BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 190

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal pursuant to s 120 of the Act
	BETWEEN	K AND S HOOD
		(ENV-2017-CHC-003)
		Appellants
	AND	DUNEDIN CITY COUNCIL
		Respondent

Court:	Environment Judge J J M Hassan Environment Commissioner R M Dunlop
Hearing:	at Dunedin on 13 and 14 November 2017
Appearances:	C Thomsen for the appellants R Brooking for the respondent D McLachlan and B Irving for the applicants
Date of Decision:	20 November 2017
Date of Issue:	20 November 2017

DECISION OF THE ENVIRONMENT COURT

A: The decision to grant consent is confirmed subject to modifying the landscaping conditions and the appeal is otherwise declined.

B: Costs are reserved and a timetable set.

REASONS

Introduction

[1] This is an appeal against a decision by the respondent granting land use consent to convert an existing shed ('shed') at 480 Riccarton Road, west Taieri ('the

site'/'property') into a dwelling ('Appeal Proposal') by Leah and Steven Greer ('the applicants'). The consent was sought retrospectively as the conversion was undertaken pre-emptively. The appeal seeks that the decision granting consent be overturned and consent be declined.

[2] The site is just over 2 ha in area and is a few kilometres south west of Mosgiel. It is in the Rural Residential ('RR') zone of the operative Dunedin City District Plan ('Plan'). There is also a proposed district plan, notified in September 2015 (entitled 'Second Generation Dunedin City District Plan ('2GP')), but its relevant rules are not yet in legal effect.

[3] Typical of other lifestyle blocks in the vicinity, the site is generally flat and rectangular and bounded by a post and wire fence and some shelterbelt planting. The shed, whose proposed conversion is the focus of the appeal, sits in its south-west corner. It is a typical rectangular shed with a pitched roof, now configured as a dwelling with an outlook and outdoor living area primarily orientated to the north-east. In contrast to other dwellings in the locality, it could be fairly described as a tidy and humble abode. Its present access is via a gravel driveway, shared for part of the way with the appellants' property.

[4] Use of the shed as a dwelling would be a permitted activity under the RR zone but for the fact that the minimum side yard for a residential activity is set at 10m (under r 6.6.2(i)) and the shed is just over 6m from the boundary with the appellants' property. As such, the proposal is a restricted discretionary activity (under Plan r 6.6.4(i)).

[5] The Council notified the consent application on a limited notified basis to the appellants. Their immediately adjacent 2 ha lifestyle block is presently bare land and is more or less south-east of the site. They intend to build their home there. In 2014, they secured resource consent to allow them to build two residential units. Under the terms of that consent, those would have been sited some 60m – 70m from the Appeal Proposal. However, in 2017, they secured a variation to this to give them greater flexibility about where to site their home within a specified building platform. Their desire is to site it on suitable high ground and to enjoy an open north-westerly outlook. They are currently consulting architects.

[6] On the applicants' side of the boundary, there is a recently lopped Poplar shelterbelt. Running parallel with that, about 1.5m in from the boundary on the appellants' side is a drain (some 4.2m – 4.5m wide), with a simple concrete culvert bridge allowing access to the applicants' site. Otago Regional Council ('ORC') has statutory responsibility for the drain. It has a designation requirement for it in the 2GP (encompassing the drain and immediate curtilage). The drain is scheduled in ORC's Flood Protection Management Bylaw 2012 ('ORC bylaw'/'bylaw'). The bylaw requires that ORC consent be obtained to put any building or structure or vegetation within a 7m restriction zone from the top edge of the drain on either side.[1] The applicants have secured written approval from ORC under both s 178 RMA and the bylaw to put up a simple boarded fence just on the drain side of their shelterbelt. The approval specifies some relevant conditions to which we return later in this decision.

[7] Part of the Appeal Proposal sits in a swale that is known to present some flooding hazard risk, particularly of surface flooding. This is depicted on a 'Swale Mapped Area' in the 2GP (and on some other Council records). However, the Council informs us that its related 2GP Rule 8.4.2.2, which requires the ORC's written approval to the application, is not yet in legal effect.[2]

[8] The court viewed the site and the appellants' property on 13 November 2017, with the assistance of the itinerary provided by the parties in their joint memorandum dated 30 October 2017. This included viewing the present shed and surroundings, including the pegged out areas on each property that were addressed by parties in evidence and submissions.

