

ORIGINAL

Decision No. A84/98

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN TREVOR FERGUSON

(RMA 300/97)

Appellant

AND THE FAR NORTH DISTRICT COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting

Environment Commissioner R F Gapes

Environment Commissioner J R Fitzmaurice

HEARING at PAIHIA on 26, 27 & 28 May 1998

APPEARANCES

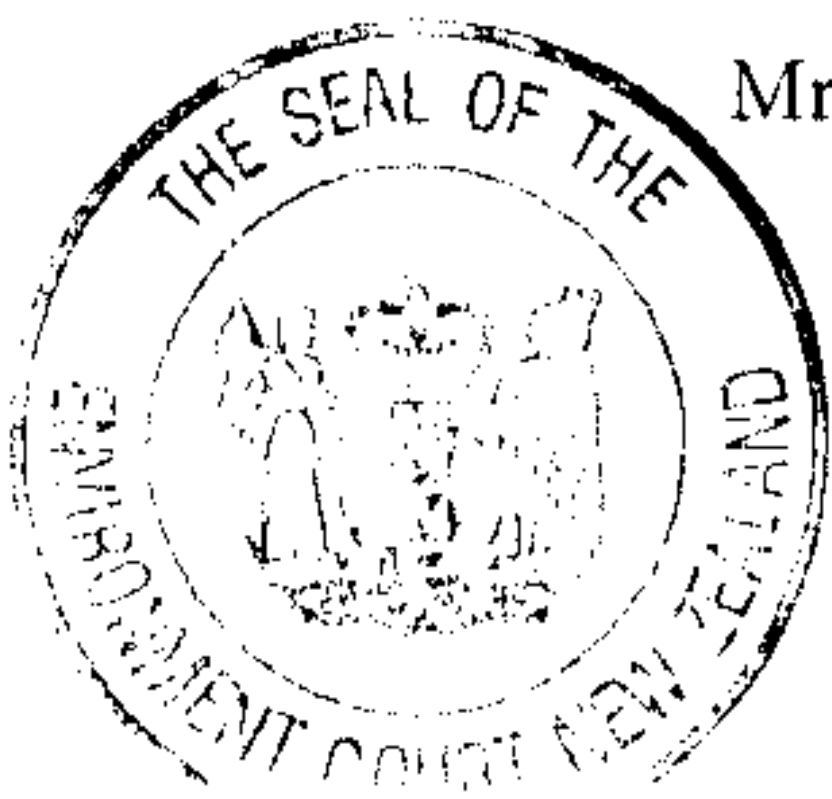
Mr G J Mathias for the appellant

Mr M A Ray for the respondent

Ms D Sandifer for self

Mr D McNeil for self

Mr C Horton for self



Ms E Horton for self

Mr R Powell for self

Ms K A Elliot for self

DECISION

This appeal is against the imposition of a condition providing for a public walkway as a condition of consent for the subdivision of Lots 2 and 3 on DP 171056 (North Auckland Registry) at Davis Strongman Place, Kerikeri, into 6 allotments.

