BEFORE THE ENVIRONMENT COURT

Decision [2012] NZEnvC 7

ENV-2009-AKL-000326

IN THE MATTER	of an appeal under cl 14 of Schedule 1 to the Resource Management Act 1991
BETWEEN	COLIN GORDON and WENDY GORDON Appellants
AND	THE AUCKLAND COUNCIL Respondent

Court: Environment Judge C J Thompson,
Environment Commissioner K A Edmonds
Environment Commissioner W R Howie
Hearing: at Auckland 12 & 14 December 2011. Site visit 13 December 2011
Counsel/Representative:
M Fisher for Mr and Mrs Gordon
G C Lanning and K M Bell for the Auckland Council

DECISION OF THE COURT

Decision issued: 27-01-2012.

The appeal is declined

Costs are reserved

Introduction

[1] In a decision made in April 2009, the then Auckland City Council declined the submission made by Mr and Mrs Gordon in respect of provisions of the Proposed Auckland District Plan: Hauraki Gulf Islands Section. This is an appeal against that decision.

Background

[2] Mr Gordon owns land on the southern coastline of Waiheke Island, totalling some 34.0873ha, including the headland between Awaawaroa Bay and Deadman's Bay. Prominent on that headland is the site of a Pa which the Proposed Plan schedules as a Category A archaeological site. The holding is notionally divided into two blocks: - the *Home Block* of about 19ha (which incorporates the Pa site) and the *Woodside Bay Block* of about 15ha. The scheduled Pa site covers an area of some 5.7ha (ie some 17% of the total landholding, and 30% of the *Home Block*) and traces of it occupy virtually the whole of the headland. There presently are no structures on the headland, save for the remnants of a jetty on its eastern shore. Mr and Mrs Gordon live in a house on the Home Block, to the northeast of the headland, and a part-time farm worker lives in a small beach cottage on that Block also. One of Mr Gordon's children lives in a house on the Woodside Bay Block, and some friends occupy a bus and some c1960s sheds on the same Block.

[3] Mr and Mrs Gordon have an aspiration to build a home on the Awaawaroa headland to replace their existing house, which Mrs Gordon describes as basic, in only fair condition, and not well-sited for sun and views. For completeness, we note that there is a further house on the northwest edge of the neck leading to the headland, but that is not owned by the Gordons and does not feature in the appeal.

[4] Mr Gordon's family have owned the land since the 1860s (their total holding was once much larger) and have farmed it continuously over that time. Farming, at least in the conventional sense of farming stock such as sheep, is now at best only marginally viable on the Island, and in terms of a return on the value of the capital asset, it does not make financial sense.

The parties' positions

[5] Mr and Mrs Gordon do not dispute the existence of the Pa site, although they may differ with the Council on the need to schedule the whole peninsula to protect the significant parts of it. Nor, in the abstract, do they argue with the proposition that items of historic heritage should be protected and preserved where and when it is reasonably possible to do so.

[6] In her submissions, Ms Fisher described the outcomes sought by Mr and Mrs Gordon as:

> (a) Remove Awaawaroa Point from Schedule 1a of the Proposed Plan (map reference 19-1); or
>
> (b) remove access track and house site on Awaawaroa Point from the scheduled area per Schedule 1a of the Proposed Plan; along with
>
> (c) some acknowledgement from Council that Council would not de facto apply the relevant Plan Provisions to any of our land so removed from Schedule 1a of the Proposed Plan;
>
> (d) such further and consequential relief as may be necessary to give full effect to the relief sought;
>
> (e) costs.

So, in short, the Gordons wish to have the Category A scheduling taken off the whole the headland, or, as per (b), of at least as much of the headland as would enable them to have a house site on it, together with access from the road which passes by the neck at its northern end.

[7] It is their position that, in terms of s85 of the Act, the Category A scheduling renders the land to which it applies incapable of reasonable use, and places an unfair and unreasonable burden upon them, as owners.

[8] The Council's position is that the Category A scheduling of the whole of the land is necessary and appropriate to manage the actual and potential effects on the land from uses that might otherwise be undertaken there, and that such scheduling does not render the land incapable of reasonable use, or impose an unfair and unreasonable burden on the Gordons as people having an interest in it. The Council submits that they have existing use rights to continue to farm the land in the way that it has been farmed for many years;

that a changed farming regime could be authorised by a *discretionary* resource consent; that the scheduling actually enhances the possibilities of subdividing and building on the land and that, in any event, any works on the site would require approval from the Historic Places Trust under the Historic Places Act 1993.

