

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2022] NZEnvC 167

IN THE MATTER of the Resource Management Act 1991

AND an application for declarations under
s 311 of the Act

BETWEEN MTP LIMITED

(ENV-2021-CHC-88)

Applicant

AND WESTLAND DISTRICT COUNCIL

Respondent

Court: Environment Judge J E Borthwick
Commissioner R M Dunlop

Hearing: 11 August 2022

Appearances: S Eveleigh for MTP Limited
R Wolt for Westland District Council

Last case event: 11 August 2022

Date of Decision: 2 September 2022

Date of Issue: 2 September 2022

DECISION OF THE ENVIRONMENT COURT

A: Under section 313(a) of the Resource Management Act 1991, the
application is granted insofar as the declaration sought is made at [65].



B: Costs are reserved and a timetable set.

REASONS

Introduction

[1] Westland District Council granted subdivision consent and a land use consent to MTP Limited for the subdivision and development of land for rural-residential purposes at Haast-Jackson Bay Road, Okuru.

[2] While the subdivision consent has been given effect to, to date only one house has been built. The District Council contends that the land use consent has lapsed and that a new resource consent is required before any more houses can be built.

[3] This proceeding concerns an application by MTP Ltd for a declaration that land use consent 140062 has been given effect to and has not lapsed under s 125 of the Resource Management Act 1991.

Background

[4] On 26 August 2014, MTP Ltd applied for resource consent to authorise the subdivision of land. The proposal included 18 rural-residential lifestyle lots, a balance lot between the development and the Okuru River/Ocean and a further lot to be held as a private road. In the same application MTP sought land use consent for the right to construct future residential dwellings on the subject site.¹

[5] On 6 October 2014, Westland District Council granted subdivision consent 140061 and a single land use consent 140062 covering the subdivided lots.

¹ MTP legal submissions dated 17 December 2022 at [2]-[7]. WDC legal submissions dated 1 February 2022 at [3].

[6] The subdivision consent authorised MTP:²

[t]o subdivide Lots 3 & 4 DP 3034 at Haast-Jackson Bay Road into twenty allotments at Haast-Jackson Bay Road, Okuru. 18 allotments, between 1004 and 3625m² in area, to be used for residential purposes, an access lot and a balance lot as submitted in an application and plans received 26 August 2014;

[7] The land use consent authorised MTP:³

[t]o use land, described as Lots 1 – 18 of the subdivision of Lots 3 & 4 DP 3034, for residential purposes, including the erection of a dwelling and ancillary buildings within 150 metres of the MHWS, as submitted in the application received 26th August 2014.

[8] The subdivision consent is subject to condition 16 that states:

Pursuant to Section 125 of the Resource Management Act 1991, this resource consent will lapse on 6th October 2019 if the consent is not exercised before the end of this period. However, this period can be extended under the Resource Management Act 1991 upon application to the Consent Authority.

[9] The lapsing condition on the land use consent (condition 7) is given in identical terms. The effect of the conditions being that both consents would lapse on 6 October 2019, some five years after the decision to grant consent.

[10] As MTP did not support its application by proposing conditions of consent, we presume therefore that the District Council is author of the same.⁴

The law

[11] At issue is whether the land use consent has been ‘given effect to’ under s 125(1A)(a) of the Resource Management Act 1991 (‘RMA’ or ‘the Act’). The

² Resource consent 140061.

³ Resource consent 140062.

⁴ Transcript (Giddens) at 23.

meaning of the words ‘given effect to’ has been considered by the courts on a number of occasions. The test of whether a consent has been given effect to under s 125(1A)(a) is a standard, the application of which depends very much upon the facts to which it is being applied in any given case and on which reasonable people can differ.⁵

[12] The Environment Court in *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council* summarised the principles that apply when considering whether consent has been given effect to:⁶

