

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2024] NZEnvC 37

IN THE MATTER of the Resource Management Act 1991

AND an application for an enforcement order under ss 314 and 316 of the Act

BETWEEN G H, L M AND P J HENSMAN

(ENV-2023-CHC-013)

Applicants

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Court: Environment Judge P A Steven
Environment Commissioner C J Wilkinson
Environment Commissioner S Myers

Hearing: at Queenstown on 5 December 2023

Appearances: G M Todd and B B Gresson for the applicants
B Dickey and A E Milne for the respondent

Last case event: 25 January 2024

Date of Decision: 15 March 2024

Date of Issue: 15 March 2024

DECISION OF THE ENVIRONMENT COURT

A: The application is granted. An order is made by the court under s314(1)(b)(i) of the Resource Management Act 1991 on terms sought in the



application, as set out at the end of this decision.

- B: Costs are reserved. Any application is to be made and served within 15 working days and any reply within a further five working days.

REASONS

[1] This is a decision on an application for an enforcement order against the Council. The order would require the Council to comply with the Resource Management Act 1991 by:

The Chief Executive or other authorised person of the Council signing a certificate stating that it has approved the deposit survey plan for Lots 309 & 310 DP 522931 dated 9 September 2022 and that all conditions of subdivision consent RM210066 have been complied with to the satisfaction of the Council, pursuant to s 224(c) of the Act.

Grounds for the application

[2] The grounds for the order are set out in the application and are:

- (a) On 1 June 2021, the Applicant obtained resource consent from the Council for the subdivision of two allotments into three allotments at Perkins Road/Angelo Drive, Queenstown (subdivision consent).
- (b) Condition 8 of the subdivision consent provides as follows:
Engineering – General
All engineering works, including the construction of retaining walls, shall be carried out in accordance with the Queenstown Lakes District Council’s policies and standards, being QLDC’s Land Development and Subdivision Code of Practice adopted on 8th October 2020 and subsequent amendments to that document up to the date of issue of any resource consent.
(general engineering condition)
- (c) In August 2022, the Applicant completed the engineering works required as part of the conditions of consent, including, in all reasonable respects, the general engineering condition, and prepared an application to the Council

for certification pursuant to s 224(c) of the Act.

- (d) In September 2022, the Council refused to certify the subdivision consent under s 224(c) and advised that various additional engineering works had to be addressed before a s 224(c) certificate could issue (additional engineering works).
- (e) None of the additional engineering works formed part of the conditions of consent. Nor are they expressly required by the Council's Land Development and Subdivision Code of Practice (COP) and could therefore be said to be required by the general engineering condition.
- (f) Notwithstanding this, the Council advised that the general engineering condition provided it with the right to require the additional engineering works to be undertaken.
- (g) The general engineering condition does not give the Council such a right, because:
 - (i) it does not expressly require the additional engineering works to be undertaken, either directly or by reference to the COP;
 - (ii) to the extent the reference to the COP allows the Council at its discretion to require the additional engineering works to be undertaken to accord with the COP, then:
 - A. the general engineering condition is unenforceable and invalid for uncertainty, and it unlawfully reserves the Council with a subjective discretion to determine whether the condition has been complied with.
- (h) The Council in determining that the additional engineering works were required before s 224(c) certification took into account irrelevant matters including feedback from members of the public received after the subdivision consent had been granted.
- (i) In the circumstances, there is no reasonable basis on which the Council can refuse to certify the subdivision consent under s 224© of the Act.

Relevant facts

[3] The application relates to a development authorised by a subdivision consent granted for the creation of three lots on an area of land on the northern side of Frankton Road between Queenstown and Frankton.

[4] The application was sought and granted under ss 104 and 221 RMA.¹ The application was triggered by rules in Chapter 27 (Subdivision and Development) of the Queenstown-Lakes District proposed plan (PDP).

[5] The site has access from Angelo Drive which extends along the northern boundary and Perkins Road which extends along the southern boundary. Two lots were to be accessed from Angelo Drive, whereas Lot 3 would be served by a new access on Perkins Road.

[6] The Council had decided that the vehicle crossing to Lot 3 should be constructed as part of the subdivision due to its proximity to a shallow stormwater drain within the road reserve. Accordingly, the application included provision for a vehicle crossing to proposed Lot 3, although resource consent was not required under any of the land use rules.

[7] The accessway within Lot 3 is depicted on the application plans with information pertaining to contours, long and cross-sections and sightlines pertaining to the location of the vehicle crossing. The information records that the accessway was compliant with the district plan rules.

[8] Plans approved with the subdivision consent depict the location of the vehicle crossing and the accessway within proposed Lot 3 (the approved plans), although that is the extent of the detail in relation to the vehicle crossing within the road reserve.

Conditions of the subdivision consent

[9] The subdivision consent (Consent) was granted with conditions, including condition 8. That condition is in the grounds for the application that we have

¹ Under the PDP the subdivision was a restricted discretionary activity. The application to cancel a consent notice triggered an overall discretionary activity status.

earlier cited.

[10] Other relevant conditions include condition 11 which relates to the engineering review and acceptance (EA) process that follows the grant of consent. The EA relates to engineering works associated with construction of the subdivision. The EA must be obtained before commencement of any works on site.

[11] Condition 11 requires the consent holder to submit design plans and other information such as engineering specifications and calculations for the Council's acceptance in relation to identified features of the development, including (a) the provision of water supply, (b) sewer connection, (c) connections to the reticulated stormwater disposal system; and (d) the vehicle crossing for Lot 3.

[12] Condition 11(d) states that the vehicle crossing is required to be sealed and constructed in accordance with the stamped "as approved plans" and shall include concrete capping of the existing stormwater main where it lies beneath the access formation.

[13] Three conditions appear under the heading "[t]o be monitored throughout earthworks" including condition 15:

No permanent batter slope within the site shall be formed at a gradient that exceeds 1(V):2(H), except where inspected and confirmed in writing as being permanently stable by a suitably qualified geotechnical professional.

[14] Condition 19 lists the matters to be completed for issue of the s224(c) certificate. This includes (relevantly):

- (a) The submission of 'as-built' plans and information required to detail all engineering works completed in relation to or in association with this subdivision ...;
- (b) The completion and implementation of all works detailed in Condition (11) above;

- ...
- (f) All earthworks, geotechnical investigations and fill certification shall be carried out under guidance of suitably qualified and experienced geotechnical professional as described in Section 2 of the Queenstown Lakes District Council's Land Development and Subdivision Code of Practice. ...
- ...
- (i) All earth worked and/or exposed areas created as part of the subdivision shall be top-soiled and grassed, revegetated or otherwise stabilised

Consenting process

[15] Consent conditions had been informed by recommended conditions contained in an engineering report from a land development engineer within the Council. The engineering report addressed many engineering aspects associated with construction of the subdivision. This included construction of the vehicle crossing and cut/batter slopes.²

Engineering approval process

[16] In advance of works proceedings, EA was sought for the design of the work in accordance with Consent condition 11. The approval was issued in writing subject to a further suite of conditions (general and specific), including the requirement for the sealing of the vehicle crossing to proposed Lot 3.³

[17] General conditions of the EA repeat the Consent requirement in condition 8 that works be undertaken in accordance with the Subdivision Code of Practice (SCOP).

