

Before the Hearing Commissioner
Appointed by Ashburton District
Council

Under the Resource Management Act 1991

In the matter of an application by GDT and JR Osborne at 798
Longbeach Road to renovate and convert a former Scout
Hall to a dwelling within the Rural B zone (LUC23/0033)

Legal submissions on behalf of the Applicants

10 September 2024

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May it please the Commissioner

- 1 These legal submissions are presented on behalf of Graham Donald Tamati Osborne and Jennifer Ruth Osborne (**Applicants**) in respect of an application for land use consent to renovate and convert the existing and currently disused former Scout Hall at 798 Longbeach Road (**Site**) to a dwelling within the Rural B zone (**Proposal**).
- 2 The external alterations proposed include replacing existing windows with modern joinery and the repair or replacement of any existing building fabric as required. No external extensions are proposed. Internal alterations include the conversion of the existing hall into a two-bedroom dwelling. The existing attached double garage building, and existing shelter belts and mature vegetation are to be retained.
- 3 The Ashburton District Council's (**Council**) Reporting Officer, Ms Wright, recommends that resource consent is granted for the Proposal subject to conditions.
- 4 The key matters for consideration include:
 - (a) whether any reverse sensitivity effects of the Proposal on the environment will be minor; and
 - (b) whether the Proposal will be contrary to the objectives and policies of the Rural B Zone, and the Ashburton District Plan generally.
- 5 The Applicant's case is that the key effect of the Proposal is reverse sensitivity. The use of the buildings as dwellings, will not alter the existing non-compliances with the site standards. However, it is submitted that the adaptive re-use of an existing building on an undersized lot, will only generate adverse effects that are less than minor, and the Proposal is not contrary to the objectives and policies of the Rural B Zone, and the Ashburton District Plan generally.

Background

- 6 The Site was purchased by the Applicants in 2020, and the application for the land use consent was received by the Council on 2 May 2023. The Applicant's intention for the Site is to use it as their holiday home. The close proximity to both Mount Hutt and Lake Hood is seen as beneficial to them.

Activity Status

- 7 The Applicants accept the Officer Report's assessment that the activity requires resource consent as a non-complying activity

8 The Proposal is a non-complying activity¹ as there are non-compliances with standards relating to setback from neighbours², site coverage³ and queueing length.⁴ As a result of these non-compliances, the zone standard applies which triggers this activity status.

Relevant law

9 An application for a non-complying activity is to be assessed under sections 104D, 104 and 104B of the RMA.

Section 104D

10 Section 104D of the RMA relevantly provides that:

104D Particular restrictions for non-complying activities

- (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
- (a) the adverse effects of the activity on the environment ... will be minor; or
 - (b) the application is for an activity that will not be contrary to the objectives and policies of—
 - (i) the relevant plan ...

11 These tests have been described as the "gateways". Pursuant to section 104D (1), only one of the two gateway tests need to be satisfied, in order for consent to be granted.

Section 104

12 Even if the Proposal meets one of the gateway tests, the Commissioner still retains overall discretion as to whether to grant consent having regard to the criteria in section 104 of the RMA.

¹ Ashburton District Plan, Zone Standard 3.10.3 Residential Density.

² Ashburton District Plan, Site Standard 3.9.5 Setback from neighbours.

³ Ashburton District Plan, Site Standard 3.9.12 Site Coverage.

⁴ Ashburton District Plan, General Standard 10.8.11 Queueing Length.

13 Section 104 RMA provides that:

Section 104 Consideration of applications

- (1) When considering an application for resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -
 - (a) any actual or potential effects on the environment of allowing the activity; and
 - (b) any relevant provisions of – ...
 - (vi) a plan ...
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
- (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect on the environment if a national environmental standard or the plan permits an activity with that effect.
- (3) A consent authority must not -
 - (a) when considering an application, have regard to -
 - (i) trade competition or the effects of trade competition;
 - (ii) any effect on a person who has given written approval to the application.

14 Your evaluation under section 104 requires giving "genuine thought and attention" to the various matters set out under this section.⁵ To "have regard to" does not require you to "give effect to."⁶ The matters of consideration under section 104 are on equal footing, so that none of the subsections are to be elevated to a primary status.⁷ All matters are to be considered and given such weight as you see fit.⁸

⁵ *Progressive Enterprises v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009 at [15].

⁶ *Progressive Enterprises v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009 at [15].

⁷ *Henderson v Papakura District Council* A019/03, 10 February 2003 at [34].

⁸ *Kennett v Dunedin City Council* (1992) 1A ELRNZ 168 at 182; Referred to with approval *Ahuareka Trustees (No 2) Ltd v Auckland Council* [2019] NZHC 3142 at [17].

