

**IN THE ENVIRONMENT COURT  
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA  
KI TAMAKI MAKAUURAU**

**Decision [2024] NZEnvC 076**

IN THE MATTER

of an appeal under s 120 of the Resource  
Management Act 1991 (the Act)

BETWEEN

WAYNE MCDONNELL AND  
KATIA MACKENZIE

(ENV-2022-AKL-238)

Appellants

AND

AUCKLAND COUNCIL

Respondent

IN THE MATTER

of an application for declarations under  
s 311 of the Act

BETWEEN

DEVELOPMENT PARTNERS  
MANAGEMENT LIMITED

(ENV-2023-AKL-000040)

Applicant

AND

AUCKLAND COUNCIL

Respondent

Court: Environment Judge MJL Dickey  
Environment Commissioner S Myers  
Environment Commissioner CJ Wilkinson

Hearing: Auckland 18-19 September 2023

Last case event: 11 October 2023, Council Memorandum in response to  
amended declarations

Appearances: B Carruthers KC and V Toan for appellants and applicant  
S Quinn for the respondent

McDONNELL & MACKENZIE v AUCKLAND COUNCIL



Date of Decision: 11 April 2024

Date of Issue: 11 April 2024

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## DECISION OF THE ENVIRONMENT COURT

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A: The appeal is allowed.

B: The Application for the Declarations is declined.

### REASONS

#### Background

[1] Wayne McDonnell and Katia Mackenzie are the owners of a property at 86 and 86A Michaels Avenue, Auckland. The property comprises two cross lease composite freehold/leasehold titles (**the Property**).

[2] The appellants have appealed part of Auckland Council's decision granting resource consent to convert the two cross lease titles for the Property to two fee simple titles subject to conditions (**Subdivision appeal**). The appeal seeks that conditions 8 and 9 of the resource consent relating to wastewater and stormwater be deleted.

[3] The appellants' agent Development Partners Management Limited<sup>1</sup> (**DPML**) has sought four declarations (**Application for Declarations**) under ss 310(a) and 310(h) of the Act addressing the Council's powers on controlled activity cross lease conversions. We address the Application for Declarations later in this decision.

[4] The Subdivision appeal essentially addresses the same issues as are addressed

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<sup>1</sup> Development Partners Management Limited is a company that specialises in the conversion of cross lease to fee simple subdivisions.

in the Application for Declarations.

[5] In support of the appeal and the Application for Declarations, evidence was called from Mr Cook, a senior chartered civil engineer, Mr Winter, a licenced cadastral surveyor and from Mr Clode, the director of DPML. The Council called evidence from Mr Revill, a civil engineer and Principal Project Manager Regulatory Engineering and Resource Consents employed by the Council, and Mr Allen, a Principal Specialist Planner employed by the Council.

[6] The questions to be decided are:

- (a) as the subdivision is a controlled activity, does the Auckland Unitary Plan (**AUP**) enable the Council to assess and then address by way of conditions the adequacy of the Property's wastewater and stormwater services?
- (b) does the subdivision give rise to any potential adverse effects on the environment?

### **Subdivision appeal**

[7] The Property contains two existing residential dwellings in separate ownership. It has a land area of 1226 square metres more or less and is contained in two composite titles.

[8] On 31 October 2022 the appellants applied for subdivision consent to convert the two cross lease titles to two fee simple title allotments: Lot 1 (666 square metres) and Lot 2 (560 square metres). There was no alteration to the existing boundaries and no alteration to the existing dwellings was anticipated. The internal boundaries matched the existing flat plan boundaries. The existing carport on Lot 2, however, was to be removed.

[9] It is well accepted that the conversion of a cross leased property to separate

freehold titles is a subdivision of land.<sup>2</sup> Section 11 of the RMA provides that no person may subdivide land unless the subdivision is expressly allowed by a resource consent or does not contravene a national environmental standard or a rule in a district plan.

### ***AUP provisions***

[10] Chapter E38 of the AUP provides for urban subdivision. The conversion of a cross lease to a fee simple title is a controlled activity.<sup>3</sup> However, if the conversion does not meet the General Standards for subdivision<sup>4</sup> or does not meet the permitted, controlled or restricted discretionary activity standards, being Standards for subdivision for specific purposes (**Specific Standards**),<sup>5</sup> it is a discretionary activity.<sup>6</sup>

[11] All subdivisions listed in the activity tables must comply with the General Standards, unless otherwise specified, as well as the Specific Standards.

