Decision No. W 29/93

ORIGINAL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to s.120 of the Act

BETWEEN **J O AND H J GILL AND OTHERS**

(Appeal No. RMA 355/92)

Appellants

AND **THE ROTORUA DISTRICT COUNCIL**

Respondent

AND **F SCHWANNER**

Applicant

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge S E Kenderdine (presiding)
Ms J D Rowan
Mr F Easdale

HEARING at ROTORUA on the 8th, 9th, 10th and 11th days of March 1993

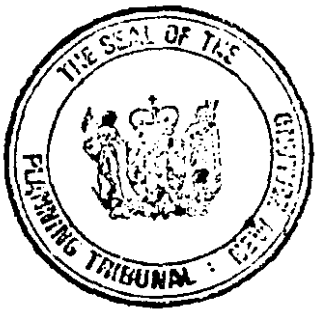
COUNSEL

Mr R G Ronayne and Ms Turton for the appellants
Mr D J McDonald for the respondent
Mr A F S Vane for the applicant
Mr J H Irving for the Minister of Conservation

DECISION

Introduction

This is an appeal pursuant to s.120 of the Resource Management Act 1991 ("the Act") against a decision of the respondent council, allowing consent to develop 11 single-storeyed residential dwellings (of similar size and style), two tennis



courts and an outdoor heated pool and a children's playground on approximately 2.1043 hectares of land owned by the applicant at Kariri Point ("the site") on the shores of Lake Tarawera, Rotorua.

The council's consent was granted subject to a comprehensive set of conditions which included the following:

- that a minimum of 50% of the existing vegetation cover on the site be retained:
- that no existing vegetation was to be disturbed on any reserve:
- that the sewage treatment plant be located underground or suitably screened to minimise effect:
- that a fence be erected between the development site and an adjacent Maori reserve (the Kariri Point Reserve containing the Spencer Family Mausoleum).

This appeal followed. Meanwhile the Bay of Plenty Regional Council approved an application to discharge stormwater and treated effluent. That was also granted but not appealed.

The legal description of the land to which the application applies is (A) Rotomahana Parekarangi No.6G2A Block VII Tarawera SD, comprised in Certificate of Title 10A 1424 and (B), part of the adjoining Recreation Reserve. Direct legal road frontage to the applicant's property is prevented by an area of Recreation Reserve land being section 29 Block VII Tarawera SD.

The site is zoned Rural 3 in the deemed (transitional) district plan and subject to a designation of Proposed Scenic Reserve.

The Site and Locality

Kariri Point ("the Point") is located 1 kilometre to the north of the southern end of the Lake Tarawera Settlement.

The site forms part of a prominent peninsula extending out into Lake Tarawera and consists of a central plateau which falls sharply to Lake Tarawera along the north eastern portion of the lake front forming a cliff face. It consists of a broad spur elevated between 6 to 10 metres above the lake. To the south-west, the plateau falls gradually to part of the Recreation Reserve which contains numerous boat sheds on the lake edge, boat launching facilities, and boat trailer parking, which has its own separate vehicle access off Spencer Road. A 7 to 10 metre high cliff runs along the eastern lake boundary and has a reverse fall to the west on its inland side.

To the south the site abuts the Maori Reserve, encompassing Spencers Tomb, a mausoleum containing the memorials of the descendants of the Reverend Seymour Spencer, an early Anglican missionary in the area. The reserve, which comprises the remaining part of the peninsula was set apart for the purpose of recreation, a landing reserve and as a place of historic interest. This reserve comprises the remaining part of the peninsula. The peninsula itself is wholly covered in regenerating native bush (with some canopy of robinia) the trees covering the property under discussion being of more recent origin than those covering the Maori Reserve.

The northern corner of the site is in grass. It is separated from road access off Spencer Road (the major road which skirts the lake) by a Local Purpose Reserve of approximately 20 metres in depth. There is a 35 metre wide Esplanade Reserve, facing Rangiuru Bay lying along the north-eastern boundary of the site. This reserve is planted in grass and ornamental trees and contains tennis courts, a boat launching ramp, childrens' play equipment, toilets and changing sheds. In close proximity to the site is an area often used by fly-fishermen for access to a significant trout fishing ground off a shelf projecting from the edge of the Point.

Separate title to the Schwanner land was created on 31 July 1931 by a Maori Land Partition Order, the whole of the peninsula having been partitioned in 1895. At that time it appears there was no legal road on to which frontage or right-of-way access could be had. When the Spencer Road subdivision was created in 1949, Lot 333 was specifically located to provide such access. That lot was vested in the council as a public road in September 1949. It passes through a gap in the Esplanade Reserve. The applicant's site is separated from Lot 333, now the legal road, by a Recreation Reserve.

Although there has been no formal right-of-way access to the Schwanner land over what is now the Recreation Reserve, there has for many years been an informal access road/track for members of the public and the applicants to obtain access to the lakeshore and to the site. That access is currently metalled and has been so for many years. After crossing the reserve, it crosses the northern corner of the site before terminating on the Recreation Reserve on the lakeshore.

The property is thus landlocked by surrounding reserves and has legal frontage to Lake Tarawera only.

Spencer Road provides the main access to Lake Tarawera and on both sides is subdivided into residential sections for a distance of 1 kilometre to the south and 1.7 kilometres to the north. These dwellings are a mixture of baches and houses (some large) nestled into areas of natural bush or dense planting. Most have views of the lake and Mount Tarawera. The dwellings on the lake side of Spencer Road are set back 60 to 70 metres from the lake edge. The area fronting these sites is largely in grass providing immediate access to the lake. There are approximately 380 houses in the settlement.

A copy of the plan showing the location of the site is attached to this decision marked Appendix "A"

Zoning History of the Site

Mr Sholl described the early planning history of the site as follows:

> "The land was zoned Rural on the First Area (County) Planning Scheme in 1959. Subsequently in 1972 the zoning proposed by the County Council was private open space which the then owner, Huia Warbrick, was successful in amending to Rural B. The surrounding sections were subdivided in 1948 and the applicant's land has actually been without legal road frontage since the Crown reserved the lakeshore under Section 122 of the Land Act 1908. However, in a letter dated 9 June 1967 addressed to a firm of solicitors acting for the then owner, the County Clerk of Rotorua County Council advised that the Council is prepared to consent to the extension of the legal road across the Crown Land to give access to Mr Warbrick's land. A Proposed Reserve designation was placed on the land following a requirement from the Minister of Works and Development pursuant to Section 118 of The Town and Country Planning Act on 4 July 1979 to which the present owner was not aware (due to non-receipt of Council correspondence)."

The site was purchased in February 1973 by Mr F Schwanner, ("the applicant") an Auckland businessman with the intention of developing it with 35 chalets integrated into the bush. At the date of purchase, it had a proposed designation of Private Open Space and a proposed underlying zoning of Rural A in the then proposed district scheme. The site's previous owner had objected to the council's designation and to the zoning proposal. Mr Schwanner took over these objections on purchase. As a result, the designation was removed and the zoning was changed to Rural B - the same zoning as that of the adjoining land on the Lake Tarawera lakefront.

In 1979 Mr Schwanner was advised by the Department of Lands and Survey that it intended to designate the site as Scenic Reserve. The council was then in the process of reviewing its scheme and proposed to change the zoning of the site from Rural B to Rural 1, and the other lakeshore properties to Rural 4. The Rural 1 zone was the general rural zoning for large scale rural activities. Despite Mr Schwanner's objection to the designation, it was upheld by the council but the site was rezoned Rural 3. In the hearing, the Planning and Bylaws Committee of the council stated that:

> "Your Committee does not believe that the land is suitable for general pastoral farming or forestry which are the stated intentions of the underlying zoning of Rural 1 and your Committee is of the opinion that such zoning is therefore not appropriate. Your Committee notes that a

zoning of Rural 3, which is intended to provide residential development in a rural environment, already exists for other land of similar character at Lake Tarawera and your Committee points out that the Rural 3 zone unlike Rural 4, keeps housing to an absolute minimum in order to preserve the existing rural character which your Committee considers desirable in the public interest in this area."

The applicant appealed that decision. In May 1983 correspondence was received from the Director, Town and Country Planning, pursuant to authority delegated by the Minister of Works and Development that the requirement be confirmed but corrected to state "Proposed Scenic Reserve". Meanwhile the designating authority indicated its willingness to purchase the site in August 1983 either with a cash purchase, land exchange, or a combination of both. We were informed by the applicant he had decided to withdraw his appeals including the one on the designation on the understanding that the Crown was committed to purchase. In his opinion the commitment to purchase began to wane as the issue was handed over to the Department of Conservation as a result of Government restructuring. We were told that the Department had then advised him that it had a long list of priorities, limited resources, and that it was unlikely to make the purchase as proposed. In 1985, however, the Department again indicated its intent to give Mr Schwanner land elsewhere in return for his, but this approach was rejected because the applicant considered that it was nothing like the quality of the proposed reserve. In August 1985 the land was designated Proposed Scenic Reserve with an underlying zoning of Rural 3 in the plan which came into operation in August 1985

The witness told us of subsequent meetings with the Department of Conservation, concluding that it was his belief that the Department's concern now appears to be the density of the development rather than acquisition of the site. Apparently it had indicated it would be happy with five dwellings - in effect one more than the present zoning allowed.

THE PARTIES

The Applicant

Evidential aspects of the proposal were presented by Mr Schwanner, Dr Robert Donald, a consultant architect, and Ms R V de Lambert, a consultant landscape architect. Planning and traffic issues were presented by Mr H Bhana, and Mr J M Burgess. Mr Burgess was not called to give evidence, his written brief being admitted by consent. Towards the end of the hearing, Mr P Bart,on of the New Zealand Forest Research Institute, explained the design and operation of a proposed sewage land treatment system developed by the Institute which was intended for this site.

All properties on the site are to be established on unit titles and the overall site is to be administered by an associated body

corporate. The applicant proposes to subdivide the site by creating a vehicle access roughly central across the peninsula and provide for seven residential sites on the north-eastern side of the vehicle access and two sites plus the manager's residence to the south west. (One lot being deleted as a result of the council's decision that only seven units be allowed facing the lake frontage.) The proposed dwellinghouses are basically single storey, with pitched cedar shingle roofs of elegant design, cedar window joinery and natural wood cladding - all to be discreetly sited in the bush. The two tennis courts, a heated pool and a childrens' playground will also be provided within the common property.

