

BEFORE THE FAR NORTH DISTRICT COUNCIL

IN THE MATTER

of the Resource Management Act 1991 ("**Act**")

AND

IN THE MATTER

of an application by Nags Head Horse Hotel Limited for resource consent to subdivide Lot 2 DP 442820 at Kerikeri Inlet Road, Kerikeri.

SYNOPSIS

Dated: 15 October 2025

MAY IT PLEASE THE COMMISSIONER:

1. These submissions are presented on behalf of the Nags Head Horse Hotel Limited (**Applicant**).
2. I have been retained by the Applicant to assist with the presentation of this application for hearing.
3. I must say that I am very impressed with the quality of the reports prepared for the Applicant and with the depth of investigation undertaken by the Council officer in reviewing the application. The Applicant very much appreciates that approach.
4. As the Commissioner will have seen, the result of these combined efforts is that they are a strong agreement between the experts engaged by the Applicant and the Council that the application can be approved with conditions.
5. I am, however, bound to advise that there have been unsavoury attempts by one or two submitters to derail the proceedings, not based on anything to do with the application but because of an alleged dispute arising under an easement. The commissioner will also be aware of the request to adjourn the hearing based on the Taylors (and Ms Houry) apparently not being available to attend. I address this issue quickly now.

6. This campaign appears largely to be driven by the Taylors. It is focussed on the easement referred to in Part A of their submissions. But they are not even a party to that easement. It is an ulterior attack.
7. Shortly after discovering this upon being retained, I wrote to the Council explaining why those issues were not relevant for consideration at this hearing. Essentially because they fell for consideration under the Property Law Act 2007 (**PLA**), not the Resource Management Act 1991 (**RMA**). In other words, there is simply no jurisdiction under the RMA to resolve the alleged “dispute” about an easement raised by the submitters. I have set out my position on this in several letters to the Council.
8. My first letter was dated 31 July 2025, and the essence was that:

First, I am not clear about the nature of the dispute. The easement registered on my client’s title (C871824.10) has no restrictions as to development of that land. The easement referred to in the submissions (C871824.6) is not registered against my client’s title. I also attach an updated scheme plan. The schedule of existing easements in the earlier version of the scheme plan lodged with the application had an error which has now been rectified.

Secondly, even if a legitimate dispute about my client’s rights in respect of the RoW had been raised, there is no power under the RMA for the Council to resolve that dispute in the context of an application for subdivision consent. Such a dispute would be determined under the Property Law Act 2007 (PLA) and a separate application under the PLA (and outside the RMA consenting regime) is required. As you know, the Council’s role under the RMA is to determine the application based on its assessment of effects and the planning provisions. Any alleged RoW dispute under the PLA is not a matter that can therefore legitimately delay processing the application under the RMA.
9. My second letter was dated 7 August 2025 which identified the objectionable paragraphs from each submission from the Taylors, Mr Malcolm and Ms Houry. The letter recorded a formal objection to any evidence being given or considered on this issue at the hearing. I have not received any response to that request so far. Instead, the Council sought further information about the nature of the dispute.
10. My third letter was dated 7 August 2025 which:
 - a) Recorded that I was not surprised that the Council did not understand what the dispute was, as neither did I; and
 - b) Then provided a very brief background to how the easements worked.

11. The information in b) above was provided on an expressly without prejudice basis that it was not relevant to this hearing but sent simply to assist the Council with its understanding.
12. If there was any doubt that such disputes cannot be resolved under that RMA, I **attach** a very recent decision of the Environment Court in *Clark v Butt*¹. This concerned whether the Environment Court had jurisdiction to give a declaration that a consent notice had been breached. The Court said it did not as the matter fell for determination under the PLA, not the RMA, and struck the claim out for want of jurisdiction. I refer you to paragraph [34] and paragraphs [55] – [74]. Any disputes about easements also fall to be determined under the PLA and are simply not relevant here for deciding this application.
13. I am pleased to see that the Council have accepted this at paragraph 6.6 of the Council report which says:
 - The easement registered on the application title (C871824.10) has no restrictions as to the development of that land. The easement referred to in the submissions (C871824.6) is not registered against the Applicant's title.
 - I consider that any dispute in respect of the RoW that has been raised cannot be resolved under the RMA. Such a dispute would be determined under the Property Law Act 2007 (PLA) and a separate application under the PLA.
14. I therefore do not propose to say anything further about this matter in these submissions.
15. I am, however, formally bound to record that the campaign to derail this hearing has quickly become unsavoury:
 - a) There were allegations from the Taylors that Ms Lowndes as director of the applicant had somehow misrepresented the easement position by making this application. Of course she has not. This submission is misconceived. But it is an unwarranted personal attack, nevertheless, quite out of place in the context of this hearing.
 - b) There were allegations (again from the Taylors) against Ms Watson and Mr Cumming with claims that each of them had breached the code of conduct of expert witnesses by not advising about some “dispute” over the easements. Of course that is not correct.

¹ *Clark v Butt* [2025] NZEnvC 304

16. Having to address this issue through a series of letters has put the applicant to unnecessary cost.
17. I therefore seek directions pre-hearing that any submissions or “evidence” about an alleged dispute under an easement is simply not relevant for the determination of this application. As I say I have identified the paragraphs in earlier correspondence.