Section 104B

- 15 Section 104B of the RMA provides that a consent authority may grant or refuse the application, and if it grants the application, it may impose conditions under section 108 of the RMA.

The Environment

- 16 It is important to determine the environment against which the Proposal should be assessed. The environment includes the environment as it currently exists and the environment as it exists with permitted activities and/or unimplemented resource consents.⁹ Determination of the environment requires a factual finding that, once made, there is no direction to disregard.¹⁰
- 17 The Site is situated in the Rural B Zone. It is on LUC Class 2 land. An existing Scout Hall and attached double garage are located on the Site. There is mature vegetation and shelter belts on the Site.
- 18 The surrounding environment is mostly rural farmland, including large farms used for grazing and cropping. Longbeach Road, which is the road that the Site is located on, is straight and wide. In all directions there is clear visibility. Wide grassed berms line both sides of the road. There are existing buildings nearby that have an appearance similar to the Site.

Effects on the environment

- 19 The RMA does not anticipate no, or even minimal effects. Any assessment of effects must be informed by the existing environment, and the provisions of the Ashburton District Plan (**District Plan**).
- 20 The effects assessed for the Proposal are:
- (a) Visual effects;
 - (b) Character/Amenity effects;
 - (c) Servicing effects;
 - (d) Traffic effects;

⁹ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] 12 ELRNZ 299, at [84]; Referred to with approval in *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2023] NZEnvC 270.

¹⁰ *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] ELRNZ 299 at [90].

(e) Reverse sensitivity effects; and

(f) Positive effects

21 The majority of these effects already exist as a result of the existing buildings on the Site. Mr Mountfort has assessed these in full in both the application and his evidence, and the Section 42A report reaches similar conclusions.

Traffic effects

22 The queuing length site standard is not met due to the Site being gated, however the Site itself is capable of providing a suitable queuing length. As a result, traffic effects have been considered.

23 The land around the Site is flat, and there is excellent visibility in all directions for drivers entering and leaving the Site. Traffic levels are light, and traffic safety issues are expected to be similar to those arising from existing dwellings along the road.¹¹ The Section 42A Report discusses the substantial berms on either side of the road, and the excellent visibility in all directions are expected to mitigate any road safety issues arising from restricted opportunity for onsite vehicle queuing.¹² The reporting officer also considered the potential for the entrance gate to be left open and the anticipated low level of vehicle movements from this Site ensure safe ingress and egress will be possible.¹³ Mr Mountfort concurs with the Section 42A Report, that any traffic effects can be appropriately managed.¹⁴

Reverse Sensitivity effects

24 The Applicant accepts the conversion of the Scout Hall to a dwelling requires consideration of both the residential activity proposed and the building it will occur in. Even without consent for a dwelling, there would remain a building that is rundown and has been located on an undersized lot for approximately 60 years, with associated non-compliances regarding site coverage, queuing length and setbacks. The granting of this consent would not change that (other than to authorise those non-compliances) but it would result in the Site and buildings being improved and maintained.

¹¹ Resource Consent Application Report at [23]; and Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [11].

¹² Section 42A Report at 15.

¹³ Section 42A Report at 15.

¹⁴ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [24]

- 25 The key adverse effect of the Proposal relates to reverse sensitivity in respect of the surrounding farm operations. Mr Mountfort explains that there is the potential for effects to arise at the Site from agricultural activities on surrounding rural land. This could include noise, dust, odours from farmed animals, production and storage of silage or spray drift.¹⁵ These effects are likely to be intermittent, short-term seasonal or occasional.¹⁶
- 26 To address these effects within the Site, the Applicants propose to double glaze both the doors and windows, along with retaining the existing plantings and shelter belts along the boundaries of the Site.
- 27 In addition, the Applicants have volunteered a no-complaints covenant (to be required in consent conditions) to be placed on the record of title for the Site to mitigate any reverse sensitivity effects,¹⁷ and this would be binding on future owners and occupiers. This would mean that no owner or occupier, now or in the future, could complain to the Ashburton District Council, Canterbury Regional Council, or any other authority regarding grazing, cropping, cultivation, crop spraying, harvesting, burning of crop residue, or irrigation operations on nearby farmland.
- 28 This approach is supported by the reporting officer, in particular Ms Wright commented that covenant condition would ensure prospective purchasers are aware of the existing environment, and that it will provide a mechanism to manage expectations of the area.¹⁸

Conclusion

- 29 In terms of the first gateway, "minor" is not defined in the RMA. However, the Planning Tribunal observed that (emphasis added):¹⁹

in using the word "minor" Parliament intended that whatever adverse effects there might be they had to be **less than major, but could be more than simply minute or slight.**

¹⁵ Resource Consent Application Report at [25]-[26]; and Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [25]-[26].

