IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2023] NZEnvC 174

IN THE MATTER	of an appeal under s 120 of the Resource Management Act 1991
BETWEEN	BARBICAN SECURITIES LIMITED
	(ENV-2022-AKL-000214)
	Appellant/ Applicant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge L J Semple
	Environment Commissioner I Buchanan
Hearing:	at Auckland on 14 – 16 June 2023
Appearances:	H C Andrews for the Appellant
	D K Hartley and W M C Randal for the Respondent
Date of Decision:	14 August 2023
Date of Issue:	14 August 2023

DECISION OF THE ENVIRONMENT COURT

A. The appeal is declined.

B. Costs are reserved. Any application for costs is to be filed within 10

working days and any response within five working days of receipt of any application.

REASONS

Introduction

[1] This appeal concerns a proposed three-lot subdivision located at 134 Linwood Road, within the rural area of Karaka in South Auckland. The site is currently comprised of 62.5973ha[1] held in one Record of Title (NA81A/738). The application originally sought consent from Auckland Council to subdivide the site into three lots comprising 19.21ha, 21.38ha and 21.32ha respectively. As a result of expert conferencing between the rural productivity and economic experts, by the time of the Court hearing, the boundaries of the lots were altered to provide for three lots comprising 18.64ha, 22.65ha and 21.32ha.

[2] The site is currently used for dairy grazing, having ceased to be a dairy farm some years ago. The land is described as "roughly square"[2] shaped; flat to easy rolling in contour, with a gully situated in the centre of the property running west-east. There is currently one habitable dwelling on the property (on the Linwood Road frontage) together with two fire damaged dwellings (one of which was damaged in late 2022 and the other of which was damaged some years previous).

[3] The immediate area around the site is described in the Joint Witness Statement (JWS) - Planning as rural including some clusters of rural residential sites, with the wider context framed by the urban development of the Hingaia peninsula to the East; the Karaka North Precinct to the West and rural properties

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1 It is noted that the Record of Title records the area as 62.5973ha whereas the Council's geomaps record the area as 62.6175ha. The Joint Witness Statement – Planning records that the 190m² discrepancy is "not significant in relation to the appeal issues" (at [4.1]).

2 Underwood EIC at [5.11].

located on the peninsula with a range of site sizes. There are watercourses and some areas of vegetation on the site but no significant native vegetation.

[4] The land is comprised of predominately LUC 2 and 3 soils which are identified as prime soils under the Auckland Unitary Plan (AUP) and "highly productive" under the National Policy Statement – Highly Productive Land (NPS-HPL). No LUC 1 soils ("elite" soils under the AUP and also "highly productive" under the NPS-HPL) were identified on the site.

[5] The site has a split rural zoning, comprising both Mixed Rural Zone and Rural Coastal Zone. Consent for the proposed three lot subdivision is required as a non-complying activity as a result of the lot sizes falling below the minimum site size of 40ha and the minimum average site size of 50ha in both zones.

[6] The application for subdivision was processed on a non-notified basis and declined by the Auckland Council on a finding that:

> the subdivision has no long-term community or environmental benefit, and the applicant has not demonstrated how the subdivision would maintain the potential for the land to be used for a range of productive purposes. There is nothing unusual or out of the ordinary about this subdivision proposal that would differentiate it from other similar proposals. Granting consent would compromise Council's endeavours to sustainably manage the rural environment and the finite and versatile qualities of the prime soil resource.[3]

The Appeal

[7] By its appeal, Barbican Securities Ltd (Barbican), sought that subdivision consent for the three lots was granted on the basis that the proposal would not result in any inappropriate fragmentation of productive land but rather, would "enable the capability, flexibility, and accessibility of land to be used for productive purposes" which, it submitted, was consistent with both the AUP and the NPS-

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3 Commissioners' Decision at [5].

HPL.

[8] The basis for this proposition was set out in the evidence of Mr Moinfar, a director of Barbican, who advised the Court that it was intended that the "new 20ha sites [are] to be used for highly productive rural activities that would otherwise be too expensive and impractical to establish on a 62ha site".[4]

[9] In that regard, Mr Moinfar explained to the Court that Barbican holds an agreement to purchase the site from the current landowner. Barbican is a related company to Citadel Capital Ltd, of which Mr Moinfar is the sole director. Mr Moinfar is also one of two directors of Fortland Capital Ltd, which Mr Moinfar advised "acts as Citadel's syndication subsidiary".[5]

[10] Mr Moinfar then explained that as a matter of corporate structure:

> Citadel also works (through Fortland) to identify opportunities to invest in land which has the potential for future urban development over the medium to long-term. Citadel's strategy is to identify large parcels of land in high-demand areas of city fringes that will foster future communities. We then procure the right to acquire the land and syndicate this to investors. Once purchased, Citadel manages the land (and investment), by actively pursuing opportunities to increase the land's value. We continue to do this through to when the land is ultimately ready to realise its full development potential, after which it is divested.
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> Citadel's first offering in this regard is the 62ha site at 132 Linwood Road, Karaka ('site') which is the subject of the application and present appeal. This offering is described by Citadel as "The Kāmahi Land Fund".