The housing layout has been designed with staggered building lines and with extensive planting of native species proposed between the houses. It is hoped the design will ensure that only a relatively small number of houses will be visible from both the lake and the surrounding locality when viewed from most directions. The planted area of the Esplanade Reserve will remain at the eastern end of the development and the native vegetation on the site generally will be retained and "managed" to remove weed species such as old man's beard, and to provide views of the lake and mountain from each property. A private driveway is to be provided at the northern end of the existing grass reserve in the form of a narrow cul-de-sac leading to public parking and a triangular area of land at the northern corner of this site will be made available for this purpose. The width of the vehicle access will be approximately 3.5 metres with provision for passing bays in two locations - at the front of the site 3 and site 6 houses. Along either side of the roadway the existing vegetation is to be retained, as far as possible, apart from the space required for vehicle access to each house site. Enrichment planting of similar species to those already existing will be added when required. Lot clearance is not to exceed 50% of the site area (the average site area per lot is 1100 square metres, not including share of common land).

It was the applicant's case that the natural character of the site will remain despite the intended development for several reasons. Firstly, the view shafts from under the vegetative canopy from the site will be "controlled" in such a way that the development will not be seen unless viewing is from directly opposite the site (that is from the lake). Even then, the applicant expects that the landform with its high escarpment and trees will protect the houses from view. Secondly, it is considered that the property forms a "transition" landscape only, sandwiched as it is between the Maori Reserve at one end and the open space and residential developments at the other, with the reserves eroded away at the edges by development (for example, the boatsheds). Thirdly, the site has a history of modification with the regenerative bush presenting as younger than that contained on the Maori Reserve. Fourthly, the site will maintain a high degree of visual amenity and natural character. What is expected to be seen is the vegetation, the escarpments on either side, with mere glimpses of the houses beyond. Essentially, the views of the site will not change.

Fifthly, whilst the site plans may present obvious linear qualities, in many of its aspects on the ground a much more organic pattern will be presented. The canopy of retained trees and vegetation will overflow the linear pattern and provide a feathering of the site contributing to a breaking up of any visual "gridding". Finally, it is proposed to place a covenant on the titles (both individual and corporate) to protect the native vegetation on the site.

During the process of putting together the proposal Mr Schwanner informed us he had consulted widely with the Tuhourangi Runanga, the Iwi Council and subsequently two Trustees of the Kariri Point Reserve, Mrs E Schuster and Mr H Waaka. The witness recorded that Mr Waaka had explained that Umukaria, father of Hinemoa and her brother Wahiao were buried in the locality of the site, although the exact burial spot was not known. The elders had Mr Schwanner's written assurance that if a burial ground was unearthed, all work would be stopped so that proper Maori tapu and reburial procedures could be undertaken.

Mr Schwanner reflected on why his proposal had been targeted for the large number of objections which the development had attracted, pointing out that the 1950 subdivision which triggered the original lakeside settlement had gone through without protest - a development that he considered had been nothing but beneficial to the Tarawera region. It was his belief that this development would bring life to the local building industry affected by the deep recession.

The applicant was enthusiastic about the innovative sewage disposal system which he proposed to introduce which is to be by way of a small treatment station and a complex of interlinking subsurface drip irrigation lines. He was also pleased, along with other innovative aspects of the proposal, at the prospect of having the reserve managed in such a way as to eradicate noxious plants such as blackberry, old man's beard and robinia.

Dr Donald presented the architectural concepts of the project together with details of the electrical and sewage services, the water supply, storm disposal system and road access issues. He detailed the extensive investigations he had made on Maori issues relating to the area, including those he had explored with the descendants of its original owners. He spoke of his liaison with the Historic Places Trust about the possible historic aspects of the site. He and Ms de Lambert comprehensively outlined aspects of the proposed landscaping and bush retention on the site.

Dr Donald also explained that as a result of objections from the fly-fishing community, which currently have had unrestricted use of part of the property for parking and access to the lake, (the witness had counted 20 cars parked on the reserve at any one time), the applicant had deleted the proposed boatsheds and swing moorings and amended the design of the jetty to accommodate concerns. Mr Schwanner believed that the fly-fishing off the point would be unaffected by the proposal,

particularly as the proposed construction of a large new jetty would make the activity safer and more enjoyable.

Ms de Lambert examined the character of the Tarawera lakeshore and the landscape content of the proposal. It was her evidence that the 10 houses could be integrated into the existing character of the landscape in such a way that there were few visual effects, either from the shore or the lake. Citing a botanist's report, she sought to demonstrate that the existing vegetation on the site was of low or moderate quality; that there was little of the true natural character of the lake or its margins remaining; that careful selection and retention of the existing native vegetation, including individual trees, together with enhancement planting of additional species, would preserve the existing amenity values and character of the lake settlement; and that with devices such as conditions and covenants on the trees held by the landowners, the landscape could be greatly preserved.

A copy of the design layout of the proposal, taken from Dr Donald's evidence, is attached to this decision marked Appendix "B" could be greatly preserved.

The planning aspects of the applicant's case we refer to below.

The Appellants

Evidence in support of the appeal was given by Mrs H J Gill and Mr Martyn Spencer, descendants of the Reverend Seymour Spencer, Mr B E Halstead, architect and landscape architect, Mr A S Garrick, consultant ecologist, Mr D M Stafford, a Rotorua historian, Mr A P A Stevens, architect, Mr A G Pilmer, Chairman of the Lake Tarawera Ratepayers Association, Mr K Waaka of the Te Arawa tribe and Chairman of the Horiui Trust. With the exception of Messrs Waaka and Stafford, all appellants have residences at Lake Tarawera. Planning evidence was presented by Mr A O Parton, consultant planner and surveyor.

Reasons for appealing were given as follows:-

- The site is designated as Proposed Scenic Reserve which gives an indication of its environmental significance and it is therefore inappropriate for residential activities:

- Removal of native vegetation and ground disturbance will result from the proposal:

- The proposal will have a detrimental effect on fly-fishing activities off Kariri Point due to the proposed boating facilities and new jetty:

- There will be adverse effects on water quality as the wastewater disposal facilities are inadequate:

- The proposal is contrary to the Rotorua Transitional

Operative District Plan. The property is presently zoned Rural 3 (Rural-Residential) which allows only one dwelling as of right.

- If consent is granted it will set a precedent for intensive residential development in other Rural 3 areas.

- The property has no legal access by road.

- The Kariri Peninsula is effectively isolated from the Rural 4 (Lakeside Settlement) zone and similar intensive residential development by Recreation and Esplanade Reserves 35 to 40 metres wide.

- Rangiuru Bay is one of only a few areas where the public have easy access to Lake Tarawera. A development such as this will have a significant detrimental effect on the enjoyment of this area by the public.

- The district planning is intended to give property owners a degree of certainty and reliance as to the future development of the district. The Rotorua District Council is charged with maintaining public confidence in the consistent administration of this document and has failed to discharge its duty.

- Kariri Peninsula has important historical significance, being the site of early Maori/missionary occupation, (Kariri Pa). The recognition of Maori ancestral land is set down as a matter of national importance in the Act.

- Under the new legislation the applicant must demonstrate that the proposed development will have only a minor effect on the environment. Intensive residential development on an important and dominant landscape feature such as Kariri Point will have a significant detrimental effect on the environment.

There were other matters associated with the development such as access across the Recreation Reserve, subdivision consent, and consent to jetties and other foreshore structures, some of which were not directly within the scope of the appeal.

The Council

Evidence for the council was given by Mr J D Sholl, Divisional Planner, Development Control and Mr A Trass, Assistant Resource Engineer on traffic issues.

Mr Sholl was of the opinion that whilst the proposal would result in some detraction in the overall appearance of the site, placed as it would be within the confines of the Lake Tarawera

settlement, it would not be substantial in terms of visual amenity. He held the view that because the lake has a natural undeveloped margin with residential development beyond, the proposal presents in very much the same way and as a continuum to the development already existing. The witness emphasised the necessity, however, for the covenant protection of the native vegetation on the site. He hesitated also over what he termed "cumulative effects" indicating, for example, that the development if not properly managed could loosen the soil along the steep edges of the site which is held together primarily by tree roots. He therefore endorsed the plans for the retention of native vegetation along the lake edge and the selected removal of vegetation from the rest of the property. He also had concerns about the effects on fly-fishing in the area through increased boat traffic in the vicinity of the site. He was of the overall opinion, however, that because much of the current settlement is found on lots of approximately 1,000 to 2,000 square metres, this proposal at a similar density would not significantly alter the character of the area.

The witness indicated some concern over the effect of granting consent due to the impact it may have on public confidence in maintaining the consistency and integrity of the district plan by allowing a proposal which ran contrary to the zoning provisions. He pointed out, however, that the council viewed the site as unique. Firstly, it is clearly different from other Rural 3 sites both at Lake Tarawera and elsewhere in the district, in that they are predominantly rural with a minimum retention of native bush. Secondly, the zoning is inappropriate and inconsistent with the area's character in that it offers no protection of existing vegetation (in spite of controls inherent in the Soil Conservation and Rivers Control Amendment Act 1959). Further, the use of the land for more intensive farming practices in accordance with the Rural 3 zoning (e.g. stables) could proceed without any right of objection. Therefore, in Mr Sholl's view, it could be said that the integrity of the actual zoning is in issue. He explained that the underlying zoning was given in the first place because the land was designated as a "Proposed Scenic Reserve" and Rural 3 was the one zone which provided for the lowest density of housing under the district plan if the site was to be developed for residential purposes. Since that designation was made effective, however, the land has not been purchased for reserve purposes and any development opportunities had been unable to proceed. A request from the Department of Conservation to retain the designation in the council's proposed district plan (being prepared in accordance with the Resource Management Act's provisions) had been received in the month preceding the hearing. Mr Sholl was of the opinion that whilst the zoning could be said to be inappropriate for this particular site, there was advantage in granting a land use consent for a non-complying activity as opposed, for example, to a plan change to the Rural 4 zone, as the council was able to apply conditions to the consent. The result was a more controlled outcome and perhaps an added right of development. The more positive

controlled outcome would be greater retention of native bush, the maintenance of a private and co-ordinated residential character of the site, and a superior wastewater treatment than could occur if development was allowed as of right.

The council considered the proposal as an application for a notified resource consent in accordance with s.93 of the Act because it was not satisfied that the effects on the environment would be minor. It also considered that consent was needed as a non-complying activity because the Rural 3 zone makes no provision for residential activities of the intensity proposed.