- (a) The statutory test requires a factual enquiry. It is not an evaluation of whether a consent should or should not lapse: *184 [Maraetai] Road Ltd*.⁷
- (b) “Given effect to” does not necessarily require that the consented project be fully completed or operational. The question is one of degree and is dependent on the factual context. The High Court decision in *Goldfinch*⁸ indicates that the answers to the following questions may help inform the position:
 - (i) what is the nature of the activity authorised by the consent?
 - (ii) why has it not been completed?
 - (iii) why has it been discontinued?
 - (iv) was discontinuance voluntary and justified?
- (c) The mere fact that there has been no physical works undertaken under the authority of the consent is not necessarily fatal. Rather, the factual matrix has to be examined. The purpose and substance of the resource consent(s) in issue (including conditions), are central to that matrix. See both the Environment Court⁹ and High Court¹⁰ decisions in *Biodiversity Defence*

⁵ WDC legal submissions at [11], referring to *G.U.S Properties v the Chairman, Councillors and Inhabitants of the Borough of Blenheim*, NZSC Christchurch, M394/75, 24 May 1976, and *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZHC 3283.

⁶ *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council*, [2018] NZEnvC 61 at [17].

⁷ *Auckland Council v 184 Maraetai Road Ltd* [2015] NZHC 2254, at [1]-[3], [23]-[30], [2015] NZRMA 490.

⁸ *Goldfinch v Auckland City Council* [1997] NZRMA 117 at [[17(b)]].

⁹ *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZEnvC 195 at [1]-[3], [56], [62]-[63], [67]-[73], [110], [114]-[121].

¹⁰ *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZHC 3283, (2013) 17 ELRNZ 337, at [1]-[4], [18]-[19], [61], [64], [78], [82]-[89].

Society;

[13] We adopt this summary of the relevant legal principles that apply when considering whether a consent has lapsed under s 125. Submitting that there are no analogous cases to this proceeding, the parties have referred to other cases to illustrate the application of the principles in different factual settings. We have had regard to all the cases cited but the legal principles aside have found them to be of limited assistance to the facts of this case.

The facts

[14] The court was presented with extensive evidence, much of which the parties agree is not relevant to any matter in issue.¹¹ We do not essay the evidence filed, but simply note the relevant facts, most of which are agreed.

[15] We do so by responding to the questions posed by the High Court in *Goldfinch* next.

The nature of the activity authorised by the consents

[16] The subdivision consent included conditions relating to the future residential use of the 18 rural-residential lots, including controls on future built form and a limit that no building be erected beyond a line 60m north of the southern boundary to be secured on an ongoing basis by s 221 consent notices. Consent notice type conditions are not unusual and are contemplated by s 221 of the Act. A further condition requires dwellings have a minimum floor level height of 0.3m above finished ground level.

[17] The land use consent authorises the use of the 18 rural-residential lots for residential purposes, including the erection of a dwelling and ancillary buildings on

¹¹ Joint memorandum of counsel dated 3 May 2022.

each lot within 150 metres of Mean High Water Springs (‘MHWS’).¹²

[18] Together these consents authorise a rural-residential development.

Works undertaken to give effect to the consents

[19] All works authorised and required by the subdivision consent are completed and the parties accept that the subdivision consent has been given effect to.¹³ The subdivision has changed the character of the site and the surrounding area from rural to rural-residential, with the residential appearance intensifying on the site’s boundary with the settlement of Okuru, which is zoned Coastal Settlement in the District Plan.¹⁴ We note, MTP maintains the subdivision landscaping in readiness for residential development.¹⁵

[20] Of the 18 dwellings authorised by the land use consent, one has been constructed.¹⁶ The construction of the residential building at 13 Fox Moth Drive has occurred in accordance with and reliance on the land use consent, and in accordance also with the consent notices arising from the subdivision consent.¹⁷ This dwelling is occupied, and the lawful use of the property for residential purposes relies on the land use consent.

[21] Sixteen of the 18 titles issued are now owned by third parties, with MTP retaining ownership of two titles.¹⁸ Building consents or concept drawings have

¹² Johnson affidavit affirmed 22 September 2022 at [48] identifies that by Westland District Plan Table 5.7(g): Rural Zone buildings and structures are required to be a minimum of 150m from MHWS as permitted and controlled activities with no limit for discretionary activities.

¹³ Johnson affidavit affirmed 22 September 2022 at [76].

¹⁴ Transcript (Giddens) at 29.

¹⁵ MTP legal submissions at [46].