Statutory framework and legal principles

[9] In determining this appeal, we have the same power, duty and discretion as the Council's independent hearings commissioner had. We may confirm, amend or cancel the appealed decision (s 290 RMA). When considering the application and submissions pertaining to the appeal we must, subject to pt 2 RMA, have regard to

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1 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [13]-[25]; evidence of Leon Hallett for the applicants, dated 12 May 2017, at [8]-[12]. Mr Hallett's evidence suggests this is a no build zone but the bylaw indicates capacity to secure ORC consent.

2 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [109](c).

matters in s 104 RMA. In terms of this appeal, those relevantly include:[3]

(a) actual and potential effects on the environment of allowing the activity (i.e. the Appeal Proposal);
(b) relevant provisions of the Plan and the 2GP;
(c) relevant provisions of the Otago Regional Policy Statement ('RPS') and the proposed Regional Policy Statement ('pRPS');
(d) any other matters we consider relevant and reasonably necessary to our determination.

[10] Because the appeal concerns a restricted discretionary activity, the RMA confines us to considering matters within the scope of the Plan's specified restrictions.[4] The Plan (in r 6.6.4) sets that restriction as follows:

> The Council's[5] discretion is restricted to the condition or conditions with which the activity fails to comply under Rule 6.6.2.

[11] There was an element of contention about the effect of this statutory constraint for our consideration of various assessment matters specified in Plan provisions (particularly in r 6.7). The respondent pointed out that the r 6.7 assessment matters are not referenced in restricted discretionary r 6.6.4, whereas they are in the equivalent rule for full discretionary activities.[6] However, we do not find that to exclude the matters from our consideration. Specifically, nothing in the Plan (including r 6.6.4) specifies the matters are not relevant and r 6.7 itself starts 'In assessing any application'. We put this down to a simple lack of drafting quality in this aspect of the Plan. That point aside, there was not significant difference between parties on the approach we should take. The Plan is clear that our discretion is restricted to the side yard breach. Therefore, similar to the position in *Ayreburn Farms,*[7] our consideration of broadly expressed assessment matters must be subject to the specified limits of our discretion in r 6.6.4, being the side yard breach.[8] However, nor do the assessment matters operate to preclude us from considering other relevant matters on the evidence. Provided the evidence shows an adverse effect or other s 104 consideration to pertain to the side

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3 We have satisfied ourselves on the evidence that none of the other matters specified as either being required for or precluded from consideration for specified matters is applicable here.
4 Sections 290, 104C, 108 RMA.
5 Applicable to the court through s 290 RMA.
6 Legal submissions for the respondent, dated 13 November 2017, at [10].
7 *Ayreburn Farms Estates Limited v Queenstown Lakes District Council* [2012] NZHC 735.
8 Legal submissions for the respondent, dated 13 November 2017, at [17].

yard breach, we are not precluded from considering it.

[12] We also note the applicants' and respondent's submission that what we term r 6.7 (the provision specifying assessment matters) is not a 'rule', but a 'method'. We find nothing in this point. Those submissions did not address s 76 RMA on district rules. It occurs to us that 6.7 meets the relevant specifications so as to qualify as a district rule. That is in the sense that 6.7 is a provision whose function in the Plan is to assist the Council's exercise of its RMA functions and achieve related Plan objectives and policies, applying to a relevant part of the district (i.e. the RR zone). It is also in the sense that the specification of assessment matters gives direction to a consent authority's application of s 104 by listing matters for consideration to the extent relevant. Counsel did not appear to dispute that ignoring a relevant listed assessment matter would be an error of law. It follows that 6.7 is intended to regulate this function and, in that sense also, it is in the nature of a rule according to s 76.

[13] A further point of difference in legal submissions concerns whether we should exercise our permitted baseline discretion in s 104 RMA. That is a discretion to 'disregard an adverse effect of the activity on the environment if ... [the Plan] permits an activity with that effect'. The applicants submit that we should (and that is supported by the Council). The appellants argue we should not. We agree with the appellants. To apply a permitted baseline discretion here would not be consistent with justice in that it would effectively see us set aside the appellants' case. In particular, it would see us largely disregard their evidence on their personal experience of amenity values, including privacy and outlook. It would also not be consistent with the public interest dimension of our decision-making role insofar as flood risk matters are concerned. In particular, to disregard flood risk on the crude footing that a permitted activity dwelling would be at no less risk clearly misses the s 5 RMA dimension of enabling people and communities to provide for their health and safety.

[14] Therefore, we proceed to make findings on all of the evidence before us. However, we record that this is not a case that is sensitive to, or turns on, whether or not a permitted baseline approach is applied.