[11] While Mr Moinfar indicated that Barbican had "not yet secured confirmed uses for each of the new lots and commercially, it would not be possible to do so, until the subdivision is consented"[6], examples of the use to which the land might

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4 Moinfar EIC at [5.1].
5 Moinfar EIC at [1.1].
6 Moinfar EIC at [5.1].

be put, if subdivided, were horticulture and specialised farming.

[12] Mr Moinfar's evidence in this regard was supported by the economic evidence of Mr Thompson who confirmed that on his analysis "there is a high probability that the proposed 20 ha lots would be used for rural production and there is no evidence that they would be taken out of rural production".[7]

The issue to be resolved

[13] There was considerable agreement between the parties as to the effects of the grant of consent on rural character and amenity, leaving the primary issue in contention whether subdivision of the land would result in a loss of productive potential (the Council's position), or a retention or improvement of productive potential (the Appellant's position). This decision is focused on answering that question.

Statutory Framework

[14] As a non-complying activity, the restrictions in s 104D of the Act apply and in this instance there was agreement from the planning witnesses that the effects of the activity were minor or less than minor such that the threshold test in s 104D(1)(a) was met. The Court agrees with that finding.

[15] The application therefore falls to be considered in terms of the relevant s 104(1) matters and the overall discretion retained by the Court in s 104B. Accordingly, regard must be had to any actual and potential effects on the environment of allowing the activity, the relevant provisions of the plan and relevant policy statements and any other matters that the court considers relevant and reasonably necessary to determine the application.

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7 Thompson EIC at [2.3].

Section 104(1)(a) - Effects on the Environment

Rural Character and Amenity Effects

[16] The JWS - Planning records that the "planners agree that the rural character and amenity effects are acceptable on the basis of the *augier* conditions offered".[8] On the basis of the evidence received, the Court accepts this opinion and finds that the effects on rural character and amenity are less than minor.

Rural Productivity Effects

[17] The likely effect on the productive capacity of the land as a result of the subdivision went to the heart of the matter before us, both in terms of effects and in terms of the relevant policy framework.

[18] Considering first the matter of effects, we found this application to be somewhat unusual in that the weight of evidence before the Court clearly established that little if anything was likely to change on the site irrespective of the subdivision being granted. This is somewhat of a double-edged sword for the Appellant, however, as we traverse later in this judgment.

Land removed from future productive use

[19] With respect to land lost to future rural productive use as a result of new dwellings and resultant curtilage, we note that the Appellant has offered to limit the extent and position of building platforms and secure the same by way of consent notice. We advance on the premise outlined *inter alia* in *Guardians of Paku Bay Association Inc v Waikato Regional Council*,[9] that such conditions can and will be complied with and enforced. We further accept that, as described in the JWS - Planning, in addition to the existing dwelling on the site, a further principal

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8 JWS - Planning at [8.2].

9 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] NZRMA 61 (HC).

dwelling and an accessory building could be built as a permitted activity provided the relevant development standards are met. There is also a right (either by way of existing consent or existing use right) to replace the dwelling which was destroyed by fire towards the end of 2022.

[20] When considered against the scenario described above, we accept the evidence of the planning witnesses, Ms Bedggood and Ms O'Connor, that something in the order of 0.3ha of additional land might be removed from future rural productive use if the subdivision consent is granted. This amounts to less than half of one percent of the total area of the site which we find to be less than what might occur if the land remained in its current use and additional farm buildings were erected.

[21] We also accept the submissions of Ms Andrews for the Appellant, that land utilised for accompanying stormwater detention, wastewater disposal and the like, is not necessarily land lost to rural productive use for the purposes of the above calculation. Unless "hard" infrastructure were to be utilised, which we do not consider likely in this environment, such land remains capable of productive use and as such, makes no further contribution to land lost to rural production. We further note that land identified as "trapped" by rural productivity expert, Mr Allen, was resolved by changes to the proposed lot boundaries prior to the hearing.

