

MINUTES

TITLE: Environment and Planning Subcommittee –
Commissioner Hearing
DATE: Monday 6 September 2010
TIME: 9.00 am
VENUE: Council Chamber, 189 Queen Street, Richmond

PRESENT: Commissioner J Jones (Chair) and Cr N Riley
IN ATTENDANCE: Principal Resource Consents Adviser (J Butler), Subdivision Officer (R Shirley), Resource Scientist (Land) (A Burton), Regulatory Services Co-ordinator (G Caradus), Administration Officer (J A Proctor)

1. P J AND P M WILKS, MALLING ROAD, REDWOOD VALLEY - APPLICATION RM090716

The application seeks the following:

The application seeks to subdivide a 53.3 hectare title to create two proposed new allotments as follows:

- Lot 1 with an area of 11.3 hectares (Containing an existing dwelling); and
- Lot 2 with an area of 42 hectares.

The land has a Rural 2 zoning according to the Tasman Resource Management Plan.

The application site is located at 162 Malling Road, Redwood Valley, being legally described as Lot 5 DP 14829 CT 9B/1292.

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

2. P J AND P M WILKS, MALLING ROAD, REDWOOD VALLEY - APPLICATION RM090716

THAT pursuant to Section 104B of the Resource Management Act, the Commissioners DECLINE consent to “P J and P M Wilkes” as detailed in the following report and decision.

Report and Decision of the Tasman District Council through a Hearing Panel

Meeting held in the Tasman Room, Richmond on 6 September 2010

Site visit undertaken on 3 September 2010

Hearing closed on 13 September 2010

A Hearings Panel (“the Panel”) for the Tasman District Council (“the Council”) was convened to hear the application lodged by **P J and P M Wilks** (“the Applicant”), to subdivide a 53.3 hectare title to create two new titles. The application, made in accordance with the Resource Management Act 1991 (“the Act”), was lodged with the Council and referenced as RM090716.

- HEARING PANEL:** Commissioner Jeff Jones, Chairperson
Councillor Noel Riley
- APPLICANT:** Mr Gerard Praat (Counsel)
Mr Peter Wilks (Applicant)
Mr Dick Bennison (Farm Management Consultant)
Mr Gary Rae (Consultant Planner)
- CONSENT AUTHORITY:** **Tasman District Council**
Mr Andrew Burton (Resource Scientist, Land)
Mr Graeme Caradus (Co-ordinator Environmental Health)
Mr Ross Shirley (Subdivision Officer), author of S42A (Officer’s) Report
- SUBMITTERS:** Mr Bill Gourley (119 Malling Road)
Mr Michael Holland (121 Malling Road)
Mr Paul Buschl (182 Malling Road)
- IN ATTENDANCE:** Mr Jeremy Butler (Principal Resource Consents Adviser) -
Assisting the Panel
Ms Julie Proctor (Panel Secretary)

1. SUMMARY

The Panel has **DECLINED** a resource consent application to subdivide a 53.3 hectare title to create two new titles.

2. DESCRIPTION OF THE PROPOSED ACTIVITY

The applicant owns a 53 hectare Rural 2 Zone property located off the end of Malling Road. The property contains an existing dwelling and is otherwise in pasture and plantation forestry, with small areas of native bush and wetland. The property is accessed via an existing right-of-way and has a legal description of Lot 5 DP 14829 contained in Certificate of Title NL9B/1292.

The proposal is to subdivide the property to create Lot 1 of 11.3 hectares containing the existing dwelling pasture and some modified wetland, and Lot 2 of 42 hectares containing a proposed building site, the plantation forestry, native bush, and most of the wetland and the pasture.

The proposal also includes a new right-of-way along the eastern boundary of proposed Lot 1 that links to a new access road to the proposed building site on Lot 2. A right-of-way up the western boundary of the new lots has been deleted from the application.

Easements in favour of the Council are proposed over the Redwood Valley water pipeline. Covenants are proposed over the wetland and a narrow strip of native bush along the eastern boundary of Lot 2.

3. TASMAN RESOURCE MANAGEMENT PLAN (“TRMP”) ZONING, AREAS AND RULE(S) AFFECTED

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

Zoning: Rural 2
 Area(s): Land Disturbance Area 1

Subdivisions in the Rural 2 Zone require, inter alia, a minimum area of 50 hectares to be a controlled activity (Rule 16.3.6.1). With proposed allotment areas of 11.3 hectares and 42 hectares the proposed subdivision does not meet the conditions of that rule. The subdivision is therefore a discretionary activity under Rule 16.3.6.2.

In the officer’s report Mr Shirley also points out that on-site access in the Rural 2 Zone is limited to a maximum length of 200 metres to be a permitted activity (Rule 16.2.2.1(b)). With the proposed building site on Lot 2 having on-site access of approximately 1200 metres the proposed on-site access breaches that rule to a significant extent. The on-site access is therefore also a discretionary activity by virtue of Section 87(B)(b) of the Act.

Overall, the proposal must be considered as a discretionary activity.

4. NOTIFICATION AND SUBMISSIONS RECEIVED

The application was publicly notified on 31 March 2010 pursuant to Section 95 of the Act. A total of 13 submissions were received. The following is a summary of the written submissions received and the main issues raised:

Submissions in Support

Submitter	Reasons
DAJ Marshall 213 Teapot Valley Road	<ul style="list-style-type: none"> No loss of productive or amenity values.
B P and L A Morley 117 Malling Road	<ul style="list-style-type: none"> No adverse effects.
D G and D B Vanstone	<ul style="list-style-type: none"> Unlikely to be any environmental effects.

50 Malling Road	
G I Muir 256 Malling Road	<ul style="list-style-type: none"> • Supports wetland protection. • No adverse environmental effects.

