IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	application by Grattan Investments Limited to Waikato District Council under section 88 of the Resource Management Act 1991 for a subdivision consent for 6 allotments at 12 Koppens Road, Tamahere (being Lot 2 DP 376523, Lot 1-2 DPS 69326, SO59669 and SO 60551 comprised in Computer Freehold Register 307734).

Decision following the hearing of an application by Grattan Investments Limited to Waikato District Council for a discretionary activity subdivision (Country Living Zone) resource consent under the Resource Management Act 1991

Proposal

To subdivide Lot 2 DP 376523, Lot 1-2 DPS 69326, SO59669 and SO 60551 comprised in Computer Freehold Register 307734 at 12 Koppens Road, Tamahere into 6 allotments, where Lot 1 is proposed at 2,918m², Lot 2 at 3,042m^2, Lot 3 at 2,793m^2, Lot 4 at 6,053m^2 (3,907m^2 Net), Lot 5 at 2,898m^2, Lot 6 at 2,998m^2 and Lot 7 (Access Lot to vest) 452m^2, with a total site area of approximately 2.1154 hectares.

The application was heard at Ngaruawahia on 12 December 2017.

The resource consent sought is **REFUSED**. The reasons are set out below.

Hearing Commissioner:	Mr David Hill
Application numbers:	SUB0289/17
Applicant:	Grattan Investments Limited
Site addresses:	12 Koppens Road, Tamahere
Legal descriptions:	Lot 2 DP 376523, and Lot 1-2 DPS 69326, SO59669 and SO 60551
Site area:	2.1154 ha
Zoning:	Country Living
Lodgement:	7 June 2017
Application on hold:	26 June 2017

S92 Request:	10 August 2017
S92 information:	29 August 2017
Limited notification:	11 September 2017
Submissions closed:	6 October 2017
Hearing commenced:	12 December 2017
Hearing closed:	14 December 2017
Appearances:	The Applicant: Mr Wayne Grattan (Applicant). Mr Tim Faulkner (Planner – Blue Wallace Surveyors) Ms Rebecca Ryder (Landscape Architect – Boffa Miskell) Mr Tony Tynan (Surveyor - Blue Wallace Surveyors) Submitters: Mr Arnold Koppens (and Mr Dallas Fisher) Ms Gail Jones Tabled: Ms Lana Gooderham – NZ Transport Agency Council: Ms Bridget Parham (Counsel) Mr Jason Wright (Reporting Planner) Ms Katherine Overwater (Senior Policy Planner) Mr Michael Graham (Landscape Architect) Ms Lynette Wainwright (Committee Secretary) Various other staff in attendance but not appearing.

Summary Decision:

1. Pursuant to section 104 and 104B of the Resource Management Act 1991, the discretionary activity subdivision consent application is refused.

Introduction

2. This decision is made on behalf of the Waikato District Council (Council) by Independent Hearing Commissioner Mr David Hill appointed and acting under delegated authority under sections 34 and 34A of the Resource Management Act 1991 (the RMA).

3. This decision contains the findings from my deliberation on the application for resource consent and has been prepared in accordance with section 113 of the RMA.

4. The application was limited notified to six identified owners/occupiers of adjacent properties on 11 September 2017, with submissions closing on 6 October 2017. Three submissions were received in time – all in opposition.

5. The s42A report notes that the Tamahere Community Committee lodged a letter of objection to the application but, not being an identified affected party for the purpose of limited notification, that letter of objection was not accepted. The Chair of that Committee was subsequently called as a witness by submitter, Mr Koppens. The appearance was challenged by the applicant. The commissioner ruled orally that appearance as a witness was permitted to the extent that any representation made was within the scope of the lawful submitter – and that weight would be apportioned accordingly.

6. No late submissions were received.

7. The NZ Transport Agency has provided its written approval subject to an agreement on the provision of an acoustic bund along the site boundary with SH1. That was accepted by the applicant and by Council through the s42A hearing report. Accordingly no further consideration has been given to that matter.

8. The s42A RMA hearing report was prepared by Mr Jason Wright. Mr Wright's overall recommendation was to decline the subdivision consent sought as he considered (in summary) that the effect on the environment of allowing the activity would undermine the broader 5,000m^2 lot size policy architecture for the Tamahere Country Living zone and create an adverse precedent effect. His report was informed by technical reviews from Mr Victor Wong (land development engineering) and Mr Michael Graham (visual and landscape effects), both of whom indicated conditional support for granting consent subject to a range of proposed conditions.

