Decision No. A 101 /2003

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120 of the Act
BETWEEN	**GULF DISTRICT PLAN ASSOCIATION INC**
	(RMA 076/02)
	Appellant
AND	**AUCKLAND CITY COUNCIL**
	Respondent
AND	**PETER AND JENNY HAY**
	Applicants

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner D H Menzies

HEARING at Auckland on 3,4 and 5 February 2003

APPEARANCES

Mr R A Walden for appellant
Ms M McCulloch and Ms B Parkinson for respondent
Ms J C Campbell for applicants

INTERIM DECISION

Introduction

[1] Gulf District Plan Association Inc ("GDPA") was a submitter in opposition to an application by the Hays, for land use consent which was granted by the Auckland City Council in December 2001. GDPA brought this appeal.

[2] The application was to undertake a "cleanfill" operation at 65A Junction Road, Palm Beach, Waiheke Island. The Hays sought to import from other places on the island, and place in the bottom of a steep-sided gully, 19000m^3 of cleanfill comprising clay, topsoil, roading metal, and rotten rock; and thereby recontour the gully to enable future fruit tree planting to take place. The works were intended to be undertaken and staged in such a way that they would comprise a permitted activity in terms of regional planning instruments separately administered by Auckland Regional Council, while still needing land use consent from the respondent.

The issues

[3] The issues canvassed in the hearing are summarised below. The listing of them here is for the purpose of assisting the reading of this decision, and is not necessarily a complete list; nor is it to evince any order of importance or priority. They are:

- Status of land use activity (agreed non-complying);
- Sufficiency of information in the application;
- Assessment against objectives, policies, rules and other provisions of the district plan;
- Effects on the environment:
    - noise (construction, and later operation; measurement locations, bulldozer activity; screening);
    - traffic safety;
    - amenity (rural/residential and general visual);
    - ecological (on and off the site);
    - erosion and sedimentation;
    - comparison with effects of permitted baseline.
- Does the application pass either of the gateways in s. 105(2A)?
- Consideration of New Zealand Coastal Policy Statement.
- Consideration of Hauraki Gulf Marine Park Act 2000.
- Alleged past conduct of applicants (and is that relevant?)

- Is there a need for the activity? (and is that relevant?)

[4] During case management of the appeal last year, the presiding Judge directed meetings of relevant experts to narrow, and where possible, agree issues. Those meetings occurred, but we were disappointed during the course of the hearing to find that there remained many points, particularly on matters of fact, which should have been capable of greater agreement between experts. In one instance a professional witness had taken upon himself to refuse to receive and consider some technical calculations, in breach of the direction. Accordingly, during the early stages of the hearing, further meetings were ordered and technical issues quite considerably narrowed. It is the expectation of the Court when such directions are given during case preparation (and even where they are not) that counsel and experts will attend to the narrowing of issues in a responsible fashion, and will not seek to score points, ambush other parties, or expressly refuse to receive and consider material (as happened here).

The proposal

[5] The site comprises two properties owned by the applicants, one containing 5.8608 hectares and zoned Land Unit 20 (Landscape Protection) in the Operative District Plan; and a lot over which access is intended, containing 0.1475 hectares, zoned Land Unit 11 (Traditional Residential). Junction Road follows a ridgeline that runs east-west near the centre of the island, and the site is contained within a steep-sided gully to the south of it.

[6] The applicants and the respondent considered that the application was comprised in the following documents:

- The application;
- Plans by Adams Engineering, May 2000;
- Written information supplied with the application on 10 May 2000;
- Details of sediment controls attached with written material from ARC Guidelines, May 2000;
- Traffic report by Selwyn Green, August 2001;
- Ecological assessment by Kingett Mitchell Associates Limited, August 2001;
- Noise assessment by N I Hegley, July 2001;
- Requests for information by ARC dated 5 July 2001 and 14 June 2001;

- Further information in response to those requests, being:

    - letter from applicants 12 May 2001;
    - letter from applicants with detailed engineering information, 5 June 2001;
    - letter from applicants, 6 June 2001;
    - letter from applicants to clarify matters for submitters, 26 June 2001;

[7] The applicants propose to remove an existing house on the residential lot at the street front, prior to building an accessway through that lot to the main lot down to the rear.

[8] Certain preparatory construction works are intended to create the accessway together with some sediment control features and a noise mitigation bund, prior to commencement of the cleanfill operation.

[9] Detailed conditions of consent were proposed by the applicants and incorporated with modifications and additions in the decision of the respondent. Such was the iterative nature of the proposal before us, that further modifications and additions were proposed for our consideration at various stages during the hearing.

Status of proposed activity

[10] The application is essentially about earthworks. No buildings are proposed. Land use consent as a discretionary activity is required in Land Unit 20, pursuant to Rule 6C.1.3.6 *(Earthworks)* and Table *3 (Standards for Discretionary Activities).* Land use consent as a non-complying activity is required pursuant to Rule 6.11.4.1B (b) *(Permitted Activities - Particular Rules)* to allow the establishment of the proposed accessway through 57 Junction Road.

[11] It was agreed by all parties that because the two components were completely interconnected, consent for the proposal as a whole must be judged against the tests in the Act for non-complying activities.

Adequacy of content of application

[12] By way of preliminary attack the appellant submitted that the application had essentially been expressed as one for consent to plant fruit trees, with some

preliminary filling of ground in the gully in the applicants' property. The appellant also submitted that the application did not make it clear that the residential street frontage site at 57 Junction Road was involved, and that therefore public notification of the application contained serious shortcomings.

[13] We have studied all documents that comprise the application, and considered the forms of public notification employed by the respondent. We consider that in their totality they made it sufficiently clear that the proposal was one for a cleanfill operation, and that access was to be gained through the property at 57 Junction Road.

[14] Public notification was undertaken by the respondent in a local newspaper "Gulf News", and a City Council weekly news publication called "City Scene", on 13 May 2001 and 17 May 2001 respectively. At that stage the material held by the respondent in connection with the application was the material described in the first four bullet points in paragraphs [6] of this decision, above.