Neutral Submissions

Submitter	Reasons
Weingut Seifried Ltd 65 Malling Road	<ul style="list-style-type: none"> • Wishes to retain right to farm.
NZ Fire Service Commission	<ul style="list-style-type: none"> • Requires condition to ensure sufficient water supply for firefighting.
J M and Y L Barry	[no comments]
Tasman District Council Engineering Department ¹	<ul style="list-style-type: none"> • Agree to the volunteering of an emanations easement by the applicant and seek that this be imposed if consent is granted.

Submissions in Opposition

Submitter	Reasons
W H and E G Gourley 119 Malling Road	<ul style="list-style-type: none"> • Concerns about the road at the top end of Malling Road; particularly the lack of visibility and turning area.
P K and K J Buschl 182 Malling Road	<ul style="list-style-type: none"> • A Forestry Right registered over Lots 1 and 2 could create a third legal ownership entity. • Cross-boundary issues with lifestyle block adjoining working farm. • Right-of-way B and C for forestry purposes will have a detrimental effect on use and value of their property.
M S and K D Holland 121 Malling Road	<ul style="list-style-type: none"> • Adverse effects on operation of stud cattle farm. • Adverse effect on privacy. • Reverse sensitivity effects on dog breeding operation. • Top end of Malling Road not adequate for everyday traffic. • Reverse sensitivity effects with Eves Valley landfill. • Inaccuracies in application.
R E Kiddle 148 Thorpe-Orinoco Road	<ul style="list-style-type: none"> • Concerns regarding subdivision of rural land. • Precedent. • The Rural 3 Zone caters for smaller land holdings.

¹ This submission was originally in opposition but, following discussions with the applicant, was amended to be neutral. The submitter did not exercise their right to be heard at the hearing.

5. EVIDENCE HEARD

We heard evidence from the applicant, expert witnesses, submitters, and the Council's reporting officer and his supporting expert witnesses. The following is a summary of the evidence heard at the hearing.

5.1 Applicant's Evidence

Mr Gerard Praat (Counsel)

Mr Praat introduced the application and said that there is provision for this type of discretionary subdivision under the TRMP. He said that the proposed subdivision will result in two relatively large blocks of land. He also outlined how the applicant had addressed all matters of concern or contention in the application.

Mr Praat confirmed that covenants are proposed for the wetland where it has not been channelised, and for an area of native bush on the northern edge of the forestry plantation.

Mr Praat indicated that a number of submitters who live on Malling Road have either provided written approvals or have submitted in support of the application.

Mr Praat went on to address submissions in opposition. He said that the traffic is not a significant issue given the separation distances between driveways. He confirmed that the applicant has removed the proposal for a right-of-way on the western boundary of proposed Lot 2 and noted that the creation of a registered forestry right is not part of the present application.

Mr Praat said that the proposed driveway is part of the ordinary incidence of life in the Rural 2 zone. He suggested that stock sensitivity issues may have been overstated. He said that concerns for the Holland's dog breeding activities would be unfounded if complaints from any new owners were unmeritorious.

Mr Praat confirmed that following a prolonged period of negotiations the Council's Engineering Department was satisfied that the agreed emanation easement met their concerns and has now taken a neutral position on the application.

Mr Praat said that there seems to have been no attempt on Mr Shirley's part to analyse the application under Schedule 16.3A of the TRMP. Instead he has relied upon broad policy statements.

Mr Praat suggested that there is now no issue with the traffic based on the submitted expert evidence of Traffic Design Group, the relocation of the access right-of-way to the central gully, and the removal of the proposed right-of-way from the Buschl boundary.

In considering fragmentation and productivity, Mr Praat noted that the land is of "*relatively limited productive potential*". He said that the use of the land is unlikely to change as a result. Mr Praat took issue with the approach of Mr Shirley in using language that treats the subdivision like a non-complying activity. He said that there is no size "threshold", simply sizes to meet the controlled activity rule.

Mr Praat said that the subdivision and the new dwelling will not create adverse amenity effects. Any light emission at night from the proposed dwelling site will be at a significant distance from other dwellings.

Turning to the natural values, Mr Praat said that the native forest is in “*excellent condition*” and it is the intention that stock continues to be excluded from that area to maintain its regeneration. He noted that the wetland area is a site of “*significance*” and the protection of it is an integral part of the proposal to subdivide.

Mr Praat said that the resulting lot sizes will be in step with the landholdings in the area and maintained that the TRMP supports subdivision below lot sizes of 50 hectares in appropriate circumstances.

Mr Praat addressed the matter of precedent. He said that unless the Council has some evidence of future applications that may occur as a result of granting this application then we (the Panel) are constrained to considering the effects of the application. He accepted that like cases should receive like treatment but noted that in the current application there are circumstances which set it apart such as the wetland and the native forest.

Mr Peter Wilks (Applicant)

Mr Wilks said that, apart from his dwelling and surrounds, his farm has mostly been leased to professional farm managers but the income has only just covered the costs of development, rates and maintenance. Nevertheless, he said that it is more attractive and productive now than when he purchased it.

Mr Wilks believes that they have “realised the potential of the land as a single unit” and seek a strategy whereby they can sustain the productive use of the land while ensuring they have the energy to continue maintain the property and live there. He said that his son has moved away and his daughters are not interested. He said that it is not a property that one person can realistically maintain.

Mr Wilks said that he has tried hard to develop a proposal that does not result in rural-residential type development. He said that the proposed boundaries match the contours of the land.

Mr Wilkes said that where possible they have adjusted the proposal to take the concerns of their neighbours into account. He said that the proposal does not create any increase in the number of lots bordering the landfill.

