

Decision following the hearing of an application for resource consent under the Resource Management Act 1991

Proposal

G and S Stilwell (the Applicant) has applied for resource consent pursuant to section 88 of the Resource Management Act 1991 (the Act) to undertake a two-stage subdivision (subdivision consent) and for the subdivision, change of land use and disturbance of contaminated soil (land use consent) under the National Environmental Standard for Assessing and Managing Contaminants in Soil (NESCS).

Resource consent for land use consent to subdivide, change the use of land and disturb soil on Part Lot 1 DP 7129 is **GRANTED**

Resource consent for the subdivision of Part Lot 1 DP 7129 is **REFUSED**

Application number:	2022-47 (Subdivision) and 2022-49 (NES land use)
Site address:	98C Ōhiwa Harbour Road (Onekawa Road), Ōhiwa
Applicant:	G and S Stilwell
Hearing commenced:	25 August 2022
Hearing panel:	Rachel Dimery (Chair)
Appearances:	<p><u>For the Applicant:</u></p> <p>Vanessa Hamm – Legal counsel</p> <p>Gavin Stilwell – Applicant</p> <p>Chris Campbell – Landscape Architect</p> <p>Shae Crossan – Planner</p> <p><u>For the submitters:</u></p> <p>Linda Conning, for Forest and Bird</p> <p>Arthur Sandom, for himself</p> <p>Ian Bertram, for himself</p>

	<p>Logan Bertram, for himself</p> <p><u>For the Council:</u></p> <p>Gerard McCormack - Planning & Regulatory Manager</p> <p>Laura Swan - Planner</p> <p>Kim Goodfellow - Landscape Architect</p>
Also in attendance:	<p>Sue Stilwell</p> <p>Mike Stilwell</p> <p>Tanya Moore</p> <p>Kurt Bledsloe</p> <p>Peter Edwards</p> <p>Hamiora Ngatoro</p> <p>Dean Bertram</p> <p>Kim and Angela Bryan</p>
Hearing adjourned:	25 August 2022
Commissioner's site visit	24 August 2022
Hearing closed:	5 September 2022

Introduction

1. This decision is made on behalf of Ōpōtiki District Council (Council) by Independent Hearing Commissioner Rachel Dimery, appointed and acting under delegated authority pursuant to sections 34 and 34A of the Resource Management Act 1991 (the Act).
2. This decision contains the findings on the application for resource consent and has been prepared in accordance with section 113 of the Act.

Summary of proposal

3. G and S Stilwell (the Applicant) has applied for resource consent to undertake a two-stage subdivision and activities involving a piece of land upon which Hazardous Activities and Industries List (HAIL) activities is/are being undertaken as follows:

- (i) Stage one of the subdivision comprises a boundary adjustment and amalgamation, with a balance lot of 6.25ha; whereby proposed lot 8 (0.71ha) would be transferred to the owners of Part Lot 1 DP 6545, proposed lot 14 (0.17ha) would be transferred to the owners of Lot 2 DP 545499. Proposed easements would be provided for rights of way, services and drainage.
 - (ii) Stage two of the subdivision was put forward with two alternative configurations comprising either ten lots (the 'proposal as notified') or eight lots (the 'alternative proposal') and a road to vest. The proposal as notified would result in nine additional house sites and one lot for the existing house, while the alternative proposal would result in seven additional house sites and one lot for the existing house.
 - (iii) Subdivision, change of land use and soil disturbance on a site previously used as a kiwifruit orchard and currently used as an avocado and passionfruit orchard.
4. The legal description of the site is Part Lot 1 DP 7129 (Record of Title GS5D/1364, comprising 7.1.201 hectares), Part Lot 1 DP 6545 (Record of Title GS5C/1404 comprising 8.0793 hectares), and Lot 2 DP 545499 (Record of Title 926420, comprising 0.5553 hectares).
 5. A copy of the application and accompanying assessment of effects and supporting reports was included in the hearing agenda. A detailed description of the site, locality and proposed activity can be found in Sections 2.1, 2.2, 3.0, 3.1 of the AEE prepared by Stratum Consultants, dated March 2022.
 6. The 'alternative proposal' was put forward in evidence for the Applicant, in response to the Section 42A Report and submissions.¹

Notification, submissions and affected party approvals

7. The application was publicly notified on 26 May 2022. Ten submissions were received, as set out and summarised in the Section 42A Report.² Ms Linda Conning for Forest and Bird, Mr Arthur Sandom, Mr Ian Betram and Mr Logan Bertram spoke at the hearing.
8. Fire and Emergency New Zealand tabled a statement for consideration, which was prepared by Alec Duncan, a planner at Beca Limited. The statement set out the conditions sought by the submitter, should consent be granted.
9. Section 4.0 of the Section 42A Report sets out the details of the parties from whom written approvals were obtained. Figure 5 in the Section 42A Report shows the location of the properties in relation to which written approvals were obtained and the location of three adjoining properties, for which no written approval was obtained.
10. I am required to disregard any effects on the parties from whom written approval has been obtained, pursuant to s104(3) of the Act.