[15] Included amongst the plans prepared by Adams Engineering in May 2000, was a plan showing the whole of the proposed works as then designed, including an accessway rising through the gully and passing through the property at 57 Junction Road, to join the street. The latter portion of the accessway is labelled on the plan *"Refer to Sheet 2 for Access Detail at 57 Junction Road"*. Sheet 2, also lodged with the application shows that detail and is clearly labelled *'Lot 2 DP147427 Waiheke - Proposed Landfill - 57 Junction Road Access"*. There was, also a Sheet 3 bearing a similar label and depicting a longitudinal section.

[16] The application documentation commenced with a pre-printed form supplied by the respondent, filled in by hand by the applicants. It describes the site as 65a Junction Road, Palm Beach, and provides the lot description for the principal lot. No mention is found on that sheet of 57 Junction Road. However in the first paragraph on the next page of the application, headed "Explanatory Statement", the following sentence is found:

> A new access road will be created from the property at 57 Junction Road, which is to be purchased by the applicants for this purpose.

[17] The basis of the appellant's complaint is that the public notices in Gulf News and City Scene make no mention of 57 Junction Road.

[18] Section 93 RMA sets out the requirements for notification of applications. Subsection (1) provides that:

> (1) Once a consent authority is satisfied that it has received adequate information, it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is-
>
> (a) served.. .
>
> ...
>
> (g) publicly notified.

Subsection (2) provides, so far as is relevant:

> (2) A notice under subsection (1) shall be in the prescribed form and shall-
>
> (a) where it is to be served in accordance with paragraphs (a) to (e) of subsection (1), contain sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her; and
>
> (b) where it is to be published or given in accordance with paragraphs (f) to (h) of subsection (1), contain a description of the application including the location (as it is commonly known) of the proposed activity;...

[19] Section 93(2)(a) provides strict requirements as to the detail to be contained in material served pursuant to section 93(2)(a). It was held by the Environment Court in ***Christchurch Civic Trust v Christchurch City Council***[1] that the material should contain sufficient information to enable a recipient, without reference to other information, to understand the general nature of the application and whether it will affect him or her.

[20] In some contrast, the Court held in that decision that there was a lesser standard required concerning information to be publicly notified under section 93(2)(b). The Court said[2]:

> We infer that it is not unreasonable to require a person sufficiently alerted under para (b) to make further enquiries. There must be enough information as to the application and location for a person to establish that they might be affected and thus to put them on notice to inquire further. [emphasis found in that decision].

[1] [2001] NZRMA 385 at paras [25] and [26].
[2] At para [26].

The Court also said[3]:

> ... it is the step which alerts persons that they may need to inform themselves about the application more fully...

And further[4]:

> ...the public notice must contain enough information to inform a reasonable member of the public with a reasonable knowledge and understanding of the location identified, to generally understand what the activity is to be.

[21] We have seen the plans for the properties involved, and inspected the location at the invitation of the parties. The driveway accesses for 57 and 65A Junction Road are only a few metres removed from each other, and both of them issue onto the outer radius of the bend in the road that was described to us in traffic evidence.

[22] Having regard to the findings in the ***Christchurch Civic Trust*** decision, and having regard to the geographical descriptions in the application and the public notices as we have set them out, we consider that there was enough information in the public notices to inform persons that they might be affected, and to put them on notice to inquire further. They would certainly have a general understanding of what the activity was to be, and there was sufficient information to inform a reasonable member of the public with a reasonable knowledge and understanding of the locality.

The district plan provisions and other statutory instruments

[23] The applicants called the evidence of Mr A P Gysberts, a resource management and planning consultant. His analysis of the relevant plan provisions and statutory instruments was thorough, and was little challenged in cross-examination. He was asked only about interpretation of certain provisions in the Hauraki Gulf Marine Park Act (essentially a legal matter), and some questions about a recent plan change concerning control of construction noise (on which nothing of importance turned). We have considered his analysis, and accept it as accurate.

[3] At para [27].
[4] At para [32].

The district plan

[24] The objective for Land Unit 20, in clause 6.20.3.1 is:

> To provide for a diverse range of land use activities compatible with maintaining the special environmental amenity and open rural landscape of Land Unit 20, in order to secure its long term protection as a rural buffer area with potentially productive rural land use capability in some parts.

Relevant policies include protecting wetlands and other water systems, native bush areas and other environmentally sensitive areas; and ensuring that the land unit is maintained as a green belt buffer between and around residential settlements.

[25] As will be seen when we analyse the effects on the environment, there will necessarily be a temporary disruption to the surface of the land, coupled with removal of existing vegetation which is mainly weed species. There will be ultimate conformity with the concept of the green belt buffer after contouring and landscaping are completed.

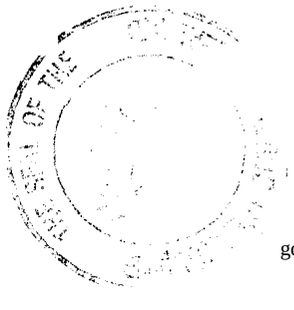
[26] Subject to what we have to say about management of stormwater and strict controls on the escape of sediment, it may be possible to protect wetlands and water systems.

[27] Because the provisions are essentially effects-based, and having regard to our findings on effects, the proposal will largely accord with the objectives and policies relating to Land Unit 20. If made subject to appropriate controls, it will not be contrary to any of them.

[28] The assessment criteria for Land Unit 20 focus on environmental quality and amenity. Once again, subject to proper control, especially as concern noise, traffic, ecology, sedimentation and visual effects, the criteria can be met.

[29] The objectives and policies of Land Unit 11 ("Traditional Residential") might logically have been expected to provide more challenges for the application, but that is not borne out by a close examination of them. The four objectives found in clause 6.11.3, are as follows:

> 1. To provide for residential development which maintains neighbourhood amenities and the qualities of the local environment.



2. To facilitate the establishment of non-residential activities which are compatible with a predominantly residential area.