[22] Overall, we find that the loss of land to rural production which might be occasioned by the grant of subdivision consent and the construction of new dwellings is nominal and will make an insignificant difference to the productive potential on the site in this instance.

Effect of subdivision on productive capacity of balance land

[23] For policy and planning reasons which we will come to shortly, a determination on the effect of subdivision on the productive potential of the balance land is a critical component of the issues at play in this case and as such,

we have carefully evaluated the evidence before us.

[24] Mr Thompson for the Appellant opined that, for economic reasons, "not only could the subdivided lots continue to be used for rural/primary production activities….but that the site's productive potential would in fact be increased following subdivision".[10]

[25] Dr Fairgray, in providing expert economic evidence for the Council, held a differing view, considering that Mr Thompson's analysis was insufficient to found his conclusions regarding improved productive potential and citing "a number of major studies, which have found that the fragmentation of farmland (subdivision into smaller blocks) is often associated with decreases in farm production on the land".[11] Contrary to Mr Thompson's view, Dr Fairgray considered that "the proposed subdivision can be expected to increase the potential for the land to be used for lifestyle activity in the short to medium term, and it would increase its potential to be used for urban activity in the medium to long term".[12]

[26] In answer to that criticism, Mr Thompson set out in some detail in his evidence the economic or market conditions that he considered meant that the subdivided lots would be:

a) unlikely to be used as lifestyle properties; and

b) more attractive for horticultural and/or specialist farming use than the current 62ha block.

[27] Specifically, with respect to the likelihood of the land being used as three lifestyle properties, Mr Thompson identified that the majority of lifestyle properties in South Auckland (90%) were less than 10ha in size, with the average

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10 Thompson Rebuttal Evidence at [1.6].

11 Fairgray EIC at [3.29].

12 Fairgray EIC at [4.3].

lifestyle property being 4ha. Only 4% (220) of the total number of lifestyle properties were in the 15-25ha category. Mr Thompson then undertook a lot-by-lot analysis of those 220 rural lifestyle properties and determined that "it is not practical or economic to utilise a large area of land of 15 – 50ha for residential use" and there was no evidence to suggest that the land would be taken out of rural production (i.e. converted to lifestyle properties) as a result of the proposed subdivision.

[28] With respect to the likelihood of horticultural use of the subdivided lots, Mr Thompson noted that on his analysis, dairying, forestry and pastoral uses typically require 50 – 150 hectares with 90% of rural properties in South Auckland over 20ha involved in the dairying and pastoral sectors. Where properties are 20ha or less, 80% are involved in the horticulture and specialist sectors. Both sectors utilise prime and elite soils and where these are present, "in all instances, the average lot size is less than 20ha".[13]

[29] Mr Thompson also identified a correlation between lot size and the price per hectare of rural land with an increase in price per hectare correlating with a reduction in lots size which, he says, "reflects the more intensive rural activities that tend to occur on smaller lots (e.g., Kiwifruit or Horses). Smaller 10-20 ha rural properties have a higher price which confirms that they have a higher rural production value (i.e. owners are willing to pay a higher price because they can produce greater profit using these properties for higher value Horticulture and Specialist uses...)".[14]

[30] Building on that thesis and utilising the Auckland Council rating database, Mr Thompson then demonstrated the economic rationale that, he considered, meant it more likely that horticultural activities would establish if the site were subdivided into three smaller lots. As set out by Mr Thompson, the site has a rating valuation of $12.7M, however, over the past two years, such valuations have

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13 Thompson EIC at [2.5].

14 Thompson EIC at [2.6].

tended to be around 40% lower than the actual sale price for farms in Auckland. A 40% uplift on the ratings valuation would place the value of the property at close to $18M or around $300,000 per hectare. Accounting for a small return for the work involved in effecting the subdivision, each lot would therefore be valued for sale at $6M to $7M.

[31] Mr Thompson's analysis of farm sale price data establishes that 84% of farm properties are purchased in the under $5M price range with only 4% above $10M and 2% above $13M. At $6M to $7M per lot, Mr Thompson considered that the proposal before the Court would be "slightly above the core of the market but...far closer to the core market than the $18M".[15]

[32] On the basis of that economic analysis, Mr Thompson formed the view that "a horticultural use would be the most viable at this price" and that "without this subdivision, it is unlikely that there would be a purchaser for the farm, and this would undermine its ability to be used for horticulture".[16] Given all of the above, Mr Thompson's analysis led him to believe that the subdivision would "likely improve the rural production capacity of the property".[17]