Following questioning Mr Wilks stated that the previous owner had dug a trench in the lower section of the wetland to improve drainage. The area had now been fenced off and planted with ornamental trees to minimise erosion. Mr Wilks referred to Mr North’s report that stated that these areas were of least significance and did not merit being protected.

Mr Dick Bennison (Farm Management Consultant)

Mr Bennison stated that he was at odds with Mr Burton’s report. He said that the land’s capability was not significantly affected by the proposed subdivision. Mr Bennison provided additional background information relating to the land’s history when it was owned by TNL Farms. He said that the land was then covered in gorse

and over time as the land was subdivided into various smallholdings, each new owner had tackled the gorse issue. Most gorse was now confined to the gully areas.

Mr Gary Rae (Consultant Planner)

Mr Rae said that the TRMP contemplates that subdivisions will occur to less than 50 hectare allotments in the Rural 2 zone. Mr Rae demonstrated this by way of a table showing the subdivision applications he has been involved with as a consultant reporting officer.

Mr Rae noted that any subdivision will fragment the land and, since it is clearly not the intention of the TRMP to cease all subdivision, it becomes a matter of scale and degree. Mr Rae pointed to the other subdivisions he has been involved with as a consultant reporting officer for the Council and said that "only one was declined". He said that the average lot size created is 11.4 hectares. He considered this subdivision to be well within scope to be considered favourably.

Mr Rae said that smaller lot sizes do not need to be justified, just considered on their merits.

Mr Rae said that in terms of landscape and amenity values the addition of one dwelling and its driveway will not have significant effects. He said that character will be retained by protection of native bush and the wetland.

In considering the subdivision criteria in the TRMP, Mr Rae said that it was his assessment that all the relevant matters can be met by the imposition of conditions as volunteered. He said that this is a subdivision that is contemplated by the TRMP and is well within the Council's powers to grant.

Mr Rae did not consider Mr Shirley's consideration of the Rural 3 Zone to be particularly relevant.

Mr Rae discounted the use of precedent as an argument. He pointed to the native bush and wetland retention and possible enhancement as positive effects resulting from the subdivision.

Mr Rae said that there is no precedent issue at all with this application. He said that any future applications must be treated on their merits. He then referred to the issue of cumulative effects and the contention that approval of this proposal could be the point which will be the 'straw that breaks the camel's back'. He indicated that that point had not yet been reached in Redwood Valley given the size of the existing lots.

Mr Rae recommended that the application be granted, subject to conditions.

We (the Panel) clarified with Mr Rae the area of native bush proposed to be protected by covenant. He said that it is the 10 by 100 metre section where it borders the Holland property. The rest is not to be protected.

5.2 Submitters Evidence

Mr Bill Gourley

Mr Gourley spoke in opposition to the application and tabled photographs.

Mr Gourley advised that the TNL Farm land was clean when it was purchased and that Mr Bennison's statement was not correct. He continued that he was concerned about the exacerbation of traffic issues at the top of Malling Road especially the lack of turning area for vehicles.

Mr Michael Holland

Mr Holland spoke to his submission in opposition to the application.

Mr Holland was concerned about the proposed driveway up the centre of the property. Currently he took precautions to ensure that his cows were not disturbed by vehicles. If the application were approved then he would have no control over who used the access road and it may cause issues for his livestock.

Mr Holland was concerned about the possible flooding that may occur on his property if the right-of-way was formed. He sought that adequate drainage be provided.

Mr Holland is a breeder of west highland terriers and currently he has ten kennelled dogs. The dogs were kept under strict Council regulations and housed at night to mitigate barking. Mr Holland was concerned that any new neighbours may complain about his breeding kennels which may in turn lead to compliance issues. He said that he had purchased the property specifically to breed specialist livestock and dogs and that he was a considerate neighbour.

Mr Holland stated that his property was clear of gorse when he purchased it and that he did not agree with Mr Bennison's evidence regarding past neglect.

Mr Holland spoke about the wind-blown rubbish from the landfill and stated that it caused huge problems for him and that it was despicable. He has also encountered dead seagulls, allegedly poisoned by material in the landfill and noted that at least once a week he walked his land collecting the rubbish.

Mr Paul Buschl

Mr Buschl stated that Mr Wilks had spoken about his intention to sell both titles, move into Richmond and retain the forestry rights.

Mr Buschl spoke about the issues he faced with regards to wind-blown rubbish from the landfill and was surprised that the emanations easement offered did not make reference to that aspect. He described the quantity of rubbish he had to deal with as "vast".

5.3 Section 42A Council's Reporting Officer's Report and Supporting Evidence

Mr Andrew Burton (Resource Scientist, Land)

Mr Burton questioned the estimation of stock carrying capacity and referred to the Moutere Experimental Station which ran from the 1950s to the 1970s at Teapot Valley. Research was conducted on very similar soils and climate with stock units around 12.4 per hectare on original pasture and 17.3 on improved pasture, indicating good producing hill country.

Mr Burton stated that wetlands could be protected, vehicle access improved, paddock subdivision improved to increase pasture production without subdividing the land.

In response to questioning, Mr Burton stated that the changes to the TRMP policy in 2003 was to tighten up the rules surrounding land fragmentation within the Rural 1 and 2 zones.

Mr Burton spoke about a fund administered by the Council to assist landowners with fencing and managing water bodies, including wetlands.

Mr Graham Caradus (Co-ordinator, Regulatory Services)

Mr Caradus stated that Mr Buschl's comments were pertinent in relation to the landfill and he noted that it was common for goodwill to dissipate over time. He continued that the windblown rubbish bags could be seen as a public health nuisance as they were offensive. Mr Caradus noted that it was reasonable to complain about such things and that in general, any subdivision could increase the number of potential complainants.