9. Mr Wright provided a supplementary written statement in opening and a detailed oral response.

10. The matter was heard in Ngaruawahia on 12 December 2017, and closed on 14 December 2017.

Site description

11. The history of the previous Icepak Cool Stores site is well known locally and recorded in the application documentation, the s42A report and in evidence and submissions.

12. As described in the s42A report, State Highway 1 (Waikato Expressway) is located along the north-eastern property boundary, Devine Road along part of the eastern boundary and Koppens Road along the south-western boundary.

13. The site topography is relatively flat and vacant of development. The site was previously used for a commercial activity (cold storage operation) with large areas of hard surface concrete still present across the entire site. Existing vegetation is scattered along the road boundary of Koppens Road and the right-of-way access from Devine Road.

14. Four existing entrances access the site, two from Koppens Road and two (including a right-of-way) from Devine Road.

15. Land uses in the surrounding area are a mix of lifestyle residential use, with a commercial wedding and conference venue (Gail's of Tamahere) to the north-west of

the site and to the south, Tamahere Model Country School, an early childhood facility, community hall and church.

16. The s42A report notes[1] that there are a number of legal interests registered on the Computer Freehold Register (CFR), none of which materially restrict the proposed subdivision.

17. While the site has an underlying Country Living zoning, a commercial zone overlay had been placed over the site so that the Icepak activity could operate. I was told that the commercial overlay was removed by agreement on or about 2014 following clearance of remaining buildings and debris left from the 2008 fire that destroyed the cool store, and the site reverted to its underlying zoning. That is the present situation.

Summary of proposal and activity status

18. In short, the proposal is to subdivide this country living zoned site into 6 parcels and enable each to develop a single residential dwelling, with a consent notice restriction on dependent person's dwellings (which are otherwise permitted, subject to standards, in the zone). As explained by Ms Ryder[2], the applicant's landscape architect, this latter ensures (in her opinion) an appropriate provision of open space between the dwellings, commensurate with the smaller than minimum lot sizes and the objectives of the zone.

19. Resource consent is required under the operative Waikato District Plan – Waikato Section 2013 as follows:

- Rule 27.50D – Building setback from the Tamahere Commercial Area B is infringed because Lots 1, 2, 5 and 6 have setbacks of less than 100m. This is a restricted discretionary activity.
- Rule 25.62 – Minimum net site area is infringed because all lots are less than 5,000m^2. This is a discretionary activity.
- Rule 27.65 – Road access is infringed because the access to the right-of-way and Lot 4, as well as Lots 1 and 2 and Lot 3 with the adjacent property, have less than the required minimum separation distance, and the development generates additional traffic movements in excess of those meeting the controlled activity standard. This is a restricted discretionary activity.
- Rule 27.66 – Building platform and shape factor is infringed by Lot 1, and Lots 4 and 5. This is a discretionary activity.

20. The application has been reviewed for compliance with Regulation 5(5) of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NES). The relevant experts accepted that while contaminant levels on site are above background levels, soil contamination levels do not exceed the applicable rural-residential standards in the NES, hence present levels of soil chemicals at the site are highly unlikely to pose a health risk to future occupants of the site.

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[1] S42A report, para 1.4.

[2] Ryder, Statement of evidence, para 5.3

21. Overall the application is to be assessed as a discretionary activity. That activity status was not in dispute.

Procedural and other matters

22. No procedural matters were raised for consideration.

23. However, Ms Parham (Counsel for Council) did step through the current caselaw relating to the question as to whether and/or the extent to which Part 2 RMA is pertinent (a matter presently awaiting a ruling from the Court of Appeal arising from the 2016 Environment Court decision in *R J Davidson Family Trust v Marlborough District Council*). Having rehearsed the recent caselaw, and while awaiting the Court of Appeal ruling, Ms Parham concluded that, in her submission, it would be prudent to "cover both bases", being to have regard to Part 2 in the s104 consideration, as well as separately applying the Part 2 overall broad judgement. She observed that, in this instance, the outcome did not appear to be determined by the approach taken.

24. For the record I note that a letter from NZTA was tabled in support of the application subject to an agreement relating to an acoustic bund along the boundary between the site and SH1.

Relevant statutory provisions considered

25. In accordance with section 104 of the RMA I have had regard to the relevant statutory provisions, including the relevant sections of Part 2, sections 104 and 104B.

