An approach which carries a determination that the adverse effects of the proposed subdivision are no more than minor, through to an entitlement to a resource consent, is too narrow.

[65] In this case the Environment Court without difficulty concluded that the adverse effects of the subdivision would be no more than minor; it carried through that finding, which brought the proposal through the gateway of s 104D, into consideration of **any** actual and potential effects on the environment of allowing the activity under s 104(1). But that factor could not legitimately exclude consideration by the Environment Court of the subdivision in light of the objectives, policies and other provisions of the Plan: to promote the sustainable management of the Heretaunga Plains land resource. The Environment Court found that notwithstanding this particular subdivision would have adverse effects that were no more than minor, it would run directly counter to the provisions of the Plan in that it would result in a land holding that could not accommodate a wider range of activities that can support the life-supporting capacity of the *Plains* resources; it is contrary to the intention of the Plan, which is to retain the land in rural use rather than urban use (at [27]).

[66] That was a conclusion open to the Environment Court taking into account the macro (as Mr von Dadelszen described them) effects of the proposal as compared with the micro impacts of the proposal.

[67] The Court was entitled to take into account the precedent effect of granting the consent sought by the appellants. *Dye* is authority that there is no concept of precedent and each case has to be considered on its merits:

> Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances (at [25]).
>
> The most that can be said is that the granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities (at [32]).

But the Court of Appeal also said at [49] that:

> The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity.

[68] Thus it was entirely open to the Environment Court to conclude, as it did at [32], that the fact the McKennas' property is hard against the border of the Havelock North residential area meant that if there was to be an insidious movement towards the non-complying subdivision of lots, that is where it would logically start, and that would be directly contrary to the intent of policy RP5.

[69] In considering the permitted baseline the Environment Court was exercising a judgment and a discretion under s 104(2) of the Act. It was concerned with the integrity of the Plan. It held, as it was open to it to do, that the effects not being the decisive factor in relation to the McKennas' subdivision proposal, the permitted baseline was of little relevance. As the Court concluded at [37]:

> Things do not begin and end with effects …

Result

[70] I conclude that the decision in the Environment Court, in the particular circumstances of the McKennas' application was open to it. It made no error of law. The appeal is dismissed.

Costs

[71] I did not hear from the parties on costs. The Council is entitled to costs. I consider a 2B basis appropriate. If counsel cannot settle costs on an agreed basis then memoranda may be submitted, the Council by Friday 13 February 2009 and the appellants by Friday 27 February 2009. I will then determine costs on the papers.