[12] The dispute between the parties centres around the interpretation of both standards and the lawfulness of the conditions.

### ***Consent***

[13] Consent for the subdivision was granted as a controlled activity subject to conditions.

[14] Condition 1 requires that the subdivision must be as described in the application and Assessment of Environmental Effects. Extensive advice notes are contained in that condition, which note that "...consent has been granted on the basis of all the documents and information provided ... demonstrating that the new lot(s)

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<sup>2</sup> *Re McKay* (2018) NZEnvC 180.

<sup>3</sup> Activity (A13).

<sup>4</sup> Activity (A12). General standards are at Rule E38.6.

<sup>5</sup> Standards for subdivision for specific purposes are at Rule E38.7.

<sup>6</sup> Activity (A13).

can be appropriately serviced (infrastructure and access).”

[15] Contrary to the statement in the advice note, conditions 8 and 9 were imposed.

Condition 8 relates to wastewater and requires the consent holder to:

...satisfy the Council that the existing wastewater drainage systems and connections for Lots 1 and 2 are suitably located and are fit for purpose (Fit for purpose – requires all wastewater to be able to pass through the system to an approved outfall, and there is no damage to the drain that would allow leakage to the surrounding environment).

[16] Condition 9 relates to stormwater and requires the consent holder to:

...satisfy the Council that the existing stormwater drainage systems and connections for Lots 1 and 2 are suitably located and is fit for purpose. (Fit for purpose requires all stormwater to be able to pass through to an approved outfall).

[17] Reasons for granting consent included, at section 6:<sup>7</sup>

5. ...  
Subject to the removal of the carport on Lot 1, no additional works are proposed as part of this subdivision consent that may generate adverse effects, including effects of the site design, size, shape, gradient and location, including existing buildings, manoeuvring areas and outdoor living spaces, effects of infrastructure provision, effects on historic heritage and cultural heritage items.
  - The application has provided a new as-built drainage plan via CCTV inspection. The application did not include CCTV inspection notes or video for Council specialists to verify the infrastructure is fit for purpose to satisfy E38.11.1(c), therefore conditions of consent have been included. A wastewater and stormwater condition have been included as the CCTV inspection plan showed a blockage in the south-west corner of the site and the stormwater soakage devices have not been inspected to be fit for purpose.
  - There are no future development rights created on under-developed lots with regards to coverages that need to be managed further by consent notices.
6. In accordance with an assessment under s 104(1)(b) of the RMA the proposal is consistent with the relevant statutory documents. In particular, regard has been given to assessment criteria E38.11.2 of Chapter E38 Subdivision – Urban and the relevant provisions of the Auckland Unitary Plan – Operative in Part under E38.7.2.3.

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<sup>7</sup> Decision dated 24 November 2022.

## **The appellants' case and the Council's response**

[18] The nub of the appellants' challenge to the conditions is that they inappropriately require them to satisfy the Council that the services are adequate for the residential activities occurring or proposed to occur on the Property, and ignore that the cross lease and building consents were lawfully obtained, albeit some time ago.

[19] The Council argues that it is appropriate to satisfy itself that the services are not only appropriately located but that they are adequate. It says that the AUP's rules enable it to require such information as is necessary to satisfy itself on those matters.

### ***The subdivision***

[20] There are two relevant standards – the 'General', and the 'Specific'.

[21] The General Standards<sup>8</sup> relate to site size and shape, access and entrance strips, services, staging, overland flow paths and existing vegetation on the site.

[22] For this proceeding we need only focus on those Standards relating to services. These standards require:<sup>9</sup>

- (1) For all proposed sites capable of containing a building, or for cross lease or unit title, strata title, company lease, each lot must be designed and located so that provision is made for the following services:

**(a) collection, treatment and disposal of stormwater;**

**(b) collection, treatment and disposal of wastewater;**

(c) water supply;

(d) electricity supply; and

(e) telecommunications.

(emphasis added)

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<sup>8</sup> Rule E38.6.1-6.6.

<sup>9</sup> Rule E38.6.3 (1).