[33] Mr Moinfar confirmed Mr Thompson's market analysis, indicating in answer to questions from the Court that the subdivision enables "the greater portability of that land asset to the extent which allows operators which are potentially more capital intensive, horticultural use, for example, to fit within a quantum which allows ….market experience and involvement; essentially provides a more realistic and appealing opportunity to … potential buyers should the land be sold".[18]

[34] As indicated previously, Dr Fairgray reached a somewhat different conclusion stating that he did "not consider that the proposed subdivision is

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15 Transcript at 59, line 33.
16 Thompson Rebuttal Evidence at [3.13].
17 Thompson Rebuttal Evidence at [5.1].
18 Transcript at 19, line 5.

needed to achieve higher productivity on the land"[19] and that Mr Thompson's analysis did not substantiate such a claim. Moreover, he outlined in his written brief of evidence that "the proposed subdivision can be expected to increase the potential for the land to be used for lifestyle activity in the short to medium term, and it would increase its potential to be used for urban activity in the medium to long-term".[20] In answering questions from the Court, however, Dr Fairgray, modified this view and indicated that a change of use to lifestyle purposes was not the most likely scenario in the short term, substituting the view that a continuation of the current land use was the most likely immediate short-term use in his view.[21]

The Court's Evaluation of Effects

[35] Turning first to the likelihood of the land being used for lifestyle purposes if subdivided, we accept the evidence of Mr Thompson and the modified view of Dr Fairgray as expressed during the hearing, that the grant of consent for the subdivision as sought will not likely occasion a change of use to lifestyle/residential purposes. At 18ha – 21ha the lots are significantly in excess of the average lifestyle block in the area (4ha) and we are satisfied that Mr Thompson's analysis shows very few, if any, blocks of this size are used solely for residential purposes. As such, we do not consider this a likely effect of the grant of consent.

[36] In this regard, we note that much of Dr Fairgray's evidence related to a concern that subdivision to smaller lot sizes as sought here was a precursor to future urbanisation. Dr Fairgray's concern about this matter was heightened by evidence from Mr Moinfar together with appendices to evidence from Ms Bedggood which set out Citadel's longer term urbanisation aspirations for the site. We stress that the Court must make its assessment based on the application before it, not on any future application for a change in use which has not been applied for and may or may not be granted. For that reason, other than in the

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19 Fairgray EIC at [4.2].

20 Fairgray EIC at [4.3].

21 Transcript at 153.

limited way outlined later in this judgment, the court has not taken account of the future aspirations of the Appellant for the site in reaching its decision.

[37] Having determined that residential use is unlikely as a result of subdivision, the question then becomes what is the most likely future use of the land if subdivided and what impact, if any, would this have on its rural productive capacity?

[38] In answering this question, we were not persuaded by Mr Thompson's view that horticulture or specialist farming was the most likely use if the land was subdivided for the following reasons.

[39] Mr Thompson's economic thesis was based on providing lots to the market at a price point that was attractive for horticultural or specialist farming use, however, as Mr Thompson accepted in answer to questions from the Court, on his rateable value plus 40% equation, lots would need to be sold at $6M to $7M. This is above the $5M or less price point at which 84% of farm sales occur and approaching the $10M threshold at which only 4% of farm sales occur. Mr Thompson himself acknowledged that such a purchase price was "slightly above the core of the market but its far closer to the core market than the $18M"[22] (being the full value of the 62ha site).

[40] However, given the importance of this economic thesis, at the Court's request, the Appellant disclosed the actual purchase price of the property (subject to confidentiality orders to protect commercially sensitive information). The Court will therefore not disclose the purchase price other than to say it was above the figure used by Mr Thompson in his analysis. As such, we find it likely that the value of the subdivided blocks would sit well above the core market identified by Mr Thompson.

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22 Transcript at 59, line 32.

[41] Alongside Mr Thompson's market evidence, we were assisted in our understanding of the likelihood or otherwise of a conversion to horticultural use by the evidence of Ms Underwood, a horticultural consultant of some 36 years' experience, called by the Appellant. Ms Underwood was clear in stating in her evidence that while certain horticultural crops were technically feasible for the site, "progressing implementation of any new crop option for the site would require more comprehensive evaluation against a broader set of criteria".[23]

[42] In answer to questions from the Court, Ms Underwood expanded on the level of evaluation likely to be necessary before embarking on a new horticultural activity. She explained that such evaluations were "quite extensive" requiring "looking at the industry infrastructure, the research base that's out there to improve an industry, the financing, what [the] breakeven point is, the impact if your production is a year or two behind where you think it will be…".[24] She further explained that when undertaking such an evaluation it is necessary to take a reasonably long term view given the infrastructure required to establish such ventures. By way of example, she explained that people will:

> up-spec their development so they've got a greater chance of managing things [that can go wrong]. So for example if you look at the long-term average for rainfall you'll see that you might need irrigation in December/January /February but you look at any specific season you might need irrigation in October. The frost season – the long-term averages will tell you that the frost is finished by September but within my career there's been a damaging frost on 20 November. So you need to have the tools to - and the infrastructure - to try and get around those sort of things and increase the chance you'll actually get to where you think you're going.[25]

[43] She further assisted the Court in explaining that undertaking a new horticultural venture entailed sourcing the necessary plants and that, given very few nurseries "grow a lot on spec", it is often necessary to order such plants two

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23 Underwood EIC at [2.10].