The relevant Plan provisions

[9] The Proposed Plan provisions on scheduling are relatively brief, so we set them out in full:

> **7.8.3 Objective**
>
> To protect significant archaeological sites which contribute to the islands' heritage, knowledge and appreciation of the past.
>
> **Policies**
>
> 1. By identifying and scheduling archaeological sites significant for their historic, cultural, scientific and visual amenity value.
> 2. By retaining scheduled archaeological sites which contribute to the historic, cultural, scientific and visual amenity values of the islands.
> 3. By ensuring that land use and development does not result in the damage or destruction of scheduled archaeological sites and their scheduled site surrounds.
> 4. By avoiding a reduction in the heritage values associated with scheduled archaeological sites and their scheduled site surrounds.
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> **7.8.4 Criteria for scheduling archaeological sites**
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> To determine whether an archaeological site is worthy of protection in the Plan, it has been assessed and evaluated against the criteria for scheduling archaeological sites listed in appendix 4 - Criteria for scheduling heritage items:
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> The evaluation criteria are also used to determine whether a site is a category A, or category B item.
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> **7.8.4.1 Category A**
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> These are extremely valuable archaeological sites that, when assessed against the relevant criteria, were considered to have heritage significance beyond their immediate surrounds. Their loss or degradation would be unacceptable in terms of achieving the purpose of the RMA. These sites therefore need to be preserved.
>
> **7.8.5 Rules for archaeological sites**
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> **7.8.5.1 Permitted activities**
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> The following are permitted activities in relation to any category A and B scheduled archaeological sites:

1. The routine maintenance and repair of existing lawns, gardens and structures, that will not endanger, damage, destroy or detract from the values for which the site has been scheduled.
2. Eradication, control or management of plant pests listed in appendix 14 - Plant and animal pests with hand tools only.
3. Maintenance, repair and restoration of existing buildings.
4. Grazing by light animals - eg sheep.

7.8.5.2 Restricted discretionary activities

Except where provided for as a permitted activity in clause 7.8.5.1, the following are restricted discretionary activities in relation to any category B archaeological site:

1. Earthworks (except for earthworks for burials provided for in clause 7.8.5.1(5)).
2. External alterations and additions to existing buildings and the construction and/or relocation of new buildings.
3. Planting of vegetation on the scheduled site.
4. Grazing of heavy animals - eg cattle, horses.
5. Any activity that damages the scheduled archaeological site.

7.8.5.3 Discretionary activities

Except where provided for as a permitted activity in clause 7.8.5.1, the following are discretionary activities in relation to any category A archaeological site:

1. Earthworks.
2. External alterations and additions to existing buildings and the construction and/or relocation of new buildings.
3. Planting of vegetation on the scheduled site.
4. Grazing by heavy animals - eg cattle, horses.
5. Any activity that damages the scheduled archaeological site.

Appendix 4 Criteria for scheduling archaeological sites

To determine whether an archaeological site is worthy of protection in the Plan, it has been evaluated against the following criteria:

Archaeological/scientific value

A. Gaining information and knowledge archaeologically: The potential to define or expand information and provide recoverable evidence on past human activity and environments (New Zealand history) through archaeological or scientific techniques.

B. Representative example: The extent to which the archaeological site or place is a good example of a site type, feature or activity in New Zealand's history.

C. Diversity: The extent to which the archaeological site is diverse in form and/or content.

D. Rarity: The rarity of an archaeological place or site, or if it contains a rare component.

Context

E. Group: The value of the archaeological site as a component of a recognisable, intact group of geographically associated archaeological sites.

F. Visual contribution to landscape: The visual impact or contribution of the archaeological site to the wider landscape.

Integrity

G. Setting: The extent to which the integrity of the archaeological site's historical or cultural setting survives.

H. Intactness: The intactness of the archaeological site.

Education

I. Education and interpretation value: The potential to interpret the past and enhance public understanding and appreciation of the history of the Hauraki Gulf islands.

J. Community association with or public esteem for: The extent to which the archaeological site is a focal point for the spiritual, cultural, customary, religious, social, political, philosophical or economic values of an ethnic or local or wider community.