3. To maintain the amenity and landscape qualities of beachfront locations.

4. To ensure that the quality of natural water bodies and potable water sources are not compromised by development.

Objective 3 is not relevant. Objective 1 is supported by policies concerning the controlling of density of development and allowing opportunity for a range of housing; objective 2 is supported by policies allowing for activities which have functions that are complementary to residential activities, and ensuring that character, intensity and use of buildings and hours of operation of all non-residential activities are compatible to the amenities and character of the surrounding residential area; objective 4 is supported by policies about ensuring that development will not lead to siltation or degradation of natural water courses, wetlands and the coastal marine area, and requiring that all development be capable of disposing of all effluent safely and effectively.

[30] The policies for Objective 1 do not bear upon the proposal, and because they inform and limit the scope of the objective, the latter (despite its apparent broad scope when read on its own) loses relevance because housing is not a part of this proposal.

[31] Objective 4 and its policies will not trouble the proposal if the issue of avoidance of siltation can be dealt with satisfactorily.

[32] Objective 2 and its policies provide the only possible challenge. Mr Gysberts expressed the view, relying on other expert testimony, that the "inevitable and unavoidable effects" of establishing and operating the temporary access can be mitigated over the life of the proposed project to the point where noise, dust and vibration effects would be no more than minor. Hence, he said, the establishment of the proposed temporary accessway would not be contrary to the objectives and policies.

[33] The only expert evidence called by the appellant touching on amenity in the residential zone, was that of acoustic engineer Mr C Robinson. Mr Robinson did not mention the objectives and policies of LU 11, but confined his evidence to matters of measurement and assessment of noise. We will consider his evidence in the separate section of this decision dealing with noise as a potential effect on the environment.

[34] Counsel Mr Walden was the only representative of the appellant to address us on the topic of objectives and policies, but he did not mention the objectives and polices of LU 11.

[35] The issue of character, intensity, and hours of operation of a non-residential activity (Policy B to Objective 2) and the more general issue of "compatibility" (Objective 2), involve an examination of the potential effects on the environment. We will be addressing those in a subsequent section of this decision. Drawing on the results of our evaluation in that later section, in particular noting proposals for mitigation and also the present exposure of houses on Junction Road to noise from trucks and buses, our findings on this issue are as follows. While it could be said that the proposal does not sit entirely comfortably with the two objectives and with Policy B to Objective 2, it is not contrary to them in the sense of being repugnant to them. Policy A to Objective 2 is more neutral in the current situation, it being simply a policy that is enabling of functions complementary to residential activities so the proposal is not repugnant to it.

[36] Mr Walden made mention of standards for the assessment of discretionary activities contained in Parts 6C and 6E of the district plan. The introductory paragraph to clause 6C. 1.3.5 reads:

> An application to vary the noise standards defined in Part 6B will be considered by Council as a discretionary activity and will be assessed against the criteria outlined in Part 6E.

Those criteria are very general. The relevant portion of clause 6E. 1.1.6 reads:

> The likely effects of the proposal:
>
> A. On the neighbourhood and wider community and in particular:
>
> (a) Where the proposal will maintain amenity values and social needs of the surrounding area;
>
> …
>
> (d) That the proposal does not exceed the noise standards for the land unit within which it is located.

As can be seen, these provisions lead back to assessment of relevant effects. It must also be remembered that the proposal is categorised as a non-complying activity, not as a discretionary activity. Having regard to our later findings on effects, the proposal is not contrary to these provisions in the sense of being repugnant to them.

Indeed, it may not be contrary to them at all, if adequate mitigation can be undertaken concerning the placing of the accessway through 57 Junction Road.

Part II, RMA

[37] Mr Walden addressed submissions to us on aspects of section 5 (the purpose of the Act), and on sections 6 and 7. He submitted that the: evidence would show that the proposal would be contrary to aspects of sections 5(2)(b) because it would not safeguard the life-supporting capacity of water, soil and ecosystems; and also section 5(2)(c) because the proposal would not avoid, remedy or mitigate adverse effects of activities in the environment. As to section 6(a) he submitted that the evidence would show that the natural character of the coastal environment would potentially be seriously degraded; that section 6(c) would be offended as areas of significant indigenous vegetation and significant habitats of indigenous fauna would not be recognised and provided for due to discharge of silt into wetlands and the estuary downstream. He submitted that subsections (a), (b), (f) and (g) of section 7 would likewise be offended, again essentially because of the potential effect of silt on the relevant waterways and ecosystems.

[38] Once again, the analysis of effects on the environment in this case, is the key to whether or not consent should be granted.

[39] Mr Gysberts, called by the applicants, weighed the proposal against various aspects of Part II. As to section 5 he reasoned that the proposal was in accordance with the intention of subsection (2)(a) in sustaining the potential of the land as a resource in a way which would avoid, remedy or mitigate adverse effects as required by subsection (2)(c).

[40] Mr Gysberts also gave reasons for his view that the proposal would not offend against any of the matters required to be recognised and provided for under section 6. In particular, he did not consider that there were any outstanding natural features or landscapes deserving protection (subsection (b)), or areas of significant indigenous vegetation and significant habitats of indigenous fauna (subsection (c). Mr Gysberts is not however qualified in ecological matters, and we do not accept those latter opinions, as will be seen when we discuss the issue of effects on ecology in the relevant section of this decision, Importantly, we have regard to concessions that were made during the hearing by Dr I K G Boothroyd, the consultant ecologist called by the applicants.

[41] As to the matters in section 6(a), Mr Gysberts acknowledged that clause 3.3.2.3 of the district plan describes the whole of Waiheke Island as a "coastal environment". He considered that to be a "rather generous appellation", but focusing on the site itself, offered the opinion that it had no features that comprise sufficient "natural character" to acquire special recognition, because the land is retired pasture that currently supports mainly exotic weed species.