24 Transcript at 34, line 30.

25 Transcript at 35, line 4.

years in advance.

[44] On the basis of Ms Underwood's evidence, the Court finds it likely that any change to horticultural use would take approximately three years of planning and development before any planting was undertaken.

[45] Mr Thompson's evidence then assisted us in understanding the likely capital investment involved in such an enterprise, indicating that the investment cost for horticulture can vary significantly with some crops such as kiwifruit attracting costs of up to $500,000 per hectare "so when you're dealing with 20 hectares, its – you run into some quite large numbers quite quickly".[26]

[46] This brings the Court to the evidence of Mr Moinfar regarding his company's aspirations for the site. Mr Moinfar was candid with the Court around the possible future urbanisation of the land given its location and proximity to the existing rural urban boundary. He was also unequivocal in stating in answer to questions in cross examination that Barbican's strategy was "long term ownership of [the] land".[27] This contrasted with Mr Thompson's analysis and to some extent, Mr Moinfar's own evidence that the subdivision would enable the sale of the land to horticultural or specialist farm operators who otherwise could not afford the market value of the larger block (recognising that Mr Moinfar qualified his evidence in this regard with "if sold").

[47] Alongside that, Mr Moinfar agreed in answer to questions in cross examination that a related company of which he was one of two directors (Fortland Capital) was currently in the market actively seeking investment capital in relation to the site under the name of the Kāmahi Land Fund Limited Partnership and that "Kāmahi intends to, after acquisition of the property, add value through actively pursuing a defined planning strategy to rezone the property for urban

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26 Transcript at 59, line 12.

27 Transcript at 8, line 32.

development".[28] Mr Moinfar also accepted that the same investment website refers to the main objective of the fund which "does not include land development activity or capital intensive improvements to the land, rather the objective is to prepare the property for future urbanisation" [29] and that "the projected investment term is five to seven years".[30]

[48] Given the evidence regarding the likely market value of the land, the additional investigations, planning and capital investment required to change the use to horticultural purposes, the timeframe within which such investigations and development would need to occur, and the investment proposition and timeframe for potential urbanisation being advanced by Barbican's related company, Fortland and its Kāmahi Land Fund, the Court finds it very unlikely that the land, if subdivided, would be sold for horticultural or other specialist farming purposes in the short to medium term.

[49] Rather the Court finds, as Dr Fairgray did in answer to the Court's questions, that the most likely use in the short term is a continuation of the current use, namely dairy grazing. Put another way, the Court finds that the status quo will prevail irrespective of the change in land tenure as a result of subdivision.

Section 104(1)(b) – Relevant Planning Provisions

[50] We now consider the above findings in light of the relevant plan provisions, to which we are required to have regard. The JWS - Planning identifies the relevant plan and policy statement provisions as follows:

a) New Zealand Coastal Policy Statement;

b) National Policy Statement – Highly Productive Land;

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28 Transcript at 13, line 30.
29 Transcript at 14, line 2.
30 Transcript at 16, line 13.

i. Objective 2.1, Policies 1, 7, and 8, and clauses 3.8, 3.9 and 3.10;

c) Regional Policy Statement;

ii. Chapter B9;

d) Auckland Unitary Plan;

iii. E39.2, E39.3, H19.2, H19.4.

New Zealand Coastal Policy Statement

[51] Although part of the site is zoned Rural – Rural Coastal, there was some disagreement between the planning witnesses as to whether the NZCPS applied given the separation of the site from the coast. Irrespective, both planners agreed the grant of consent would be consistent with the relevant objectives and policies of the NZCPS. The Court adopts that finding.

NPS-HPL

[52] As previously outlined, the site is predominantly comprised of LUC 2 and 3 soils which fall within the definition of highly productive land in the NPS-HPL.

[53] The NPS-HPL has the sole objective of protecting highly productive land for use in land-based primary production, both now and for future generations (Objective 2.1). Relevant to this case, it seeks to meet this objective by avoiding the subdivision of highly productive land (except as provided for) (Policy 7) and protecting highly productive land from inappropriate use and development. (Policy 8).