Application information

11. I have received and considered the following information in reaching this decision:

¹ Statement of Evidence, Mr Crossan, dated 10 August 2022, at paragraphs [13] and [44]

² Section 42A Report at Section 5.0, at pages [10-12]

- (a) The application dated March 2022, prepared by Stratum Consultants.
- (b) The supporting information attached to the application, which included:
- Records of Title
 - Email correspondence with Mr Trevor Ransfield of Te Upokorehe iwi
 - Archaeological Assessment, prepared by InSitu Heritage Limited, dated 18 March 2022
 - Landscape and Visual Assessment Report and associated Site Context & Design Statement and plans, prepared by Greenwood Associates Landscape Architecture Limited, Revision 2, dated 22 April 2022
 - Geotechnical Assessment Report, prepared by Stratum Consultants, dated 18 March 2022
 - Written approvals and correspondence with neighbours
 - Detailed Site Investigation, prepared by BCD Group, Rev 1, dated 8 March 2022
 - Scheme Plan, prepared by Stratum Consultants, Sheet 01, Issue F and Sheet 02, Issue B
 - Wastewater Feasibility Study prepared by BCD Group, dated 21 March 2022
 - Concept design for proposed public road
- (c) Information received post notification including:
- Updated Visual Simulation Package dated 28 July 2022
 - Additional viewpoint photos
 - Response to comments on initial visual simulations
 - Overall Planting Strategy and plan dated 27 July 2022
 - Stormwater Assessment dated 27 July 2022
- (d) A Section 42A Report, dated 3 August 2022, prepared by Ms Laura Swan for the Council.
- (e) The appendices to the Section 42A report, which included the information received post notification, Landscape and Visual Assessment Report – Peer Review, prepared by Kim Goodfellow, dated 2 August 2022.
- (f) The submissions received.
- (g) The Legal Submissions on behalf of the Applicant prepared by Ms Vanessa Hamm.

- (h) The Applicant's Evidence prepared by:
- Mr Gavin Stilwell, Applicant
 - Mr Christopher Campbell, Landscape Architect³
 - Mr Shae Crossan, Planner⁴
- (i) The Applicant's Reply prepared by Ms Hamm and dated 2 September 2022, which included the following:
- A copy of the encumbrance and plan for Mountain Ridge Holdings protected bush
 - An extract from the New Zealand Institute of Landscape Architects' Guidelines
 - Survey plan of shelterbelt trees on the boundary of the paper road and site and email from Council re same.
 - Email from Te Upokorehe
 - Planting Implementation, Weed Removal, Establishment and Maintenance Specification
 - Proposed conditions for Stages 1 and 2 of the alternative proposal (seven lot proposal)
 - Stage 1 boundary adjustment scheme plan and proposed conditions.

Preliminary matters

Optionality

12. At the commencement of the hearing, I sought clarification as to whether the application was for seven or nine vacant lots and further, whether it was open to me to consider both options. Ms Hamm told me that there was no issue as the lawfulness and confirmed that the proposal was presented as providing optionality, as opposed to a formal amendment.
13. Ms Hamm addressed this in her right of reply. It was her submission that it was open to me consider the alternative proposal, as the alternative proposal was for less lots, had been addressed in the evidence of Messrs. Campbell and Crossan and lastly, the Applicant was not asking me to indicate the level of development that was appropriate.
14. I agree with Ms Hamm that it accords with the principle of timely, efficient, consistent and cost-effective processes to consider both the nine and seven lot proposals.⁵ As such, I have considered both the proposals. I have referred to the two options throughout my decision as the proposal or nine lot proposal and the alternative proposal or seven lot proposal.

³ Which included revised visual simulations dated 9/08/2022

⁴ Which included a scheme plan for the alternative proposal

⁵ Reply submissions on behalf of the Applicant, 2 September 2022 at paragraph [80]

Bundling and Activity Status

15. There was some disagreement whether it was open to me to approve the boundary adjustment, being proposed Stage One of the proposal if I reached the decision that the seven or nine lot proposal (Stage Two) should be refused. Ms Swan clarified that her recommendation was that the controlled activity land use consent under the NESCS must be approved, but that the controlled activity subdivision consent for the boundary adjustment was bundled as part of the subdivision application. In support of her view, she noted that the AEE did not express the boundary adjustment as a separate proposal and as such, the overall activity status of the subdivision consent was a discretionary activity and therefore it was open to me to refuse the subdivision consent.
16. Ms Hamm requested that should I reach the decision is to decline resource consent for the subdivision, that consent be granted to the subdivision consent for the boundary adjustment and the NESCS land use consent.⁶ In Ms Hamm's opening submissions she stated that the applications had been bundled for the purposes of assessment, but that there is no impediment to the application being granted in part given the controlled activity status of the land use consent and the subdivision consent for the boundary adjustment.
17. At this point, I note that the NESCS land use consent was not a matter in contention. The Section 42A Report recommended the land use consent be granted. The land use consent under the NESCS is supported by a Detailed Site Investigation (DSI), which identifies that the site is a 'piece of land' under the NESCS as a result of its historical land use. It further identifies that subdivision and change of land use trigger consideration as a controlled activity, and that soil disturbance may also possibly be applicable. As such, I do not address this particular aspect any further.
18. Ms Swan clarified in the officer's response, that she did not recommend that the boundary adjustment subdivision application⁷ be approved. In support of her view, she noted that the AEE refers to the proposal being a discretionary activity overall⁸ and that the reasons provided in support of proposed Lot 8 relate to the provision of a buffer from the proposed residential lots in Stage Two.
19. The AEE states that the proposed boundary adjustment *'can comply with the provisions of 15.4.8 in that the boundary adjustments will not result in any significant changes to the resulting title areas and the boundary adjustments will not reduce rural production options.'* In this regard, I had the assistance of Ms Swan, who prepared supplementary evidence, which included a table identifying the permitted activities in the zone. Up to three dwellings are permitted on lots greater than 4 hectares, as well as a range of rural activities including farming, seasonal worker accommodation, artificial crop protection and existing plantation forestry. Ms Swan went on to state in her supplementary evidence that the boundary adjustment meets the criteria for boundary adjustments in 15.4.8.1(1) and 15.4.8.1(3).
- ~~20.~~ The evidence of Mr Stilwell was that there are poor returns from the present horticultural uses, which comprise approximately 2 hectares planted in avocados and 2000m² planted in passionfruit. Mr Stilwell further advised that 3 – 4 hectares is the minimum area required for financial viability in the avocado industry. It is difficult to see how further reducing the 7.1201-hectare landholding by some 0.88 hectares, following the boundary adjustment, would result in