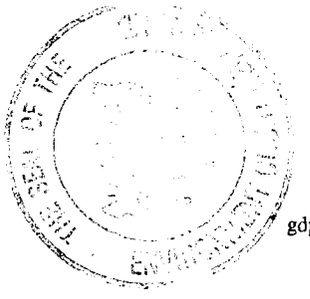
[42] As to section 7, Mr Gysberts identified the relevance of subsection (b), and offered the view that the proposal results in the efficient use and development of natural and physical resources on the site, in an efficient and productive way. As to (c), he opined that the clearing of the exotic weeds and recontouring of the land would result in proper maintenance and enhancement of amenity values. As to (d) ("intrinsic values of ecosystems"), Mr Gysberts acknowledged that the property is an identifiable catchment leading to the ecosystem of the Okahuiti Creek Site of Ecological Significance identified in Appendix C of the district plan. As to subsection (f) ("the maintenance and enhancement of the quality of the environment"), Mr Gysberts acknowledged that there will be some temporary changes during the life of the project, but that there would be measures in place to mitigate noise and effects on ecology. He considered that the evidence would show that the imperatives of the subsection would be met.

[43] Again, resolution of these issues will essentially turn on the analysis of effects on the environment.

Other statutes and statutory instruments

[44] Mr Walden, noting that the whole of Waiheke Island is defined in the district plan as being within the coastal environment, submitted that it was necessary to have "particular regard" to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000. He did this, relying on section 13 of that Act which reads:

> **Except as provided in sections 9 to 12,** in order to achieve the purpose of this Act, all persons exercising the powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 must, in addition to any other requirement specified in those Acts for the exercise of that power or the carrying out of that function, have **particular regard** to the provisions of sections 7 and 8 of this Act. [emphasis supplied]



[45] Ms Campbell, counsel for the applicants, reminded us that although the Resource Management Act is specified in Schedule 1 to the Hauraki Gulf Marine Park Act, section 9 (4) of the latter Act establishes a less stringent approach to be taken when a consent authority considers an application for resource consent:

> (4) A consent authority must, when considering an application for resource consent for the Hauraki Gulf, its islands, and catchments, **have regard** to sections 7 and 8 of this Act in addition to the matters contained in the Resource Management Act 1991. [emphasis supplied]

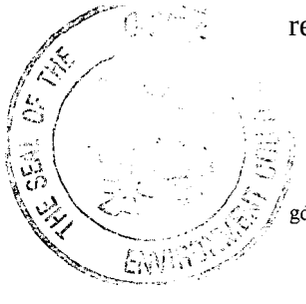
[46] Sections 7 and 8 are set out as Appendix 1 to this decision.

[47] The appellant understandably stressed provisions concerning ecology in sections 7 and 8, in particular the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments. It was submitted that the proposal would contravene them because soils, waters, wetlands, and freshwater and marine ecosystems including fish breeding grounds, would be destroyed. It was also submitted that the social and economic well-being of certain neighbours, for instance one of them who operates a home-stay business, would be harmed.

[48] Once gain, analysis of effects will be the key to the decision. It is undeniable that the site is at least in a limited way a part of the coastal environment, and that it is linked by a freshwater system to the southern coastline of the island and to the Okahuiti Creek Site of Ecological Significance. The primary question is, what will the effects be on them, and then whether consent should be granted.

[49] Mr Gysberts analysed the proposal against various provisions in the New Zealand Coastal Policy Statement 1994 and the Auckland Regional Policy Statement 1999, in particular concerning the high priority placed on the natural character of the coastal environment. These provisions are important, but are not unlike provisions of the RMA and the Hauraki Gulf Marine Park Act that we have already described. Once again it comes back to what the effects will be, principally in the coastal land and water areas down the catchment from the applicants' site.

[50] Mr Gysberts also considered briefly the provisions of the Auckland Regional Plan, Air, Land and Water 2001, and offered the opinion that the proposal does not require specific consent in terms of that document.



Effects on the environment

Traffic

[51] Traffic safety on Junction Road, particularly around a moderately sharp bend adjacent to the applicants' proposed accessway, was one of the main issues of concern to a number of near neighbours who were called to give evidence. They expressed concerns about the narrowness of the road (suggesting that the road was barely wide enough for two buses to pass); about allegedly inadequate sight distances at the bend, lack of footpaths, and the presence of pedestrians and cyclists including school children. Some of them acknowledged that Junction Road was already a major bus route, and one of them mentioned that tourist buses stop in the vicinity of the bend to allow passengers to enjoy the view down to the coast to the south.

[52] The only traffic engineer called to give evidence was Mr F S Green. He was called by the applicants and offered us detailed opinions, based where relevant on technical research materials, concerning the Junction Road environment, the proposed access, the likely impact on the road network, as well as the design of internal access within the site.

[53] Mr Green described the proposal as involving the bringing to the site of 19,000m^3 (solid measure) of cleanfill over a 3-year period, resulting in an average of approximately 4 trucks visiting the site each day. He noted an offer by the applicants to set a maximum of 25 trucks on any one day. He then described how the proposal would work in traffic terms. Junction Road is classified in the district plan as a principal road, so has the potential for the highest level of activity in the road hierarchy on the island. On a typical day, 28 timetabled buses pass the site, in addition to which there are shopping buses, tour buses, and buses servicing a nearby resort. A variety of trucks serving this part of the island also use the road. The road carriageway near the site has approximately 5.5m of sealed pavement, with side drains but no footpaths. A 50km/h speed limit applies, but the speed environment is effectively constrained by horizontal curves. Mr Green estimated that the typical operating design speeds (85 percentile) would be about 50km/h eastbound and about 40km/h westbound.

[54] Sight distance available to the west is 80 metres. Sight distance **required** for a design approach speed of 50km/h, is the same, 80m. To the east, the available sight distance is 65m to a sharp bend, a little greater than the **required** sight distance of 60m. Mr Green's calculations were based on the often used Austroads Guidelines on safe intersection sight distances.

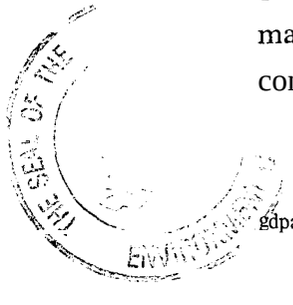
[55] Mr Green recommended that whether or not the proposal proceeds, the Council should keep the inner grass verge area on the bend from getting overgrown. He also noted that trucks are higher than cars, extending the available sight distance to the east for truck drivers to more than 75m.

