IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2021-404-000539
[2021] NZHC 3095

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of sections 95A, 95B, 95D, 95E, 104 and 104C of the Resource Management Act 1991 in relation to an application to review statutory decisions to grant consents on a non-notified basis under the Resource Management Act 1991
BETWEEN	GARY WALLACE and VICKI WALLACE First Applicants
AND	RICHARD BRABANT and ELEANOR BRABANT Second Applicants
AND	JASON ORR and LESLEY ORR Third Applicants

Continued overleaf…

Hearing: 27-28 September 2021 (via VMR)

Appearances: M J Williams for the Applicants
D K Hartley and A F Buchanan for the First Respondent
W S Loutit and R S Abraham for the Second Respondent

Judgment: 17 November 2021

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 17 November 2021 at 3.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Continued from previous page…

AND	AMANDA WILKINSON, MATTHEW WASHINGTON and DAVID NICOL Fourth Applicants
AND	DAVID PEDERSEN and TRACY PEDESEN Fifth Applicants
AND	AUCKLAND COUNCIL First Respondent
AND	44 VENTNOR LIMITED Second Respondent

Solicitors/Counsel:
Shakespeare Chambers, Napier
Grove Darlow & Partners, Auckland
DLA Piper, Auckland
Simpson Grierson, Auckland

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APPENDICES

Introduction

[1] The applicants are residents of 36, 42, 46 and 48 Ventnor Road and 4 Loreto Heights in Remuera. They have applied to review the decisions (together referred to as the Decisions) of the first respondent, the Auckland Council:

(a) not to notify an application by the second respondent, 44 Ventnor Ltd (44VL),[1] for resource consents to develop 44 Ventnor Road by constructing 13 terraced houses on the site (Notification Decision); and

(b) to grant resource consents for the construction of the 13 terraced houses and the subdivision of the site (Substantive Decision).

[2] The applicants say that, in taking the Decisions, the Council failed to comply with the notification and decision requirements of the Resource Management Act 1991 (RMA) and failed to apply correctly the Auckland Unitary Plan – Operative in Part (AUP).

[3] The applicants ask the Court to set aside the Decisions and the resource consents, with the consequence that work on the development would have to cease unless and until new consents are granted in accordance with the RMA and the AUP.

[4] The Council and 44VL say that the Decisions were made in accordance with the RMA and the AUP. They also say that, if errors were made, the Court should exercise its discretion and not grant the relief sought by the applicants because any errors were minor and not material to the Decisions. 44VL also says that to set aside the consents would cause it and others significant prejudice and that, if it were required to reapply for the consents, it is inevitable that the Council would decide not to notify the application and would grant the consents on the terms sought.

[5] While this application relates specifically to the development at 44 Ventnor Road, its determination may have more general significance to the extent that it bears upon the approach that the Council takes on future applications for consents for more

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[1] A list of acronyms used in the judgment is set out in Appendix 1 to the judgment.

intensive development of sites in the Residential – Mixed Housing Suburban Zone (MHS Zone), the largest residential zone provided for in the AUP. Leaving aside the large lot and rural and coastal residential zones, the principle residential zones in Auckland are, in order of envisaged intensity: the Residential – Single House Zone (SH Zone), the MHS Zone, the Residential – Mixed Housing Urban Zone (MHU Zone) and the Residential – Terraced Housing and Apartment Building Zone (THAB Zone).

[6] The application is concerned only with whether the Council complied with the requirements of the RMA and the AUP when taking the Decisions and not with the substantive merits of the Decisions or the actual effects of the development. However, at the urging of the applicants, and with the acquiescence of the respondents, I viewed the site of the development in order to gain some understanding of the locality and the development. Because of the restrictions of the COVID-19 Alert Level 3 lockdown, I did so without counsel.

[7] The view consisted of standing outside the development on Ventnor Road for a few minutes on 10 October 2021 and looking at the development and properties adjacent to and in the vicinity of the development, as well as looking at properties further along Ventnor Road and on Lucerne Lane, Benson Road and Loreto Heights, the other roads that encompass the development. It appeared that construction of the development was well advanced, with the frames of the units erected.

Relevant history

[8] On 26 November 2020, 44VL lodged with the Council an application for land use consent and subdivision consent for the proposed development. Filed with the application was an Assessment of Environmental Effects (AEE) prepared by Tattico Ltd on behalf of 44VL.

[9] Supporting documents filed with the AEE included:

(a) architectural plans and an Architectural Design Statement prepared by Middleton + Novak, the architects for the development; and

(b) a Transport Assessment of the development prepared by Traffic Planning Consultants.

[10] According to the AEE, the site comprises 1,684 square metres and, at the time of 44VL's application, had an existing two-storey dwelling and separate accessory buildings. The proposal included the removal of those buildings, site clearance works, including the removal of a large tree and other vegetation, earthworks and the construction of 13 two-storey terraced houses which would be mainly oriented around the boundaries of the site. Nine of the proposed units would be three-bedroom dwellings. The remaining four units would have two bedrooms.

[11] The AEE said that each unit would have one parking space on site and that waste would be removed from the site by a refuse disposal truck in accordance with a waste management plan provided with the AEE.

[12] As stated in the AEE, resource consents were required were to:

(a) construct four or more dwellings on site as a restricted discretionary activity;

(b) construct new buildings that did not comply with the height in relation to boundary development control but which complied with the alternative height in relation to boundary control, as a restricted discretionary activity;

(c) subdivide the site, as a restricted discretionary activity and, in one respect, a controlled activity;

(d) undertake earthworks, as a restricted discretionary activity; and

(e) permit reverse manoeuvring onto the street from one carpark and for the refuse disposal truck as a restricted discretionary activity.

[13] The AEE said that, overall, resource consent for a restricted discretionary activity was required for the development.

[14] The AEE also stated that the proposed development complied with the building height, height in relation to boundary and yard controls in the AUP and, in that regard, that one unit utilised the alternative height to boundary control in the AUP. The development also complied with the standards for maximum impervious area, building coverage, landscaped area, outlook space, daylight, outdoor living space, fences and walls and minimum dwelling size.

[15] The AEE recommended that the application be processed without public notification and without limited notification.

Initial Council review of application

[16] Upon the Council's receipt of the application on 26 November 2020, a Council planner (the Planner) reviewed the application documents and briefed relevant specialists whose input was sought in assessing the application.

[17] On 11 December 2020, the Planner visited the site to familiarise himself with the layout of the site in the context of its own development and its relationship to adjacent sites. During the visit, the Planner took photographs of the site and its outlook to adjacent properties.

Engagements between residents of Ventnor Road, the Council and 44VL

[18] From 8 to 23 December 2020, residents with properties in the vicinity of 44 Ventnor Road communicated with a councillor on the Auckland Council, Council officers and representatives of 44VL, including Mr Loutit, its legal counsel, about the development. The AEE and supporting documents were made available to one of the residents, Mr Brabant, a senior resource management law barrister (since retired). In addition, the chair of the Ōrākei Local Board (OLB) sent emails to the councillor and to Council officers expressing concern at the proposed development.

[19] The correspondence from the residents and the OLB chair raised questions about how the development should be considered in terms of the AUP, its effects on the privacy of neighbours and traffic effects, and whether the application should be notified. Replies from Council officers, including the Planner, said that these matters

would be taken into account to the extent permitted under the AUP. Mr Loutit and Mr Brabant exchanged emails about the residents meeting representatives of 44VL to discuss the proposed development.

[20] On 23 December 2020, Mr Brabant, on behalf of the owners and occupiers of 36, 39, 42, 46 and 48 Ventnor Road and 4 Loreto Heights, requested that the application be notified to them so that a submission on the application could be made and evidence and legal submissions presented to an independent hearing panel. The letter stated that the residents' principal concern related to the proposed intensity of the development, its scale, form and appearance, as well as traffic and parking effects. They considered that there would be more than minor effects from the proposed development on neighbourhood character, residential amenity and the surrounding residential area. The letter also stated that Mr Brabant considered there were special circumstances justifying limited notification given the proposed intensity of the development and its scale, form and appearance.

[21] On 18 January 2021, Mr Brabant emailed Mr Gibbons, the sole owner and director of 44VL, regarding a meeting between the residents and 44VL. Mr Brabant proposed a "without prejudice" discussion of a different approach to developing the land.

[22] On 18 February 2021, Mr Brabant formally requested, on behalf of the owners of 36, 39, 42, 46 and 48 Ventnor Road and 4 Loreto Heights, that 44VL agree to the neighbouring property owners being notified of the application and to advise the Council accordingly.

[23] A virtual meeting with Mr Gibbons took place on 23 February 2021. Mr Brabant and Mr Wallace, the owner of 46 Ventnor Road, asked Mr Gibbons to put the application on hold to discuss an alternative, less intensive form of development. Nothing eventuated from that meeting before the Decisions were made.

Council consideration of application

[24] On 2 March 2021, the Planner completed and signed reports (together referred to as the Reports) in which he had made recommendations on whether the application

should be notified (the Notification Report) and whether the resource consents sought should be granted (the Substantive Report).

[25] The contents of the Reports as they bear on the applicants' case are discussed below. In the Notification Report, the Planner recommended that the application should be processed without public or limited notification. In the Substantive Report, the Planner recommended that the resource consents should be granted, subject to conditions set out in the Substantive Report.

[26] On 4 March 2021, the application, AEE and supporting documents, further information provided in response to requests under s 92 of the RMA, correspondence from the chair of the OLB and Ventnor Road residents, the specialist reports prepared on the application, the Reports and the Planner's site visit photographs were sent to the Duty Commissioner for his consideration.

Decisions on notification and on application

[27] In an affidavit sworn in this proceeding, the Duty Commissioner, who is a planning consultant and an accredited and experienced hearing commissioner, says that on Thursday, 4 March 2021, he inquired about undertaking a site visit. However, because Auckland was under a COVID-19 Alert Level 3 lockdown at that time, he was advised that site visits were possible only if absolutely necessary and that it might be best to wait until the following week when the Alert Level might be lower.

[28] On Friday, 5 March 2021, the Duty Commissioner considered the application documents and the Reports and site visit photographs. He also had before him the "relevant planning instruments," including the AUP and the Council's Geographic Information Systems viewer, including aerial photographs. The Duty Commissioner says he spent some time reviewing the materials and carefully considered the matters raised by the residents and the OLB.

[29] The Duty Commissioner says he agreed with the recommendations in the Reports and that he largely adopted draft notification and draft substantive decisions prepared by the Planner, subject to editorial and formatting changes and a few minor substantive changes recorded in his affidavit.

[30] On 5 March 2021, the Duty Commissioner made the Notification Decision. On 7 March 2021, the Duty Commissioner made the Substantive Decision. The contents of the Decisions are discussed below.

Residents advised of the Decisions and commence proceeding

[31] On 8 March 2021, the Planner sent Mr Brabant copies of the Decisions and the Reports.

[32] On 9 March 2021, Mr Brabant emailed Mr Loutit advising that the residents in the properties neighbouring 44 Ventnor Road wished to negotiate with 44VL with a view to reaching agreement on an alternative less intensive development. Mr Brabant advised that judicial review proceedings would be issued unless 44VL undertook not to exercise the consents and to engage in negotiations. Mr Loutit replied that he was instructed to accept service.

[33] On 26 March 2021, the proceeding was filed and served.

[34] By joint memorandum of counsel dated 6 May 2021, the parties sought an urgent fixture and proposed timetable directions for a two-day hearing as soon as possible after 9 August 2021. The reasons given included that:

(a) The development was progressing in accordance with its resource consents; and

(b) In lieu of seeking injunctive relief, counsel for the applicants had proposed that the hearing of the application for judicial review be expedited.

[35] By minute dated 12 May 2021, Downs J made the timetable directions sought and set down the proceeding for a two-day fixture commencing 27 September 2021.

The Reports

[36] Because the Reports influenced the Decisions and were referred to in some detail in counsels' submissions, it is appropriate to describe their relevant sections.

The Notification Report

[37] In section 3 of the Notification Report, the Planner described the proposal, the site and the surrounding environment. He said that the surrounding environment consisted primarily of residential activities and that in terms of residential scale and built character, there was a mixture of large dwellings on un-subdivided sections and low-density infill development, which also generally consisted of large dwellings. He noted that the majority of sites in the area in the MHS Zone, with pockets of sites in the SH Zone, and that further south, towards Remuera Road, zoning intensified to the MHU Zone and the THAB Zone. He then gave brief descriptions of the neighbouring properties to the west (42 Ventnor Road), north-west (4 Loreto Heights), north-east and east (46 Ventnor Road) and south (37 Ventnor Road and the rest home and hospital then operating at 17 Upland Road). He recorded that all of the residential buildings were large and the majority were two-storey and that, as viewed from Ventnor Road, the rest home and hospital buildings also presented as two-storey.

[38] In section 4, the Planner recorded the correspondence he had received from the OLB and neighbours and which had recommended or requested notification. The Planner set out the issues and comments made by the OLB spokesperson, including a reminder not to tick off compliance with development controls and the need to apply judgment in the exercise of discretion under H4.8.1(2) of the AUP.

[39] Section 7 contained the Planner's assessment of whether public notification was required under ss 95A, 95C and 95D of the RMA.

[40] The Planner concluded that public notification was not required under Step 1 of s 95A and was not precluded under Step 2. He then considered whether public notification was required under Step 3 and, in particular, whether the activities for which consent was sought would have adverse effects on the environment that were more than minor. The Planner recorded that only those effects that related to matters within the Council's discretion under the rules would be considered in that assessment.

[41] The Planner set out in full H4.8.1(2) and other provisions of the AUP concerning land disturbance, transport and infringement of standards, in relation to which the Council has restricted its discretion, and provisions relating to subdivision

on which has specified matters of control and restricted its discretion. He stated that no other effects had been taken into account in his assessment. He also recorded that, in accordance with ss 95A(8)(b) and 95D of the RMA, he was to disregard any effects on owners or occupiers of adjacent properties. He identified 37, 42 and 46 Ventnor Road and 4 Loreto Place, as well as the rest home at 17 Upland Road, as being adjacent properties.

[42] The Planner said that the environment against which the application must be assessed included permitted activities under relevant plans, lawfully established activities and any unimplemented resource consents. He then said the reasonably foreseeable environment within which the adverse effects were to be assessed was the MSU Zone, characterised by a planned suburban built character of two storeys in a variety of types and sizes. Within that environment, reasonably foreseeable permitted development would result in sites modified by residential development comprising three dwellings, and the zone also provided for developments over three dwellings per site, if they met the objectives, policies and assessment criteria for the zone and obtained resource consents. The Planner acknowledged that the proposed development was a notable departure from the existing environment but said that had to be viewed in the context of adverse effects permitted and the scale of development anticipated in the zone as reflected by the objectives, policies and development standards. He stated, "It is against the above environment to which effects have been assessed against [sic]."

[43] The Planner said he had also undertaken the assessment in the context of relevant objectives and policies of the AUP. He said the purpose of the MSU Zone was to enable intensification while retaining suburban built character and said that while the existing built character may differ significantly from what is proposed in terms of intensity, the zone's purpose directed assessment against the planned character only. The Planner said the change in built character and intensity would be a significant departure from the existing environment, but the zone specifically did not seek to control density and that in itself was not an adverse effect that would warrant notification. The Planner stated that it was also appropriate to consider the type of development that could reasonably be anticipated within the zone and that it was conceivable that a building could be constructed based on the relevant development

standards – maximum height, height in relation to boundary and yard setbacks – and that these were a useful guideline for establishing the envisaged built form of the planned suburban character.

[44] Under the heading "Adverse amenity, character and streetscape effects", the Planner said the proposed development represented a typology, attached housing, that could reasonably be anticipated to occur within the zone, achieved the two-storey height limit through general compliance with development standards, and was of a height, bulk and form within the anticipated building envelope. He considered that the modulation of building form and articulation through glazing, materials and roof forms, combined with a comprehensive planting scheme, ensured the design and appearance of the development would be well within levels envisaged by the zone. He also considered that building separation, low fencing and planting, combined with the variety in form and materials, would result in an adequately attractive streetscape. The Planner concluded that, "Overall, for the reasons above, it is considered that adverse effects on the environment relating to the built form will be less than minor."

[45] The Planner noted the comments received from the OLB, which included a statement that the applicant and its consultants had ignored existing neighbourhood character and residential amenity. The Planner then stated:[2]

> In response to Local Board's comments, I firstly recognise that compliance with the development standards does not automatically equate to less than minor effects. I also acknowledge that the matters for discretion, notably H4.8.1(2)(a)(b), which pertain to effects on the surrounding residential environment resulting from bulk, scale and intensity, effectively restates policy H3.3(2). In light of this, I consider that outline of the plan context and adverse effects assessment above addresses Local Board's comments on the scale and intensity of the proposed development, noting in particular that the context to which effects are to be primarily assessed against [is] the future planned environment over the existing.

[46] The Planner then considered adverse infrastructure effects, adverse land disturbance effects, adverse traffic effects, adverse contamination effects and subdivision effects and concluded that any adverse effects on the environment would be minor.

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[2] It is apparent that the reference to policy H3.3(2) was intended to be a reference to policy H4.3(2).

[47] With regard to traffic effects, the Planner recorded that the Council's development engineer generally concurred with the traffic and transport assessment prepared by Traffic Planning Consultants for 44VL. The Planner noted that the level of traffic generated would be low and could be safely accommodated within the existing road network, the proposed access layout was adequate and that effects on pedestrian safety from the refuse collection truck and some residents having to reverse to exit the site would be low.

[48] Under Step 4 in s 95A, the Planner concluded that there were not special circumstances that warranted public notification. He said while the proposed development represented a significant change from the historical zoning and the existing low-medium density suburban built character, the zone's objectives and policies allowed for developments of this scale and typology to occur. He considered that the intensity of the proposal did not itself constitute a special circumstance considering the development's compliance with the majority of the zone's standards.

[49] In section 8, the Planner considered whether limited notification was required in accordance with ss 95B and 95E – G.

[50] The Planner recorded that, in determining whether a person was an affected person, only effects within the matters of discretion restricted under the AUP would be considered. He also recorded that for the purposes of the assessment of whether persons were adversely affected, he adopted the receiving environment as set out earlier.[3] He stated that no persons were considered to be adversely affected by the proposal for the reasons that followed.

[51] Under the heading "Adverse residential amenity and character effects," the Planner considered the effects on persons at 42 Ventnor Road, 46 Ventnor Road, and 4 Loreto Heights in terms of visual dominance and character, shading and privacy. He considered the effects on persons at 37 Ventnor Road and 17 Upland Road in terms of visual dominance and streetscape effects. He noted that the development complied with zone standards for setbacks, height, height in relation to boundary and site

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[3] I am satisfied that the reference to the earlier discussion of the receiving environment was to the discussion in section 7 of the report.

coverage, and that effects were "within levels reasonably anticipated to occur within the zone" or were "within levels enabled by the zone." In all cases, he was satisfied that the effects on persons at those addresses would be less than minor.

[52] Under the subheading "Effects on all adjacent persons", the Planner stated:

> With respect to character, as discussed in the public notification assessment above, the proposal is consistent with the outcomes envisaged by the zone, being two storey attached dwellings with appropriate appearances that are contained within a generally spacious setting, noting also the balance between building and landscaped coverages achieved. Accordingly, adverse effects relating to the planned suburban character on all adjacent persons will be less than minor.

[53] The Planner recorded that he considered the above assessment had adequately addressed the concerns raised by neighbours regarding privacy and intensity of use.

[54] With respect to adverse traffic effects, the Planner recorded that, on the basis of 44VL's traffic consultant's report and the input of the Council specialist, he was satisfied that any adverse effects had been minimised and managed to the extent that no persons were adversely affected.

[55] With regard to Step 4 in s 95B, the Planner recorded that:

> … I have turned my mind specifically to the existence of any special circumstances under s95B(10) and conclude that there is nothing exceptional or unusual about the application, and that the proposal has nothing out of the ordinary run of things to suggest that notification to any other persons should occur.

[56] For all the above reasons, the Planner recommended that the application be processed without public or limited notification.

The Substantive Report

[57] The analysis in the Substantive Report was considerably shorter than that in the Notification Report and built on the analysis in the Notification Report.

[58] In the Substantive Report, the Planner recommended that the consents be granted. He recorded that, in accordance with s 104C of the RMA, only matters on

which the Council had restricted its discretion had been considered, including H4.8.1(2) with respect to four or more buildings on site.

[59] The Planner stated that, in accordance with s 104(1)(a) and (ab) of the RMA, the actual and potential effects of the proposal would be acceptable because, among other things:

(a) The proposed dwellings were of a scale and intensity consistent with the planned suburban character of the zone;

(b) The proposed front dwellings would continue the appearance and form "described above in relation to streetscape,"[4]

(c) The effects in terms of visual dominance, shading and privacy were within acceptable levels or within levels reasonably anticipated by the zone;

(d) With respect to traffic safety, the proposed common parking area would provide for adequate manoeuvring depths and that while two vehicles[5] and the refuse truck would have to reverse to exit the site, traffic volumes would be low, there were adequate sightlines and waste collection would occur only twice a week outside of peak hours, thereby reducing the risk to the public.

[60] In terms of s 104(1)(b) of the RMA, the Planner assessed the proposal as consistent with the relevant statutory documents as they related to the matters on which the Council had restricted its discretion and discussed the effects of the development with regard to relevant policies and objectives in H4.2 and H4.3 and to the assessment criteria in H4.8.1(2)(b), (d), (e) and (g) concerning variety of building types, achieving safe and attractive streets and open space, maintaining a reasonable standard of sunlight access and privacy and minimising visual dominance to adjoining sites, and

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4 I am satisfied that the phrase to "described above in relation to streetscape" is a reference to the discussion of effects on streetscape in the Notification Report.

5 In fact, only one residents' vehicle must reverse to exit the site.

the extent to which outdoor living space provided for access to sunlight and privacy within the site.

[61] The Planner concluded that, overall, the proposal was consistent with the relevant statutory documents and would result in acceptable effects. He recommended that the consents be granted on the conditions recommended in the Substantive Report.

The Decisions

[62] It is apparent from the Decisions that the Duty Commissioner adopted much of the analysis and language of the Reports, as the Duty Commissioner acknowledged in his affidavit.

Notification Decision

[63] The Duty Commissioner recorded that he had read the application, supporting documents, and the report and recommendations on the application for resource consent and was satisfied he had sufficient information to consider the matters required by the RMA and make a decision on notification.

[64] The Duty Commissioner recorded that the application would proceed without public notification because public notification was not required under Step 1 of s 95A, public notification was not precluded under Step 2, and under Step 3 the activities would have or were likely to have adverse effects on the environment that were no more than minor.

[65] The reasons given for the conclusion under Step 3 included, under the heading "Adverse amenity, character and streetscape effects", that:

(a) The proposal achieved the two-storey height limit and, as reflected through general compliance with the development standards, the proposal would be of a height, bulk and form which was within the anticipated building envelope. Each block would be well-modulated and articulated though glazing, varied materials and roof form which, combined with the comprehensive panting scheme, would ensure the

design and appearance of the development would be within levels envisaged by the zone.

(b) With respect to the streetscape, the proposal would provide for street-facing kitchen windows and directly accessible front entrances, ensuring a sense of passive surveillance was achieved. The dwellings were appropriately separated from the front boundary by landscaped yards, with low fencing, hedging and specimen trees, and combined with the variety in form and materials, would result in an adequately attractive streetscape.

(c) Overall, it was considered that adverse effects on the environment relating to the built form would be less than minor.

[66] Under the heading "Adverse traffic effects," the Duty Commissioner repeated, virtually verbatim, the Planner's assessment in the Notification Report and concluded that the proposal would result in less than minor safety or traffic effects on the environment.

[67] Under Step 4 in s 95A, the Duty Commissioner adopted the analysis and language of the Notification Report and concluded there were no special circumstances applicable for public notification purposes.

[68] With regard to limited notification under s 95B, the Duty Commissioner said the application would proceed without limited notification because limited notification was not required under Step 1 and was not precluded under Step 2 and under Step 3, there were no adversely affected persons.

[69] In the analysis under Step 3, the Duty Commissioner observed that the proposal would be viewed and experienced slightly differently by various persons, but particular regard had been made to persons at 37, 42 and 46 Ventnor Road and 4 Loreto Heights. Under the heading "Adverse residential amenity and character effects," the Duty Commissioner gave a more general assessment of effects on persons at the identified addresses than the Planner had given. However, he largely adopted the

Planner's analysis of effects of visual dominance and character, shading and privacy and the Planner's assessment under the subheading "Effects on all adjacent persons" as set out at [52] above. The Duty Commissioner concluded that overall, no persons would be adversely affected in terms of residential amenity.

[70] The Duty Commissioner also adopted the Planner's analysis and conclusions in deciding there were no special circumstances warranting limited notification under Step 4 of s 95B.

The Substantive Decision

[71] In the Substantive Decision, the Duty Commissioner also recorded that he had read the application, supporting documents, and the report and recommendations on the application and was satisfied he had sufficient information to consider the matters required by the RMA and make a decision on the application.

[72] The Duty Commissioner noted that under s 104C of the RMA, only those matters over which the Council had restricted its consent would be considered. These included H4.8.1(2) as well as other relevant provisions under which the Council had restricted its consent.

[73] In giving his reasons for granting the consent, the Commissioner adopted, in most material respects, the Planner's analysis and assessment of the actual and potential effects of the proposed development under s 104(1)(a) and (ab) of the RMA as described at [59] above. One difference, which the Duty Commissioner noted in his affidavit, was that he stated that the planned suburban character of the zone enabled two-storey multi-unit development.

[74] The Duty Commissioner also adopted the Planner's analysis and assessment of the proposal under s 104(1)(b) as described at [60] above.

The alleged errors of law

[75] The applicants' statement of claim alleges six errors of law by the Council when making the Decisions. However, the applicants' counsel, Mr Williams, advised

that the applicants were pursuing only the first and second alleged errors of law, which relate to both the Notification Decision and the Substantive Decision , the third alleged error of law, which relates to the Notification Decision only, and the fifth alleged error of law, which relates to the Substantive Decision only.

[76] The errors of law which the applicants still allege are:

(a) The Council failed to identify the neighbourhood, the neighbourhood character and residential amenity when assessing the effects of the development and had inadequate information upon which to assess those effects (first error of law);

(b) The Council failed to consider the adverse effects of the intensity of development on the neighbourhood character, residential amenity, safety and the surrounding residential area (second error of law);

(c) The Council failed to identify affected persons (third error of law); and

(d) The Council's decision was unreasonable because of the inaccuracy and inadequacy of information on adverse traffic effects (fifth error of law).

Statutory and planning context

[77] The alleged errors relate to the interpretation and application of:

(a) Sections 95B and 95E of the RMA, which concern the limited notification of applications for resource consents and the related question of who is an affected person for the purposes of limited notification;

(b) Sections 104(1) and (2) and 104C(1) of the RMA, which govern the consideration of applications for resource consents for restricted discretionary activities; and

(c) Chapter H4 of the AUP, which concerns the MHS Zone: in particular: H4.1 Zone description; H4.2 Objectives; H4.3 Policies; H4.4 Activity table; H4.5 Notification; H4.6 Standards; and H4.8 Assessment criteria for restricted discretionary activities.

[78] It is common ground that these provisions must be considered in the context of the RMA as a whole and the AUP as a whole, as well as other relevant planning instruments, including the National Policy Statement on Urban Development (NPS-UD) and the Auckland Regional Policy Statement (RPS) set out at Chapter B of the AUP. Relevant provisions of the RMA, the NPS-UD, the RPS and the AUP are set out in Appendix 2 to this decision.

[79] For the purposes of analysis, it is appropriate to record the following.

[80] First, when considering an application for resource consent, a consent authority must consider whether the application should be notified in terms of the requirements of ss 95A to 95E of the RMA and, in that connection, whether the application should be publicly notified under s 95A or, if not, should be given limited notification under ss 95B and 95E. In addition, the consent authority must consider whether special circumstances exist that warrant notification to any other persons not already determined to be eligible for limited notification, but excluding persons assessed under section 95E as not being affected persons.

[81] In the present case, the applicants do not argue that there should have been public notification of the application for the resource consents in accordance with s 95A or that special circumstances existed that warranted limited notification of the application to them. The applicants' case is that the Council failed to consider properly whether they were affected persons and should have been given limited notification under ss 95B(9) and 95E.

[82] Section 95B relevantly provides:

(1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to give limited notification of an application for a resource consent, if the application is not publicly notified under section 95A.

…

Step 3: if not precluded by step 2, certain other affected persons must be notified

(7) …

(8) In the case of any other activity, determine whether a person is an affected person in accordance with section 95E.

(9) Notify each affected person identified under subsections (7) and (8) of the application.

…

[83] Section 95E relevantly provides:

(1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an **affected person** if the consent authority decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor).

(2) The consent authority, in assessing an activity's adverse effects on a person for the purpose of this section,—

(a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; and

(b) must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and

(c) ...

(3) A person is not an affected person in relation to an application for a resource consent for an activity if—

(a) the person has given, and not withdrawn, approval for the proposed activity in a written notice received by the consent authority before the authority has decided whether there are any affected persons; or

(b) the consent authority is satisfied that it is unreasonable in the circumstances for the applicant to seek the person's written approval.

(4) Subsection (3) prevails over subsection (1).

[84] Secondly, where, as here, the application is for a restricted discretionary activity, the application must be considered in accordance with ss 104 and 104C of the RMA. In accordance with the definition of "restricted discretionary activity" in s 2 and s 76A(3) of the RMA, a consent authority's power to decline a consent for a restricted discretionary activity, or to grant a consent and to impose conditions on the consent for a restricted discretionary activity, is limited to the matters over which discretion is restricted.

[85] Section 104 relevantly provides:

> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) …
>
> (b) any relevant provisions of—
>
> (i) …
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) …
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

[86] Section 104C relevantly provides:

> (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

(2) The consent authority may grant or refuse the application.

…

[87] Thirdly, where, as here, the application concerns an activity in the MHS Zone, that application must be considered in accordance with Chapter H4 of the AUP.

[88] Under Table H4.4.1, four or more dwellings per site is a restricted discretionary activity. The standards to be complied with in respect of that activity are: Standard H4.6.4 Building height; Standard H4.6.5 Height in relation to boundary; Standard H4.6.6 Alternative height in relation to boundary; and Standard H4.6.7 Yards.

[89] H4.8.1(2) provides that, when assessing a restricted discretionary activity resource consent application for four or more buildings per site, the Council will restrict its discretion to:

(a) the effects on the neighbourhood character, residential amenity, safety and the surrounding residential area from all of the following:

(i) building intensity, scale, location, form and appearance;

(ii) traffic; and

(iii) location and design of parking and access.

(b) all of the following standards:

(i) Standard H4.6.8 Maximum impervious areas;

…

(viii) Standard H4.6.15 Minimum dwelling size.

…

[90] H4.8.2(2) provides that, for four or more dwellings on a site, the Council will consider the following assessment criteria:

(a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or a better outcome:

(i) Standard H4.6.8 Maximum impervious areas;

…

(viii) Standard H4.6.15 Minimum dwelling size.

(b) The extent to which the development contributes to a variety of housing types in the zone and is in keeping with the neighbourhood's planned suburban build character of predominantly two storey buildings (attached or detached) by limiting the height, bulk and form of the development and managing the design and appearance as well as providing sufficient setbacks and landscaped areas.

…

(d) The extent to which development achieves attractive and safe streets and public open space by:

(i) providing doors, windows and/or balconies facing the street and public open space;

…

(vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings as viewed from streets or public open spaces.

(e) The extent to which the height, bulk and location of the development maintains a reasonable standard of sunlight access and privacy and minimises visual dominance to adjoining sites.

(f) The extent to which dwellings:

(i) Orientate and locate windows to optimise privacy and encourage natural cross ventilation within the dwelling;

…

(iv) Provide the necessary waste collection and recycling facilities in locations conveniently accessible and screened from streets and public open spaces.

(g) The extent to which outdoor living space:

(i) Provides for access to sunlight;

(ii) Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street.

…

Submissions by counsel for the applicants

First and second errors of law

[91] Mr Williams submits that, when making the Notification Decision and the Substantive Decision, the Council failed to consider and assess the effects of the development on the existing environment as required by the RMA, and failed to consider and assess the building intensity of the development on the existing neighbourhood character and residential amenity of the Ventnor Road environment, as required by the AUP. He says that, instead of considering the effects on the actual environment, the Planner and the Duty Commissioner wrongly assumed that:

(a) Whatever level of building intensity could be achieved within the bulk and location controls of the AUP would have minor effects at worst on adjoining properties and the neighbourhood character and residential amenity;

(b) The MHS Zone does not seek to control the density of development; and

(c) The effects of building intensity of the development should be assessed only against the future planned suburban built character of the Zone rather than the existing character of the neighbourhood.

[92] Mr Williams notes that in H4.8.1(2)(a), the Council reserved its discretion with respect to the effects on neighbourhood character, residential amenity, safety and the surrounding residential area from building intensity, scale, location, form and appearance. He submits that because the Assessment Criteria in H4.8.2, which relate to developments covered by H4.8.1(2), do not have a criterion that specifically addresses building intensity, there is a gap in the AUP but that gap does not absolve the Council from its responsibility to consider that matter when assessing the effects of the proposed development.

[93] Mr Williams submits that the Council failed to engage its discretion over the intensity of the development and, in particular, did not consider what the effects would

be from the building intensity of 13 terraced houses on a single site within a neighbourhood that contains nothing like the proposed development. He says that level of intensity is more appropriate to urban rather than suburban form, and contrasts the policies and rules of the MHS Zone with those of other residential zones in the AUP, in particular the MHU Zone and the THAB Zone. He also says the Council failed to consider whether a development of lesser intensity would retain the suburban built character which is the express purpose of the MHS Zone.

[94] Mr Williams says the Council failed to identify adequately the neighbourhood of the development, which he says was a necessary first step to considering the effects of the development on neighbourhood character and residential amenity. He refers to the evidence of Stephen Brown, an experienced planner, on what constitutes the neighbourhood of the development, the impacts on the character and residential amenity of that neighbourhood, and the assessment of effects that Mr Brown considers the Council failed to undertake. Mr Williams also refers to the size and extent of the MHS Zone, and the diversity of environments within that Zone, and says it would be untenable to assume a consistent or coherent character across all land within the MHS Zone as a reference point for considering the effects of a development within a given neighbourhood. He draws attention to the consequences for the Zone if the Council's approach in the present case were to be applied more generally.

[95] Mr Williams submits that the errors regarding neighbourhood character and residential amenity affected the Notification Decision as well as the Substantive Decision because the assessment of the development's effects on the character of the neighbourhood and residential amenity were a necessary consideration of effects for the purposes of the Notification Decision.

Third error of law

[96] With respect to the third error of law, Mr Williams submits that, because the Council failed to identify and define the existing neighbourhood, it wrongly assumed that the only parties to be considered as being potentially affected by the development for the purposes of notification were the owners and occupiers of properties adjacent to the development. Mr Williams says that if the Council had approached the issue

correctly, others would have been, or may very well have been, identified as adversely affected as persons to whom the application should have been notified because the effects from building intensity on the neighbourhood in which they live would be minor or more than minor.

[97] Mr Williams also submits that, with respect to adjacent owners and occupiers, the Council confined its consideration to effects associated with built form and scale (such as privacy, shading and visual dominance) and failed to have regard to the mandatory consideration of effects from building intensity.

Fifth error of law

[98] Mr Williams says the Council lacked adequate information upon which to make a reasonably informed decision that the adverse traffic-related effects of the development, including of residents' vehicles and the refuse truck reversing onto the street, would be less than minor. In particular, he says the traffic assessment report was prepared on the basis of an eight-year old survey and without consideration of existing traffic volumes or assessment of vehicle speeds and daily pedestrian movements.

Submissions by counsel for the Council

[99] Ms Hartley and Ms Buchanan, counsel for the Council, say that the relevant effects of the development, including the effects of building intensity on neighbourhood character and residential amenity, were assessed by the Council with regard to the receiving environment and the relevant objectives and policies of the AUP. They also say the Council had sufficient information upon which to assess the level of effects. They argue that the applicants' challenge to the Decisions is really a challenge to the merits of the kind of development envisaged in the MHS Zone.

First error of law

[100] Counsel for the Council submit that there is no requirement on the Council to exactly delineate the boundaries of the neighbourhood of the development and say that, on the basis of the material before him, including the Architectural Design

statement included with the AEE and the Reports, the Duty Commissioner had a sufficient understanding of the collective qualities or characteristics of the area where the development site is located and the relevant effects of the development. They also say that it was sufficient and appropriate for the Duty Commissioner to consider the relevant effects of the development having regard to and in the context of the zone statement, policies and development standards of the MHS Zone. They say the Decisions are not amenable to being set aside just because the applicants and their expert, Mr Brown, have a different view of the neighbourhood character and the effects of the development.

Second error of law

[101] Counsel note that there is no definition of "building intensity" in the AUP but submit that "building intensity" refers to built intensity and is related to the scale, location, form and appearance of buildings and encompasses matters such as the height and bulk of buildings, whether they are attached or detached, site coverage and setbacks. They submit that the assessment criteria in H4.8.2(2) indicate that the matter of discretion reserved under H4.8.1(2)(a)(i) is focused on built form and built character and say there is no gap in those criteria. They note that the assessment criteria were introduced into the AUP through a decision of the Environment Court which also removed the density controls from the MHS Zone, as had been recommended by the Independent Hearings Panel on the proposed AUP.[6]

[102] Counsel for the Council submit that the key objectives and related policies for the MHS Zone anticipate an increase in housing capacity, intensity and choice for developments that are in keeping with the neighbourhood's planned suburban built character of predominantly two-storey buildings; the effects of which are controlled by limiting height, bulk and form of building development and managing design and appearance and requiring sufficient setbacks. The zone provisions give effect to the residential growth provisions in the Regional Policy Statement (RPS) in Chapter B of the AUP, which are also focused on planned built character.

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6 *Adams v Auckland Council* [2018] NZEnvC 8.

[103] Counsel say the "broader scale" effects of building intensity that were not addressed in the Notification Decision were not relevant to the assessment of the development under H4.8.1(2)(a). They also say the effects identified by the applicants in their affidavits and in the evidence of Mr Brown were either not required to be addressed or were adequately addressed in the Decisions.

Third error of law

[104] Counsel for the Council submit that, when making the Notification Decision, the Duty Commissioner correctly identified the range of potential adverse effects on the environment arising in relation to the matters he had to decide and that there was no failure to consider the effects of building intensity on neighbourhood character and residential amenity. It was open the Duty Commissioner to determine that the adverse effects on others were less than minor and, as a result, to determine that there were no adversely affected persons to be notified.

Fifth error of law

[105] Counsel say that the Council had adequate information to assess the traffic and parking effects of the development, that those effects were the subject of discussion with 44VL after further information had been requested and that the consent conditions were adjusted as a consequence. They say the Commissioner was entitled to rely on the information that had been provided and that it was open to the Commissioner to conclude that the traffic effects were less than minor.

Submissions by counsel for 44VL

[106] Mr Loutit submits that to understand the legality of the Decisions, it is necessary to consider the full context in which they were made and that includes the objectives and policies of the MHS Zone, the RPS, the NPS-UD and the RMA itself.

First and second errors of law

[107] Mr Loutit notes that the development complies with all height, bulk and location controls which are how effects on streetscape, neighbourhood character, sunlight, privacy, visual dominance and residential amenity are managed and how the

planned suburban built character of the MHS Zone is achieved. He accepts that an assessment of effects on the environment was required but says that assessment had to be done in the context of the AUP, including the fact the development complied with height, bulk and location controls. He says the controls give strong guidance on the likely level of effects that needed to be considered and the level of scrutiny required.

[108] Mr Loutit says that the number of buildings or "building intensity" does not create any relevant effects or, if it does, that these were carefully considered. He says the applicants have failed to describe what the effects alleged to arise from the number of buildings on site are and submits that there are no effects beyond those addressed through the development standards

[109] He says the applicants oppose the proposal because it amounts to change but the changes to which the applicants refer are not controlled by the RMA or the AUP. He notes that the purpose of the RMA, sustainable management, is forward looking. So too are district plans, particularly the AUP, which has the purpose of providing for Auckland's housing demand over the next 30 years.

[110] Mr Loutit submits that the applicants' approach ignores the context of the rule permitting three dwellings on a site in the MHS Zone. He says the three dwelling threshold simply establishes the point beyond which effects must be assessed through the resource consent process. He notes that, under the AUP and the MHS Zone, three dwellings can be constructed as of right on sites in the vicinity of 44 Ventnor Road that would result in lots similar in size to those in 44VL's development. He says that is a clear indication of what the AUP envisages.

[111] Mr Loutit says there was more than sufficient information before the Commissioner to assess the scale of likely effects of the development. He says the neighbourhood and neighbourhood character were addressed in the AEE and the Architect's Design Statement and that notifying the neighbours would not have provided the Commissioner with additional relevant information on effects or affected persons.

[112] Like the Council's counsel, Mr Loutit says the matters identified by the applicants as relevant concerns were either outside the scope of the RMA and AUP or were adequately assessed in the documents considered in the development standards and in the documents before the Commissioner or are permitted under the AUP. He says the applicants have failed to identify any specific relevant effects arising from the number of dwellings that were not properly considered.

Third error of law

[113] Mr Loutit says the alleged failure to consider potentially affected parties has no substance because, under H4.5 of the AUP, the Council was required to consider the application on a non-notified basis because it complied with all the relevant standards in the AUP. Even putting that "Rule" aside, he says there was no reviewable error in the Council's consideration of whether persons such as the applicants were likely to be adversely affected by the development.

Fifth error of law

[114] Mr Loutit says the evidence of Mr Langwell of Traffic Planning Consultants, which was not challenged by the applicants, establishes that the traffic solutions proposed by 44VL and agreed to by the Council were based on adequate and reliable information.

Analysis

Approach to applications for judicial review

[115] As the Court of Appeal said in *Pring v Wanganui District Council*:[7]

> It is well established that in judicial review the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant, considerations were taken into account, and whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made. Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine, but, of course, there must have been *some* material capable of supporting the decision.

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7 *Pring v Wanganui District Council* [1999] NZRMA 519, (1999) ELRNZ 464 at [7].

[116] The Court went on to note that where neighbours and other users of adjacent streets are affected by a decision whose merits they cannot challenge – in that case a certificate of compliance:[8]

> … the Court will scrutinise what has occurred more carefully and with a less tolerant eye when considering whether the decision was one open to the consent authority on the material before it than it will do in a case where the decision which is being questioned required the balancing of broad policy considerations and there was less direct impact upon the lives of individual citizens …

[117] At the same time, it is important to recall that the Court of Appeal has also made it clear that non-notification decisions do not require a more intensive standard of review than would otherwise be appropriate for a Court.[9]

[118] For present purposes, I adopt the approach re-affirmed by the Court of Appeal this year in *O'Keeffe v New Plymouth District Council* that, in an application for judicial review of Council decisions not to require limited notification of an application and to grant a resource consent:[10]

> It is not the Court's role to review the merits of the Council's decision. Rather, the focus is on whether the Council had adequate information to make its decision, and whether that decision was lawfully made under the relevant provisions of the RMA.

[119] It is axiomatic that the reference to the RMA must include plans made under the RMA such as the AUP.

Questions for determination

[120] The case Mr Williams advanced in relation to the first and second alleged errors was on two fronts:

(a) First, the Council failed to consider the effects of the development on the existing environment as required by s 104(1)(a) of the RMA and instead, considered the effects of the development only by reference to the "planned environment" as envisaged under the AUP; and

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8 Ibid.
9 *Far North District Council v Te Runanga-a-iwi o Ngati Kahu* [2013] NZCA 221 at [56].
10 *O'Keeffe v New Plymouth District Council* [2021] NZCA 55, (2021) 22 ELRNZ 506 at [59].

(b) Secondly, the Council failed to assess the effects of the development's building intensity on the neighbourhood character and residential amenity of the locality as required by H4.8.1(2)(a) of the AUP.

[121] Mr Williams says that both failures invalidate the Notification Decision and the Substantive Decision because failing to consider the effects on the environment and failing to assess the effects on neighbourhood character and residential amenity are relevant to whether the applicants were affected persons for the purposes of notification and to whether the consents should have been granted.

[122] Having regard to that submission and the third and fifth alleged errors, I consider that the questions to be determined are:

(a) What is the "environment" for the purposes of ss 104 and 104C, and also for the purposes of s 95E, and did the Council apply those sections correctly?

(b) What was the Council required to consider for the purposes of H4.8.1(2)(a) of the AUP? In that regard:

(i) Is it necessary to identify the neighbourhood, the neighbourhood character and the residential amenity of the area in which the proposed development is to take place?

(ii) Did the Council have adequate information to assess effects on neighbourhood character and residential amenity?

(iii) What is building intensity?

(iv) Do the assessment criteria in H4.8.2 provide a sufficient basis for assessing the effects of building intensity on neighbourhood character and the residential amenity?

(c) Did the Council appropriately assess the effects of building intensity on neighbourhood character and residential amenity?

(d) Did the Council appropriately consider the effects of the development for the purposes of determining who were affected persons?

(e) Did the Council have adequate information upon which to assess the traffic effects of the development?

What was the Council required to take into account for the purposes of ss 104 and 104C and what is the "environment" for the purposes of those sections?

[123] Under s 104(1), a consent authority must have regard, among other things, to any actual and potential effects on the environment of allowing the activity for which consent is sought. On the other hand, s 104C(1) provides that, when considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which it has restricted the exercise of its discretion in its plan.

[124] It is plain that the two provisions must be read together and that, when the Duty Commissioner was considering the substantive application he was required to have regard to the effects of the development on the environment, but only with respect to effects relevant to the matters on which the Council had restricted its discretion. In other words, s 104C(1) limits the scope of the assessment of effects on the environment under s 104(1)(a) to those effects that relate to the matters on which the Council has reserved its discretion. That is settled by the Supreme Court's decision in *Auckland Council v Wendco (NZ) Ltd*,[11] and reaffirmed by the Court of Appeal in *Speargrass Holdings Ltd v van Brandenberg*.[12]

[125] As Mr Williams says, it has been recognised in *Tasti Products Ltd v Auckland Council* that matters relevant for consideration of whether to grant a consent under s104(1) are also relevant to the assessment that of whether a person is an affected person in terms of s 95E.[13] While *Tasti Products* was concerned with the relevance of objectives and policies in a proposed plan to a notification decision, it must be the case that effects of a development on the environment are relevant to the assessment of

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11 *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008 at [37].
12 *Speargrass Holdings Ltd v van Brandenberg* [2019] NZCA 564 (2019) 21 ELRNZ 466 at [55].
13 *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [82].

whether a resident in the area of the development was an affected person. However, as the Court of Appeal made clear in *Speargrass Holdings*, an effect cannot be taken into account for the purposes either of a decision about notification or a decision on whether to grant consent if the consent authority has restricted its discretion in a way that excludes that effect from consideration.[14] That is consistent with s 95E(2) which provides that, in making the assessment of whether a person is affected in relation to a restricted discretionary activity, a consent authority must disregard any adverse effects that do not relate to a matter for which the consent authority has restricted its discretion.

[126] In the present case, under H4.8.1(2) the Council has restricted its discretion to the effects of building intensity, scale, location, form and appearance, as well as the effects of traffic and the design and location of parking and access, on neighbourhood character, residential amenity, safety and the surrounding residential area. It follows that only effects concerning those matters are relevant to the assessment of the development's effects on the environment under s 104(1)(a) and to the assessment of who may be affected persons under s 95E. This means that the Council was required not to undertake the comprehensive assessment of the development's external effects argued for by Mr Brown, and was specifically required by ss 104C(1) and 95E2 to limit the scope of its assessment of effects to the matters on which it had restricted its discretion under H4.8.1(2).

[127] As to what constitutes "the environment," as Mr Williams acknowledges, the Court of Appeal has held, in *Queenstown Lakes District Council v Hawthorn Estate Ltd*, that the word "environment" as used in s 104(1)(a) is not limited to the environment as it exists at the time of a decision but also embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity.[15] In its analysis leading to that conclusion, the Court of Appeal considered the definition of "environment" in s 2, the purpose of the RMA in s 5, the period within which consents can be exercised in accordance with s 125 and the duration of land use consents under s 123. The Court then stated:[16]

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14 *Speargrass Holdings Ltd v van Brandenberg*, above n 12, at [58].
15 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 at [84].
16 At [57].

> In summary, all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable and even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur.

[128] However, the Court of Appeal also made it clear that, for the purposes of the assessment to be made under s 104(1)(a), the effects of activities for which resource consents that might be granted in the future should not be brought into account when considering the future state of the environment. The Court of Appeal specifically held that the High Court Judge, whose decision was the subject of appeal, had erred in holding that the effects of future consents might be brought into account.[17] The Court of Appeal endorsed the approach of the Environment Court which had rejected an argument that there could be a reasonable expectation that the council would grant consent to subdivisions that matched the intensity of other subdivisions in the area for which consent had been granted.[18]

[129] While subdivision was a discretionary activity in *Hawthorn Estate*, I do not consider that the Court of Appeal's decision applies only to the effects of discretionary activities or that a different conclusion can be reached with respect to the effects of restricted discretionary activities for which consent is required. Even in the case of a restricted discretionary activity, a consent authority is required to exercise its discretion, albeit within the bounds of the matters on which the consent authority has restricted its discretion, and the grant of consent is not a foregone conclusion. That is confirmed by s 104C(2) which makes it clear that a consent authority may grant or refuse an application for a restricted discretionary activity.

[130] It follows that there can be no certainty that a future environment may include the effects of activities for which consent is required for restricted discretionary activities. In that regard, I do not accept Mr Loutit's submission that the distinction between a permitted activity and a restricted discretionary activity is whether the proposal is likely to require an effects assessment and evaluation against the objectives and policies of the plan. The principal distinction is that a permitted activity can be undertaken as of right and does not require a resource consent, while a restricted

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17 At [84].
18 At [14].

discretionary activity cannot be undertaken as of right and requires a consent, even if the parameters for consideration of the consent are restricted.

[131] For these reasons, I am satisfied that, when considering the impacts of the development on the environment for the purposes of ss 104(1)(a) and 104C(1), and when considering who was an affected person for the purposes of s 95E, the Council was entitled to take into account the effects of the development on the environment as it exists today and as it may be modified by activities that are permitted as of right under the AUP and under any consents already granted, but was not entitled to take into account the environment as it may be modified by future resource consents. However, for the reasons already given, that assessment must be limited to the matters on which the Council restricted its discretion.

[132] It follows that, when assessing the effects of the development on the environment and on the applicants, the relevant adverse effects which the Council could take into account were effects on neighbourhood character, residential amenity, safety and the surrounding residential area from building intensity, scale, location, form and appearance, and traffic and location and design of parking and access.

[133] It also follows that effects such as the removal of trees and other vegetation, the scale and maturity of gardens, whether residents of the proposed development are owners or tenants of the units, and parking on the street, which were among the issues identified in the affidavits of the applicants and in the evidence of Mr Brown, are not relevant effects for the purposes of the assessment of effects on the environment or on the applicants. Because removal of trees and other vegetation, renting of property and parking on the street are either not controlled or are permitted under the RMA and AUP, effects relating to those matters are part of the environment as it exists or as it may be modified as of right.

[134] It further follows that other effects not caused by building intensity, scale, location, form and appearance, traffic and location and design of parking spaces are not relevant effects for the purposes of the assessment of effects on the environment or on the applicants because they do not relate to matters on which the Council has restricted its discretion.

What assessment did the Council make of the environment?

[135] It is clear from the Reports and the Substantive Decision that the Planner and the Duty Commissioner understood that their assessments were limited to the matters on which the Council had restricted its discretion. In all three documents it was stated that the assessments they contained were limited to those matters. To that extent, therefore, the Council made no error and did not incorrectly apply ss 104(1)(a) and 104C(1) of the RMA in that respect.

[136] The position is less straightforward in terms of the Council's interpretation of the relevant environment. That analysis is contained in the Notification Report in which the Planner discussed the receiving environment. The Planner adopted that analysis in the Decision Report. The Duty Commissioner did not undertake any separate analysis of the relevant environment but adopted the Planner's recommendations based on the Planner's analysis. It follows that the Planner's analysis informed and underpinned the Decisions by the Duty Commissioner.

[137] In the initial section of his analysis, the Planner accurately reflected the Court of Appeal's decision in *Hawthorn Estate.* He stated that the environment against which the adverse effects of the application must be assessed included permitted activities under the relevant plans, lawfully established activities, and any unimplemented resource consents that are likely to be implemented.

[138] In the next paragraph, the Planner observed that under the AUP, permitted development would result in existing sites modified by residential development comprising three dwellings, either detached or attached. That is correct and within the scope of *Hawthorn Estate*. However, he then stated that the MHS Zone provides for development over three dwellings, provided the development meets the objectives, policies and assessment criteria for the zone and activity and obtains consent. He included that possible development in the environment against which effects must be assessed. That is wrong as a matter of law, for the reasons discussed above. It also misunderstands why resource consent is required. As discussed below, it is clear from the history of the AUP that one of the reasons for requiring consent for four or more buildings on a site in the MHS Zone was to enable an assessment of the effects of that

more intense use of the site. It is illogical, therefore, to assess the effects of that more intense use against the effects of activities that also entail a more intense use than is permitted under the AUP.

[139] I have considered whether this error can be considered a minor misstatement that does not affect the overall analysis. I have concluded that it cannot be.

[140] First, it is inconsistent with the Court of Appeal's decision in *Hawthorn Estate*.

[141] Secondly, the error is compounded by the Planner's further analysis of adverse effects. The Planner recognised that the proposed development would be a notable departure from the existing environment but then said that must be viewed not only against what is permitted but also against the scale of development anticipated in the MHS Zone as reflected in the zone's objectives, policies and development standards. That statement is also inconsistent with *Hawthorn Estate* if it included activities that require consent, even if consistent with the MHS Zone's objectives and policies.

[142] It is, of course, entirely appropriate for the Council to take into account the AUP's objectives and policies under s 104(1)(b) and, indeed the policies and objectives of the NPS-UD and the RPS, when deciding whether or not to grant consent. However, those considerations are separate from the assessment of the effects on the environment required under s 104(1)(a) and from the assessment of effects on persons required under s 95E.

[143] Thirdly, while the Planner accurately states that the purpose of the MSU Zone is to enable intensification while retaining suburban built character, his statement that the zone's purpose directs assessment against only the planned character is not correct. The zone description in H4.1 makes it clear that while the zone enables intensification, resource consent is required for four or more dwellings on site not only to achieve the planned suburban built character of the zone but also to manage the effects of development on neighbouring sites. That is, an assessment of effects on neighbouring sites is required as well as an assessment against planned character. The zone description also states that the resource consent requirement enables the design and layout of the development to be assessed because the need to achieve a quality design

is increasingly important as the scale of development increases. In other words, an assessment of the effects of scale is inherent in the assessment to be made in the resource consent process.

[144] In these various respects, therefore, the Council made errors of law in its assessment of effects on the development on the environment and, therefore, in its assessment of whether persons were affected by the development.

[145] There is a further error in the Planner's analysis, namely that density in itself is not an adverse effect that would warrant notification. I discuss this error below. For now, I note that there is a difference between density per se, which the AUP does not seek to control, and the effects of intensity of development, of which the AUP directs consideration in the MHU Zone.

What was the Council required to consider for the purposes of H4.8.1(2)(a) and H4.8.2 of the AUP?

[146] It is common ground that because the Council had restricted its discretion to the matters in H4.8.1(2), an assessment was required of the development's effects of building intensity, scale, location, form and appearance on the neighbourhood character, residential amenity, safety and the surrounding residential area. The questions in contention relate to identification of neighbourhood character and residential amenity, the adequacy of the Council's information on those matters, what is meant by "building intensity", and whether the Council was required to have regard to matters other than the assessment criteria in H4.8.2.

Is it necessary to identify the neighbourhood, the neighbourhood character and residential amenity of the area of the proposed development?

[147] The terms "neighbourhood" and "neighbourhood character" are not defined in the AUP. The term "amenity values" is defined in s 2 of the RMA but in terms that require an evaluation of an activity in its context.[19]

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[19] Section 2 of the RMA defines "amenity values" to mean "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes."

[148] I do not accept Mr William's submission that, in order to carry out the assessment required by H4.8.1(2)(a), it was a necessary first step to identify the neighbourhood affected by the development. I agree that identification of the relevant neighbourhood could usefully inform the assessment required under H4.8.1(2)(a). However, I do not consider that identification of the particular neighbourhood was a necessary step in the process. First, H4.8.2(2)(a) is concerned with effects on neighbourhood character, not the neighbourhood itself. Secondly, bearing in mind the size and diversity of development within the MHS Zone, as recognised in the Zone description in H4.1, and bearing in mind that activities in the MHS Zone are not controlled on a neighbourhood basis, it is apparent that the MHS Zone provisions do not assume that there will be a relevant neighbourhood or relevant neighbourhood character in all cases. That conclusion is supported by the language of Policy B2.4.2(4) of the RPS, which provides that there should be lower residential intensity in a suburban area with an existing neighbourhood character. It is also supported by Policy B2.4.2(8) which provides that "existing and planned" neighbourhood character should be recognised and provided for through the use of place-based planning tools.

[149] I consider that what is required by H4.8.1(2)(a) is an assessment of the building intensity, scale, location, form and appearance of a proposed activity on such neighbourhood character and residential amenity as are found to exist in the location of the activity for which consent is required. To undertake that assessment, what is required is an adequate description of the area of the proposed activity, including any neighbourhood character and residential amenity that may be in that area, in sufficient detail to enable an assessment to be made of the effects on those matters caused by the building intensity, scale, location, form and appearance of the proposed development.

Did the Council have adequate information to assess effects on neighbourhood character and residential amenity?

[150] The Architect's Design Statement prepared by Novak + Middleton, and filed with the application and AEE, considered the neighbourhood both generally in Remuera and in the immediate vicinity of Ventnor Road, which is the entry street for and address of the proposed development. With regard to streetscape, the Design Statement said:

> The Ventnor Road streetscape is characterised by a wide two lane quiet suburban road that connects Lucerne Road with Upland Road. It has footpaths and grass berms either side of the street. It also has well established trees and planting.
>
> The properties either-side of the site generally have driveways leading to each dwelling or set back garages. The houses are typically two storeys. The houses themselves are typically set back slightly from the road boundary and generally the garage[s] address the street.
>
> There is a mixture of screening. Some houses have large hedges whilst others have low or no fencing to the street. Parking is typically at the front or side of the site.

[151] With regard to neighbourhood character, the Design Statement said:

> The neighbourhood character is consistent with the streetscape character. Buildings are typically setback slightly from the boundary, often by around 3-5 metres or more. Buildings are predominantly two storeys. Dwelling types are eclectic in style, ranging from; weatherboard or brick, with concrete tile of metal long-run hip or gable roofs typical of mid-century New Zealand residential housing to more recent and modern contemporary houses of all styles.
>
> The houses in the neighbourhood appear well maintained and are generally of high quality.

[152] Novak + Middleton described the streetscape and neighbourhood character principally by reference to the size and location of houses, their relationship to the street and house design which it considered to be "eclectic in style." It is apparent from those descriptions that Novak + Middleton did not consider that there was a particularly distinctive neighbourhood character in the location of the proposed development.

[153] It is not for the Court, on an application for judicial review, to pronounce on the merits and accuracy of the above descriptions. I am satisfied, however, that the descriptions adequately identified the neighbourhood character and residential amenity in the area of the proposed development. While the descriptions are focused on Ventnor Road and do not address the neighbourhood character and residential amenity of Loreto Heights, part of which is overlooked by the development, it is noteworthy that most of the applicants are residents of Ventnor Road and that no affidavit has been filed by the one applicant who is resident in Loreto Heights. It is reasonable to infer, therefore, that the effects of the development on Ventnor Road are

of most concern and that an assessment of the streetscape and neighbourhood of Ventnor Road are of principal relevance. In addition, it is apparent from the Planner's description of the surrounding environment in section 3 of the Notification Report that the Planner took into account the character and amenity not only of Ventnor Road but also of adjacent streets, including Loreto Heights. The Planner's description is also consistent with the Novak + Middleton assessment.

[154] I am satisfied, therefore, that the Council had adequate information to undertake the assessment of effects on neighbourhood character and residential amenity.

What is building intensity?

[155] "Building intensity" is also not defined in the AUP. In accordance with the Court of Appeal's decision in *Powell v Dunedin City Council*, when deciding what a provision of a plan means it is appropriate to have regard to the plain meaning of the words themselves but regard must also be had to the immediate context in which they are used, including the objectives and policies of the plan.[20] For that reason, definitions of "intensity" and "density" taken from the Concise Oxford English Dictionary, as offered by Mr Williams, are of limited assistance.

[156] As noted above, the Council's position is that building intensity refers to built intensity and is related to the scale, location, form and appearance of buildings and encompasses matters such as the height and bulk of buildings, whether they are attached or detached, site coverage and setbacks.

[157] As a matter of drafting, it would seem odd for "building intensity" to include the scale, location, form and appearance of buildings in the context of H4.8.1(2). As Mr Williams says, H4.8.1(2)(a)(i) lists building intensity as a consideration separate from scale, location, form and appearance. In addition, given that the standards for height, bulk and location, as well as yards, are excluded from consideration when the Council is deciding whether and how to exercise its discretion under H4.8.1(2), it would seem anomalous to include those matters for consideration in the exercise of

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[20] *Powell v Dunedin City Council* [2004] 3 NZLR 721 at [35].

that discretion. However, issues of scale, location, form and appearance, as well as height, bulk and location, are brought into account through the assessment criteria in H4.8.2. For that reason, I do not exclude these matters from being relevant to an assessment of building intensity, simply for reasons of drafting.

[158] However, I do not accept that "building intensity" is principally concerned with matters of scale, location, form and appearance, even if those matters may be relevant to assessing the effects of building intensity. I consider that "building intensity" as used in H4.8.1(2) was intended to include the density of buildings and the effects of the activities in those buildings, including the numbers of residents in those buildings.

[159] As Mr Loutit says, building density relates to the number of buildings on a site. Mr Loutit notes that the pre-AUP planning framework used to include maximum density rules which prescribed a minimum net site area per dwelling and thereby limited the number of dwellings. By limiting the number of dwellings, the pre-AUP planning framework also put constraints, albeit imprecise, on the number of people on a site, even if the planning rules did not address that matter directly. In other words, building density was a way of managing the effects of the number of people on site and, thus, of managing the intensity of the use of the site by controlling the number of buildings on site.

[160] I consider, therefore, that the effects of building intensity include the effects of the numbers of buildings on site and the effects of the activities within those buildings, including their use and occupation by people. That interpretation is consistent with the RPS, which informs the whole of the AUP, and in which intensification of the urban area in order to accommodate Auckland's growing population is a predominant theme. That is illustrated by:

(a) B2.1 Issues, which refers to the increasing demand for housing caused by Auckland's growing population and the need for growth be provided for that optimises the efficient use of the existing urban area;

(b) Objective B2.2.1(2), which provides that urban growth is to be primarily accommodated within the urban area 2016, which extends

from Albany in the north to Papakura in the south and includes all of Remuera and the suburbs to its east, south and west;

(c) Policy B2.2.2(4), which promotes urban growth and intensification in urban area 2016;

(d) Objective B2.4.1(3), which seeks an increase in housing capacity and the range of housing choice which meets the varied needs and lifestyles of Auckland's diverse and growing population;

(e) Policy B2.4.2(1), which is to provide a range of residential zones that enable different housing types and intensity appropriate to the residential character of the area;

(f) Policy 2.4.2(3), which is to provide for medium residential intensities in areas that are within moderate walking distance to centres, public transport, social facilities and open space.

[161] There can be little doubt that Policy B2.4.2(3) is directed to the MHS Zone given the graduation, in terms of envisaged intensity, in the housing zones, particularly the SH Zone, the MHS Zone, the MHU Zone and the THAB Zone.

[162] In summary, therefore, I am satisfied that "building intensity" is intended to include the effects of the number of buildings and activities within those buildings because it is the buildings and the use of those buildings that establish the intensity of use on the site.

Do the assessment criteria in H4.8.2 provide an adequate basis for assessing the effects of building intensity on neighbourhood character and the residential amenity?

[163] A central point of difference between the applicants and the respondents is whether, in assessing the effects of building intensity on neighbourhood character and residential amenity, it is sufficient to consider the development against the assessment criteria in H4.8.2 of the AUP.

[164] When interpreting H4.8.2 it is important to note the following. First, the provision states that the Council will consider the assessment criteria "to the extent relevant to the proposal." It follows that it is open to the Council to conclude that some of the assessment criteria may not be relevant. Secondly, H4.8.2(2)(a) requires an assessment of "the extent to which or whether the development achieves the purpose of" the identified standards or whether alternatives are provided that result in the same or a better outcome. That requires an evaluative assessment of whether the proposal meets the purposes of the standards or whether alternatives have been proposed that produce the same or a better result. Compliance with the standards is relevant but not necessarily sufficient. The primary focus should be on whether the proposed activity meets the purpose of the standards, having regard to the nature of the activity. Thirdly, paragraphs (b), (d), (e), (f) and (g) require evaluative assessments of the matters addressed in those paragraphs.

[165] It follows that consideration of whether the development complies with the development controls in the standards specified in H4.8.2(2)(a) would not be sufficient to assess the effects of the development.

[166] The more difficult question is whether appropriate consideration of all of the matters in H4.8.2(2) would be sufficient to assess the effects of building intensity or whether there is a gap in the plan because there is no specific direction in H4.8.2(2) to consider the effects of building intensity on the character and residential amenity of the area.

[167] As Mr Williams says, there is nothing in H4.8.2(2) equivalent to that which is provided for in H4.8.2(1), which sets out the assessment criteria for supported residential care, boarding houses, dairies, care centres and other facilities covered by H4.8.1(1). H4.8.2(1)(b)(i) specifically requires that, when giving consent for any of the facilities covered by H4.8.1(1), the Council must consider whether the intensity and scale of the activity, as well as the building location, form and appearance, are compatible with the character and residential amenity provided for within the zone and compatible with the surrounding residential area.

[168] There is no easy comparison between the scope and effect of planning controls for the relatively small number of activities covered by H4.8.1(1) and the scope and effect of controls that apply to all residential sites in the MHS Zone as provided for in H4.8.2(2). It is clearly relevant, however, that the assessment criteria in H4.8.2(1) are less numerous and less specific than those in H4.8.2(2) and do not mandate assessment in terms of the development standards and other matters identified in H4.8.2(b), (d), (e), (f) and (g). That is hardly surprising. The activities covered by H4.8.1(1) are relatively specialised. An assessment of their effects is likely to require a more individual assessment than that required for general residential development. It is also relevant that one of the purposes of the MHS Zone is to encourage a level of intensification, albeit within the parameters set in Chapter 4 of the AUP, and that one means of achieving that intensification is by providing a standard set of measures by which the effects that are to be considered can be assessed.

[169] For these reasons, I do not accept that there is a gap in H4.8.2(2) just because H4.8.2(2) does not include a provision similar to that in H4.8.2(1)(b)(i). Nor do I accept that the effects of building intensity on neighbourhood character and residential amenity cannot be adequately assessed by an appropriate consideration of the assessment standards in H4.8.2(2).

[170] It is convenient at this point to address Mr Williams' contention that the Council has mistakenly assumed that the MHS Zone does not seek to control density. In that regard, he refers to the Planner's statement in the Notification Report that the MHZ zone specifically does not control density and that density would not be an effect that warranted notification.

[171] To respond to that submission, I consider it useful to refer to what happened in the evolution of the AUP by reference to the Council's decisions on the recommendations of the Independent Hearings Panel (IHP) and relevant Environment Court decisions. Although Mr Williams objected to the admissibility of this history, I am satisfied that that material is both appropriate and admissible, having regard to the principle in s 7 of the Evidence Act 2006 that all relevant evidence is admissible, except to the extent the evidence is inadmissible or excluded under the Evidence Act or any other Act. While Mr Lala, the planner for 44VL, refers to the history of the

AUP's evolution in his affidavit, I have had regard principally to the decisions of the IHP and the Council, and the decision of the Environment Court in *Adams v Auckland Council*[21] as it bears on those decisions. These are matters of record.

[172] The IHP was the mechanism by which the many submissions on the Proposed Auckland Unitary Plan were considered. In its Overview Report, the IHP made it clear that it considered the removal of the density provisions in the major residential zones as a key element to enable development to meet future forecast demand for housing in Auckland.[22] In its report to the Council on Residential zones, the IHP recommended that all density provisions be removed from the MHS Zone, the MHU Zone and the THAB Zone and that the development standards, such as height, height in relation to boundary, yards and building coverage, and the resource consenting process should determine the appropriate level of development.[23] The IHP considered that a combination of permitted activities, development standards, consenting processes (mainly for restricted discretionary activities) and notification would achieve good quality outcomes and would negate the need for any density provisions.[24]

[173] The IHP recommendations included that up to four dwellings should be permitted as of right in the MHS Zone and the MHU Zone and that five or more dwellings should require a restricted discretionary activity consent in the MHS Zone and the MHU Zone.[25]

[174] The Council accepted all of the IHP recommendations on the residential zones, except that the Council decided that only up to two dwellings should be permitted as of right in the MHS Zone and that a restricted discretionary activity consent should be required for three buildings or more.[26] Among the reasons given for amending the threshold recommended by the IHP were that the recommended development

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21 *Adams v Auckland Council*, above n 6.

22 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) at 7 – 8 and 10.

23 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topics 059 – 063 Residential zones* (July 2016) at 16.

24 At 17.

25 At 18.

26 Auckland Council *Decisions of the Auckland Council on recommendations by the Auckland Unitary Plan Independent Hearings Panel on the submissions and further submissions to the Proposed Auckland Unitary Plan*: *Decisions Report* (19 August 2016) at 48.

standards did not manage quality residential outcomes such as the interrelationship between a number of amenity values including safety, daylight, privacy, functionality and visual amenity associated with multi-unit development.[27]

[175] The Council's decision to allow only two dwellings per site as of right in the MHS Zone was appealed to the Environment Court. That appeal was decided by the Environment in Court in *Adams v Auckland Council*, where the Court decided that up to three dwellings would be permitted as of right in the MHS Zone.[28]

[176] *Adams* did not involve any reconsideration of the matters on which the Council's discretion would be restricted on applications for dwellings in excess of the permitted threshold of three dwellings per site. The appeal did address, however, the role of assessment criteria for considering applications for resource consent. In its decision, the Environment Court made it clear that the assessment criteria were not to be regarded as checklists but were intended to create matters for consideration. The Court stated:[29]

> We therefore proceed on the basis that the criteria are intended to be informative and for guidance, but are not rules; nor is every criteria to be complied with in every application. Their purpose is to provide flexibility in approach to achieving the various standards in the relevant sections. We proceed on the basis that the criteria can be resolved with minor wording changes.

[177] The assessment criteria were later finalised in accordance with the Court's directions.

[178] In the light of the above history, I am satisfied that the AUP does not, and was not intended to, control density directly. That does not mean, however, that the AUP does not seek to control the effects of building density and intensity of use as generated by the numbers of buildings on site. Rather, in accordance with the recommendations of the IHP and with the decisions of the Council and the Environment Court, the effects of density and intensity are to be assessed by application of the assessment criteria

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27 At 49.
28 *Adams v Auckland Council*, above n 6, at [81].
29 At [16].

which require evaluative assessments of the matters set out in the criteria, to the extent they are relevant.

[179] For that reason, I am satisfied that there is no gap in the AUP when it comes to assessing the effects of building intensity of four dwellings or more on neighbourhood character and residential amenity just because the assessment criteria do not address that matter specifically. The assumption of the AUP is that the effects of building intensity can be adequately assessed by appropriate application of the assessment criteria.

[180] However, consistently with the Environment Court's decision in *Adams*, when assessing the effects of matters on which the Council reserved its discretion under H4.8.1(2)(a) by application of the assessment criteria in H4.8.2, the Council must use the criteria as a guide in undertaking the task it is required to perform. Since the effects of building intensity are one of the matters on which the Council has restricted its discretion, it follows that in applying the criteria, the Council must consider whether the effects of building intensity on neighbourhood character and residential amenity have been adequately addressed and mitigated. That is, the Council must turn its mind to the issue of building intensity and cannot simply assess whether a proposed activity complies with the standards in H4.8.2(a) and addresses the matters in H4.8.2(b), (d), (e), (f) and (g).

Did the Council properly assess the effects of building intensity on neighbourhood character and residential amenity?

[181] It is apparent that the Council did not turn its mind to the effects of building intensity when undertaking the assessments required under ss 95E and 104C(1).

[182] In the Notification Report, the focus of the Planner's consideration was on whether the proposed development was consistent in typology and form with development that could reasonably be anticipated to occur within the zone and complied with the development controls, and whether its design and appearance were within levels envisaged by the zone. In other words, the Planner's focus was on the form and appearance of the buildings and on what could be built as of right under the development controls.

[183] That is confirmed by:

(a) The Planner's reference to the comparator of a permitted single building that complied with the development controls as a useful guideline for establishing the envisaged built form of the planned suburban character of the zone; and

(b) The Planner's conclusion under the heading "Adverse amenity, character and streetscape effects" that, overall, adverse effects on the environment relating to the built form would be less than minor.

[184] In this analysis, the Planner did not consider the effects of the number of dwellings, more than four times the number permitted as of right in the MHS Zone, nor the effects of the activities of those occupying the buildings, nor the extent to which those effects were addressed by the assessment criteria.

[185] In his consideration of whether limited notification was required, the Planner did consider a number of the matters identified in the assessment criteria, notably visual dominance, shading, privacy and streetscape effects, as well as bulk and appearance. However, this assessment was in relation to form and design only, by reference to levels enabled or reasonably anticipated to occur within the zone. He did not consider the relevance of those matters to the number of buildings and activities on site. In considering matters identified in the assessment criteria, the Planner made no distinction between the effects of activities permitted as of right and the effects of the activities for which consent was required when the number of dwellings was the reason resource consent was required.

[186] In the Substantive Report, the Planner concluded that the proposed dwellings were of a scale and intensity consistent with the planned suburban character of the zone. However, he did not consider the effects of building intensity other than by reference to form and appearance. He referred to visual dominance, shading and privacy, as well as streetscape, but did not consider the relevance of those matters to the number of buildings and activities on site.

[187] In these respects, the Planner did not turn his mind to the effects of building intensity, did not apply correctly the assessment criteria in H4.8.2 and, therefore, did not properly assess the effects of the development on the environment for the purposes of ss 104(1)(a) and 104C(1) of the RMA. It follows that he did not properly assess whether the applicants were affected persons for the purposes of s 95E of the RMA. In these respects, the Planner also made errors of law.

[188] As already discussed, in the Decisions the Duty Commissioner adopted the Planner's analysis and conclusions and, therefore, made the same errors.

Did the Council properly consider the effects of the development for the purposes of determining who were affected persons?

[189] As Mr Loutit says, according to H4.5 of the AUP, the application was to be considered on a non-notified basis because it complied with all the relevant standards in the AUP. However, leaving aside the question of whether H4.5 amounts to a rule, that provision cannot qualify or derogate from the Council's obligations under ss 95B and 95E of the RMA. The Council was required to go through the steps in s 95B and, in accordance with s 95B(8), was required to consider whether any person was an affected person in accordance with section 95E.

[190] In making its assessment under s 95E, the Council was required to consider whether the adverse effects on any person of building intensity on neighbourhood character and residential amenity, being the matter on which the Council had reserved its discretion, were minor or more than minor. Since, as I have found, the Council made errors of law in its assessment of the effects of the development on the environment for the purposes of ss 104(1)(a) and 104C(1) of the RMA, it follows that the Council made errors of law in its assessment of who were affected persons for the purposes of s 95E. It is unnecessary for me to decide whether the Council should have considered whether persons other than immediate neighbours may have been affected persons. The scope of the inquiry under s 95E is necessarily dependent on the assessment of the relevant effects of the proposed development.

Did the Council have adequate information upon which to assess the traffic effects of the development?

[191] Mr Williams says the traffic assessment report relied on by 44VL's traffic consultant was prepared on the basis of an eight-year old survey and without consideration of existing traffic volumes or assessment of vehicle speeds and daily pedestrian movements. However, there is no evidence to rebut the assessment made by the Planner that the level of traffic generated by the development would be low and could be safely accommodated within the existing road network.

[192] The Court has no basis for setting aside the Council's assessment on traffic effects, which relates to the substantive merits of the Council's consideration of the application, on an application for judicial review. There is no evidence before the Court to justify a finding that the information before the Court was inaccurate or unreliable, or that the Council's assessment of traffic effects was unreasonable.

Conclusions on applicants' substantive case

[193] For the reasons set out in the above analysis, I am satisfied that:

(a) The first alleged error of law is not made out. The Council did not fail to identify the neighbourhood, the neighbourhood character and residential amenity when assessing the effects of the development and did not have inadequate information upon which to assess those effects.

(b) The second and third alleged errors of law are made out. The Council did not properly consider the adverse effects of the building intensity of the development on the neighbourhood character, residential amenity, safety and the surrounding residential area because, in assessing those effects on the environment and on who may be affected persons:

(i) the Council considered matters which are not part of the existing environment and which are not permitted as of right under the AUP; and

(ii) the Council did not turn its mind to the effects of building intensity neighbourhood character and residential amenity in its consideration of the assessment criteria in H4.8.2 of the AUP.

(c) The fifth alleged error of law is not made out. The Council's assessment of traffic effects was not unreasonable.

Relief

[194] I have considered carefully the submissions of:

(a) Mr Williams that, once error has been established, the Decisions and the resource consents should be set aside in accordance with the decision of the Court of Appeal in *Waiotahi Contractors Ltd v Murray*;[30] and

(b) The Council and 44VL that, even if the Council is found to have made errors, the Court should exercise its discretion and not set aside the Decisions.

[195] In *Waiotahi Contractors*, the Court of Appeal upheld a decision of Elias J to set aside decisions of a consent authority not to notify applications for resource consents to subdivide land and the resource consents that were then issued because errors of law had been made when deciding not to notify the applications and in issuing the consents.[31] The Court of Appeal held that, because the consent authority had erred in law in its decision, the respondents in that case, who had been deprived of their opportunity of being heard, were *prima facie* entitled to have the non-notification decision and the ensuing substantive decision to grant resource consents set aside, subject to any discretionary matters which might mitigate against such relief.[32]

[196] As in *Waiotahi Contactors*, the principal consequence of the Notification Decision was that the applicants were deprived of their opportunity to be heard.

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30 *Waiotahi Contractors Ltd v Murray* [1999] NZRMA 305 (CA).
31 *Murray v Whakatāne District Council* [1997] NZRMA 433, (1998) 3 NZLR 276 (HC).
32 *Waiotahi Contractors Ltd v Murray*, above n 30, at 308.

Mr Loutit disputes that that was the case. He says any reconsideration of the application would result in the consents being granted on a non-notified basis and subject to the same conditions. Mr Loutit invites the Court to accept that the outcome of any reconsideration is inevitable because, among other things, the development complies in all material respects with the MHS Zone's development standards and the applicants have failed to identify any actual effects on them that are relevant or which were not properly considered in the decisions.

[197] There is some similarity between Mr Loutit's submissions and those that were rejected by the Court of Appeal in *Waiotahi Contactors*. In that case, the Court of Appeal agreed with Elias J that it was simply speculative to suggest that the result might have been the same if the consent authority had properly understood the scope of its powers.[33] The Court of Appeal also rejected an argument that it could be satisfied that the consents would have been granted in any event because the proposal complied with the transitional district plan.[34] The Court considered that the errors of law made in that case were material, in the sense that it was capable of influencing the ultimate outcome and, indeed, could be described as fundamental.

[198] I consider it would be similarly speculative for this Court to conclude that any reconsideration of the Decisions would lead to the same results.

[199] I agree that the policy considerations in the NPS-UD, the RPS and the AUP militate strongly in favour of greater intensification of residential development in Auckland. To that extent, there is a strong policy basis for the consents to be granted, provided that the Council is satisfied that the adverse effects of the proposal are avoided, remedied or mitigated in accordance with the purpose of the RMA.[35] Even so, it would be speculative to conclude that the consents would have been granted if the Council had correctly understood the environment against which the development was to be assessed and had properly applied the assessment criteria in H4.8.2(2). This was, after all, a proposal to put more than four times the permitted number of dwellings on a site in the MHS zone, as distinct from the MHU and THAB zones which envisage

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33 Ibid.
34 At 310.
35 See s 5(2)(c) of the RMA.

a greater level of intensification than that envisaged for the MHS Zone. Mr Loutit may well be right that the consents will be granted on the same terms on any renewed application. However, the Court has no way of knowing that.

[200] It would be even more speculative to conclude that the application would be considered on a non-notified basis if the Council had correctly understood the environment against which the development was to be assessed and had properly applied the assessment criteria in H4.8.2(2). Except to the extent required by s 95E(2)(a) and (b), the policy considerations in the planning instruments listed in s 104(1) are not part of the assessment of effects on affected persons under s 95E. As far as the Notification Decision is concerned, therefore, the policy impetus in favour of more intensive development has less relevance.

[201] I accept that some of the objections raised by the applicants were without merit. The Council appropriately took no account of those matters. However, on an application for judicial review, it is the lawfulness of the Council's actions that are under review. It is not necessary for the applicants to prove that the application should have been notified or that the consents should not have been granted, even if the strength of their case may be relevant to the exercise of the Court's discretion.

[202] The other matters which Mt Loutit says favour the Court exercising its discretion not to grant relief are the funds spent by 44VL in obtaining the consents and the impacts on innocent purchasers of units in the new development.

[203] Quite properly, Mr Loutit does not seek to bring into account the funds spent by 44VL after the consents were granted. 44VL knew within days of the consents being granted that the residents intended to challenge the consents and its counsel cooperated in securing an urgent fixture for the hearing of the substantive review rather than incur time and cost in seeking interim measures. For these reasons, the applicants cannot be faulted for not seeking interim relief. The costs of 44VL after the consents had been granted were incurred in the knowledge that the consents were to be challenged and that there was a risk that the consents would be set aside. That was a commercial decision by 44VL that does not carry significant weight in the circumstances of this case.

[204] As to 44VL's costs in obtaining consent, I am not persuaded that those costs are wasted if there is to be a reconsideration of its application. The information filed in the application is still relevant. What is now required is an assessment of the effects of the building intensity of the development on neighbourhood character and residential amenity, having regard to the environment as it is today, and may be modified as of right and through a proper consideration of the assessment criteria in H4.8.2(2).

[205] In addition, while costs incurred in obtaining consents have been considered relevant to the exercise of the Court's discretion on whether to grant relief, the circumstances in the decisions to which Mr Loutit refers are rather different from the present.

[206] In *Auckland Regional Council v Rodney District Council*,[36] the applicant for consents was caught in a dispute between the District Council and the Regional Council. The Court considered that the Regional Council had been slow in taking action, had sought to prevent the exercise of the consent and had adopted a legal position that the Court considered was wrong and indefensible.[37] It was in these circumstances that the Court considered relevant the costs spent on the project.[38]

[207] The circumstances in *Videbeck v Auckland City Council*,[39] are more analogous. In that a case, a neighbour made it clear to the Council before consent had been granted that they wished to be consulted on an application for consent to relocate a building on Waiheke Island. Even so the Council proceeded to issue the consent on a non-notified basis. Heath J was critical of the failure of the Council's planner to bring to the decision-maker's attention the fact that the neighbour had wanted to be heard on the application and of the process by which the Council's decision had been made. He considered that the Council's decision-maker had not had adequate information and that the decision was susceptible to review.[40]

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36 *Auckland Regional Council v Rodney District Council* [2007] NZRMA 535 (HC).
37 At [166] – [180].
38 At [181] – [187].
39 *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC).
40 At [34] – [69].

[208] Heath J considered that both the applicant for consent and the neighbour were innocent parties and that the issue for the Court was which of those innocent parties should suffer.[41] He weighed "the obvious prejudice" to the applicant if the consent should be set aside against the "moderate" effects of the consent being implemented on a neighbour who was not a permanent resident of Waiheke and was satisfied that in "the peculiar circumstances" of that case relief should not be granted.[42]

[209] Those circumstances do not arise in the present case. For the reasons already discussed, I do not consider that the Council failed to provide the Duty Commissioner with relevant information. The concerns of the neighbours and of the OLB were put before the Duty Commissioner and were discussed in the Notification Report. The errors made by the Planner and the Duty Commissioner were errors of law and not of process. There can be no criticism of their bona fides.

[210] The applicant was aware throughout of the neighbours' wish to be notified and consulted. Even before the Notification Report and the Substantive Report had been written, it was known there was strong neighbourhood interest in the application and a strong desire on the part of the neighbours to be notified of the application.

[211] 44VL cannot be faulted for choosing to exercise its legal rights once the consents had been granted. However, the fact it chose to take the commercial risk of commencing construction knowing that the consents might be set aside should not deprive long-term, full-time residents in the vicinity of their rights to have the question of whether they are adversely affected by a significant development properly determined in accordance with the RMA and the AUP. This also applies to the positions of those who have purchased the units. To the extent that 44VL sold units after the consents had been granted – of which there is no evidence – it took that commercial risk.

[212] In the circumstances of the present case, I am in no position to assess the substantive merits of the applicants' objections. There is no evidence of what conclusions would be reached from an assessment of the effects of building intensity

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41 At [71].
42 At [76] – [77].

on neighbourhood character and residential amenity properly carried out properly in accordance with H4.8.2(a). I do not accept Mr Loutit's submission that no different conclusions would be reached from those reached by the Planner and the Duty Commissioner.

[213] I recognise that there will be prejudice to 44VL and disappointment to the Council that a proposal for a more intensive use of a large site in a residential zone in Auckland is being held up when there is a strong policy impetus in the NPS-UD and AUP for more intensive development in residential zones and when central government is looking to enable even greater intensification of certain residential areas than that currently provided for in the NPS-UD.[43] However, the Court's task is to apply the law as it stands today and to ensure that proposals that may have significant implications for individuals are properly assessed in accordance with the RMA and the AUP.

[214] In this case, I am not satisfied that a proposal for a significant development was so properly assessed. As a consequence, the applicants may have been deprived of their rights to be notified and to have their views taken into account before consents were granted. I am satisfied, therefore, that the applicants should be granted relief and that the Decisions and the resource consents should be set aside.

Result

[215] For all the above reasons:

(a) I find that, in the Decisions not to notify the application for resource consents for the development at 44 Ventnor Road and to grant the resource consents, the Council made the following errors of law in assessing the effects of the development on the environment and on who may be affected persons:

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[43] On 19 October 2021, after the hearing of this application, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill was introduced into Parliament with the objective of enabling a greater supply of housing in urban areas.

(i) First, the Council considered matters which are not part of the existing environment and which are not permitted as of right under the Auckland Unitary Plan – Operative in Part and are therefore outside the scope of s 104(1)(a) of the Resource Management Act 1991; and

(ii) Secondly, the Council did not turn its mind to the effects of building intensity on neighbourhood character and residential amenity in its consideration of the assessment criteria in H4.8.2 of the Auckland Unitary Plan as required by the Plan.

(b) I quash the Decisions and the resource consents.

(c) I direct the Council to reconsider the application, subject to any amendments the applicant may wish to make, and to reconsider who may be affected persons for the purposes of s 95E of the Resource Management Act.

Costs

[216] As the successful parties, the applicants are entitled to costs on a 2B basis. If the parties are unable to agree costs, they may submit memoranda of no more than five pages.

[217] Any memorandum by the applicants should be filed and served by 8 December 2021.

[218] Any memorandum by the Council or 44VL should be filed and served by 22 December 2021.

_____

G J van Bohemen J

Appendix 1 Acronyms used in judgment

AEE	Assessment of Environmental Effects
AUP	Auckland Unitary Plan – Operative in part
IHP	Independent Hearings Panel
MHS Zone	Residential – Mixed Housing Suburban Zone
MHU Zone	Residential – Mixed Housing Urban Zone
NPS-UD	National Policy Statement on Urban Development
OLB	Ōrākei Local Board
RMA	Resource Management Act 1991
RPS	Auckland Regional Policy Statement
SH Zone	Residential – Single House Zone
THAB Zone	Residential – Terraced Housing and Apartment Building Zone
44VL	44 Ventnor Ltd

Appendix 2: Relevant law and planning provisions

Resource Management Act 1991

Section 2 defines:

amenity values to mean:

> those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes

environment to include:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

Section 2AA defines:

affected person to mean:

> a person who, under section 95E or 149ZCF, is an affected person in relation to the application or matter

limited notification to mean:

> serving notice of the application or matter on any affected person within the time limit specified by section 95, 169(1) or 190(1)

notification to mean:

> public notification or limited notification of the application or matter

restricted discretionary activity to mean:

> an activity described in section 87A(3)

Part 2, comprising ss 5 – 8, sets out the purpose and principles of the Act.

Section 5(1) provides that the purpose of the RMA is to promote the sustainable management of natural and physical resources.

Section 5(2) provides that "sustainable management" means:

> … managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 sets out the matters of national importance which persons exercising functions and powers under the RMA must recognise and provide for in achieving the purpose of the Act.

Section 7 sets out the other matters to which persons exercising functions and powers under the Act must have particular regard in achieving the purpose of the Act in relation to managing the use, development, and protection of natural and physical resources. Among those matters are:

> (c) the maintenance and enhancement of amenity values:
>
> (f) maintenance and enhancement of the quality of the environment:

Section 87A(3) provides:

> (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—
>
> (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted

(whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

Section 95B provides:

95B Limited notification of consent applications

(1) A consent authority must follow the steps set out in this section, in the order given, to determine whether to give limited notification of an application for a resource consent, if the application is not publicly notified under section 95A.

…

Step 3: if not precluded by step 2, certain other affected persons must be notified

(7) …

(8) In the case of any other activity, determine whether a person is an affected person in accordance with section 95E.

(9) Notify each affected person identified under subsections (7) and (8) of the application.

Step 4: further notification in special circumstances

(10) Determine whether special circumstances exist in relation to the application that warrant notification of the application to any other persons not already determined to be eligible for limited notification under this section (excluding persons assessed under section 95E as not being affected persons), and,—

(a) if the answer is yes, notify those persons; and

(b) if the answer is no, do not notify anyone else.

Section 95E provides:

95E Consent authority decides if person is affected person

(1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an **affected person** if the consent authority decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor).

(2) The consent authority, in assessing an activity's adverse effects on a person for the purpose of this section,—

(a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; and

(b) must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and

(c) ...

(3) A person is not an affected person in relation to an application for a resource consent for an activity if—

(a) the person has given, and not withdrawn, approval for the proposed activity in a written notice received by the consent authority before the authority has decided whether there are any affected persons; or

(b) the consent authority is satisfied that it is unreasonable in the circumstances for the applicant to seek the person's written approval.

(4) Subsection (3) prevails over subsection (1).

