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*Vanessa Jane Ham,  
Lawyer for Applicant*

**BEFORE THE ŌPŌTIKI DISTRICT COUNCIL**

**UNDER** the Resource Management Act 1991

**AND**

**IN THE MATTER OF** a resource consent application by G & S Stilwell for subdivision consent, and land use consent under the National Environmental Standard for Assessing and Managing Contaminants in Soil (NESCS), at 98C Ōhiwa Harbour Road (Onekawa Road), Ōhiwa

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**LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT**

**25 AUGUST 2022**

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## Introduction

1. The applicant, Mr and Mrs Stilwell, seek resource consent to subdivide their property at 98C Ōhiwa Harbour Road, to create rural residential allotments.
2. The property is located within the Coastal Zone under the Ōpōtiki District Plan and involves:
  - (a) A boundary adjustment to amalgamate two areas of the property with land owned by adjacent property owners;
  - (b) The subdivision of the balance into 10 allotments; and
  - (c) Consent under the National Environmental Standard for Assessing and Managing Contaminants in Soil (**NESCS**).
3. Whilst the first and last of these matters are controlled activities, the subdivision is discretionary, and accordingly on a bundled basis the overall activity status is discretionary.
4. Although the applicant has not formally amended its application, it has also put forward an alternative proposal through its evidence, which removes two lots resulting in seven rural residential allotments / house sites.
5. The key issues in this case relating to whether or not it is appropriate for resource consents to be granted are:
  - (a) The natural character effects of the proposal; and
  - (b) Whether the proposal is consistent with the objectives and policies of the District Plan (or poses a challenge to the District Plan's integrity).

6. On these matters, the applicant's case is that:
- (a) Care has been taken in the design of the subdivision and the mitigation measures proposed by the applicant to avoid, remedy and mitigate adverse effects on the natural character of the Coastal Zone (and from a broader perspective, on the values of the Ōhiwa Harbour).
  - (b) The site has low productive potential. The relevant objectives and policies for the Coastal Zone primarily relate to enabling rural production activities rather than outright restricting or avoiding the fragmentation and loss of productive rural land. Given the low productive potential of the property, providing for subdivision in this case does not present a challenge to those objectives and policies.
7. In light of those matters, it is appropriate for consent to be granted, particularly when the benefits of the proposal with respect to native planting and pest control are considered.

### **Discretionary activity status**

8. The activity attracts discretionary activity status. This means that the Council retains a broad discretion over whether to grant or refuse resource consent.<sup>1</sup>
9. In that context, it is my submission that questions of plan integrity or precedent have little bearing. As the Environment Court has recently said in relation to discretionary activity status:<sup>2</sup>

#### **Precedent and plan integrity**

As we noted earlier, we do not consider this case to be one of high principle. The activity is discretionary. The weight of the relevant objectives

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<sup>1</sup> Section 104B, RMA.

<sup>2</sup> *High Quality Ltd v Auckland Council* [2022] NZEnvC 117 at [104].

and policies and the zoning provisions are considered along with the evidence of actual effects. As it can be seen, most of the effects have been addressed.

No subdivision of land is involved. We are satisfied that there is no compromise to any future urban zoning of this land. The activity will have minimal or no effects on matters including stormwater and other infrastructure installation. We acknowledge that the plan does not encourage, and seeks to actively discourage, changes of use within the FUZ zone prior to its rezoning for urban use.

Nevertheless, the activity is provided for as a discretionary activity. We need to consider all the relevant provisions in reaching a conclusion. This particularly convoluted method gets us to the core issue in this case: is the rural character and amenity of this locality maintained?

10. In this case, the Coastal Zone is a relatively broad zone. The issues cover a number of matters, which are perhaps most usefully brought together in Issue 13:

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.