Mr Ross Shirley (Subdivision Officer)

Mr Shirley commented on Mr Praat's submissions by saying that the hill country at the top end of Malling Road adjoins land zoned Rural 1 generally to the north of the property either side of that road, and that this explains the smaller lots immediately nearby because Rural 1 land, for the reasons set out in the TRMP, can be subdivided to a greater density than the subject land. Therefore, he maintained that comparing the sizes of proposed Lots 1 and 2 of this proposal to the lot sizes in the Rural 1 zone is not valid.

Regarding the matter of taking the Rural 3 zone into account, Mr Shirley said that the matter could happily be considered as an "other matter" under Section 104 of the Act. He continued that when the Rural 3 zone was first notified the objectives and policies for the Rural 1 and Rural 2 zones were deliberately strengthened having regard to the more relaxed provisions for development in the Rural 3 zone.

Mr Shirley referred to Mr Rae's appendix discussing 17 subdivision applications. He suggested that the subdivision applications were not necessarily a fair representation of all the applications received and processed by the Council. He said that it should also be noted that subdivisions prior to 2003 had a lower threshold in terms of policies and objectives.

Mr Shirley said that productive capacity was the ability of the land to be available for a range of uses and that land versatility was reduced with subdivision.

Mr Shirley stated that the proposed building platform commanded a prominent position and that it would impact on the open space of the hills that provided the backdrop to the Waimea Plains. The building site had an elevation of 120 metres and would be one of the highest above the Plains.

Mr Shirley stated that the subdivision should not occur just to ensure protection for the native wetlands. The area was insignificant in size and while significant in terms of the Moutere ecological district it was not significant in regional terms. He

continued that if the wetland were so important then the lower reaches should be restored and protected as well.

Mr Shirley outlined the history of subdivisions approved in the area. He said that if the application were approved, it would result in a title of 11.3 hectares which was smaller than any other existing title in the area on land that was subject to the same zoning and not subject to special exemptions or historic Environment Court decisions. It would therefore be out of character.

Mr Shirley spoke about cross boundary issues and referred to historical events which included the impact of frost fans on neighbours, and the MDF plant purchasing neighbouring properties to stop complaints. He continued that the landfill was an important issue and that the impact of complaints could potentially be disastrous for the District.

Mr Shirley stated that in his experience, rural emanations easements do not necessarily work because emitters must be working within their legal constraints (resource consent or designation) in order to avoid complaints. However, potential complainants can not know whether those constraints are being complied with and may therefore complain anyway.

Mr Praat was asked to comment on the emanations easement. He said it was designed so that if the owner of the landfill operated within the rules, then the landowner who was subject to the easement was contractually prohibited from complaining. He continued that if the owner breached the rules, then landowners were permitted to lodge a complaint with Council. Mr Praat continued that the benefit of the easement was that any new landowner of Lot 2 would be aware of the landfill.

Mr Shirley stated that he had estimated that the right-of-way and access road was in the region of 1200 metres in length and that to form the road to an TRMP mandated standard would cost in the region of \$100,000 to \$300,000.

Mr Shirley summarised by saying that in his mind the adverse effects on land productivity, the existence of the Rural 3 planning framework, rural amenity and traffic effects, and the effects of land fragmentation were more than minor and approaching significant. He then said that he considered the adverse effects of cumulative effects, the adverse precedent, and the effects on the integrity of the TRMP were over the threshold of significance.

In balancing this argument he said that he considered the positive effect of protecting the wetland to be a less than minor positive effect. Mr Shirley said that for him to consider supporting the application the wetland would have to be of national significance with the only way of protecting being by means of a subdivision. He said that this was not the case here.

Mr Shirley recommended that the application be declined.

5.4 Applicant's Right of Reply

Counsel for the applicant, Mr Praat was given the opportunity to submit a written Right of Reply, to avoid either a late finish to the hearing or it having to be reconvened the following day for that purpose alone. He chose to do so after conferring with the applicant.

In his written reply, Mr Praat addressed the traffic concerns of Mr Gourley but did not consider them to be significant.

Mr Praat said that there will be nothing unusual about an access road running adjacent to Mr Holland's boundary. He commented that it is unfortunate that Mr Holland is under the impression that any complaints or objections are a threat to his dog breeding business.

Mr Praat then discussed the reverse sensitivity issue with respect to the landfill. He said that the new dwelling would be no more intrusive than the Wilks' existing dwelling. He reaffirmed that the Council's Engineering representatives appear satisfied on the landfill issue.

Mr Praat disputed Mr Shirley's interpretation of Section 6 of the Act that the wetland protection is not a relevant matter. He said it is a matter which is high in the hierarchy of priorities of the Act.

Mr Praat said that Mr Burton was too generalised in his analysis as he focussed on a generic effect of subdivision as potential reduction in productivity. He said that Mr Burton should consider the entire proposal as a package including the better access and better fencing that would result. Mr Praat said that there will be an element of fragmentation and loss of production potential but that this would be offset by improved opportunity for pasture management and stock control.

Mr Praat reiterated his objection to consideration of the effect on the Rural 3 zone. He said that the proposal is not "out of zone" but can happen depending on how the particular proposal addresses the relevant matters set out in the assessment criteria.

Mr Praat pointed out the benefits of emanations easements. He said that it clearly put owners on notice of the existence of the landfill and its effects. Such easements prevent the owner from complaining where the landfill is complying and would limit the ability of the landowner to take ongoing action.

He noted that if the landfill is being operated outside of the terms of its consent then the Council has an obligation to enforce the terms of the consent whether residents complain or not.