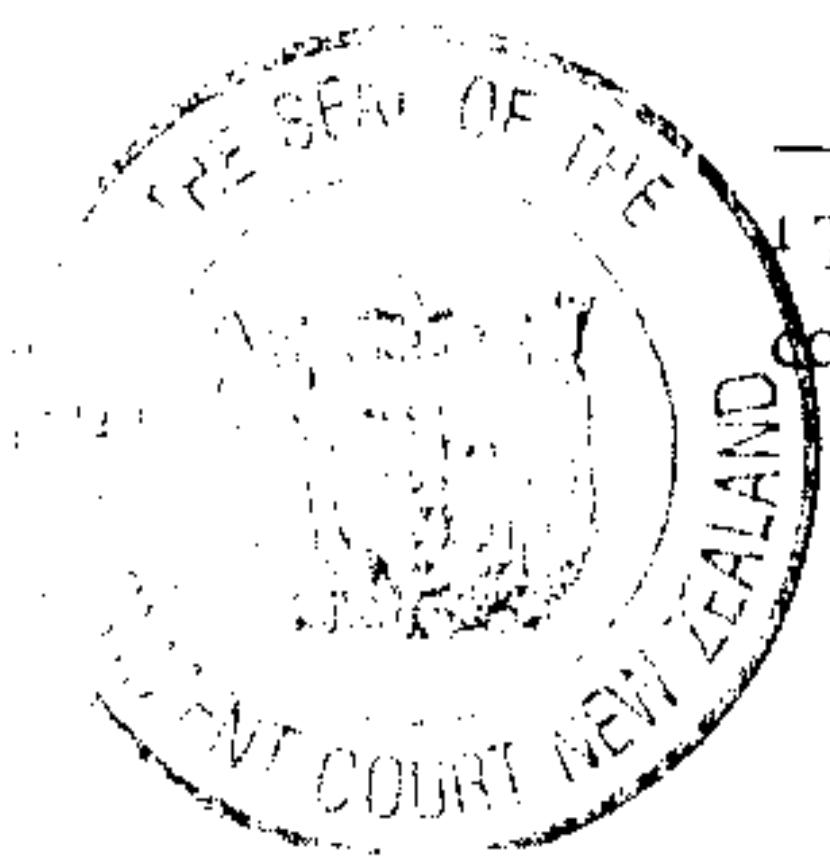
The appeal originally requested that conditions 1(d), 2(a), 2(h), and 2(o) be severed from the consent, and that condition 2(k)(iii) be severed or amended to record the intention accurately. With the exception of condition 1(d) all of the issues have been settled or are not to be pursued. Condition 1(d) requires that the applicant:

Provide public pedestrian access from Davis Strongman Place to Edmonds Ruins. The access is to terminate at the Edmonds Ruins gateway on the Northern boundary of Lot 6. Access is to be a minimum of 2.5m in width.

The site is unusual in that it is almost entirely perimeter fenced by dry stone walls from the earliest period of European settlement in the area. These walls were built by Mr John Edmonds, a stone mason who arrived in New Zealand with his family in 1834. The walls form part of the original homestead and farm enclosures (including areas for cultivation, a sheep pen, stockyards, a burial ground, and possibly an orchard). The area known as the "Edmonds' Ruins" contains the house ruins. They were recorded as an archaeological site [N11/25], (P5/9), in 1969, and gazetted as the 'Edmonds' Ruins Historic Reserve' in 1975. The House ruins were registered in 1982 under the Historic Places Act 1980, and now have category II status.

An archaeological report¹ prepared for the Hearings Committee of the Far North District Council (in relation to the subdivision application), states that the stone walls which enclose and divide the area of the proposed subdivision, meet the

¹ This evidence was presented to us by the author, Mr Michael Taylor, an archaeological consultant.



criteria under the Historic Places Act 1993, and accordingly should be treated as an archaeological site under that Act.

The site comprises 6.235 hectares, situated in a no-exit street (Davis Strongman Place) servicing a lifestyle block development off Kerikeri Inlet Road in the Bay of Islands. Beyond the appellant's land lies the Edmonds Ruins. Many of the stone walls described above are within the boundaries of the sections as surveyed. The appellant has subdivided all of the allotments having access from Davis Strongman Place. There are seven houses on the 12 lifestyle blocks previously created. The present application is to subdivide the remainder of the property (Lots 2 & 3) into 6 lifestyle allotments, with one small piece of land to vest in the Council as road, extending Davis Strongman Road, although not as far as the Ruins. The proposed walkway (the subject of the contested condition) would allow public access from the road, across the allotments and to the back of the Ruins.

A preliminary procedural matter occurred regarding the scope of the appeal. The appeal is confined solely to the issue of the condition 1(d)².

Mr Mathias counsel for the appellant advanced a number of grounds as to why the walkway should not be imposed. These include:

1. The condition is improper as it does not serve a resource management purpose.
2. The condition is improper as it does not fairly and reasonably relate to the development authorised by the consent.
3. The condition is unreasonable or ultra vires the powers of the respondent.



4. The condition is uncertain in that it does not provide for the future legal status of the proposed public pedestrian access and its future maintenance.
5. The condition should not be imposed for a number of reasons which include:
 - (a) it would not serve a useful public purpose;
 - (b) it would create a danger to the integrity of the Edmonds' Ruins;
 - (c) it would create a danger to the future integrity of the stone walls along which the walkway would run;
 - (d) it is unnecessary.