[56] Mr Green compared (as small) the concentration of trucks likely to serve the proposed site, with an operation with which he was familiar on Auckland's North Shore. He categorised the present proposal as a small-scale operation compared to that of many other fill sites.

[57] Mr Green was not cross-examined about matters of safety, and we have no reason to doubt the assurances that he provided us. On truck numbers, his opinion that this would be a small-scale operation was not shaken. He indicated that there would be many construction sites on Waiheke Island which would be visited by more than 25 trucks a day, and suggested that matters should be "kept in perspective".

[58] Mr Green described the internal site layout in terms of truck access. The gradient of one of the sections of the accessway will be relatively steep, 1 in 4, but will be within the capability of the applicants' truck fleet and other vehicles likely to visit the site. The first 10m of the accessway at Junction Road will have a much slighter grade of 1 in 20, which Mr Green described as likely to facilitate exit and turning manoeuvres, and to accord with good design practice. An all weather cement-stabilised metal surface was recommended to be employed on the main access driveway and in the tipping head area, to avoid truck wheels picking up soil and carrying it onto the road network, to lessen dust, and to assist traction. A wheel-wash facility was also recommended.

[59] We are satisfied concerning traffic safety and the efficiency of truck manoeuvring, that effects on the environment will be no more than minor if suitable conditions are imposed.



Ecological effects

[60] This was one of the technical areas in which extremely detailed evidence was prepared on behalf of both the appellant and the applicant. There appeared (from our reading of the evidence prior to the commencement of the hearing), to be substantial, and possibly unnecessary, differences of view between the two groups of witnesses. We placed some questions before the parties and their relevant witnesses, and invited further careful consideration by the witnesses.

[61] The appellant called evidence from an experienced ecologist Dr N M U Clunie, a forest ecologist Ms R Ebbett, and a Waiheke nurseryman Mr I Kitson. The applicants called the evidence of an experienced ecologist Dr I K G Boothroyd. Leaving aside differences of emphasis in qualifications and experience (for instance Dr Clunie being trained principally in matters botanical and Dr Boothroyd in matters of aquatic ecology), we indicated that from the evidence we had seen, some closer agreement on matters of fact and expert opinion should be possible. In particular we signalled to the applicants that it seemed surprising that the downstream wetlands might not be regarded as particularly important, in view of the presence of the listed Site of Ecological Significance.

[62] The principal ecological witnesses Dr Clunie and Dr Boothroyd were subsequently able to reach a significant degree of agreement, which was reduced to writing and put before us. We set it out as follows:

> **AGREED:**
>
> **Wetlands:**
>
> - We agree on the extent of bio-diversity and age of establishment of the downstream wetlands.
> - We agree that the wetlands are important and must be considered in any assessment of ecological effects arising from the proposal.
> - Specific points are outlined in more detail in the notes of meeting between N Clunie and I Boothroyd that was presented to the Environment Court on 3 February 2003.
>
> **Terminology:**
>
> - We agreed on the terminology used to describe the flow channel of the proposed cleanfill site, ie a deeply insized v-shaped channel form that has formed over a long period of time as a result of stormwater descending from the head catchment. Within this channel is a smaller and actively eroding flow channel that acts as a conduit for stormwater

along the base of the valley. All other terminology pertaining to ecological matters is agreed.

DISAGREE:

Native vegetation regeneration:

- We disagree on the natural vegetation regeneration capacity. Specifically this relates to

  - existence of current dominant weed growth to assist or inhibit regeneration of native vegetation, ie seedlings.

  - rate of potential regeneration.

[63] We have no difficulty as a result in finding that the sections of the catchment below the applicants' property, particularly the Okahuiti Creek Site of Ecological Significance, are important, and require to be considered most carefully. We have in mind particularly the relevant provisions of section 6 RMA including subsection (a) ("the preservation of the natural character of the coastal environment including the coastal marine area, wetlands, and lakes and rivers and their margins and the protection of them from inappropriate subdivision, use and development"), and (c) ("the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna"). Section 6 requires us, in considering this appeal, to recognise and provide for those matters.

[64] Within the site itself, it seems there is little of importance in the way of flora and fauna. Much of the current vegetation is exotic weed species, although there are some indigenous specimens that are generally of small size. **Above** the site, is a small stand of better quality indigenous vegetation, but we were not told of any likelihood of discernible effect on that.

[65] The next major debate in the case emerged as between Dr Clunie on the one hand, and further witnesses for the applicant, engineer Mr C J Adams, and geologist Mr H B Alldred. Dr Clunie offered us extensive evidence about existing and potential ground surface erosion, the nature of flow channels, the steepness of the valley walls, a land slip, and the potential for the release of significant quantities of sediment into the important downstream receiving environments.

[66] Mr Adams and Mr Alldred were extremely critical of Dr Clunie's evidence in this regard, and through them, the applicants strongly challenged Dr Clunie's expertise in that area. For their part, the applicants' witnesses noted the existing uncontrolled, slip-prone environment and opined that a properly regulated cleanfill

operation that produced a stabilised and contoured landform, would be likely to represent an improvement. Mr Alldred went further, and from the point of view of his expertise in mineral geology and geo-technical studies on Waiheke Island, he described the history of the creation of the landform, streams and wetlands over approximately the last 1800 years. He described in particular the formation of the coastal swamps, significantly formed by accumulated sediment.

[67] Dr Clunie defended his evidence on this topic by describing the Auckland Regional Council publication TP90 (guidelines for such works), as inadequate, and telling us of his experience working with engineers in New Zealand and Papua New Guinea on erosion problems associated with forestry and mining. He assured us that he did not claim to be engineer, but had experience working with them on these problems, as an ecologist.

[68] We have no doubt about the honest and genuine basis upon which Dr Clunie offered us his views in this area. His evidence was offered in quite a passionate manner, and he clearly holds strong views on the issues. However the opinions go some way beyond his professional expertise, and accordingly need to be considered most carefully when placed against the views of an experienced engineer and an experienced geologist. Mr Adams and Mr Alldred gave evidence of having adopted, deliberately, extremely conservative rainfall calculations. They also offered detailed knowledge of the landform, matters upon which they were not shaken in cross-examination. Dr Clunie's evidence has to be approached cautiously, in the light of these things.