Finally, Mr Praat cautioned that matters of plan integrity and precedent must be used with caution and were overstated. He said that this proposal will not result in cumulative effects. Mr Praat said that the fragmentation introduced will be balanced by the positive effects on access, stock and pasture management and the potential for two owners to farm and/or control a given area of land.

6. PROCEDURAL MATTERS

The only quasi-procedural matter that required our consideration was some discussion about the various roles of the various Council departments and officers.

In this case the Council has a more complex position than usual in that it is an adjacent landowner and a submitter on the consent, as well as being the consent authority.

We made the point at the hearing but we feel it is worth reaffirming our position on this matter in this decision. Given the complex responsibilities of local government, Councils - particularly unitary Councils such as in Tasman - often have to represent different positions on a given issue. We are aware of instances where a department of the Council (often the Engineering Department) must apply to another part of the Council for resource consent or building consent etcetera. Similarly, some parts of the Council may be subject to enforcement action from compliance staff within the Council.

Mr Praat, in his opening submissions, said that:

“The Council as landowner and submitter cannot on the one hand make a submission opposing the consent ... which it later withdraws on the basis of ... an enforceable emanation easement and on the other hand effectively make a further submission through the Officers Report [sic] which expresses absolutely no confidence in the ... easement.

In this case we are clear that the Engineering Department is acting as the landowner of a significant designated regional asset. We also have regulatory staff (Mr Shirley) assessing the consent application with support from in-house experts and advisory staff (Mr Caradus and Mr Burton). The officers of the Engineering Department are entitled to take whatever position is appropriate in managing the asset, and Mr Shirley is entitled to assess the merits of the application from a planning perspective. We are clear that the considerations and positions may be, and in this case are, quite different.

No evidence or suggestion has been put before us that any improper confusion or entanglement of these different roles has taken place. We are therefore satisfied that these two groups within the Council are able to, indeed should, and have, maintained their independence in this matter, one representing Council in its “operational” role, and the other in its “regulatory” role.

7. PRINCIPAL ISSUES AND OUR MAIN FINDINGS

After considering all the submissions and evidence that we heard, the applicant’s counsel’s written right of reply, as well as the original application and its supporting papers and the written officers’ reports, we conclude that the principal issues that were in contention and our main findings on these issues are:

a) To what extent will the proposal create adverse traffic safety and congestion effects on Malling Road?

While this matter attracted a considerable amount of evidence and discussion at the hearing we do not consider it to be a particularly significant matter in terms of adverse effects. We agree with Mr Shirley and the expert evidence from Traffic Design Group for the applicant, that the effects on Malling Road and the various rights-of-way will be minor.

b) To what extent will the new access road to the proposed building site have adverse effects on the environment?

Mr Shirley was opposed to the construction of the 1,200 metre long driveway that would be required to access the new dwelling on the basis that it will result

in the fragmentation of land (beyond that caused by the subdivision), will necessitate extensive earthworks and will necessarily cross the wetland.

We are more relaxed about this access road as we find that it is within the permitted baseline. In other words the applicant could now, without subdivision, at their pleasure, construct a farm track to access the rear part of the property. It is however recognised that the proposed accessway will have to be to a higher standard than a farm track and that this will necessitate greater earthworks and a more permanent formation. Nevertheless, we do not see significant adverse effects resulting from the formation of this accessway.

c) To what extent will the proposal cause the fragmentation of land, and decrease the productivity and versatility of the land?

Both Mr Rae and Mr Shirley quoted from the TRMP with respect to potential land fragmentation. We agree with Mr Rae's summary that virtually all subdivision results in fragmentation and that therefore it is a matter of scale and degree.

Mr Wilks told us that the proposed boundaries have been chosen to "fit in with the natural topography". However we do not find this to be the case. The existing property boundaries run more or less down the catchment boundaries and the proposed lot seems to arbitrarily "take a chunk" out of the existing block. We certainly understand that the proposed Lot 1 does include the house and includes land from the ridge to the wetland. Nevertheless, with the inevitable access road to the proposed house site on proposed Lot 2, we agree with Mr Shirley that this is a "classic case of land fragmentation that the TRMP seeks to avoid".

As a result of the various briefs of evidence presented and the submissions of Mr Praat, we accept that the land can summarily be described as being of limited productive potential but not unproductive. Mr Burton says that the block is suitable for semi-intensive pastoral and forestry based systems. He classed it as some of the higher productive hill country in the region. Mr Bennison, however, points to various reasons why subdivision will only have a "less than minor" reduction in productivity.

We prefer the reasoning of Mr Burton. While there are certainly limitations to the productive capacity of the block we find that these limitations will only be amplified by subdividing the block into two. We also find that there is a greater likelihood that the block will be used productively and in an economically viable way if retained as a single title. The larger the size of the block the more versatility it retains. In other words retaining it as a larger block will mean that a greater range of activities may be possible than would apply to each of the two smaller blocks.

Mr Bennison pointed to the moderate/limited productivity of the land and also to the minor loss of productivity from implementation of the proposal. He pointed to these as reasons why the effects of subdivision are minor. To our way of thinking, and we believe inline with Mr Burton's reasoning, the fact that the land is not highly productive means that there is even less scope to tolerate a small loss of productivity. That is, on land of limited productivity even a small loss of production will have a greater likelihood of tipping the two smaller blocks into

low-productivity. As we see it, this can have a range of flow-on effects including use of the land as a relatively unproductive lifestyle block, neglect or pressure for further subdivision for rural residential housing. As Mr Burton says, lifestyle blocks can be productive, but the likelihood of them being so is much lower.