⁶ Legal submissions at paragraph [86]

⁷ Stage one of the proposed subdivision

⁸ AEE, Version 1, March 2022 at page 25

a lot that is *more suitable* for activities provided for in the Coastal Zone. Nor would it satisfy 15.4.8.1(3), which states the adjustment shall not result in the reduction of rural production options for the land and in particular versatile land within the site. Again, based on Mr Stilwell's evidence, it is clear that the smaller a landholding becomes, the more limited the rural production

21. I find that the boundary adjustment component of the subdivision consent requires consent as a discretionary activity as it does not meet the requirements of Rule 15.4. Further, I find that the effects of the boundary adjustment overlap with the effects associated with the subdivision in terms of enabling rural production activities in the Coastal Zone and that the subdivision proposal should be bundled and considered as a whole.

Relevant statutory provisions

22. This application must be considered in terms of Sections 104, 104A, 104B, 106, 108 and 220 of the Act.
23. Section 104 is subject to Part 2 of the Act and sets out those matters to be considered by the consent authority when considering a resource consent application. Section 104(1) states I must have regard to the following:

(a) Any actual and potential effects on the environment of allowing the activity; and

(b) Any relevant provisions of:

(i) a national environmental standard:

(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 matters the consent authority considers relevant and reasonably necessary to determine the application.

24. Section 104(3)(a)(ii) requires that that I have no regard to effects on people who have given written approvals to the application.
25. Section 104(6) and 104(7) provide that an application for resource consent may be declined on the grounds of inadequate information to determine the application and further that, any such assessment must have regard to whether any further information resulted from any request for further information.

26. Following assessment under Section 104, the application must be considered under Section 104B of the Act, which states:

“After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority-

(a) may grant or refuse the application; and

(b) if it grants the application, may impose conditions under section 108.

27. Section 106 of the Act provides that a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers there is a significant risk from natural hazards, or where sufficient provision for legal and physical access to each allotment has not been made.
28. Sections 108 and 220 empower me to impose conditions on land use and subdivision consents respectively.

Planning framework and relevant provisions

29. The subject site is zoned Coastal under the Operative Ōpōtiki District Plan (the District Plan).
30. Full details of the resource consents required, and status of the activity are set out in the Section 42A Report. As already discussed above, I have determined that the boundary adjustment component of the proposal requires consent as a discretionary activity.
31. Ms Swan and Mr Crossan agreed that resource consent was required for the following aspects of the proposal:
- (a) The subdivision of land, change of land use and disturbance of soils of a piece of land⁹ is a controlled activity under Regulations 9(1) and 9(3) of the NESCS.
 - (b) Subdivision that does not meet the minimum lot size of 4 hectares is a discretionary activity under Rule 15.3.4.2.
32. Overall, consent is required as a discretionary activity.
33. The relevant provisions of the District Plan and Bay of Plenty Regional Policy Statement were comprehensively set out in the Section 42A Report. The Section 42A Report and AEE also identified the following as relevant to determination of the application:
- (a) National Environmental Standard for Assessing and Managing Contaminants in Soil (NESCS)
 - (b) Bay of Plenty Regional and Natural Resources Plan (RNRP)
 - (c) Bay of Plenty On-Site Effluent Treatment Regional Plan (OSETRP)

⁹ Being land described in Regulations 5(7) and 5(8) of the NESCS

34. Ms Swan and Mr Crossan largely agreed on the relevant provisions, with the main exception being the relevance of the objective 11.2.1 and policy 11.2.1.2 for the Ōhiwa Harbour Zone. Ms Swan contended that these provisions were relevant as the Ōhiwa Harbour Zone is part of the receiving environment, while Mr Crossan considered these provisions should be afforded little weight, due to the proposal's location in the Coastal Zone.
35. The Section 42A Report noted the imminent release of the National Policy Statement for Highly Productive Land (NPS-HPL) and that it may need to be considered under s104. The NPS-HPL was published on 12 September and has legal effect from 17 October 2022. As such, this decision is not required to have regard to the NPS-HPL.

Summary of submissions and evidence heard

36. The Reporting Officer's Section 42A Report and the Applicant's evidence was circulated prior to the hearing and was taken as read. The applicant's experts provided summaries of their evidence at the hearing. All of the witnesses were available to answer questions at the hearing.
37. The Submitters all provided written statements, which they spoke to at the hearing, with exception of Fire and Emergency. Fire and Emergency elected to not attend the hearing and tabled a statement for my consideration.
38. I have read all the material, and the following is a brief outline of the submissions and evidence presented. The summary does not detail all matters advanced at the hearing but captures the key elements of what I was told.
39. The content of the evidence will be referred to throughout the decision, where relevant to the principal issues in contention.