The appellant did not seek the condition himself and evidence was presented that the condition was originally opposed by the New Zealand Historic Places Trust, and that the Council's reporting officer recommended against the condition. The origin of the condition was said (by the appellant) to be two submitters from nearby properties (Ms Sandifer and Ms Elliot). The appellant believes that the condition was sought to provide a means of obtaining access between the properties of the submitters (across the appellant's land).

We heard from a number of residents supporting the pathway for a variety of reasons, including, that children needed access to the reserve (where the ruins are sited) as a play area, and that the present road (Inlet Road) is too dangerous for them to cycle upon. Submissions were made that the subdivision did not provide the children with recreation areas, and that the design of the subdivision "cut off" the residents of Davis Strongman Place from the rest of their community, and from the Waitangi Wetlands and Windsor Landing areas. Concern was also indicated that without the provision of a controlled pathway, de facto access would occur across the stone walls.



Mr Rae, counsel for the respondent, noted that condition 2(a) provided, in part, that the 2.5m public pedestrian access “can be credited to the total of the reserve contribution fee”. Counsel submitted that the Council’s decision had relied substantially on the evidence of Ms Sandifer regarding the danger of Inlet Road (being narrow and winding), and her opinion that the subdivision would further compound the problem by increasing demand on the road.

The issue is, whether the condition may lawfully be imposed. Mr Mathias, counsel for the appellant, stated the general law as being that:

To be valid a condition must:

- (i) be for a valid resource management purpose
- (ii) fairly and reasonably relate to the development authorised by the consent to which the condition is attached; and
- (iii) not be so unreasonable that no reasonable planning authority could have approved it: *Newbury DC v Secretary of State for the Environment*; *Newbury DC v International Synthetic Rubber Co Inc* [1980] 1 ALL ER 731 (HL).

Mr Mathias noted that these criteria had been accepted and applied in the Resource Management Act decisions *Application by the Christchurch International Airport Limited* [1995] NZRMA 1, *Bletchley Developments Ltd v Palmerston North City Council* [1995] NZRMA 337, *Coote v Marlborough District Council* (W96/94).

As to the first matter, the appellant noted that there was already legal access to the Ruins, and that section 220 of the RMA did not give a legal basis to impose this condition on a subdivision. Further, it was submitted that there was no power under section 120 of the Act or section 106.

The respondent (because the subdivision would increase the density of residents) adopted Ms Sandifer’s evidence, that the potential conflict between pedestrians and traffic in Inlet Road is such as to require the provision of a safer accessway for children to move around the area, and that the pathway is therefore required in order to avoid/mitigate that adverse effect.



As to whether the condition related to the development, Mr Mathias referred us to the decision, *Henderson v Tauranga City* 8 TCPA 269, approved in *Bletchley Developments Ltd v Palmerston North City Council* [1995] NZRMA 337. It was said, in *Henderson*, that:

Conditions imposed under that general power (S279(2)(n) Local Government Act 1974) must relate to the act of subdivision, to the changed circumstances which the subdivision will bring about, or to the provision of such services as will be necessary or desirable for the new lots; and the conditions must be fair and reasonable.

In applying this test, the (then) Planning Tribunal said³:

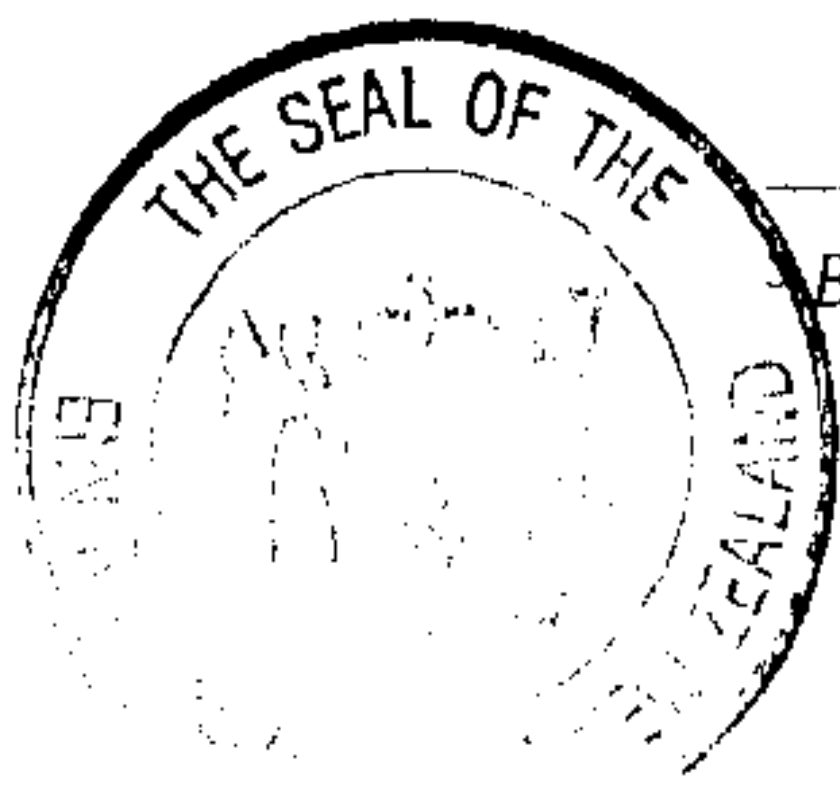
We hold that it is impliedly limited by law to conditions that are fairly and reasonably related to the subdivision authorised by the consent (see *Newbury ...*), including the changed circumstances which the subdivision will bring about, and the provision of such services as will be necessary or desirable for the new lots (following *Henderson ...*).