Mr Bennison also told us that the land was previously gorse covered and unproductive. He implied that historical subdivision into smaller blocks enabled greater productivity through making the blocks more manageable. While Mr Bennison may be correct (although his facts were disputed by submitters) it does not follow that further subdivision will necessarily further increase productivity again. The fact is that the land is now virtually clear of gorse, well maintained, and has the potential to be productive. Further subdivision will reduce the economies of scale and versatility and the likelihood that both resulting blocks will be productively used.

Mr Praat continued with Mr Bennison's argument in his reply by saying that the fragmentation will be balanced by positive effects resulting from access, stock and pasture management and having more numerous owners. We do not agree. There is nothing to stop a motivated farm owner/manager from achieving exactly the same access and stock management benefits without subdividing the land. Indeed, the economies of scale and productivity advantage of having a larger block make this more likely.

The importance of such loss of potential productivity varies around the District. In the Rural 2 Zone the TRMP requires that we give this a higher weighting than in, say, the Rural 3 or Rural Residential Zones. This discussion also leads on to consideration of maintaining the integrity of the TRMP which we discuss further below.

d) To what extent will the proposal have adverse effects on the rural character and the amenity of surrounding land?

We disagree with Mr Shirley that the proposal will have a more than minor effect on rural amenity and character. We see the visual impact of any new dwelling on the designated building site from the Waimea Plains as being minor. We take the point that the removal of the forestry behind the house may cause it to stand out more, and indeed may cause it to be on the ridgeline from some vantage points, but as long as the house is not actually on the ridgeline we do not consider that there will be any significant adverse effects.

e) What is the value of the native forest and the wetland? To what extent can their protection be considered as positive effects resulting from the subdivision?

We agree with Mr Shirley in his assessment of the importance of the offer to protect the wetland and what could be referred to as a 'sliver' of native bush.

We give negligible weight to the applicant's offer to protect 1/10th of a hectare of regenerating native vegetation which Mr North, in his report presented as evidence, does not describe as significant. The value of this is solely to address matters of reverse sensitivity which we discuss below. Protection of the entire extent of the native bush would carry more significance as, we understand, isolated blocks of habitat have habitat value in allowing movement of native

fauna to move around the countryside. However, protection of all of the native vegetation was not proposed.

The protection of the wetland would certainly be desirable and it is a positive effect for us to consider in making our decision. The wetland, apart from the lower section which has been channelised appears to have withstood potential of stock damage to date and, given the lack of remaining wetland, this is good reason to seek protection.

However, we are also aware that wetlands already have some existing protection under the TRMP. Under Rule 17.6.5.1 the destruction or removal of the indigenous vegetation is not permitted and is, in fact, a discretionary activity. Therefore, the present and any future landowner must apply for consent to damage or destroy the wetland. This gives a certain amount of protection which we must consider when gauging the magnitude of the benefit that results from the applicant's volunteered protection.

f) To what extent is the proposal consistent with the existing pattern of subdivision and development?

Mr Shirley gave us a very informative history of the creation of lots in the vicinity of Malling Road. We agree that any analysis of the pattern of development must be done having clear regard to the history and circumstances of the area. We find that we agree with Mr Shirley's reasoning that all other small lots in this Rural 2 Zone precinct can be explained through exceptional circumstances, and when we consider the current proposal we conclude it to be out of keeping with the existing pattern of development.

g) To what extent will the proposal cause or exacerbate reverse sensitive cross-boundary effects?

The reverse sensitivity matter we see as being most significant is that in relation to the landfill. Mr Wilks says that the proposal will not increase the number of lots bordering the landfill, but to our mind it will certainly increase the proximity of the nearest house. The concerns that Mr Buschl, Mr Holland and others raise about the effects of the landfill are certainly striking, particularly where demonstrated by photographs.

We understand the issues Mr Shirley has with the emanations easement proposed by the applicant. We agree that such a instrument will have little effect in a situation where it is difficult, if not impossible, for a nearby landowner to know whether or not the landfill is operating within the rules. Generally speaking, if any neighbour - whether subject to a "no-complaints" easement or not - is affected by the landfill's activities but the landfill is found to be operating within its legal constraints then the query or complaint will receive little credit. Conversely, if any neighbour - whether subject to a "no-complaints" easement or not - is affected by the landfill's activities but the landfill is found not to be operating within its legal constraints then all neighbours irrespective of the easement will have a legal ability to complain and expect enforcement action to be taken.

Therefore, the salient point is that whether a neighbour that is subject to an emanations easement "enquires" about the landfill's level of compliance, or

whether another neighbour that is not subject to an easement complains outright about a possible breach makes little or no difference to the fact that increasing the density of people around the landfill will increase the scrutiny applied and, arguably, the restrictions it is subject to under its existing or future resource consents.

We feel that it is prudent to avoid such reverse sensitivity effects for this regionally important and designated asset which provides an essential, but “unpopular” from a NIMBY point of view, public service. We recognise, as did Mr Praat, that an agreement of sorts was reached with the land and asset owner (the Council’s engineering department). As a result, and as is its prerogative, it amended its submission to be neutral. However, this is not the same as supporting the application, nor providing its written approval. Therefore we are entitled to take the effects on that party into account.

We give some, but less, weight to the concerns of Mr Holland. We consider that a new owner of proposed lot 2 will be able to have more of an idea as to when Mr Holland may be breaching the conditions of his permit. Nevertheless the door is still open to a vexatious neighbour regularly “enquiring” as to Mr Holland’s level of compliance. This can place Mr Holland under the same level of scrutiny as if a neighbour had full rights of complaint. Again, we see that avoiding such potential reverse sensitivity effects as being preferable; and we support the ongoing use of the Rural 2 land for rural activities as promoted by the TRMP.

h) What effect will the proposal have on the integrity of the Rural 3 zone? To what extent is this an appropriate consideration under Section 104?