PLANNING BACKGROUND

18. As set out in Ms Watson’s evidence the site is located within what must be regarded as an extremely unusual subzone called the South Kerikeri Inlet zone (**SKIZ**).
19. The drafters of the new/proposed district plan (**PDP**) have recognised the SKIZ as an anomaly, and it is not proposed to be continued in the new version of the plan. I do not understand that any appeals have been lodged against that direction.
20. I understand that that the SKIZ was only included in the operative plan out of sheer desperation to resolve concerns raised by some of the same submitters on this application.
21. In the PDP, the site is shown as Rural Lifestyle with a coastal environment overlay. The s 32 RMA report supporting the PDP clearly states there is nothing particularly special about this land (including the subject site) and it certainly does not meet any of the criteria established by the Council that are required for a special purpose zone to be implemented. The extract from the Council’s s 32 RMA report on the proposed plan (included at paragraph 7.1 of Ms Watson’s evidence) records:

It is considered that neither the SKISpz or the PVSPZ meet the tests in the Zone Framework Standard of the National Planning Standards to be retained in the PDP as special zones, i.e. they do not meet all of the following criteria:

An additional special purpose zone must only be created when the proposed land use activities or anticipated outcomes of the additional zone meet all of the following criteria:

- a. are significant to the district, region or country
- b. are impractical to be managed through another zone
- c. are impractical to be managed through a combination of spatial layers.

The proposed land use activities and the anticipated outcomes for the SKISpz and PVSPZ are not considered to be significant to the district, region or country for the following reasons:

The SKISPZ only applies to 25 properties along the southern Kerikeri Inlet, and these properties do not have any characteristics or values that distinguish them from any other properties located within the coastal environment in the district.

Neither special zone area is distinctive from or holds significantly different values to any other areas of rural lifestyle development along the coast, within the district, the wider region or the country. While these areas have recognised coastal, landscape and ecological values, these values can be managed through the district-wide/overlay provisions in the PDP and do not warrant specific zoning provisions.

22. It is submitted that this conclusion is 100% correct. If independent confirmation is required, it is provided by the *expert* reports in support of this application.
23. The submissions in opposition are not prepared by experts and read as if the submitters consider that any further development on the SKIZ is prohibited. It seems nothing short of “no development” would satisfy them.
24. Yet development is not prohibited in the SKIZ. Indeed, quite the opposite is the case. Again, as Ms Watson’s evidence records, the environmental outcomes expected for the zone are recorded as:

10.10.2.1 A South Kerikeri Inlet zone in which rural residential development occurs in appropriate locations that have the capacity to absorb such development.
25. These environmental outcomes are then of course supported by the objectives and policies which, as described in the commentary:

... are intended to be as flexible, permissive and enabling as possible given the statutory requirement to preserve the natural character of the coastal environment and the sensitivity that parts of the landscape have for the wider area.
26. The commentary also notes that:

There is potential for integrating discrete areas of built development with not more than minor effects.
27. That is precisely what is occurring here with full expert support from the Applicant’s and Council’s expert advisers.
28. It is submitted that the non-complying status of the application also arises from a *quirk* of the SKIZ provisions. Part of the development will occur in a “sensitive area” and would normally mean the application

was for a discretionary activity. However, given the proposed new Lots are only 2ha there is an additional requirement for a management plan, and without that, the status defaults to non-complying.

29. However, as Ms Watson explains, the purpose of the management plan is simply to manage jointly owned land within a larger development to achieve the best environmental outcomes. It's a belts and braces approach to ensure Lot owners that are also owners of common property organise themselves to ensure sustainable environmental outcomes for that common property, and the environment generally.
30. Ms Watson made a strategic decision that a management plan would have been a step too far in this case. The only commonly owned land is the Lake, and all the environmental outcomes are protected by through the conditions of this application as explained by Ms Watson at paragraphs 4.11.1 – 4.11.5. I applaud Ms Watson for taking this step. It is simply not the type of development where a management plan is necessary.
31. Therefore, in my submission, and for what it is worth, both the effects (addressed below) and the planning s 104D "gateways" are available for this application.
32. Finally, I note that the intended density of the residential activity at this site would meet the permitted standards under the rural lifestyle zone of the PDP and Ms Watson considers the application would be entirely consistent with the objectives and policies for that zone.

EFFECTS

33. I do not propose to say much about the effects given the nature of the Council response to the Applicant's expert reports in support of the application.
34. I do note that Ms Hawthorn has very cleverly explained the context of the site both within the coastal environment and the sensitive area provisions. I say cleverly because she has indicated using RL data about the location and siting of building platforms as a basis to discern the potential adverse visual impacts. Using that base, mitigation screening planting has then been designed which, over time, will create positive landscape effects for the area. This approach directly implements the objectives and policies for the SKIZ as summarised by the commentary noted above.
35. The ecological report confirms that wetlands will all receive covenanted protection and that appropriate setbacks from the lake have been imposed to ensure that habitats are protected.

36. Engineering design has been conceived to upgrade the farm culvert within easement A as per the scheme plan and appropriate further regional consents will be required for that to be implemented. Otherwise, all the general engineering (stormwater, wastewater and the like) issues are fully and competently addressed by the expert reports.

CONCLUSION

37. In conclusion, therefore, I respectfully submit that there are no reasons for the application to be declined.
38. I would strongly caution about allowing this hearing to be hijacked by issues relating to the easement and for which there is simply no statutory power to determine under the RMA.
39. A full set of conditions has been agreed between the experts and subject to one amendment are supported by the Applicant. It is strongly submitted that with those conditions imposed any potential effects from the subdivision will be adequately controlled and ultimately lead to an improvement overall in the environment.
40. In all these circumstances, I ask that the application be approved.