The Minister of Conservation

Counsel explained that in these proceedings the Minister is acting pursuant to of the advocacy function provided by s.6 of the Conservation Act 1987. In this regard the Minister is primarily concerned with assisting in consideration of the nationally important matter of the preservation of natural character of the site. The Minister is also the designating authority in respect of the land, formerly as successor of the Minister of Lands, and for the future as a result of the continuance of that designation. The Minister also has a Reserves Act 1977 consent role in respect of the right-of-way application over the reserve.

Evidence was given for the Minister by Mr S J Smale, a conservancy landscape architect, who addressed the effects of the development on the natural character of the lake and its margins.

DISTRICT PLAN PROVISIONS

There are three basic land use classifications along the eastern side of Spencer Road adjoining the Lake Tarawera foreshore. These include Rural 4, Rural 3 and Rural 1.

The main differences between the zones may be summarised as follows:

> Rural 4 provides for the lakeside settlement where the land has already been closely subdivided. Controlled uses include one dwelling house per site and a subsidiary household unit of the granny flat type on sites in excess of 1500 square metres. Discretionary uses allow two or more dwellinghouses at a minimum density of one per 1000 square metres. The minimum lot size is 2000 square metres on new subdivision and no more than eight units may share a private access. Amongst the purposes of the zone is the preservation of the natural character of lakes and their margins with development designed to ensure associated preservation of trees and other vegetation.
>
> Rural 3 is intended to remain essentially rural in character with a range of farming uses while providing for

residential development with one dwellinghouse per site as a permitted activity and one subsidiary household unit as a controlled activity to which landscape provisions apply. Minimum lot size on subdivision is 8000 square metres. Apart from the applicant's land there is one other Rural 3 area at Lake Tarawera on Spencer Road and that is approximately 1.6 km to the north

Rural 1 is a general pastoral farming and forestry zone where the subdivisional requirement is a minimum of 20 ha of usable land.

Appendix P to the district plan indicates that the western and south-western shores of Lake Tarawera, including the subject site are included within the Bay of Plenty Catchment Commission's Development Control under s.34 of the Soil Conservation and Rivers Control Amendment Act 1959. No clearing of scrub or tree vegetation in the Rural 1 and 3 zones is permitted to be carried out without the catchment authority's written consent.

A number of objectives and policies of the plan are relevant to this proposal.

300 Introduction to all rural zones:

(c) to recognise the great natural beauty and to protect the scenic and environmental character of the district

Objectives:

2.1 Social:

The protection of the cultural identity and traditions of the Maori people, in particular their relationship with their ancestral land.

2.3 Physical:

(3) The preservation of the natural character and environmental quality of the lakes, rivers and streams including their margins and waters.

(5) The preservation of historic, rare or otherwise significant exotic and indigenous trees and plants and preservation of native forest areas and associated native fauna.

Policies:

3.2 Rural Settlements

(2) Policy: Environment

To strictly control the expansion of settlements within the lake catchment in order to preserve lake water quality and the natural quality of the lake margins.

3.3 Rural Land Use

(4) Policy: Subdivision

To limit the subdivision of rural land within the lake basins so as to avoid sporadic development and unnecessary disaggregation of rural holdings.

(7) The preservation of land within the catchments of lakes and waterways against the adverse effects of land development.

3.7 Reserves

Policy: Access to Waterways

To facilitate public access to the margins of lakes and streams within the district and where feasible to expand the reserve network to provide continuity of access.

3.9 Amenities

(4) Landscaping

As far as practicable to retain and use existing site features as an integral design element of the development.

In respect of the reserve fronting Rangiuru Bay and between the sideroad off Spencer Road and the subject site, the areas have a zoning of Amenity 1 and a sub classification of "local purpose - esplanade". The permitted uses are:

> "Any use consistent with the purpose of the particular reserve as shown in the District Planning Maps ...
>
> Local Purpose Reserves shall be set aside for the purpose of providing and retaining areas for such educational, community, social or other local purposes as may be specified in a Gazette Notice issued under Section 16 of the Reserves Act 1977 classifying the reserve. (These include Esplanade Reserves, Drainage Reserves, Reservoirs, Water Supply Reserves, Plantation Reserves and Utility Reserves)."

LEGAL PROVISIONS

The legal provisions which apply to this proposal are ss.104 and 105 of the Act relating to resource consents for non-complying activities. We are required to consider, first of all and as directed by s.105 (2) (b), the matters contained in section 104(1) - the actual and potential effects of allowing the subdivision: s.104(4)(a) the relevant rules of the district plan: s.104(4)(b) the relevant policies and objectives of the

district plan and (d)(ii)the regional plan and under s.104(4)(e) Part II of the Act. Under Part II, of relevance are s.5 - the purpose of sustainable management, s.6 which deals with matters of national importance, s.7 which deals with other matters of national importance, section 8 which requires regard to the principles of the Treaty of Waitangi 1840. Sections 175, 176, 178, 179, 184, 374 and 420 which relate to designation, are also required to be analysed.

Under s.105(2)(b) of the Act a consent authority may not consent to a non-complying activity unless it is satisfied that either the effects of granting the application will be minor or that the granting is not contrary to the objectives and policies of the plan having considered, first of all, the relevant matters in s.104. Part II matters, it may be noted, are not to be given primacy, as in the Town and Country Planning Act 1977,as the section merely requires the consent authority "to have regard to" the various issues raised there.

EVALUATION

It will be seen from the aforegoing provisions of the legislation that this proposal attracts lengthy analysis under numerous sections of the Act. We were therefore appreciative of the extensive submissions given by legal counsel in assisting us in our analysis. We turn now to those provisions.

For a variety of reasons we have taken the various categories to be considered slightly out of order from the way they are presented in the legislation.

The Rules, Policies and Objectives of the District Plan

The applicant and the council considered that there were sufficient circumstances of an unusual nature, (in line with the test formulated in Batchelor v Tauranga District Council, 1 NZRMA 266 at 271) that would distinguish approval of this proposal from approval of similar developments on other Rural 3 land in the district. Both the council and the applicants identified as unique reasons for its consent, the "extraordinary" history of the zoning and designation of the site, the current zoning (and existing alternatives) as inconsistent with the desirability of protecting the character of the area and, finally, the ability of the council to control development through the application of more site specific controls than those available under the district plan. In support, counsel for the applicant cited Roman Catholic Archbishop of the Diocese of Wellington v Wellington City Council WO 7/85 (a case under the previous legislation, which he considered was still applicable) where it was held that the zoning of the site indicated that there was an awareness that the existing zoning was inappropriate and therefore the integrity of the scheme was not under challenge.

We were urged to regard favourably the fact that the council has been able to place restrictive conditions on the proposal in an attempt to preserve as much of the natural vegetation on the site as possible. We were also to regard favourably the fact that the Rural 3 zone is inappropriate on the site taking into account the closer settlement found on either side of the peninsula. Rule 303.6, for example, states that the council may consent to a lesser site area in the zone where a conditional use is authorised, providing the remainder of the land after subdivision would still conform to the provisions of the plan.

The applicant's witness was of the opinion that whilst the Rural 3 zoning restricts the number of dwellings permitted on the site to a maximum of two (with a subdivision) and two subsidiary units, the range of discretionary activities allowed includes garden centres and service stations, piggeries and Educational Institutions and Recreational Activities, all of which would have a greater effect on its natural character. Mr Bhana considered that the two latter uses could provide more intensive residential development on the site than others stating that the council was under "misapprehension" that the Rural 3 zoning would preserve the site's existing rural character. He contrasted unfavourably the purpose of the zone (to provide for residential development in a rural environment) with that of Rural 1 where the council's stated purpose is to prevent the removal of trees and bush within the lakeside catchment and to preserve its natural character. He saw the absence of such a provision in the Rural 3 zone as a reflection of a general policy of zoning land in existing pastoral use as Rural 3 thereby avoiding the obvious inconsistency in zoning land for intensive rural uses and at the same time expecting that portions of it will be protected from use. He was of the opinion that on this site the removal of the existing vegetation and the use of land for more intensive purposes could proceed as of right and then went on to state that the Rural 3 zone on this site, apart from the designation, had created a spot zone which lacked any credibility, wedged as it is within more closely settled land on either side of the peninsula. He found this inconsistent with sound planning principles. Nor did he consider a Rural 4 zoning of any assistance as he considered it contained no limitation on removal of natural or existing vegetation.

Deeper analysis, however, calls into question many of the conclusions drawn by the applicant's witness.

As Mr Parton pointed out the site is unusual for reasons quite different from those the applicant has put forward. The site has no road access and it is surrounded by existing reserves and lake frontage, and is predominantly covered in native bush and in a conspicuous location. It is therefore <u>these</u> special features which concern its unique qualities. These characteristics indeed make it more sensitive to change therefore than any other Rural 3 land in the area. In this regard we do not accept that since 1979 there has been

little demonstrated commitment of the Crown to purchase this site. There was clearly a hiatus when the Department of Conservation took over from the Department of Lands and Survey, but the evidence demonstrated that a recent offer by the Department to swap land was met with refusal by the applicant because the replacement site was not of similar quality as the appeal site. In our opinion it will be very difficult to match such quality - which says a great deal about the site's unique aspect.

Mr Parton's evidence, having examined the principal reason the council's Planning and Bylaws Committee applied the Rural 3 zone to the site, concluded that it was not to encourage intensive farming activities "but rather to achieve the zoning's primary purpose which is to provide for residential development in a rural environment by limiting the intensity of allowable residential development" - and that the reason for doing so was that it was in the public interest to preserve the character of the site as far as possible.

He was of the opinion that if we accept the validity of the Rural 3 zone on the site, he would expect two houses developed on the lakeside and two on the bayside of the property. The area of esplanade reserve required would be the same as currently proposed.

In respect of the zoning, we find it is not inconsistent with the desirability of protecting the area. We find as a matter of fact that the council, in zoning the land, was setting out to limit residential development in a rural environment on this site in the public interest. The reference to that public interest in its decision demonstrates the council's intent at that time to give it protection for its intrinsic values which appear to be scenic and also to protect it from inappropriate subdivision. Mr Bhana himself acknowledged in his evidence-in-chief that one of the reasons for zoning was to protect its "visual character". Moving to the Rural 4 provisions, it is an objective of the Rural 4 zone to provide for limited residential development along lake margins which are already closely subdivided. It is a purpose of that zone to preserve as far as practical the natural character of the lakes and their margins. There are other more general provisions also which limit the form of residential development. It is the overall objective of the plan to preserve the natural character and environmental quality of the lakes including their margins. It is also a policy to strictly control the expansion of settlements within the lake catchments to preserve the natural quality of lake margins.