¹⁶ 13 Fox Moth Drive.

¹⁷ MTP legal submissions at [6].

¹⁸ Transcript (Giddens) at 14.

been prepared for 1, 9 and 31 Fox Moth Drive,¹⁹ together with Lot 8.²⁰

[22] From time to time informal occupation of the newly created lots has been observed with caravans parked on certain lots.²¹

[23] An airstrip is maintained onsite and is used by the directors of MTP and owners of the new lots.²²

[24] MTP did not make an application to extend the lapse date for the land use consent prior to the 6 October 2019 lapse date.²³ Subsequently, the District Council notified MTP, and third-party landowners, that the land use consent has lapsed. Since the lapse date, and in furtherance of the District Council's stance that the land use consent has indeed lapsed, an application seeking land use consent to construct three dwellings has been lodged with the District Council.²⁴

Discontinuance

[25] MTP submits that at no time has the consent been abandoned or the development activity discontinued. Rather, the fact that the land use has not been completed simply reflects the time it has taken to progress through the process of subdivision, marketing and sale of lots, preparation, and approval of building plans by third party landowners, and construction.²⁵

The issues

[26] The submissions identify three key issues:

¹⁹ Giddens affidavit affirmed 28 July 2021 at [45] and [47].

²⁰ Giddens affidavit affirmed 4 August 2022 at [3].

²¹ Transcript (Giddens) at 27.

²² Transcript (Giddens) at 27.

²³ Section 125(1A)(b) RMA is not at issue.

²⁴ Transcript (Johnson) at 49.

²⁵ MTP legal submissions at [45]-[46].

- (a) are the consents interrelated?
 - (i) the salience of this sub-issue concerns whether works carried out under the subdivision consent may be attributed to giving effect to the land use consent.
- (b) subject to the above, has the consent been given effect to?
- (c) as a matter of construction, pursuant to the consent conditions:
 - (i) when does the subdivision consent lapse?
 - (ii) when does the land use consent lapse?

Summary of submissions

[27] The District Council considers the subdivision consent and land use consent are separate and discrete consents that operate sequentially and independently of the other.²⁶ MTP, agreeing that the consents are to operate in succession,²⁷ submits that the conditions of consents overlap to such a degree that they form an interwoven suite for the purposes of determining the question of lapse under s 125(1A)(a). The two consents are a suite that together provide for the activity of rural residential development.²⁸

MTP submissions

[28] MTP submits the two consents were sought for the single purpose of establishing a rural residential development on the site. This singular purpose is clear from the framing of the application, the joint processing of the application by the District Council, the single decision issued, the description of the activities and the conditions of consent as granted.²⁹ In particular, MTP notes that the conditions of both consents are not strictly limited to the activity authorised by each individual consent. For example, condition 1 of both consents requires that

²⁶ WDC legal submissions at -[57]-[58].

²⁷ MTP legal submissions at [22] and [25].

²⁸ MTP legal submissions at [29].

²⁹ MTP legal submissions at [29]-[30].

the subdivision and land use to proceed as described in the application submitted for consent and its associated plans.³⁰ Counsel for MTP further submits that consideration of the works undertaken pursuant to the subdivision consent is also relevant to the factual enquiry as regards the land use consent. Treating applications for subdivision and land use as a single proposal is consistent with the general principle that all consents required for a project should be applied for together so that the effects of any one proposal can be comprehensively considered.³¹

[29] MTP's planner, Mr Giddens, gave evidence that the subdivision is inextricably linked to a particular development outcome, which is secured primarily through the subdivision consent notices, not the conditions of the land use consent.³² The consented land use therefore depends upon the subdivision having first been completed. For that reason also, MTP submits the completion of the subdivision is relevant to the assessment of what has been done to give effect to the land use consent.³³

District Council's submissions

[30] On the other hand, the District Council argues MTP's submission as to the development's single purpose is 'somewhat contrived' observing that the reasons the consents were sought could equally be viewed as being for the dual purpose of enabling MTP to first subdivide the land so that the subdivided lots could be sold with a right to build, and then enabling the purchasers of the subdivided lot to erect a dwelling,³⁴ and indeed this is what happened. Although the consents are related and addressed by a single application, the subdivision and land use consents were treated by the District Council as separate activities. Each activity was issued a separate consent with its own decision number and was granted subject to

³⁰ MTP legal submissions at [31]-[32].