² CB 158 and 159.

³ Although the affidavit from Mr Hansen of 16 February 2023 states that it was the condition of EA that required the vehicle crossing to be sealed, this is also a requirement of the resource consent condition (11(d)).

[18] EA condition 11 states:

GENERAL CONDITIONS

Work shall be undertaken in accordance with *QLDC Land Development & Subdivision Code of Practice (2021)* and the *National Code of Practice for Utility Operators Access to Transport Corridors (2011)*. Where ambiguities or inconsistencies exist between Councils adopted standards and the accepted documents, the adopted standards shall take precedence unless prior agreement in writing has been obtained from Council.

[19] We note that EA condition 11 refers to a later version of the SCOP (being a version of the SCOP adopted in 2021). We were not provided with a copy of that.

[20] The EA was issued with plans attached. The location of the vehicle crossing into Lot 3 on plans attached to the EA is consistent with the approved plans as are other details. Contours shown on the EA plans do not extend to the formed boundary of Perkins Road.⁴

EA variation

[21] After works commenced on site, an inspection was undertaken of the vehicle crossing and accessway constructed within the site, at which point the Council officer determined that the accessway was too steep and not in accordance with the SCOP.

[22] Documentation of the visit records that the inspection failed the access on the basis that there was no Council approved EA variation to lay in concrete and that it was a steeper gradient than the SCOP requirement of 1:6. The measured gradient of the right-of-way was 1:4.8 which the inspection notice records

⁴ Nor is that detail depicted on the approved subdivision consent plans.

“...does not comply with Council standards”.

[23] The consent holder sought to vary the EA to allow for a change in the surface treatment of the vehicle crossing and accessway from asphalt to concrete to accommodate autumn weather conditions during construction. That variation was given approval.

[24] Further documented dialogue between a representative of the consent holder (Ms Tock) and officers at the Council on the gradient issue reveals that the consent holder took the view that the vehicle crossing had been constructed at a grade of 1:5, in compliance with QLDC standards.

[25] Ms Tock sent an email to the Council on 9 May 2022 stating that this was addressed during the consenting stage of the subdivision stating:

Regarding the gradient of the driveway, during consent stage of this subdivision there was discuss about the gradient of this driveway. Since it was decided that this was the only practical access route for Lot 3, it was decided that a gradient steeper than 1 in 6 was feasible as decided by Cam Jones. This is explained and shown in the attached Resource Consent Decision.

[26] Relevantly, Ms Tock states that to achieve a gradient of 1:5, a small adjustment would be made “at the bottom”.

[27] Ms Tock’s email was responded to in an email from a Council officer referring to the stamped “as approved plans” which depicted the gradient as being 17.642% and stating:

I don’t think that there are any District Plan Rules which require adherence to the COP in this case (which’d be a max of 1:6), but Rule 29.5.16 is explicit about what’s required. No consent was granted to breach this Rule.

[28] The Council officer’s position was that no inspection would be passed if the vehicle crossing was constructed at a 1:6 gradient. That was consistent with

the position taken by the Council at the hearing.

[29] We assume that the Council officer was there referring to the gradient of the accessway rather than the vehicle crossing. However, we note that over the course of the hearing it became apparent that the Council treated these as a single feature.

[30] Further correspondence between the Council and the consent holder followed in relation to the finish of the accessway (whether the concrete finish was non-slip) and the drainage path and sheet flow onto Perkins Road.

[31] This occurred in preparation for a request for the s224(c).

[32] That lead to further dialogue about the gradient of the accessway.

[33] Ms Tock again wrote to the Council stating that the accessway would only have one user as it was only accessing one lot. Accordingly, the vehicle crossing could be 1:5 overall, referring to PDP r 29.5.16.b. Ms Tock repeats that the driveway would be raised 500mm at the base to achieve that gradient.

Outstanding matters of compliance with SCOP

[34] When works were completed, the consent holder took the view that the resource consent conditions had all been complied with and certification was sought under s224(c). The Council declined the request.

[35] Further works were identified by the Council requiring remediation to comply with SCOP provisions, the majority of which remained outstanding at the hearing before the court. These included:

- (a) comment from a geotechnical expert as to slope stability;
- (b) comment from a traffic engineer as to the raised edge of the vehicle crossing within the road boundary;

- (c) a requirement for a vehicle safety rail to be designed by a structural engineer at the top of the slope within the site;
- (d) comment from the pavement designer; and
- (e) reshaping of swales in both directions.

[36] When asked to identify which conditions of the resource consent required those works, the Council officer pointed to Consent condition 8. The officer's correspondence noted that no exemptions had been sought from SCOP provisions.

[37] SCOP provisions supporting the requested works were cited as being:

- (a) cl 3.3.4 for the safety barrier because the drop-off adjacent to the new vehicle crossing is greater than 1 m fall within 2 m of the road;
- (b) cl 2.3.10 for the geotechnical comment on the batter which was steeper than 2H:1V which was a stability issue;
- (c) cl 3.2.7 for the post construction road safety audit for the entire driveway design and interaction with Perkins Road due to concern as to a safety issue with the constructed design of the vehicle crossing;
- (d) referring to the requirement for over land flow post construction and the impact on adjoining land although provisions of the SCOP relied on were not cited;
- (e) condition 19(i) of the subdivision consent in relation to the revegetation of earth worked and exposed during construction.

[38] Ongoing discussions were unsuccessful in resolving issues, leading to the filing of proceedings in this court.

Witnesses for the Council

[39] Technical evidence was provided by the Council by Mr Bond, a Principal Geotechnical Engineer; Mr Smith, a Principal Transport Engineer; and Mr Vermaas, a Senior Subdivision Engineer at QLDC. Mr Mulligan, a licensed

Cadastral Surveyor, provided evidence outlining the survey of the vehicle accessway.

[40] The affidavits of Messrs Smith, Bond and Vermaas raised issues with the as-built accessway being outside the requirements of the SCOP in relation to the average gradient of the accessway and the requirement for a safety barrier on the accessway.

[41] Issues of concern included the safety of road users, slope stability, and the condition of the berm adjacent to the vehicle crossing.⁵ The “elevated” leading edge of the vehicle crossing within the road reserve was also raised as an issue. It was explained that the EA drawings showed no contour lines and indicated that flush surface would be achieved.⁶

The central underlying legal question

[42] The Council relied (primarily) on reference to the SCOP within Consent condition 8 in support of its opposition to the application.

