MINUTES

TITLE: Environment & Planning Subcommittee
DATE: Monday, 23 June 2008
TIME: 9.00 am
VENUE: Council Chamber, 189 Queen Street, Richmond

PRESENT: Cr N Riley (Chairman), Crs S G Bryant and J A Glover

IN ATTENDANCE: Principal Consents Planner (J Butler), Resources Consents Manager (R Lieffering), Subdivisions Officer (R D Shirley), Community Services Planner (R Squire), Administration Officer (B D Moore)

1. R J AND L A HAINES, 156 BARNETT AVENUE, BEST ISLAND, RICHMOND, APPLICATION NO. RM071019

1.1 Proposal

The applicant applied to subdivide an 809 m^2 residential property being Lot 19 DP 5090, CT NL4B/1008, at 156 Barnett Avenue, Best Island, Richmond. The existing site contains two dwellings and the applicant proposed to subdivide the site to create Lot 1 of 411 m^2 (net 300 m^2) and Lot 2 of 399 m^2 (net 325 m^2). A 3.5 metre right-of-way was proposed over Lot 1 to connect Lot 2, to the esplanade reserve to provide legal frontage.

The Committee proceeded to hear the application, presentation of submissions and staff reports as detailed in the following report and decision.

The Committee reserved its decision.

RESOLUTION TO EXCLUDE THE PUBLIC

Moved Crs Riley / Bryant
EP08/06/04

THAT the public be excluded from the following parts of the proceedings of this meeting, namely:

R J and L A Haines

The general subject of the matter to be considered while the public is excluded, the reason for passing this resolution in relation to the matter, and the specific grounds under Section 48(1) of the Local Government Official Information and Meetings Act 1987 for passing this resolution are as follows:

General subject of each matter to be considered	Reason for passing this resolution in relation to each matter	Ground(s) under Section 48(1) for the passing of this resolution
R J and L A Haines	Consideration of a planning application	A right of appeal lies to the Environment Court against the final decision of Council.

CARRIED

Moved Crs Bryant / Glover
EP08/06/05

THAT the open meeting be resumed and the business transacted during the time the public was excluded be adopted.
CARRIED

2. R J AND L A HAINES, 156 BARNETT AVENUE, BEST ISLAND, RICHMOND, APPLICATION NO. RM071019

Moved Crs Riley / Bryant
EP08/06/06

THAT pursuant to Section 104B of the Resource Management Act, the Committee DECLINES consent to R J and L A Haines as detailed in the following report and decision.
CARRIED

Report and Decision of the Tasman District Council through its Hearings Committee

Meeting held in the Tasman Room, Richmond

on 23 June 2008, commencing at 9.00 am

A Hearings Committee ("the Committee") of the Tasman District Council ("the Council") was convened to hear the application lodged by **Leonie and Rodney Haines** ("the Applicants"), to subdivide their property on Bests Island into two allotments. The application, made in accordance with the Resource Management Act 1991 ("the Act"), was lodged with the Council and referenced as RM071019.

PRESENT: **Hearings Committee**
Cr N Riley, Chairperson
Cr G Glover
Cr S Bryant

APPLICANT: Mrs L Haines
Mr R Haines

CONSENT AUTHORITY: **Tasman District Council**
Ms Ros Squire, Planner Community Services
Mr R Shirley, Consent Planner Subdivisions
Dr R Lieffering, Manager Resource Consents

IN ATTENDANCE: Mr J Butler, Principal Resource Consents Adviser – Assisting the Committee
Mr B Moore – Committee Secretary

1. DESCRIPTION OF THE PROPOSED ACTIVITY

The Applicants, L and R Haines, own an 809 square metre residential property on Bests Island (legal description Lot 19 DP 5090). The site contains two dwellings and is unserviced for wastewater. Physical access is via a road located on private land with legal description Pt Lot 2 DP 1667 owned by A B Barclay and M A and B D Gillespie (hereafter referred to as "the Barclay land"). Legal access to the property is via an esplanade reserve and thence to the sea.

The Applicants have applied to the Council to subdivide their land to create Lot 1 of 330 square metres and Lot 2 of 325 square metres (net areas), with each allotment to contain one of the existing dwellings. It is proposed that physical and legal access is to be via rights-of-way that connect both lots to the road and also to the esplanade reserve. No changes are proposed on the ground with the exception of a possible upgrade of the wastewater treatment and discharge system as a result of the legal separation of the two dwellings. The two dwellings currently share a septic tank-based wastewater system.)