[23] For cross lease conversions, the Specific Standards<sup>10</sup> require that:

- (1) All existing development must meet **one** of the following:
  - (a) comply with the relevant overlays, Auckland-wide and zone rules;
  - (b) be in accordance with an approved resource consent;
  - (c) have existing use rights;
  - (d) be in accordance with an approved building consent,
  - (e) have a code of compliance certificate, or
  - (f) have a certificate of acceptance.
- (2) All service connections and on-site infrastructure must be located within the boundary of the site they serve, or have legal rights provided by an appropriate legal mechanism.

(emphasis added)

### *Specific Standard*

[24] The Specific Standard has two elements that must be met. The first requires that all existing development must meet one of the listed ‘authorisations’. The second states that all service connections and on-site infrastructure must be located within the boundary of the site or have legal rights provided by an appropriate legal mechanism. We find that the subdivision meets this standard for the reasons which follow.

### *Authorisation of existing development*

[25] One of the listed matters must be met; including being in accordance with an approved resource consent or an approved building consent; or having existing use rights, a code compliance certificate or a certificate of acceptance.

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<sup>10</sup> Rule E38.7.2.2 (1) and (2).

[26] Mr Quinn accepted that more than one ‘authorisation’ might apply, and that as these are RMA terms it is appropriate to read them as including planning consents, building permits, and s 314 Local Government Act 1974 certificates, among others.

[27] In any event, the Council has accepted that the two houses on the property have appropriate building consents in place.<sup>11</sup> It is also clear that the cross lease for each building was certified under s 314 of the Local Government Act. The first limb of the Specific Standard is, therefore, met.

*Location of services*

[28] The Council’s planning witness, Mr Allen, said that in addition to the location of infrastructure service connections, the Standard requires Council to consider the functionality and operation of the service connections. He said that the Council will sometimes request information as to whether the services are ‘fit for purpose’ to ensure that the existing servicing infrastructure is operating in a manner that is avoiding the creation of adverse effects on the environment.

[29] Later in questioning,<sup>12</sup> Mr Allen acknowledged that this provision relates to the location (of services) and not the functioning of pipes, and that fitness for purpose or functionality of services is not expressed or provided for in the wording of the Standard.<sup>13</sup>

[30] On a plain interpretation of the second element of the Standard it is evident that it is limited to the location of services. It does not extend to the condition, adequacy or functionality of those services.

[31] The question then arises as to whether the General Standards can be relied on by the Council to support the imposition of conditions (8) and (9).

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<sup>11</sup> Decision dated 24 November 2022 at section 3.

<sup>12</sup> Notes of Evidence (**NOE**) page 139, lines 15-32 and page 121, lines 17-23.

<sup>13</sup> NOE page 122, lines 2-6.



### General Standards

[32] Unlike the Specific Standards for cross lease conversions, these Standards are broader, and refer to “proposed sites capable of containing a building” and require that “each lot must be designed and built ... so that provision is made” for the collection, treatment and disposal of stormwater and wastewater. The Standard includes water, electricity and telecommunications supply.

[33] The Council accepted in the Consent decision that no additional works are proposed as part of the consent that may generate adverse effects, including effects of infrastructure provision. Where the parties diverged was over the Council’s requirement that the consent holder establish the adequacy of the existing services for the existing development. The appellants say it is not a relevant consideration.

[34] The Council identified the relevant General Standards as those relating to site size and shape and services.

[35] Mr Allen did not specifically address the General Standard relating to services save when addressing the conditions. He confirmed that the conditions were imposed to ensure that stormwater and wastewater collection and disposal did not result in discharges that adversely affect the environment or people.

[36] We find that the subdivision complies with the General Standards because the proposed sites already contain buildings and services.

### Finding on standards

[37] The subdivision is a controlled activity. It complies with the Specific Standards for cross lease conversions, as both houses have building consents and s 314 Certificates under the Local Government Act 1974. Services are shown on the subdivision plan, are located within the property and/or have legal rights to them provided by easement.

[38] The subdivision complies with the General Standards. No new works are

proposed as part of the proposal save for the removal of the existing carport.

Conditions

[39] Having determined that the subdivision complies with the relevant Standards, we now consider the appropriateness of the conditions imposed.

[40] Section 108AA RMA states that a condition must not be imposed unless the applicant agrees to it, or the condition is directly connected to an adverse effect of the activity on the environment or an applicable district or regional rule, among others.

[41] We address first the Plan rules that enable conditions.