[43] Central to the proceedings is the question of whether the Council can rely on Consent condition 8 to require additional work not itemised in the resource consent conditions (conditions 11 and 19 in particular), and notably the actions identified in paragraphs [35](a)-(e) above.⁷

[44] The Council further argued that the court has no jurisdiction to make an enforcement order requiring the Council to issue the s224(c) certificate as that would amount to an order requiring the Council to be satisfied that the conditions were complied with when it did not hold that view.

⁵ Vermaas at [27].

⁶ Vermaas at [43] and [44].

⁷ By the conclusion of the hearing the Council had abandoned its request for a post-construction road safety audit.

[45] The applicants submitted that the court is not precluded from making an order requiring the Council to issue the certificate.

[46] We propose to address the jurisdiction issue before moving to the merits of the application.

Legal framework

[47] Section 316 of the Act relevantly provides:

316 Application for enforcement order

- (1) Any person may at any time apply to the Environment Court in the prescribed form for an enforcement order of a kind specified in paragraphs (a) to (d) of section 314(1), or in section 314(2).

...

[48] The order was sought under s314 which provides that:

314 Scope of enforcement order

- (1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:

...

- (b) require a person to do something that, in the opinion of the court, is necessary to —

- (i) ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or

...

Northlake decision

[49] We start by noting that broadly similar issues had arisen in *Northlake Investments Ltd v Queenstown Lakes District Council (Northlake)*.⁸ *Northlake* addressed the jurisdiction of the court to make a declaration and enforcement order against the Council requiring performance of a function deriving from a subdivision consent condition.

[50] Condition 11 of the consent granted to Northlake Investments Ltd (NIL) pertained to the engineering review and acceptance process for works to be undertaken, as does Consent condition 11 in the case before this court.

[51] Although the nature and extent of engineering works required to be undertaken is different, the EA process required to be followed under each of the conditions is essentially the same.

[52] *Northlake* records that NIL's subdivision consent contained a condition (condition 4) similarly worded to Consent condition 8, in that works were to be carried out in accordance with the SCOP.

[53] Declarations were sought that:

- (a) Condition 11 of resource consent RM210637 (i.e. the Stage 16 Subdivision Consent) does not provide QLDC with the discretion to refuse to issue an Engineering Review and Acceptance ('Engineering Acceptance'), where an Engineering Acceptance application is compliant with the specifications and requirements of Condition 11 ('Declaration A'); and
- (b) QLDC's failure to issue an Engineering Acceptance for Catchment A of the Northlake development in accordance with Condition 11 of the Stage 16 Subdivision Consent within 45 working days, following receipt of a compliant Engineering Acceptance application, contravenes section 21 of the RMA ('Declaration B').

⁸ *Northlake Investments Ltd v Queenstown Lakes District Council* [2022] NZEnvC 5.

[54] A related enforcement order was sought within the terms of s314(1)(b)(i) requiring the Council to issue the EA for the works proposed by NIL as that had been refused by the Council.

[55] The Council had opposed the application on grounds (inter alia) that the condition did not impose an obligation on the Council that was capable of being enforced by the court.

[56] For reasons explained in the decision (at para [10]), the issues were referred to court-facilitated mediation. However, the court made “in principle” observations on the jurisdiction issue. The court was also requested to, and duly made, a preliminary ruling on the interpretation of conditions 11 and 4.

[57] In considering jurisdiction, the court commenced by referring to the s21 duty under the Act, observing that this pertained to the exercise of the Council’s s31 functions. The court then observed that the EA process under condition 11 operates as a means for the exercise of the s31 functions, which was to be exercised in accordance with the duty under s21.

[58] The court observed that an enforcement order can, inter alia, require a person to do something the court considers necessary to ensure compliance by or on behalf of that person with the RMA.

[59] Relevantly, the court observed that “in principle, at least” that can encompass something found necessary to address any breach of an RMA duty pertaining to a local authority’s functions in the administration of resource consents, which in that case related to the issuing of the EA approval under condition 11.

Section 224(c)

[60] We consider that the court’s observations in *Northlake* have relevance to and are helpful in considering the Council’s function under s224(c), this being

triggered by compliance with relevant subdivision consent conditions.

[61] Section 224 prevents the deposit of a survey plan unless (inter alia):

- (c) there is lodged with the Registrar-General of Land a certificate signed by the chief executive or other authorised officer of the territorial authority stating that it has approved the survey plan under section 223 (which approval states the date of the approval), and all or any of the conditions of the subdivision consent have been complied with to the satisfaction of the territorial authority and that in respect of such conditions that have not been complied with –
 - (i) a completion certificate has been issued in relation to such of the conditions to which section 222 applies:
 - (ii) a consent notice has been issued in relation to such of the conditions to which section 221 applies:
 - (iii) a bond has been entered into by the subdividing owner in compliance with any condition of a subdivision consent imposed under section 108(2)(b); and ...

[62] Mr Todd was critical of the Council's focus on the term "satisfaction" in this provision as he considers that this confuses rather than clarifies the issues.

[63] While it is for the Council to undertake the factual assessment contemplated by this section, we agree that it is implicit that the Council must act on reasonable grounds when certifying or refusing to certify that compliance has been achieved with relevant conditions. Moreover, the works required to achieve compliance must be within the scope of the resource consent.

[64] In the context of this application, we further agree that if the court is satisfied that relevant conditions have been complied with, the certificate under s224(c) should then issue, there being no lawful reason for that to be withheld.

[65] In other words, as Mr Todd submitted, the court is able to consider whether relevant subdivision consent conditions have been complied with, that being a factual enquiry frequently undertaken by the court in an enforcement order

context.

[66] Mr Todd notes the court is able to make an enforcement order against a consent holder to enforce non-compliance with consent conditions. The fact that in this case the non-compliance is alleged against the Council does not alter the nature of the task in determining whether compliance has been achieved. The factual assessment required on the evidence is essentially the same in each situation.

Our consideration

[67] We agree with Mr Todd's position on this jurisdictional issue. What s224(c) requires on a plain reading is that where, as a matter of fact, works undertaken as part of the subdivision comply with relevant conditions of a resource consent or subdivision, a s224(c) certificate should be issued.

[68] Applying the *Northlake* approach (by analogy), the Consent conditions, and conditions 8, 11 and 19 in particular, operate as a means for the exercise of the Council's s31 functions. An enforcement order can be sought to address the Council's breach of an RMA duty pertaining to the Council's function in the administration of resource consents, which in this case relates to certification under s224(c).

[69] Accordingly, we are satisfied that the court has jurisdiction to entertain the s314 application. We find that the court is entitled to decide whether the conditions have been complied with or whether there are any outstanding works required to be carried out before the s224(c) certificate can (or should) be issued by the Council.