For the Applicant

40. **Ms Vanessa Hamm** presented legal submissions on behalf of the Applicant. Her submissions addressed the discretionary activity status, matters of precedent and plan integrity, natural character, rural production, the alternative proposal for seven rural residential allotments/house sites and the aspects of the proposal requiring controlled activity consent.
41. Ms Hamm submitted that precedent and plan integrity issues were not at play, due to the activity status being classified as discretionary. It was her submission that the Coastal Zone does not seek to avoid subdivision *per se*. She emphasised the relatively mixed nature of the coastal zone and range of uses provided for. It was her submission that the objectives and policies for the coastal zone were not expressed in strongly directive terms and therefore as the proposal was not a matter of high principal, should be considered under s104(1) of the Act.
42. In Ms Hamm's view, it was open to me to consider both the nine lot proposal and the alternative proposal for seven lots. She requested that should I find neither proposal to be acceptable and reach a view that the subdivision should be declined, that I grant consent to the boundary adjustment and NESCS land use consent.
43. **Mr Stilwell**, provided a summary statement, which drew out key points from his evidence. Mr Stilwell outlined his considerable experience in the rural industry, including as a farmer and orchardist. He emphasised the poor horticultural returns from the avocado orchard and explained how the returns had diminished over time as more and more people entered the

avocado industry. He noted that planting in New Zealand doubling in four years and in his view, it was likely smaller producers would have to amalgamate or dissolve. He told me that currently, the passionfruit orchard subsidises the avocado orchard.

44. Mr Stilwell explained show the subdivision and subsequent development would enable investment in further native planting on the property, as well as realising some personal financial gain as a retirement fund. He provided details of the planting undertaken on the property over the last six years and his and Mrs Stilwell's involvement in the Ōhiwa Sanctuary and pest control efforts.
45. **Mr Christopher Campbell**, a landscape architect, provided an analysis of existing environment, the landscape planting proposal, the landscape effects, his response to the Section 42A Report and the conditions of consent. He considered the existing environment to be rural-residential and the sensitivity of the site to absorb change to be low-moderate. He outlined the details of the mitigation proposed, which included restrictions on the colour of future buildings; a height limit of 7m for the buildings on proposed Lots 1, 2, 3, 4, 6 and 7 and 5m on proposed Lots 10, 11 and 12; planting of native species at the external and internal boundaries, as detailed in the Overall Planting Strategy/Plan at Appendix 1 to his evidence. Mr Campbell concluded that while the future residential buildings had the potential to detract from the prevailing landscape character, these would be relatively short-term effects and there would be a long-term benefit from establishing native vegetation. He considered the proposed planting would be a visual continuation of the existing native planting adjacent to the site, would achieve a degree of naturalness. He saw the native planting as providing greater positive effects in the long term.
46. **Mr Shae Crossan**, a planner, addressed planning issues. He attached a scheme plan for the alternative proposal, together with a set of conditions to his evidence. In his summary statement, he focussed on the matters contested, which related to rural production; character and amenity; landscape and visual and biodiversity. Mr Crossan acknowledged that the subdivision would remove the land on the subject site from rural production but considered this to have little impact on the rural land resource of the district overall. Relying on Mr Stilwell's evidence, he considered the subdivision would remove some marginal land from rural production.¹⁰
47. Mr Crossan saw character and amenity effects and landscape and visual effects as similar in nature. Relying on Mr Campbell's evidence, he was satisfied that the character, amenity, visual and landscape effects could be adequately mitigated. He clarified that Ms Swan had drawn to his attention that it was not her recommendation that the boundary adjustment component of the subdivision should be approved. He was content that there was adequate information to approve the boundary adjustment component of the proposal should I determine that Stage 2 of the subdivision should be refused.
48. Mr Crossan confirmed that he still supported the proposal as notified but acknowledged that the alternative proposal would reduce the visual impacts, particularly around proposed Lot 11.

For the Submitters

49. The tabled statement for **Fire and Emergency New Zealand** noted that its submission had requested conditions of consent to ensure sufficient provision of firefighting water supply and adequate access for fire appliances. It noted that conditions 16-21 address the matters raised,

¹⁰ Mr Crossan, Statement of Evidence at paragraph [38]

including an advice note in its submission and requested that should consent be granted, these conditions or similar be imposed.