11. The Coastal Zone provisions do not seek to avoid subdivision per se. In that context, and the broad context of the Coastal Zone provisions, it is my submission that this is not a case where issues of plan integrity or precedent have a strong role to play.
12. Furthermore, while the site in question is visible from the Ōhiwa Harbour, and the applicant must undertake a full assessment of effects, it is a site which is located in the Coastal Zone and is not subject to any overlays or restrictive zoning. It is not in the Coastal Environment, or an area of outstanding, very high, or high natural character, as mapped in the Bay of Plenty Regional Policy

Statement (**RPS**). It is not in an Outstanding Natural Feature or Landscape as mapped in the Bay of Plenty Regional Coastal Environment Plan. It is not in the Ōhiwa Harbour zone as mapped in the District Plan. While all of those zones and overlays are relevant to the assessment of effects of the proposal, the assessment should not approach the proposal as though it sits within those areas. That would set the bar too high.

13. This is particularly given that the District Plan signals to its ratepayers that zoning is the principal regulator of activities within the district:<sup>3</sup>

**Zoning is the main technique to manage subdivision, and the use and development of land in the District.** Zoning is applied to all land in the District as shown on the Planning Maps and recognises that land needs to be managed for different purposes in the District. Each zone has different objectives, policies and rules, including activity lists and standards to be met.

**The main advantages of zones are clarity and certainty for residents and landowners and simplicity through grouping of common standards.** In addition, zoning is well understood by most people who will use the Plan.

14. Chapter 1 of the District Plan describes the Coastal Zone as follows:<sup>4</sup>

**Chapter 9 - Coastal Zone**

The Coastal Zone applies to the coastal environment with a focus on retaining and enhancing the special landscape and *natural character* values of the coastline and its ecological values.

**Coastal zone – natural character**

15. The provisions within the Coastal Zone on natural character are the most relevant to the proposal. Two of the six objectives relate to natural character.

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<sup>3</sup> District Plan, at 1.6.1 and 1.6.2.

<sup>4</sup> District Plan, at 1.6.3.

Both relate to natural character within the Coastal Zone, or the natural character of the Coastal Zone.

16. In the District Plan, the term “natural character” is defined as:

Those attributes of the environment that give New Zealand its particular, natural and distinctive character. These qualities may be ecological, physical, spiritual, cultural, or aesthetic in nature. They include natural and modified environs.

17. In this context, it is my submission that the characterisation by the applicant’s landscape architect, of a rural-residential landscape, is one that is not only factually correct (as supported by Mr Campbell’s evidence), but one that is consistent with the Coastal Zone itself where land within the zone is able to be used for farming and horticulture activities, as well as recreational and residential uses.

18. Furthermore, the policies supporting the objectives of the Coastal Zone are not directly challenged:

(a) Policy 9.2.1.2 seeks to avoid as far as practicable and otherwise remedy or mitigate *significant* adverse effects.

(b) While Policies 9.2.2.5 and 9.2.2.6 look to encourage subdivision within established coastal settlements, such subdivision is of a much more residential nature. This proposal is not ‘sprawling subdivision’ of small residential lots, but comprises rural residential lots, where controls are proposed (consistent with Policy 9.2.2.2).

19. Outside the Coastal Zone itself, it is relevant to consider the natural character of the coastal environment (and in particular whether this proposal – located outside the coastal environment – would adversely affect the natural character values of the coastal environment). On this, Mr Campbell has specifically

considered the values of the outstanding natural character of the Ōhiwa Harbour, and considers that the proposal will not detract from the scheduled natural character elements and that the proposal is consistent with scheduled land cover and land use elements.<sup>5</sup>

20. Given that the proposal does not adversely affect the natural character of the coastal environment, and does avoid as far as practicable and otherwise remedy or mitigate adverse effects on natural character *within* the Coastal Zone through building controls and extensive planting, it is my submission that the proposal is acceptable and deserving of resource consent.