Relevant standards, policy statements and plan provisions considered

26. In accordance with section 104(1)(b)(i)-(vi) of the RMA, I have had regard to the relevant policy statement and plan provisions of the documents noted below – the relevant provisions of which are assessed, in part, in section 7 of the application AEE, paragraphs 40-45 of Mr Faulkner's evidence, and more particularly and thoroughly in section 7.0 of Mr Wright's s42A hearing report. The identification of these provisions was largely agreed. Having reviewed those provisions and particularly the objectives and policies, I confirm and adopt them. Therefore, there is no need to repeat the details in this decision. Those provisions are contained in the following statutory documents:

    - Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011;
    - Waikato Regional Policy Statement 2016;
    - Waikato Regional Plan (WRP) 2007;
    - Waikato District Plan – Waikato Section 2013;

27. No other national policy statement or environmental standard was identified as being relevant to this consent and I accept that to be the case.

28. I do not consider any other matter to be relevant and reasonably necessary to determine the application in accordance with section 104(1)(c) of the RMA. While Mr

Koppens' witness Mr Fisher made reference to a local Tamahere Community Plan[3] prepared by the Tamahere Community Committee, that Plan, despite its broad genesis, is not a statutory document and does not add materially to the relevant provisions of the district plan.

Permitted Baseline / Existing Environment

29. There is no particularly relevant permitted baseline, including known unimplemented resource consents, which might have a bearing on this matter.

Summary of evidence / representations / submissions heard

30. The s42A Hearing report by Council's reporting officer, Mr Wright, was circulated prior to the hearing and taken as read. That report was accompanied by technical reports as noted in paragraph 8 above.

31. The evidence presented at the hearing responded to the particular issues and concerns identified in the s42A recommendation report and submissions.

32. The evidence, all of which had been pre-circulated, presented by the applicant's witnesses at the hearing are summarised below:

    Mr Wayne Grattan, owner / director of Grattan Investments Limited, provided background to his involvement with the site for the past 15 years and his ownership for the past 2 years.

    Mr Tim Faulkner, a consultant planner with Blue Wallace surveyors Limited, gave planning evidence in support of granting the application. Mr Faulkner particularly disputed the precedent argument against granting consent, contending that the site was sufficiently unique in its circumstances that such could not arise and, relying on Ms Ryder's landscape and visual evidence, that the subdivision outcome was not substantially inconsistent with the objectives sought from the Tamahere Country Living zone.

    Ms Rebecca Ryder, a registered Landscape Architect and Senior Principal with Boffa Miskell Limited, gave evidence on vegetation, visual effects and landscape character. She was in substantial agreement with Council's reciprocal expert, Mr Michael Graham. Based on her perception of the zone being more akin to a large lot residential, and in the context of SH1 and the Village itself, Ms Ryder supported the subdivision design. Ms Ryder had helpfully prepared a comparative concept plan analysis of a complying 4 and the 6 lot subdivision.

    Mr Tony Tynan, a registered Surveyor, attended to answer questions.

33. The following submitters made representations:

    Mr Arnold Koppens, 7 Koppens Road; and

    Ms Gail Jones, 28A Devine Road.

[3] Tamahere – The Country Lifestyle Community – Community Plan 2011-2021

34. Submitters elaborated on their concerns, particularly about the potential effect on the integrity of the Country Living Zone and perceived errors in the application documentation and evidence and, in Ms Jones' case, potential effects on her commercial access.

Principal issues in contention

35. In terms of section 104(1)(a) of the RMA, the actual and potential effects of allowing the activity on the environment, I note that there was broad agreement that infrastructural and related effects were not significant and could be managed – regardless of whether the subdivision was for 4 or for 6 lots. I accept that conclusion and therefore do not discuss those matters further and refer to the relevant discussion in the s42A report in section 6.1 and companion reports.

36. The principal matter in contention was the effect that granting the 6 lots, each of a net size materially less than the minimum 5,000m^2 required in this zone, could have:

    (a) in terms of the perceived density (and corresponding amenity) of the specific subdivision proposed for those surrounding properties within the zone; and /or

    (b) on the coherence of the zone itself in terms of the potential for significant numbers of applications for further subdivision below 5,000m^2.

37. These issues are discussed in the following section.

Neighbouring amenity

38. Evidence on visual / neighbourhood amenity was given principally by Ms Ryder for the applicant and Mr Graham for Council. There was a large measure of agreement between those two landscape and visual effect experts.