50. **Ms Linda Conning**, Chairperson of the Eastern Bay of Plenty Branch of Forest and Bird, advised Forest and Bird support the findings of the Section 42A Report and opposed the application. Ms Conning provided a written summary of her presentation. She advised that the key issue was the number of lots and maintained that the alternative proposal would similarly fail to adequately mitigate the adverse effects. She strongly disagreed with the contention the site was rural residential in character and asserted that it was rural in character. She considered that approval of the subdivision application would prompt further applications for similar densities and that the density proposed was well below the 4 hectares contemplated by the District Plan. She also raised concerns about the introduction of pests into a biodiversity restoration area and outlined the need for fencing and ongoing active pest and weed control.
51. **Mr Arthur Sandom**, a resident in the Ōhiwa/Waiotaha area provided a written summary of his presentation. Mr Sandom opposed the application. He confirmed that he sought that the alternative proposal for seven lots be refused. He provided plan of a potential subdivision layout for three additional lots that he saw as acceptable. Mr Sandom advised that he runs a rural revegetation business and operates a plant nursery. He told me that he rejected the claim that housing was the best use of the site and that he was of the view there were other horticultural options for the site. He observed that the planting followed boundaries and would make a minimal contribution to restoration of native habitat. He advised that he could see potential for a three lots subdivision to be acceptable, provided this was accompanied with substantial areas of native revegetation on the site.
52. **Mr Ian Bertram**, owner of a neighbouring property (Lot 1 DP8749), provided a written summary of his presentation. He sought that the subdivision be declined. Mr Bertram noted there may be a potential legal issue relating to the presence of easements within the proposed lot to vest as road. He discussed his concerns, which included potential privacy impacts, increased noise, traffic, and landscape effects. He considered Lots 10-12 were inappropriate due to the prominence of the ridgeline in the wider landscape. Overall, he considered the subdivision (both as notified and the alternative proposal) as a whole would introduce an urban style of development in a rural environment that would undermine the objectives and policies of the District Plan. He confirmed that he wished to see the alternative proposal declined.
53. **Mr Logan Bertram**, owner of a neighbouring property (Lot 1 DP545499), provided a written summary of his presentation. He asked that the subdivision be declined. He considered the key issues were traffic, privacy, impacts on endangered native species from an increase in domestic cats and dogs, and impacts on landscape character. Mr Bertram considered that the section sizes may set a precedent for other projects and that the subdivision would break up the natural landscape, as viewed from Ōhope, Wainui and Ōhiwa. Mr Bertram was of the view the proposed native planting was insignificant and noted that in his role managing a pest control company in Auckland, he had observed how cats can impact on ecosystems.

For the Council

54. **Mr Kim Goodfellow**, a landscape architect, provided comments and supplementary evidence in response to the evidence heard. He reiterated his view that the visual simulations lacked plausibility and maintained that the landscape and visual effects could not be evaluated with certainty. He noted that cumulative effects were not addressed. In his opinion, advanced planting would be required to mitigate the effects of Lots 10, 11 and 12.

55. **Ms Laura Swan** responded to issues raised during the hearing. She advised that she had prepared supplementary evidence in response to Mr Crossan's evidence. It was her view that the mitigation offered was not adequate to mitigate the adverse effects on rural character, even with the reduced number of lots. She emphasised that while there are differences in the objectives and policies for the Coastal, Ōhiwa and Rural zones, the subdivision provisions in Chapter 15 apply to all three zones and the lot size provisions are the same.
56. Ms Swan highlighted the district plan's definition of natural character and told me that as it includes modified environs, rural production and horticultural activities contribute to the natural character. She confirmed that her recommendation stood and that in her opinion consent should be declined, both in respect of the proposal and the alternative proposal.

Applicant's right of reply

57. **Ms Hamm** provided a written right of reply. She advised that the key issues remained as set out at the opening of the hearing, being visual and natural character effects and consistency with the objectives and policies of the District Plan.
58. Ms Hamm was critical of Mr Goodfellow's approach, which she saw as focussing on the need for additional information, rather than engaging with the evidence of Mr Campbell and presenting a view on the proposal. She went on to say that Mr Goodfellow had placed too much emphasis on visual simulations. She submitted that no evidence had been produced to the contrary and that the landscape and natural character effects of the proposal are acceptable.
59. The reply went on to emphasise that the applicant maintains the Coastal Zone is a Mixed Zone, for which rural production is not a primary purpose.¹¹
60. Amended conditions were attached for the alternative proposal (seven lot proposal), as well as for the Stage 1 boundary adjustment, together with a scheme plan.

The principal issues in contention

61. A wide range of matters were traversed in the application, submissions, the Section 42A Report and supporting material, and during the hearing.
62. After analysis of the application and supporting evidence (including proposed mitigation measures and the volunteered conditions), a full review of the Section 42A Report, consideration of the submissions and my site visit, I have determined that principal issues in contention are as follows:
- (i) Effects on visual amenity, landscape and natural character
 - (ii) Consistency with the objectives and policies of the District Plan
 - (iii) Precedent and plan integrity

¹¹ Reply submissions at paragraph [33]

Main findings on the principal issues in contention

63. My findings on the principal issues in contention, and the reasons for my findings are set out below.

Effects on visual amenity, landscape and natural character

64. The Section 42A Report comprehensively described the receiving environment and described the sites in the surrounding area for which subdivision consent had been obtained, as well as describing the sites where additional dwellings could be established as a permitted activity. It also identified sites for which subdivision consent had been approved, but which had not yet obtained title. Copies of the approved scheme plans were included at Attachment 3.
65. I observed on my site visit that there are now dwellings on some of the lots to the west of the paper road immediately adjoining the site, which are not evident in the aerial photography. The Section 42A Report noted this and identified that this subdivision is on land zoned Ōhiwa Harbour and that the lots range in size from 2,100m² to 5,500m² in area, with a balance lots beyond of 45 hectares.
66. The Section 42A Report concluded that the receiving environment is the existing environment, plus those lots that are consented but have not yet obtained title, buildings on vacant lots and lots that are permitted to have additional dwellings or other buildings.
67. My overall impression of the surrounding area as I approached the site from Ōhiwa Harbour Road was of an overriding rural character, with isolated dwellings tucked into the landscape, pockets of native bush and a mixture of rural land uses including grazing and orchards. This impression rather abruptly changed, as I approached the site from the south at the intersection with Ōhiwa Harbour Road. There are new houses recently constructed and under construction to the south and west of the site. Recent planting was evident below the new houses, with additional planting in progress at the time of my site visit. The houses are relatively prominent as viewed from the right of way serving the application site. The subject site is rural in character, with established shelterbelts, an avocado orchard, passionfruit orchard and one existing dwelling.
68. The Revised Landscape and Visual Assessment prepared by Mr Campbell at paragraph 3.46 describes the landscape thus:

The site sits within an area that has seen an increase in residential built form but can still be seen as having a strong underlying rural character.