[69] The appellant also called the evidence of Mr B A Handyside who holds a Bachelor of Agricultural Science degree and has 25 years experience in erosion and sediment control in the northern half of the North Island, in particular working for the Auckland Regional Council. Mr Handyside gave evidence that even if sediment control measures were constructed and maintained to TP90 Standards, sediment loss from the property would still be likely to be 2 to 3 times more than the current sediment loading from the catchment, and would be greatly increased during large storms. From his knowledge of the technical publications and his own experience he offered us calculations of likely present sediment releases, and potential releases both during and after the placement operation. In addition, the appellant called the evidence of Mr M J Salinger, an experienced climate scientist who is a specialist in studies of climate change. Mr Salinger offered us a learned treatise on recent and likely future climate trends, but his evidence was of very limited assistance to us, in

that he offered us only the surprisingly general conclusion that "global warming will lead to an increased incidence of heavy rainfall in the Auckland Region". Mr Adams and Mr Alldred claimed, in answer, to have taken account of that by building into their calculations their conservatively high rainfall volumes.

[70] Hence, while the appellant's witnesses were asserting that serious erosion and sedimentation problems would arise during periods of severe rainfall (particularly cloud-bursts), the witnesses for the applicants were saying that their studies of the existing landform, the detailed engineering proposals, and a particularly conservative approach to allowance for rainfall volumes (almost three times those generally anticipated in TP90), would result in **improvements** over the current uncontrolled and slip-prone regime.

[71] Of some concern to us, was the revelation under cross-examination, that Mr Handyside, when meeting with Mr Adams, had refused to receive and consider calculations undertaken by the latter concerning rainfall volumes and runoff control. This refusal appeared to be in direct contravention of the directions made last year by the presiding Judge that expert witnesses meet and attempt to narrow the issues. We directed that a further meeting occur between these two witnesses. When Mr Handyside returned he announced that he and Mr Adams had agreed that the calculations were "fine", in particular that the sizes of the channels were "fine", although he remained concerned about the proposed rock amouring in the channel as possibly causing problems for the water flows.

[72] Under further cross-examination by Ms Campbell, Mr Handyside agreed that a number of issues listed before the hearing were now resolved to his satisfaction, including earlier perceived problems with construction of a sediment pond, slope stability issues associated with the access road, the adequacy of a proposed main sediment retention pond, and aspects of batter erosion and culvert blockage in relation to a proposed noise mitigation bund. He retained some concerns about the likelihood and adequacy of ongoing maintenance of the works, but then offered some further concessions under cross-examination about proposed conditions of consent.

[73] It also emerged that there was a distinct likelihood that with proper controls, particularly limiting the maximum area of land that would be bare of vegetation at any one time, that overall sediment yields could be reduced to the point where they might be a little less than half the annual quantities that he had estimated as likely to

be discharged from the cleanfill site. Mr Handyside also made some important concessions that certain rural activities that Mr Gysberts had considered to be within the permitted baseline and not fanciful, could result in significant land disturbance and sedimentation. These included the grazing of stock and cultivation of the land for crops. He agreed that photographs shown to him of extensive such ground disturbance on a neighbouring steep property, could generate sediment during a storm that would be significant in comparison to that that could be generated by the cleanfill proposal properly regulated by conditions.

[74] Our view, having considered all of the detailed evidence, and the concessions and agreements reached along the way, and comparing the proposal to permitted baseline effects, is that with stringent conditions of consent as offered by the applicants and further strengthened, effects on the environment would be no more than minor. In addition, we note the agreement of Mr Hay, under questioning, that he would be happy for the conditions of consent to include engineering peer review. Some of the conditions should in our view be tightened, but by and large those presently offered are conservative and well-thought out. We will indicate the way in which the proposed conditions should be tightened, later in this decision.

[75] Our final observation on this issue is that it can be said that pressure from the appellant appears to have contributed quite significantly to the tightening of conditions of consent, both during processing of the application by the Auckland City Council and during preparation for the hearing before us.

Noise effects

[76] This was another area in which the applicants had introduced a number of changes to the proposal to achieve mitigation. They had done this by reference to the district plan's stringent noise control rules for permitted activities, even though the proposal is in fact a non-complying activity.

[77] Expert evidence on this topic on behalf of the applicants, was given by Mr N I Hegley. The appellant called another acoustic engineer, Mr C Robinson. The differences of view between these gentlemen were quite technical in nature, and focussed more on noise measurement than on assessment.

[78] Rule 6B. 1.3.5 of the district plan provides as follows:

(i) With the exception of (ii), (iii) and (iv) below, the following noise standards shall apply to all permitted activities:

(a) Unless otherwise stated the L_{10} noise level shall not exceed the limits specified for the relevant land unit in Table 1, and

(b) The maximum noise level (L_{max}) at night time in all areas shall be the background noise level (L_{95} plus 30 dBA; or 75 dBA, whichever is the lower.

Note: *Except where otherwise stated all noise measurements shall be made at 20m from any adjacent dwelling (or another lot) or at the legal boundary, where this is closer to the dwelling. This may be referred to as the notional boundary.*

Noise levels shall be measured and assessed in accordance with the requirements of the New Zealand Standards, NZS 6801:1991 Measurement of Sound and NZS 6802: 1991 Assessment of Environmental Sound.