Policy 7 – Avoiding Subdivision

[54] Policy 7 is implemented by clause 3.8 which provides that territorial authorities must avoid the subdivision of highly productive land unless such

subdivision falls within one of three identified exemptions. Relevant to this case is clause 3.8(1)(a) which provides an exemption if:

> The applicant demonstrates that the proposed lots will retain the overall productive capacity of the subject land over the long term.

[55] Territorial authorities are required to give effect to this clause by including appropriate objectives, policies and rules in their district plans. While the Auckland Plan has not yet been varied to give effect to the NPS-HPL, the clause provides a clear direction as to the relevant provisions to be included when the variation is completed. Moreover, as an operative national planning statement we are able to have regard to the clause as it stands.

[56] Our finding of fact, as previously outlined, is that the most likely effect of the subdivision is retention of the status quo, that is to say the land will continue to be used for its current pastoral use irrespective of the grant of a subdivision consent. On that basis we find that the overall productive capacity of the land will remain the same and thus be "retained" within the terms of clause 3.8.

[57] While we appreciate that in the long term there is a stated aspiration for urbanisation of this land, we stress that no application in that regard is before this Court. In addition, we heard no evidence to suggest that subdivision into three lots now, would in any way assist in such future consent being granted. As such, we can make no finding that the subdivision will diminish rural productivity in the long term.

[58] On the evidence before us, the pastoral use of this land is the most likely outcome until some further application is made. At that point, these matters may well fall to be reconsidered but that is the not the present job of this Court.

[59] We acknowledge the evidence of Dr Fairgray that research he undertook for the Ministry for the Environment indicated that "subdivision of productive rural land into smaller lots – typically a one-way process – increases the potential for

land use change from primarily rural primary production activity to peri-urban uses – especially countryside living".[31] However, we understand Dr Fairgray's concern to be primarily regarding subdivision accompanied by a change of use to rural lifestyle which he agrees is unlikely to happen here.

[60] We also found that, should new dwellings and curtilage be established on the lots (which again we think improbable given the evidence before us that the status quo will likely prevail), the resultant loss of productive capacity would be inconsequential as compared to what could occur as of right.

[61] Based on those findings, we find that the application is consistent with the subdivision exemption provided for in the NPS-HPL.

Policy 8 – Inappropriate Use and Development

[62] Given our finding that the land will be retained in land based primary production, we also find that the subdivision sought in this instance, cannot be categorised as "inappropriate use and development" for the purposes of Policy 8 and accordingly those provisions do not apply here.

AUP

[63] Chapter B9 which forms part of the Regional Policy Statement and Chapters E39 Subdivision – Rural and H Rural Zones are identified as the relevant chapters of the AUP. In traversing these, we were again assisted by the JWS – Planning, the evidence of both planning witnesses who helpfully focussed on the matters of dispute and the submissions of Counsel.

[64] Chapter B9 identifies issues faced in acknowledging and enabling the contribution made by rural areas to the overall well-being of a region in the face of urban expansion pressures. In the Auckland context, and of relevance to this

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31 Fairgray EIC at [1.13].

case, this is expressed, inter alia, as "managing subdivision to prevent undue fragmentation of large sites in ways that restrict rural production activities".

[65] A series of objectives and policies are then provided which seek to ensure "rural areas … are protected from inappropriate subdivision, urban use and development" and "rural production and other activities that support rural communities are enabled". More specific objectives are provided for highly productive land with land containing prime soils (as is the case here) "managed to enable its capability, flexibility and accessibility for primary production". With specific reference to rural subdivision, Policy B9.4.2(2) sets out specific circumstances in which subdivision is to be enabled. This includes the creation of parks and reserves, establishing infrastructure and relevantly for the purposes of this case, rural production purposes.

[66] Chapter E39 then particularises these matters further by setting out how such subdivision is to be undertaken within the rural zones, for example, by managing adverse effects on historic heritage or Māori cultural heritage. Importantly for the purposes of this matter, Objective E39.2(10)(b) provides that "Fragmentation of rural production land by subdivision of land containing prime soil is avoided where practicable". The resultant policies reinforce this dual approach of providing for subdivision which supports the policies of the zones (Policy E39.3(1)) and avoiding (where practicable) the fragmentation by subdivision of land containing prime soil (Policy E39.3(8)).

[67] In this way, the AUP establishes a planning framework which provides for subdivision in those circumstances where it is appropriate to enable the positive outcomes sought for the zone (and in those circumstances sets out how such subdivision should be undertaken) but otherwise directs that it is to be avoided.