As far as the rules are concerned in the Rural 3 zone, it is to this end that not more than one dwelling unit only is allowed as a permitted activity so there is an inherent limitation of what may be allowed. Also, accessory buildings must be accessory or incidental to the main use and in our opinion would again have an inherent limitation. Further, the list of discretionary activities as outlined in the planning evidence could mostly be

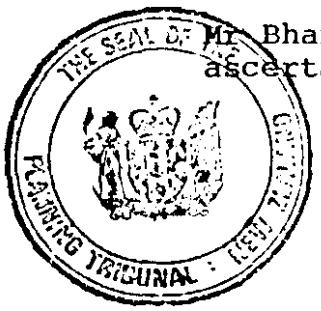
considered inappropriate on this site and it is extremely doubtful whether they would be allowed. Even acknowledging that one large house could be built on the site as of right, with attendant clearances of the native vegetation, the council's approval of 11 dwellings is, therefore, clearly contrary to the Rural 3 zoning of the land.

We accept Mr Parton's proposition too that the proposal is inconsistent with general policy 3.2(2) which relates to the environmental aspects of rural settlements. It is also inconsistent with those parts of the scheme statement which do not permit closer residential subdivision of rural land i.e. policy 3.3.(4) and (7) which relate to limitation of subdivision of rural land within a lake basin. It is also inconsistent with the purposes of the Amenity 1 zone adjacent.

With respect to the other rules of the district plan, there was division among the planning witnesses as to whether the proposed development involved a subdivision of the land. There was also some dispute about the correct way of assessing the likely intensity of use if the site was zoned Rural 4 in the same way as the rest of the land in the settlement, as a way of justifying the proposal. Council in its decision had clearly accepted that the intensity of the Rural 4 zone was more appropriate given the other Rural 4 developments on either side of the site. Mr Parton hypothesised what would have happened if the applicant's land had been rezoned Rural 4 at the time of the last review. He made reference to the subdivision provisions for the Rural 4 zone (Rule 304.6) which explains that the site area of 2000 square metres for a subdivision is designed to ensure the preservation of trees ... in conjunction with the development. He expected it could be subdivided into a series of conventional residential lots off a centrally located private entrance strip or public road (cul de sac): an esplanade reserve would still be required along the eastern lake boundary and he expected the northern corner to be set aside for reserve purposes at a rate of 130 square metres per newly-created allotment. On his analysis there could be 8 dwellinghouses as discretionary activities if served by a public road and subdivided into 8 lots and the number of potential units at 16, whilst only 8 units would be possible in respect of a private accessway. The latter would be less than this proposal allows for.

The figure 16 could be made up of 8 sites at not less than 2000 square metres per site and 8 additional subsidiary units made up of 72 square metres per site (granny flats). Such intensity of development would be most unlikely for it would necessitate the uplifting of part of the 35 metre wide reserve area in the north-western side of the development, revesting it as public road into the property and it would be most unusual for two dwellings to be sought on more than a very small number of allotments in such a development.

Mr Bhana did not accept this hypothesis was a valid means of ascertaining the likely level of development pointing to Rule



201.5 of the plan. One argument was that in the introductory paragraphs to the Code of Ordinances it states that applications to subdivide land are made under the Local Government Act 1974. He was of the opinion that under that legislation a unit title development was not deemed to be a subdivision. He suggested that in this area of about 2.1 hectares, a maximum number of 21 houses would be allowed under a Rural 4 zoning at a density of one house per 1000 square metres under Rule 304-4.2 with no land being set aside for reserves. He saw the only criteria necessary for assessing such a discretionary activity was the landscape requirements and possibly a notice under s.34 of the Soil Conservation and Rivers Control Amendment Act 1959. The development as proposed was therefore much more restrictive than what might have been allowed.

We consider that the applicant's argument is unsound for under s.218(1)(a)(v) of the Act, a unit title development is deemed to be a subdivision of land and requires a subdivision consent. On an application for that consent, land would have to be set aside for an esplanade reserve and for reserve contributions. These requirements may affect further the number of dwellings that could be accommodated - quite apart from the implications of the designation and requirements under a s.34 notice. Overall, we concluded the applicant's proposal is more intensive than allowed for with a private accessway, whilst the second option at a similar intensity to this proposal would have an unlikely chance of succeeding.

The Designation

The designation of Proposed Scenic Reserve exists on the whole of the site. An issue raised by the appeal is whether the designation is to be considered when assessing the effect that granting consent to the application would have on the integrity and public confidence in the district plan and its administration. The applicant made two submissions in that regard. Firstly, that the designation should not be included in the evaluation of integrity and public confidence in the plan. Counsel argued that the integrity of the designation would not be affected by the grant of the resource consent as the prior written consent of the designating authority (the Department of Conservation) would be required under s.176(1)(b) of the Act. Secondly, it was submitted that the council has no control over the actions of the designating authority and any consent given under s.176 would not affect public confidence in the district plan and its administration. Counsel cited Manukau City Council v Pakuranga Community Drop-In Society (1981) 8 NZTPA 225 (where both the designation and the underlying zoning were held to provide barriers to the application for consent to the use of the land for an art gallery/arts centre) as a case that could be distinguished from the present situation because it dealt with an issue where the designated land was already in the designating authority's ownership. The applicant's counsel also pointed out that the Pakuranga decision had not been followed in Koroneho Properties Limited v Far North District Council A 18/91 and the Queenstown

Bungy Centre Limited v Queenstown Lakes District Council (1991) 1 NZRMA 86 decisions. In his submission counsel claimed that designations are not rules of the district plan and made reference to the definitions contained in s.2 of the Act. The applicant's counsel also submitted that the opening words of s.176(1) includes the words "regardless of any resource consent" and argued that this implies that a resource consent may be granted which is contrary to the designation. Further, in his submission the applicant's counsel claimed that designations are not rules of the district plan and made reference to the definitions contained in s.2 of the Act.

The appellants, however, contended that the granting of the resource consent would be seen to be inconsistent with the designation (as part of the district plan) and would weaken public confidence in its integrity and administration. The appellants submitted that the ownership of the land is not relevant to the issue of whether a resource consent should be granted for an activity which is inconsistent with the designation. It was submitted that in the Pakuranga case the ownership of the land was not a relevant consideration, but the wording of the designation was. Counsel's response to the submissions on the Koroneho and Queenstown Bungy Centre cases was that those two decisions did not depart from the principles stated in the Pakuranga case. Counsel for the appellants pointed out that designation would not have to be considered if the district plan made it clear that an activity could be allowed if it fell within the underlying zoning. There was no such provision in this plan. Issue was also taken by the appellants with the applicant's submission that the decisions cited dealt with s.121 of the 1977 Act and that there was no similar provision in the 1991 Act. The appellants submitted that s.176 of the 1991 Act is an abbreviation of ss.121 and 124 of the 1977 Act and that the effect of the new section is similar to the former.

In reply Mr Roynane also submitted that the reason for the inclusion of these words "regardless of any resource consent" was to make it clear that the designating authority, in deciding whether to consent to a proposed activity on designated land, would not be bound by a resource consent which may have been granted for that activity. The council may decide that the activity is not inconsistent with a designated purpose. It was his submission therefore that s.176(1) makes it clear that consent could be refused by the designating authority regardless of the resource consent. He also submitted that pursuant to s.374(3)(c) of the Act designations may be deemed to be a district rule and should therefore be considered under ss.104 and 105(2)(b) of the Act. Further, in his submission the applicant's counsel claimed that designations are not Rules and made reference to the definitions contained in s.2 of the Act.

After careful analysis of the arguments for and against, we must agree with all submissions put forward by the appellants and for the reasons outlined in those submissions. Under s.373(1) of the Act the operative scheme is deemed to be a transitional

district plan and under s.374(3)(c) the designation is deemed to be a district rule. In the transitional provisions s.420(3) effectively provides that all designations in existence at the time of commencement of the Act are to run for five years. Section 184(1)(b) of the Act provides that designations not given effect five years from the date of commencement of the Act may lapse. Hence the designation on this site has at the time of writing three and a quarter years to run at which time it will lapse, although the Minister's notice for its inclusion rather makes that unlikely. Meanwhile the applicant may apply for its removal or compulsory acquisition orders under s.185. The designation therefore has to be considered as a rule under ss.104 and 105(2)(b) of the Act. By implication a designation prohibits activities which are inconsistent with the designation. In our opinion the grant of the consent for the scale of development proposed would be inconsistent with the designation which relates to the site's preservation as a scenic reserve and weaken public confidence in the plan's integrity and administration.

If the applicant wishes to call in question the designation he has a number of options. He could ask the Minister of Conservation for his consent under s.176(1) to a development of the land for residential purposes and appeal to the Tribunal against any refusal of consent under s.179. (The Minister's consent is his alone.) Or he could challenge the need for the designation when the district plan is reviewed later this year and if unsuccessful before the council he may bring the appeal to the Tribunal under s.174. Finally, if the designation, which relates to its preservation as a scenic reserve, affected his ability to sell the land he could seek an order from the Tribunal under s.185 obliging the Minister to acquire the land, compensation to be assessed as if the designation had not been created. There is one other provision open to Mr Schwanner. A designation lapses on the expiry of five years after the date on which it is included in the plan. Under s.184 unless it is given effect to in that period or the territorial authority determines on an application made within three months before the expiry of that period that substantial progress has been made towards acquisition, the designation lapses - but we have said that avenue is unlikely to open up for the applicant.

Regional Rules

It also became an issue as to whether the site is subject to a notice under s.34 of the Soil Conservation Amendment Act 1959. The applicant was of the opinion that it did not apply to this development, the notice relating as it does to the removal of vegetation causing major soil loss and silt transfer into water courses. He did not believe, either, that the powers of the regional council under s.369(5)(a) of the Act could be used for the protection of the visual character of the area through such notice provisions, and that if it did, it was ultra vires its function under the notice provisions.