2. PROPOSED TASMAN RESOURCE MANAGEMENT PLAN ("PTRMP") ZONING, AREAS AND RULE(S) AFFECTED

According to the PTRMP the following apply to the subject property:

Zoning: Residential
Area(s): Coastal Environment Area, Special Domestic Wastewater Disposal Area

There are no permitted subdivision rules in the PTRMP. The proposed activity does not comply with Controlled Activity Rule 16.3.3 of the Proposed Tasman Resource Management Plan and is deemed to be a discretionary activity in accordance with Rule 16.3.4 of the Plan.

3. PROCEDURAL MATTERS

Non-Notification

Public notification of this application was not considered necessary by the Resource Consents Manager as the effects of the activity were considered to be minor.

Non-notification of the application was considered subject to the written approvals of the following parties who were considered to be potentially adversely affected:

a) the occupiers of the second dwelling on the property;

b) the Department of Conservation, being the department responsible for the administration of the Reserves Act 1977. The esplanade reserve adjoining the property is subject to the Reserves Act;

c) A B Barclay and M A and B D Gillespie, being owners of Part Lot 2 DP 1667, being the land over which the physical road to the property is constructed.

The written approval of each of these parties was provided and the application was processed on a non-notified basis.
However, due to legal considerations the Council's staff determined that, pursuant to Section 100 of the Act, a hearing was necessary.

4. EVIDENCE HEARD

The Committee heard evidence from the Applicants, and the Council's reporting officers. The following is a summary of the evidence heard at the hearing.

4.1 Applicant's Evidence

Mr R Haines introduced himself. He stated that the application is for a "line on a piece of paper" and not a proposal to build anything, increase traffic flow, alter the treatment of wastewater or change the supply of fresh water. He stated that this is a situation that has existed for 17 years and it has been permitted by the Council through the issuing of building consents.

Mr Haines showed how other properties have been split into two by building two dwellings and then separating them by the creation of two cross-lease titles. Mr Haines stated that this is the situation with his property, however the job was never completed (i.e. the subdivision was never finalised). He considered that this subdivision was always envisaged by both the original builder of the dwellings and the Council.

Mr Haines stated that granting this consent cannot create a precedent as there are no other lots on the island which have two separate existing dwellings that could be subdivided.

Mr Haines pointed out that, contrary to Mr Shirley's report, there has been subdivision on the island since the original 1950 subdivision.

Mr Haines then outlined why he is seeking this subdivision. They seek to go boating more while retaining their Bests Island property, and they do not wish to be landlords to the second property.

Mr Haines suggested that his proposal is consistent with the Council's efforts to encourage and enable infilling in residentially zoned land.

Mr Haines stated that there are a number of amendments that can be made to the application if sought by the Council. They could remove the right-of-way (ROW) over proposed Lot 2. This would leave the esplanade reserve as the legal access. He also suggested that the ROW over proposed Lot 1 could be narrowed to a width to accommodate pedestrians only. Removing the ROWs would bring the net areas to near 400 square metres each.

He then commented on the access issues. He stated that the Act talks of legal and practical access. However, he pointed out that they do not have to be the same access. It may be permissible to have “legal access” and “practical access”.

Mr Haines dismissed Mr Shirley’s opinion that the current access to the property is at the grace and favour of the landowner. He stated that there are rights that attach to prolonged use and he contended that there is no doubt that there is practical access.

He stated that the Council offers services over the Barclay land to the residential allotments and that the Council should take responsibility by coming up with alternatives such as taking the land by force or negotiating legalisation of the road.

Mr Haines agrees with Mr Shirley that the adverse effects are no more than minor.

With regard to the wastewater, Mr Haines offered to install another septic tank on the request of their neighbour, on their selling Lot 1, or after 10 years if no reticulated system becomes available. They offered an appropriate covenant to ensure that this is done.

Mr Haines stated that the septic tank on proposed Lot 1 has served both dwellings satisfactorily for the 17 years that the dwellings have been there. However, he recognised that little is known about the discharge component of the system. He also stated that the top of the septic tank is up to 1 metre below ground level.