History

K. Early period: The archaeological site dates from an early period of Auckland or New Zealand's settlement.

L. People: The extent to which the archaeological site is associated with important persons, groups, organisations, or institutions that have owned, lived in, worked on, carried out activities at, or been associated with the place.

M. Event: The extent to which the archaeological site is associated with an important historic event or action.

N. Archaeology/science history: The extent to which the archaeological site is important in the history, development and documentation of the profession of archaeology in Auckland or New Zealand.

Architectural value

O. Architectural value: The extent to which the archaeological site or place is an important, rare or innovative example of an architectural style, type or method of design, construction, craftsmanship or use of material.

Technological value

P. Technical accomplishment or value: The extent to which the archaeological site or place is important in the development of technology.

The legal framework for considering a proposed plan

[10] The RMA's legal framework for considering a proposed plan begins with sections 72–76 and incorporates, by reference, sections 31 and 32. The process of analysis, once

the matter is before the Court, was reviewed in the decision of *Long Bay – Okura Great Park Soc Inc v North Shore CC* (A078/2008), and further commented on in the more recent decision in *High Country Rosehip Orchards Ltd and Ors v Mackenzie D C* [2011] NZEnvC 387. In the circumstances of what is in issue in respect of this Proposed Plan the otherwise rather lengthy list of factors to be analysed can be compressed. We consider whether the scheduling provisions of the Proposed Plan:

- accord with and assist the Council in carrying out its functions so as to meet the purpose of the Act;
- take account of effects on the environment;
- are consistent with, or give effect to (as appropriate) applicable national, regional and local planning documents; and
- meet the requirements of s32 RMA, including whether the rules are the most appropriate for achieving the objectives and policies of the plan.

[11] There is no presumption that the terms of the proposed Plan are appropriate (or not) for achieving the requirements of Part 2. The Court is required simply to seek an optimum planning solution based on the information and options put before it. We shall consider the factors sequentially.

The requirements of Part 2 of the Act

[12] Section 6 played a prominent part in the submissions of both parties. Relevantly, it provides:

> 6. Matters of national importance
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.

The term *historic heritage* is defined in the Act as including archaeological sites that ... *contribute to and understanding and appreciation of New Zealand's history and cultures.* The Council submits that the section provides a strong directive about the relationship of Maori to ancestral lands, sites and taonga, and the protection of historic heritage, they being matters of national importance. The directive is that they be recognised and

provided for and, in the case of historic heritage, that it be protected from ... *inappropriate subdivision, use and development*. Its view is that scheduling this site as a Category A site is the only effective way of complying with those directives.

[13] We agree entirely with Mr Lanning's submission that the historic site, building or object does not itself need to be of national significance to qualify for protection under s6(f). That is not what the section says – it is historic heritage as a concept that is the subject of the provision, and its protection from inappropriate use and development is declared to be a matter of national importance. See eg *NZ Historic Places Trust v Tauranga CC* [2010] NZEnvC 322 and *NZ Historic Places Trust v Manawatu DC* (W081/2004). The submission made for Mr and Mrs Gordon that the Pa site was of regional significance only seems to have been based on a misunderstanding of that point.

[14] In terms of s7 and the matters to which decision-makers are to have particular regard, we can mention perhaps paras (c) *The maintenance and enhancement of amenity values*, (f) *Maintenance and enhancement of the quality of the environment* and (g) *Any finite characteristics of natural and physical resources.* If it is accepted that the protection of historic heritage is important – and it must be, because the Act says so – then it must follow that harming it will not maintain, let alone enhance, the amenity values given by the site, or the quality of the environment. That is reinforced by (g): – by definition, intact pre-European Pa sites are a *finite* resource.

[15] In considering s5, which encapsulates the purpose of the Act, we need to consider whether that purpose will be better served by the terms of the Proposed Plan than some other offered alternative. We bear in mind that the explanation of the purpose of *sustainable management* speaks of enabling ... *people and communities to provide for the their social, economic and cultural wellbeing* ... . It was implicit in the positions taken by Mr and Mrs Gordon that they see the outcome they proposed as enabling them to better provide for at least their economic wellbeing. Equally implicit was the argument that the Proposed Plan as it stands will not do so because, effectively, it prohibits further subdivision and development of the land. In answering that issue, we need to turn to the submissions made for them about s85 of the Act.