³¹ MTP reply submissions at [8].

³² Giddens affidavit affirmed 28 July 2021 at [37].

³³ MTP legal submissions at [20] and *AFFCO v Far North District Council* A6/94 1B ELRNZ 101.

³⁴ WDC legal submissions at [35].

separate conditions.³⁵

[31] The District Council's planning officer, Ms Johnson, explained that it is common practice for proposals of this nature to be applied for and processed together. This is both efficient and appropriate because it avoids having to apply for land use consents at a later date in circumstances where residential use is otherwise already anticipated.

[32] In this instance, Ms Johnson notes, the decision addresses the two consents and their respective conditions and includes a lapse date on both.³⁶ The District Council submits the fact that the subdivision consent and land use consent are subject to separate conditions, including separate lapsing conditions, is material to the matters to hand whereas, the fact that the consents were sought in a single application document and the decision issued in one document are not.³⁷

[33] While the two consents are clearly related, the subdivision consent and land use consent are separate consents authorising separate activities; completion of the subdivision consent is not, therefore, relevant to whether the land use consent has been given effect to. The District Council submits that the land use consent should be viewed in isolation of the subdivision consent, and the works undertaken under the land use consent assessed against the terms of that consent and its purpose and substance.³⁸

[34] Having compared both sets of conditions, the District Council concludes that there is no substantial overlap between the matters addressed by, and the requirements of, the subdivision consent and land use consent. To the contrary, the requirements of each consent are separate and distinct. This view, the District Council submits, is supported and reinforced by the fact that they have separate

³⁵ WDC legal submissions at [36], [42].

³⁶ Johnson affidavit affirmed 22 September 2021 at [52]-[57].

³⁷ WDC legal submissions at [42].

³⁸ WDC legal submissions at [6].

lapse date conditions.³⁹

[35] We set out next the provisions from the RMA that are relevant to the parties' submissions on whether the activities for which consent is sought are interrelated.

Provisions relevant to the consents being interrelated

[36] The term 'resource consent' has the meaning set out in s 87 of the Act, and includes all conditions to which the consent is subject.⁴⁰

[37] Section 87 identifies five types of resource consents and defines them as follows (relevantly):

In this Act, the term **resource consent** means any of the following:

- (a) a consent to do something that otherwise would contravene section 9 or section 13 (in this Act called a **land use consent**);
- (b) a consent to do something that otherwise would contravene section 11 (in this Act called a **subdivision consent**);

[38] Pursuant to s 88(1) and (2), a person may apply to the relevant consent authority for a resource consent and when they do, the application must:

- (a) be made in the prescribed form and manner; and
- (b) include the information relating to the activity, including an assessment of the activity's effects on the environment, that is required by Schedule 4.

...

[39] The prescribed form,⁴¹ Form 9, requires an applicant for resource consent is to:

³⁹ WDC legal submissions at [50].

⁴⁰ RMA, s 2.

⁴¹ Resource Management (Forms, Fees, and Procedure) Regulations 2003.

- (a) identify the type of resource consent sought;
- (b) describe the proposed activity;
- (c) locate the site at which the proposed activity is to occur;
- (d) confirm whether there are other activities that are part of the **proposal** to which the application for resource consent relates;
- (e) confirm whether additional resource consents are needed for the proposal and confirm the status of those additional consents (if required); and
- (f) provide an assessment of the proposed activity's effects on the environment.

[our emphasis]

[40] The prescribed form introduces the concept of a 'proposal': a proposal may include one or more activities in relation to which resource consent(s) may be required in order to carry out. A proposal can include activities that are permitted under a plan.

[41] If the proposal concerns more than one activity, the additional activities need to be identified and, if resource consent is required, this is to be addressed in the application.⁴²

[42] With these provisions in mind, we have no difficulty in accepting the proposition that the two consents are interrelated and pertain to a single proposal.