DATED 15 October 2025



Alan Webb KC
Counsel for the Applicant

**IN THE ENVIRONMENT COURT
AT AUCKLAND
I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision No. [2025] NZEnvC 304

IN THE MATTER

of the Resource Management Act 1991

AND

an application for declarations under
s311 of the Act

BETWEEN

STEPHEN CLARK &
WAIRINGIRINGI ANI PATRICIA
ANNE SMITH

(ENV-2025-AKL-117)

Applicants

AND

ADAM BUTT AND SARA-JANE
MCCRAITH

First Respondents

AUCKLAND COUNCIL

Second Respondent

Court: Environment Judge K G Reid

Hearing: In chambers on the papers

Last case event: 24 June 2025

Date of Decision: 10 September 2025

Date of Issue: 10 September 2025

**PRELIMINARY DETERMINATION
OF THE ENVIRONMENT COURT**

- A: The Environment Court does not have jurisdiction to make the declarations sought.
- B: The application for declarations is refused.
- C: Costs are reserved. Given the interrelated nature of this proceeding with that of ENV-2024-AKL-256 (the enforcement order proceeding), costs should be dealt with together. Any application for costs should be filed within 10 working days, any reply should be filed within a further 10 working days, with any final right of reply filed within a further 5 working days.

REASONS

Introduction

[1] This proceeding concerns an application for declaration by Stephen Clark and Wairingiringi Ani Patricia Anne Smith (the applicants)¹ against Adam Butt and Sara-Jane McCraith (first respondents). The applicants seek that the court declares the first respondents have breached the conditions of consent notice² by constructing a dwelling on their property at 71B Taiapa Valley Road, Muriwai³ and further that the Auckland Council (second respondent) is incorrect in determining that the first respondents have not breached the consent notice.

[2] This decision addresses the preliminary issue of whether the Environment Court has jurisdiction to make the orders sought, being a declaration regarding whether there has been a breach of a consent notice.

¹ Application for declaration dated 20 May 2025.

² Consent notice 6668390.4.

³ Legally described as Lot 2 DP 473376 and held in Certificate of Title 647282.

Background

[3] Concerned about potential impacts on the amenity of their property, the applicants' appealed the grant of resource consent RMA 23267⁴ which authorised the subdivision of neighbouring land.⁵ The appeal was resolved through mediation and confirmed by consent order RMA10/98 that was issued on 21 January 1999. This order granted resource consent RMA 23267, subject to conditions agreed upon by the parties, enabling the subdivision of the neighbouring land into 17 rural residential lots and 1 bush lot.

[4] RMA 23267 included a number of conditions to protect the amenity from the Clark Smith dwelling as well as their property.⁶ For instance, condition (a)(vii) of the resource consent requires the building site on Lot 17 to be positioned so it is not directly visible from the Clark Smith dwelling, and condition (a)(viii) requires a landscape plan to mitigate visual impacts, prepared by a qualified landscape architect, to mitigate any visual impact of a constructed dwelling when viewed from the applicants' property.

[5] These conditions were registered on the record of title for the subdivided land by way of consent notice 6668390.4 on 29 November 2005. Mr Clark understood this would prevent direct visibility of future buildings and preserve his property's scenic character.⁷

[6] The neighbouring land was further subdivided into three lots under subdivision consent R58901 granted on 16 December 2013. Consent R58901 contains a number of conditions, including recognition of the First Condition and the Second Condition of R23267 that are reflected in the consent notice. The consent notice was retained on the record of title for the three subdivided lots

⁴ Granted on 23 December 1997.

⁵ At the time owned by Taiapa Developments Limited.

⁶ At 277 Taiapa Road, Muriwai (Part Lot 1 DP 151305 and Lot 1 DP 158806).

⁷ S Clark affidavit affirmed 16 December 2024 at [11].

(including the first respondents' property).

[7] In August 2022, the first respondents obtained building consent and began construction of a dwelling directly visible from the applicants' dwelling.

[8] Ms Smith's affidavit records numerous efforts to engage with both the first and second respondents between October 2022 and June 2024. The Council and first respondents maintained there was no breach of the consent notice.

[9] In December 2024, the applicants applied for an enforcement order. The respondents applied to strike it out, arguing the application disclosed no reasonable case, was frivolous, vexatious, and constituted an abuse of process.

[10] The applicants did not oppose the strike out application. In a letter dated 2 April 2025, and at a Judicial Telephone Conference (JTC) held on 14 May 2025, it accepted that the court lacked jurisdiction to consider the enforcement order sought. They indicated an intention to seek declarations under s310 RMA, and requested leave to amend the existing application accordingly.

[11] Leave was declined as this would have substituted the application for enforcement order with one for declarations, despite the two being distinct legal mechanisms. The applicants were advised that any application for declarations must be filed as a separate proceeding.

[12] At the JTC the first respondents and Auckland Council had indicated that, if it were filed, they would oppose the declaration application on jurisdictional grounds. The court's record of JTC from the enforcement order proceeding recorded that the jurisdictional grounds would be determined as a preliminary matter in the new proceeding, were it filed.⁸

[13] The declaration application was filed on 20 May 2025. On 23 May 2025,

⁸ Record of JTC for related proceeding ENV-2024-AKL-256, dated 15 May 2025 at [13].

the court determined the unopposed strike out application. Pursuant to s279(4) RMA, the enforcement order application was struck out in its entirety.⁹

Application for declaration

[14] The declarations sought pursuant to s310(h) RMA, relating to the interpretation of a consent notice, are:

- (i) that the First Respondents, by commencing construction of a dwelling on the property at 71B Taiapa Valley Road, Muriwai (legally described as Lot 2 DP 473376, and held in Certificate of Title 647282) (the Butts' Property), in a location that is directly visible from the Applicants' dwelling, have breached the conditions of consent notice 6668390.4; and
- (ii) that the Second Respondent, has incorrectly determined that the First Respondents are not in breach of the consent notice 6668390.4 by commencing construction of a dwelling on the Butts' Property, in a location that is directly visible from the Applicants' dwelling.

[15] This decision is confined to determining whether the court has jurisdiction to grant the declarations sought. Accordingly, I will not address the grounds of the application or its merits.

Jurisdiction to make the declarations sought

Applicants' submission

[16] The applicants submit the respondents' jurisdictional objections lack merit and should be dismissed. Rather, the declarations should be made as they would resolve a live dispute, clarify the law, and uphold the integrity of the RMA consent regime.

[17] The applicants' jurisdictional argument rests on the premise that

⁹ *Clark & Smith v Butt* [2025] NZEnvC 163.

interpreting a consent notice condition is, in substance, the same as interpreting a resource consent condition. Counsel submits that a consent notice issued under s221 RMA, is neither a standalone regulatory instrument nor a private agreement between parties, but a statutory mechanism by which a territorial authority records and gives enduring legal effect to subdivision consent conditions intended to bind successors in title.¹⁰

[18] Section 220 RMA empowers authorities to impose such conditions, and s221 enables their preservation via consent notice where ongoing performance is required. Counsel submits these notices do not create new obligations but secure those already imposed ensuring their permanence and enforceability by recording them on the title.¹¹

[19] The subdivision consent and the consent notice are inherently interdependent; the latter derives from the former and cannot be separated from it. Although subdivision consents are typically given effect to when survey plans are deposited and titles issued, the conditions may be framed to have enduring legal effect, particularly where they are intended to bind successors in title. Counsel submits that the completion of the consent process does not sever the legal connection to those conditions, which continue to operate through the consent notice.¹²

[20] Counsel submits further that assessing compliance with a consent notice is equivalent to assessing compliance with a resource consent condition, engaging the jurisdictional pathway under s310(h) RMA. Furthermore, a dispute concerning the meaning or effect of a consent notice condition is, in essence, a dispute about a subdivision consent condition requiring ongoing compliance by current and

¹⁰ Applicants' submissions at [27].

¹¹ Applicants' submissions at [29]-[30].

¹² Applicants' submissions at [28], [32]-[33].

future landowners. This engages the Environment Court’s jurisdiction under s310(h).¹³

[21] Section 310(h) broadly confers jurisdiction on the court to make declarations related to “the interpretation, administration, and enforcement” of the RMA. Counsel submits that the court has clear jurisdiction under ss 310(h) and 311 of the RMA to determine, as a matter of interpretation, what the consent notice requires and therefore whether the first respondents have breached the requirements of the consent notice and accordingly whether or not the second respondent incorrectly determined that no breach has occurred.¹⁴

[22] Citing the following passage from *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council (Forest & Bird)*¹⁵ where the court observed “this provision [(310(h))] gives the Court a wide power to make declarations on issues or matters other than those specifically identified in s310(a)-(g)”.¹⁶ Counsel submits that this provision is intentionally general to encompass a wide range of matters, including disputes over consent notices, and is not limited by the specific categories listed in subsections (a)-(g).¹⁷ Interpreting 310(h) as narrower than the specific categories that precede it would be illogical given it is a catch-all clause, intended to broaden the provision’s scope, offering flexibility for unforeseen or uncategorised situations that still pertain to the interpretation, administration, or enforcement of the Act.¹⁸

[23] Further, counsel refers to the Court of Appeal’s decision in *Burrell Demolition Ltd v Wellington Regional Council (Burrell)*.¹⁹ The Environment Court declined to make a declaration as to the true meaning of a condition of a resource consent.

¹³ Applicants’ submissions at [34]-[35].

¹⁴ Applicants’ submissions at [60].

¹⁵ *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219.

¹⁶ At [101].

¹⁷ Applicants’ submissions at [24].

¹⁸ Applicants’ submissions at [25]-[26].

¹⁹ *Burrell Demolition Ltd v Wellington Regional Council* CA161/01, 18 March 2002.

The Judge's refusal was appealed, and the High Court concluded that the Environment Court had been wrong to decline to make a declaration and went on to make formal declarations as to the meaning of the relevant condition. In short, counsel submits that the dispute concerns the legal meaning of the consent notice, not the factual circumstances on the ground. This is precisely the type of question the court is authorised to determine by way of declaration, as was made clear in *Burrell*.²⁰

[24] The applicants submit that it cannot directly enforce the consent notice; only the second respondent has that authority. Accordingly, declaratory relief under s310 is the appropriate mechanism to clarify whether the notice has been breached. Counsel argues that the court's declaratory function is essential to ensure resource consent conditions, especially those benefiting specific parties, are not rendered ineffective simply because the Council declines to act.²¹

[25] Under s221(4) RMA, a registered consent notice is deemed to be a covenant running with the land under the Land Transfer Act 2017 (LTA). Counsel submits that the consent notice cannot be enforced as a covenant in gross as the applicants are not parties to the consent notice. Although the LTA introduced the concept of enforceable covenants in gross, that regime does not apply retrospectively. The consent notice in question was issued in 1999, and covenants in gross exclude instruments predating 12 November 2018. As such, the applicants cannot enforce the notice under that regime. Counsel submits this limitation reinforces the appropriateness of seeking declaratory relief under s310 to determine the meaning and effect of the consent notice.²²

[26] Counsel submits that refusing to make the declaration on jurisdictional grounds would leave the applicants without any legal means to enforce a condition specifically imposed to protect their interests. In such circumstances, the

²⁰ Applicants' submissions at [53]-[57].

²¹ Applicants' submissions at [38].

²² Applicants' submissions at [39]-[41].

condition would be rendered effectively meaningless.²³

[27] Further, they submit the Environment Court routinely determines questions of this kind. It has both the specialist expertise and jurisdiction under s310(h) to interpret resource consent conditions recorded in consent notices and to assess compliance. Its jurisdiction is not displaced simply because parties hold differing views on the meaning or effect of a consent condition.²⁴

[28] The applicants submit that enabling the Environment Court to determine whether an instrument required by a resource consent condition, such as a consent notice, has been complied with promotes certainty in land use planning, ensures enforceability of resource consent conditions and upholds the integrity of the RMA consenting framework. It would be inconsistent with the purpose and scheme of the RMA if obligations in a consent notice could not be the subject of declarations by the Environment Court, particularly where those obligations flow from, embody, and are inherently interdependent on, the conditions of a subdivision consent.²⁵

The respondents' submission

[29] Both the first and second respondents contend that the declarations sought fall outside the scope of s310 RMA. Their submissions, which are substantively similar, are addressed together.

[30] The first respondents argue that the court lacks jurisdiction to grant the declarations sought, asserting that the Environment Court's powers are confined to those expressly listed in s310.²⁶

[31] It is submitted that a full reading of *Forest & Bird* makes it clear that the

²³ Applicants' submissions at [42]-[47].

²⁴ Applicants' submissions at [47]-[52].

²⁵ Applicants' submissions at [58]-[59].

²⁶ First respondents' submissions at [2.1].

court did not interpret s310(h) as providing standalone jurisdiction to make general declarations independent of the specific categories listed in s310(a)-(g).²⁷ Both respondents rely on *Environmental Defence Society Inc v Minister for the Environment*,²⁸ where the court held that s310(h) must be interpreted in light of the closed list in s310(a)-(g), none of which refer to consent notices.²⁹

[32] As such it is submitted that s310(h) is not a general “catch-all” provision. It must be read in the context of the specific grounds in s310(a)-(g), which do not include consent notices. Moreover, s310(h) limits declarations to matters concerning the interpretation, administration, or enforcement of the RMA. It does not confer general jurisdiction or permit judicial review of administrative decisions.³⁰

[33] Counsel for the first respondents submits that if parliament had intended the court to interpret or assess compliance with consent notices, it would have expressly included them in s310(c), which refers to whether an act or omission contravenes the RMA, associated regulations, plans, designations, heritage orders, or resource consents. Given s310 is silent on consent notices counsel argues this omission is deliberate, as subdivision consents are deemed implemented upon s224(c) certification. Ongoing obligations are preserved through consent notices. Counsel submits that the absence of reference to consent notices reflects the fact that breaches of such notices are not RMA offences. Instead, registered consent notices are treated as land covenants enforceable under property law, not as instruments subject to enforcement under the RMA. This is logical, given that breaches of consent notices are not RMA offences.³¹

[34] Further, counsel submits the declarations sought do not concern “an issue or matter relating to the interpretation, administration, or enforcement of the

²⁷ First respondents’ submissions at [2.6]-[2.7].

²⁸ *Environmental Defence Society Inc v Minister for the Environment* [2024] NZEnvC 24.

²⁹ First respondents’ submissions at [2.3], second respondent submissions at [3.3].

³⁰ Second respondent’s submissions at [3.2].

³¹ First respondents’ submissions at [2.5].

RMA” and therefore fall outside the scope of s310(h) or any other subsection of s310. While consent notices preserve ongoing conditions, they are governed by a distinct statutory framework and are not equivalent to resource consent conditions. Once registered under s221(4) RMA, a consent notice becomes an interest in land under s51 of the LTA and a covenant running with the land. The Council argues that the application concerns the effect of a dwelling in relation to a consent notice registered under the LTA, not the interpretation, administration, or enforcement of the RMA. Since the RMA does not provide enforcement powers for consent notices, the appropriate forum for the applicants to address its concern is under the Property Law Act 2007 (PLA).³²

[35] The respondents reject the applicants’ claim that declaratory relief is the only practical legal avenue to test compliance with the consent notice. They argue that the application seeks to expand the court’s jurisdiction under s310(h) beyond its statutory limits and amounts to a judicial review of the Council’s enforcement decisions, which is outside the scope of s310(h).³³

[36] Counsel submits that even if no alternative enforcement mechanism exists, that does not justify expanding the court’s jurisdiction beyond what is expressly provided in the RMA.³⁴

[37] The RMA provides enforcement powers for contraventions of resource consents, but none of its provisions (including those on declarations, enforcement orders, or abatement notices) refer to consent notices. This distinction was recognised in *Speargrass Holdings Ltd v Queenstown Lakes District Council (Speargrass)*,³⁵ where the court noted that consent notices are the mechanism under the LTA to ensure obligations bind subsequent owners. If consent notices were equivalent to consent conditions, enforcement could be pursued under s314(1)(b)(i) RMA.

³² First respondents’ submissions at [2.14], second respondent submissions at [4.4].

³³ First respondents’ submissions at [2.15]-[2.17].

³⁴ First respondents’ submissions at [2.16].

³⁵ *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009.

However, the applicants have acknowledged the lack of jurisdiction by withdrawing their enforcement proceedings and instead seeking relief under the PLA in the High Court. Further, the Council argues that, given the similar wording of ss 314 and 310, it would be illogical for the court to have the power to declare rights under a consent notice but lack enforcement powers.³⁶

[38] Even if jurisdiction exists, the court may decline to issue a declaration if it lacks practical utility, such as where the issue is abstract, hypothetical, or mixed with fact and law. The Council submits that the declaration sought lacks utility because enforcement under the PLA is discretionary, and the court cannot compel the Council to act. Further, the consent notice reflects the applicants' preferences, rather than any environmental concerns. No expert evidence has been provided to suggest there are adverse amenity effects. The condition was volunteered by the applicants, not imposed by the Council. Enforcement would not assist the Council in meeting its RMA obligations or justify resource allocation. Screening is already in place or nearing completion, and the temporary building site will be removed once construction is finished. Counsel submits that even if jurisdiction exists, the Council maintains that the declaration would serve no useful purpose.³⁷

Applicants' reply

[39] In reply, counsel submits that the question to be determined is whether the declarations sought in relation to consent notices fall within the scope of s310(h) RMA. The applicants argue they clearly do. Section 310(h) empowers the Environment Court to make declarations on matters relating to the interpretation, administration, and enforcement of the Act. This provision is broad and intended

³⁶ First respondents' submissions at [2.12]-[2.14], second respondent submissions at [5.1]-[5.4].

³⁷ Second respondent submissions at [6.1]-[6.3].

to cover instruments created under the RMA, including consent notices under s221.³⁸

[40] The respondents' view that the court lacks jurisdiction because consent notices are not explicitly listed in s310 is considered overly narrow and "takes an unnecessarily restrictive interpretation of the scope of s310".³⁹ The applicants contend that such an interpretation would require s310 to list every possible RMA instrument, which is impractical. Instead, s310(h) serves as a residual clause to capture matters not specifically addressed in s310(a)-(g).⁴⁰

[41] Counsel submits that the proper question is not whether consent notices are listed in s310, but whether the declarations sought involve interpretation, administration, or enforcement under the RMA. The applicants contend the answer is yes, and that the court's jurisdiction is not excluded merely because consent notices are not expressly mentioned.⁴¹

[42] The applicants refer to *Burrell*,⁴² where the Court of Appeal affirmed the value of declaratory relief in resolving disputes over RMA obligations. Although factually distinct, the case underscores the importance of declarations in clarifying legal obligations under the RMA. The Court recognised that while such relief must be exercised cautiously, it is appropriate where parties dispute the interpretation of RMA instruments.⁴³

[43] Counsel submits that *Burrell*, as a binding Court of Appeal decision, supports a broader interpretation of s310(h), which should prevail over the narrower approach advanced by the respondents. The case affirms the utility of

³⁸ Applicants' reply at [7]-[8].

³⁹ Applicants' reply at [5].

⁴⁰ Applicants' reply at [9].

⁴¹ Applicants' reply at [7]-[10].

⁴² *Burrell Demolition Ltd v Wellington Regional Council* CA161/01, 18 March 2002.

⁴³ Applicants' reply at [12].

declaratory relief in promoting legal clarity under the RMA.⁴⁴

[44] Consent notices are statutory instruments created under s221 RMA. Although deemed covenants for registration purposes, they remain RMA-derived obligations not general property covenants. The deeming provision in s221(4) facilitates registration but does not alter the statutory origin or planning function of a consent notice. The notice in question was imposed to protect the applicants' interests following a subdivision appeal and predates the LTA. As such, the applicants cannot enforce it under the LTA and rely on declaratory relief as their only viable legal remedy.⁴⁵

[45] The applicants reject the claim that the declaration application is a disguised judicial review. They are not challenging the Council's decision not to enforce the notice, but seeking legal clarity on the meaning and effect of the consent notice, specifically, whether the first respondents breached their conditions by constructing a dwelling visible from the applicants' property.⁴⁶

[46] The application does not seek to review the second respondent's decision or compel it to take enforcement action. Rather, it seeks declarations which go to the heart of the meaning and effect of the consent notice. Indeed, one of the declarations sought relates exclusively to the first respondents. It is a declaration as to whether the first respondents, by commencing construction of a dwelling on the neighbouring property in a location directly visible from the applicants' dwelling, have breached the conditions of the consent notice.⁴⁷

[47] They argue that judicial review addresses the lawfulness of decision-making, whereas declaratory relief under s310(h) is designed to resolve legal disputes arising under the RMA. Clarifying the interpretation of the consent notice is a legitimate

⁴⁴ Applicants' reply at [13].

⁴⁵ Applicants' reply at [15]-[17].

⁴⁶ Applicants' reply at [18]-[19].

⁴⁷ Applicants' reply at [19].

use of the court's declaratory powers and would guide the Council in its future administration of the notice.⁴⁸

[48] The applicants argue that the Environment Court is the appropriate forum to resolve the legal meaning of the consent notice under s310(h) RMA. They emphasise that this is not a judicial review but a request for legal clarification of an RMA-derived instrument. Judicial review addresses the lawfulness of decision-making, whereas declaratory relief under s310(h) is designed to resolve interpretive disputes with practical implications.⁴⁹

[49] The consent notice, created under s221 RMA, remains a statutory instrument despite being deemed a covenant for registration purposes. As it predates the LTA, the applicants cannot enforce it privately and must rely on declaratory relief.⁵⁰

[50] The applicants reject the first respondents' vague suggestion that alternative forums exist, noting none have been identified. They argue that the Environment Court is best placed to interpret the consent notice and determine compliance.⁵¹

[51] The applicants also reject the second respondent's claim that declarations must be tied to enforcement powers under s314. Section 310(h) is broader and permits declarations on interpretation and administration of the RMA, even where enforcement is not available. They cite *Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) v Attorney-General*,⁵² affirming the Court's longstanding power to issue declarations without accompanying remedies.⁵³

[52] The applicants argue that if the court finds the second respondent's

⁴⁸ Applicants' reply at [20].

⁴⁹ Applicants' reply at [24]-[26].

⁵⁰ Applicants' reply at [15]-[17].

⁵¹ Applicants' reply at [24].

⁵² *Sisters of Mercy (Roman Catholic Diocese of Auckland Trust Board) v Attorney-General*, HC Auckland CP219/99, 6 June 2001.

⁵³ Applicants' reply at [27]-[31].

interpretation incorrect, it is reasonable to expect the Council to adjust its position. While the second respondent claims the declarations lack utility due to enforcement discretion, the applicants maintain that legal clarity alone is a sufficient and practical purpose.

[53] The applicants also dispute the claim that the consent notice lacks environmental purpose. It was imposed to address visual and amenity effects – legitimate RMA concerns – and remains a binding obligation, even if it benefits a specific party. They clarify that the consent notice contains two distinct conditions: one prohibiting visibility of the building site from the applicants’ dwelling, and another requiring screening for views from elsewhere on the property.⁵⁴

[54] Because the interpretation of these conditions remains in dispute, the applicants submit that declaratory relief is essential to resolve the matter. They argue that the court’s power to issue declarations does not depend on the availability of enforcement, and that legal clarity alone justifies the declarations sought. The declarations sought would resolve the dispute by clarifying the interpretation of the consent notice, which is the substance of the dispute between the parties.⁵⁵

Evaluation

[55] I am persuaded by the arguments for the first and second respondents. I find that there is no jurisdiction under s310(h) to make the proposed declarations concerning the consent notice in this case.

[56] Unlike Higher Courts, the Environment Court does not have inherent declaratory jurisdiction. Its powers are strictly limited to those set out in s310 RMA. Section 310, subsections (a)-(g) do not refer to consent notices. Section

⁵⁴ Applicants’ reply at [35]-[37].

⁵⁵ Applicants’ reply at [38].

310(h) is a catch-all provision, empowering the court to make declarations on any issue relating to the interpretation, administration, or enforcement of the RMA.

[57] However, as the court has made clear, this subsection is not used to substantially expand the ambit of subsections (a)-(g). I refer particularly to the comments of Chief Judge Kirkpatrick in *Trustees of the Motiti Robe Moana Trust v Bay of Plenty Regional Council*,⁵⁶ to that effect and the comments of Judge Steven in *Environmental Defence Society Inc v Minister for the Environment*.⁵⁷

[58] Judge Steven stated:⁵⁸

Section 310(h) is not a stand-alone source of declaratory power; it is a catch-all to fill gaps arising from the more specific provisions. Accordingly, this provision does not operate to enlarge the list in (a) – (g) to create a source of power to scrutinise national direction against the empowering provisions and Part 2 of the Act.

[59] And further that:⁵⁹

Section 310(h) was inserted by the Resource Management Amendment Act 2003 ... the principal issue at the time related to the forum in which challenges to a Council's notification decisions (made under ss 95 – 95G RMA) should be considered.

However, that exclusion does not mean that s310(h) allows for other questions within the review powers of the High Court. Section 310(h) must be read in the context of the more specific preceding subparagraphs. Subsections 310(a) – (g) address a closed list of matters.

⁵⁶ *Trustees of the Motiti Robe Moana Trust v Bay of Plenty Regional Council* [2020] NZEnvC 180 at [68].

⁵⁷ *Environmental Defence Society Inc v Minister for the Environment* [2024] NZEnvC 24.

⁵⁸ At [40].

⁵⁹ At [88]-[89].

[60] The court took a broader view of the ambit of s310(h) in *Forest & Bird*,⁶⁰ where the court stated that s310(h) empowers it to make declarations on issues or matters other than those specifically identified in the preceding subsections.⁶¹ However, as was noted by both Chief Judge Kirkpatrick and Judge Steven, the court in *Forest & Bird* found that there was a clear jurisdictional basis for the declarations in s310(a) and (c). The court comments on s310(h) were therefore not essential to the court’s reasoning.