Mr Haines considered that legal access by sea was acceptable 17 years ago and dividing the title into two does not alter that premise. He also considered that practical access is still available through the Barclay land. With reference to Mr Shirley’s contention that “[The Council] may be open to enforcement action or liability” he believed that the liability exists irrespective of the granting of this consent.

Under questioning by Cr Bryant, Mr Haines stated that no one now uses the sea as the bridge (causeway) now solves all such access problems to the island. Mr Haines also described any attempts to legalise access to the island properties through the Barclay land as being at a “Mexican stand-off” in that the developer wants a contribution from residents for costs. He stated that there is no legal agreement for access.

When asked by Cr Bryant if sea level rise is a concern Mr Haines stated that his property is about 1 metre above high tide level and that it is not currently a concern. He also stated, however, that there are several other properties that are much lower.

With regard to the wastewater system, all parties have agreed that it is not satisfactory in the long term but can be tolerated in the short term.

4.2 Council’s Reporting Officers’ Report and Evidence

Ms R Squire

Ms Squire spoke on behalf of the Council’s Parks and Reserves (Community Services Department). She stated that it does not support vehicle access to the esplanade reserve. She stated that she supported a reduction in width of Right-of-Way 1 over proposed Lot 1.

Mr R Shirley

Mr Shirley presented his report. He stated that the purpose of Section 106(1)(c) of the Act is to ensure that all properties have adequate access. He showed that there are a wide variety of access scenarios to be considered (for example, foot access only in Wellington). However, he considered that Section 106(1)(c) puts an imperative on the Council to either ensure that legal and physical access is achieved or conditions are placed on subdivision consents to do so. In this case neither can be achieved and ensured.

Mr Shirley agreed that he was incorrect in saying that no previous subdivision had happened on Bests Island and that there has, in fact, some subdivision in 1973. However, he stated that if access over the Barclay land is denied then the owners of a lot created by a recent subdivision may have a case against the Council as they allowed the creation of the lot without provision for legal and physical access. He suggested that a Court may require the Council to compulsorily acquire land for access or pay compensation.

While he considers the effects to be only minor, he quotes recent case-law (McKenna v Hastings District Council) which confirms that decision-makers have regard to district plans and other relevant matters and not just effects.

However, overall he believes that the considerations of Section 106(1)(c) should prevail.

When questioned about the practicalities of sea access Mr Shirley stated that it is not common but is not prohibited. Realistically the road is the only access as many people on Bests Island work regular hours in Richmond. Mr Shirley stated that an easement would be an option across the Barclay land and would satisfy Section 106(1)(c) of the Act.

Dr R Lieffering

Dr Lieffering was called by the Committee to answer questions in relation to his report on the wastewater treatment and disposal system.

When asked by the Chair how satisfied he was with the treatment and discharge system he stated that not much treatment would occur in the land application area and that the discharge would likely be of a very low standard.

When asked whether he was aware that the septic tank (and therefore the discharge point) was deeper than usual he answered that he was aware of this and that this was the reason for his caution about the system and a desire to see it replaced or improved.

4.3 Applicant's Right of Reply

Mr Haines stated that if access through the Barclay land was stopped then they would always have legal access through the esplanade reserve, although this was a last case (and very undesirable) scenario.

Overall he considers there to be no adverse effect on the coastline and nothing that offends Part II of the Act.

5. PRINCIPAL ISSUES

The principal issues that were in contention were:

a) Are the adverse effects of granting the subdivision only minor?

b) Is there a precedent under the existing planning regime and documents that would legitimise the granting of this resource consent?

c) Is the current state of legal and physical access to the Applicants' property "sufficient" as required by Section 106(1)(c)?

d) Is there a legal risk to the Council if it was to grant subdivision consent without sufficient legal and physical access to the Haines' property?

e) Are the proposed lot sizes appropriate in this location?

f) Could the granting of this subdivision consent set a precedent on Bests Island for the subdivision of any other lots where there are two existing, legally established dwellings or household units?