Matters of Control and Assessment Criteria

[42] The AUP's Matters of Control and Assessment Criteria for controlled activities state:<sup>14</sup>

The Council will reserve control over all of the following matters when assessing a controlled activity resource consent application:

- (1) All controlled activities:
  - (a) compliance with an approved resource consent except for boundary adjustment subdivision;**
  - (b) the effect of the site design, size, shape, gradient and location, including existing buildings, manoeuvring areas and outdoor living spaces;
  - (c) the effects of infrastructure provision; and**
  - (d) the effects on historic heritage and cultural heritage items.
 (emphasis added)

[43] Relevant Assessment Criteria<sup>15</sup> state:

The Council will consider the relevant assessment criteria for controlled activities from the list below:

- (1) all controlled activities:

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<sup>14</sup> Rule E38.11.1.

<sup>15</sup> Rule E38.11.2(1) (a) and (c).

- (a) compliance with an approved resource consent except for boundary adjustment subdivision;
  - (i) refer to Policy E38.3(6);
- ...
- (c) the effects of infrastructure provision;
  - (i) whether provision is made for infrastructure including creation of common areas over parts of the parent site that require access by more than one site within the subdivision; and
  - (ii) refer to Policy E38.3(17)
- ...

[44] The Matters of Control include “the effects of infrastructure provision” and the Assessment Criteria focus on provision for infrastructure, access to it, and Policy E38.3(17).

[45] Policy E38.3(17) requires there be sufficient road reserve to accommodate, inter alia, stormwater networks and network utilities.

[46] While there was some suggestion by Mr Clode in his evidence on behalf of DPML that “infrastructure” in this context “doesn’t include private drainage”<sup>16</sup> and is limited to public infrastructure, there was no compelling argument to support such a limitation and nor do the relevant sections of the AUP differentiate between private and public infrastructure.

[47] For controlled activities the Council can only impose conditions for those matters over which control is reserved, in this case the “effects of infrastructure provision”.

[48] Mr Quinn submitted that “provision” is not just about the existence of infrastructure, and that “it would not be the ‘provision’ of infrastructure if it does not carry water from A to B”.<sup>17</sup> In other words, the Council reads into the Matters of Control a requirement that the infrastructure must be workable or “fit for purpose” in order to be provided.

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<sup>16</sup> NOE page 67, lines 23-24.

<sup>17</sup> Council’s Closing Submissions, at [35].

[49] Ms Carruthers submitted that the Council cannot attempt to widen the scope of the Matters of Control – “effects of infrastructure provision” to impose conditions that require further investigation or upgrades or repairs to infrastructure.<sup>18</sup>

[50] We broadly acknowledge the sense of an approach which reads into “provision” [for services] a requirement of adequacy. However, that approach may be constrained by the words in a plan or an analysis of a proposal’s effects. The RMA is an effects-focussed statute. When a subdivision such as this does not change the effects profile for the property it is not appropriate for the Council to reserve to itself the power to require changes to the services that are in place. If that had been the AUP’s intention, we would have expected clearer language and rationale.

[51] We find that it would be stretching the interpretation of the AUP rules to write into, or infer, for cross lease conversions, that “provision” for the collection, treatment and disposal of stormwater and wastewater means that the systems are “fit for purpose”. The rules provide for a cross lease conversion. The Specific Standards require that existing development must meet one of the standards outlined – which include being in accordance with approved resource consent or building consents. There are then quite specific requirements as to the location of on-site infrastructure.

[52] In simple terms, the purpose of a cross lease subdivision is to replace a composite (freehold/leasehold) record of title with a freehold record of title. Generally, what is physically on the property before the cross lease conversion does not change with the issue of freehold titles. The services to the site, which are already existing, need to be identified and located so that the legal rights to those services can be protected by, for example, the creation of easements; but the standards relating to conversions require no more.

[53] We also observe that the Matters of Control and Assessment Criteria for controlled activities include “compliance with an approved resource consent except for boundary adjustment subdivision”. For Assessment, the reader is also referred to

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<sup>18</sup> Appellant/Applicant’s Closing Submissions, at [24].

Policy E38.3(6). That policy provides:

- (6) Provide for subdivision around existing development, and where it enables creation of sites for uses that are in accordance with an approved land use resource consent and where there is compliance with Auckland-wide and zone rules.