[15] Although not applying the permitted baseline discretion, we give consideration to what the Plan identifies as being anticipated for the RR zone. That includes our consideration of what it specifies as permitted activities (as well as what it says, for

instance, in objectives and policies). That evaluation bears on our consideration of evidence as to effects, including on amenity values, rural character and flood hazard matters. We put those propositions to counsel for the applicants and appellants, and understood them to be accepted.[9]

The determinative issues

[16] As counsel for the appellants acknowledged:[10]

> ... this is a simple case: Are the effects acceptable or are they not?

[17] The evidence, and emphasis of submissions, show these to be the determinative issues:

(a) would there be unacceptable effects on amenity values or rural character including open space?
(b) would there be unacceptable conflict between rural and residential activity or reverse sensitivity risk?
(c) would there be unacceptable flooding risk?

Would there be unacceptable effects on amenity values or rural character?

[18] In terms of these matters, the planning witnesses both focused on localised effects and, in particular, the effects that the side yard intrusion would have for the appellants' property. We agree and take the same approach to our consideration.

[19] The RMA defines 'amenity values' in the following terms not modified by the Plan:

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

[20] That definition serves s 7(c) RMA. Subject to the limits of our discretion, it requires that we have particular regard to the maintenance and enhancement of

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9 Transcript, p 12, l 27-33, p 13, l 1-8.
10 Transcript, p 82, l 16-32.

amenity values.

[21] On the matter of amenity values, a point of focus in the appellants' submissions (and cross-examination) is whether the Council planner (Ms Shipman) properly considered the appellants "subjective" appreciation of amenity values and rural character. They submit that she erred by solely focusing on what the Plan objectively describes as amenity values.[11] Relying on *Schofield,*[12] the applicants submit that what the appellants themselves appreciate is to be considered through the objective lens of planning provisions. In essence, they submit that the appellants' heightened desire for privacy and amenity should not hold sway over what the Plan intends by way of amenity value and character outcomes for the RR zone.[13]

[22] Firstly, we find the appellants' criticism of Ms Shipman unwarranted. Her evidence plainly considers the appellants' subjective appreciation of amenity values.[14] It is fair to observe that she was strongly guided by the Plan's approach to amenity values in her evaluation, but there is no error in that. In any case, the task is ours and we are amply informed of the appellants concerns.

[23] The RMA defines 'amenity values' in terms that come back to what people appreciate. Self-evidently, that can encompass what particular people (including the appellants) appreciate whether or not this reflects what other people appreciate. However, the relevant weight to be ascribed to those individual experiences is a different matter. Importantly, s 7(c) functions to direct particular regard to the maintenance or enhancement of amenity values rather than imposing any duty that they be maintained or enhanced. Nor is there any such duty in the Plan (or the 2GP). Clearly, as this case illustrates, one group of people may appreciate different, and potentially competing, amenity values. For example, the applicants see the amenity value of the shed's present location as allowing them more room for their small-scale farming,[15] whereas the appellants value the shed being retained for such usage in that it buffers them from any dwelling being built in that locality.[16]

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11 Legal submissions for the appellants, dated 14 November 2017, at [33].

12 *Schofield v Auckland Council* [2012] NZEnvC 68 at [51].

13 Legal submissions for the applicant, undated delivered 13 November 2017, at [46]-[48]; Transcript, p 114, l 8-14.

14 Evidence of Ms Shipman for the Council, e.g. at [136], [138], [140].

15 Evidence of Steven Greer for the applicants, dated 12 May 2017, at [4].

16 Evidence of Stacey Hood, dated 16 June 2017, at [5], Anx 2.

[24] Given that people can have competing amenity values, the Plan provides an important objective lens, as *Schofield* recognised. In this regard, we find Ms Shipman's approach sound. She has properly informed herself of the competing personal values of the parties and been guided by the Plan's related objectives and policies and what they indicate as the Plan's intended outcomes. As a further point, more assertions of concern not backed by a proper foundation in fact, are ascribed less weight.

[25] Ms Hood raises various concerns in regard to privacy, noise, light spill, and/or visual amenity effects.

