Decision No. W 24/2003

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **B & K HENRY**

(RMA 345/01)

Appellants

AND **THE KAPITI COAST DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J E S Allin (presiding)
Environment Commissioner P A Catchpole

HEARING at WELLINGTON on 17 February 2003

APPEARANCES

H R Dixon and S L Smith for B & K Henry
J G A Winchester for the Kapiti Coast District Council

INTERIM DECISION

[1] Mr B and Mrs K Henry want to subdivide beachfront land at 41 - 45 Wharemauku Road, Paraparaumu Beach. The Council declined consent based on section 106 of the Resource Management Act 1991 and the Henrys have appealed.

[2] The sole issues before the Court relate to the application of section 106 of the Act to this proposal:

- is there any land in the proposal that is or is likely to be subject to "material" damage by erosion or inundation in terms of section 106(1)(a); and, if so
- can the effects in section 106(1) be mitigated in accordance with section 106(2) of the Act.

The proposal

[3] The application seeks a subdivision consent to create two lots from land in a single title (that is currently in three lots) and to create rights of way to allow easier access into 49 Wharemauku Road. The single title contains 2763m^2, with the land covering three street

numbers. The proposed new Lot 1 (the lot on the seaward side) would be some 1820m^2 in area, which is more than 3 times the minimum lot size of 550m^2 under the Kapiti Coast District Plan. The proposed Lot 2 (the landward side) would be some 643m^2 in area. The land for which subdivision consent is sought is legally described as Lots 1 & 4 DP20607 and Lot 8 Block 1 DP2397.

[4] The application for consent was not notified and it is common ground that the proposal is for a controlled activity in the Kapiti Coast District Plan. It was also common ground that there are no effects under sections 104 or 105 that the Court needs to consider.

[5] The Council declined consent on the basis that to do otherwise would have been contrary to section 106 of the Act on the grounds that:

- the Council considered that parts of the land are likely to be subject to material damage as a result of coastal erosion; and
- the mitigation measures submitted as part of the application did not adequately address the likelihood of damage.

[6] Since the Council hearing and refusal of the subdivision consent, the Council has granted the Henrys consent for a discretionary activity to build a single residential dwelling on proposed Lot 1. Construction of the dwelling, which is to be their home, has started. So, the construction of that structure on the land is already authorised, regardless of the outcome of this appeal.

[7] The Henrys continued to offer a no building area and planting as mitigation at the hearing. Some issues arose at the hearing as to precisely what was being offered. The parties agreed that, if we decided to grant consent, we should issue an interim decision with leave to the parties to provide an agreed memorandum dealing with appropriate wording for the conditions.

[8] While we have concluded that we do not need to set out all the careful and detailed legal submissions on behalf of the parties about the meaning of section 106, we were assisted by those submissions.

Section 106

[9] Section 106 provides:

> "(1) A consent authority shall not grant a subdivision consent if it considers that either-
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> (a) Any land in respect of which a consent is sought, or any structure on that land, is or is likely to be subject to material damage by erosion ... or inundation from any source;
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> (b) ...
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> unless the consent authority is satisfied that sufficient provision has been made or will be made in accordance with subsection (2).
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> (2) A consent authority may grant a subdivision consent if it is satisfied that the effects described in subsection (1) will be avoided, remedied or mitigated by one or more of the following:
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> (a) Rules in the district plan:

(b) Conditions of a resource consent, either generally or pursuant to section 220(1)(d):

(c) Other matters, including works."

The District Plan

[10] The land is zoned residential in the District Plan and is subject to two "yard" restrictions:

- approximately 3 metres of the proposed Lot 1 falls within the Council's 20 metre wide coastal building line restriction. The Henrys do not propose to build in this area and in fact have offered an additional area, to extend close to the location of the dwelling being built, where no building would occur;
- proposed Lot 1 is also subject to a 30 metre wide area where only relocatable buildings are permitted. The dwelling for which the Henrys have consent, and are building, complies with this requirement.