Table 1 specifies the following levels, amongst others:

Noise (L_{10} levels)	**Land Unit 11**	**Land Unit 20**
7:00am to 10:00pm Monday to Saturday and Sunday 9:00am to 6:00pm	45 dBA	45 dBA
At all other times including Public Holidays (night time)	35 dBA	35 dBA

[79] Mr Hegley went on to tell us that the district plan does not place controls on construction activity noise, but that it would be his recommendation that the requirements of New Zealand Standard NZS 6803:1999 *Acoustics - Construction Noise,* be adopted. At Table 2 of that Standard provides:

Time of week	Time period	Typical duration (dBA)		Short term duration		Long term duration	
		L_{eq}	L_{max}	L_{eq}	L_{max}	L_{eq}	L_{max}
Weekdays	0630-0730	60	75	65	80	55	75
	0730-1800	75	90	80	95	70	85
	1800-2000	70	85	75	90	65	80
	2000-0630	45	75	45	75	45	75
Saturdays	0630-0730	45	75	45	75	45	75
	0830-1800	75	90	80	95	70	85
	1800-2000	45	75	45	75	45	75
	2000-0630	45	75	45	75	45	75
Sundays and Public holidays	0630-0730	45	75	45	75	45	75
	0730-1800	55	80	55	85	45	75
	1800-2000	45	75	45	75	45	75
	2000-0630	45	75	45	75	45	75

Where:

"Short-term" means construction work at any one location for up to 14 calendar days.

"Typical duration" means construction work at any one location for more than 14 calendar days but less than 20 weeks; and

> "Long-term" means construction work at any one location with a duration exceeding 20 weeks.

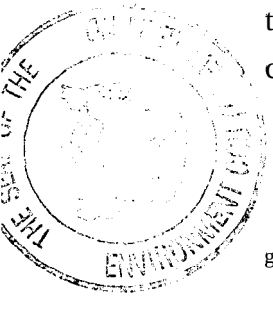
The time needed for the construction phase would place it within the "typical duration" category. Construction on this occasion would involve the removal of topsoil and the construction of noise control bunding. Such activity fits within the definition found in the Standard.

[80] Mr Hegley recorded his understanding of the nature of the construction work and the subsequent cleanfill operation, including numbers of trucks, the 3-year period of the operation, the limit placed on working area exposed at any one time ($1200m^3$), and the types of trucks and the bulldozer likely to be used in the operation. He conducted noise measurements on the site with the relevant trucks and machinery manoeuvring in a manner as close as possible to the intended operations.

[81] Building upon Mr Hegley's measurements and assessments, the applicants offered a detailed set of proposed conditions of consent to mitigate noise during the cleanfill operation. These included the construction of 1.8m high boundary fences alongside the accessway in the LU11 area, and the construction of a substantial earth bund and fence between the cleanfill operation and the houses up near Junction Road. Mr Hegley then assumed certain worst-case scenarios, for instance trucks and the bulldozer operating on the site at the same time, and made a noise level prediction in the absence of any screening. This prediction came within 3 dBA L10 of complying with the permitted activity control at the notional boundary of 20m from the face of any house (or property boundary if closer), 45 dBA L10. Mr Hegley was happy with this outcome, particularly given that the noise control standard in the district plan is in his view a conservative one. He then made a further assessment, assuming the screening to have been installed, and found that the noise level at notional boundaries would comply with that district plan requirement.

[82] To illustrate how conservative that requirement is, Mr Hegley reminded us that a level of 45 dBA L_{10} is often adopted in district plans as a control that would allow undisturbed sleep at night-time. Mr Robinson, when cross-examined about that, agreed.

[83] Mr Robinson was critical of Mr Hegley's interpretation of the requirement in the Standard for the place where noise measurements should be taken to demonstrate compliance. Mr Robinson said:



> It is believed that the intention of the noise rule is to limit the day-time noise level to L_{10} 45 dBA within the property area bounded by the notional boundary and that any assessment should not be confined to the notional boundary position only, but anywhere inside the notional boundary.

He said that compliance with the limit should ensure avoidance of unnecessary noise under section 16 RMA as well.

[84] We disagree with Mr Robinson's interpretation. We find no difficulty interpreting the district plan rule requirement, and find it to be as Mr Hegley understood it to be. The meaning of "Notional Boundary" in NZS 6801: 1999 contains the answer. It is there defined as:

> ...defined as a line 20 metres from any side of a dwelling, or the legal boundary where this is closer to the dwelling.

Issues under section 16 of the Act are a separate matter and will be governed by their own circumstances, environments, measurements, and assessments.

[85] Mr Robinson questioned the noise measurements that Mr Hegley had taken, and described in general terms some measurements that he said his firm had taken of similar machinery over the years. Unfortunately we were not assisted by such general observations, knowing nothing of the topography and other circumstances in which they had been taken. Accordingly, we were not dissuaded from accepting Mr Hegley's work undertaken on the site of the proposal and under relevant conditions.

[86] Neither were we assisted by some other technical criticisms offered by Mr Robinson, like his suggestion that a 5 decibel penalty be assigned to truck movements for a "gear whine", a factor which Mr Hegley resolutely denied from his knowledge of the particular trucks and the particular terrain. In like manner, we reject a noise measurement that Mr Robinson said he made of the bulldozer on the site in circumstances in which it was known to him and others involved in the test that the bulldozer was due for maintenance to remove a loud squeak from the movement of its tracks.

[87] Finally, we record that the applicants have offered strict conditions about the maintaining of vehicles and equipment, and the taking of regular noise measurements of them during operations on the site.

[88] Our overall assessment of the noise evidence is that the applicants, having taken careful professional advice, are proposing mitigation measures and strict monitoring and control mechanisms that will achieve first, levels of construction noise that it would be reasonable to expect in either of the two zones (and hence effects on the environment that will be no more than minor); and secondly a level of noise during the cleanfill operation that will meet the permitted activity controls in the vicinity of the houses along Junction Road and will amount to an effect on the environment that will no be more than minor.

Visual effects

[89] The evidence was that during the 3-year life of the operation there would be, in the steep-sided gully, up to 1200m^2 of disturbed earth surface at any one time. There would also be some moderately tall fencing for noise mitigation, access tracks, and sediment control works including ponds. Local residents expressed concern about the visual aspects of these features. In particular, Mr A Anderson, who operates a home stay business about 300m down the valley from the site, considered that much of the work would be in view of his house.

[90] No expert landscape evidence was called, but Mr Gysberts addressed the issues. He compared the visual aspects of the proposed operation with the unsightly state of the valley at the moment, containing as it does many exotic weed species and few native plants. He also produced computer-aided graphic representations of the works as they are likely to appear when completed, with the ground contoured and grassed.