Section 85 – 'reasonable use' and an 'unfair and unreasonable burden'

[16] The provisions of s85 figured prominently in the submissions Ms Fisher made for Mr and Mrs Gordon. As the basis for discussing their position, we set out the section in full.

> 85 Compensation not payable in respect of controls on land
>
> (1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.
>
> (2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—
>
> (a) In a submission made under Part 1 of the First Schedule in respect of a proposed plan or change to a plan; or
>
> (b) In an application to change a plan made under clause 21 of Schedule 1.
>
> (3) Where, having regard to Part 3 (including the effect of section 9(3)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a plan made under clause 21 of Schedule 1, may—
>
> (a) In the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and ...
>
> (4) Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of Schedule 1.
>
> (5) In subsections (2) and (3), a "provision of a plan or proposed plan" does not include a designation or a heritage order or a requirement for a designation or heritage order.
>
> (6) In subsections (2) and (3), the term **reasonable use**, in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.
>
> (7) Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14.

[17] There can be no doubt that, as its owner, Mr Gordon has an interest in the land. And there is no doubt that provisions in the proposed plan apply to that land. The first

point to be resolved is whether the provisions of the proposed plan render his interest as owner ... *incapable of reasonable use*.

[18] Ms Fisher's submission begins with the proposition that, under the proposed plan, the only *permitted* activities on the headland would be:- see Rule 7.8.5 at para [9]:

1. routine maintenance and repair of existing lawns, gardens and structures that will not endanger, damage, or destroy or detract from the values for which the site has been scheduled;
2. eradication control or management of plant pests listed in Appendix 14 – plant and animal pests, with hand tools only;
3. maintenance, repair and restoration of existing buildings;
4. grazing by light animals – eg sheep.

Given that there are no existing lawns, gardens, structures or buildings, for practical purposes the list of *permitted* activities comes down to weed control and the grazing of light animals. It does need to be pointed out of course that, with the apparent exception of the occasional grazing of cattle and horses, that is pretty much the extent of what has been done on the headland within living memory. Equally, we accept the point that the current farming activity is not a financially viable use, in the sense that it is not even self-sustaining, let alone producing a profit. Ms Fisher submits that reasonable uses would be (a) as a house site; (b) subdivision as a separate lot incorporating a house site; or (c) the Council purchasing the headland as a reserve.

[19] The submission that the Council should purchase the headland as a reserve arose in part from Ms Fisher's argument that if it wished to restrict development on the headland, the Council could only use the heritage order (and purchase) provisions of the RMA, and could not use *scheduling* under that Act to achieve its purpose. We agree with Mr Lanning's submission that there is nothing in the Act requiring a Council to pursue heritage orders, and that the scheduling of historic sites is a common and appropriate technique.

[20] As a matter of legal interpretation, we cannot agree with Ms Fisher's further propositions on the interface between the RMA and the Historic Places Act. It is common for approvals to be required under more than one statute. As Mr Lanning points out, dual approvals are required under, for example, the Reserves Act 1977 and the

Conservation Act 1987, as well as the RMA. The two statutes we are concerned with run in parallel, and both deal with issues of heritage protection. One does not operate to the exclusion of the other.

Valuation evidence

[21] We mention at this point the argument about the value of the land, if only to explain why we put it aside. Part of Mr and Mrs Gordon's case was, from the evidence of Mr Robert Lawton, a registered valuer engaged by them, that on the figures from the Council's own valuation of the peninsula it could be demonstrated that the scheduling of the land as a Category A site, with the development and use restrictions inherent in that, reduced the value of that 5.7ha by some $2M. That alone, it was argued, demonstrated that the land was rendered incapable of reasonable use and imposed an unreasonable and unfair burden on its owner.

[22] Reflection on the issue has led us to conclude that we should not put weight on the valuation evidence. The reason for that is that while an assessment of value with, or without, the Category A scheduling and restrictions could reasonably be made, the land was not really valued as it actually is – ie with the recognition that whether or not the land is scheduled under the Plan, the archaeology undoubtedly exists, and imposes its own restrictions via the Historic Places Act 1993. Any work at all which would destroy, damage or modify the archaeology on the site would require an authority from the Historic Places Trust, which seems to us to be not dissimilar to requiring a resource consent, and likely to cause a somewhat similar drop in value.