Natural landscape elements are [sic] key part of defining this character, particularly the interplay between the open pastoral spaces fragments of both native remnant forest vegetation and geometrically arranged fragments of horticultural and utilitarian planting.

69. The assessment goes on to conclude in respect of the existing environment that:

The site sits within a wider landscape that, although seeing an increase in the presence of residential built form still has a strong sense of rural identity underscored by the visual presence of ongoing rural amenity activities.

70. The assessment concludes that overall, the permanent and temporary adverse effects on both landscape and visual amenity would be very low to low / no more than minor. In response to questions, Mr Campbell confirmed that he had applied the New Zealand Institute of Landscape Architect's guidelines¹², and that his overall assessment of the proposal was that it would result in very low adverse effects on visual amenity and landscape and that the temporary effects would be low to moderate, until such time as the planting established. He said that this equated to a minor adverse effect.
71. As can be seen from the application information set out earlier in this decision, there were several permutations of the Landscape Visual Report and accompanying visual simulations. The latest being those attached to Mr Campbell's evidence at Appendix 3. The methodology states that *'All buildings modelled are 200sqm, lots 10-12 are single storey at 5m in high and lots 1-7 are two-storeys at 7m high. They are positioned near the northwestern corner of each building platform.'*
72. At the start of the hearing, I was advised by Mr Goodfellow advised the peer review was based on the previous proposal. He had not had the opportunity to have direct discussions with Mr Campbell regarding the alternative proposal, however I was advised that the planners had discussed the proposal. Later in the hearing, Mr Goodfellow provided supplementary evidence in response to Mr Campbell's evidence.
73. Mr Goodfellow told me that he maintained that the methodology applied by Mr Campbell was lacking in accuracy, plausibility and credibility. In particular, he highlighted the following issues:
- A lack of accuracy and realism of the building models
 - Lack of 3d views
 - The eastern viewpoint is not sensitive, and another location would be preferable
 - Only three viewpoints have been provided, however it is stated in Mr Campbell's assessment that Lots 1, 2, 3, 4, 6, 7 will have views to the east. Therefore, if the lots can see out, it must also be possible to see into the site. Viewpoints should be selected where the buildings can be seen.
 - It is not possible to ascertain the impact of windows and this is where a 3d model would assist.
 - There was confusion as to the total number of trees proposed
74. The set of conditions attached as Appendix 3 to the applicant's reply propose conditions 9 and 33 are imposed as consent notices to require ongoing compliance. Condition 9 relates to Lot 8 in Stage One and states that the same controls are to be imposed as for Lot 7. Condition 33 applies to Lot 7, as well as Lots 2-4, 6, 10 and 12. The following restrictions in condition 33 are of relevance to the potential visual amenity, landscape and natural character effects:
- (a) all lots are restricted to one dwelling, which must be located within the building platforms shown on the Land Transfer Plan;

¹² Te Tangi A Te Manu – Aotearoa New Zealand Landscape Assessment Guidelines

- (b) a 7m height restriction for Lots 2-4, 6 and 7 and a 5m height limit for Lots 10 and 12;
 - (c) reflectivity limits for the exterior of all buildings;
 - (d) any structural retaining outside the dwelling footprint is limited to a maximum of 0.5m in height;
 - (e) building coverage on Lots 10 and 12 is limited to 500m² per lot;
 - (f) maintenance of the existing shelterbelts as shown on the landscape plan to a height not less than 6m, including those on the paper road adjoining the site; and the replanting of any vegetation within the Onekawa Road legal road reserve should it be removed;
 - (g) maintenance of the native landscape plantings.
75. I asked Mr Campbell about his role with the changes to the proposal. He told me that he was engaged to prepare a landscape and visual assessment. I asked whether his assessment had a bearing on the number of lots proposed. Mr Campbell told me that it did not. From further questions, I understood that Mr Campbell had a role in recommending reduced heights for the future buildings, but the subdivision layout and planting design was of Mr Stilwell's design. I was surprised to learn of this and comment that a landscape architect having no or little involvement in the layout and design of a subdivision is unusual and it did cast some doubt on the validity of Mr Campbell's evidence.
76. Mr Crossan offered the opinion that while the proposed development will result in a change to the existing character and environment, the change and how this perceived is often subjective to the individual. He went on to note that *'the vast majority of directly adjoining properties have provided their written approval to the development'*. I accept that I am required to have no regard to effects on people who have given written approvals to the application. However, as already discussed, there are two submitters who own properties adjacent to the site and other submitters who reside in the wider area.
77. Mr Ian Bertram, Mr Logan Bertram and Mr Sandom told me about their associations with the area and perceptions of the landscape. Mr Ian Bertram advised he had lived in the area for 40 years. He told me he was unhappy with the level of development occurring on the adjoining site and wished for the area to be preserved as it was. He said he did not have words to describe the impact of Lots 10 and 12. Mr Logan Bertram described the importance of Ōhope beach and the wetlands by Wainui Saltmarshes and told me about his childhood experiences climbing trees and exploring the area. He considered that the visual impacts of the proposal, particularly Lots 10-12 would be 'crazy' and very intrusive on the skyline. Mr Sandom highlighted the views, amazing trees, the birds and the weather as all contributing to his experience of the wider locality. He said it used to be a quiet place but had become noisier as a result of recent developments; in his words, *'every new house has a lawnmower'*.
78. As noted, Mr Goodfellow provided a peer review of Mr Campbell's landscape and visual assessment. He identified deficiencies and uncertainties in relation to the methodology used by Mr Campbell. However, I found it unsatisfactory for Mr Goodfellow, a registered landscape architect of some considerable experience to not offer a view on the potential landscape and visual effects of the proposal.