[70] We disagree with the Council that there is no ability for the court to substitute its own assessment about compliance with subdivision consent to that of the respondent. If that is our finding, there can be no reasonable grounds to withhold issue of the s224(c) certificate.

Northlake on scope of conditions of consent

[71] A further relevant issue in *Northlake* involved consideration of the extent of works required to be addressed by the EA approval process under condition 11 and whether that extended to works beyond those for which subdivision consent had been granted to NIL, that being a further issue in common with the case before this court.

[72] Condition 11 of NIL's consent was described in *Northlake* as (in part) "a type of certification condition" to which established authority applies, stating:⁹

I need go only so far, at this stage, to indicate that certification does not delegate to officer's substantive approval of the subdivision and development activities for which consent was sought (that approval already having been made by QLDC decision for which QLDC is now *functus officio*).

[73] Condition 11 further required NIL to document to the Council's "reasonable satisfaction" that specified infrastructure works had been designed to accord with the Council's standards (*inter alia*), which the court observed were addressed in condition 4.

[74] Condition 4 required performance with standards in the Council's SCOP, that being the equivalent of Consent condition 8 in the case before this court. As to that condition, the court observed that it coloured the meaning of condition 11:

Condition 4 sets a related standard for that design that effectively colours what Condition 11 intends. That is that the design is to accord, in performance terms, with QLDC's Land Development and Subdivision Code of Practice adopted on 8 October 2020 and subsequent amendments ('COP').

⁹ At para [42].

Correct approach to the meaning of condition 8

[75] Consent condition 8 has been construed by the Council as requiring compliance with such provisions of the SCOP considered by the Council officers to be of relevance to the consented works.

[76] However, Consent condition 11 must be read alongside other Consent conditions, including Consent condition 8 (that being the approach of the court in *Northlake*).

[77] Consent condition 11(a)-(e) identifies the engineering works required to accord with the SCOP under Consent condition 8 (in addition to all retaining walls which are also expressly referred to).

[78] SCOP provisions of relevance to the EA process are those that relate to these works listed in Consent condition 11.

[79] This approach is consistent with the terms of the EA issued by the Council which states:

In respect to your application for Engineering Review & Acceptance under the RM210066 Subdivision Consent, the following conditions have been reviewed and accepted by Council:

- Condition 11(a) – Water supply
- Condition 11(b) – Foul sewer connections
- Condition 11(c) – Stormwater disposal
- Condition 11(d) – Vehicle crossing to Lot 3
- Condition 11(e) – Design certificate

[80] Under that text, a further note states:

There may be additional “prior to commencement of works” conditions within your Resource Consent decision that are beyond the scope of this Engineering Review and Acceptance (including Environmental

Management Plans). It is the Applicant's/Consent Holder's sole responsibility to ensure that all "prior to commencement of works" conditions have been suitably addressed prior to the commencement of any works on site. Please contact QLDC Resource Consent Monitoring if you have any questions regarding any other prior to commencement of works conditions.

The proposed works have been reviewed and accepted subject to the following conditions and on the basis that all works are in accordance with Councils standards unless specifically detailed below:

[81] To summarise our findings on the scope of the Consent conditions:

- (a) engineering works referred to in Consent condition 8 are necessarily limited to works within the scope of the Consent, being works involving construction of a three-lot subdivision, associated earthworks, provision of services and the vehicle crossing to proposed Lot 3;
- (b) more specifically, Consent condition 11(a)-(e) sets out the engineering works for which an EA is required after the grant of subdivision consent (in addition to any retaining walls);
- (c) Condition 11 also requires the consent holder to furnish specified information "... as is considered by the Council to be both necessary and adequate, in accordance with condition (8)" in relation to works listed in 11(a)-(e);
- (d) notably, works required to be completed before the issue of the s224(c) certificate are set out in condition 19. Relevantly, this includes Consent condition 19(b), "[t]he completion and implementation of all works detailed in Condition (11)".

[82] Works required under Consent conditions cannot be modified by the terms of the EA. Once a resource consent has been issued, the Council is *functus officio*.

[83] We now consider whether Condition 8 and its reference to the SCOP alters

that (orthodox) position. In other words, does reference to SCOP give its provisions residual legal effect in the manner contended by the Council?

SCOP

[84] The SCOP is a large wide-ranging document (more than 200 pages) addressing the engineering standards for construction of a subdivision. The SCOP was originally adopted by the Council in 2015, although it has since had three revisions.

[85] The SCOP incorporates content of the Standard NZS 4404:2010 land development and subdivision infrastructure, the purpose of which is to provide standards for the implementation of well-designed development and subdivision infrastructure projects that have obtained the necessary resource consents under the RMA. That standard also provides best practice land development and subdivision infrastructure techniques and low impact design, climate change, and urban design.

[86] The process for acceptance of design and construction is addressed in cl 1.8.1. Documents are to be submitted for design review and acceptance “[prior] to, or as a condition of, granting a resource consent for subdivision or development of land, or as otherwise required by district plan, or is otherwise considered necessary by QLDC when considering applications to construct infrastructure.”

[87] Documents required to be submitted include an engineering review and acceptance application; and design, construction, operation and maintenance documentation including drawings, specifications and calculations for:

- (a) Earthworks and geotechnical requirements;
- (b) Roading and site access including a design and access statement and a road safety audit. This requirement documentation shall demonstrate compliance with relevant resource consent conditions or

- explanations of deviations are proposed;
- (c) Stormwater;
 - (d) Wastewater;
 - (e) Water supply;
 - (f) Landscape;
 - (g) Network utility services;
 - (h) Lighting; and
 - (i) Three Waters Facility Asset Identification Specifications.

[88] Further information is provided as to the documentation requirements for the design review and acceptance process.

[89] The Council will notify the owner of that the design is approved when it is satisfied that the design meets the requirements of the SCOP.

[90] However, for the applicants, Mr Hansen gave evidence that in his experience Council officers rely on the SCOP as justification for engineering works to be undertaken irrespective of the scope of the resource consent authorising the development at their absolute discretion.

[91] Mr Hansen explained his expectation that the EA process would involve a compliance check for the design of proposed works with SCOP specifications.

[92] However, in practice his experience is that conditions such as Consent condition 8 triggers a requirement for a further resource consent from the Council which elongates post-consent construction timeframes and adds considerable complexity and cost to the s224(c) completion process.¹⁰

[93] Accordingly, Mr Hansen explains that the applicants commenced the proceedings to obtain a determination as to whether compliance has been achieved with the resource consent conditions to justify the issue of the s224(c) certificate

¹⁰ See paras [49] and [50] of Mr Hansen's affidavit of 16 February 2023.

for the subdivision.

[94] We also heard evidence from Mr Vermaas about the Council's practice of relying on the SCOP in the engineering review and acceptance process which occurs after the subdivision consent or other relevant resource consent has been granted.