In this matter we accept the submissions of counsel for the Minister of Conservation. He states that the true analysis of the interreaction of the two Acts is as follows:

> "s368(1) and (2)(f) of the Resource Management Act operate to make former extant notices under s34(2) of the Soil Conservation and Rivers Control Amendment Act 1959 provisions of a deemed (transitional) regional plan.
>
> s369(5) provides that in that case (of s368(2)(f) instruments being deemed provisions of a regional plan) the plan 'shall be deemed to include a regional rule to the effect that no person may do or omit to do anything which the notice declares as likely to facilitate soil erosion or floods or cause deposits in ... lakes ...' and that the provision shall cease to be operative 2 years after the notice was originally notified."

It was submitted that insofar as this rule prohibits something it would appear to create a "non-complying activity". Counsel noted that the "positive duty" aspect (no person shall omit to do something) is unusual given regional rules normally "prohibit, regulate or allow" activities in the Act's normal context (s.68(1)). He submitted that accepting that there is a prohibiting rule and the consequent non-complying activity, it follows that s.9(3) requires that "no person may use any land in a manner that contravenes a rule in a regional plan ... unless that activity is expressly allowed by a resource consent granted by the regional council ...". The term "use" in relation to land is defined as meaning for the purposes of s.9(a) ..., (b) any excavation, drilling, tunnelling or other disturbance of the land, (c) any destruction of, damage to, or disturbance of, the habitats of plants ... in on or under the land; or ... (e) any other use of the land (s.9(4)) (our emphasis).

It would appear that the activity specified in the s.34 notice is within the uses described and therefore a resource consent must be obtained from the regional council before the land can be used. Such consent is a land use consent (s.87(a)) and applications must be made in terms of Part VI of the Act. The information requirements of s.88, include the assessment of effects on the environment including matters relating to the scale and significance of the effects and those prepared in accordance with the Fourth Schedule. Section 104 then provides what matters are to be considered by the consent authority in determining the application. Part II of the Act then imposes a mandatory duty on the regional council to have regard to the various matters contained therein. These latter sections are similar to the analysis we are currently undertaking in respect of this proposal and may well limit development on the scale proposed.

Part II of the Act

Part II of the Act is applicable in its numerous provisions to this proposal.

Under s.6(a) the consent authorities are to recognise and provide for the preservation of the natural character of the lake and its margins and its protection from inappropriate subdivision and development. Under s.6(b) they are required to recognise and provide for the protection of outstanding natural ... landscapes from inappropriate subdivision and development. Under s.6(c) they are required to recognise and provide for the maintenance of public access to the lake. Under s.6(d) they are required to recognise and provide for the relationship of Maori with their ancestral lands ... . The recognition and provision for such matters of national importance shall be expressed in the way in which the use and development is managed and the way in which the natural and physical resources are protected. As we shall see many of these issues are closely interrelated .

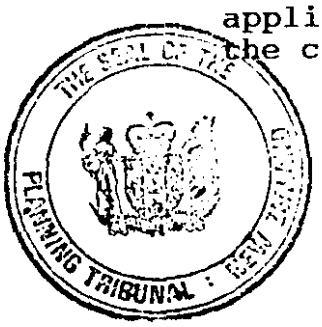
In respect of s.6(a) we are of the opinion, supported by the appellant's evidence, that the peninsula does not form an integral part of the lakeside settlement as such. When seen from most vantage points it has a quite distinctive, striking and independent "non-settlement" character making a significant contribution in its own right to the impact of the lakeside margin. We agree with Mr Garrick that it is the site and the vegetative cover currently existing which is a key element contributing greatly to the natural character of this area of the lake. In respect of that attribute of a natural character, whilst the botanical consultant assisting the applicant ranked the botanical conservation values of the site as of "low to moderate value" only, the assessment was, in a regional context, of the Rotorua Lakes Ecological District as a whole. Also the robinia/mahoe-fuschia-five finger-kahuhu forest is now the dominant cover over much of the site (as Ms de Lambert explained) and this has a moderate ranking in the scale of values. We accept that whilst the site currently supports native species of somewhat inferior value on the scale of values, that the vegetation is but a successional or intermediary type which, in time, will be replaced by more advanced or mature forest types comprising species which grow to a greater stature, meanwhile acting as a nursery for emergent species. In our view, the intensity of the proposed development and the subdivision itself will not preserve this aspect of the natural character. Indeed, despite the extensive proposed replanting programme, it will present both a gridded and patchwork look over a great many years and will be subjected to pruning to preserve views. We accept, too, Mr Garrick's opinion that implicit in s.6(a) is the protection of ecosystems and ecological processes and the extent to which those are modified by any development. Specific protection is accorded the intrinsic values of ecosystems under s.7(d)), and this aspect of the natural characteristics of the site has not been given particular regard by the council. Mr Smale and Mr Garrick were careful to point out that allowing too much light into emergent forests is damaging to the continuing afforestation of the site. In addressing the clearance of the native trees to make way for the development, the witnesses spoke of die back in

native trees caused by their sudden exposure to light by the clearing of adjoining vegetation. Such die back is attributable to a number of changes in microclimatic conditions including increased light levels, wind exposure, reduced moisture levels both in the canopy and the soil and changes to dynamics in the soil litter layer. The witnesses estimated there would be some decline in the health of the remaining vegetation particularly of "five finger" if the development as proposed proceeds. It appears also there will be a much greater "edge" effect or exposure of the vegetation to undesirable and modifying influences. Mr Garrick was also critical that the applicant proposes to relocate some of the larger trees as specimens pointing out that they would have uncertain prospects of success on this site and that unacceptable stress would be placed on the trees as a result.

We carefully considered the applicant's innovative proposal to covenant the trees but consider this may not work effectively, given the fact that no trees have yet been identified to preserve or bush defined either by canopy edge or the extent of the tree trunks. We also anticipate it will be very difficult to retain a 50% vegetative cover on the site in view of our findings below on site clearances and the impact of the sewage system, and that such coverage is unlikely to be achievable. We are doubtful too about the practicality of covenants on this site. Mr Halstead pointed out that it is a natural human instinct to clear trees for sunlight and he spoke of the constant activity of landowners already in the area cutting the trees and vegetation surrounding their dwellings to maintain their views. For the potential owners of houses on this site such activity would be a constant temptation that no covenant would ultimately protect, given that the view shafts or corridors are an integral part of the proposal to allow the landowners views of the mountain or the lake.

We find the council has not provided for the preservation of the natural character of the lake and its margins, in allowing a proposal of such intensity in a way that will be effective. The condition requiring 50% retention of native vegetation in our view will not be sustainable in the long term - partly due to the natural processes we expect to occur, partly from the clearances we expect will be required to occur, and partly from the vagaries of human nature intent on protection of sun and views.

With respect to s.6(b), again we consider that the peninsula is an outstanding natural landscape in the area of which the site is an integral component. Indeed, we consider it amongst the most important landscape features on the western side of the lake. We consider the proposed development inappropriate as to scale and that the landscape would not be protected in the way envisaged by the developer. In this assessment we accept the evidence of Mr Smale as being persuasive over those of the applicant's witness. Mr Smale was of the opinion that whilst the character of adjoining areas has a bearing on what happens



on Mr Schwanner's property, the fact that other parts of the lake margin have been developed, does not take away from the integrity of the site as a natural landscape and it is this which he considered, which needs to be considered in determining what type of development which might be appropriate. He was concerned with the integrity of the landscape as a whole system, not only with the view, pointing out that an unmodified original indigenous landscape clearly has a very high degree of natural character. He contrasted the landscape of the site cleared of its original vegetation but left to regenerate, with one cleared and then maintained by grazing under introduced pasture systems (which is the position of the Rural 3 land further round the lake). Of the two, the former obviously has the higher degree of "natural" character. He indicated also, that in the range of landform features, peninsulas are invariably assigned special value by the community. Such value is heightened by the remnant of native bush and forest on the peninsula when it is viewed in the context of surrounding cleared spaces, or residential development - such as exists on the western shore of the Lake Tarawera. In this respect he considered Kariri Point as a discreet landscape unit of which the Schwanner property approximates merely one-third. He made a comparison between this site and a development at Whakamoenga Point, Taupo, where whilst the owners are allowed to clear the existing vegetation from their freehold sites, there are additional incentives to encourage vegetation retention as well (including greater flexibility of what is acceptable in building design because of the increased visual absorption capacity of the vegetated site). He concluded that in that example, the natural character of the area remains dominant, because the development is very much one of houses scattered in the bush. He considered the Schwanner proposal by comparison, too intensive to achieve a similar character.

That is our decision also. We find the council did not recognise appropriately or provide for the protection of the landscape which is assigned special value by the community which surrounds it, and which is indeed supported by the designation.

Under s.6(c) we are of the opinion that whilst the vehicle and pedestrian access of the public to the Esplanade Reserve will not be impeded by the development, the development itself will inhibit public access along the front of the site and conversely unreserved public access could well be a nuisance to the residents and cause conflict in the future. Mr Parton noted in his evidence-in-chief that the concept plan illustrates a 20 metre setback from what is described as the "lake edge", but which is shown on the surveyor's (J Yeoman) plan as "top of cliff". From his inspection of the property, there appeared to be approximately 4 to 5 metres difference between the two features and he was not certain as to what area is intended to be set aside for further Esplanade Reserve. This could, therefore, affect the final location of the building lines. In our view, this just generally adds to the overall uncertainty in respect of the whole proposal and what access the public may properly enjoy. Mr Stevens pointed out the existing reserve effectively isolates and protects Kariri Peninsula from

subdivision and development. Meanwhile the reserve has the potential to provide for pedestrian access between Kariri Point and Rangiuru Bay, and to provide for a continuous pedestrian promenade or walkaway along the lake front.

Under s.6(d) the consent authorities are required to recognise and provide for the relationship of Maori with their ancestral lands. Under s.7(e) they are required to have particular regard to the heritage values of sites and places. We therefore propose to consider both aspects of these provisions together.

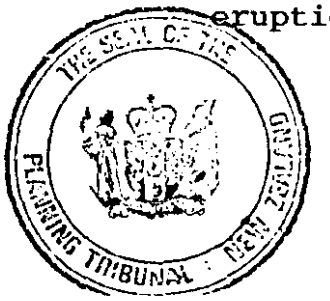
The evidence disclosed there are tribal as well as ecological relationships with the site which are (albeit unwittingly), intertwined and protected - but as a result of the designation.