79. I asked Mr Campbell what the size of the existing dwelling on the site is. He was assisted by Mr Stilwell, who advised that it is approximately 270m². Having regard to this, the proposed building coverage restriction set out above and the District Plan's permitted activity standard of 40 percent site coverage, I agree with Mr Goodfellow that the visual simulations provided do not provide a plausible basis to reach a conclusion as to the level of potential effects on visual amenity, landscape or natural character.
80. I was also mindful of Mr Goodfellow's comments that the buildings have been positioned sideways to key views. Having been to the site and noting the expansive views enjoyed from the area surrounding the existing dwelling, I agree that this adds to the lack of credibility of the visual simulations.
81. On balance I do not have sufficient confidence in the evidence presented by Mr Campbell. However, nor do I have the benefit of an evaluation as to the extent of the actual or potential effects from Mr Goodfellow. As I have do not have an assessment or reliable evidence to draw conclusions from, I have not been able to determine what the extent of effects will be on visual amenity, landscape or natural character.
82. However, I find that there will clearly be a perceptible change to the landscape and visual amenity values as a result of the proposal and alternative proposal. The proposed lots will be clearly visible from the new public road and the existing paper road, and there will be a degree of domestication associated with each of the proposed lots. Although landscaping is proposed and the retention of some of the avocado trees, I agree with Mr Goodfellow and Mr Sandom, it is more akin to amenity planting or residential gardens, as it will follow the boundaries of the lots and result in ribbons of planting confined to the perimeter of the lots. I find that the proposed plantings will draw attention to the site's use for principally residential and domestic activity and will not improve the site's natural character.¹³
83. Overall, I was not persuaded by Mr Crossan's view that the landscape and visual effects can be adequately mitigated through the planting and design controls proposed.

Consistency with the objectives and policies of the District Plan

84. The planners agreed that the site does not lie in coastal environment and therefore the New Zealand Coastal Policy Statement was not relevant to my consideration of the proposal. However, Ms Swan and Mr Goodfellow emphasised the site was adjacent to the coastal environment and this was the receiving environment.
85. Both Mr Crossan and Ms Ham asserted that the Coastal Zone is a 'Mixed Zone' for which rural production is not a primary purpose, and that subdivision has no impact on the integrity of that zone. Both relied on the issues statement for the zone, which states that:

Some land within the Coastal Zone is used or able to be used for farming and horticulture activities. The zone provisions need to provide for such uses alongside recreational and residential uses of the zone while recognising the need to preserve the natural character of the Coastal Environment.

¹³ I note here, that as advised by Ms Swan, the District Plan's definition of natural character includes both natural and modified environs.

86. This view was difficult to reconcile against the relevant objectives and policies and the list of permitted activities that were provided by Ms Swan. Permitted activities in the Coastal Zone are the same as for the Rural Zone, with the following exceptions:
- Deer farming is not a permitted activity
 - Plantation forestry is only permitted if it is existing
 - Ōpōtiki Airport related activities are not permitted
 - Frost fans are not permitted
 - Relocation and re-siting of buildings is permitted
87. By and large, the permitted activities are very much of a rural nature, such as farming, provision for seasonal worker accommodation and with some limited provision made for visitor accommodation of up to four persons.
88. As will be apparent from the foregoing discussion on visual amenity, landscape and natural character; I find that the general nature of the Coastal Zone is clearly rural, as opposed to one of rural lifestyle or rural residential in character. I disagree with the views advanced by Mr Crossan and Ms Hamm that the Coastal Zone is a mixed zone. The fact that one of the six objectives is devoted to rural production does not in turn lend support to the proposition that it is a 'mixed zone'.
89. Policy 15.2.1.3 reads as follows:
- To avoid the fragmentation and loss of the productive rural land and, in particular versatile land, by restricting subdivision for purposes other than rural production activities.*
90. Mr Crossan was critical of Ms Swan's reliance on the land use classification being the basis to reach a conclusion that the subdivision would result in the fragmentation of rural land and not accord with the relevant objectives and policies. Mr Crossan, relying on the evidence of Mr Stilwell, described the land as marginal and having limited potential for productive rural activities. He was satisfied that while the site would be removed from rural production, this was not the primary goal for the Coastal Zone.
91. Ms Swan disagreed and in her supplementary evidenced observed that Mr Stilwell's evidence is that the existing orchard is marginal from an economic perspective, but that the land is viable for horticultural use. In my questions to Mr Stilwell, he confirmed that the avocado orchard was productive, but that the issue was increased production with more land here in New Zealand and overseas being converted to avocado orchards.
92. Ms Swan observed that the proposed lots are not large enough to support rural production activities and that nearby lots of a similar size contained large dwellings, accessory buildings, gardens and native planting. This accorded with my observations on my site visit of the prominence of the recently constructed dwellings to the south and west of the site.
93. I was also assisted by Ms Conning for Forest and Bird. She advised me that in her view, Policy 15.2.1.3 applied to all rural land. The use of the words 'in particular' did not confine its application

to versatile land, rather it conveyed that while the policy definitely applies to versatile land, it still applies to other rural land.