Section 104(1) provides:

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

…

(iii) a national policy statement:

…

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan …; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Section 104C provides:

> **104C Determination of applications for restricted discretionary activities**
>
> (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—
>
> (a) a discretion is restricted in national environmental standards or other regulations:
>
> (b) it has restricted the exercise of its discretion in its plan or proposed plan.
>
> (2) The consent authority may grant or refuse the application

National Policy Statement on Urban Development

The NPS-UD came into force on 20 August 2020. It replaced the National Policy Statement on Urban Development Capacity 2016 which was operative at the time the AUP became operative. Because the NPS-UD post-dates the AUP and because it is focused on directing local authorities to amend their regional policy statements and plans to give effect to it, the NPS-UD is not directly relevant to the Decisions that are under review. Nonetheless, the NPS-UD is indicative of the future direction of residential development in Auckland, subject to any amendments that may be made to it. In that regard, it is relevant to note the following provisions of the NPS-UD.

Under cl 2.1, the Objectives include:

> **Objective 1**: New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.
>
> **Objective 2**: Planning decisions improve housing affordability by supporting competitive land and development markets.
>
> **Objective 4**: New Zealand's urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities, and future generations.
>
> **Objective 6**: Local authority decisions on urban development that affect urban environments are:
>
> (a) integrated with infrastructure planning and funding decisions; and

(b) strategic over the medium term and long term; and

(c) responsive, particularly in relation to proposals that would supply significant development capacity.

Under cl 2.2. the Policies include:

Policy 1: Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:

(a) have or enable a variety of homes that:

(i) meet the needs, in terms of type, price, and location, of different households; and

(ii) enable Māori to express their cultural traditions and norms; and

…

(d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets;

…

Policy 2: Tier 1, 2, and 3 local authorities, at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term, and long term.

Policy 6: When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:

(d) the planned urban built form anticipated by those RMA planning documents that have given effect to this National Policy Statement

(e) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:

(i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and

(ii) are not, of themselves, an adverse effect.

The Auckland Unitary Plan

Chapter B comprises the Auckland RPS.

B2.1 Issues provides:

> Auckland's growing population increases demand for housing, employment, business, infrastructure, social facilities and services.
>
> Growth needs to be provided for in a way that does all of the following:
>
> …
>
> (3) optimises the efficient use of the existing urban area;

B2.2. deals with urban growth and form.

B2.2.1 Objectives provides:

> (1) A quality compact urban form that enables all of the following:
>
> (a) a higher-quality urban environment;
>
> …
>
> (2) Urban growth is primarily accommodated within the urban area 2016 (as identified in Appendix 1A).
>
> (3) Sufficient development capacity and land supply is provided to accommodate residential, commercial, industrial growth and social facilities to support growth.

B2.2.2 Policies provides:

> (1) Include sufficient land within the Rural Urban Boundary that is appropriately zoned to accommodate at any one time a minimum of seven years' projected growth in terms of residential, commercial and industrial demand and corresponding requirements for social facilities, after allowing for any constraints on subdivision, use and development of land.
>
> …
>
> 4) Promote urban growth and intensification within the urban area 2016 (as identified in Appendix 1A), enable urban growth and intensification within the Rural Urban Boundary, towns, and rural and coastal towns and villages, and avoid urbanisation outside these areas.
>
> …

B2.4 deals with residential growth.

B2.4.1. Objectives provides:

(1) Residential intensification supports a quality compact urban form.

(2) Residential areas are attractive, healthy and safe with quality development that is in keeping with the planned built character of the area.

(3) Land within and adjacent to centres and corridors or in close proximity to public transport and social facilities (including open space) or employment opportunities is the primary focus for residential intensification.

(4) An increase in housing capacity and the range of housing choice which meets the varied needs and lifestyles of Auckland's diverse and growing population

B2.4.2. Policies provides

Residential intensification

(1) Provide a range of residential zones that enable different housing types and intensity that are appropriate to the residential character of the area.

(2) Enable higher residential intensities in areas closest to centres, the public transport network, large social facilities, education facilities, tertiary education facilities, healthcare facilities and existing or proposed open space.

(3) Provide for medium residential intensities in area that are within moderate walking distance to centres, public transport, social facilities and open space.

(4) Provide for lower residential intensity in areas:

…

(d) where there is a suburban area with an existing neighbourhood character.

…

Residential neighbourhood and character

(8) Recognise and provide for existing and planned neighbourhood character through the use of place-based planning tools.

(9) Manage built form, design and development to achieve an attractive, healthy and safe environment that is in keeping with the descriptions set out in placed-based plan provisions

Chapter 8 provides for the zones to which specific provisions of the Chapter apply.

The Zone description of the MHS Zone in H4.1 is:

> The Residential – Mixed Housing Suburban Zone is the most widespread residential zone covering many established suburbs and some greenfields areas. Much of the existing development in the zone is characterised by one or two storey, mainly standalone buildings, set back from site boundaries with landscaped gardens.
>
> The zone enables intensification, while retaining a suburban built character. Development within the zone will generally be two storey detached and attached housing in a variety of types and sizes to provide housing choice. The height of permitted buildings is the main difference between this zone and the Residential – Mixed Housing Urban Zone which generally provides for three storey predominately attached dwellings.
>
> Up to three dwellings are permitted as of right subject to compliance with the standards. This is to ensure a quality outcome for adjoining sites and the neighbourhood, as well as residents within the development site.
>
> Resource consent is required for four or more dwellings and for other specified buildings in order to:
>
> - achieve the planned suburban built character of the zone;
> - achieve attractive and safe streets and public open spaces;
> - manage the effects of development on neighbouring sites, including visual amenity, privacy and access to daylight and sunlight; and
> - achieve high quality on-site living environments.
>
> The resource consent requirements enable the design and layout of the development to be assessed; recognising that the need to achieve a quality design is increasingly important as the scale of development increases.

The Objectives of the MHS Zone in H4.2 are:

> (1) Housing capacity, intensity and choice in the zone is increased.
>
> (2) Development is in keeping with the neighbourhood's planned suburban built character of predominantly two storey buildings, in a variety of forms (attached and detached).
>
> (3) Development provides quality on-site residential amenity for residents and adjoining sites and the street.
>
> …

The Policies of the MHS Zone in H4.3 include:

> (2) Achieve the planned suburban built character of predominantly two storey buildings, in a variety of forms by:
>
> (a) limiting the height, bulk and form of development;
>
> (b) managing the design and appearance of multiple-unit residential development; and
>
> (c) requiring sufficient setbacks and landscaped areas.
>
> …
>
> (4) Require the height, bulk and location of development to maintain a reasonable standard of sunlight access and privacy and to minimise visual dominance effects to adjoining sites.
>
> (5) Require accommodation to be designed to meet the day to day needs of residents by:
>
> (a) providing privacy and outlook; and
>
> (b) providing access to daylight and sunlight and providing the amenities necessary for those residents.
>
> …
>
> (8) Enable more efficient use of larger sites by providing for integrated residential development.

As stated in H4.4 Activity table:

> Table H4.4.1 Activity table specifies the activity status of land use and development activities in the Residential – Mixed Housing Suburban Zone pursuant to section 9(3) of the Resource Management Act 1991.

Under Table H4.4.1, four or more dwellings per site is a restricted discretionary activity. The standards to be complied with in respect of that activity are:

> Standard H4.6.4 Building height; Standard H4.6.5 Height in relation to boundary; Standard H4.6.6 Alternative height in relation to boundary; Standard H4.6.7 Yards

H4.5 Notification provides:

> (1) Any application for resource consent for the following activities will be considered without public or limited notification or the need to obtain the written approval from affected parties unless the Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991:

(a) four or more dwellings per site that comply with all of the standards listed in Table H4.4.1 Activity table

…

H4.6 Standards provides:

H4.6.1 Activities listed in Table H4.4.1 Activity table

(1) Activities and buildings containing activities listed in Table H4.4.1 Activity table must comply with the standards listed in the column in Table H4.4.1 called Standards to be complied with.

H4.6.4 Building height; H4.6.5 Height in relation to boundary; H4.6.6 Alternative height in relation to boundary; and H4.6.7 Yards set out the standards to be complied with in respect of each of those matters. Other standards for maximum impervious area, building coverage, landscaped area, outlook space, daylight, required setbacks for daylight, outdoor living space, front, side and rear fences and walls, and minimum dwelling size are also set out in Table H4.4.1 Activity table.

H4.8.1 Matters of discretion provides:

The Council will restrict its discretion to the following matters when assessing a restricted discretionary activity resource consent application:

(1) for supported residential care accommodating greater than 10 people per site inclusive of staff and residents; boarding houses accommodating greater than 10 people per site inclusive of staff and residents; visitor accommodation accommodating greater than 10 people per site inclusive of staff and visitors; dairies up to 100m2 gross floor area per site; care centres accommodating greater than 10 people per site excluding staff; community facilities; and healthcare facilities up to 200m2 gross floor area per site:

(a) the effects on the neighbourhood character, residential amenity, safety, and the surrounding residential area from all of the following:

(i) building intensity, scale, location, form and appearance;

(ii) traffic;

(iii) location and design of parking and access; and

(iv) noise, lighting and hours of operation.

(b) Infrastructure and servicing.

(2) for four or more dwellings per site:

(a) the effects on the neighbourhood character, residential amenity, safety and the surrounding residential area from all of the following:

(i) building intensity, scale, location, form and appearance;

(ii) traffic; and

(iii) location and design of parking and access.

(b) all of the following standards:

(i) Standard H4.6.8 Maximum impervious areas;

(ii) Standard H4.6.9 Building coverage;

(iii) Standard H4.6.10 Landscaped area;

(iv) Standard H4.6.11 Outlook space;

(v) Standard H4.6.12 Daylight;

(vi) Standard H4.6.13 Outdoor living space;

(vii) Standard H4.6.14 Front, side and rear fences and walls; and

(viii) Standard H4.6.15 Minimum dwelling size.

(c) Infrastructure and servicing.

H4.8.2 Assessment criteria provides:

The Council will consider the assessment criteria below for restricted discretionary activities to the extent relevant to the proposal:

(1) for supported residential care accommodating greater than 10 people per site inclusive of staff and residents; boarding houses accommodating greater than 10 people per site inclusive of staff and residents; visitor accommodation accommodating greater than 10 people per site inclusive of staff and visitors; dairies up to 100m2 gross floor area per site; care centres accommodating greater than 10 people per site excluding staff; community facilities; and healthcare facilities up to 200m2 gross floor area per site:

(a) infrastructure and servicing:

…

(b) building intensity, scale, location, form and appearance:

(i) whether the intensity and scale of the activity, the building location, form and appearance is compatible with the character and residential amenity provided for within the zone and compatible with the surrounding residential area.

(c) traffic:

(i) whether the activity avoids or mitigates high levels of additional nonresidential traffic on local roads.

(d) location and design of parking and access:

(i) whether adequate parking and access is provided or required.

(e) noise, lighting and hours of operation:

(i) whether noise and lighting and the hours of operation of the activity avoids, remedies or mitigates adverse effects on the residential amenity of surrounding properties, by:

- locating noisy activities away from neighbouring residential boundaries;
- screening or other design features; and
- controlling the hours of operation and operational measures.

(2) for four or more dwellings on a site:

(a) the extent to which or whether the development achieves the purpose outlined in the following standards or what alternatives are provided that result in the same or a better outcome:

(i) Standard H4.6.8 Maximum impervious areas;

(ii) Standard H4.6.9 Building coverage;

(iii) Standard H4.6.10 Landscaped area;

(iv) Standard H4.6.11 Outlook space;

(v) Standard H4.6.12 Daylight;

(vi) Standard H4.6.13 Outdoor living space;

(vii) Standard H4.6.14 Front, side and rear fences and walls; and

(viii) Standard H4.6.15 Minimum dwelling size.

(b) The extent to which the development contributes to a variety of housing types in the zone and is in keeping with the neighbourhood's planned suburban build character of predominantly two storey buildings (attached or detached) by limiting the height, bulk and form of the development and managing the design and appearance as well as providing sufficient setbacks and landscaped areas.

(c) [deleted]

(d) The extent to which development achieves attractive and safe streets and public open space by:

(i) providing doors, windows and/or balconies facing the street and public open space

(ii) minimising tall, visually impermeable fences

(iii) designing large scale development (generally more than 15 dwellings) to provide for variations in building form and/or façade design as viewed from streets and public open spaces

(iv) optimising front yard landscaping

(v) providing safe pedestrian access to buildings from the street

(vi) minimising the visual dominance of garage doors, walkways or staircases to upper level dwellings, and carparking within buildings as viewed from streets or public open spaces

(e) The extent to which the height, bulk and location of the development maintains a reasonable standard of sunlight access and privacy and minimises visual dominance to adjoining sites

(f) The extent to which dwellings:

(i) Orientate and locate windows to optimise privacy and encourage natural cross ventilation within the dwelling

(ii) Optimise sunlight and daylight access based on orientation, function, window design and location, and depth of the dwelling floor space

(iii) Provide secure and conveniently accessible storage for the number and type of occupants the dwelling is designed to accommodate

(iv) Provide the necessary waste collection and recycling facilities in locations conveniently accessible and screened from streets and public open spaces.

(g) The extent to which outdoor living space:

(i) Provides for access to sunlight

(ii) Provides privacy between the outdoor living space of adjacent dwellings on the same site and between outdoor living space and the street

(iii) When provided at ground level, is located on generally flat land or is otherwise functional

(h) refer to Policy H4.3(7) [concerning maximum impervious area]

(i) infrastructure and servicing:

…