[23] Leaving aside for the moment the concept of an existing use, any activity outside the list in Rule 7.8.5 would require, at the least, a resource consent as a *discretionary* (unrestricted) activity.

[24] Ms Fisher suggested that there was a dearth of authority in decisions about the relationship between s85(2) and s85(3), and argued further that the Council, in its first instance decision, failed to deal with the s85(2) argument at all. We think that, although there was a procedural gap with s85(3) (see eg *Steven (Re an Application)* (1997) 4 ELRNZ 64), the position is now tolerably clear, as was discussed in *Riddiford v Masterton DC and Ors* [2010] NZEnv 262. Subsection (2) provides a ground on which

dissatisfied landowners can challenge a provision in a proposed Plan or Plan Change. In its hearing processes the Council can consider that ground of challenge and, if it finds it convincing, may delete or amend the proposed provision accordingly. If there is dissatisfaction with the Council's decision, an appeal to the Court may follow under clause 14 of Schedule 1 and the same grounds of challenge can be considered on appeal, *de novo*.

[25] Alternatively (or as well) an affected landowner may launch an application directly to the Court under subsection (3) and Clause 21 of Schedule 1. This specifically requires reference to Part 3 of the Act and imports the extra ground (to be made out by the applicant) of ...*and places an unfair and unreasonable burden on any person having an interest in the land*... .

[26] The end result here is that we should first consider subsection (2). A s32 analysis of the Proposed Plan provisions is required and the appellant needs to make out the ground that, by reason of the proposed provisions, the land in question has been rendered incapable of reasonable use. If we are satisfied that that is so, we have the powers under s85 to direct the necessary changes.

[27] In considering that possibility, we first remind ourselves of s85(6), defining ... *reasonable use* ... of land as ... *includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.* Attention needs to be paid to those words. *Effects* are not confined to those which are necessarily adverse, and *significant* connotes a degree of effect higher on the scale than *minor*, or some similar term. Unrestricted development on the headland would, as discussed elsewhere, at least potentially cause *significant* effects on the environment, in the sense of the archaeological values present on it.

[28] For the reasons discussed in the following parts of this decision, while recognising that some restriction is undoubtedly placed on the use of the headland, we do not consider that the restriction goes so far as to render the whole landholding incapable of reasonable use. Further, in terms of s85(3), while recognising that the level of restriction inevitably places some burden on the owner, we do not consider it to be unfair and unreasonable.

The concessionary possibilities for the development of the balance of the land assist in avoiding a burden of that degree.

What does the Proposed Plan allow (in the absence of a scheduled site)?

[29] For context and comparison we need to consider what the Proposed Plan would allow by way of subdivision and development in the absence of any scheduled site on the land. The 19 ha *Home Block* is subject to the Landform 5 provisions. Setting aside the implications of the scheduled archaeological site, that means:

- one house is a *permitted* activity
- an additional house would be a *non-complying* activity
- subdivision of the Gordons' land would be a *non-complying* activity as a minimum site size of 25 ha is required for *discretionary* activity subdivision (Table 12.4).

[30] As mentioned earlier, there was a suggestion that the Gordons might wish to demolish their existing house and replace it with a house on the scheduled archaeological site. The Council's planner, Mr Blakey, gave evidence that the land is subject to a number of development control limitations under the Proposed Plan that would indicate some difficulties in the development of an appropriate house site as a *permitted* activity, regardless of the proposed scheduled site status. He specifically mentioned the:

- coastal protection yard of 40 metres for buildings or earthworks along the MHWS boundary of the headland (Rule 10c.5.7 and Table 10c.1)
- ridgeline control which requires the building to be below the significant ridgeline or below the top of protected vegetation that either screens the building or forms a backdrop against the ridgeline at that point (Rule 10c.4.7)
- earthworks controls ($50m^2$ for land with a slope over 1:6) (Rule 10c.5.6 and Table 10c.1).

Exceedances of these development controls would result in the need for a *discretionary* activity consent (10c.3.1).

[31] He went on to say that there are recession planes under the height-in-relation-to-boundary control on the western and eastern coastal boundaries under Rule 10c.4.3 and the steep topography may influence the allowable building envelope on the western side.

We were not told whether such a breach would also require consent as a *discretionary* activity, although it would appear so from our own reading of the Proposed Plan.