It was Mr Stafford's evidence that the Kariri Peninsula (called after Lake Galilee by the Reverend Dr Spencer) is significant tribal land for the Te Arawa people, and that it is also of historical importance predating the days of European settlement as the residence of many noted chiefs, the birth place of Hinemoa and the site of many tribal battles. It is also the site of the Tuhourangi Pa (originally named Tauaroa) and later to be called Te Rua-O-Umukaria which literally means "the pit of Umukaria". Umukaria was the father of Hinemoa and her brother Wahiao who was killed at Rotokakahi (the Green Lake). Wahiao's head was apparently taken to Tauaroa and buried there in a cave. The descendants of Wahiao today comprise the Ngati Wahiao subtribe, many of whom now live at Whakarewarewa.

The importance of the site to Maori was identified by Mr Stafford as being confirmed by their decision to allow Reverend Seymour Spencer to establish his mission station there. Mr Stafford referred us to an early sketch of the mission station by W Bambridge and to early Spencer journals which referred to the Tauaroa village as located "in a lovely situation, being on a Peninsula stretching out into the Lake from the western shore ...", being where the first Spencer shelter was built. The second dwelling was built away to the west of Tauaroa. An early account describes the church situated on a knoll, the highest point in the Pa and well away from the point of the peninsula. Ms de Lambert talked of such a knoll in her landscape evidence:

> "In the west there is a small knoll, the peak of which is beyond the site boundary towards Spencer Road."

Two Spencer infant children appear to have been buried on the peninsula. After the mission was closed, the site apparently remained as a pa with an accommodation house and as a hub for the small kainga in the area for years to come. The eruption of Mount Tarawera on 10 June 1886, however, covered the whole of the peninsula with mud and ash and destroyed the settlement. We were told by Ms de Lambert that the covering was thought to be in the order of six metres deep over much of the area and that current lake levels are somewhat different to those prior to the eruption.



Evidence was also given by Mr Kuru Waaka of Te Arawa, Chairman of the Kariri Point Trust. His parents had been born at Te Wairoa (the Buried Village) from whence many of the settlers from the Tauaroa village had come after the eruption. His evidence confirmed the Maori aspects of Mr Stafford's evidence. He too stated that Umukaria was connected with Kariri having established his fighting pa there and that the ancestral name is recognised by Te Arawa people today as the home of Tuhowangi/Ngati Whiao. Mr Waaka was critical that a separate title for Mr Schwanner's property had originally been created from the Maori Reserve for its original owner Mr Alfred Warbrick by way of a Maori Land Court Partition Order. He alleged that europeanisation of the land had resulted from what he described as the "ethnic influence of pakeha parentage". He claimed that Mr Warbrick did not have the moral right to segregate Maori land from that previously held by the tribe in common. He emphasised that the site, together with the rest of the block, should have been included in the Maori Reserve. He praised the work of the Reverend Seymour Spencer and protested on behalf of his ancestors, the Schwanner development for the purpose of pecuniary gain. He alluded to the possibility of Umukaria being buried in close proximity to the site.

Part of Mr Waaka's evidence was challenged by the unsworn testimony from a descendant of Mr Alfred Warbrick, Mrs Diane Hickman who is living in Queensland, Australia and who was approached by the applicant for verification of some of Mr Waaka's statements. In that letter Mrs Hickman disputed some of the factual evidence and explained that her grandfather Alfred Warbrick did not inherit the site. He bought it after the title had been europeanised. She stated also that there was no burial ground on the property, it being her understanding that Umukaria was buried on a separate island.

One of the nationally important requirements of the Act under Part II considerations is that account be taken of principles of the Treaty of Waitangi 1840 under s.8 of the Act. One of these principles is that of consultation with the tangata whenua (see NZ Maori Council v Attorney-General [1989] 2 NZLR (CA 42,52). The council itself does not appear to have actively consulted with the tribe over the proposal. In its report to council, the Statutory Hearings Committee stated in the light of allegations that the council had not adequately consulted the Trustees that: "Your Committee points out that the records clearly indicate that the necessary advice was conveyed to the Trust, and from there it was a matter for the Trust to deal with". This is not what the legislation requires. The council's actions appear to have been merely passive. The test which the council has to meet under all provisions of s.7 is a high one. It is required to have particular regard to the issues listed. We have no evidence that the council gave especial regard to the Maori issues in its investigations into the proposal. The section imposes a duty to be on enquiry. The evidence disclosed the Maori people of the area had supported the Scenic Reserve

designation in 1979. The council had, until this point, supported the Scenic Reserve designation also. It should have investigated further why the Maori people supported it originally and to have been on the alert as a consequence.

It was Mr Schwanner and Dr Donald who paid particular regard to the concerns of the tribe. The evidence is that Mr Schwanner himself and Dr Donald too went to extensive lengths to co-ordinate the views of those most closely concerned with the area. We find from the evidence, including letters from Mr Schwanner about his meetings with the Trustees that the applicant had conscientiously and consistently attempted to resolve what obviously became an increasingly difficult issue. From what we heard and saw in the correspondence, the applicant had every justification to be concerned that on his investigations, having reached agreement with Mr Waaka on a number of issues, his integrity and ownership were both then challenged.

As to an urupa purported to be in the vicinity of the site, Mrs Hickman's statement that Umukaria was buried on a separate island was not disputed by Mr Waaka and no other tribal members came forward to challenge her view. Mr Vane offered to have Mrs Hickman's testimony sworn but we declined because it was unchallenged. Further, we find Mr Waaka's reference to a burial site "in the vicinity of Kariri Point" too general in the light of such a clear statement from Mrs Hickman. Further, if Kariri Point was originally a pa site and a church site it is likely there are burial grounds close by - for both pakeha and Maori, but not on the site itself. This seems to be recognised by the fact that the Maori Reserve containing the Spencer mausoleum adjoins the Schwanner property and that site is tapu. Further, evidence was given that the Tuhourangi Rununga A Iwi, by letter, indicated to the council that it had no objection to the resource consent as long as it did not encroach on ancestors' burial grounds. These grounds appear to be contained in the Maori Reserve. The Partition Order dated 31 April 1931 records that the partition was to the carried out by the surveyor so as not to interfere with the urupa and he was directed to cut off Warbrick's interest "by locating the block in such position as will not interfere with the urupa". Mr Stafford spoke also of two recognised waahi tapu in the rock face (rock burials) of the former Plaine property "although none are known to exist on the Peninsula". Mr Stafford was giving evidence on behalf of those seeking to preserve Kariri Point and as a reputable local historian and friend of the Maori people. As such we would have thought he would have been the first to seek its preservation as an urupa if he thought one existed on the site. Thirdly, if the Maori people had invited the Spencer family to build a church and home within the pa as the evidence indicated, it is unlikely that they were invited to do so if the ground had been sacred ground. We are therefore very doubtful if there are any waahi tapu on the site and that aspect is not an issue of national importance to the site in terms of s.6(e) of the Act.

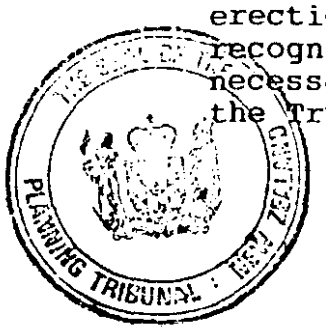
It was claimed by the applicant that the Maori Land Court would not have made a Partition Order in 1931 and would not in 1969

have declared the appeal site not be Maori land if it had had any significance to the tribe. As the appellants' counsel submitted, however, the Partition was not an alienation of Maori land, but a severance of an undivided interest and a vesting of the land in one of the former owners. Nor was the Maori Land Court involved in 1969. The change in status of the land occurred at the time by the registration of a "status declaration" which had the effect of terminating its status of Maori Land. The land became European land in 1966 under Part I of the Maori Affairs Amendment Act 1967. This action took place under the Maori Land legislation for which the Crown was responsible. The Treaty of Waitangi 1840 gave the Maori people and their successors the chance to walk in two legal worlds. The Maori land legislation provided one such mechanism and Mr Huia Warbrick who apparently lived at Lake Tarawera for many years took advantage of the Crown mechanisms available to take over an interest in the land and to pass it on to Mr Arthur Warbrick. As land in individual title, it could legitimately be sold by Mr Warbrick to Mr Schwanner. It is unjust to penalise Mr Schwanner for matters over which he has had no control and over issues which stretch back to the Treaty of Waitangi 1840 and the Crown's methods of abrogating Maori customary title. The appellants need to be aware of how deeply troubling such challenges can be. It did not escape our notice that the council of the Iwi gave consent to the proposal. The trustees only were in obvious conflict by the time of the council's hearing. Their's is an immediate and ongoing relationship with the land.

Having made these statements, it is clear that the land is ancestral Maori land and an ancestral site within the provisions of s.6(e) of the Act and that it holds much significance for the descendants of those who lived there, irrespective of the fact it is land in individual title.

We have found from the case law emanating from the past decisions of the Tribunals that sometimes the Maori people have difficulty in expressing just what they feel for ancient tribal lands, for the expressions are not necessarily recognisable in a non-Maori context. Because of this difference, challenges, as in the case of Mr Waaka, often emerge in inappropriate ways - for example that the Schwanner development is challengeable because it is for "pecuniary gain". Non-Maori find this somewhat incomprehensible.

The ancestral relationship of the tribe with Kariri Point, in our view, will endure irrespective of anyone who lives there. Through the proposed designation, however, the Crown has given the tribe an ecological basis by which to preserve its heritage. As the appellants submitted and we accept, the present undisturbed natural state of the Kariri Peninsula assists in the recognition and appreciation of the land as a place or site of ancestral and historical importance. The erection of ten houses on the applicants' land will reduce that recognition and appreciation. "Particular regard" does not necessarily mean protection of the Historic Places Trust under the Trust's legislation. Section 7(e) requires that particular



regard to the recognition and protection of heritage values of sites. In respect of the heritage value of this site - it seems to us that this has been basically ignored by the council. The site's significance does not necessarily depend, in Maori terms, upon any relic or archaeological remains which would normally be the subject of heritage orders. To Maori it has a value which transcends such issues.

Because of the designation and because of the proximity of the adjoining Maori Reserve and of all the historic and Maori connections with the site it seems appropriate that in the context of this region, the Schwanner land will have increasing importance as ancestral land and as a Maori heritage site for future generations. The evidence has established to our satisfaction that this site has heritage value because of its association with one of the early mission stations in the Rotorua district and as an early pa site of a famous chieftain.