[54] That policy is clearly focussed on enabling subdivision around existing development provided the sites and uses are in compliance with an approved land use consent. The Council accepts there is compliance with the consent. The reference to Auckland-wide and Zone rules brings any analysis back to the relevant Subdivision Rules.

### **Adverse effects of the activity on the environment**

[55] The subdivision application describes the onsite soakage system for stormwater, and that the dwellings are to be serviced by a reticulated wastewater system.<sup>19</sup> There was disagreement between the experts as to whether testing of the stormwater soakage system is required.

[56] The Council is concerned that the cross lease conversion may result in wider environmental effects. Changing the underlying legal arrangement may result in additional development that would not have occurred but for the subdivision. From engineering and planning perspectives, that would have adverse stormwater effects due to unlawful discharges resulting from poor functioning and location of connections arising from future development effects relating to new rights that provide for intensification. Similar concerns were raised about adverse wastewater effects resulting from unauthorised or poorly functioning collection and disposal networks.<sup>20</sup>

[57] Future development effects in terms of residential amenity and neighbourhood character were raised, with new lot boundaries allowing for intensification, increased impervious areas or building coverage requiring an upgrade

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<sup>19</sup> JWS dated 15 September 2023, at [18].

<sup>20</sup> Council's Opening Submissions, at [20].

of infrastructure. There was discussion at the hearing about various scenarios for future development, but we find that they would likely trigger other processes under the Building Act 2004 or under the AUP.

[58] The potential for wider environmental effects was tested during questioning of Mr Revill, who conceded that any such effects would be existing with or without the subdivision.<sup>21</sup>

[59] Mr Revill and Mr Cook agreed that “in theory the activity of a cross lease conversion is in effect a paper exercise that should have no impact as no physical works are being undertaken”.<sup>22</sup>

[60] The appellants argue that the cross lease conversion does not alter the built form of any existing buildings, the intensity of any existing activity or the servicing of those buildings and activities. Any pre-existing adverse environmental effects on the environment may continue but are not caused or created by the cross lease conversion.

[61] Mr Quinn acknowledged that conditions 8 and 9 are not about future developments on the site; they relate to whether existing infrastructure adequately works for the proposed cross lease to fee simple subdivision.

[62] We find that conditions 8 and 9 are not directly connected to a rule in the plan nor an adverse effect (of the subdivision activity) on the environment.

[63] The cross lease conversion does not involve any additional development or physical works (other than the removal of an existing carport). There are no physical changes or changes to the use of the dwellings due to the subdivision. The proposed subdivision changes the tenure from cross lease to fee simple, with the boundary lines being consistent with the lease lines of the original cross lease plan.

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<sup>21</sup> NOE page 104, lines 10-22.

<sup>22</sup> JWS dated 15 September 2023, at [16].

[64] We allow the appeal and delete conditions 8 and 9 from the resource consent.

## **Declarations**

[65] The applicants, in their final submissions, amended the Application for Declarations to focus more clearly on controlled activity cross lease conversions.<sup>23</sup>

[66] The declarations now sought are:

- a) The Auckland Council can only impose conditions on subdivision consents authorising conversion from cross lease title to fee simple title as a controlled activity under E38.4.1(A3) of the Auckland Unitary Plan where directly connected to a matter of control listed in AUP E38.11.1;
- b) Matter of Control E38.11.1(c) enables the Council to:
  - i) Condition for the provision of services to each lot and manage the effects of providing such services (where physical works are required); and
  - ii) Impose conditions requiring the legal rights to services to be provided by an appropriate legal mechanism.
- c) The Auckland Council has no function, power, right or duty to impose conditions on a subdivision consent authorising the conversion from cross lease title to fee simple title as a controlled activity under E38.4.1(A3) of the Auckland Unitary plan relating to the standard of private on-site infrastructure and servicing.

[67] The Council does not oppose the declaration in (a), does not oppose the declaration in (b) provided an element of functionality is included, and opposes the declaration in (c).

### ***Declaration (a)***

[68] This declaration reflects the relevant requirements of E38 Urban Subdivisions. Subdivision is a controlled activity provided it complies with the applicable standards.<sup>24</sup> If there is compliance with the General and Specific Standards, the activity will be a controlled activity. Matters of Control for controlled activities are

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<sup>23</sup> Appellant/Applicant's Closing Submissions.