[91] Some of the local residents complained that there was no need to fill the lower portion of the valley in order that the applicants could plant fruit trees as they ultimately intend. That however is not the point. We must determine whether effects on the environment from the proposal will be more than minor or not. We hold that they will not be more than minor. In making this finding, we accept the evidence offered by Mr Gysberts. In addition, our inspection of the site and surrounds, particularly from Junction Road, and from Mr Anderson's house, indicated that views of the operation will indeed be limited because it will be below steep valley sides that fall from Junction Road (in the case of views for residents there and people on Junction Road), and because views from Mr Anderson's property will be somewhat distant and partly obscured by trees. This latter feature

could be controlled to a further reasonable degree by the imposition of an appropriate landscaping condition.

Gateways under s.105(2A)

[92] In order to have jurisdiction to grant a resource consent for a non-complying activity, we must be satisfied, under s. 105(2A):

> (a) The adverse effects on the environment (other than any effect to which s.104(6) applies) will be minor; or
>
> (b) The application is for an activity which will not be contrary to the objectives and policies of-
>
> (i) ...the relevant plan;
>
> …

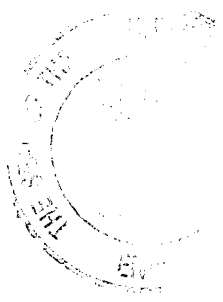
[93] It will be apparent from our evaluation of the proposal, both as to effects on the environment, and as against the objectives and policies of the operative district plan, that the proposal passes through either of the available gateways. Accordingly we have jurisdiction to grant the application.

Past conduct of the applicants

[94] The appellant and some of the local residents complained that the applicants had in the past conducted on the land some illegal operations ancillary to their earthmoving business, and had not desisted until pressed by the Council during the processing of the current application.

[95] Our task under s.104(1)(a), like that of the Council in whose place we sit at this stage, is to have regard to the actual and potential effects on the environment **of allowing the activity.**

[96] As Ms Campbell submitted, even if the allegations of past conduct against the applicants are correct, they have no bearing on the actual and potential effects on the environment of the cleanfill proposal.



[97] Ms Campbell correctly submitted that it has been settled law since the decision of the Court of Appeal in ***Barry v Auckland City Council***[5] that in considering an application for a resource consent, the applicant is entitled to have it assumed by the consent authority, that he, she or it will act legally. That approach has been followed by the Court many times, for instance recently in ***Adams Landscapes Limited v Auckland City Council***[6] and ***Walker v Manukau City Council***[7]

[98] We find that the applicants having offered stringent conditions, and those conditions (as may need to be modified by us to a small degree) being clear and enforceable, it must be assumed that they will adhere to them and that the environmental outcomes will be moderated accordingly.

Need for the activity

[99] In earlier interlocutory proceedings in which the applicants sought a priority fixture for the hearing of this application, the presiding Judge considered evidence that there was a real shortage of cleanfill sites on Waiheke Island. That evidence having been found to be reasonably compelling, the interlocutory application had been granted on that basis[8].

[100] A number of the residents called by the appellant offered opinions to the effect that there were other places where cleanfill could be placed, and that there was no need for the application to be granted.

[101] We hold that our task is to consider the potential effects on the environment from granting consent, and not need (or lack of need) for the facility. As submitted by Ms Campbell, it is instructive to consider the decision of the Court of Appeal in ***Fleetwing Farms v Marlborough District Council***[9]**,** where in the context of determining the order of priority for consideration of two competing applications in relation to the same portion of coastal marine area, the Court held that every case should be considered on its merits, and that it is not the role of the Court to identify the "best" proposal to achieve a given end.

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[5](1975) 5NZTPA 312 at 318.
[6] Decision A108/2002.
[7] C213/1999.
[8] Decision No, A167/2002 *Gulf District Plan Association Inc v Auckland City Council and another.*
[9] [1997] NZRMA 385.

[102] Even if "need" were relevant, the evidence called by the appellant was not detailed or conclusive. At the very least it seems there are significant question marks over the availability of other reputed sites on Waiheke Island.

Decision

[103] Having held that we have jurisdiction to grant the application, and having made the findings contained in this decision, we exercise our discretion under section 105(1)(c) to grant consent to the proposal as a non-complying activity.

[104] Further work is needed by the parties concerning conditions of consent, so our decision is an interim one. We direct that the parties confer and endeavour to agree a set of conditions, and lodge the same for our consideration within 20 working days of this decision. If agreement cannot be reached on any particular condition(s), the parties are to file submissions stating their positions on those, when filing those agreed

[105] The conditions of consent should be along the lines contained in the decision of the respondent, further augmented in opening submissions of counsel for the applicants, and should also address dust suppression; peer review of civil engineering design and proposals for sediment control; the making available to the respondent of audits of truck movements and volumes of material received; controls on erosion and sediment in relation to the proposed noise bund; grassing over of completed works at least every 6 months (see Mr Adams' evidence para [32]), noise testing of trucks and machinery in line with para [6.5] of the evidence of Mr Hegley; and screen-planting with large specimens on the southern boundary.

[106] Costs are reserved, but we do not encourage applications given the quite significant modifications made to the proposal as a result of evidence brought by the appellant.

DATED at **AUCKLAND** this 19th day of June 2003.

For the Court:

L J Newhook
Environment Judge

APPENDIX 1

HAURAKI GULF MARINE PARK ACT 2000

7. Recognition of national significance of Hauraki Gulf

(1) The interrelationship between the Hauraki Gulf, its islands and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.

(2) The life-supporting capacity of the environment of the Gulf and its islands includes the capacity-

(a) to provide for-

(i) the historic, traditional, cultural and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands; and

(ii) the social, economic, recreational, and cultural well-being of people and communities:

(b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation:

(c) to maintain the soil, air, water, and ecosystems of the Gulf.

8 Management of Hauraki Gulf

To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands, and catchments are-

(a) the protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments:

(b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:

(c) the protection and, where appropriate, the enhancement of those natural, historic, and physical resources (including kaimoana) of the Hauraki Gulf, its islands, and catchments with which tangata whenua have an historic, traditional, cultural and spiritual relationship:

(d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:

(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand:

(f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.