39. Among other things Ms Ryder had reviewed Grattan Investment's landscape and visual assessment and design, and prepared a Landscape Mitigation Plan and provided amendments to the design controls. She considered that these resulted in a subdivision that was consistent with what she described[4] as "*a transitioning landscape character from rural residential to effectively large lot residential*". She gave her opinion that lot size was not the driving factor in the generation of landscape and visual effects but, rather, design elements such as restrictions on the location and footprint of building to maintain the characteristic balance of open space; controls on building heath, colours and fencing; and appropriately complementary and integrated landscape planting. In other words, as I understood her evidence, it was the general distribution of buildings across the zone landscape that provided the defining context – noting that there were a variety of large lot sizes within the zone from less than 5,000m^2 to more than 6,000m^2. Furthermore, the viewing catchment for this particular subdivision was quite restricted – and particularly because of the proximity of SH1 along the north-eastern boundary.

40. Ms Ryder had also prepared[5], subject to a s92 RMA request from Council, comparative 4-lot and 6-lot subdivision plans, with indicative aerial oblique views, demonstrating to

[4] Ryder, Statement of evidence, para 4.2

[5] Ryder, Statement of evidence, Annexure 3 – Comparative Subdivision Analysis Diagrams

her satisfaction that the magnitude of change on the landscape character was not dependent upon lot size alone. Of particular note was her observation that a complying subdivision enabled unrestricted building placement and location – which, I understood, meant that a dwelling could be particularly dominant from a public viewing point, reducing one's perception of openness.

41. While Mr Graham had some relatively minor disagreements with Ms Ryder's analysis, these did not appear to be significant differences. He concluded that consent could be granted with a suite of conditions, that he proposed[6].

Finding

42. In the immediate context, a 6-lot subdivision and associated, albeit restricted, residential development could be located in this part of the Tamahere Country Living zone with relatively minor adverse visual and landscape effect over and above that generated by a fully permitted, complying 4-lot subdivision. In that regard the context of SH1 is significant.

Precedent and zone integrity

43. Council's main concern with this application (as was that of submitter Mr Koppens and his witness, Mr Fisher) related to the potential precedent effect that could be created for the rest of the zone if this application is granted.

44. The Court's have accepted that a precedent effect can result from a discretionary activity application – although such would not normally be the case because every application is assessed on its merits and typically has unique characteristics that are distinguishable. This latter point was detailed in reply by Mr Faulkner.

45. The precedent of concern arises, I was told, because the specific zone control (minimum lot size of 5,000m^2) has been in place for some 20 years, been confirmed through various plan reviews / changes, and is widely supported by the community. I was also advised that under the current plan review – not yet notified – that policy position is unchanged. I was also told that over that period of time only 3 subdivisions of a lesser lot size have been granted – and those were marginally less than the required 5,000m^2 (unlike the present application, all of which lots are significantly less than 5,000m^2).

46. In evidence I was also presented with maps by both Mr Wright and Ms Ryder showing parcel size distribution across the zone, which confirm the preponderance of lots of 5,000m^2 and larger - and including a significant number of lots of 5,000m^2 – 1ha and 1ha+ that are potentially subdivisible to a lesser lot size if that threshold of 5,000m^2 is changed - and the relative lack of lots of less than 5,000m^2.

47. No calculation of the number of additional lots that might thereby be created under this precedent scenario was provided – or the commercial viability of so doing - but the maps were persuasive of the potential, which would clearly result in a significant change to the character of this zone.

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[6] s42A Hearing report, Appendix C: Landscape and Visual Assessment Peer Review Report

48. I note that the applicant's witnesses repeatedly referred to a comparison with the large lot residential zone (and countryside living zones in adjacent planning jurisdictions). Neither comparison is helpful or relevant when the extant zone parameters and standards are clear, not in dispute, and not apparently intended for change. I therefore discuss those cross-referenced matters no further.

49. Mr Faulkner noted that lots below the minimum lot size are a discretionary activity under the Plan, not a non-complying activity. Had the Plan wished to restrict the lot size further, he suggested, it could have used that latter activity status with a further stated threshold – or proposed a prohibited activity status. While Mr Faulkner is correct in that proposition, one is not entitled to conclude that just because those status options are not used, reduced lots of whatever size are permissible. Clearly the objectives and policies then come into play – and these do not appear to support that proposition.

50. Is there any evidence in support of the precedent contention? Ms Overwater[7] produced a short statement referencing anecdotal evidence from the District Plan Review consultation Tamahere Open Day in which she participated. She notes that a number of landowners expressed clear interest in subdivision below the 5,000m^2 threshold, concluding that the risk is real – and not only for the Tamahere Country Living zone.