<sup>24</sup> Rule E38.4.1 (A3).

provided, and the Council's ability to impose conditions is limited to those matters.<sup>25</sup>

[69] The declaration has been agreed by both parties. We find, however, that the declaration would be a duplication of the provisions already in the AUP and is therefore of no utility. We decline it.

***Declaration (b)***

[70] The declaration in (b)(i) seeks to limit the Council's ability to impose conditions on [cross lease conversions] under the Matter of Control addressing "the effects of infrastructure provision".<sup>26</sup> The Council does not oppose, provided that the declaration is amended to include a reference to the 'functionality of infrastructure'.

[71] We are not sure that the declaration advances the Applicant's cause with its reference to "condition for the provision of services to each lot and manage the effects of providing such services (where physical works are required)". That is the type of condition that has led to the appeal and this Application for Declarations. Also, it is not clear what the reference to "physical works" means. For its part, with its conditional agreement to this declaration the Council is attempting to impute into the AUP provisions the concept of functionality; that the relevant Standard relates to more than just the location of infrastructure but also the condition of that infrastructure. We have found that the relevant Standards relate to location of infrastructure and not the functionality of stormwater and wastewater pipes. We are not, therefore, willing to declare that the condition outlined in (b)(i) can be imposed.

[72] The Application for Declaration (b)(ii), again as for (a), repeats what the Plan enables. We decline to make that declaration.

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<sup>25</sup> Rule E38.11.1.

<sup>26</sup> Rule E38.11.1(c).



***Declaration (c)***

[73] Declaration (c) as redrafted is somewhat broad in nature, albeit restricted to cross lease conversions as a controlled activity. It is opposed by the Council.

[74] Not all cross lease conversions are necessarily similar, and while Mr Clode has acknowledged that virtually all of the cross lease subdivisions he is or has been involved with have been on the basis of existing use rights, this is not necessarily always the case.

[75] We are assisted by the Court's observations in *Re McKay* that there may be:<sup>27</sup>

...subsidiary issues as to the extent to which an assessment of effects on the environment should go in assessing such an application. There may also be issues as to the extent to which the consent authority can or ought to impose conditions on any subdivision consent whether under ss 108 and 22 of the Act or under statutory provisions that may affect the development of land, especially where a conversion may require changes to the existing buildings or services (including rights of way and vehicle crossings).

[76] Furthermore:<sup>28</sup>

The most likely source of conflict will be where the owners and the Council disagree as to the extent that the terms and conditions on which the cross lease was first granted consent remain sufficient and otherwise appropriate at the time of the conversion. While it is true that the Council may not impose conditions which would require the owners, in carrying out any building work associated with the conversion, to achieve performance criteria that are additional to, or more restrictive than, performance criteria prescribed in the building code in relation to that building work or take any action in respect of that building work if it complies with the building code, it is possible that alterations to existing buildings will entail upgrading work to be undertaken. There may be other changes to structures or other arrangements (such as access and services) on site which similarly could require relocation or upgrading work.

[77] There is no doubt that an assessment of the effects on the environment is required to include information which is specified in sufficient detail to satisfy the purpose for which it is required. The applicant must provide enough information.

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<sup>27</sup> *Re McKay* [2018] NZEnvC 180, at [49].

<sup>28</sup> *Re McKay*, at [50].

And conversely the Council ought not require too much.

[78] Indeed:<sup>29</sup>

...the consent authority should generally approach such an application in a way that is mindful of the possibility that there may be few, if any material environmental implications warranting a full scale assessment of the proposal as if it were a new development. ...

[79] Each application for a cross lease conversion must be treated on its own merits. Each application may be similar but also may be different. It is important that the consent authority is able to assess each application individually, and therefore we find that the Application for Declaration (c) is too broad and wide ranging.

[80] The Application for Declaration (c) is declined.

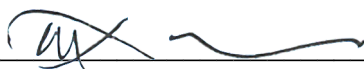
### **Outcome**

[81] **The appeal is allowed and conditions 8 and 9 are cancelled.**

[82] **The Application for declarations is declined.**

[83] **Costs are reserved. Any application for costs is to be filed within 10 working days; any reply within 10 working days after that.**

For the court:



**MJL Dickey**  
**Environment Judge**

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<sup>29</sup> *Re McKay*, at [55].