We see the matter of an effect on the Rural 3 zone as being a subset of the question posed in (i) below which is to investigate the effect of the proposal on the integrity of the TRMP.

The TRMP must be viewed as a whole and, on that basis, we consider that it is appropriate to look at the overall regulatory framework that the Council has set. As a result our consideration of this matter is not into the details of the cost or otherwise of developing in the Rural 3, nor do we have an explicit interest in the success or failure of the Rural 3. But we do see that through the progressive development of the TRMP the Council has set a clear framework to provide that rural residential activities and lifestyle blocks should largely be developed on land of low productivity and in zones such as Rural 3 and Rural Residential.

Of course, the Act, being effects based, does not prevent an applicant applying for a subdivision in a zone such as the Rural 2 as Mr Wilks has done, but we are entitled to have regard to the whole of the TRMP which includes the other zones and, correspondingly, sets the bar high for developing in the Rural 2 zone.

i) To what extent will this proposal set a precedent that may result in adverse cumulative effects? To what extent is this a relevant consideration in deciding upon this application?

Mr Praat and Mr Rae rightly point out the problems and difficulties with considering precedent.

Precedent, in itself is not an effect, but we consider that it can result in adverse cumulative effects on the environment and setting undesirable precedents can affect the integrity of the TRMP. Essentially, granting a resource consent to do something leads to others having a legitimate expectation that, given similar circumstances, they will get the same result should they too apply.

Mr Rae purports not to take any previous precedent into account, but it is clear from his reasoning that the size of lots and pattern of past subdivisions, surely precedents, certainly influences his conclusion that the subdivision is appropriate. Given that analysis of past subdivisions, we ask (rhetorically) how it could be that another subdivision of the same or smaller size in the Rural 2 zone will not also set or reinforce a “standard” or “culture” of subdivision down to lots in the order of 11 hectares in the Rural 2 zone. How can it be that planners repeating the same analysis as Mr Rae will not “factor in” the smaller lots that have been granted subdivision consent?

While it is fine to say that all future applications must be treated on their merits it would be naïve to think that a grant of consent here will not influence the thinking of future decision makers on other similar applications.

In attempting to avoid setting a precedent, applicants will often point to special or particular circumstances of their application. We find that the purported special circumstances of this application (the wetland and native bush) will do little or nothing to set this application apart as many if not most properties will have some similar feature on the land that they can point to.

So, in summary, we do consider that this proposal will set a precedent for other subdivisions, particularly within this Rural 2 precinct, but also in the Rural 2 Zone generally. This being the case, we see a significant risk that this will have an adverse effect on the integrity of the TRMP by undermining the priorities that have been set for the Rural 2 zone. The cumulative effects that accumulate with progressive subdivisions are the adverse physical manifestation of the breakdown of the integrity of the TRMP.

8. RELEVANT STATUTORY PROVISIONS

8.1 Policy Statements and Plan Provisions

In considering this application, we have had regard to the matters outlined in Section 104 of the Act. We have also had regard to the relevant provisions of the following planning documents:

- a) Tasman Regional Policy Statement (TRPS); and
- b) the Tasman Resource Management Plan (TRMP);

8.2 Part 2 Matters

In considering this application, we have 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.

9. DECISION

Pursuant to Section 104B of the Act, we **DECLINE** consent.

10. REASONS FOR THE DECISION

Effects on the Environment

It is fair to say that the more commonly encountered and tangible adverse effects on the environment were not the principal reasons for reaching the decision that we have. Nevertheless, the proposal will cause direct adverse effects that we discuss here.

The principle adverse effect on the environment is the effect on land productivity through fragmentation. We accept the evidence of Mr Burton that the versatility and therefore the intrinsic value of less than highly productive blocks of land is in their large size. To undermine even a small level of productivity or versatility is likely to, both individually and cumulatively over the District, reduce the likelihood that land will be used to its maximum potential productivity.

The other notable adverse effect is the reverse sensitivity concerns that we have. This was extensively discussed in Section 7 above and it is also for those reasons, in part, that we have declined consent.

For completeness, we record that we did not decline consent because of any perceived adverse effects on traffic or rural character and amenity.

We acknowledge the positive effects claimed by the applicant, including the offer of protection of the wetland. We consider that they do not achieve a sufficiently great positive effect to offset the adverse effects on the environment and the lack of consistency with the TRMP as discussed below.

Objectives and Policies of the TRMP

The following objectives and policies of the TMRP are relevant.

Objective 7.1.2 *Avoid the loss of potential for all land of existing and potential productive value to meet the needs of future generations, particularly land of high productive value.*

Policy 7.1.3.1 *To avoid, remedy or mitigate the adverse effects of subdivision of rural land, particularly land of high productive value.*

Policy 7.1.3.2 *To avoid, remedy or mitigate the effects of activities which reduce the area of land available for soil-based production purposes in rural areas.*

Policy 7.1.3.3 *To avoid, remedy or mitigate adverse actual, potential, and cumulative effects on the rural land resource.*

Policy 7.1.3.4 *To require land parcels upon subdivision to be of a size and shape that retains the land's productive potential, having regard to the actual and potential productive values, the versatility of the*

land, ecosystem values, the management of cross-boundary effects, access, and the availability of servicing.

The commentary that follows these policies (7.1.30) makes it clear that the intention of Rural Residential zones and the Rural 3 Zone are to relieve pressure for fragmentation of the rural land resource. This is relevant, not because the fragmentation should only occur in those zones, but because fragmentation in those zones appears to best serve the outcomes sought by the plan and it is clear that fragmentation outside of those areas is not desirable without good reason or positive effects. We find that the proposal is inconsistent with these policies and this objective.