¹⁶ Resource Consent Application Report at [28]; and Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [29].

¹⁷ Resource Consent Application Report at [29].

¹⁸ Section 42A Report at 16.

¹⁹ *Bethwaite and Church Property Trustees v Christchurch City* PT Decision C85/93, 10 November 1993.

30 The High Court has observed that (emphasis added):²⁰

the purpose of s 104D(1)(a) is to allow applications for non-complying activities which may or will be contrary to the objectives and policies of an operative district plan or proposed district plan where the adverse effect is **so "minor" that that is likely not to matter.**

31 In respect of this Proposal, both Mr Mountfort and the Reporting Officer, Ms Wright conclude that the effects are less than minor. Accordingly, consent can be granted to the Proposal under the first gateway test.²¹

Positive effects

32 Positive effects can be considered under the RMA. The Reporting Officer, Ms Wright and Mr Mountfort both consider a number of positive effects will be realised by the Proposal. These include:

- (a) the visual appearance of the Site will be enhanced by the restoration and repair of the buildings on the Site, and the Site itself;²²
- (b) the restoration of a building with some heritage value;²³
- (c) the provision of additional residential accommodation;²⁴
- (d) the increase in the variety of housing stock in the district without relying on the subdivision of productive land;²⁵
- (e) the suitability of the size of the site and location for residential use by those working nearby, hoping to retire in the country, or with children attending Longbeach School in particular;²⁶ and

²⁰ *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815 at [101]-[102].

²¹ Resource Management Act 1991, section 104D(1)(a).

²² Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [20].

²³ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [37].

²⁴ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [38]; and Section 42A Report at 16.

²⁵ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [38]; and Section 42A Report at 16.

²⁶ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [38]; and Section 42A Report at 16.

- (f) investment into the maintenance and general improvement of a structure with anecdotal historic significance to the local community after being utilised as the Longbeach Scout Hall for over 50 years.²⁷

Planning Framework

Ashburton District Plan – Objectives and Policies

- 33 The relevant provisions relate to rural primary production²⁸, rural character and amenity²⁹, natural hazards in rural areas³⁰, biodiversity³¹, and transport safety and accessibility³².
- 34 Both Mr Mountfort and Ms Wright have assessed the Proposal against the relevant objectives and policies of the Ashburton District Plan, and have concluded that the Proposal is consistent with the majority of the relevant objectives and policies of the Ashburton District Plan, and is not contrary to the relevant provisions.³³
- 35 It is submitted that the correct weight to be given to plan provisions flows from the provisions themselves, both their terms and their context. Generally, an assessment of relevant objectives and policies requires "a fair appraisal of the objectives and policies read as a whole."³⁴ However, following the judgement of the Supreme Court in *King Salmon*, it is now recognised that more specific or directive provisions, particularly those which set "environmental bottom lines" may warrant greater weight.³⁵

²⁷ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [38]; and Section 42A Report at 16.

²⁸ Ashburton District Plan, Objective 3.1, and Policies 3.1A, 3.1D and 3.1E.

²⁹ Ashburton District Plan, Objective 3.5, and Policies 3.5A and 3.5B.

³⁰ Ashburton District Plan, Objective 3.7 and Policy 3.7A.

³¹ Ashburton District Plan, Objective 3.2 and Policy 3.2A.

³² Ashburton District Plan, Objective 10.3 and Policy 10.3B.

³³ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [52]; and Section 42A Report at 22.

³⁴ *Dye v Auckland Regional Council* CA86/01, 11 September 2001 at [25]; referred to with approval in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

³⁵ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38; [2014] NZLR 593.

36 Objectives and policies of recent instruments in the policy hierarchy may be given more weight but relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled.³⁶

37 I note that Policy 3.1D provides:

Policy 3.1D

Avoid the establishment of residential activities or the expansion of urban boundaries in close proximity to intensive farming or other rural activities, to manage reverse sensitivity effects that can be created by such activities i.e. noise, odour and dust.

38 It is submitted that the potential reverse sensitivity effects will be appropriately managed through volunteered conditions, relating to landscaping, double glazing and a no-complaints covenant, and are less than minor. Accordingly, the Proposal is not contrary to this policy.