[43] An application may be sought in relation to one or more activities (including different classes of activities). A consent authority will usually decide whether it is appropriate to grant or refuse the application rather than deciding whether it is appropriate to allow any one of the individual activities to occur; see *Marlborough District Council v Zindia Ltd*.⁴³ This is because consent is sought in relation to a

⁴² The form gives the option of identifying whether the additional resource consents have or have not been applied for.

⁴³ *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765.

proposal and not just those aspects (activities) of the proposal requiring consent.⁴⁴

[44] On this occasion, a single application was filed seeking consent for two activities (subdivision and land use). That the activities for which consent was granted are interrelated is evidenced by the fact that the activities were bundled and decided together and, secondly, by the securing of the future residential use of the subdivided land through consent notices.⁴⁵

Issue: when does the subdivision consent lapse?

[45] Both parties agree that the consents were to operate sequentially. Ordinarily, that would also be our expectation.

[46] The parties agree also that s 125(2) RMA provides when a subdivision consent is given effect to. The section provides:

- (2) For the purposes of this section, a subdivision consent is given effect to when a survey plan in respect of the subdivision has been submitted to the territorial authority under section 223, but shall thereafter lapse if the survey plan is not deposited in accordance with section 224.

[47] Thus, a subdivision consent is given effect to under s 125(2) when a survey plan is submitted to the territorial authority for approval under s 223.⁴⁶ Under condition 16, MTP had until 6 October 2019 to give effect to the subdivision consent (5 years from date of grant).

[48] Pursuant to s 224 an approved survey plan may be deposited with the Registrar-General of Land together with a certificate from the territorial authority stating whether all (or any) of the conditions of subdivision have been complied

⁴⁴ *Zindia* at [47].

⁴⁵ Pursuant to RMA, s 221.

⁴⁶ RMA defines 'survey plan' in s 2 as meaning (for our purposes) a cadastral survey dataset of subdivision of land.

with.⁴⁷ That said, an approved survey plan may only be deposited if less than three years has elapsed since the territorial authority approved the survey plan under s 223.⁴⁸ Combined, if a lapse date is not specified in the subdivision consent (s 125(1)) the Act allows up to eight years for completion of ss 223 and 224 processes.

[49] Our understanding of the relevant sections is at variance with the District Council's planner. Ms Johnson gave evidence that the subdivision consent is considered 'effected' once a s 224 certificate is signed by the territorial authority and new records of titles issued by Land Information New Zealand.⁴⁹ That is incorrect. As noted above, under s 125(2) the subdivision consent is given effect to when the survey plan has been submitted to the territorial authority for its approval under s 223; the subdivision consent is not given effect to upon the depositing of a survey plan with the Registrar-General of Land in accordance with s 224. After the survey plan has been submitted to the territorial authority for approval under s 223, the consent holder had up to three years to deposit the survey plan with the Land Registrar.⁵⁰

[50] If the survey plan has been deposited with the Registrar-General in accordance with s 224, then new records of title may be issued under the Land Transfer Act.

Interpretation of the lapsing conditions

[51] Condition 16 on the subdivision consent is expressed as being 'pursuant to s 125' of the Act. The text of s 125 follows:

⁴⁷ Pursuant to RMA, s 224(c).

⁴⁸ Pursuant to RMA, ss 224(h) and 11(1)(a)(i) or (iii).

⁴⁹ Johnson affidavit affirmed 22 September 2021 at [76].

⁵⁰ For completeness, we note s 224(c)(i)-(iii) deals with what is to occur if consent conditions are not complied with. We have not been told s 224 (c)(i) – (iii) applies in this case.

Lapsing of consents

- (1) A resource consent lapses on the date specified in the consent or, if no date is specified,—
 - (a) 5 years after the date of commencement of the consent, if the consent does not authorise aquaculture activities to be undertaken in the coastal marine area; or
 - (b) 3 years after the date of commencement if the consent does authorise aquaculture activities to be undertaken in the coastal marine area.
- (1A) However, a consent does not lapse under subsection (1) if, before the consent lapses,—
 - (a) the consent is given effect to; or
 - (b) [Not applicable.]
- (1B) [Not applicable.]
- (2) For the purposes of this section, a subdivision consent is given effect to when a survey plan in respect of the subdivision has been submitted to the territorial authority under section 223, but shall thereafter lapse if the survey plan is not deposited in accordance with section 224.