[26] She said her family's need for privacy is "well known" and "affirmed by our family physician".[17] However, she did not elaborate on those points. Without having heard from the physician, we are not in a position to make any finding on whether or not there are any particular medical reasons why the appellants, or particular members of this family, require enhanced privacy. Similarly, we do not give significant weight to the report attached to Ms Hood's evidence entitled 'The Psychological Impact of Home Privacy' and shown to be authored by Christopher Burt, Associate Professor, University of Canterbury. It concludes that conversion of the shed to a dwelling would invade the appellants' home privacy and negatively impact on their wellbeing. However, the report does not disclose, and we were not told, whether Mr Burt is a registered psychologist on the New Zealand Psychologists Board register. Nor does the document record that Mr Burt has read and abided the Environment Court's code for expert witnesses. In addition, we find that the unqualified stringency of some opinions in the report verge on advocacy rather than being those of an independent expert in his field.

[27] The appellants' planner, Mr Anderson, draws from Ms Hood's evidence and his own experience. He considers the fact that the Appeal Proposal would be only 6m from the boundary would give rise to unacceptable effects on the appellants' amenity values and their appreciation of open space and other aspects of rural character. In all of those matters, the Council planner, Ms Shipman, disagrees. She concurs with the conclusions of the Council's independent hearings commissioner, namely that the proposal does not give rise to unacceptable effects on amenity values or rural character, including in the respects alleged. For the following reasons, we prefer Ms Shipman's evidence and find the Council decision sound in all respects.

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17 Evidence of Stacey Hood, dated 16 June 2017, at [3].

[28] Firstly, we are satisfied that the practical separation between the Appeal Proposal and the appellants' consented building platform will be satisfactory and sufficient.

[29] In reaching that finding, we accept the evidence of the applicant's surveyor, Mr Hallett. Because of the intervening ORC scheduled drain, we find an effective separation distance of at least 18.9m – 19.4m would be achieved.[18] That would be the case were the appellants to elect to build as close as possible to the north-eastern side of their consented building platform. Hence, they would be practically no worse off under such a scenario than if a permitted activity dwelling were built on the applicants' property.[19] On the other hand, the appellants resource consent gives them a generous degree of flexibility to achieve greater separation should they elect that and/or to design and orientate their dwelling and landscaping to achieve enhanced privacy and seclusion.

[30] The shed is an established structure in the view of the appellants' property. Mr Anderson correctly acknowledges that, if used as a shed, it is a permitted activity in its current location. However, he says that the adverse effects arise from its change of use to residential purposes.[20] Those effects are particularised by Ms Hood to include light spill, movement of people and vehicles close to the boundary, noise disturbance and "visual interaction".[21] Mr Anderson considers that one of the rural amenity values of the locality is "neighbours at a distance". He refers to the fact that there will be windows and a glass door facing his client's property providing "an element of visibility"[22] with internal lighting being able to be observed.[23] He considers this overly close proximity to compromise the feeling of open space, rural outlook and privacy.[24]

[31] We accept that, relative to a typical Residential zone in say Mosgiel or Dunedin, the RR zone intends more generous open space, and separation between neighbours. However, we accept Ms Shipman's evidence that the key control for these things in the RR zone is the density control, along with controls on allotment size, height limits and status of activities. The Appeal Proposal complies with all of those

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18 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [124], [125].
19 Common Bundle, Tab 4.
20 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [82].
21 Evidence of Stacey Hood, dated 16 June 2017, at [18] 4th bullet point.
22 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [77]-[82].
23 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [77]-[80].
24 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [69]-[72].

controls.

[32] We also accept Ms Shipman's opinion that, through compliance with those controls, there is satisfactory mitigation of all the claimed amenity and rural character effects.[25] We agree with Ms Shipman that the side yard controls have only a limited role in protecting privacy, quietness and other residential amenity values in the Plan's RR zone. In this context, we find that even more confined given the Appeal Proposal:

(a) is of a relatively low height (i.e. well below the 10m height limit for a permitted activity);
(b) is on a site that is more or less level with the appellants' property;
(c) has its outdoor living predominantly orientated towards the north-west, rather than towards the appellants' property (a point acknowledged by the appellants in submissions);[26] and
(d) is sited in a locality that would remain generously set back from any potential new dwelling on the appellants' property (given the scheduled drain).

[33] As to that last matter, we accept Mr Hallett's evidence that the effective separation deficit would be 0.6m – 1.0m.[27] We agree with Ms Shipman that this is immaterial in that it would not have any detrimental consequence for amenity values or rural character or outlook.[28]

[34] Overall, we are satisfied on the evidence that the appellants would be no worse off than if a permitted activity dwelling were constructed next door. Having said that, we record that neither the RMA nor the Plan requires an outcome such that effects are no worse than for a permitted activity. We also accept Ms Shipman's evidence in finding that, should the appellants desire to enhance their privacy or other amenities, they have ample ability to do so under their resource consent and in the design and configuration of their home and its landscape treatment.[29] As this is a restricted discretionary activity, the applicants are entitled to have their proposal considered on its merits. Having done so, we are overwhelmingly satisfied that there are no amenity

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25 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [135]-[137].
26 Evidence of Mr Greer, dated 12 May 2017, at [8], Transcript, p 86, l 8-17.
27 Evidence of Leon Hallett for the applicants, at [14], [15].
28 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [124], [125].
29 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [138].

value or rural character considerations that are so significant that consent is inappropriate.