[95] His evidence explains that the SCOP contains a set of minimum standards and good practice guidelines for developers undertaking a subdivision. Mr Vermaas explained that once EA has been given, there is no residual discretion under the SCOP to request other works. That is, unless changes occur during construction of the consented works in which event a variation will be required to the EA.

[96] Mr Vermaas noted reference to Consent condition 8 although he also referred to similarly worded EA condition 11.

[97] We had earlier noted the wording of that condition where it states:

Where ambiguities or inconsistencies exist between Councils adopted standards and the accepted documents, the adopted standards shall take precedence unless prior agreement in writing has been obtained from Council.

[98] We understand that reference to "accepted documents" is to the documents and plans accepted as part of the EA, as opposed to those approved through a prior resource consent. We construe this statement as meaning that SCOP provisions prevail over accepted documents including plans, if ambiguities or inconsistencies arise with relevant provisions of the SCOP.

[99] However, any plans accepted through the EA process would have to conform to those approved by the resource consent in relation to matters relevant to the PDP standards and consenting process. That is contemplated by extracts of the SCOP referred to above.

[100] The EA process does *not* provide opportunity to exercise any discretion in relation to aspects of the subdivision evaluated and approved through the consenting process, particularly those aspects of a subdivision that are regulated by rules in the district plan. Nor can the EA process or the revisit consent conditions incorporating SCOP design requirements. Condition 8 does not allow that.

[101] It goes without saying that such a discretion is *not* available when the council is considering an application to certify compliance with resource consent conditions under s224(c). The s224(c) certification process is not dependent upon compliance with the EA or the SCOP except to the extent that works governed by the SCOP and addressed through the EA process are incorporated into the terms and conditions of the relevant resource consent.

[102] In this case, Consent condition 19 states which conditions (requiring works) are to be complied for the purposes of the s224(c) certification process.

Status of the SCOP – incorporated or not?

[103] The court had received a copy of the SCOP in the bundle of material filed prior to the hearing (being a version that was dated 23 September 2020). On our inspection of that document, we had noted introductory text in cl 1.3.1 explaining the relevance of the SCOP in the context of the consenting framework:

This Code of Practice does not have a binding effect unless incorporated into a regional/district plan or bylaw. If the Code of Practice is not referred to in the plan or any bylaw, the Code of Practice can still serve as a technical compliance manual to assist guiding decision-making and forming conditions of resource consent.

[104] We note that incorporation is provided for in Pt 3 of Sch 1 RMA. Where a provision has been incorporated by reference in a regional or district plan, that provision “has legal effect as part of the plan” in accordance with cl 30, Pt 3 of

Sch 1 RMA.

[105] Relevantly, an amendment to or replacement of material incorporated by reference will only have legal effect if incorporated by:

- (a) a variation that has merged in and become part of the proposed plan which states that the amendment or replacement has that effect; or
- (b) an approved change made to the plan states that the amendment or replacement has that effect.¹¹

[106] Accordingly, prior to commencement of the hearing, the court asked the Council whether the SCOP had been incorporated into the PDP and whether/how that bears on our consideration of the issues.

[107] The Council provided copies of relevant chapters of the PDP where certain provisions of the SCOP are referred to, including where parts have been incorporated into the PDP. Relevantly, the SCOP has not been wholly incorporated.

[108] Chapter 27 Subdivision does not incorporate any SCOP provisions. This chapter refers to the SCOP as “provid[ing] assistance in the design of subdivision and development”.

[109] It is also referred to in the assessment criteria for restricted discretionary subdivision activities in relation to the provision of services. That technical guidance function is contemplated by cl 1.3.1 of SCOP earlier referred to.

[110] Chapter 29 Transport incorporates Section 3 of the SCOP 2018. However, later revisions of the SCOP have not been incorporated into this chapter (or elsewhere in the PDP for that matter).

¹¹ By cl 31 Pt 3 of Sch 1.

[111] Relevant Chapter 29 references (for the purpose of these proceedings) include (but are not limited to):

- (a) Advice Notes 29.3.3 – General which incorporates Section 3 and Appendices E and F of the SCOP 2018; and
- (b) Rule 29.5.13 (Access) which incorporates design standards for roads and accesses from Table 3.2 of the SCOP 2018.

[112] Of relevance to the Council's position in these proceedings are provisions in Section 3 which are now incorporated into Chapter 29:

- (a) cl 3.3.16; and
- (b) cl 3.3.4.

Clause 3.3.16

[113] The provision addresses the steepness of a proposed new private road, private way or other private access to be constructed on a sloping site. The Council relies on this clause in relation to the vehicle crossing and accessway within Lot 3.

[114] A 'note' to that clause states that:

The TA may approve exceptions provided the design includes suitable vertical transitions and adequate safety at the point where the access meets the footpath or road.

[115] This 'Note' purports to afford the Council discretion to depart from the gradient requirements of this clause during the EA process. However, any exercise of an arbitral power under authority of this 'note' during the EA process would be unlawful.

[116] Moreover, this provision has been incorporated into the PDP. Accordingly, it has legal effect (as a rule). However, it is the SCOP 2018 version of this provision that has been incorporated into Chapter 29.

[117] To add confusion, the PDP already contains a *similar* rule being r 29.5.16, which is also contained in Chapter 29.

[118] Rule 29.5.16 requires a maximum gradient for any private way used for vehicle access shall be 1:6 although in residential zones where a private way serves no more than two residential units, the maximum gradient may be increased to 1:5 provided:

- (a) the average gradient over the full length of the private way does not exceed 1:6; and
- (b) the maximum gradient is no more than 1:6 within 6m of the road boundary; and
- (c) the private way is sealed with a non-slip surfacing.

[119] Unhelpfully, r 29.5.16 and cl 3.3.16 of the SCOP 2018 are differently worded. Longitudinal gradients in each of these provisions differ. Moreover r 29.5.16 applies to a “private way used for vehicle access” whereas the 2018 SCOP version of cl 3.3.16 applies to “private ways, private roads and other private accesses”.

[120] To add further layers to the confusion, Consent condition 8 refers to the 2020 version of the SCOP (2020 SCOP).

[121] The 2020 SCOP includes changes to various of its provisions including to cl 3.3.16. The 2020 SCOP version of cl 3.3.16 replicates r 29.5.16.

[122] It was the 2020 SCOP version of cl 3.3.16 that was referred to in the evidence called by the Council. The 2020 SCOP version of this clause has not been incorporated into Chapter 29.

[123] However, because of the existence of r 29.5.16, incorporation of this provision would have no additional legal effect beyond removing the existing inconsistency between the 2018 SCOP version of cl 3.3.16 and PDP r 29.5.16. As

matters stand, each of these provisions has legal effect (as a rule) and yet they are differently worded.

[124] None of this has assisted the court in considering the application.

[125] Issues are compounded when considering the Council's contention that Consent condition 8 achieves incorporation of relevant SCOP provisions even where not incorporated into the PDP under cl 30 Pt 3 of Sch 1.