Mr Praat told us that “*Strictly speaking there is no size ‘threshold’ for subdivision in Rural 2*”. However, in the explanatory section that follows the objective and policies above (7.1.30) it is stated that: “*Subdivision below the threshold will be limited to that which supports the objective. The Rural 2 Zone comprises land of more limited productive values, and the subdivision size threshold is thus larger.*”

Mr Praat said that the TRMP “*supports subdivision below lot sizes of 50 hectares in appropriate circumstances*”. That may be so but, for the reasons outlined, we certainly do not consider that appropriate circumstances are present in this case.

Objective 7.2.2 Provision of opportunities to use rural land for activities other than soil-based production, including papakainga, tourist services, rural residential and rural industrial activities in restricted locations, while avoiding the loss of land of high productive value.

Policy 7.2.3.2 To enable sites in specific locations to be used primarily for rural industrial, tourist services or rural residential purposes (including communal living and papakainga) with any farming or other rural activity being ancillary, having regard to:
(a) the productive and versatile values of the land;
(d) cross-boundary effects, including any actual and potential adverse effects of existing activities on such future activities;
(g) transport access and effects;
(h) potential for cumulative adverse effects from further land fragmentation;
(j) efficient use of the rural land resource;

Policy 7.2.3.4 To enable the subdivision of land or amalgamation of land parcels for the preservation of:
(a) significant natural values, including natural character, features, landscape, habitats and ecosystems;
(b) heritage and cultural values;
where preservation is assured through some statutory instrument and statutory manager.

This objective and these policies provide for alternatives to soil based production. We include these for completeness but find that they are not particularly relevant because the proposal is still for the land to be used for soil-based production, albeit at a lower rate of productivity. However, Policy 7.2.3.2 is still noteworthy in that when

providing for activities other than soil-based production such as rural residential purposes, productivity, cross-boundary effects and fragmentation remain as important considerations.

Policy 7.2.3.4 puts some emphasis on allowing subdivision for the preservation of, inter alia, habitats and ecosystems. Firstly, as we have already stated, we do not consider that the benefits of doing so in this case warrant the adverse effects and lack of consistency with the TRMP. Secondly, the subdivision proposed is not “for the preservation” of the wetland in question. The wetland is not under threat from either the proposed development, where enhancement was proposed, or the status quo. Furthermore, any activity which might have an adverse effect on the wetland could not occur without a separate resource consent.

Mr Praat and Mr Rae asked us to look at the subdivision assessment criteria in Schedule 16.3A of the TRMP. We have carefully done so and find that while many matters are not offended, we also find that some matters, particularly (1) and (9) do not support the subdivision to the extent that we have made the decision to decline. Matters (1) and (9) from that Schedule are:

- (1) *The productive value of the land in Rural1, Rural 2 and Rural 3 zones, and the extent to which the proposed subdivision will adversely affect it and its potential availability.*
- (9) *The relationship of the proposed allotments with the pattern of adjoining subdivision, land use activities and access arrangements, in terms of future potential cross-boundary effects.*

Other Matters

The interwoven matters of precedent, cumulative effects and TRMP integrity are also considerations in our decision to decline consent. We find that the circumstances of the subdivision that were advanced as being exceptional by the applicant (the wetland and the native bush) are not so. A grant of consent would likely contribute to the undermining of the integrity of the TRMP and, in particular, the Rural 2 Zone through enabling others to “chop a ‘homestead’ block off” by creating a (reasonable) expectation of similar treatment.

Although not a consideration under Section 104 we also feel that some commentary on the rationale for the subdivision is warranted. Mr Wilks said that the property is “more attractive and productive” now than in 1992. He continued:

“... we now believe we have realized (sic) the potential of the land as a single unit. It is time to consider how we can sustain the productive use of this land while ensuring we have the energy to continue maintaining the property and remain living here for some time to come. Subdividing the property will meet this goal.”

Mr Wilks then told us that his offspring are variously unable or unwilling to ‘take over the farm’. From these comments we certainly understand Mr Wilks position and motivations. But we make the comment that such personal circumstances do not justify the subdivision of Rural 2 land. We can understand that subdivision may make it more productive or manageable for the Wilks family but, as we have found above, it will do the opposite overall from the intrinsic versatility/productivity point of view.

It is a generalisation but we feel that we are justified in saying that if every family could subdivide land more or less at will to suit their family circumstances the effect on the rural land resource would be more than significantly adverse. In making our decision we have had to step beyond the genuine desires and motivations of the Wilks family and make the best decision for the productivity of the rural land and the ongoing integrity of the planning framework in the TRMP.

Purpose and Principles of the Act

The following matter of national importance is relevant:

Section 6(a): the preservation of wetlands and the protection of them from inappropriate subdivision.

We agree with Mr Shirley that this matter is not particularly relevant given that the wetland is not under threat from the proposal. Nevertheless the importance of protecting wetlands from future destruction, as is proposed as part of this consent, is made clear by this matter.

The following are the other matters that we have had particular regard to:

Section 7(b): the efficient use and development of natural and physical resources;
Section 7(c): the maintenance and enhancement of amenity values;
Section 7(d): intrinsic values of ecosystems;
Section 7(f): maintenance and enhancement of the quality of the environment;
Section 7(g): any finite characteristics of natural and physical resources

There are no Section 8 Treaty of Waitangi matters relevant to the application.

In considering Section 5, we find that this subdivision proposal will not promote sustainable management of natural and physical resources. We find that the social, economic, and cultural wellbeing of people and communities, and sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations will be best served by not allowing subdivision of this block of land.

Issued this 5th day of October 2010



Commissioner Jeff Jones
Chair of Hearings Panel

Date Confirmed:

Chair: