BEFORE FAR NORTH DISTRICT COUNCIL

UNDER	The Resource Management Act 1991 ("the Act")
IN THE MATTER OF	of a resource consent application by Nags Head Horse Hotel Limited for resource consent to subdivide Lot 2 DP442820 at Kerikeri Inlet Road, Kerikeri.

Synopsis of Legal Submissions of Counsel

for Angela Houry (Submitter)

21 October 2025

Julian Dawson
BARRISTER

e julian@rmalawyer.co.nz
m 0274 200 223
post PO Box 531
Whangarei 0140

Auckland Office:
By Arrangement

Northland Office:
Suite 1, 7 Norfolk Street,
Whangarei 0110

May it Please the Commissioner:

1. These submissions are made on behalf of Angela Houry who resides at 405B Kerikeri Inlet Road, and who has submitted in opposition to the proposal.

2. My contention is that the Applicant does not enjoy sufficient legal access to service the subdivision now proposed, and therefore, resource consent for subdivision should not, and actually, cannot be granted.

3. Some submitters have presented fairly extensive material on this issue, and Mr Webb has tried to dispel any notion that it might be a concern. For the reasons, I set out below, it is actually fairly straightforward, and the question of whether or not there is sufficient legal access is one that is squarely within your jurisdiction, and required consideration, under section 106 Resource Management Act 1991.

4. Section 106 of the Act provides:

106 Consent authority may refuse subdivision consent in certain circumstances

(1)A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—

(a)there is a significant risk from natural hazards; or

(b)Repealed.

(c)sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.

(1A) For the purpose of subsection (1)(a), an assessment of the risk from natural hazards requires a combined assessment of all of the following taken together:

(a) the likelihood of natural hazards occurring (whether individually or in combination):

(b) the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards:

(c) any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b).

(2) Conditions under subsection (1) must be—

(a) for the purposes of avoiding, remedying, or mitigating the effects referred to in subsection (1); and

(b) of a type that could be imposed under section 108.

5. You are required to consider whether there is sufficient legal access available, under s106(1)(c) of the Act. That, is a broad enquiry, considering a range of circumstances.

6. For example, in *Haines v Tasman District Council*[1], the Environment Court determined in the case of a two lot subdivision, that the presence of an existing, but informal private road, and alternative access by the coastline, to the proposed lot, was not sufficient. The Court concluded that:

> *[24] Section 106(1)(c) enables a consent authority to decline a subdivision consent which it might otherwise have to grant (eg a controlled activity subdivision) if it considers that sufficient provision has not been made for both legal and physical access to allotments to be created by the proposed subdivision.*
>
> *[25] Inherent in s 106(1)(c) is a certain flexibility or discretion in the way in which a consent authority deals with access issues. The consent authority has discretion as to whether or not to grant consent (may refuse to grant) and discretion as to whether or not to grant consent subject to conditions (may grant . . . subject to conditions).*
>
> *[26] Section 106(1)(c) appears to create a somewhat more flexible position in terms of matters of access than did s 321 Local Government Act 1974 (a predecessor provision now repealed) which contained various mandatory requirements in terms of road access.*
>
> *[27] At the heart of s 106(l)(c) is consideration as to whether or not sufficient provision has been made for legal and physical access. The word sufficient is not defined in RMA. Dictionary definitions include:*
> *• enough to meet a need or purpose; adequate*
> *• enough, adequate*
> *• suffice, enough, adequate.*
>
> *[28] We consider that the purpose of use of the word sufficient in s l06(1)(c) is to enable consent authorities to undertake a broadly based inquiry into the adequacy of both legal and physical access provisions for allotments to be created by a proposed subdivision.*

[1] 15 ELRNZ 182

7. Here, we are concerned that there is not sufficient legal access to each of the proposed allotments. That is because the proposal seeks to utilise an existing Right of Way off Kerikeri Inlet Road notated as "Existing appurtenant access easements subject to conditions Ref: Easement Documents"[2] I refer to this as "the Right of Way".

8. The Right of Way contains three segments; C, D & J. My client's land (now Lot 2 DP210733), Peter Malcolm's land (in part comprising Lot 1 DP442820), and the Applicant's land all have legal access over the Right of Way.

9. However, the number of lots that Mr Malcolm, and my client can each use the Right of Way for, is restricted. The right to pass and repass over the Right of Way is limited. That restriction is set out in Easement 871824.6, to which I will refer to as "#6 Easement". Clause 1(c) of Easement #6 says:

> *(c) While the local authority planning requirements restrict to five the number of rear allotments that may be served from any right of way the registered proprietor of the servient tenement will be entitled to subdivide his property to a maximum of three allotments serviced by the right of way marked "C" and the registered proprietor of the dominant tenement will be entitled to subdivide his property to a maximum of two allotments serviced by the right of way marked "C". Should the local authority requirements alter at any time in the future to increase or further restrict the number of rear allotments which may be served by a right of way each parties entitlement to further subdivision shall reciprocally increase or reduce on the same pro-rata share of three-fifths to the registered proprietor of the servient tenement and two-fifths of the registered proprietor of the dominant tenement.*

10. My client's property was part of the original servient tenement (to which 60% of the access rights are attributable) and Peter Malcolm's land is the dominant tenement (to which 40% are attributable).

[2] Proposed Subdivision of Lot 2 DP 442820, p54 Application Document.

11. What is now the Nag's Head property (and subject of this resource consent application) was part of the original servient tenement under Easement #6. For clarity, what Easement #6 refers to as Right of Way "C", is now shown as "J" on DP 167657[3]. It is the first part of the Right of Way off Kerikeri Inlet Road.

12. Easement #6 should be registered on the Nag's Head property title, in which case, we would not be arguing the point. If it were, then on a rationale analysis, it would have only 2 access rights from the Right of Way, meaning, that at best, only one additional lot could use the Right of Way, from the Nag's Head property. The balance (of 2.8 lots) then attaches to my client's land. However, whether or not Easement #6 is registered on the Nag's Head title, it continues to bind my client, Peter Malcolm, and, of course, Nag's Head.

13. Let me explain.

14. This all started on 31 July 1995, with a land deal between Peter Malcolm, and the then owners (the Fentons) of the land now comprised in the Nag's Head and Houry titles.

15. The current record of title for the Nag's Head property is Identifier 552855. Attachment 1. Easement #6 is not recorded on that title, but the Right of Way (we are talking about) is instead provided by Easement 871824.10 (the *#10 Easement*).

16. The #10 Easement does not mention any restriction on the use/entitlement of the Right of Way, and the Right of Way is shown as easement C, D and J on DP167657. Attachment 2.

17. The previous title to the current record of title was NA101C/993 (which was cancelled) Attachment 3. That title does not record the #6 Easement.

18. However, the previous title, from which this all started, is 101B/256 of some 55 hectares. That is the original Fenton title. Attachment 4. That title records Easement #6 having been registered on 31 July 1995. At the same time a boundary adjustment between the Fenton and Malcolm blocks occurred, the Nags Head and the Houry tiles were issued, and various other memorials were registered, including Easement #10.

19. The salient point though, is that Easement #6 was registered on the Fenton title, recording part Lot 1 DP 107204 (Attachment 5) as the servient tenement to right of way "C" on DP 166944 (Attachment 6). The Fenton title has now become the Nag's Head property and the Houry

[3] Referred to in easement 871824.10

property. Right of way "C" on DP 166944 corresponds to easement area "J" in the Right of Way now under discussion.

20. Where that lands us is that the Nag's Head property was, and is, subject to a constraint over the use of the Right of Way. Easement #6 should have flowed down onto the current Nag's Head property title, because it is an interest in land; both a benefit and a burden.

21. The entitlement falling to the Nag's Head and Houry properties is a combined total of 60% of the rear allotment entitlement under the Planning ordinance, from time to time. At an understood total of 8 (beyond which Far North District Council's transportation standards require the formation of a public road), that gives 4.8 lots between Nag's Head and Houry. If a pro-rata split based on land area was made, that would give something like 2 lots to Nag's Head and 2.8 lots to Houry. In any event, well short of the 4 lots Nag's Head now seeks.

22. Mr Webb KC takes the position that because Easement #6 is not currently registered on the Nag's Head title, then Nag's Head are not bound by the restriction/allocation of the Right of Way. He says, in any event, that this is a Property Law Act matter, and outside of your jurisdiction.

23. That, with respect, is disingenuous. The submitters (especially Mr Malcolm), clearly say that they have attempted to have this issue addressed or negotiated with Nag's Head for quite some time now. The response, has been one of no concern.

24. As I have discussed above, you are not asked to resolve the allocation of "access rights" between these three landowners, for I agree with Mr Webb KC, that such an enquiry is beyond the scope of this hearing.

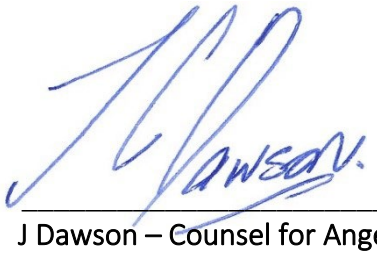
25. You are, however, asked to be satisfied, and required to be satisfied; that there is sufficient legal and physical access available to enable access to the lots proposed. That is what s106 of the Act requires of you. Two of the three affected landowners consider that Nag's Head must be bound by the right of way restrictions, just as they are.

26. There is most certainly a dispute and in my view, a compelling argument, borne out by the title history, restricting Nag's Head's ability to utilise the Right of Way.

27. Looking at this slightly differently. The Right of Way has a limited capacity. If Nag's Head is allowed to ignore the allocation of entitlements between the Malcolm and Houry landholdings, then their entitlements, and obligations are rendered meaningless. Easement #6 by which their properties are bound, is meaningless.

28. My client has raised other issues in her submission, but it would be fair to say that those pale in comparison, to the access constraint. In my view, this is actually a straightforward issue, and an instance, where s106 certainly comes into play. The consent must, be declined.

Dated 21 October 2025



J Dawson – Counsel for Angela Houry

Attachment 1

Title 552855

RECORD OF TITLE
UNDER LAND TRANSFER ACT 2017
FREEHOLD

Search Copy

R.W. Muir
Registrar-General
of Land

Identifier **552855**
Land Registration District **North Auckland**
Date Issued 08 March 2013

Prior References
NA101C/993

Estate Fee Simple
Area 14.3750 hectares more or less
Legal Description Lot 2 Deposited Plan 442820
Registered Owners
Nags Head Cow Hotel Limited

Estate Fee Simple - 1/3 share
Area 5.2350 hectares more or less
Legal Description Lot 4 Deposited Plan 167657
Registered Owners
Nags Head Cow Hotel Limited

Interests

Saving and excepting from the land formerly described Section 42 Block XI Kerikeri Survey District all minerals within the meaning of the Land Act 1924 on or under the land and reserving always to Her Majesty the Queen and all persons lawfully entitled to work the said minerals a right of ingress egress and regress over the said land

Subject to a right of way over part Lot 4 DP 167657 marked H on DP 167657 and over part Lot 2 DP 442820 marked A on DP 442820 specified in Easement Certificate B442108.5 - 30.7.1985 at 2:08 pm

The easements specified in Easement Certificate B442108.5 are subject to Section 309 (1) (a) Local Government Act 1974

Appurtenant hereto is an electricity right specified in Easement Certificate B578021.4 - 8.9.1986 at 1:32 pm

Appurtenant hereto is a right of way and telecommunications and electricity rights specified in Easement Certificate C871824.10 - 31.7.1995 at 2.34 pm

The easements specified in Easement Certificate C871824.10 are subject to Section 243 (a) Resource Management Act 1991

Subject to a telecommunications right (in gross) over part Lot 4 DP 167657 marked H on DP 167657 and over part Lot 2 DP 442820 marked A on DP 442820 in favour of Telecom New Zealand Limited created by Transfer C874249.1 - 4.8.1995 at 2.55 pm

D088754.3 Deed of Land Covenant - 20.1.1997 at 1.26 pm

D088754.4 Variation of Easement Certificate C871824.10 - 20.1.1997 at 1.26 pm

Appurtenant hereto is a right of way and an electricity and telecommunications right created by Transfer D587086.3 - 14.3.2001 at 11.04 am

Land Covenant in Transfer D587086.3 - 14.3.2001 at 11.04 am

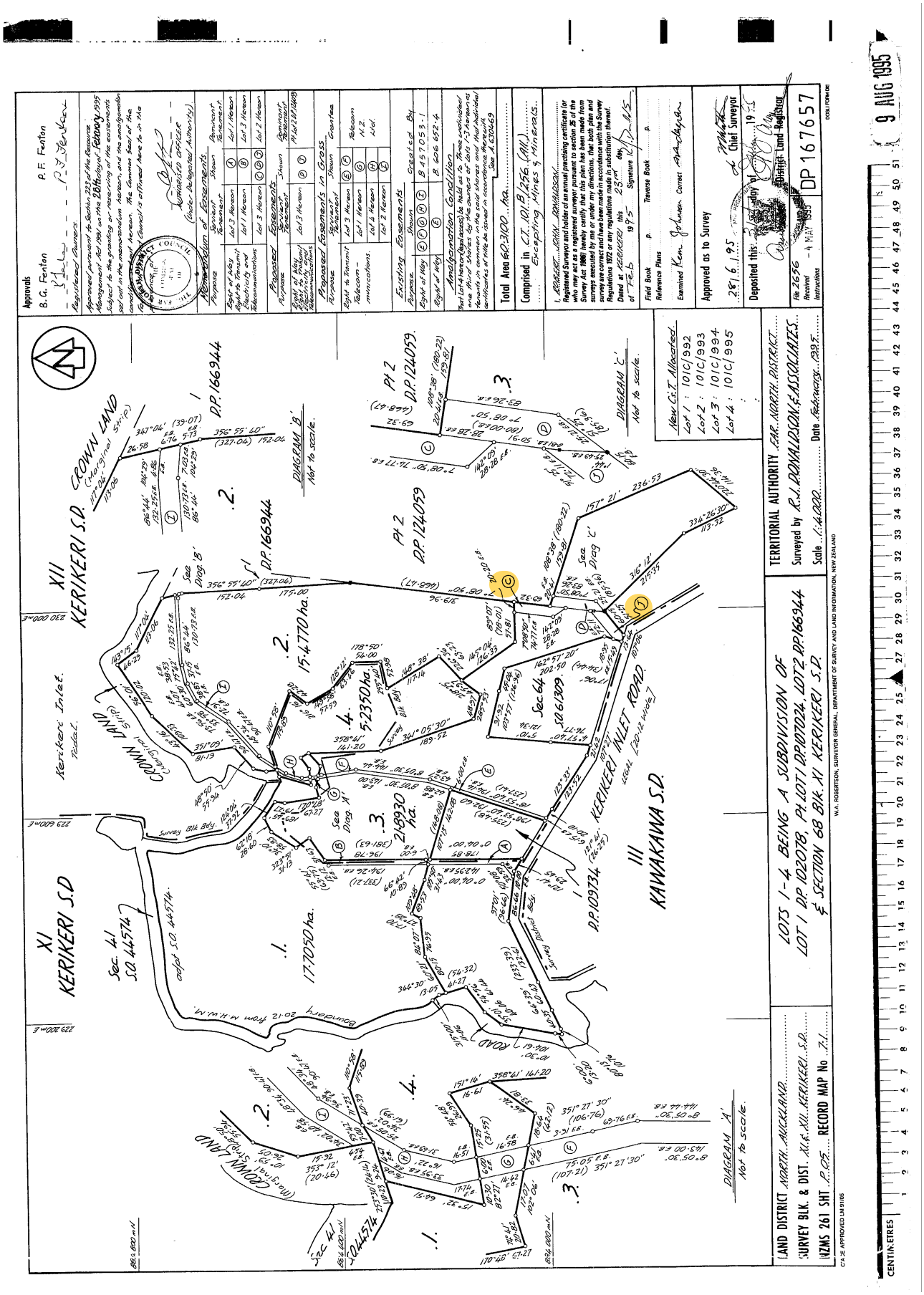
9315062.1 Surrender of Land Covenant D088754.3 as to the benefit of Part Lot 1 DP 442820 formerly contained in CT

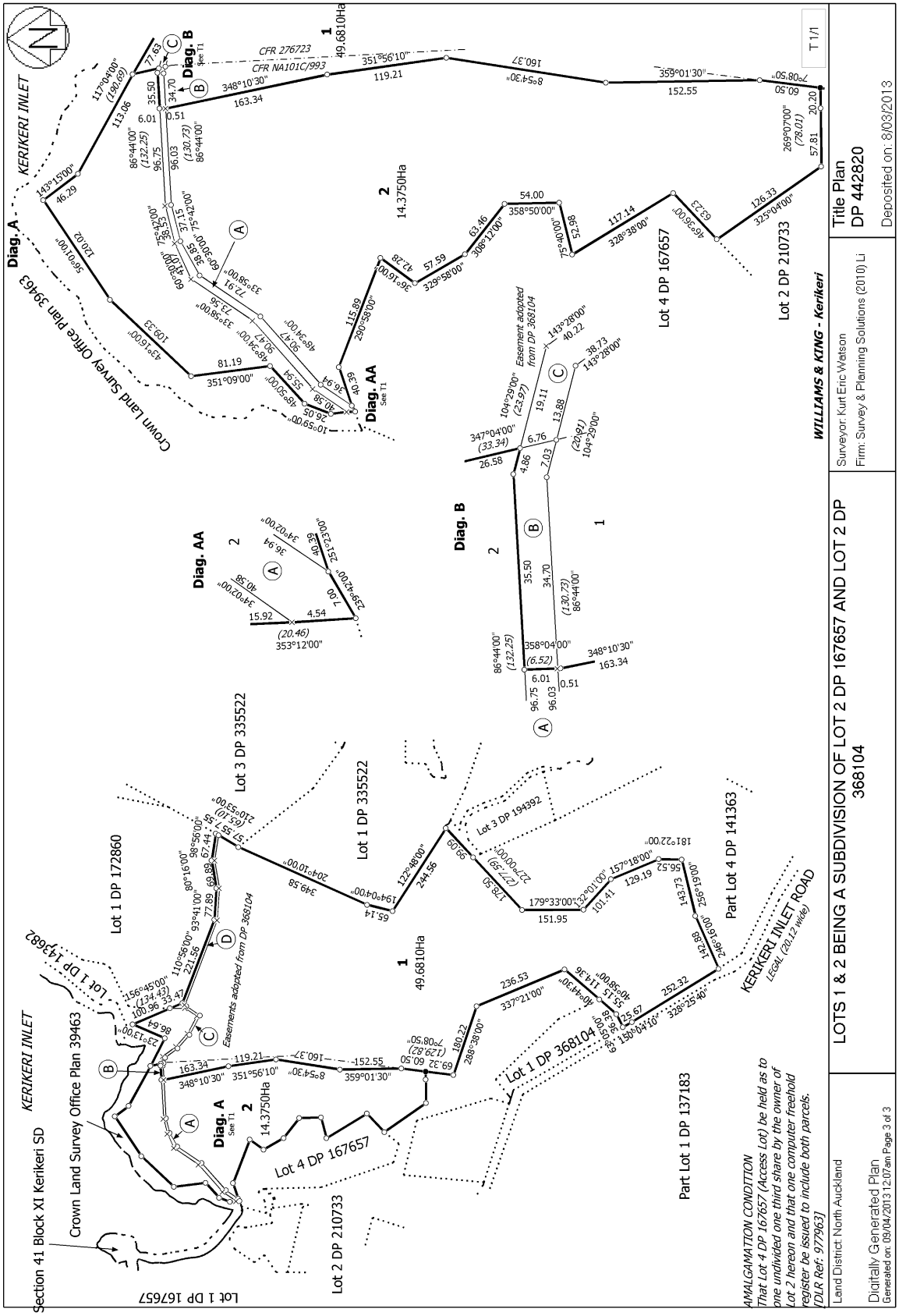
NA101C/993 - 8.3.2013 at 11:39 am

Subject to Section 241(2) Resource Management Act 1991 (affects DP 442820)

11727318.1 Mortgage to Sarah Jane Noble Lowndes - 31.3.2020 at 5:36 pm

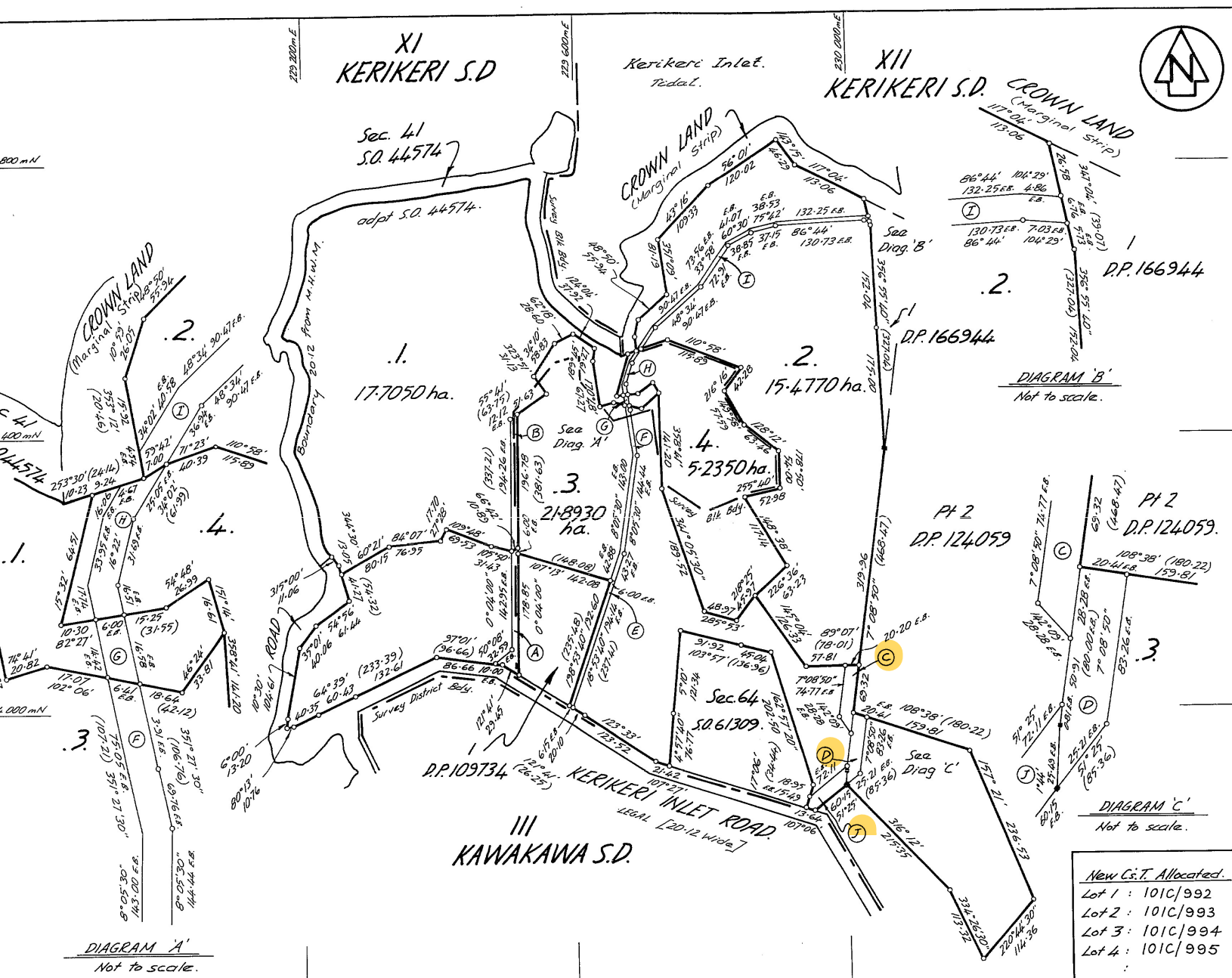
12736076.2 Revocation of Land Covenant D088754.3 as to Lot 7 DP 579108 - 26.10.2023 at 4:16 pm


Approvals
B. G. Fenton
P. F. Fenton
Registered Owners
Approved pursuant to Section 321 of the Resource Management Act 1991 on the 28th day of February 1995 subject to the granting or reserving of the easements set out in the memorandum hereon, and the amalgamation condition set out hereon. The Common Seal of the Kaipara District Council is affixed here to in the presence of
Authorised Officer (Under Delegated Authority)
Memorandum of Easements
Proposed Easements in Gross
Existing Easements
Amalgamation Condition
Total Area 60.3000 ha
Comprised in C.T. 1018/256 (All)
Surveyed by R.W. DONALDSON & ASSOCIATES
Scale 1:4000
Date February 1995
TERRITORIAL AUTHORITY FAR NORTH DISTRICT
LAND DISTRICT NORTH AUCKLAND
SURVEY BLK. & DIST. XI & XII KERIKERI S.D.
NZMS 261 SHT P 05
RECORD MAP No 71
LOTS 1-4 BEING A SUBDIVISION OF LOT 1 DP 102078, PT LOT 1 DP 70024, LOT 2 DP 166944 & SECTION 68 BLK XI KERIKERI S.D.
W.A. ROBERTSON, SURVEYOR-GENERAL, DEPARTMENT OF SURVEY AND LAND INFORMATION, NEW ZEALAND
DP 167657
9 AUG 1995
CENTIMETRES


LOTS 1 & 2 BEING A SUBDIVISION OF LOT 2 DP 167657 AND LOT 2 DP 368104
Title Plan DP 442820
Deposited on: 8/03/2013
Surveyor: Kurt Eric Watson
Firm: Survey & Planning Solutions (2010) Li
WILLIAMS & KING - Kerikeri
Land District: North Auckland
Digitally Generated Plan
Generated on: 09/04/2013 12:07am Page 3 of 3
AMALGAMATION CONDITION
That Lot 4 DP 167657 (Access Lot) be held as to one undivided one third share by the owner of Lot 2 hereon and that one computer freehold register be issued to include both parcels.
[DLR Ref. 977963]
KERIKERI INLET
KERIKERI INLET ROAD
Crown Land Survey Office Plan 39463
Section 41 Block XI Kerikeri SD
Lot 1 DP 167657
Lot 2 DP 210733
Lot 4 DP 167657
Part Lot 1 DP 137183
Lot 1 DP 368104
Part Lot 4 DP 141363
Lot 1 DP 172860
Lot 1 DP 335522
Lot 3 DP 335522
Lot 3 DP 194992
Lot 1 DP 147682
Lot 2 DP 210733
Diag. A
Diag. B
Diag. AA
Easements adopted from DP 368104
CFR 276723
CFR NA101C/993
49.6810Ha
14.3750Ha

Attachment 2

DP 167657



Approvals

B. G. Fenton — P. F. Fenton

Registered Owners.

Approved pursuant to Section 223 of the Resource Management Act 1991 on the 28th day of February 1995 Subject to the granting or reserving of the easements set out in the memorandum hereon, and the amalgamation condition set out hereon. The Common Seal of the Far North District Council is affixed here to in the presence of

AUTHORISED OFFICER (Under Delegated Authority).

Memorandum of Easements.

Purpose	Servient Tenement	Shown	Dominant Tenement
Right of Way Right to Transmit Electricity and Telecommunications	Lot 3 Hereon	A	Lot 1 Hereon
	Lot 1 Hereon	B	Lot 3 Hereon
	Lot 3 Hereon	C D J	Lot 2 Hereon

Proposed Easements

Purpose	Servient Tenement	Shown	Dominant Tenement
Right of Way Right to Transmit Electricity and Telecommunications	Lot 3 Hereon	D J	Pt Lot 2 D.P. 124059

Proposed Easements in Gross

Purpose	Servient Tenement	Shown	Grantee
Right to Transmit Telecommunications.	Lot 3 Hereon	E F	Telecom N.Z. Ltd.
	Lot 1 Hereon	G	
	Lot 4 Hereon	H	
	Lot 2 Hereon	I	

Existing Easements

Purpose	Shown	Created By
Right of Way	E F G H I	B 457053·1
Right of Way	E	B. 606 652·4

Amalgamation Condition

That Lot 4 hereon (legal access) be held as to three undivided one third shares by the owners of Lots 1-3 hereon as tenants in common in the said shares and that individual certificates of title be issued in accordance therewith. See A. 630469

Total Area 60·3100 ha.

Comprised in C.T. 101B/256 (All.) Excepting Mines & Minerals.

I, ROBERT JOHN DONALDSON Registered Surveyor and holder of an annual practising certificate (or who may act as a registered surveyor pursuant to section 25 of the Survey Act 1986) hereby certify that this plan has been made from surveys executed by me or under my directions, that both plan and survey are correct and have been made in accordance with the Survey Regulations 1972 or any regulations made in substitution thereof.

Dated at KERIKERI this 23rd day of Feb 1995 Signature

Field Book p. Traverse Book p.

Reference Plans

Examined Kem Johnson Correct

Approved as to Survey

28/6/95 Chief Surveyor

Deposited this 31st day of July 1995

District Land Registrar

File 2656 Received 4 MAY 1995 Instructions

DP 167657

New C.T. Allocated.

Lot 1 : 101C/992
Lot 2 : 101C/993
Lot 3 : 101C/994
Lot 4 : 101C/995

LAND DISTRICT NORTH AUCKLAND

SURVEY BLK. & DIST. XI & XII KERIKERI S.D.

ZMS 261 SHT P.05 RECORD MAP No 7-1

LOTS 1-4 BEING A SUBDIVISION OF LOT 1 D.P. 102078, Pt LOT 1 D.P. 107024, LOT 2 D.P. 166944 & SECTION 68 BLK. XI KERIKERI S.D.

TERRITORIAL AUTHORITY FAR NORTH DISTRICT

Surveyed by R.J. DONALDSON & ASSOCIATES

Scale 1:4000 Date February 1995

W.A. ROBERTSON, SURVEYOR GENERAL, DEPARTMENT OF SURVEY AND LAND INFORMATION, NEW ZEALAND

DOSLI FORM DIE

APPROVED LM 91/05

METRES 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51

9 AUG 1995

Attachment 3

Title 101C/993

COMPUTER FREEHOLD REGISTER
UNDER LAND TRANSFER ACT 1952

Historical Search Copy

R.W. Muir
Registrar-General
of Land

Identifier **NA101C/993**

Cancelled

Land Registration District **North Auckland**

Date Issued 31 July 1995

Prior References
NA101B/256

Estate Fee Simple
Area 15.4770 hectares more or less
Legal Description Lot 2 Deposited Plan 167657
Original Proprietors
Good Move NZ Property Co Limited

Estate Fee Simple - 1/3 share
Area 5.2350 hectares more or less
Legal Description Lot 4 Deposited Plan 167657
Original Proprietors
Good Move NZ Property Co Limited

Interests

Subject to Section 241(2) Resource Management Act 1991

Saving and excepting from the land formerly described as part Sections 14, 42 and 44 all minerals within the meaning of the Land Act 1924 on or under the land and reserving always to Her Majesty the Queen and all persons lawfully entitled to work the said minerals a right of ingress egress and regress over the said land

Subject to a right of way over parts marked H and I on DP 167657 specified in Easement Certificate B442108.5

The easements specified in Easement Certificate B442108.5 are subject to Section 309 (1) (a) Local Government Act 1974

Appurtenant hereto is an electricity right specified in Easement Certificate B578021.4 (affects part)

C871824.8 Resolution pursuant to Section 321(3)(c) Local Government Act 1974 - 31.7.1995 at 2.34 pm

Appurtenant hereto is a right of way and telecommunications and electricity rights specified in Easement Certificate C871824.10 - 31.7.1995 at 2.34 pm

The easements specified in Easement Certificate C871824.10 are subject to Section 243 (a) Resource Management Act 1991

Subject to a telecommunications right (in gross) over parts marked H and I on DP 167657 in favour of Telecom New Zealand Limited created by Transfer C874249.1 - 4.8.1995 at 2.55 pm

D088754.3 Deed of Land Covenant - 20.1.1997 at 1.26 pm

D088754.4 Variation of Easement Certificate C871824.10 - 20.1.1997 at 1.26 pm

Appurtenant hereto is a right of way and an electricity and telecommunications right created by Transfer D587086.3 - 14.3.2001 at 11.04 am

Land Covenant in Transfer D587086.3 - 14.3.2001 at 11.04 am

8817934.1 Change of Name of Good Move NZ Property Co Limited to Nags Head Horse Hotel Limited - 1.8.2012 at 12:53 pm

9315062.1 Surrender of Land Covenant D088754.3 as to the benefit of Part Lot 1 DP 442820 - 8.3.2013 at 11:39 am

9315062.2 Transfer of Part Lot 1 DP 442820 to Peter John Malcolm - 8.3.2013 at 11:39 am

9315062.3 CTs issued - 8.3.2013 at 11:39 am

Legal Description	**Title**
Lot 2 Deposited Plan 442820 and 1/3 share in Lot 4 Deposited Plan 167657	552855
Part Lot 1 Deposited Plan 442820	552856

CANCELLED

References
Prior C/T 101B/256

Transfer No.
N/C. Order No. C.871824.9

Land and Deeds 69

REGISTER

No. 101C/993

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT

This Certificate dated the 31st day of July one thousand nine hundred and ninety five under the seal of the District Land Registrar of the Land Registration District of NORTH AUCKLAND

WITNESSETH that BRUCE GORDON FENTON of Kerikeri farmer and PAMELA FRANCES FENTON his wife are seised of an estate in fee simple as to an tenants in common in equal shares

~~is seised of an estate in fee simple~~ (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial underwritten or endorsed hereon) in the land hereinafter described, delineated with bold black lines on the plan hereon, be the several admeasurements a little more or less, that is to say: All that parcel of land containing 15.4770 hectares more or less being [redacted] Lot 2 Deposited Plan 167657 [redacted] and being part Sections 26, 42 and 44 Block XI and part Section 14 Block XII Kerikeri Survey District AND THIS CERTIFICATE FURTHER WITNESSETH that the aforenamed BRUCE GORDON FENTON and PAMELA FRANCES FENTON are seised of an estate in fee simple as to an undivided one-third share as tenants in common in equal shares in the land hereinafter described. All that parcel of land containing 5.2350 hectares more or less being Lot 4 Deposited Plan 167657 and being part Allotments 26, 42 and 44 Block XI and part Section 14 Block XII Kerikeri Survey District saving and excepting from the land formerly described as part Sections 14, 42 and 44 all minerals within the meaning of the Land Act 1924 on or under the land and reserving always to Her Majesty the Queen and all persons lawfully entitled to work the said minerals a right of ingress, egress and regress over the said land

DISTRICT LAND REGISTRAR NORTH AUCKLAND NEW ZEALAND

Assistant Land Registrar

Interests at date of issue:

Subject to Section 241(2) Resource Management Act 1991

Appurtenant to part herein is an electricity easement over the part Lot 1 Plan 109734 (CT 61C/1152) marked 'B' on Plan 109734
See Easement Certificate B.578021.4

Subject to a right of way over the parts marked 'H' and 'I' on Plan 167657 appurtenant to parts Lot 1 and 4 Plan 132850 (CsT 78B/235 and 78B/237) and to Lot 1 Plan 143682 (CT 85B/465)
See Easement Certificate B.442108.5

The above easements are subject to Section 309(1)(a) Local Government Act 1974

C.871824.8 Resolution pursuant to Section 321(3)(c) Local Government Act 1974

C.871824.10 Easement Certificate affecting lots on Plan 167657

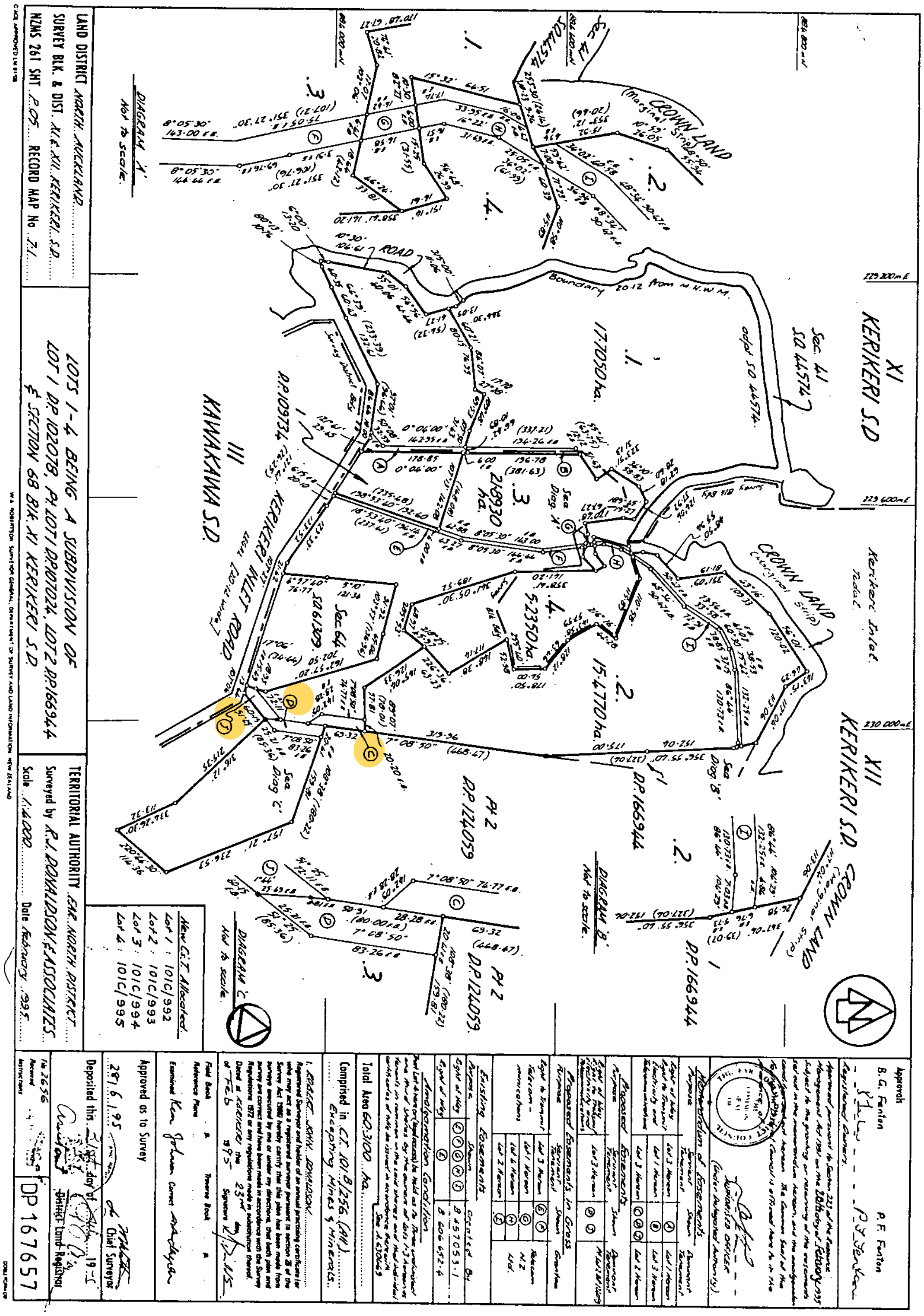
Nature	Servient Land	Dominant Land
Right of Way, electricity and Telecommunications	part Lot 3 (CT 101C/994) marked 'C','D','J'	Herein

- 31.7.1995 at 2.34 o'c

DH

Measurements are Metric

No. 101C 993


LAND DISTRICT NORTH AUCKLAND
SURVEY BLK. & DIST. XI & XII KERIKERI S.D.
NZMS 261 SHT. P.05 RECORD MAP No. 7.1
LOTS 1-4 BEING A SUBDIVISION OF LOT 1 D.P. 102078, Pt. LOT 1 D.P. 107024, LOT 2 D.P. 166944 & SECTION 68 Blk. XI KERIKERI S.D.
TERRITORIAL AUTHORITY FAR NORTH DISTRICT
Surveyed by R.J. DONALDSON & ASSOCIATES
Scale 1:4000 Date February 1995
New C.T. Allocated
Lot 1 : 101C/992
Lot 2 : 101C/993
Lot 3 : 101C/994
Lot 4 : 101C/995
DIAGRAM 'A' Not to scale
DIAGRAM 'B' Not to scale
DIAGRAM 'C' Not to scale
XI KERIKERI S.D
XII KERIKERI S.D.
III KAWAKAWA S.D.
KERIKERI INLET ROAD
CROWN LAND (Marginal Strip)
Kerikeri Inlet
Boundary 20.12 from M.H.W.M.
17.7050 ha.
15.4770 ha.
21.8930 ha.
5.2350 ha.
D.P. 109734
D.P. 124059
D.P. 166944
Sec. 41 S.O. 44574
Sec. 64 S.O. 61309
Approvals
B.G. Fenton P.F. Fenton
Registered Owners.
Memorandum of Easements
Proposed Easements
Proposed Easements in Gross
Existing Easements
Amalgamation Condition
Total Area 60.3100 ha.
Comprised in C.T. 101B/256 (All) Excepting Mines & Minerals.
Approved as to Survey
Chief Surveyor
Deposited this 21st day of June 1995
District Land Registrar
DP 167657

CERTIFICATE OF TITLE No. 101C/993

The above easement when created will be subject to Section 243(a) Resource Management Act 1991

A.L.R.

C.874249.1 Transfer granting a telecommunications easement in gross over the parts marked 'H' and 'I' on Plan 167657 in favour of Telecom New Zealand Limited - 4.8.1995 at 2.55 o'c

A.L.R.

D.088754.3 Deed of Land Covenant - 20.1.1997 at 1.26 o'c

A.L.R.

D.088754.4 Variation of Easement Certificate C.871824.10 - 20.1.1997 at 1.26 o'c

A.L.R.

D.088754.5 Transfer to Valdir Holdings Limited at Auckland - 20.1.1997 at 1.26 o'c

A.L.R.

D587086.1 Change of name of the registered proprietor to Good Move NZ Property Co Limited

Appurtenant hereto is a right of way and an electricity and telecommunications easement over part Lot 2 marked Z DP 203088 CT 131A/353 created by Transfer D587086.3

Land covenant in Transfer D587086.3

All 14.3.2001 at 11.04.

for RGL

Attachment 4

Title 101B/256

References
Prior C/T 72B/680, 61A/710

Transfer No. C.871824.5
N/C. Order No.

Land and Deeds 69

REGISTER ONLY

REGISTER

No. 101B 256

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT

This Certificate dated the 31st day of July one thousand nine hundred and ninety five under the seal of the District Land Registrar of the Land Registration District of NORTH AUCKLAND

WITNESSETH that BRUCE GORDON FENTON of Kerikeri farmer and PAMELA FRANCES FENTON his wife are seised of an estate in fee simple as tenants in common in equal shares

~~is seised of an estate in fee simple~~ (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial underwritten or endorsed hereon) in the land hereinafter described, delineated with bold black lines on the plan hereon, be the several admeasurements a little more or less, that is to say: ~~All that parcel of land containing~~ All those parcels of land together containing 55.7839 hectares more or less being Section 68 and part Sections 26, 42 and 44 Block XI and part Section 14 Block XII Kerikeri Survey District the said part Section 14 and 42 being more particularly described as part Lot 1 Deposited Plan 107204 the said part Section 26 and 44 being more particularly described as Lot 1 Deposited Plan 102078 the said part Section 14 being more particularly described as Lot 2 Deposited Plan 166944 saving and excepting from the said part Sections 14, 42 and 44 all minerals within the meaning of the Land Act 1924 on or under the land and reserving always to Her Majesty the Queen and all persons lawfully entitled to work the said minerals a right of ingress, egress and regress over the said land

DISTRICT LAND REGISTRAR NORTH AUCKLAND NEW ZEALAND

Assistant Land Registrar

Interests at date of issue:

Subject to Section 241(2) Resource Management Act 1991

Appurtenant to Lot 1 Plan 107204 herein is a electricity supply easement over the part Lot 1 Plan 109734 (CT 61C/1152) marked 'B' on Plan 109734
See Easement Certificate B.578021.4

Subject to a right of way over the parts marked 'A' on Plan 107204 appurtenant to part Lots 1 and 4 Plan 132850 (CsT 78B/235 and 78B/237) and to Lot 1 Plan 143682 (CT 85B/465)
See Easement Certificate B.442108.5

Subject to a right of way over the part marked 'A' on Plan 109734 appurtenant to Lot 1 Plan 109734 (CT 61C/1152)
See Easement Certificate B.578021.4

Measurements are Metric

The above easements are subject to Section 309(1)(a) Local Government Act 1974

A.L.R.

C.871824.6 Easement Certificate affecting lots on Plan 166944

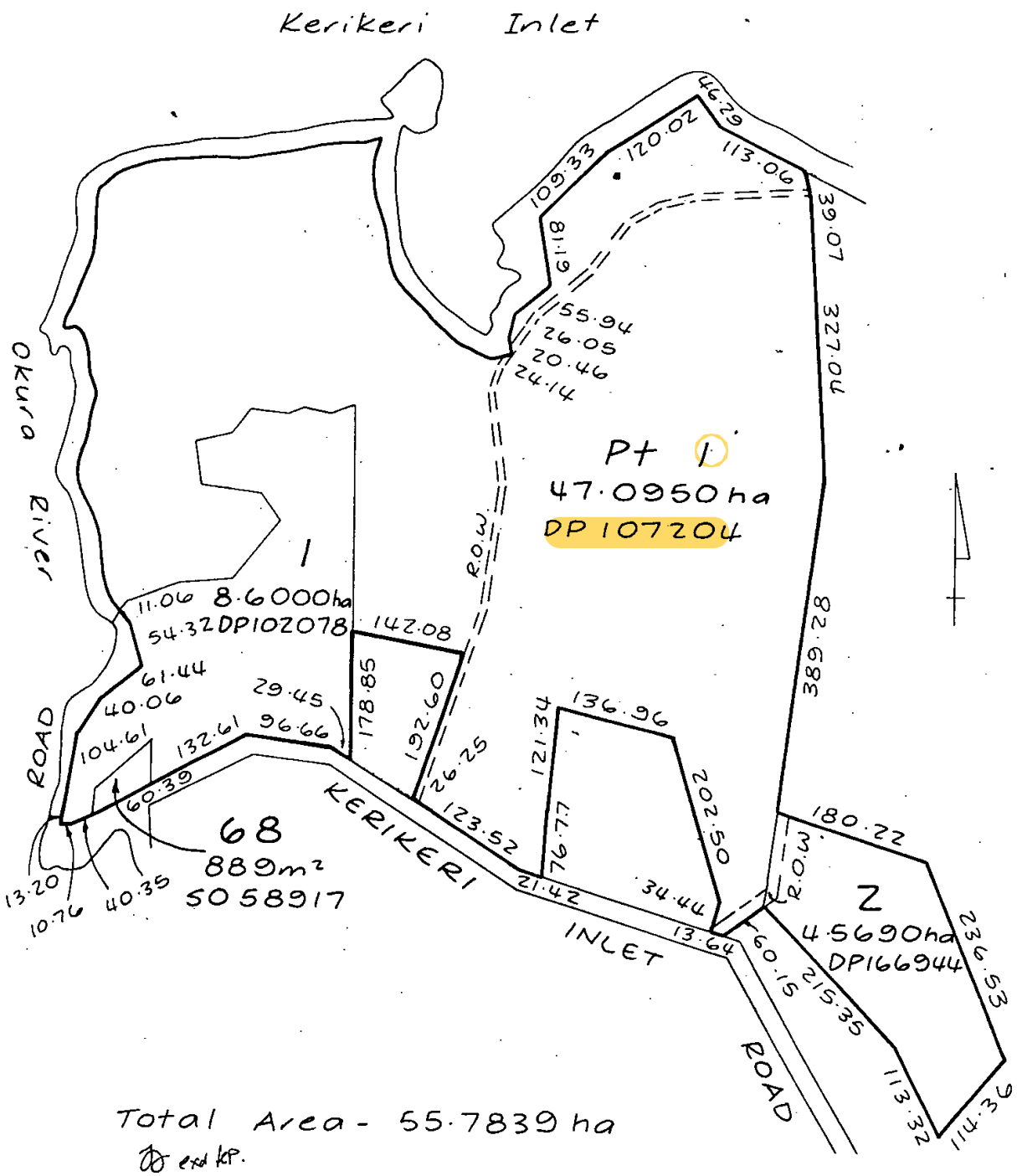
Nature	Servient Land	Dominant Land
Right of Way, electricity telecommunications stormwater sewage and water	part Lot 1 Plan 107204 herein marked 'C'	Lot 1 Plan 166944 and part Lot 2 Plan 124059 (CT 101B/255)
Right of Way, electricity telecommunications stormwater sewage and water	part Lot 2 Plan 166944 herein marked 'B'	Lot 1 Plan 166944 and part Lot 2 Plan 124059 (CT 101B/255)

- 31.7.1995 at 2.34 o'c

A.L.R.

101B 256 No.

FAR NORTH DISTRICT



Total Area - 55.7839 ha

Ø excl RP.

CERTIFICATE OF TITLE No. /

The above right of way, electricity and telecommunications easements when created will be subject to Section 243(a) Resource Management Act 1991

A.L.R.

C.871824.7 Certificate of Conditions pursuant to Section 224(c) Resource Management Act 1991 (affects Plan 167657) - 31.7.1995 at 2.34 o'c

A.L.R.

C.871824.8 Resolution pursuant to Section 321(3)(c) Local Government Act 1974 (affects Plan 167657) - 31.7.1995 at 2.34 o'c

A.L.R.

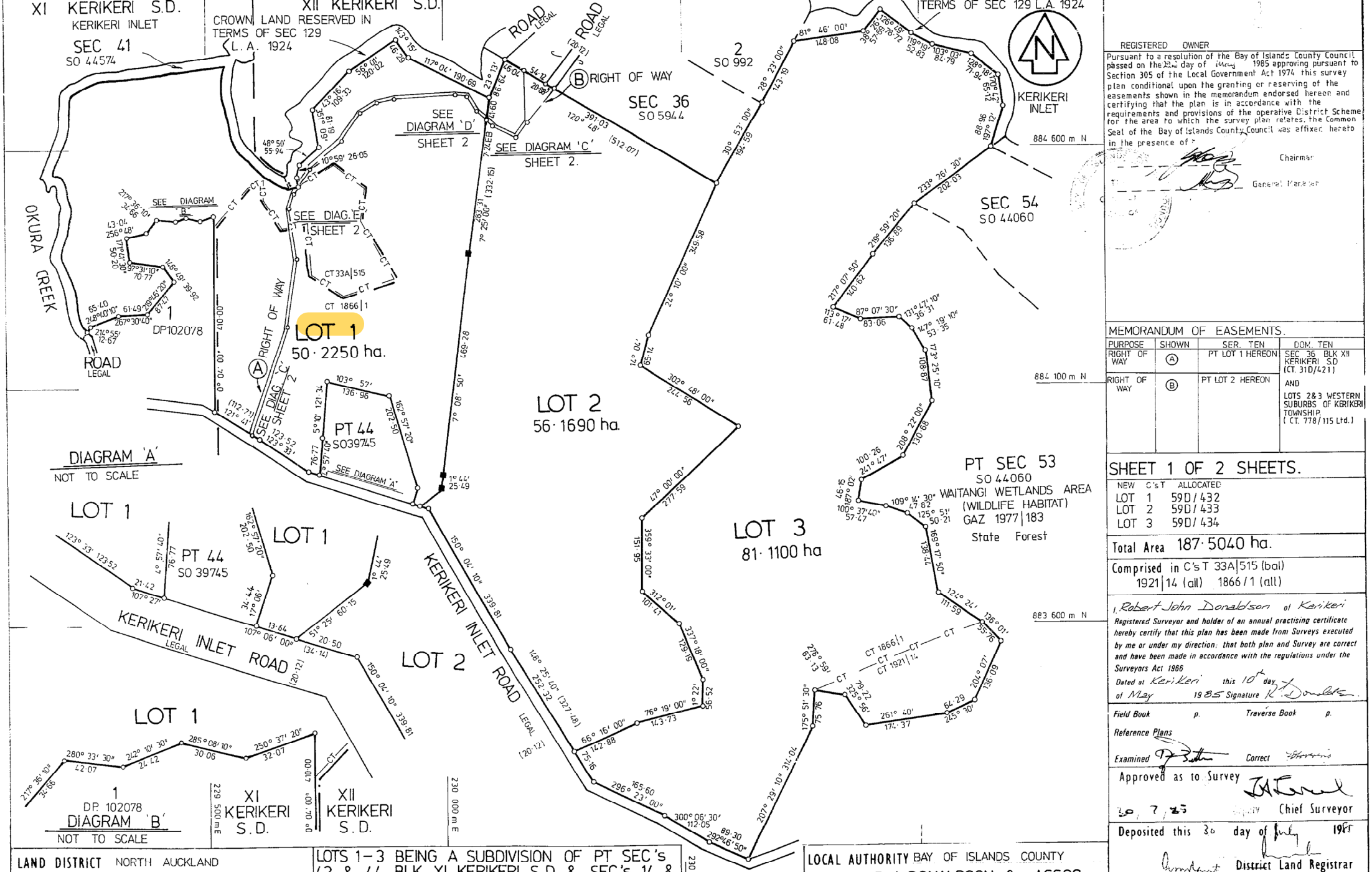
C.871824.9) Cancelled as to Lots on Plan
ONCT) 167657 and new CsT issued
31.7.1995) Lot 1 and a 1/3 share in Lot 4 101/992
Lot 2 and a 1/3 share in Lot 4 101C/993
Lot 3 and a 1/3 share in Lot 4 101C/994

A.L.R.

CANCELLED

Attachment 5

DP 107204



REGISTERED OWNER

Pursuant to a resolution of the Bay of Islands County Council passed on the 21st day of May 1985 approving pursuant to Section 305 of the Local Government Act 1974 this survey plan conditional upon the granting or reserving of the easements shown in the memorandum endorsed hereon and certifying that the plan is in accordance with the requirements and provisions of the operative District Scheme for the area to which the survey plan relates, the Common Seal of the Bay of Islands County Council was affixed hereto in the presence of

Chairman

General Manager

MEMORANDUM OF EASEMENTS.

PURPOSE	SHOWN	SER. TEN	DOM. TEN
RIGHT OF WAY	(A)	PT LOT 1 HEREON	SEC 36 BLK XII KERIKERI S.D (CT. 31D/421) AND LOTS 2&3 WESTERN SUBURBS OF KERIKERI TOWNSHIP. (CT. 778/115 Ltd.)
RIGHT OF WAY	(B)	PT LOT 2 HEREON	

SHEET 1 OF 2 SHEETS.

NEW	C'S T	ALLOCATED
LOT 1	59D/432	
LOT 2	59D/433	
LOT 3	59D/434	

Total Area 187·5040 ha.

Comprised in C'S T 33A|515 (bal)
1921|14 (all) 1866/1 (all)

I, Robert John Donaldson of Kerikeri Registered Surveyor and holder of an annual practising certificate hereby certify that this plan has been made from Surveys executed by me or under my direction; that both plan and Survey are correct and have been made in accordance with the regulations under the Surveyors Act 1966

Dated at Kerikeri this 10th day of May 1985 Signature R. J. Donaldson

Field Book p. Traverse Book p.

Reference Plans

Examined Correct

Approved as to Survey 30/7/85 Chief Surveyor

Deposited this 30 day of July 1985 District Land Registrar

File 953.
Received
Instructions

DP 107204

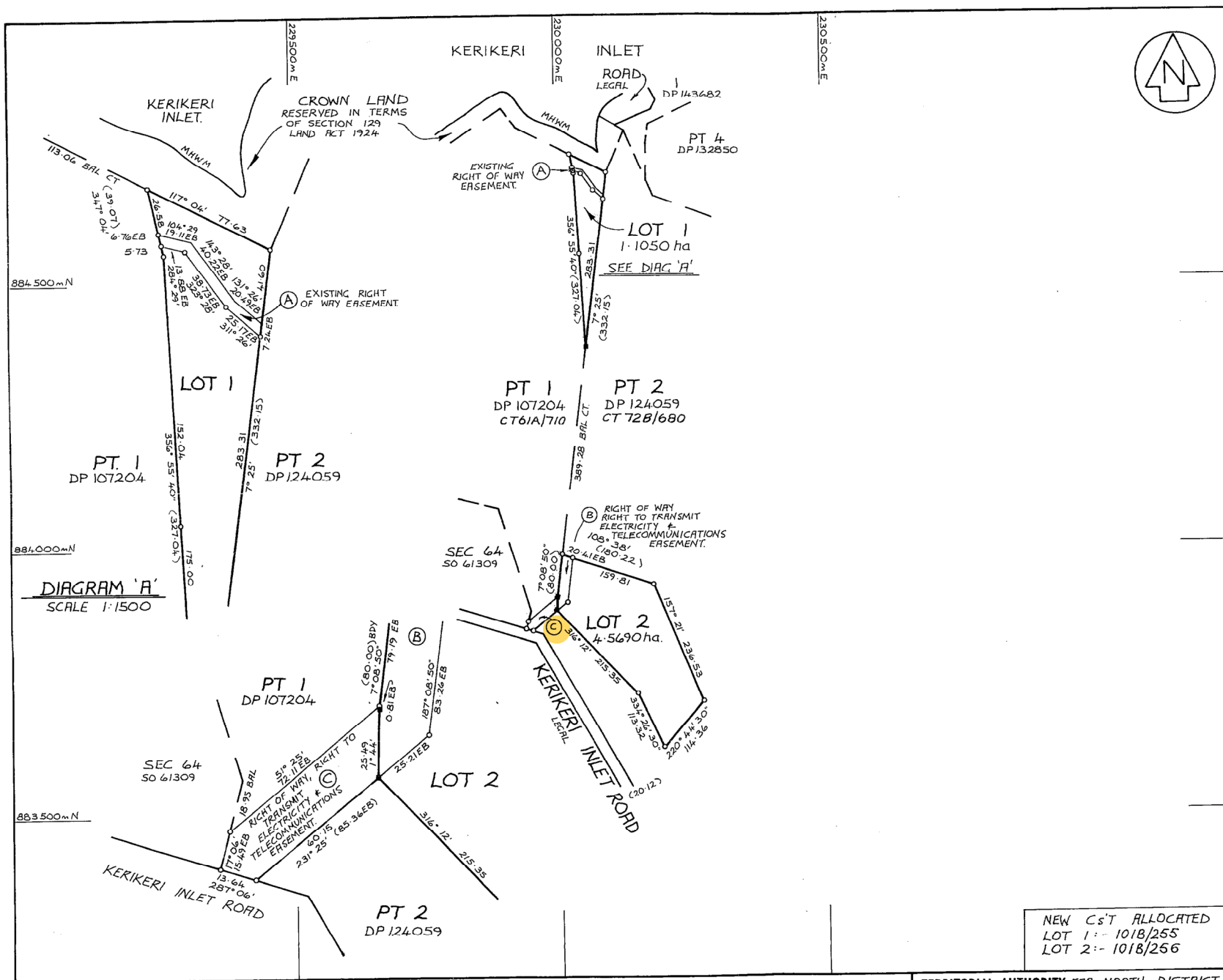
LAND DISTRICT NORTH AUCKLAND
SURVEY BLK.& DIST. XI & XII KERIKERI
NZMS SHEET No. P05/7·1 & 31·04

LOTS 1–3 BEING A SUBDIVISION OF PT SEC's 42 & 44 BLK XI KERIKERI S.D. & SEC's 14 & 48 BLK XII KERIKERI S.D.

LOCAL AUTHORITY BAY OF ISLANDS COUNTY
Surveyed by R. J. DONALDSON & ASSOC.
Scale 1:5000 Date FEB 1985

Attachment 6

DP 166944



NEW Cs'T ALLOCATED
LOT 1 :- 1018/255
LOT 2:- 1018/256

Approvals

P J Fenton

REGISTERED OWNERS:- B.G. & P.F. PENTON

REGISTERED OWNERS:- P.J. MALCOLM

APPROVED PURSUANT TO SECTION 223 OF THE RESOURCE MANAGEMENT ACT 1991 ON THE 17th DAY OF February 1995 SUBJECT TO THE AMALGAMATION CONDITIONS SET OUT HEREON AND SUBJECT TO THE GRANTING OR RESERVING OF THE EASEMENTS SET OUT IN THE MEMORANDUM HEREON. THE COMMON SEAL OF THE FAR NORTH DISTRICT COUNCIL IS AFFIXED HERETO IN THE PRESENCE OF:

AUTHORISED OFFICER (UNDER DELEGATED AUTHORITY)

AMALGAMATION CONDITIONS

THAT LOT 1 HEREON BE TRANSFERRED TO THE OWNER OF PART LOT 2 DP124059 (CT 72B/680) AND THAT ONE CERTIFICATE OF TITLE BE ISSUED TO INCLUDE BOTH PARCELS.

THAT LOT 2 HEREON BE TRANSFERRED TO THE OWNER OF PART LOT 1 DP107204, LOT 1 DP102078 SEC 68 BLK XII KERIKERI SD (CT 61A/710) AND THAT ONE CERTIFICATE OF TITLE BE ISSUED TO INCLUDE BOTH PARCELS. SEE AG30376

EXISTING EASEMENT

PURPOSE	SHOWN	DOCUMENT
RIGHT OF WAY	A	B509655·1

MEMORANDUM OF EASEMENTS

PURPOSE	SERVIENT TENEMENT	SHOWN	DOMINANT TENEMENT
RIGHT OF WAY RIGHT TO TRANSMIT ELECTRICITY & TELECOMMUNICATIONS	PT LOT 1 DP 107204	C	PT LOT 2 DP 124059
	LOT 2 HEREON	B	

PROPOSED EASEMENT

PURPOSE	SERVIENT TENEMENT	SHOWN	DOMINANT TENEMENT
SEWER & STORMWATER	LOT 2 HEREON	B	PT LOT 2 DP124059
	PT LOT 1 DP 107204	C	

Total Area 5·6740 ha.

Comprised in CT 61A/710 (PT) excepting mines & minerals; CT 72B/680 (PT).

I, Robert John Donaldson

Registered Surveyor and holder of an annual practising certificate (or who may act as a registered surveyor pursuant to section 25 of the Survey Act 1986) hereby certify that this plan has been made from surveys executed by me or under my directions, that both plan and survey are correct and have been made in accordance with the Survey Regulatinns 1972 or any regulations made in substitution thereof.

Dated at Kerikeri this 3rd day of Feb. 1995 Signature

Field Book ... p ... Traverse Book ... p ...

Reference Plans ...

Examined Ken Johnson Correct E. Hindmarsh

Approved as to Survey

10/5/95

Chief Surveyor

Deposited this 31st day of July 1995

Assistant District Land Registrar

File 2621

Received Instructions 27 MAR 1995

DP 166944

LAND DISTRICT NORTH AUCKLAND

SURVEY BLK. & DIST. XII KERIKERI

NZMS 261 SHT ... **RECORD MAP No** P05/7.1

PLAN OF LOTS 1 & 2 BEING A SUBDIVISION OF PART LOT 1 DP 107204 & LOT 2 DP 124059.

TERRITORIAL AUTHORITY FAR NORTH DISTRICT

Surveyed by R.J. DONALDSON & ASSOC.

Scale 1:5000 **Date** OCTOBER 1994

Approved LM91/08 PD492/4000 DOSLI FORM D15

Supplied by Lockleys

W.A. ROBERTSON, DIRECTOR GENERAL/SURVEYOR GENERAL, DEPARTMENT OF SURVEY AND LAND INFORMATION, NEW ZEALAND

CENTIMETRES 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51

9 AUG 1995

HAINES v TASMAN DISTRICT COUNCIL

Environment Court, Wellington (W019/09) 23 January;
Judge Dwyer, C Mills, C Howie 11 March 2009

Resource management — Consents — Subdivision — Access — Appellants proposed subdividing a property and creating a right of way alongside two allotments — Access to appellant's property by way of a private, and not formalised, road — Respondent council declined consent to subdivide due to a lack of access under s 106(1) Resource Management Act 1991 and from a desire not to set a precedent — Appeal — Respondent's charges levied in deciding subdivision consent application also challenged — Counties Amendment Act 1961; Local Government Act 1974, s 321; Resource Management Act 1991, ss 36, 36(1), 36(1)(b), 36(2), 36(3), 36(5), 106(1)(c), 120; Town and Country Planning Act 1953; Town and Country Planning Act 1977.

The appellants owned a section containing two houses on Best Island in the Waimea Inlet near Nelson. They proposed to subdivide the property and create a right of way alongside two allotments. Only one road, Barnett Ave, provided access to the residential area of island via bridge from the mainland. Though Barnett Ave was a legal road, its legal status only extended to the start of the island's residential area. Access to the appellants' property was off a private road that was the physical continuation of Barnett Ave. The private road was not formalised by vesting, or through a grant of easement. The Tasman District Council ("TDC") declined the appellants' application for consent to subdivide on the grounds of: (i) lack of access under s 106(1)(c) Resource Management Act 1991 ("RMA"); and (ii) a desire not to set a precedent of approving subdivisions contrary to s 106(1)(c) RMA.

The appellants argued that: (i) subdivision would not make any practical change to the current situation, as there were already two houses on the property; (ii) an alternative access to the property was available by boat or across the mud flats; (iii) earlier approvals by the TDC created a precedent for approval of their proposal; and (iv) their proposal had distinguishing features so as not to create precedent for further subdivisions of land without

sufficient access. The appellants also sought to challenge the charges levied by TDC in deciding subdivision consent application.

Held, (1) section 106(1)(c) RMA enabled a consent authority to decline subdivision consent if sufficient provision was not made for both legal and physical access. The word "sufficient" in s 106(1)(c) RMA enabled consent authorities to undertake a broadly based inquiry into the adequacy of both legal and physical access provisions. In the appellants' case, the private road was probably adequate in a physical sense. However, the TDC's opposition was on the basis of the road's lack of legal standing. Here, the only practical physical access was the private road extension of Barnett Ave, which was not adequate for legal access, as it was entirely dependant upon the ongoing good will of a landowner. Such access could be terminated at any time. Further, boat access to the subdivided land was insufficient for about 40 percent of every tide, as was foot access over the mud flats. Although boat or foot access could be sufficient in other cases, it was not appropriate to approve subdivision, but rather restrict the extent of development to the present level to reflect the two existing dwellings as would not constitute sustainable management or adequately address sufficiency of access. (paras 28-31)

(2) The appellants rightly expected a degree of consistency in the way local authorities treated citizens and enforced district plans. However, precedent provided by earlier decisions led to an expectation of like treatment. There was no absolute entitlement to like treatment, as it would be wrong for one questionable decision to lead to a series of inappropriate decisions. Additionally, the context was significant. Precedents should compare like with like. The appellants sought to rely on decisions made under different statutory and planning regimes, and therefore these were not useful comparisons. (paras 45, 48, 49, 53)

(3) Granting the appellants' consent would signal a willingness to allow subdivision without sufficient legal and physical access. This could have wider implications than other properties on Best Island currently containing more than one dwelling. (paras 54, 55)

(4) The respondent's charges were fixed under s 36(1) RMA. Consequently, there was no right to object or appeal. There was no power to direct TDC in terms of charges. It was noted that s 36(5) RMA gave a local authority absolute discretion to remit whole or part of any fixed charge. The appeal was dismissed. (paras 64, 68)

Cases referred to

Dye v Auckland RC [2002] 1 NZLR 337; [2001] NZRMA 513; (2001) 7 ELRNZ 209 (CA)

Scurr v Queenstown Lakes DC 29/4/05, Judge McElrea, EnvC Christchurch C060/05

Appeal dismissed

Appeal
This was an unsuccessful appeal against a Tasman District Council decision refusing to grant the appellants consent to subdivide land.

R Haines, in person
J Ironside and *S Chadwick* for respondent

The judgment of the Court was delivered by

JUDGE DWYER (reserved):

Introduction

[1] Rodney John Haines and Leonie Ann Haines ("Mr and Mrs Haines") appeal against a decision of Tasman District Council (the Council) declining an application to subdivide land at 156 Barnett Ave, being Lot 19 DP5090 (the site) situated at Best Island near Richmond in the Tasman District.

[2] Attached to the evidence which Mr Haines gave on behalf of his wife and himself was a copy of the proposed subdivision plan (dated March 10, 2008) which the Haines had presented to the Council. The plan shows that the Haines' property is rectangular in shape and that the subdivision proposal was to create two allotments, one containing 330 m^2 net and the second 325 m^2 net, the net figures being arrived at after deducting the area of a right of way which would run along one side of each of the proposed allotments.

[3] The subdivision in question constitutes a discretionary activity in terms of the Tasman Resource Management Plan ("the District Plan").

[4] There are already two houses on the site. Mr and Mrs Haines live in a two-storey, two bedroom building at the southern (coastal) end of the site and there is a single storey, one bedroom dwelling at the northern end which they rent out to a long-term tenant.

[5] Although there seemed to be some uncertainty in Mr and Mrs Haines' minds as to whether or not they had applied for a subdivision to create two fee simple titles or alternatively a cross lease subdivision based on a flat plan, it seems clear from their initial application that the former was actually applied for although Mr and Mrs Haines would have accepted the latter. For the purposes of our considerations nothing turns on the mode of subdivision in any event.

Background

[6] Best Island is one of a number of islands situated in the Waimea Inlet and lies almost due north of Richmond itself.

[7] Best Island comprises approximately 125 ha in total. It is effectively broken up into three separate component parts:

- The northern part of the island comprising about 55 ha is zoned Recreation and contains the Greenacres Golf Club.
- The middle part of the island containing about 60 ha is zoned Rural 1 and is largely in pasture.
- The southern part of the island comprises approximately 10 ha. It is zoned Residential in the District Plan.

[8] The residential component of Best Island may in turn be broken down into a number of areas:

- A line of about 32 residential allotments generally containing somewhere in the order of 800-1,000 m^2 follows the coast in a rough U shape around the southern end of the island. These allotments are occupied by a range of dwelling houses used for both permanent and holiday occupation. This line of houses is separated from the sea by an esplanade reserve vested in the Council which has a nominal width of 20 m.
- The central and northern parts of the Residential zoned area are largely undeveloped, although there are many trees in these areas.
- A recreation reserve containing 3,541 m^2 is situated approximately in the centre of the residential enclave with a connecting leg to the esplanade reserve around the coast.

[9] Subdivision of the Best Island residential area to create the allotments which we have described was approved by the Waimea County Council (a predecessor to the Council) in the mid-1950s.

[10] We were told by Mr R D Shirley (the Council's subdivision officer) that at the time of subdivision access to the residential area from the *mainland* was obtained from Lansdowne Rd which in turn ran off Queen St, a main road into Richmond itself.

[11] Lansdowne Rd ran down to the edge of the Waimea Inlet and access was then gained to the island across the mud flats of the estuary. We understand that a line of power poles across the inlet currently marks what was the commonly used access route which could only be used at low tide. Mr Shirley believed that early residential development of Best Island consisted mainly of baches and holiday cottages which seems consistent with the somewhat limited access to it in the early days.

[12] In the late 1970s a road bridge was established providing vehicular access across the narrow estuary from Lansdowne Rd onto the island.

Roads have since been established on Best Island giving vehicular access to the golf club, the farmland and the residential enclave at the southern end of the island. It is the matter of the road access to the residential enclave which lies at the heart of the disagreement between Mr and Mrs Haines and the Council as to the outcome of the subdivision application.

Access

[13] Barnett Ave is the road from the bridge down to the residential enclave. On our site visit Barnett Ave appeared to be in good condition and we understand is maintained by the Council. It seemed apparent to us both from what we were told in evidence and from our own observations that Barnett Ave is the only practicable access to the residential land on the island and certainly the only vehicular access.

[14] There are some other access options however and they were described in these terms by Mr Haines:

> The channel in front of our place has a minimum depth of 1.5 m. It is accessible on about 40% of every tide. Before the bridge was put in, the settlers crossed the mud flat on foot (sometimes carrying their clothes in a bundle atop their heads) or by vehicle (the famous on the Island Lada) we can still do this but we don't, of course, for fear of damage to the environment.

[15] For those unfamiliar with Best Island discussion about access either by boat or foot across the inlet might seem academic because of the presence of vehicular access along Barnett Ave. Unfortunately, there are difficulties with the Barnett Ave access.

[16] Barnett Ave has been formed and legalised in a manner which gives access to the northern boundary of the Best Island residential enclave. However, the legal road does not extend into the enclave itself and has never provided legal access to the residential allotments around the coastline (except for one property).

[17] Physical access to Mr and Mrs Haines' property is obtained by what is described by a sign at the entrance to the residential enclave as a *private road.* The private road extends off the end of Barnett Ave and proceeds along the landward side of the residential allotments roughly parallel with the coast. This private road provides access to about 20 or so of the allotments in the residential area being those situated on the western and southern sides of the residential enclave. Access to the remaining allotments along the eastern side of the residential area is obtained by a series of tracks which come off the private road through the recreation reserve and then through the remaining area of undeveloped Residential zone land held in private ownership.

[18] Although it is called Barnett Ave and is a physical continuation of Barnett Ave, the private road has not been formalised either by way of vesting or grant of easement. The private road provides access by the *grace and favour* of the owner of the land through which it runs. Mr Haines appeared to acknowledge that the owner of the land in question could prevent access should he/she wish to do so, although he implied that would create something of a furore.

[19] The north western most allotment in the residential enclave (122 Barnett Ave) actually has physical access out onto the legal road, but other than that none of the remaining residential allotments around the coast of Best Island (including Mr and Mrs Haines) has legal access to Barnett Ave.

The issues

[20] The Council declined the subdivision for two reasons.

- The first and what the Council described as the principal reason for decline of consent was the *imperative of s 106(1)(c) of the Act.*[1]
- The second reason was that the Council was mindful that it must not set a precedent of approving subdivisions contrary to s 106(1)(c) on Best Island.

[21] Argument before us revolved around those two issues. Mr Shirley conceded on the Council's behalf that the physical effects on the environment of granting consent to the subdivision would be no more than minor.[2] Indeed it seems apparent on reading the Council decision that if it was not for the access difficulties, the Council would have approved the subdivision.

[22] Accordingly we turn to consider what the parties appeared to agree were the determinative issues namely s 106(1)(c) and precedent.

Section 106(1)(c) RMA

[23] Section 106(l)(c) provides as follows:

> (1) Despite s 77B, a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—
>
> . . . . .
>
> (c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.

1 Council Reasons for Decision.

2 Para 34 EIC.

[24] Section 106(1)(c) enables a consent authority to decline a subdivision consent which it might otherwise have to grant (eg a controlled activity subdivision) if it considers that *sufficient provision* has not been made for both legal and physical access to allotments to be created by the proposed subdivision.

[25] Inherent in s 106(1)(c) is a certain flexibility or discretion in the way in which a consent authority deals with access issues. The consent authority has discretion as to whether or not to grant consent *(**may** refuse to grant)* and discretion as to whether or not to grant consent subject to conditions *(**may** grant . . . subject to conditions).*

[26] Section 106(1)(c) appears to create a somewhat more flexible position in terms of matters of access than did s 321 Local Government Act 1974 (a predecessor provision now repealed) which contained various mandatory requirements in terms of road access.

[27] At the heart of s 106(l)(c) is consideration as to whether or not *sufficient provision* has been made for legal and physical access. The word *sufficient* is not defined in RMA. Dictionary definitions include:

- enough to meet a need or purpose; adequate[3]
- enough, adequate[4]
- suffice, enough, adequate[5].

[28] We consider that the purpose of use of the word *sufficient* in s l06(1)(c) is to enable consent authorities to undertake a broadly based inquiry into the adequacy of both legal and physical access provisions for allotments to be created by a proposed subdivision.

[29] In terms of Mr and Mrs Haines' proposed subdivision there is physical access to the site by means of the existing private road which is an extension of Barnett Ave. Although the private road takes the form of a fairly basic metalled track which (we are fairly certain) would not comply with any Council roading standards it is probably adequate in a physical sense for the small beach community. In any event the Council's opposition to the subdivision proposal was not based on the physical standard of the Barnett Ave extension but rather its lack of legal standing.

[30] That brings us to the issue of whether or not there is *sufficient* legal and physical access. We consider that there is not. The only practical physical access is the so-called private road onto Barnett Ave. This is clearly not adequate for the purpose of providing legal access to the Haines' property (nor to the other properties which use it) because it is

---

3 *Collins Concise Dictionary* (5th ed), London, Collins, 2001.
4 *Concise Oxford Dictionary* (8th ed), Oxford, Oxford, University Press, 1993.
5 *New Zealand Oxford Dictionary*, Oxford University Press, Melbourne, 2005.

entirely dependent upon the on-going good will of the landowner and could be terminated at any time.

[31] The suggestion that the other means of possible legal or physical access to which Mr and Mrs Haines referred, (boat access or access by foot across the mud flats) might be sufficient, simply bears no relationship to reality. We have no hesitation in finding that boat access from the channel in front of the Haines' property which is accessible on about 40 percent of every tide or foot access across the mud flats with the users possibly carrying their clothes in bundles on their heads is not *sufficient* access even though the Waimea County Council may have considered that these means of access were appropriate when it approved the initial subdivision in 1953 or 1954.

[32] The simple fact is that there is not adequate provision for both legal and physical access to the allotments which would be created by the Haines' subdivision. That, of course, is the existing situation in respect of the site which presently has two small houses established on it.

[33] It was Mr and Mrs Haines' position that allowing the subdivision would not make matters any worse as there are already two houses on 156 Barnett Ave in any case, and all they are doing is drawing a boundary between them. Accordingly, we gave some consideration to whether or not it might be appropriate to approve the subdivision provided that controls were in place so that the extent of development on the site was restricted to its present level until such time as legal access was available. In other words there could be no expansion of the existing buildings beyond their present floor area (for example). We suggested that this might be effected by way of an appropriately drafted consent notice. Arguably, this would not make the present access situation any worse than it presently is, but would recognise the reality of the existing dwellings on the site.

[34] Counsel for the Council and Mr Shirley were both opposed to such a proposition. Although we understood them to have some reservations about the precise terms of such a document their primary objection appeared to be one of principle against creating a further certificate of title without sufficient access even if that situation was signalled to a prospective owner. Mr Haines appeared to consider that such a restriction was not necessary, although we understood his position to be that he would live with it if the Court felt that it was appropriate.

[35] Ultimately, having considered the possibility of allowing the subdivision with some restriction on development beyond what already exists, we have determined that it is not appropriate to proceed on that basis. We consider that allowing the subdivision to proceed, even if the extent of further development was restricted, does not adequately address the matter of sufficiency of access which consent authorities are directed to consider. Instead of there being only one title without sufficient legal and physical

access there would be two such titles if subdivision was approved. Although that situation might be signalled to any new owner by virtue of the consent notice, we do not consider that it constitutes sustainable management to allow ongoing subdivision of allotments which do not have sufficient access provided to them.

Precedent

[36] There were two legs to Mr and Mrs Haines' position on precedent:

- Firstly, they contended that earlier approvals by the Council of a subdivision and subsequent cross lease development at Best Island provided a precedent for approval of their proposal.
- Secondly, they considered that their proposal had certain distinguishing features which meant that it would not provide a precedent for further subdivisions of land without sufficient access at Best Island.