[32] And he also thought that any access driveway would likely infringe the 1:6 gradient control under Rule 13.6.1, resulting in the need for consent to a *restricted discretionary* activity.

[33] Mr Blakey considered that a resource consent application resulting from any infringement of the coastal protection yard or earthworks limits would also need to take into account the *Outstanding Natural Landscape* provisions which now apply to the Gordon property, and site stability (geotechnical) aspects.

What are the subdivision and development implications of the scheduling?

[34] The appeal sought a formula for heritage credits and/or transferable development rights to compensate for a loss of development potential as the result of scheduling for heritage purposes referring, as an example, to the heritage floor space bonus approach in Rule 6.7.2.5 of the Auckland District Plan (Central Area Plan). However, that possibility was not pursued at the hearing.

[35] To repeat (see para [9]) scheduling makes the following *discretionary* activities on the Category A archaeological site, except where they are provided for as a *permitted* activity in Rule 7.8.5.1 (Rule 7.8.5.3):

- Earthworks ...
- External alterations and additions to existing buildings and the construction and/or relocation of new buildings
- Planting of vegetation on the scheduled site
- Grazing by heavy animals – eg cattle, horses
- Any activity that damages the scheduled archaeological site.

[36] The following are *permitted* activities on a scheduled Category A archaeological site (Rule 7.8.5.1):

The routine maintenance and repair of existing lawns, gardens and structures, that will not endanger, destroy or detract from the values for which the site has been scheduled (not relevant here).

- Eradication, control or management of plant pests listed in appendix 14 – Plant and animal pests with hand operated tools only (including hand held power tools) that will not endanger, damage, destroy or detract from the values for which the site has been scheduled.
- Maintenance, repair and restoration of existing buildings (not relevant here).
- Grazing by light animals e.g. sheep.

(There is, we understand, agreement to amend the second activity to read as underlined as part of other proceedings.)

[37] However, Mr Blakely said that for subdivision associated with *Significant Environmental Features* (SEFs), Rule 12.9.3 provides the opportunity for, and benefit of, further subdivision. He considered that for the Gordon land, the SEF provisions would be an appropriate mechanism to provide for additional lots in exchange for the protection of the scheduled archaeological site.

[38] He explained this as follows:

- SEFs are defined in Part 14 of the Proposed Plan to mean: *Any feature of archaeological, historical or cultural significance.* The definition specifically states that it may include: *Any item scheduled in the Plan for its archaeological, historical or cultural significance.*
- Subdivision using the SEF provisions enables a higher density of subdivision where scheduled SEFs are protected – for example by covenanting SEFs and realising appropriate development outside those SEF areas, including directing building sites to be created in a manner that does not adversely affect (damage or alter) the archaeological site.
- The scheduled archaeological site would qualify as a significant environmental feature, for which further subdivision benefits may accrue elsewhere on the Gordon's landholding.
- Using the SEF provisions (minimum 4 ha, average 7.5 ha, under Table 12.1), the subdivision of the 19 ha *Home Block* into two lots could be applied for as a *discretionary* activity using the scheduling of the Category A archaeological site. In terms of the 15 ha Woodside Bay block, subdivision into two lots could also be applied for as a *discretionary* activity by using the scheduled Category A

archaeological site on that Block, which is a 1ha triangular shaped headland between Deadmans Bay and Woodside Bay, and is not subject to appeal.

- If the whole of the Gordons' landholding (ie both the Home Block and Woodside Bay blocks) was treated as one site (by way of boundary relocation as a *discretionary* activity), the Gordons could use *only one* of the two scheduled Category A archaeological sites to trigger the SEF provisions and apply for subdivision of the whole into four lots as a *discretionary* activity.

[39] The scheduled archaeological site enables the Gordons to explore further subdivision opportunities under the SEF provisions of the Proposed Plan. Moreover, there are a number of potential house/building sites on the Gordons' land outside the scheduled site.

[40] The scheduling of the archaeological site would also affect the use that could be made of the subdivided lots, with one house per lot a *permitted* activity (subject to the development controls referred to above) outside of the archaeological site, but any house in the scheduled area would require a *discretionary* activity resource consent. Building sites on or affecting the archaeological site would be considered through the subdivision process, as would the protection of the archaeological values of the scheduled site.