[11] The Council noted that, in the Plan, the 20 metre coastal building line restriction is a fixed line on the relevant planning maps, and does not move as foredunes are eroded. Approximately 8-10 metres of that 20 metre strip has already been lost to erosion.

Evidence about erosion

[12] Mr J L Lumsden, a qualified expert in coastal erosion with considerable experience at the Kapiti Coast, was the only witness who gave evidence.

[13] Mr Lumsden testified that he has been conducting a Coastal Erosion Hazard Management Project commissioned by the Council. That study commenced in June 2000 and the draft report has been prepared and provided to some Council officers. A draft was not provided to the Henrys, despite a request on their behalf.

[14] Historically, the Kapiti coast has undergone long-term accretion since sea levels stabilised around 6500 years ago. The growth has been most pronounced at Paraparaumu where the off-shore presence of Kapiti Island creates a zone of reduced wave energy thus allowing a greater accumulation of sediment. As the headland bulge at Paraparaumu was created, that caused depletion of sand to the south of the headland, where the Henry land is located.

[15] Despite the evidence of historical accretion, there have been periods of active erosion during the last 100 years. In 1976, a series of storms caused extensive damage along some parts of the Kapiti coast, and the Council responded by constructing timber seawalls along the worst-affected parts. There is not a seawall in front of the Henry land. Mr Lumsden referred to the unexpected and variable nature of erosion, by using the example of the northern end of the Paraparaumu coastline where some 25 metres of erosion has occurred during the past decade, despite the fact that this part of the Kapiti coast had undergone significant accretion during most of the last century.

[16] In terms of the vicinity of the Henry land, Mr Lumsden testified that there had been some 10 metres of accretion in the 13 years prior to 1978 and then a loss of 8 metres during the subsequent 22 years to 2000. He expressed his opinion that this reflects the dynamic

nature of the shoreline at this location and indicates the very real potential for significant movement to occur.

[17] Mr Lumsden deposed that, due to an erosion cycle that was threatening the roadway approximately 300 metres to the north of the Henry land, he was responsible for a beach renourishment project in 1994. That project replenished the beach in the eroding area with 6,000 cubic metres of sand. Sand has been added to that area since. Mr Lumsden explained that the sand is moved, by the waves and currents, generally in a southerly direction. So the sand deposited is supplying sand to the south, including in front of the Henry land. We accept Mr Lumsden's opinion that the beach in front of the Henry land would have continued to erode without the beach renourishment project occurring to the north.

[18] Mr Lumsden deposed that he considers that there is sufficient risk of erosion (i.e. retreat of the coastline and loss of land) during the next 100 years at the Henry land to restrict building activity for a distance of 50 metres back from the present shoreline, and that no construction for habitation or commercial purposes should be permitted in the seaward 25 metres. Mr Lumsden's opinion is that there is a 50% chance of erosion within 100 years and a 30% chance within 50 years.

[19] We understand Mr Lumsden's opinion to be that:

- there should be no building for habitation or commercial purposes within the seaward 25 metres, measured from the present shoreline. The Henrys do not propose building in that area and have offered a larger no building area than proposed by Mr Lumsden;
- there should only be relocatable buildings in the next 25 metres. The dwelling for which the Henrys already have consent (and which complies with the current provisions relating to relocatable buildings in the District Plan) would intrude into this area by about 8 metres. So, for 8 metres of the area where Mr Lumsden considers buildings should be relocatable, that part of the Henry dwelling would not be relocatable.

[20] Our opinion is that the difference between what Mr Lumsden considers should occur and what would occur under what the Henrys propose is small, particularly given that consent has already been granted for the dwelling, which is in the process of being built. Any risk of damage to that building by erosion or inundation will not be increased or decreased by our decision on this application.

[21] The parties agreed that even if one assumed that the 50 metres of land to which Mr Lumsden referred were to disappear completely, the seaward Lot 1 would still be approximately 1000m^2 as compared with the minimum lot size for a rear lot under the District Plan of 550m^2. The Council accepted that the lot would still comfortably comply with the District Plan standards.