39 In terms of the second gateway, an activity must not be contrary to the relevant objectives and policies "as a whole" to obtain consent under section 104D (1)(b) RMA. It is rare for this conclusion to be reached based on a single objective or policy.³⁷ The Court observed (emphasis added):³⁸

it is rare for a consent authority, or the court, to base its decision either way, on a single objective or policy. The usual position is that there are sets of objectives and policies either way, and **only if there is an important set to which the application is contrary can the local authority rightly conclude that the second gate is not passed.**

40 To be "contrary to" the objectives and policies of a relevant plan is a high threshold to meet. The Court has found that "contrary to" means "repugnant to" or "opposed to".³⁹

³⁶ Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency [2021] NZHC 390, [2021] NZRMA 303 at [30] (in rejecting a suggestion that "environmental bottom lines" stood in the way of a proposal).

³⁷ *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74].

³⁸ *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110 at [74].

³⁹ *Outstanding Landscape Protection Society Incorporated v Hastings District Council* [2008] NZRMA 8 at [15].

41 It is submitted that in terms of this gateway test, the Proposal is not contrary to the relevant objectives and policies of the Ashburton District Plan.⁴⁰ Therefore, consent can also be granted under this gateway.

National Policy Statement for High Productive Land 2022 (NPS-HPL)

42 The NPS-HPL was introduced in 2022 and its primary objective is that highly productive land (**HPL**) is protected for use in land based primary production, both now and for future generations. Relevant to this Proposal, is:

- (a) Policy 8 which provides that HPL is protected from inappropriate use and development; and
- (b) Policy 9 that reverse sensitive effects are managed so as not to constraint land-based production activity on highly productive land.

43 The NPS-HPL applies to the Site as it is zoned rural and contains LUC Class 2 land, which means the interim definition of highly productive land applies.⁴¹

44 Clause 3.9 of the NPS-HPL provides that "territorial authorities must avoid the inappropriate use or development of highly productive land that is not land based primary production," unless it meets one of the exceptions provided. It is submitted that the proposed conversion of an existing building falls into the exception as "a small scale land use activity that has no impact on the productive capacity of the land." The Site itself is not going to be affected, as no additional building is occurring.

45 Clause 3.9(3) further requires that territorial authorities must take measures to ensure that any use or development of highly productive land:

- (a) Minimises or mitigates any actual loss or cumulative loss of the availability and productive capacity of highly productive land in their district; and
- (b) Avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on land based primary production activity from use or development.

⁴⁰ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [52]; and Section 42A Report at 22.

⁴¹ NPS-HPL 2022, Clause 3.5(7).

46 Given the Proposal will only result in the change in use of an existing building, the Site is already used for non-rural purposes, and there will be no loss of highly productive land⁴², it is submitted the Proposal is consistent with the objectives and policies of the NPS-HPL.

Canterbury Regional Policy Statement (CRPS)

47 It is submitted that the Proposal does not challenge any policies in the CRPS and therefore the CRPS is not relevant to the application. This approach is supported by both Mr Mountfort and Ms Wright.

Precedent effect

48 If there is concern regarding precedent, this should be addressed under section 104(1)(c) of the RMA.⁴³ The precedent effect of granting a resource consent is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity.⁴⁴ While earlier decisions provide an expectation of like treatment, this is not an absolute entitlement.⁴⁵

49 However, it is submitted that there is an extremely low risk of precedent effect if this Proposal is granted due to its "unique nature."⁴⁶ For a precedent effect to occur another application would need the following characteristics⁴⁷:

- (a) a small, disused former community building;
- (b) on its own separate title;
- (c) in an expansive Rural B or C zoned area;
- (d) relatively distanced from any settlement;
- (e) surrounded by large farms; and
- (f) on a lightly travelled local road.

⁴² Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [44].

⁴³ *Dye v Auckland Regional Council* CA86/01, 11 September 2001 at [42].

⁴⁴ At [49].

⁴⁵ *Feron v Central Otago District Council* ENC Christchurch C075/09, 11 September 2009 at [65].

⁴⁶ Section 42A Report at [6.6].

⁴⁷ Statement of Evidence of David Mountfort dated 30 August 2024 at [58].

Plan Integrity

50 Integrity of the plan can be considered.⁴⁸ Issues regarding integrity of the plan are addressed under sections 104(1)(b) or (c) of the RMA.⁴⁹ The weight to be given to any effect on integrity must be a matter of judgment for the consent authority.⁵⁰ An application will only be declined on the basis of plan integrity where the proposal clearly clashes with important provisions of a plan or it is likely that further applications will follow which are both materially indistinguishable and equally incompatible with the plan.⁵¹ Both precedent and integrity effects must be largely based on the particular circumstances of the application.⁵² Given the conclusions in relation to precedent effects, it is submitted that no plan integrity issues arise.