The Tribunal went on to say that:

The requirement about the width of the road and carriageway was plainly related to the service of future development beyond subdivision. It was not related to the provision of service for the new lots. It was only related to the changed circumstances which the subdivision will bring about in that it was thought expedient to have the road formed from the start to the width ultimately needed, while the developers earthmoving plant was working there and before the land was occupied by residents. We hold that the requirement does not have sufficient relationship with the subdivision to which resource consent was granted, and was not authorised by s108(2).

Likewise, Mr Mathias suggested that the public accessway was not something which arose from the act of subdivision, nor was it relevant to the changed circumstances consequent on subdivision.

It is clear from the evidence, that the need for the accessway was perceived by the respondent to have arisen from the shortcomings of an existing road - Inlet Road. While residents of Davis Strongman Place may feel uncomfortable using Inlet Road, that is a matter related to the state of that road, not to the needs of the subdivision. From the evidence, it appears that Inlet Road is perceived as unsuitable by some

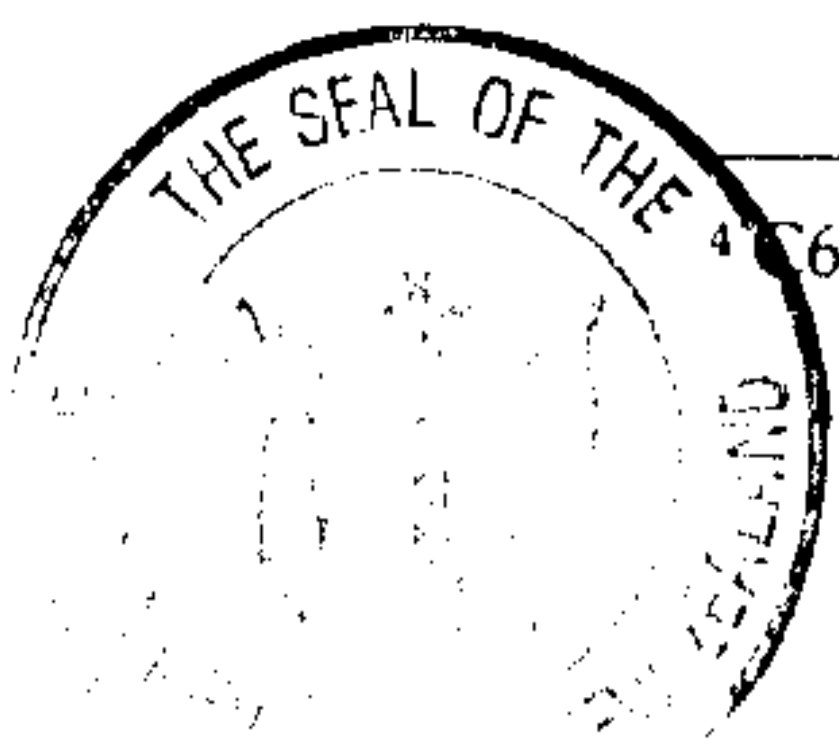


residents of the area, including those who do not live in Davis Strongman Place. The use of a public, legally formed road by residents is not an adverse effect where it is within the load that the road was designed for. No evidence was brought that this was not the case. It is our tentative finding that the condition is unreasonable on this ground.