[52] Condition 16 of the subdivision consent states that the consent will lapse on the specified date ‘if it is not exercised at the end of this period’. The parties did not address what the meaning of the phrase ‘if it is not exercised at the end of this period’ may be, but we do not interpret the phrase as reading down or varying the general direction that the condition operates pursuant to s 125 of the Act. Thus, the consent would lapse on 6 October 2019 if the survey plan had not been approved in accordance with s 223.

[53] In common with the subdivision consent, condition 7 of the land use consent is also expressed as being pursuant to s 125. However, by the specified date stated (6 October 2019), any approved survey plan may not have been deposited with the Registrar-General (s 224), or records of title for the new lots created or construction of dwellings completed. There is nothing in the consent application to suggest that the land use would be exercised, and dwellings constructed, prior to new records of titles being created and the lots sold.

[54] We find that the lapsing conditions on the two consents specify timeframes

that run concurrently, not sequentially as the parties may have thought. If this is correct, the lapsing condition on the subdivision consent could frustrate the exercise of the land use consent or negate the consent granted, and such a condition would be unreasonable in law. At the very least, we find, the intended operation of the consent conditions to be inappropriately framed.

[55] The lapsing conditions have challenged both parties. The key submission made by the District Council is that there have been insufficient works done to date to give effect to the land use consent. While the district planner was of the view that in order to give effect to the land use consent, 18 dwellings would need to have been built by the lapsing date,⁵¹ counsel for the District Council was more circumspect and would not be drawn on the question of sufficiency by suggesting a qualifying number of houses. Instead, she submitted, there needed to be something more than substantial progress or effort having been made while admitting to the possibility that something less than every dwelling built would suffice. On this occasion the District Council says that what has been done to date is insufficient to demonstrate that the land use consent has been given effect.⁵²

[56] Given the construction of the consent conditions, we find that what was required to give effect to the land use consent was that it be exercised prior to the lapse date. This is consistent with the wording of condition 7 and results in the condition being applied in a way that does not frustrate the grant. Having regard to the facts set out above, and to the interpretation of the lapsing provisions, we find that the construction of a single dwelling was sufficient to give effect to the land use consent. The fact that the subdivision was given effect to prior to 6 October 2019 is immaterial to the interpretation of the law or to construction of the lapsing conditions.

[57] We do not consider this case as setting a precedent (being a concern of the

⁵¹ Transcript (Johnson) at 61.

⁵² Transcript (Wolt) at 90-94, 101-102.

District Council) as the decision turns on the construction of consent conditions.

Natural hazards

[58] While it is not necessary to do so for the disposition of this proceeding, we briefly address the concerns raised in relation to natural hazards and their relevance to the matters in issue. Our comments are *obiter dicta*.

[59] As it is brief, we set out the District Council's decision on the application for resource consent in full:⁵³

The Consent Authority accepts that the conditions imposed on the subdivision and associated land use will adequately mitigate the adverse environmental effects. The Council has considered the existing modified nature of the site, and its location immediately adjoining the Okuru settlement. **The existing environment of unimplemented subdivision and land use consents, along with consents issued from the West Coast Regional Council for a larger scale development and protection works on site has been considered as part of this decision.** It is considered that subject to the conditions imposed, the subdivision and land use will not be contrary to the objectives and policies of the Westland District Plan and the threshold tests for non-complying activities has therefore been met.

The Consent Authority has considered the application under the relevant provisions of the Westland District Plan, including the objectives and policies relating to infrastructure and services, the Maori perspective, the natural environment, the land resource, landscape, the coastal environment, natural hazards, heritage and amenity. Consideration has also been given to the relative sections of the Resource Management Act 1991, the New Zealand Coastal Policy Statement and the West Coast Regional Council Policy Statement. This proposal has not been found to be inconsistent with any matters in these documents.