[126] We have earlier noted Ms Tock had referred to r 29.5.16 in her correspondence to the Council officer during the processing of the application for subdivision consent in support of the applicants' position that the gradient of the accessway fully complies with QLDC standards.

[127] That is when the Council *ought* to have addressed compliance with the accessway in terms of the gradient requirements, due to the existence of r 29.5.16. We are unsure whether Ms Tock was aware of the incorporation of the (inconsistent) version of the gradient requirements of 2018 SCOP (cl 3.3.16) when the application for subdivision consent was being considered by the Council, least of all whether any of the officers involved in the consenting process had any awareness of that duplication.

[128] However, we note the Council's evidence (primarily from Mr Smith) relied entirely on the 2020 SCOP provisions, including in relation to the gradient of the accessway (citing cl 3.3.16).

[129] The Council contends that cl 3.3.16 (the 2020 SCOP version) remains enforceable through the terms of Consent condition 8. Counsel submitted that formal incorporation under Pt 3 of Sch 1 RMA is irrelevant as the SCOP was incorporated by Consent condition 8.

Clause 3.3.4

[130] As this clause has been incorporated into Chapter 29, it also has legal effect (as a rule). As such, it would have to be treated as a further standard for a road, private way or vehicular access in addition to the gradient requirements in r 29.5.16 (inter alia).

[131] Clause 3.3.4 of the 2018 SCOP¹² states:

3.3.4 Safety barrier provisions

Where roads, private ways, or other vehicular accesses, whether public or private, run parallel with land that drops away to a height of greater than 1.0m within 2.0m of the road or footpath, the site shall be provided with safety barriers to protect vehicular traffic.

[132] We construe this provision as requiring a safety barrier along *that part of any* new road, private way or vehicular access that runs parallel to the crest of a slope that is higher than 1m and where the separation from the crest of the slope to the road, private way or vehicular access is less than 2.0m.

[133] On that approach the safety barrier would not need to follow the full length of the accessway down to Perkins Road, if indeed this standard is relevant, that being the Council's contention.

[134] However, this provision was amended in the 2020 SCOP. An additional element has been added, namely that the target operating speed is 60km/hr or less. That later version has not been incorporated into the PDP although as with cl 3.3.16, the Council contends that the 2020 version of this provision remains enforceable through incorporation by Consent condition 8.

¹² The clause was also amended in the 2020 SCOP.

Clause 2.3.10 – batter slope

[135] This provision has *not* been incorporated into the district plan.

[136] Clause 2.3.10 Cut and Fill Batters refers to the slope of the batter and identifies several requirements for any batter slope that has a slope of greater than 2m(H):1m(V) and exceed a height of 3m, including site specific design for stability.

[137] The requirements of cl 2.3.10 include:

- (a) a site-specific design for stability (including benching if appropriate) for approval by Council;
- (b) minimum width of any bench shall be 1.8m;
- (c) stormwater shall be conveyed to a point clear of the filling and discharge in such a manner as to prevent erosion;
- (d) unless formed in rock, all batters shall be formed such that they may be reinstated with grass or other consistent vegetation;
- (e) the edge of the batter should be a minimum of 600mm behind the kerb or back edge of the footpath; and
- (f) safety barriers shall be provided in accordance with NZS 4404:2010 section 3.3.4 as modified by SCOP.¹³

[138] However, this provision appears to have been accounted for during the subdivision consent process (at least in part) in Consent condition 15 which is one of the three conditions under the heading “[t]o be monitored throughout earthworks”.

[139] The court assumes that the drafting of this condition was guided by the wording of cl 2.3.10, that being the intended function of SCOP provisions not

¹³ We are unsure what section 3.3.4 of NZS 4404:2010 states, and whether that is different to cl 3.3.4 of the SCOP, which is based upon that standard.

formally incorporated into the PDP (see cl 1.3.1 SCOP).

[140] We had earlier referred to the engineering report provided to the Council officer (under s42A of the Act) determining the subdivision consent application. That report addressed the cut and fill slope batters. Only slope of the batter was referred to as it was in the evidence presented at the hearing. We heard nothing about whether the slope exceeded the 3m height limit. The engineer's recommended conditions are reflected in the Consent conditions.¹⁴

[141] On that basis, cl 2.3.10 cannot be revisited during the EA process, at least not for the purpose of modifying the nature of works required by relevant Consent conditions (in the case of the batters, conditions 19(f) and (i)). The Council is functus officio in relation to conditions 19(f) and (i).

Is the accessway within the scope of the resource consent?

[142] In closing submissions Mr Todd emphasised that the subdivision consent application was sought under Chapter 27. None of the provisions of Chapter 29 were engaged. In particular, resource consent was not sought for the accessway under r 29.5.16.

[143] The court has proceeded on the basis that Mr Todd is correct, having also inspected the relevant documents provided to the court. The application included consent for the vehicle crossing to proposed Lot 3. However, we find that the PDP defines vehicle crossings separately from roads or accesses and treats the two as different activities even if in a physical sense, they are constructed as a single feature.

[144] That resource consent was required for the vehicle crossing (in terms of sightlines) does not lead to the result that consent was necessarily required for the

¹⁴ NOE p 40.

accessway.

[145] It would be permissible for a consent holder to construct a complying accessway without the need for a resource consent. That was clearly the intention of the applicants in this case. Discussion had occurred about the gradient requirements under r 29.15.6 during the consent processing. Ms Tock contended that the gradient requirements were complied with. That position appeared to have been accepted by the Council officers involved in the consenting process.

[146] Accordingly, as a permitted activity, we find that the accessway was not 'authorised' through the consenting process.

Our consideration

[147] Because the accessway is beyond the scope of the Consent, cls 3.3.16 and 3.3.4 have no application to the certification process under s224(c). Any non-compliances associated with the *constructed* accessway (if indeed there are any) would fall to be considered by the Council's enforcement armoury under the Act.

[148] It would not be lawful for the Council to decide to defer (or revisit) the exercise of its discretion in relation to the design (or gradient) of an accessway during or after the EA process following a grant of subdivision consent, even if the subdivision consent application had, even if resource consent had been sought for the accessway.

[149] The wording of Consent condition 8 does *not* allow for that to occur. All relevant PDP rules must be accounted for at the resource consenting stage. That includes SCOP provisions incorporated by Pt 3 of Sch 1 RMA.

[150] Of the SCOP provisions cited as supporting the Council's request for further works we find that none have residual legal effect through the operation of Consent condition 8 as contended by the Council.

[151] We expand on our reasoning having considered the evidence called by the Council.

Council's evidential case

Evidence on batter slope

[152] Mr Vermaas considered that the batter slope issue is independent of the driveway gradient issue.¹⁵ However, Mr Bond considered that the issues were inter-related and that it is not just an issue as to the need for a safety barrier but a combination of the slope of the driveway, the batter slope and the construction of the driveway in terms of the crossfall promoting water coming straight onto the slope.