Mr Rae for the respondent suggested that there would be a cumulative adverse effect as the subdivision would "permit the introduction of an additional six dwellings into the area", increasing the number of pedestrians. It was also stated that, because the developer was also responsible for the earlier subdivision in Davis Strongman Place, the Council could take that fact into account when assessing the effects of this new subdivision, particularly in terms of the need for access to be provided.

In determining whether the condition is fair and reasonable, we have considered this "cumulative effects" argument. We are of the opinion that this argument is unsustainable. Because the pathway is to be set off against the reserves contribution, that contribution must relate to the subject subdivision. Imposing the pathway condition on the basis of the earlier subdivision would be analogous to imposing a reserves contribution retrospectively. The Environment Court has held that it is neither fair nor reasonable to seek a reserves contribution some nine years after a development has taken place. The Court held that the time to take into account any new demand made on reserves in the locality by a subdivision, is when the particular demand arose - i.e. at the original time of subdivision (*Housing New Zealand Limited v Dunedin City Council*⁴). The time to take the demand caused by the first subdivision into account was when that subdivision was approved. We consider that it is unreasonable to seek to accumulate demand (stemming from earlier subdivisions) merely because of the coincidence that the developer is the same.

Mr Mathias, for the appellant, submitted that the condition providing for the pathway was unreasonable, or ultra vires the power of the respondent, because



section 315(1) of the Local Government Act 1974 envisaged that accessways were something to be provided for by a local authority, not a private landowner. Further, counsel noted that there is no reference in section 220 of the RMA to conditions for providing for accessways. We were referred to the decision *Reeves v Waitakere City Council*⁵, wherein a condition requiring that accessway be given over the subdivider's land in favour of a neighbour (not land-locked), was struck out, for being unreasonable.

Mr Rae, for the respondent, submitted that the condition was reasonable, citing the 'set off' from the reserves contribution payable as evidence that the appellant was not being made to pay for something twice (effectively). Ms Sandifer's evidence was cited as indicating that the Historic Places Trust and local iwi did not oppose the pathway. A letter was received into Court from the Historic Places Trust, stating that they no longer opposed the walkway.

We note that Ms Strongman (a local iwi member) gave evidence of her concerns, that the pathway would encourage use of the reserve and waahi tapu⁶ as a recreational area, and that it was preferable for any access to be by the front entrance (in the traditional manner), and that account be taken of the fragile nature of the ruins.

We do not rule on the general question of whether it is ever within a council's power to impose a condition providing for an accessway, but note that the facts of this case do not demonstrate that provision of the accessway is fair and reasonable. It may be that some in the local community would like a pathway in the general locality, but this is a general matter for the Council to consider in due course.

Mr Mathias referred to *Bitumix Ltd v Wellington Borough Council*⁷ as requiring that conditions must be sufficiently detailed as to provide certainty. We accept counsel's submission that a condition requires specificity, clarity and accuracy of

⁵ W68/95, followed in *Bayview Subdivisions Limited v Nelson City Council* (W21/97).

⁶ There is an adjacent burial area which was transferred to the Otahuaio Burial Trust by Mr Ferguson.

⁷ [1979] 2 NZLR 57 (HC), followed in *Wood v Selwyn District Council* (C35/94)



expression leading to a certain measure of certainty, before it can be enforceable. Mr Rae conceded that the condition was not as well drafted as it might have been. He suggested a new draft of the condition but even then we feel it lacked sufficient certainty. Indeed, we are of the opinion that there are considerable grey areas, including where the pathway is to go, who is to be responsible for its creation, formation and maintenance, and who will be legally responsible for the pathway. Other difficulties explained to us included the protection of the walls from people, and from the effects of vegetative growth including trees, blackberry and gorse.

Overall, we have considered the question of whether the condition is fair and reasonable against the evidence presented at the hearing (not all of which is reproduced here), and are of the firm opinion that it is not. We are also clearly of the view that the condition is uncertain. Accordingly, for the reasons given above, we hold that the appeal is successful, and that the condition must be severed from the consent.

Costs are reserved.

DATED at AUCKLAND this 16th day of July 1998.



R Gordon Whiting
Environment Judge

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