Submissions

51 The application was limited notified to two parties, and one submission from Ian and Diana Mackenzie (**Submitter**) was lodged in opposition to the Proposal. The Submitter is the adjoining landowner at 902 Longbeach Road, Ashburton.

52 Some of the matters raised in the submission have been addressed above, in this section I address the outstanding matters.

53 The submission also stated that:

- (a) the site was "too small";
- (b) the proposal will result in "externalities such as reverse sensitivity";
- (c) there would be "possible contamination" of the ground water bore;
- (d) the buildings are "derelict" and "an eyesore"; and
- (e) they are "not suitable for conversion into a dwelling".

54 The outstanding issue is in relation to the servicing of the Site and the Submitters perceived concerns regarding "possibly contamination" of the ground water bore. The proposed dwelling is to be serviced with a water

⁴⁸ *Batchelor v Tauranga District Council (No 2)* HC Wellington AP189/92, 12 November 1992.

⁴⁹ *Gould v Rodney District Council* ENC Auckland A163/2003, 22 September 2003 at [59]-[60].

⁵⁰ *Batchelor v Tauranga District Council (No 2)* HC Wellington AP189/92, 12 November 1992.

⁵¹ *Blueskin Bay Forest Heights Ltd v Dunedin City Council* [2010] NZEnvC 177 at [48].

⁵² *Auckland Regional Council v Roman Catholic Diocese of Auckland* (2008) 14 ELRNZ 166 at [111].

tank and a septic tank.⁵³ A consent is held from Environment Canterbury for the septic tank (CRC212067).⁵⁴ Both these tanks are standard features at rural dwellings and are compatible with the rural environment.⁵⁵

- 55 The reporting officer noted they were unable to speculate on contamination of neighbouring water sources and that they would defer to the specialist expertise of those processing the septic tank consent application at the Canterbury Regional Council.⁵⁶ The Applicants concur that speculation is inappropriate in the circumstances and that appropriate water consents (and the associated effects) are a Regional Council function. The Canterbury Regional Council's advice is that the implementation on CRC212067 would not have any impact on the neighbour's water supply bore and its position is that the system can be installed as per the condition contained within it.⁵⁷
- 56 The Applicants are aware that building consent is required for the change in use. The Applicants record that the s42A report advises that the "Ashburton District Building Manager raised no concerns around the redevelopment during this initial review of this application."⁵⁸

S42A Report

- 57 The resource management issues have been identified in the Section 42A report by Ms Wright. The majority of the aspects of the Section 42A report have already been addressed in these submissions. This section focuses on the outstanding matters that are not covered above.
- 58 The reporting officer has proposed the inclusion of conditions relating to a contaminated material discovery protocol, and recognition of the mitigation proffered by the Applicant including retention of shelterbelts and double glazing of the buildings. The Applicants consider these conditions are appropriate.

⁵³ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [19].

⁵⁴ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [65].

⁵⁵ Statement of Evidence of David Laurence Mountfort dated 30 August 2024 at [19].

⁵⁶ Section 42A Report at 16.

⁵⁷ Statement of Evidence of David Mountfort at Appendix 2

⁵⁸ Section 42A Report at 16.

Part 2

- 59 There is now a well settled line of case law that identifies the need for lower-order planning document to give effect to higher order planning documents, and for generally there to be no need to refer to Part 2 in consideration of a resource consent when the relevant Plan has competently prepared under the RMA.⁵⁹
- 60 For completeness, it is submitted that the Proposal is in accord with Part 2 and the Applicant agrees with both Mr Mountfort and the Reporting officer's conclusion that no further assessment under Part 2 is required.

Conclusion

- 61 The Applicant's case is that when viewed objectively in the context of the receiving environment, and the existence of the Scout Hall, that the conversion to a dwelling will not generate effects that are more than minor and the Proposal is not contrary to the relevant District Plan objectives and policies.
- 62 The Applicant is confident that the reverse sensitivity issue raised by the Submitter has been appropriately considered, and the provision of a no-complaints covenant for both the owner and any occupier (if the case arises) of the Site will satisfactorily address this.
- 63 It is submitted that the Proposal meets both the gateway tests under section 104D, and therefore consent can and should be granted under the RMA with the conditions contained in the s42A Report.

Witnesses

- 64 The Applicants will call Mr David Mountfort, planning witness, in support of its case, and if the Commissioner has any questions, Ms Jenny Osborne, the Applicant, is also present today.

Dated this 10th day of September 2024



Samantha Gardner

Counsel for the Applicant

⁵⁹ *Crafar v Taupo District Council* [2024] NZEnvC 91 at [64]; *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316