[emphasis added]

[60] We note any reports that may have been prepared by the District Council

⁵³ Giddens affidavit affirmed 28 July 2021, Appendix C: Decision granting resource consents.

in relation to processing the application for resource consent could not be found and none may have been prepared.⁵⁴

[61] The bold text above, is to highlight that the decision to grant consent may have proceeded from an error of fact and/or law. An error of law may have been made if the District Council accepted the application's treatment of a proposed extension to an existing rock protection wall as being part of the permitted baseline⁵⁵ or as part of the existing environment.⁵⁶ Factual errors may have been made if the District Council, in deciding to grant consent, had accepted a statement made in the application that technical evidence supported a finding that the site is protected from coastal inundation by the existing rock protection wall, when the statements made pertain to a different site.⁵⁷

[62] Responding to the court, the District Council affirmed that it does not approach the declaration from the stand point that the consent *should* lapse.⁵⁸ Nevertheless, the District Council led extensive evidence on the topic of natural hazards, and in spite of the reasons given for leading this evidence,⁵⁹ it is our impression that the risk of material damage to land from natural hazards underlies the District Council's position on this proceeding.⁶⁰

⁵⁴ Pursuant to RMA, ss 42A and 39. Transcript (Giddens) at 23; transcript (Johnson) at 51.

⁵⁵ Giddens affidavit affirmed 28 July 2021, Appendix B: Application for resource consents at p 20.

⁵⁶ Giddens affidavit affirmed 28 July 2021, Appendix B: Application for resource consents at p 9 stating the applicant was not proceeding with the extension of the consented rock wall and confirmed at [21] and [23] of the Affidavit. Mr Gidden notes at transcript p 25 a further 'complicating factor' being that the 52 lot consents are contingent on the rock protection wall and coastal marine area reclamation taking place. The salience of this statement, we presume, goes to whether the larger 52 lot development could be regarded as part of the existing environment.

⁵⁷ The statement pertains to part Lot 2 DP 3034 and not Lots 3 and 4 DP 3034 being the subject site. Johnson affidavit affirmed 22 September 2021, Annexure A: Natural Hazard Assessment – BF Whitman Ltd & Lakes Consulting Group Ltd at [3]-[4].

⁵⁸ Transcript (Wolt) at 138.

⁵⁹ Counsel for the District Council advised that this evidence was led in response to inaccurate statements made by MTP's planning witness. See Transcript (Wolt) at 138.

⁶⁰ Transcript (Johnson) at 61-63.

[63] District Plan policies pertaining to the coast⁶¹ and natural hazards⁶² contemplate the subdivision and development proposals and the effects of the same being considered together. Land use consent was required because the proposal did not comply with the standard in a rule that dwellings be set back from MHWS (Rule 5.6.3 (g)). Rule 7.4 of the District Plan states that an application for subdivision consent will be refused where land may be subject to material damage. MTP relied on a consent notice preventing the erection of buildings beyond a line of 60 metres north of the southern boundary of the site to address the risk of natural hazards.⁶³

[64] This proceeding cannot resolve any factual or legal errors that may have led to the grant of consent, and indeed the court expressly has no view as to whether mistakes were made. Put colloquially, the District Council had the tools in its toolbox⁶⁴ to address the risk that arises, and we must presume that when considering and deciding the resource consent application that it reached for the same. That said, the rigour with which the District Council has pursued this case testifies that it is aware of and engaged with this important aspect of its resource management functions.⁶⁵

Outcome

[65] Pursuant to s 313(a) of the Act, I declare that land use consent 140062 has been given effect to and has not lapsed under s 125 RMA.

[66] Costs are reserved but not encouraged. Any application for costs is to be made by **Friday 23 September 2022**; any reply is to be filed by **Friday 7 October 2022** and final reply by **Friday 14 October 2022**. In the event no application for costs is made, the court's order will be (without further decision of the court

⁶¹ District Plan, Section 4.10: The Coast and Policy 4.1.A and 4.1.B.

⁶² District Plan, Section 4.14: Natural Hazards and Policies 4.14.A.

⁶³ Giddens affidavit affirmed 28 July 2021 at [17].

⁶⁴ That is, the District Plan and RMA, s 106.

⁶⁵ RMA, s 30(1)(b)(i).

issuing) that there is no order as to costs.

For the court

Jane S.



J E Borthwick
Environment Judge