[37] The previous subdivision to which Mr and Mrs Haines were referring was a subdivision of a parcel of land being originally Lot 23 DP5090 (the Haines' land being Lot 19 DP5090). The sequence of events identified by Mr and Mrs Haines is as follows:

- 1973/74 Waimea County Council approved subdivision of Lot 23 DP5090 into two allotments being Lot 1 DP8686 (containing 1,536 m^2) and Lot 2 DP8686 (containing 1,256 m^2). Freehold titles issued on 27 May 1974.
- 15 August 1988 cross lease titles issued giving a title to two separate houses already established on Lot 2 DP8686.

[38] According to Mr and Mrs Haines the person who had constructed two houses and undertook the cross lease process on Lot 2 DP8686 was a local builder, Mr M Madden. We were told that at about the time of the sale of the two cross lease units on Lot 2 DP8686, Mr Madden purchased the (now) Haines' property and subsequently erected the two existing dwellinghouses on the site.

[39] Mr and Mrs Haines contend that it was envisaged by the builder that he would then follow a similar process to that which had been undertaken on Lot 2 DP8686 and obtain cross lease titles for the two buildings but for reasons which were not identified the cross leasing process was never undertaken.

[40] We note from the certificate of title to the site (CT4B/1088) that Mr Madden was registered as proprietor in 1991 so that his (supposed) intention to obtain cross lease titles to the two buildings which he constructed there may have been thwarted by the coming into force of the Resource Management Act in 1991 as the Act brought cross lease developments within the ambit of subdivisions which was not previously the

case. In any event Mr and Mrs Haines maintain that their application to subdivide the site is giving effect to what the builder and (they claim) the Council intended at the time the two buildings were constructed during Mr Madden's period of ownership (1991-1995).

[41] Irrespective of the parties' intentions at the time Mr Madden constructed two buildings on the site, Mr and Mrs Haines' submit that their proposed subdivision ought to be allowed on the basis of the precedent of the subdivision of Lot 23 DP5090 into two allotments in 1974 and the subsequent issue of cross lease titles in respect of one of those allotments (Lot 2 DP8686) in 1988.

[42] The second precedent aspect of their case is that they maintain that approval of their subdivision (whether by way of subdivision into freehold allotments or by the issue of cross lease titles) would not provide a precedent for further such proposals at Best Island.

[43] Mr and Mrs Haines identified that other than their site there were only two residential allotments on Best Island which currently contain more than one dwelling (which Mr and Mrs Haines claimed was a distinguishing feature of their application), those being properties at 122 and 129 Barnett Ave.

[44] 122 Barnett Ave is the north-western most of the residential allotments on Best Island and has frontage onto Barnett Ave at a point where it is legal road and is accordingly not subject to the access constraints of the remaining residential allotments. According to Mr Haines, 129 Barnett Ave is situated on sand and had experienced difficulties with its septic tank. He contended that this was different to the situation of 156 Barnett Ave which comprised river gravel and whose septic tank operated satisfactorily. In short it was Mr and Mrs Haines' position that there were distinguishing features relevant to their property which meant that subdivision of the site would not provide a precedent for subdivision of the only other residential allotment containing two houses which did not have legal road access.

[45] Mr and Mrs Haines' case reinforced to the Court the importance which members of the public place on prior council decisions. The public expects (quite rightly) that local authorities show a degree of consistency in the way they treat their citizens and enforce their district plans. That expectation is frequently expressed to the Court by parties who seek to advance their position by reference to other council decisions in similar situations. That is precisely what Mr and Mrs Haines have done in this instance.

[46] However the legal position in respect of precedent is not as clear cut as that. The Court of Appeal in its decision *Dye v Auckland RC*[6] said:

---

6 [2002] 1 NZLR 337; [2001] NZRMA 513 (CA).

The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s 105(2A)(b) and s 104(1)(d).[7]

[47] We think that it is commonly accepted that precedent may also be a relevant factor when considering discretionary activity applications. In *Scurr v Queenstown Lakes DC*[8] the Environment Court commented on the precedent issue, noting that granting a consent to a discretionary activity can be seen to create . . . *an expectation that a like application will be treated in a like manner.* Two issues arise from this statement of the legal position.

[48] The first is that the so-called precedent provided by earlier decisions is an expectation of like treatment, not an absolute entitlement. It may be the case that, on examination (with the benefit of hindsight), the earlier decision on which an applicant seeks to rely is an inappropriate decision. It would clearly be wrong for one questionable decision to form the basis for a series of on-going questionable decisions. At the end of the day if a proposal does not otherwise meet the criteria specified in RMA for the grant of consent, it should not receive consent simply because another similar proposal had previously been approved.

[49] Secondly, in considering matters of precedent, it is important that like is compared with like or to use the colloquial expression *apples are compared with apples.* In that regard context will often be extremely significant. Insofar as the earlier developments on which Mr and Mrs Haines rely are concerned, we note that the decisions:

- To approve the subdivision of Lot 23 DP5090.
- To allow the construction of two dwellings on Lot 2 DP8686; and
- To allow the construction of two dwellings on Lot 19 DP5090;

were made under considerably different statutory and planning regimes than exist today.

[50] The applicable statutory regimes would have included the Counties Amendment Act 1961, the Local Government Act 1974, the Town and Country Planning Act 1953 and the Town and Country Planning Act 1977.

[51] Of particular significance in that regard is that the subdivision to create Lot 2 DP8686 was approved by the Waimea County Council under the Counties Amendment Act 1961 prior to the coming into force of the Local Government Act 1974 which introduced a requirement that any allotment to be created had to have frontage to a legal road to provide vehicular access (with certain exceptions).

---

7 Para 49.

8 29/4/05, Judge McElrea, EnvC Christchurch C060/2005.

[52] We also note that all of the developments described above took place under a planning regime preceding the current District Plan which was notified on 25 May 1996 and became partially operative on 1 November 2008.

[53] Accordingly, in terms of comparing *apples with apples* we do not consider that any comparison can be made between Mr and Mrs Haines' situation and the previous decisions on which they now seek to rely. Those decisions were made under substantially different statutory and planning regimes a good many years ago.

[54] We only briefly considered the issue of whether or not grant of consent to Mr and Mrs Haines would provide a precedent for further subdivision of 129 Barnett Ave. It appeared to us that the important precedent issue is that we would be signalling a willingness to allow subdivision of allotments which do not have sufficient legal and physical access. That may have wider implications than just 129 Barnett Ave.

Outcome

[55] We consider that the Council was right to decline consent to subdivide 156 Barnett Ave having regard to the provisions of s 106(1)(c). The site does not presently have sufficient legal and physical access and that situation will not be remedied or mitigated in any way by the proposed subdivision. Irrespective of what might have happened at Best Island in the past we do not consider that it constitutes sustainable management to allow subdivision without adequate legal and physical access. The alternatives to vehicular access (boat and foot access) are, in our view, not sufficient access.

[56] In making that ruling we are not suggesting that boat or foot access may never provide sufficient access to subdivided land. What constitutes sufficient access in any given instance will be determined by the particular circumstances of the parcel of land to be subdivided and the likely access requirements of those who might use it. Boat access in particular is a common means of access in some parts of New Zealand. However boat and foot access in this case is extremely constrained by the physical nature of the Waimea Inlet. We consider that there is no reliable, practicable alternative to the Barnett Ave access which in fact provides physical access to the residential enclave but unfortunately is not legal access.

[57] We decline the appeal accordingly having regard to s 106(1)(c) RMA.

Section 36, administrative charges

[58] After filing their appeal, Mr and Mrs Haines subsequently filed a letter dated 7 August 2008 adding to the contents of their initial appeal documents. They sought to challenge the charges levied by the Council for

receiving, processing and deciding their subdivision consent application.

[59] The total costs claimed by the Council for undertaking such work was $6,617.50. A copy of the Council invoice for this amount was appended to the evidence of Mr R E Lieffering, the Council's resource consents manager. The invoice identified two separate cost streams:

Administrative/technical staff time —	5,457.25
Council hearing decision time —	1,160.25
	$6,617.50

Mr and Mrs Haines paid a deposit of $600 at the time their application was lodged and accordingly still owe the Council $6,017.50.

[60] The Council's cost invoice shows that staff time totalled 66.75 hours, the bulk of which was Mr Shirley's time (34.75 hours) with one other Council officer expending 15.25 hours and not less than five other Council staff members having some input into the process for varying periods of time.

[61] Mr Lieffering testified that the Council fixes charges for determining resource consent applications pursuant to s 36(l)(b) RMA. Such charges are fixed in accordance with the provisions of s 36(2) which provides:

> [(2) Charges may be fixed under subsection (1) only—
> (a) in the manner set out in section 150 of the Local Government Act 2002; and
> (b) after using the special consultative procedure set out in section 83 of the Local Government Act 2002; and
> (c) in accordance with subsection (4).]

[62] Mr Lieffering testified that resource consent processing charges are determined through the Council's Draft Annual Plan using the relevant LGA 2002 procedures and that in the case of Type 1 resource consent applications (subdivision consents being identified as a Type 1 application), charges are calculated by way of a formula being the total staff hours spent on the application multiplied by an hourly charge out rate. The charge out rate is $83 per hour for staff time and that was how the costs were calculated in this instance.

[63] Section 36(3) gives local authorities power to impose additional charges if fixed charges are inadequate in any given case. In this instance however the Council says that there are no additional charges included in the Council's fees which simply reflect Council staff time multiplied by the relevant hourly charge out rates.

[64] The significance of the Council charges being fixed charges in accordance with s 36(1) is that there is no right to object to or appeal against

the level of charges imposed. When additional charges are imposed pursuant to s 36(3) there is a right of objection to the Council against the additional charges together with a subsequent right of appeal. However no such rights exist in the respect of fixed charges under s 36(1).

[65] Mr and Mrs Haines did not challenge Mr Lieffering's evidence and Mr Lieffering was not required to appear and give evidence, his statement coming in to the Court by consent. On that basis the Court must accept Mr Lieffering's evidence and the submission of Counsel for the Council that the charges in question are fixed charges pursuant to s 36(l) which the Court has no power to consider.

[66] Having said that, we have sympathy with Mr and Mrs Haines' concerns about the level of costs charged in this case. We have no doubt that the Council officers dealing with this matter (primarily Mr Shirley) may have found Mr and Mrs Haines challenging applicants who sought to question and debate the Council process and the conclusions which Mr Shirley (in particular) had formed as to whether or not the subdivision application could be approved because of the obvious access difficulties.

[67] We also accept that Mr and Mrs Haines may have contributed to the amount of time involved in this application by their dogged refusal to acknowledge the reality of their access situation in legal terms. We think that Mr Shirley's appraisal of the access issue was entirely fair and indeed his approach was inevitable having regard to s 106(1)(c). Even so, we consider that the level of costs is very high having regard to the limited complexity of this particular application. Notwithstanding the Council's ability to fix its charges on the basis of recovering time spent at an identified hourly rate we consider that in this instance someone from the Council should stand back and ask the question is this a fair fee for this comparatively simple application.

[68] We note that s 36(5) gives a local authority an absolute discretion to remit the whole or any part of any fixed charge and we would have thought that this is an appropriate case for the Council to at least consider the remission of part of the charge. Obviously we have no power to direct the Council as to what it should do, nor do we wish to open a *can of worms* We take the matter of Council charges no further than that.

Costs

[69] Notwithstanding that Mr and Mrs Haines' appeal has been unsuccessful we do not consider that this is an appropriate case for an award of costs and there is accordingly no reservation of costs to the Council.