### **Coastal zone – rural production**

21. The reporting officer places emphasis on the Coastal Zone being available for rural production activities, although acknowledges that the site does not meet the definition of versatile land.
22. Whilst Objective 9.2.5 looks to *enable* rural production activities in the Coastal Zone, the zone provisions are otherwise relatively neutral on the issue of providing for rural production. As Mr Crossan says, avoiding the removal of land used rural production is not the primary goal for the Coastal Zone.<sup>6</sup>
23. The provisions of the Subdivision chapter in the District Plan contain further objectives and policies with respect to subdivision, but on a careful reading of these, most are not directly challenged by this proposal. In particular:
- (a) The proposed lots are consistent with the rural residential character and mixed purpose of the Coastal Zone, so do not confront Policy 15.2.1.1.

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<sup>5</sup> Chris Campbell, paragraph 44. These are:

1 The rural landscape around the Ōhiwa Harbour has scatterings of dwellings consistent with a rural landscape.

2 Much of the coastal vegetation has been lost and all that remains is set within the harbour itself.

<sup>6</sup> Shae Crossan, paragraph 68.

- (b) The proposal does avoid, remedy or mitigate the adverse effects of subdivision on applicable ecological, landscape, heritage and cultural values (Policy 15.2.1.2).
  - (c) Policy 15.2.1.3 is clearly directed towards versatile land.
  - (d) Reverse sensitivity is not in issue (Policy 15.2.1.4) and the lots are not small lots in a sensitive environment (Policy 15.2.1.5).<sup>7</sup>
  - (e) Policies 15.2.1.6 – 8 are not engaged.
24. The objectives and policies for the Coastal Zone primarily relate to enabling rural production activities (rather than outright restricting or avoiding the fragmentation and loss of productive rural land), and the provisions of the Subdivision chapter in the District Plan do not detract from that.
25. Given the low productive potential of the property, providing for subdivision in this case does not present a challenge to those objectives and policies of the District Plan.

### **Commissioner's decision**

26. The applicant seeks resource consent for the activities applied for, and subject to the conditions of consent as attached to Mr Crossan's evidence. In my submission, the proposal has been formulated so that it is consistent with the purpose of the Coastal Zone.
27. If the Commissioner disagrees, then the applicant invites the Commissioner to consider and grant consent to the alternative proposal for seven rural residential allotments / house sites. For that purpose, a scheme plan and

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<sup>7</sup> Shae Crossan, paragraph 76.



landscape plan have been prepared and included within the applicant's evidence. It may however be appropriate to issue an interim decision to allow a finalised set of conditions to be agreed with the reporting officer.

28. Finally, should the Commissioner consider that the subdivision itself should be declined, the applicant asks the Commissioner to nevertheless grant consent to the boundary adjustment and NECS land use. Although the applications have been bundled for the purposes of assessment, there is no impediment to the application being granted in part and given that those applications have controlled activity status, this is appropriate. In these circumstances, an interim decision may also be appropriate to allow a finalised set of conditions to be agreed with the reporting officer.

## **Conclusion**

29. The key consideration in this case relates to the consistency of the proposal with the Coastal Zone, on which the key issue relates to natural character. The zone recognises that land within it is used or able to be used for farming and horticulture activities, and recreational and residential uses, while recognising the need to preserve the natural character of the Coastal Environment.
30. The zone itself exhibits a rural-residential character and the proposal is consistent with that character. Outside of the zone, Mr Campbell has assessed the impact of the proposal on the regional natural character and landscape overlays, and concluded that the proposal does not detract from their values.
31. In these circumstances, the proposal is deserving of resource consent, but should the Commissioner consider that an issue of precedent arises with respect to the non-productive nature of the proposal, then Mr Stilwell's evidence is clear as to the low productive potential of the land. In these circumstances, there is no challenge to the integrity of the District Plan.

**Witnesses for the applicant**

32. I will be calling three witnesses in support of the proposal:

- (a) Gavin Stilwell on behalf of the applicant;
- (b) Chris Campbell, landscape architect; and
- (c) Shae Crossan, planner.

**DATED** this 25<sup>th</sup> day of August 2022



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Vanessa Jane Hamm

Counsel for Mr and Mrs Stilwell