[153] Two issues with the batter slope were raised by the Council, firstly the batter slope angle (cl 2.3.10) and secondly the height of the drop in relation to the proximity to the road (cl 3.3.4). The Council considered the works do not meet these two requirements in the SCOP.

[154] The Council raised further road safety issues in addition to concerns around the stability of the batter slope, relying on the survey plans provided by Mr Mulligan.

[155] The two issues were often conflated in the evidence and were difficult to follow. Further explanation was sought at the hearing, including in relation to the grounds for the works being required.

Clause 2.3.10 – batter slope

[156] Regarding the batter slope angle, Mr Bond and Mr Vermaas considered that the slope profile had been formed at a batter slope angle greater than

¹⁵ NOE pp 84-85.

2m(H):1m(V). The witnesses consider that this requires a site-specific design pertaining to slope stability as set out in cl 2.3.10.¹⁶

[157] Cross-section 2 of Mr Mulligan's survey plans indicates the batter to the downhill side (south) of the driveway has a batter at a grade of 1 in 1.26 (79.4%) for the upper half and 1 in 1.75 (57.1%) for the lower half.¹⁷

[158] Mr Bond was concerned the batter slope is overly steep, unstable, and prone to surficial instability that may lead to localised further failure. Below the accessway on road reserve it is showing signs of erosion failure and will likely continue to develop as a minor slide on to Perkins Road.¹⁸

[159] Mr Bond noted that the lower portion of slope had been filled to raise the accessway profile, and slopes that have formed are overly steep and comprise loose topsoils.¹⁹

Our consideration

[160] The applicants are of the opinion that the conditions have been met. In particular, the slope has been top-soiled and grassed, revegetated or stabilised as required (by condition 19(i)).

[161] We agree with the applicants on this issue. Diagrams of the long-section and cross-sections of the accessway design are contained in the resource consent decision.²⁰ The cross-section plans suggest a 1:2 batter slope or better.²¹

[162] The s224(c) checklist (attached to the application for a s223(4) certificate signed by Ms Tock) refers to cl 15 which states that "No permanent batter slope

¹⁶ Bond at [39].

¹⁷ Mulligan affidavit at [16] and CB 263.

¹⁸ Bond at [30] and [33].

¹⁹ Bond at [36].

²⁰ CB 172 and 173.

²¹ NOE p 98.

within site has been formed to that of a gradient that exceeds 1(V):2(H)".

[163] Moreover, there was no evidence that a permanent batter slope has been formed (except at the base itself at the vehicle crossing) beyond that which existed before works commenced:

- (a) Mr Bond in his affidavit (CB 49) notes "[t]he historical images indicate that the existing slopes are stable and do not show any evidence of localised instability, even at relatively steep face angles of close to 1V:1H";
- (b) in the email exchange between Ms Tock and the Council (CB 529) Ms Tock notes that "the slope of the site is at around a 1:1 slope, meaning that the 1:1 cut batter should not waiver the stabilisation of the existing ground, as it is already at this steepness".

[164] Mr Bond does seem to differentiate between the "global (wider) stability of the slope both upslope and along slope" and the "slope below the accessway on the road reserve". At para [32] of his affidavit (CB 50) he states:

The global (wider) stability of the slope both upslope and along slope is not considered to be unstable and the development of the accessway has not significantly affected the overall stability of the road reserve slopes.

[165] And at para [33]:

However, the local stability of the slope below the accessway on the road reserve is showing signs of erosion induced failure as a translational slope failure... .

[166] Condition 15 is also of relevance as this provides that:

No permanent batter slope within the site shall be formed at a gradient that exceeds 1(V):2(H) except where inspected and confirmed in writing as being permanently stable by a suitably qualified geotechnical professional.

[167] Condition 19(f) requires the consent holder to provide a Geotechnical Completion report by a qualified and experienced geotechnical professional. This was duly provided. A Geotechnical Completion Report by Geosolve dated November 2018 is attached to Mr Hansen's rebuttal affidavit as Exhibit A.

[168] In his rebuttal, Mr Hansen explains that:²²

The consent holder already engaged a geotechnical engineer to assess the proposed development, including the batter slope. Paul Faulkner of Geosolve Limited produced a report in support of the previous resource consent application in 2018 which encompassed the larger area of the site and adjacent lots. ...

[169] Mr Hansen further explained²³ that Mr Faulkner then provided further comments on the stability of the proposed accessway as part of the resource consent process in an email in May 2021, which was forwarded to the Council, on 18 May 2021.²⁴

[170] The correspondence from Mr Faulkner stated:

The cuts are relatively low in height and the ... risk of wider instability developing is low... Protecting the cut surface by planting and/or matting is recommended.

[171] Mr Bond concurred with this recommendation but interpreted it as referring to the wider instability risk rather than accessway. He expressed his opinion that the engineer should have been requested to provide further comment, although that did not happen.

[172] We make the following findings:

- (a) slope stability is addressed in condition 15. Moreover, condition 19(i) of the resource consent requires "All earth worked and/or exposed

²² Hansen rebuttal at [23].

²³ Hansen rebuttal at [24].

²⁴ Correspondence attached in Annexure B of Hansen's rebuttal.

areas created as part of the subdivision shall be top-soiled and grassed, revegetated, or otherwise stabilised”. We are satisfied that these works were carried out.;

- (b) the Geotechnical Completion report required under condition 19(f) was also provided to the Council and a copy was produced to the Court;
- (c) slope stability was not addressed in the EA process;
- (d) the provisions of cl 2.3.10 of the SCOP (which are not incorporated into the PDP) are reflected in the drafting of Consent conditions having been recommended by the engineering report prepared under s42A. The SCOP has served its intended function in relation to provisions not incorporated under Pt 3 of Sch 1 RMA. Clause 2.3.10 cannot now be invoked to require further, or other works in relation to the batter slope not required in the Consent conditions;
- (e) issues pertaining to the batter slope now raised by the Council cannot justify withholding the s224(c).

Clause 3.3.4

[173] The Council’s requirement for a safety barrier was founded on cl 3.3.4. This relates to the height of the drop of the batter slope being greater than one metre and within two metres of the roadway. The Council’s assessment is that there is a lack of a shoulder on the accessway, the edge of the accessway is too close to the batter slope, and a safety barrier should be provided.²⁵

[174] Mr Vermaas was concerned about a vehicle driving off the edge of the accessway, slipping off the edge in winter, and creating a danger to anyone using Perkins Road at the time.²⁶ He explained that if the accessway met the requirements of the SCOP the distance from the edge of the slope and the actual

²⁵ NOE pp 108-9, 116.