[68] In addressing the Court on these respective "enable" and "avoid" directions, Counsel for the Appellant reminded us that both terms have been found to be

strongly directive[32] and the negative "avoid" direction should not, by default, be afforded greater weight than the positive "enable" direction. We accept that.

[69] As the High Court outlined in *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc*, "many of the policies in the Regional Policy Statement are concerned with achieving positive outcomes rather than with controlling or restricting negative outcomes. Given that most positive outcomes will be achieved by private actors, rather than by the Council, it is only natural that these policies use verbs such as "enable", "encourage" or "promote" rather than a verb such as "require".[33] As such, Councils will, in some instances, need to enable subdivision to occur to achieve the positive outcomes sought for the zone. Such circumstances include where rural production is enabled by subdivision.

[70] We caution, however, as the High Court did in *Eden Epsom* that context is important. The enable and avoid directions in the relevant chapters of the AUP are not, in our view, in competition with each other such that the Court is required to balance them. Rather, they form a comprehensive package that, on our reading, provides that subdivision in the rural zones is generally to be avoided unless it meets certain parameters that are considered to promote or support the policies of the zone.

[71] In this instance, rural subdivision to minimum lot sizes of 40ha and average site sizes of 50ha is enabled (on the basis that lots of this size support the policies of the zone). Where subdivision is sought below those minima, the onus is on the applicant to demonstrate that subdivision to a smaller lot size is needed to meet the policies of the zone. In this case, that means demonstrating that rural productivity is enabled or better enabled by subdivision below that lot size.

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32 *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] NZSC 38, *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948.

33 *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 at [119].

[72] Counsel for the Respondent submitted that there is no requirement in the AUP for an applicant to show that land needs to be subdivided to enable rural production. We disagree with that submission. Subdivision is enabled in certain circumstances and in this instance, only to the extent that is necessary to meet the policies of the zone. As such, it is incumbent on the applicant for a smaller lot size subdivision to show how that enables or better enables rural production than subdivision in accordance with the minima.

[73] Turning to the case before us, the Court has determined that the grant of consent would make no difference to the rural productive capacity of the land. Indeed, our finding of fact is that on the balance of probabilities the use of the land will remain the same irrespective of the subdivision. In those circumstances, we are not persuaded that subdivision to a reduced lot size is required to enable rural production. It follows therefore that the policy direction to avoid fragmentation by subdivision is practicable to comply with in this instance, while still meeting the intent of the zone.

[74] Much was made during the hearing regarding the alternative option of leasing the land for horticultural use rather than subdividing, on the basis that the policy directive to avoid subdivision "where practicable" requires an assessment of alternatives.[34] As set out above we consider that the onus is on the Applicant to prove subdivision is needed to enable rural production. As such, where rural production can be enabled via alternatives to subdivision, these alternatives will fall to be assessed. Although we find that conversion to horticultural use is unlikely given the specific circumstances of this case, we record that we received evidence from Ms Underwood, Mr Allen, Dr Fairgray and Mr Thompson (in answer to questions under cross examination[35]) that leasing was a viable alternative to subdivision in this instance. Again, that reinforces to us that rural production can be enabled while avoiding subdivision which is, we consider, the intent of the

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34 *Gray v Dunedin City Council* [2023] NZEnvC 45.

35 Transcript at 53, line 22 and following.

relevant AUP provisions.

[75] Finally, during the hearing, Counsel for the Appellant placed some emphasis on the rationale or otherwise for the minimum lot sizes in the AUP, submitting that the minimum lot sizes were somewhat arbitrary and as such, an application for subdivision below those minima should not automatically be deemed "inappropriate".

[76] We make no comment on the provenance of the minimum lot sizes. As the Court stated in *Noel Leeming Appliances Ltd v North Shore City Council (No 2)*:[36]

> An application for consent to a non-complying activity is not an appropriate opportunity for parties to challenge the merits of the provisions of the district plan.

[77] As such, we take the plan as we find it. We do, however, record that on our reading of the plan, we agree with Counsel for the Appellant that the size of the lot applied for as part of a consent application should not, of itself, render subdivision inappropriate. As we have set out above the test is the extent to which a lot size below the minima is required to enable rural production. The circumstances of a particular use may prescribe a range of lot sizes that would meet that criterion. As Ms Underwood set out in her evidence, different crops require very different scales of enterprise and as such a smaller lot size may better enable rural production in some instances but not others.