6. MAIN FINDINGS OF FACT

The Committee considers that the following are the main facts relating to this application:

a) The adverse effects of granting the subdivision are only minor and there is no reason, on the basis of effects, why the subdivision cannot be granted.

b) The evidence presented, and the understanding of the Committee, is that there has been no recent subdivision or similar development approved or implemented since the introduction of the modern planning environment (the introduction of the Act) and the introduction of modern planning documents (principally the PTRMP). In particular, Section 106(1)(c) is new to the Act and puts additional requirements on the Council. Historical subdivisions or cross-lease arrangements in the 1970s and 1980s are not relevant as they were done in a different planning environment without Section 106(1)(c).

c) The current state of access to the Bests Island properties is not satisfactory. While sea access may be legal it is simply not practicable in today's society. The road is the only effective and practicable access for the people who seek to permanently live on Bests Island. While the lots may currently have physical access the Committee is not satisfied that it is suitably secure.

   The Committee does believe that legal land access is likely be achieved through the course of development of the Barclay land over which access is currently gained. However, there is no way of knowing what problems, disagreements or legal undertakings may occur through that development process which may impact on the current physical access.

d) If the subdivision were to proceed, the Applicants could sell one of the properties to another party and then, if access through the Barclay land was denied, the Committee considers there may well be a legal case for the Council to answer.

The Council would have knowingly approved a subdivision without suitable access when Section 106(1)(c) clearly states that this is grounds for declining the subdivision consent. While Section 106 says that a "consent authority may refuse to grant a subdivision consent" (emphasis added) Brookers legal commentary states that:

"If the land is subject to one or more of the conditions set out in subs (1), it could be interpreted that, despite the discretion now available to a consent authority, a consent may only be granted subject to conditions which can be imposed under subs (2)."

e) The Applicants stated that the sizes of the proposed lots were appropriate as they are similar to those of urban Richmond. However, the disposal of wastewater on-site puts considerable constraints on how small lots can be. The existing problematic situation of a buried septic tank immediately adjacent to a courtyard area with poor access, and a land treatment area which is possibly under the courtyard is the type of situation that commonly arises when on-site wastewater treatment and discharge systems are put on small lots. Overall the Committee considers the lots to be too small once land is given up as rights-of-way. The reduction in the width of the right-of-way over proposed Lot 1 is appropriate as vehicle access to the esplanade reserve is not encouraged.

f) A valid precedent could only be argued by another party if they were in a virtually identical situation of having two or more dwellings or separate householding units on a property. The Applicants stated that no other parties on the island are in this situation but, but from general observations and personal knowledge of the Island, the Committee is not satisfied that this is necessarily the case. It is conceivable that, in the interests of consistent decision-making, the Council would be under considerable pressure to grant other similar subdivision applications.

7. RELEVANT STATUTORY PROVISIONS

7.1 Policy Statements and Plan Provisions

In considering this application, the Committee has had regard to the matters outlined in Section 104 of the Act. In particular, the Committee has had regard to the relevant provisions of the following planning documents:

a) the New Zealand Coastal Policy Statement;
b) Tasman Regional Policy Statement (TRPS); and
c) the Proposed Tasman Resource Management Plan (PTRMP).

7.2 Part II Matters

In considering this application, the Committee has taken into account the relevant principles outlined in Sections 6, 7 and 8 of the Act, as well as the overall purpose of the Act as presented in Section 5.

8. DECISION

Pursuant to Section 104B of the Act, the Committee **DECLINES** consent.

9. REASONS FOR THE DECISION

The principle reason for the decline of subdivision consent is the imperative of Section 106(1)(c) of the Act. The Committee considers that the legal access situation is too tenuous to allow the Committee to authorise the creation of an additional lot. While the Committee is aware that one more lot will not, on the face of it, create a significantly greater problem if and when access is denied or negotiations are undertaken, it is the creation of a new lot in today's planning environment under the guidance of Section 106(1)(c) which creates significant legal risks for Council. Future owners of a new lot could rightly ask why the Council authorised the subdivision when the access was so uncertain. Overall, the Committee is of the opinion that while the legal access is as it is, no further residential lots (and hence property owners) should be added.

The Committee is also mindful that it must not set a precedent of approving subdivisions which are contrary to Section 106(1)(c) on Bests Island. If other landowners can present a similar scenario to the Applicants, the Council may be obliged to grant other applications which have sub-standard legal access.

The Committee does, however, consider that the actual adverse effects of this proposal are minor and that, once the access issue is resolved and legal and physical access is ensured in perpetuity a similar application is likely to succeed.

Issued this 15th day of July 2008

Cr Noel Riley
Chair of Hearings Committee

Date Confirmed:	**Chair:**