94. I do not agree with Mr Crossan that there is any evidence that the land is marginal or unsuitable for rural production activities. It has a history of being used for kiwifruit and avocado orchards and as Ms Swan observed, may be suitable for new crops or varieties not currently grown in the area. The overriding policy direction in Chapter 15 Subdivision and Chapter 9 Coastal Zone is that rural production is to be enabled and that the fragmentation and loss of productive rural land is to be avoided. I agree with Ms Swan that the proposal is in direct opposition to the intention of Policy 15.2.1.3. I further find that the proposal is also contrary to Policy 15.2.1.8. The land is in a rural area and would not result in lot sizes that are not of sufficient size to be suitable for rural production activities.
95. Mr Crossan advised that he agreed the proposal was not entirely consistent with policies 9.2.2.5 and 9.2.2.6, as the development would not be consolidated within an established coastal settlement. These policies read as follows:

9.2.2.5 Manage the effects of subdivision, use and development on the natural character of the Coastal Zone through avoiding inappropriate development outside existing settlements, as far as practicable, or remedying or mitigating adverse effects, while recognising that some activities, due to functional, operational or technical requirements, need to locate in the Coastal Zone.

9.2.2.6 Encourage subdivision, use and development within established coastal settlements to ensure that residential development is managed to avoid, remedy or mitigate the effects of sprawling subdivision on the natural character of the Coastal Environment.

96. Mr Crossan went on to state that he did not consider the proposal would result in a 'sprawling' subdivision. In response to questions, he advised me that the proposed planting was not the sole mitigation proposed and that the building controls to be imposed as consent notices would also mitigate the effects. As discussed earlier, I am not satisfied that there is evidence these controls will appropriately mitigate the impact of future buildings on the proposed lots.
97. Overall, I find that the proposal is inconsistent and, in some cases, contrary to the relevant objectives and policies of the District Plan. Rural production activities will cease on the site, the proposal will result in inappropriate development outside existing settlements and the density and size of future buildings have not been demonstrated to appropriately mitigate potential effects on the natural character of the area.

Precedent effects

98. I am concerned that this proposal will set a precedent for others to follow. I acknowledge the applicant has gone to some effort already to establish some native planting on the site and is proposing additional native planting. The applicant also made efforts to reduce the number of lots (the alternative proposal) and the height of the future buildings on Lots 10-12. However, the overall appearance of the proposal, while not an urban development, will be one of comparatively dense level of settlement which is not anticipated in the Coastal Zone. I consider that precedent effects do arise.

Reasons for the decision

99. The subdivision, change in land use and earthworks on a piece of land identified in the NESCS can be satisfactorily addressed. A detailed site investigation has been undertaken and conditions of consent can be imposed to require any soil removed from the site to be disposed of appropriately. Consent to the land use consent is GRANTED, subject to the conditions appended to this decision.
100. For the reasons set out above, I have found the proposed subdivision to be inappropriate on this site and consent is REFUSED. The subdivision and creation of either seven or nine new Records of Title and the resultant development for residential use will likely cause adverse effects on the rural character and amenity of the area. The subdivision is inconsistent with, and in some cases, directly contrary to the relevant objectives and policies of the District Plan.

R Dimery

Independent Hearings Commissioner

10 October 2022

Appendix 1 – Consent Conditions

Appendix 1 – NESCS Land Use Consent and Conditions

Pursuant to section 9(1)(a) of the Resource Management Act 1991 and Regulation 9 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011, the Ōpōtiki District Council grants consent for a controlled activity to subdivide, change the use of land and disturb soil on Part Lot 1 DP 7129 located at 98C Ohiwa Harbour Road, Ohiwa, subject to the following conditions which are imposed under S108 of the Resource Management Act 1991:

Conditions

1. Except where modified by any condition of this consent, all activities shall be carried out in accordance with Resource Consent Application 2022-49 and in particular the Detailed Site Investigation report prepared by BCD Group for 98C Ohiwa Harbour Road, Opotiki, Job Number 22-0079, dated 8 March 2022.
2. Unless additional testing is undertaken to determine the level of contaminants in the soil meets cleanfill criteria, any soil removed from the site shall be disposed of at an appropriately licensed landfill facility. Any additional sampling must be undertaken in accordance with the Ministry of the Environment's Cleanfill guidelines.
3. A copy of any receipts from landfill operators showing the date and volume or tonnage of any soil disposed off-site shall be provided to the council for record keeping upon completion of any works involving soil removal.
4. A monitoring fee of \$130 (inclusive of GST) shall be paid to the council for the monitoring and supervision of this resource consent. Notwithstanding the above, where there is good and reasonable cause for unprogrammed monitoring and additional site inspections, the costs of that will be charged to the consent holder. Such costs are recovered on an actual and reasonable basis as defined in the Fees and Charges Schedule as approved by the Council in terms of Section 36 of the Resource Management Act 1991.