Any other relevant matter – s 104(1)(c)

Precedent Effect/Plan Integrity

[78] Counsel for the Respondent submitted that should consent be granted, it "could well influence how other similar proposals for non-complying rural

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36 *Noel Leeming Appliances Ltd v North Shore City Council (No 2)* (1993) 2 NZRMA 243 (PT).

subdivision well below minimum site sizes are considered on sites containing highly productive land, and also other rural sites in the Auckland region".[37] As we have set out above, we place little store on the "well below minimum sizes" in this application. In our view, that is not the appropriate test, but rather whether the subdivision, at the size sought below the minima, is required to enable rural production. The answer to that may vary from case to case, and as such we do not think the level at which the application falls below the minima is material.

[79] We do accept in this instance, however, that as Ms Hartley put it "the proposal is a direct challenge to the strategic policy direction of the AUP to avoid the fragmentation of rural production land and the approach of tightly circumscribing the situations in which rural subdivision is enabled….".[38]

[80] Having found that the proposal is contrary to the clear policy intent of the AUP, we find that granting consent would impact the integrity of the plan and has the potential to create expectations that similarly framed proposals would gain consent.

[81] That said, we repeat that we do not consider the AUP provisions provide for a "blanket approach" to refusing subdivision. There are most certainly circumstances in which subdivision can and should be enabled to support rural production (or to meet other of the specific circumstances set out in the plan). As such, and to the extent it is necessary, we state that if the position of Auckland Council is, as Ms Andrews put it, an "inappropriate desire to preclude any subdivision of rural land, unless that is for transferable rural site subdivision, minor boundary adjustments or within the Countryside Living zone",[39] that, too, would be contrary to the policy framework established by the AUP.

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37 Respondent's Submissions at [76].

38 Respondent's Submissions at [77].

39 Appellant's opening Submissions at [1.14].

Commissioners' Decision

[82] Under s 290A of the Act, we are obliged to have regard to the Commissioners' Decision. As Ms Andrews noted in opening, the Appellant accepts that, "at first instance, [it] did not provide the Commissioners with sufficient evidence regarding the productive potential of the site once in smaller lots, to demonstrate why granting the application would not undermine the future productive potential of the site".[40]

[83] This Court therefore received the benefit of evidence from Ms Underwood and Mr Thompson that was not available to the Commissioners and as such, some of our findings differ. Specifically, the Commissioners considered that the proposal was contrary to the NPS-HPL. We do not agree with that finding on the basis of the evidence before us that rural productive capacity will be retained by the proposal.

[84] We also disagree that "fragmentation may suggest cutting land up into very small lots (fragments) which this proposal does not do". As set our previously, we consider that the size of a subdivided lot is not necessarily determinative of its productive capacity based on Ms Underwood's evidence. We do agree, however with the Commissioners' finding that "a plain reading would say that fragmentation may occur where site characteristics or specific land use proposals support more productive use in a smaller area".[41]

[85] For the reasons set out previously, we also concur with the Commissioners that, taken as a whole, the proposal is contrary to the objectives and policies of the AUP in relation to the management of the rural environment.

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40 Appellant's opening Submissions at [1.11].

41 Commissioners' Decision at [32].

Part 2

[86] Given the comprehensive way in which we find the AUP provides for the sustainable management of the rural land resource, we do not consider it necessary to have recourse to Part 2. We accept that, although the AUP has not yet been reviewed in light of the NPS-HPL, the Plan already provides strong policy directions around protecting highly productive soils. Moreover, we have had specific regard to the NPS-HPL as part of our consideration under s 104(1)(b). For the avoidance of doubt, however, our findings above indicate that the grant of consent would be inconsistent with Part 2.

Overall Evaluation

[87] We now exercise our discretion in the light of our findings. In doing so, we are to have regard to such matters listed in s 104 of the Act as are relevant. The exercise of our discretion requires us to make a judgement in terms of s 104B of the Act to grant or refuse consent. That judgement has to be made to achieve the purpose and principles of the Act set out in Part 2.

[88] We find the adverse effects of the application to be less than minor in relation to rural character and amenity and rural productivity. Moreover, we find that the productive use of the land will be retained irrespective of the grant of consent.

[89] We find that the proposal is, however, contrary to those objectives and policies of the AUP which seeks to avoid subdivision of highly productive land other than in specified circumstances. We find those specified circumstances do not apply in this case.

Conclusion

[90] Having considered the effects of the proposal and the relevant provisions of the AUP, consent should be refused. The appeal is therefore declined. Costs are reserved. Any application for costs is to be filed within 10 working days and

responses within five working days of receipt of any application.

L J Semple
Environment Judge

I Buchanan
Environment Commissioner