[61] Chief Judge Kirkpatrick’s decision in *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* was appealed to the High Court⁶² where the ambit of s310(h) was also considered. Before the High Court, counsel for the appellant conceded that his argument⁶³ would give the Environment Court a power of judicial review (on RMA matters) equivalent to or the same as the High Court. After considering s301, subsections (a) and (c), Hinton J said:⁶⁴

I also agree with Judge Kirkpatrick that the “catch all” subs (h) could not sensibly be construed to establish a judicial review jurisdiction in the Environment Court. It is designed to fill any gaps arising from the more specific provisions that precede it. Further if the intention of section 310(h) or any of the other subsections was to import a power of judicial review, I have no doubt that Parliament would have made that clear.

[62] The High Court found that the declarations sought in *Forest & Bird*⁶⁵ did not amount to a judicial review.⁶⁶

[63] Based on the above authorities, the question I must consider is whether the

⁶⁰ *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219.

⁶¹ At [101].

⁶² *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846.

⁶³ At [7]-[8], [27].

⁶⁴ At [67].

⁶⁵ *Royal Forest and Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219.

⁶⁶ *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846 at [63].

proposed declarations concerning an alleged breach of a consent notice would be filling a gap in the otherwise closed list of matters covered by subsections (a)-(g).

[64] I do not think there is any gap to fill. In my view the proposed declaration is well outside of the available scope for declarations under s310 for the following reasons.

[65] I find that the interpretation of a consent notice is not a matter relating to “the interpretation, administration, or enforcement of the RMA” under s310(h). Consent notices come about as the result of a condition imposed on a subdivision consent requiring registration. However, post registration the RMA is clear as to the nature of that consent notice and how it is to be treated. A consent notice is an interest in land and is deemed a covenant that runs with the land pursuant to the LTA.⁶⁷

[66] Once a certificate under s224(c) has issued, a subdivision consent is considered to have been fully implemented and is effectively complete.⁶⁸

[67] As the High Court made clear in *Speargrass*,⁶⁹ a consent notice is enforceable only under the PLA and not under the RMA. None of the enforcement mechanisms under the RMA; abatement notices, enforcement orders or a prosecution, are available for a breach of a consent order.

[68] It would in my view be a significant anomaly if the Environment Court had the power to make a declaration as to the breach of a consent order (as is sought here) but to have no corresponding enforcement powers with respect to the same order.

[69] Further, I do not think it can have been the intention that a declaration

⁶⁷ RMA, s221(4).

⁶⁸ *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [67].

⁶⁹ *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009.

relating to a breach of a consent order would be available in the Environment Court, but enforcement would then be a matter to be pursued in the High Court. In any such High Court process a breach (or perhaps pending breach) of the consent order in question would be a matter for that Court. The determination that there has been a breach of a consent order, and the remedy for that breach are inherently connected.

[70] There is a noteworthy similarity in the wording of s310(c) relating to declarations, and s314(1)(a)(i) relating to enforcement orders. These subsections deal with the court's powers where there has been a breach or "contravention" of one of a specified list of instruments.⁷⁰ The list in each subsection is materially the same and neither includes consent notices. In my view, the court's powers with respect to declarations and the making of enforcement orders for contraventions of instruments align for good reason – where there has been a contravention a remedy to compel compliance should be available.

[71] I am not persuaded by the applicants' submissions concerning the lack of an available alternative legal avenue for them (as opposed to the council) to test compliance with the consent notice in this case.⁷¹

[72] The respondents submit that declarations may be able to be pursued by the applicants in the High Court under the Declaratory Judgments Act 1908. But even if that course is not available, that would not in my view be a good reason to expand this court's jurisdiction beyond what is expressly provided for in the RMA.

[73] As indicated, the courts have made it clear that s301(h) cannot be used to judicially review the Council's decision-making beyond the express provisions in subsections (a)-(g). In my view, the second declaration is effectively seeking to judicially review the Council's enforcement decision – that is the decision not to

⁷⁰ The wording is slightly different for each section, but the list is the same – this Act [that is the RMA], regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent.

⁷¹ See [25] above.

seek enforcement of the consent notice under the PLA.

[74] For completeness, I do not consider *Burrell* to be helpful. This case concerned a High Court appeal against a refusal of the Environment Court to grant a declaration in the exercise of its discretion, having made a substantive determination on the underlying issue. The parties had jointly sought the Court's guidance and the High Court found that in those circumstances it was wrong to decline relief in the exercise of the Court's discretion. The case was not concerned with an issue of jurisdiction, nor with the ambit of the Court's powers under s310.

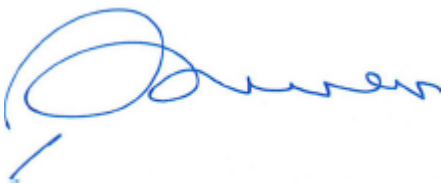
Outcome

[75] Under s279(1)(c) RMA, the application for declarations is refused and the proceeding accordingly dismissed on the basis that the Environment Court does not have jurisdiction to make the declarations sought.

[76] Costs are reserved. Given the interrelated nature of this proceeding with that of ENV-2024-AKL-256, being the enforcement order proceeding, it is my view that costs should be dealt with together.

[77] Any application for costs should be filed within 10 working days, any reply should be filed within a further 10 working days with any final right of reply filed within a further 5 working days.

For the court



K G Reid
Environment Judge