Is there any land in the proposal that is or is likely to be subject to "material" damage?

[22] We deal first with the issue of whether, under section 106, there is "any land ... [that] is or is likely to be subject to material damage ...".

[23] The Council referred to section 36 of the Building Act 1991, compared it with section 106 of the Resource Management Act, and submitted that the critical differences in the two sections assist in illustrating the coverage and scope of section 106. By way of contrast, the Council submitted that in terms of section 106 of the Resource Management Act, it is the state of all the subject land which is relevant. Mr Winchester submitted, by way of example, that even if only 30% of the subject land was, or was likely to be, subject to material damage by erosion or inundation, on its face section 106 still poses a jurisdictional barrier to the grant of subdivision consent due to the fact that section 106(1) expressly refers to "*any* land in respect of which consent is sought".

[24] Mr Winchester accepted that a purposive interpretation of section 106 should be adopted, and submitted that in order to be "material", the level of damage that is or is likely to occur must be of some consequence. He submitted that this will depend upon a case-by-case analysis and it may well be that factors such as the location of the land (e.g. inland or coastal, above faultlines, etc), the nature of the natural hazard, and the proposed use of the land (e.g. rural vs urban/residential) could be taken into account by the Court when assessing whether damage to the land or to any structure on that land would be material.

[25] He submitted that it is important to bear in mind that the damage that the Council considers is likely is actual physical loss of the land and potentially structures through coastal erosion. In authorising the creation of a new allotment, subsequent coastal erosion could substantially reduce it not only in size and function, but also in value. He submitted that, put simply, the effects of coastal erosion could well result in diminution of the size of the relevant title.

[26] While Mr Winchester noted that the New Zealand Coastal Policy Statement (NZCPS) cannot be directly relevant to the interpretation of section 106, he submitted that the Court is entitled to give some weight to the precautionary principle in the NZCPS and referred us to the following statements:

> "In addition to the foregoing, to provide for the special context of the coastal environment, regard shall be had to the following general principles:
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> …
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> 7. The coastal environment is particularly susceptible to the effects of natural hazards.
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> …
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> 12. The ability to manage activities in the coastal environment sustainably is hindered by the lack of understanding about coastal processes and the effects of activities. Therefore, an approach which is precautionary but responsive to increased knowledge is required for coastal management."

[27] He submitted that the NZCPS offers additional support for a cautious approach in this instance.

[28] Mr Winchester submitted that a key issue is whether land which is not intended to be developed or built on should fall within the scope of section 106. In the statement of facts and issues lodged with the Court, the view expressed by the Council is that the offered mitigation will mitigate material damage to a building (restricting its location and ensuring it

is relocatable on or off the site) but not to land and that if a material amount of land were lost that would be sufficient to constitute material damage.

[29] Ms Dixon submitted that it is important to keep in mind the size of the land involved. As already noted:

- the proposed seaward Lot 1 would be some 1820m^2 in area, which is more than 3 times the minimum allotment size for subdivision under the District Plan;
- even if 50 metres of land were to disappear, proposed Lot 1 would still be approximately 1000m^2 as compared with the minimum lot size for a rear lot under the District Plan of 550m^2.

[30] Ms Dixon submitted that the Council considers that the only way to mitigate the material damage to the land is effectively to prevent or remediate the process of coastal erosion itself. She submitted that what the Council is seeking is not mitigation but remediation or avoidance of erosion and that, in the context of subdividing land (especially where there is no accompanying application for a building consent), such an approach is unjustifiable and unreasonable.

[31] It was submitted for the Henrys that there was no evidence that *this land* will be subject to erosion. We do not accept that and conclude that Mr Lumsden's evidence about erosion along this section of the Kapiti coast is sufficient to persuade us that the Henry land is at risk of erosion, as is that section of the coast. We conclude that at least part of the Henry land is or is likely to be subject to erosion or inundation. The question remains, though, as to whether it is material.