If development of the scale proposed does not take place and Mr Schwanner is of the opinion that he could see his way to selling it or exchanging it for land elsewhere, then it would be appropriate for the designating authority to acquire the site in the interests of the nation and for the values we have identified in this decision.

Under s.7(c) and (f) the consent authorities are required to have particular regard to the maintenance and enhancement of amenity values and of the quality of the environment, "amenity" being defined in s.2(1) as the natural or physical qualities of an area which contribute to the public's appreciation of its pleasantness and aesthetic coherence. As it was presented to us and as Mr Parton pointed out the proposal seeks to clear a series of view corridors through the existing bush situated on the future esplanade reserve adjoining the eastern boundary of the property and maintain these for the continuing benefit of the adjoining residents. He could not recall coming across a comparable situation where sections of bush in a proposed future scenic reserve or esplanade reserve are first cut down for the benefit of future adjoining owners and a view corridor is then maintained in that state for the benefit of the same residents by way of a private management agreement. It was his opinion that the trees on the esplanade reserve area should be retained and maintained by the council or Department of Conservation for the benefit of the public rather than the adjoining landowners. This should be particularly so if the trees are to provide a screening effect. In our opinion Ms de Lambert identified one of the vitally important components of the amenity value of this site - and that is the visually intact nature of its vegetative cover. A canopy of secondary native forest with emergent Robinea psuedoacacia is now almost continuous across the whole of the site and the Maori Reserve. It is our view that because of the relatively conspicuous location of the site it is visited regularly by the public and is such an integral part of the natural landscape, that only limitation on development will

provide maintenance and enhancement of its amenity values with vegetation left to grow untrammelled except for minor modification.

The council may have thought it gave particular regard to amenity values by the conditions it imposed and certainly it is to be commended for that attempt. On the evidence , however, we do not consider the amenities will be preserved.

Effects of the Proposal

Effect of the Designation

The appellants submitted the council was wrong to ignore the designation. At the council hearing Mr Sholl indicated that it was up to the Minister of Conservation to decide what protection shall be given to the designation under s. 176(1)(b). On this basis the council was invited to evaluate the application only in terms of the Rural 3 zoning. We do not accept this is a correct view partly for the reasons given on the results of a designation, including the fact that it may be deemed to be a district rule to be considered under ss.104(4)(a) and 105(2)(b) of the Act.

Because the property is designated as proposed scenic reserve s.176(1) of the Act comes into play and that states:

> "Where a designation is included in a district plan under Section 175, then, notwithstanding anything to the contrary in any plan and regardless of any resource consent -
>
> (a) ...
>
> (b) No person may, without the prior written consent of that requiring authority do anything in relation to land that is the subject of the designation including -
>
> (i) ...
>
> (ii) Subdividing the land
>
> (iii) Changing the character, intensity or scale of use of the land -
>
> that would prevent or hinder the public work project or work for which the designation relates."

We accept Mr Parton's point of view that one of the fundamental purposes of designation of the site is to preserve the lake margin in its natural scenic state.. It would clearly be inconsistent with the designated purpose as scenic reserve to clear the land of 50% of the bush. The applicant's proposal would limit future public access to the area and reduce the extent of the shoreline that remains in a natural state. The

proposal is also inconsistent with the purpose of the designation as a scenic reserve preserved in the public interest and its features would prevent or hinder any future acquisition for that purpose. In any event, under the designation, the existing vegetation could not be removed without the consent of the designating authority. In Auckland Airport Hotel v Manukau City 12 NZTPA 257 and 279 the Tribunal held "If planning consent ... is required, the designation will be relevant as an important indication of what is likely to occur in the future".

The Effect of the Proposal on the Natural Character of the Site

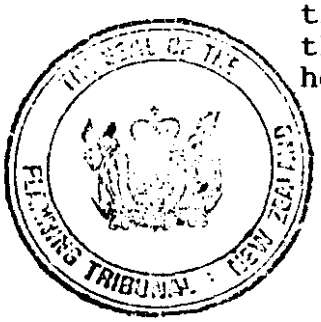
It was the applicant's case that the original natural character of the lakeside margin in the area of the appeal site has been so modified by the character of the existing settlement and that the proposal will be able to be so integrated that it will not encroach either upon the character of the lake or the headland (the site making up only one-third of the peninsula's total area).

All the planning and landscape witnesses, however, identified the peninsula as being a landscape feature which forms a distinctive and discreet landscape character unit within the overall environment of the Lake Tarawera foreshore.

The development, as proposed, presents a regimented layout with larger houses by comparison than those generally in the existing settlement. When viewed from the lake the trees currently combine to form a visual "fence". The development will provide view shafts outwards to the lake with a 12 metre wide swathe. Ms de Lambert sought to convince us that the canopy of trees to be retained under the covenants will provide a severed vegetative look with view shafts provided for only under a canopy; that whilst the plan obviously had linear qualities, once on the ground there would be a much more organic pattern. We found this aspect of the evidence unconvincing. On the one hand she said that any native vegetation within the construction zone should be removed and relocated but it is the construction zone itself which determines what trees are to be identified and saved - not the significant trees themselves which determine where the houses are to be located. Thus the significant trees and, logically, those which might provide an overall canopy effect over the view shafts, may not remain to do so.

The applicant indicated that as little as 15-20% of the existing vegetation on the site may need to be cleared to provide for the development. Messrs Smale and Parton seems very sceptical about this figure and so is the Tribunal. Mr Smale said this:

> "Dr Donald has identified an average house size of about 1500 ft^2 or about 140 m^2. The proposed ten houses themselves will therefore occupy about 1400 m^2. Each of the two tennis courts covers about twice the area of one of the houses, so the courts are the equivalent of another 4 houses or about 560 m^2. So the area of the site occupied



> by houses and tennis courts alone, without any vehicle accessways, parking areas, lawns or other open space is about 1960 m^2, say 2000 m^2.
>
> This is just under 10% of the total site area of 2.1 ha. Without actually measuring areas it is quite obvious from the plans that the amount of open space proposed is substantially more than twice the area physically covered by building pads and tennis courts ie. substantially more than 20% of the existing vegetation will require removal. In my opinion therefore it is not possible to implement the development proposed without clearing substantially more than 20% of the existing vegetation."

Mr Parton estimated that 50% would have to be cleared. He was also of the opinion that the council's requirement of 50% bush to be retained whilst sounding generous was approximately 10 to 15% less than comparable occupied sections in the vicinity of the site.

We are convinced in the light of their evidence that the proposal will have many irreversible effects on the natural character of the site. We have considered this aspect more fully under our Part II evaluation. There would be effects from the subdivision which the applicant does not appear to have thought through clearly. The original plan indicates that prospective owners would be able to have views of the mountain and the lake. As a result of plans and angle diagrams produced by Mr Parton it became clear that these views could not be achieved without extensive bush clearing, increasing the height of some of the buildings or modification of the height of the cliff edge. If the number of houses along the lake frontage was reduced to seven, five house sites would possibly be able to achieve a clear lake view, but at the cost of a highly developed and therefore modified environment which will be clearly evident from the lake. Any hopes for the retention of vegetation to provide a visual fence would, in our view, be very suspect as a result.

Mr Smale whilst acknowledging that the residential development in this vicinity is notable for the degree to which it is integrated within a framework of native vegetation stated as follows:

> "This site clearly has a very high degree of natural character ... its landform is created by natural processes including the Tarawera eruption and its cover of regenerating forest is developing in response to natural influences ... The peninsula stands out from its landscape matrix both physically and in terms of its values and is characterised by its difference. What is appropriate on the peninsula will be different from what is appropriate along the rest of Spencer Road."

He considered that as a forest landscape it had a higher visual absorption capacity than for example a dune land or tussock

landscape and considered there were opportunities for limited residential development with sensitive design and careful implementation. He considered the intensity of the development must be limited to a level which maintains viable natural processes and systems: that the development must acknowledge its landscape character: that its character should be scattered houses in the bush: that the existing land form and forest structure must remain the dominant landscape component in the new landscape. He concluded the development does not preserve the natural character of the site to an appropriate degree, despite the vegetation retained around the margins of the development in strips. Between individual house sites, the existing forest structure would not remain the dominant landscape component in the new landscape.

Ms de Lambert saw the Maori Reserve land at the end of the peninsula as the major component of the middle ground of the view and the development site of lesser visual importance. She also saw the council boat sheds forming a hard linear edge to the bay located as they are in the front of the Schwanner property reserve strip thus modifying its natural appearance.

We found the applicant's approach was to attempt to downgrade the landscape character of the site because it was seen to be surrounded by settlements. In the overall residential environment of the Lake Tarawera foreshore that conclusion does not stand up. The vegetative cover between the Schwanner property and the Maori Reserve is visually contiguous and on the other the sheds described as a major 'built' element do not necessarily capture the eye. From the aerial photographs the peninsula projects outwards onto the lake providing an impression of an untouched intact landscape and vegetative pattern. From the road elevated above the lake to the south and the foreshore to the north, the views are of an integrated landscape entity. The road to the south also provides glimpse views of the peninsula through trees and bush and houses as it rises to the south.

We see the Schwanner property and the Maori Reserve from a distance as a visual as well as geographical continuum and we see the boat sheds as merely delineating but not breaking up the margins of the lake front and the land. The tall robinia on the Schwanner property take focus away from the boat sheds to the bush beyond, so that they are diminished in terms of attention. From the adjacent lake front reserve to the north looking backwards along the lake, the visual magic lies with the unspoilt peninsula. Further north looking south on the lake front and towards the peninsula, it becomes possible to visualise the proposal integrating with houses along the lake front, <u>but only</u> if fewer in number and if nestled into the bush and trees so that the built environment is merely glimpsed. The land/water edge and the visually intact nature of the vegetative cover all combine to make this a unique site.

The Effect of the Sewage Treatment System

The technical details of what must be termed an innovative sewerage system were the subject of a resource consent from the Bay of Plenty Regional Council. These details are of no concern to this Tribunal as the actual consent was not appealed. We were impressed by the little we heard of the technical details of the system itself, but we record our dismay that the resource use consents were not heard together for it is very easy (a) to have a distorted view of a complicated proposal such as this, and (b) it is extremely difficult to assess the cumulative effects of such a proposal. Mr Parton pointed out that the consent of the Bay of Plenty Regional Council to discharge of effluent from the site required the applicant to submit a plan detailing the location and area to be irrigated. There was no revised plan before us. In the event, the applicant provided his technical witness to explain the system. This explanation revealed an aspect of the proposal which no one had thus identified.