[41] Mr and Mrs Gordon, and Mr Lawton, the valuer called by them, put a lot of store on a comparison between the position under the operative Plan and that of the Proposed Plan. That is to rather miss the point. The review, resulting in the Proposed Plan, does not take as its starting point the provisions of the operative Plan. A review provides the opportunity to take a new look at the issues and develop objectives, policies and methods to achieve Part 2 of the RMA. The review also needed to recognise the 2003 amendment of the RMA, making the ... *protection of historic heritage from inappropriate subdivision, use, and development* a matter of national importance under s6(f) of the RMA.

[42] The scheduling as a Category A archaeological site confirms its status as an SEF, notwithstanding the submission that there was no advantage to this. Dr Louise Furey, the archaeologist called for the Council, gave evidence that while it was not registered under the Historic Places Act, in her opinion it is worthy of being registered as a Category 1 site. Rule 12.9.3.1 provides that the Council may consent to the subdivision of land as a

discretionary activity to create sites which will protect any SEFs from development and any adverse effects of land use activities.

[43] Overall, the submission made for Mr and Mrs Gordon attempted to depict the heritage objectives and policies as effectively prohibiting development and subdivision. That is to take a very narrow view of provisions in a Plan which sets up an SEF framework and allows consideration of heritage and other issues through a resource consent process - not just for subdivision but also for land use.

[44] Mr Blakey gave evidence that the approach of using the SEF provisions would increase the likelihood of a subdivision being approved and a landowner being given *credit* for protecting the site as part of any subdivision proposal. He said, and it is an obvious point, that it would be much more difficult to obtain consent to further subdivision (or, we add, for new houses) as a *non-complying* activity than it would as a *discretionary* activity.

Summary of views about the factors

[45] The provisions of the proposed Plan accord with and assist the Council to meet the purpose of the Act – we have discussed the relevant sections of Part 2 in paras [12] to [15].

[46] In terms of effects on the environment, the evidence of Dr Furey, and Mr Blakey, was clear that unrestricted grazing and the development of a building on the scheduled site (and indeed on other similar sites on the Gulf Islands) would be likely to have significant adverse effects on archaeological resources. A resource consent process is the appropriate way to assess archaeological values and to control effects that land use change might have on them.

[47] Mr Blakey considered the proposed rules are the better method to give effect to the objectives and policies, and to s6(f). We agree. In terms of the factors, we consider that the Proposed Plan is consistent with the RMA and the Hauraki Gulf Marine Park Act 2000, and gives effect to the other planning documents to which we were referred.

[48] Other than by implication, there were no real challenges to the terms of the Proposed Plan on s32 grounds. We accept that through the consultation, notification, hearings and appeal processes, ample information has been acquired to assess the costs and benefits of what is in the Proposed Plan, and the possible alternative methods of achieving the desired results have been adequately explored.

Conclusions

[49] There is, almost always, a tension between the perfectly understandable wish of landowners to develop their land as best suits their wishes and circumstances, and the wish of consent authorities to protect heritage sites or items which happen to be on that land from what is seen as ... *inappropriate subdivision use and development.* Almost always, there is no compromise which will entirely satisfy both goals. Here, the irresolvable difference lies in the wish to be able to build at least one house and accessway on the headland. We can understand that, but we can equally understand the opposing wish to keep the headland and its heritage aspects intact.

[50] It is our view that the compromise contained within the Proposed Plan is the best achievable planning outcome. Using the concession available if the headland is scheduled, Mr and Mrs Gordon will be able to apply, as a *discretionary* activity, to subdivide the *Home Block* into two, and potentially the whole landholding into four, most attractive lots.

[51] That concession, we think, goes a good way to making up for the opportunity that *might* (not *would* – see para [29]) have been possible if the Pa site did not exist. Included in that concessionary outcome, it should be recalled, is the possibility of applying for consent to development on the headland as a *discretionary* activity. If a good enough proposal can be presented, the opportunity for some development there has not been foreclosed.

Result

[52] For those reasons we are satisfied that the terms of the Proposed Plan are appropriate, and the appeal should therefore be dismissed.

Costs

[53] In all the circumstances we do not encourage any application for costs, but if there is to be one, any application should be lodged within 15 working days of the issue of this decision, and any response lodged within a further 10 working days.

Dated at Wellington the 26th day of January 2012

For the Court

C J Thompson
Environment Judge