[32] In *Paviour v Napier City Council*[1], the Planning Tribunal considered what amounted to "material damage". The issue was whether the expression "material" related to the physical substance of the land or something which is of great import or consequence. In that case, the Tribunal favoured the latter meaning and doubted that minor slippage, subsidence or slumpage would amount to damage to the land which could be regarded as "material". We respectfully agree.

[33] Section 106 seems to anticipate three types of damage to land:

- damage that is not material, and can be ignored;
- damage that is material, but where the effects can be avoided, remedied or mitigated by measures in section 106(2); and
- damage that is material, but the effects cannot be avoided, remedied or mitigated by measures in section 106(2).

[34] That context seems to us to provide assistance in terms of the meaning of "material" in section 106(1).

[35] Based on the facts of this case, we are of the opinion that the likelihood of damage to the land by erosion or inundation is not such that it can simply be ignored. Based on Mr Lumsden's evidence, we conclude that the land is or is likely to be subject to material damage by erosion or inundation. Given the unpredictable nature of coastal erosion, that this is a residential area, and despite the size of the proposed Lot 1, we conclude that being at risk of

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[1] Planning Tribunal Decision W 106/96.

losing up to 50 metres of land is material. If the full 50 metres were to be lost, that would affect 8 metres of the dwelling which is currently being built.

Can the effects be mitigated in accordance with section 106(2)?

[36] We turn now to address the second issue of whether the effects, including damage to the land and/or structures, can be mitigated in accordance with section 106(2) and can deal with this briefly.

[37] We are satisfied that the effects of any material damage by erosion or inundation will be avoided, remedied or mitigated by the no building setback offered by the Henrys which extends to, or close to, the dwelling being built (with the details of the precise location of that setback to be finalised between the parties), the relocatable buildings rules of the Plan, and by planting (again with the details of a condition to be finalised between the parties).

[38] As already noted, any effects on the dwelling being built are not altered by the subdivision consent. In any event, the Council accepted in the statement of facts and issues that the offered mitigation will mitigate material damage to the building.

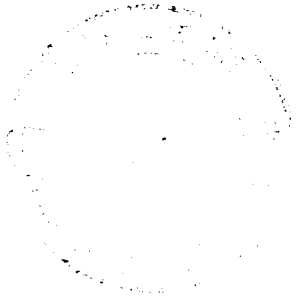
[39] Even if 50 metres of the land does erode, the remaining section size would still be substantially larger than permitted by the Plan.

[40] The Council expressed the view that any no build zone should advance as the coastline advances, consequent on any erosion that may occur. The District Plan does not currently provide for a moveable line and it seems that Mr Lumsden is not proposing that the Council adopt a moveable line in any changes it may make to the District Plan. We do not accept that there is any justification for adopting a moveable line in relation to a single property along this section of the coast.

Conclusion

[41] Provided that appropriate conditions are imposed, we conclude that the Council's decision should be cancelled and that subdivision consent should be granted. We will make the formal order in the final decision.

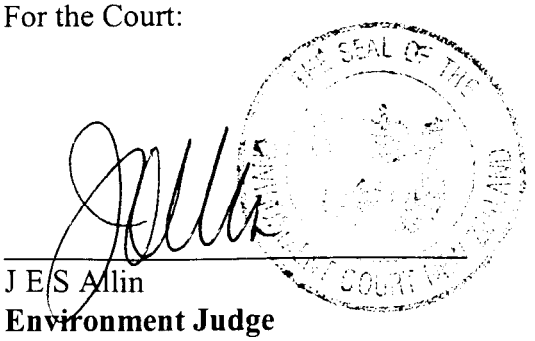
[42] The parties have leave to lodge a memorandum by 30 May 2003 setting out agreed conditions for the consent. The parties are reminded that the agreed conditions should address the issues raised by the Court during the hearing about the consistency of some of the conditions.



[43] The question of costs is reserved. However, given the legal issue confronting the Council, our preliminary view is that this is not a case where costs should be awarded. We do not accept that the Council was unduly influenced in its decision by potential liability issues.

DATED at WELLINGTON this 15th day of April 2003

For the Court:



J E S Allin
Environment Judge