What is of concern is the land use impact of an installed system, for one of its features is a series of lateral drip irrigation lines, in the order of 1000 metres in length, 15 millimetres in diameter, which will be installed to a depth of 400 millimetres over a period of months using either a cable trench digger and/or a mole plough. Dripper lines would be located between two and four metres apart allowing for installation around trees. Mr Parton stated they could be easily laid on the site. He had had experience of laying them, for example, between the rows of trees in orchards.

Mr Halstead, an experienced landscape architect, whose evidence on the impact of system we accept, stated it would be impossible to run trenches for pipelines for soakage through the bush without seriously affecting the trees. It was his experience that there would be strong pressure to keep the soakage trenches away from the houses or the cleared areas around them and hence create greater clearance of vegetation. He also saw a need to back-hoe the pipeline in place. This would require two metres on either side of the trench to stockpile dirt thus forming an even greater clearance than anticipated. It was his experience also, that the effect of a 15 millimetre pipe buried to a depth of 400 millimetres would be such that it would be impossible to prevent harm to the native trees. The proposal would have the effect of "root pruning" them and it was his experience that to effectively lay the pipeline would mean knocking over anything in its path rather than Ms de Lambert's idea of moving the pipelines around them. He pointed out that the site was not an orchard where the pipeline could be laid by driving up the middle row between the trees. It was the evidence also that an area of 2,500 square metres is required for the irrigation area to the east of the entrance road. It is now to be provided to the back and front of the properties, but clear of the trees to be retained. This would be a clearance in itself over and above that proposed by the house sites and accessways. Mr Parton, for

his part, was of the view that laying such lines will require greater clearing of vegetation than had been identified. He calculated that the soakage field would require about 28.5 metres depth of each of the seven lakeside properties assuming an average cleared width of 12.5 metres. He was of the opinion that if the 12.5 metres width is reduced then the depth of the clearing required will have to be increased to maintain the overall size of the irrigation area. He concluded that this was one factor which resulted in the development being physically tight and over-intensive. That is our conclusion also.

The Applicant's Relationship with this Land

Regrettably this proposal will have a major and detrimental effect on the site and the Kariri Peninsula on which is stands. We say regrettably because it has not escaped our attention that the reason that the site is so outstanding is because of Mr Schwanner's care for it over the long years of his ownership. He has allowed the native vegetation to grow untrammeled. He could previously have made extensive clearances as of right and has not done so. He has, in fact, preserved a special part of the district's natural and historic and Maori heritage. It is our opinion that he has gone to the limits which developers would do to ensure that the development is environmentally and architecturally attractive and in so many of its aspects, has achieved excellence. Such excellence can be seen as a positive effect of the proposal in terms of s.3(a) of the Act. The applicant is to be commended for such considerable effort, expense and patience. In the end it is the beauty, prominence and ancestral and historic connotations of the site which defeats the development. It has been proposed by witnesses that the only way in which its amenity value could be retained is a proposal which accords with the current zoning, that is, two houses and their (two) ancillary buildings but we are unable to comment on that. We merely observe again that a very large house could be placed on the site as of right with resulting vegetation clearance.

What Mr Schwanner decides to do as a result of this decision is, of course, his choice. If he decides to sell to the Crown we hope that our analysis will assist the designating authorities to evaluate the site as a special part of Lake Tarawera and the region area generally, and make recompense accordingly. The value of a landscape, such as the applicant's site affords, will be highly prized by future generations of New Zealanders.

SUMMARY OF FINDINGS

All the above issues have needed careful attention in our evaluation of this proposal and the council's decision regrettably does not do them justice. Under s.5 of the Act its purpose is defined as one which promotes the sustainable management of natural resources. This proposal defeats that

purpose. We consider too, that the finite characteristics of the natural resources of the site will be, in time, modified by the proposal to a point which would bring them in line with the settlements on either side of the peninsula and destroy the nationally important characteristics of the site. In our opinion too the scale of the activity will destroy the public's appreciation of the pleasantness and aesthetic coherence currently presented by the landscape of the peninsula.

Under s.3 of the Act we are to have regard to the cumulative effects which would flow from an acceptance of the development concept as proposed These are as follows:-

1. We do not find anything sufficiently unusual about this site, in the applicant's terms in line with the Bachelor decision to warrant the council's decision being confirmed. To the contrary the site has natural characteristics and values which make it unique and which require protection.

2. We find as a matter of law the council did not sufficiently recognise and provide for matters of national importance under s.6(a), (b), (d) and (e) of the Act We also find that the council did not have particular regard to the provisions of s.7(c), (d), (e). Even though the latter provision (e) is not recognised in the rules of the plan, the section states there shall be particular regard to the heritage values for such sites as the Schwanner property when those exercising power under the Act are contemplating use and development. The council has the power to establish the truth of such matters as a result of its own investigations.

3. We find the council did not actively consult with the Maori Trustees of Kariri Point Reserve in terms of section 8 of the Act.

4. We find as a matter of law the council misdirected itself as to the effects of the designation. It must be considered in the evaluation of the integrity and public confidence in the plan. Mr Sholl agreed in cross examination that the effects of the proposal are more than minor if the designation is taken into account and for this reason also the consent cannot stand.

5. The combination of the designation and the underlying zoning together with the requirement to obtain consent from the catchment authority for cutting and clearing, severely limits the development of the land.

6. We find that the proposal conflicts with the rules of the district plan for the Rural 3 zoning and with many of the objectives and policies of the rural provisions of the plan. Such conflict will affect public confidence in the plan's integrity and administration if the proposal was allowed.

7. We find many aspects of the proposal have a degree of excellence unusual in such developments but they are not sufficient to outweigh the adverse effects.

8. We find the cumulative effects of the proposed land use and development as defined in s.3(d) of the Act are major adverse effects and are such that we allow the the appeal.

CONCLUSION

Having regard to the aforegoing findings, we therefore allow the appeal and cancel the council's consent in the exercise of our overall discretion conferred by s.105(1)(b) of the Act.

Costs are reserved, a memorandum from the appellants to be filed within one month of receiving this decision and memoranda in reply to be filed within two weeks of the date of the appellants' memorandum.

DATED at WELLINGTON this 3rd day of June 1993

S E Kenderdine
Planning Judge

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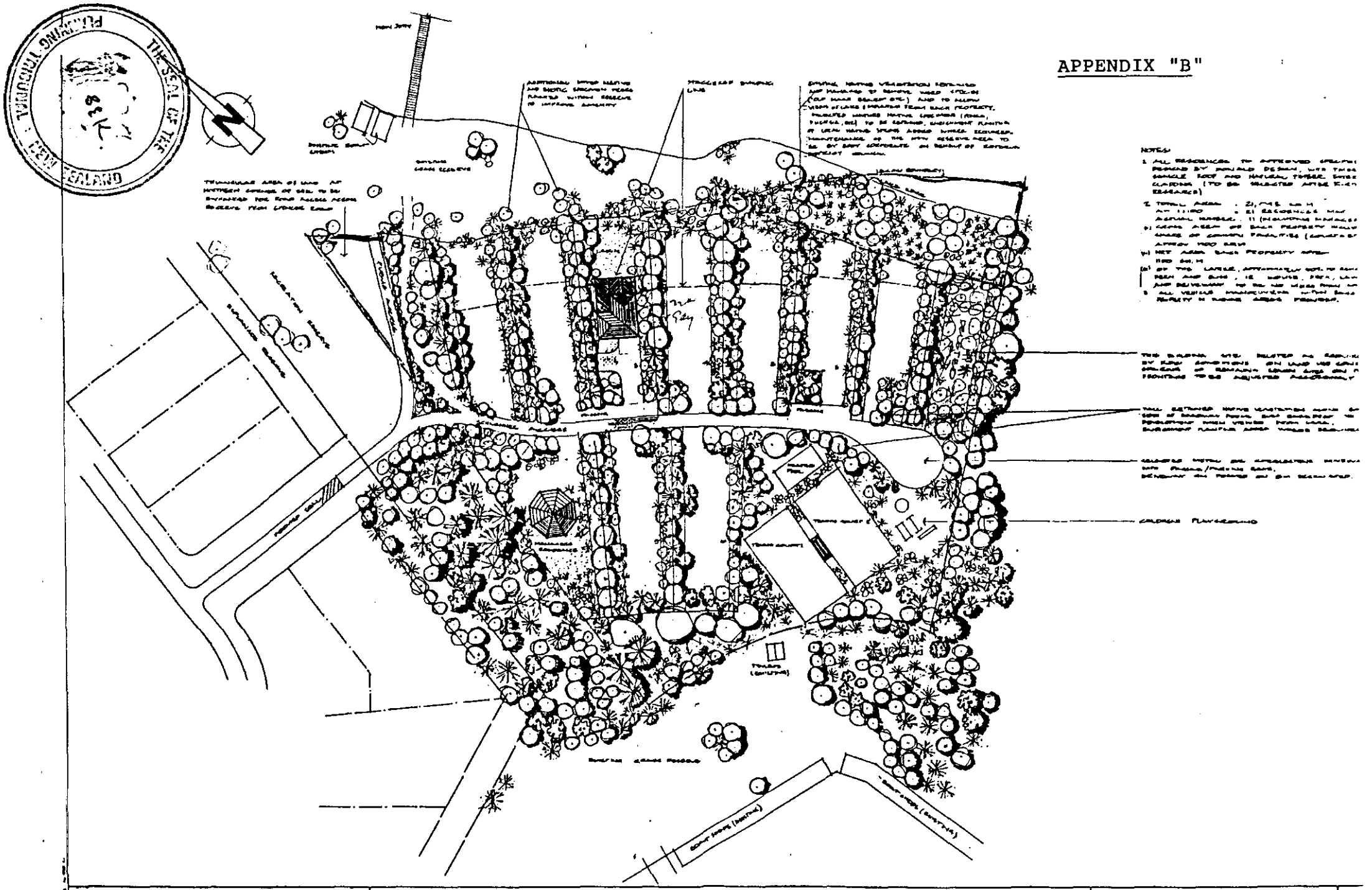

APPENDIX "B"

DONALD DESIGN
LEVEL 2 WEST PLAZA AUCKLAND 1 N.Z.
P.O. BOX 800 TELEPHONE 771652

KARIRI POINT – LAKE TARAWERA

SITE PLAN