51. While that evidence is very soft evidence indeed, there is no reason to disbelieve it. What can be taken from that evidence is the fact that there is a statutory planning process in train (notification being imminent) in which the current policy direction can be properly aired and tested.

52. In passing I note that in answer to a question from the Commissioner, Mr Grattan confirmed that a 4-lot subdivision was commercially viable, albeit that the bottom line cost for site remediation was in the stated order of $250,000. Clearly, however, the project's commercial viability increases proportionately with the number of allotments. As a consequence of that answer, therefore, I am not inclined to attach too much weight to the prospect that without a 6-lot subdivision the site is likely to remain undeveloped for another substantial period of time. A consideration that might otherwise have attracted more significant weight under s104(1)(c) of the RMA as a relevant other matter.

Finding

53. I find that the matter of precedent effect is fairly and reasonably raised and that the appropriate opportunity to revisit the policy matter will shortly be put before the public through the imminent statutory district plan review process. While I note Mr Faulkner's recital, in his formal reply, of reasons why he considers the site unique from a planning point of view, I am not persuaded (as was not Mr Wright[8]) that those are sufficiently certain to avoid consequential applications – which, of course, may be made at any time in any event. Accordingly I consider that there exists a reasonable risk of adverse precedence arising from a grant of consent.

[7] Overwater, Statement of evidence, paras 5-7

[8] Wright, Statement of evidence, paras 11-20

Part 2 RMA

54. No section 6 RMA matters of national importance or section 8 (Treaty of Waitangi principles) were identified as being directly engaged by this application.

55. Of the section 7 other matters to which particular regard is to be had, I consider the following relevant:

    (b) the efficient use and development of ... physical resources;

    (c) the maintenance and enhancement of amenity values; and

    (f) maintenance and enhancement of the quality of the environment.

56. Those matters were rehearsed in the respective documentation and evidence and regard to them has been had in this decision. I note that those matters are also engaged in the precedence argument.

57. When put into the wider context of the Part 2 sustainable management purpose of the RMA and the function of territorial authorities, it is difficult to see how allowing a move away from the established zone subdivision pattern, in the absence of clear and compelling reasons of uniqueness, would be consistent with the integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district as is required under section 31 RMA.

58. Specifically I find that the application will not promote the sustainable management purpose of the RMA, in particular as that is expressed through the operative District Plan provisions and for the Country Living zone, and therefore cannot be granted. The application is declined.

59. For the record I note that had the applicant included as an alternative a 4-lot subdivision as shown in Ms Ryder's evidence then, on the evidence before me, I could have granted that application. However, that option was not advanced.

Decision

60. In exercising delegated authority under sections 34 and 34A of the RMA and having regard to the foregoing matters, sections 104, 104B and Part 2 of the RMA, the subdivision application by Grattan Investments Limited for a 6-lot residential subdivision on the 2.115 hectare site at 12 Koppens Road, Tamahere (Lot 2 DP 376523, Lot 1-2 DPS 69326, SO59669 and SO 60551) is refused for the reasons discussed in this Decision and as summarised below.

Summary reasons for the decision

61. After having regard to the actual and potential effects on the environment of allowing the proposed activity, and taking into account the relevant statutory provisions, I find that consent for the proposed activities should be refused for the reasons discussed throughout this decision and, in summary, because:

(a) the proposed activity is not consistent with the provisions of the relevant statutory document(s), and will not avoid, remedy or mitigate the adverse precedent effects thereby created;

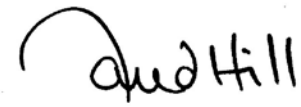
(b) granting consent would not be consistent with the sustainable management purpose and principles of Part 2 of the RMA or Council's integrated management functions under section 30 RMA;

(c) granting consent would be more likely than not to lead to other subdivision applications for lots of less than 5,000m^2, which the decision maker would have difficulty not granting since there is not sufficient uniqueness in the present application such that a credible precedent is not created;

(d) refusing consent better meets the purpose of the zone and avoids the potential to undermine those provisions; and

(e) the District Plan is currently under review (scheduled for notification in 2018) and, while Council advised that the policy direction for this zone is not intended to change, that is the appropriate process for determining whether it should and, if so, how and to what extent.

62. Overall I find that refusing consent for the application is appropriate.



David Hill

Independent Hearings Commissioner

Date: 11January 2018