²⁶ Vermaas at [49]-[52].

slope would give a driver on the driveway time to react.²⁷ However, he considered that construction of any safety barrier would have to stop at the property boundary as if it extended into road reserve that would create another hazard.²⁸

Our comment

[175] The requirement for a safety barrier relates to the height of the drop and lack of recoverable space from the accessway (which is required to be 2m from the crest of the slope). This provision is one of the two SCOP provisions incorporated into Chapter 29 of the PDP as discussed earlier in this decision. However, we have earlier found that the accessway is beyond the scope of the subdivision consent granted by the Council. Accordingly, the Council cannot request construction of a safety barrier (if one is indeed required) prior to the issue of the s224(c).

Clause 3.3.16

[176] The following issue is addressed out of an abundance of caution. We have earlier found that the accessway is not within the scope of the resource consent granted for the subdivision. However, it was clearly a contentious issue as between the parties. Moreover, the Council was adamant that the accessway was brought into scope by virtue of the consent being sought for the vehicle crossing.

[177] The Council's case opened on the basis that the 1:6 gradient requirement was not complied with, although witnesses attributed the source of the rule to the 2020 SCOP as we have earlier stated.

[178] Breaches alleged to exist were assessed in the evidence of Mr Smith who had relied upon a topographical survey of the as-built accessway gradients

²⁷ NOE p 86.

²⁸ Vermaas NOE p 72.

undertaken on behalf of the Council.

[179] Based on that survey, the average gradient of the 15.46m long accessway is 1:4.94 thereby exceeding the requirements of this provision in three locations. The survey plans were produced to the court by Mr Mulligan, a surveyor with Elliot Sinclair.

[180] Mr Smith was questioned about this provision in the as-built plans by the court as his evidence proceeded on the basis that the longitudinal gradient of the accessway was required to be 1:6 according to the SCOP provision, although over the course of the hearing he became aware that through the engineering approval process an average gradient of 1:5 was approved by the Council.

[181] We consider that Mr Smith's reference to an "approval" could only have been an acceptance or acknowledgement by the relevant engineering officer that the maximum gradient of 1:5 applied to the circumstances of the subdivision, not 1:6. We say that because:

- (a) we heard evidence that this issue had been discussed and resolved during the process of obtaining Consent, in the context of r 29.5.16 of the PDP;
- (b) at most, the engineering officer could acknowledge that earlier decision, although they could not act in an arbitral role to allow a departure from cl 3.3.16 (or r 29.5.16) which is Mr Smith's (apparent) understanding of what had occurred.

[182] Returning to Mr Smith's evidence on this provision, he was asked by the court about the effects of any breach on the basis that the rule required a 1:5 average gradient and not 1:6. He answered:

Not in the concerns of the gradient of the driveway because that's now been accepted. It does in the context of any driveway at that sort of steepness, does have the very high risk of black ice freezing but I would assume in understanding

the acceptance for one in five that Council's given good due consideration to that.

[183] Further clarification was sought from Mr Smith in the following exchange:²⁹

- Q. Well I'm wanting to know, I mean you started off writing your evidence thinking that the gradient requirement was one in six. You now know it's one in five. My question is, knowing that it's one in five and the as built is one in 4.94 do you have any residual concerns around safety arising from the gradient of the drive?
- A. Not specifically to the gradient of the drive.
- Q. So there are parts of this evidence that we can just ignore in relation to where you talk about the gradient?
- A. The –
- Q. I mean you do say gradient shouldn't be the only part of the assessment but that seems –
- A. In paragraph 34 I say gradient, you need to consider the net effects of a steep driveway. Gradient on its own is only part of the assessment.
- Q. And so when you say the access alignment is that the proximity to the top of the slope, the two-metre clearance or is that something else?
- A. That is the curve nature of the entry from Perkins Road. So it undertakes a six-metre radius curve and then also at the top there is a radius where it's not a straight entry and that was in the design plans that we had the time.
- Q. If there is no district plan or code of practice requirement in relation to those matters where does the discretion, do you know where the discretion comes from to consider those issues? I mean this is about holding back a [224] based on compliance with a code of practice for subdivision. So where do the requirements in relation to those matters arise?
- A. The 2023 proposed district plan objective 29.2.4.10 talks about accesses and then within that it's the objectives and if I can sub-quote that paragraph: "Mitigates adverse effects on the safety and efficiency of the adjoining road." So I would say that you're looking at a total package of safety and efficiency on the road network and that should be considered as we go

²⁹ NOE p 112.

through as to whether there are any discretionary matters specifically to the curve radii and alignment.

[184] Clause 3.3.16 relates to longitudinal gradient. Mr Smith did not appear to have any concern in relation to the small area of non-compliance (due to the surveyed gradient of 1:4.94).

Vehicle crossing

[185] For completeness, we address the Council's concerns in relation to the constructed vehicle crossing. As Ms Tock had noted in her communication with the Council officers during the resource consent phase, the 'base' of the accessway was lifted 500mm to meet the r 29.5.16 gradient requirements.

[186] This resulted in a change to the height of the vehicle crossing. All such details were depicted on the plans approved through the resource consent process which were attached to the Council's decision.

[187] This is a straight-forward issue. We find that any issue that the Council now has with the as-built vehicle crossing does not amount to a breach of Consent conditions 11 or 19 because:

- (a) the contour lines depicted on the plans approved by the Consent are unclear as to the level of the bottom of the accessway and the vehicle crossing in particular vis-à-vis the existing formed surface of the road;
- (b) Ms Tock had informed the Council officer involved in during the consenting of the subdivision that the bottom of the accessway would be lifted 500mm to achieve the gradient requirements of r 29.5.16.

[188] This issue cannot be revisited during the process of obtaining the s224(c), under the auspices of Consent condition 8 or for any other reason.

Overall conclusion

[189] We find that all relevant conditions required to be complied with as set out in Consent condition 19 have in fact been complied with. We have undertaken a factual assessment based on the evidence before us.

[190] Actions required to be carried by the Council as set out in paragraph [35] of this decision are not justified based on any non-compliance we find in relation to the relevant Consent conditions.

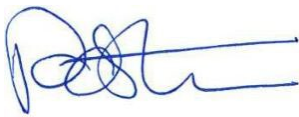
[191] While it is for the Council to be satisfied that conditions have been met, Consent condition 8 cannot be relied upon to trigger further provisions of the SCOP not accounted for during the resource consent process.

[192] The Council presented no valid legal or evidential basis for refusing to sign the s224(c) certificate confirming that conditions of the subdivision consent have been complied with.

[193] Accordingly, we make the order under s314(1)(b)(i) on terms sought in the application, namely that:

The Chief Executive or other authorised person of the Council must sign a certificate stating that it has approved the deposit survey plan for Lots 309 & 310 DP 522931 dated 9 September 2022 and that all conditions of subdivision consent RM210066 have been complied with to the satisfaction of the Council, pursuant to s 224(c) of the Act..

For the court



P A Steven
Environment Judge