[35] For completeness, we record that we have considered the contrasting opinions of Mr Anderson and Ms Shipman on related Plan assessment matters. Mr Anderson refers to 6.7.3 (on amenity values), 6.7.4 (on cumulative effect), 6.7.7 (on glare and lighting), 6.7.13 (on visual impact), and 6.7.15 (on residential units).[30] Ms Shipman also identifies 6.7.6 (noise, a matter raised by Ms Hood), 6.7.9 (bulk and location) and 6.7.14 (forestry and shelterbelts, bearing on landscape treatment). Nothing of significance arises from consideration of those matters that we have not already covered off in our above findings.

Would there be unacceptable conflict between rural and residential activity or reverse sensitivity risk?

[36] Mr Anderson identifies the potential for future occupiers of the Appeal Proposal to be impacted by reverse sensitivity to permitted rural activities across the boundary, bearing in mind the extent of intrusion into the side yard. He acknowledges that the existing drain would limit rural activities on his clients' land, but says it will not fully restrict them to the boundary.[31] Ms Shipman acknowledges the relevance of this matter, but does not discuss it. We presume that is because she does not consider it sufficiently material on the evidence.

[37] There are some relevant assessment matters in the Plan on these themes. Rule 6.7.15(iv) refers to the potential for conflict between adjoining land uses activities arising from the location of the proposed residential activity. Rule 6.7.26(i) refers to the extent to which the proposed activity may adversely affect the ability of existing rural activities to continue to operate. Rule 6.7.26(ii) refers to the extent to which the proposed activity may result in conflict with existing rural activities.

[38] We find that the positioning of the Appeal Proposal 6m from the appellants' boundary would not give rise to any material risks of this nature. We bear in mind that there is only approximately 1.5m of flat land between the boundary fence and the ORC drain. Perhaps there will be activity there from time to time, e.g. weed control or

30 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [67].
31 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [83].

fencing. The drain would likely impede farm animals wandering so close to the fence. In any case, all such rural activities are contemplated by the RR zone.

Would there be unacceptable flooding risk?

[39] Ms Shipman explains that Council GIS records identify several potential hazards over the site. In addition to land stability, earthquake and liquefaction hazards, these include the Council's flood hazard records (as referred to by Mr Anderson). She considers it is significant that these hazard notations are not identified on Plan zoning maps nor identified by Plan provisions.[32] However, we observe that r 6.7.23 refers to where the Council has good cause to suspect that an application site is prone to natural or technological hazard. Overall, Ms Shipman considers that this assessment matter has little bearing on our consideration of the Appeal Proposal as the matter concerns yard setback.

[40] We have explained why we do not accept the Council's submission that flooding risk is irrelevant or the applicants' submission that we should disregard it on a permitted baseline approach.

[41] The appellants planner, Mr Anderson points out that flood risk is known to the Council, referring to Ms Shipman's evidence and a Council document "Hazard ID:11582 Flood Overland Flow Path". With reference to Council online maps, he deposes that the area associated with the Appeal Proposal is at the lowest contour of the site. It shows areas within the applicants' site that are comparatively better elevated. He points out that the Appeal Proposal is also within the mapped swale area in the 2GP. He considers the Appeal Proposal would aggravate the hazard risk to people and property without mitigation.[33]

[42] Mr Anderson refers us to various objectives and policies of the RPS and proposed RPS that pertain to natural hazards. These are to similar effect to those of the Plan and 2GP. In essence, the RPS seeks that development be restricted on land that is subject to significant hazard unless there is adequate mitigation. Similarly, the pRPS seeks to discourage activities that increase natural hazard risk as part of requiring natural hazard risk reduction. He points out that the RPS identifies the site as

32 Evidence of Melissa Shipman for the respondent, dated 2 June 2017, at [39].
33 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [97]-[101], [115].

being in a 'Level 3' flood hazard area, being an area subject to short term surface flooding but having a low risk to people and property.[34]

[43] Ms Hood produces photographs showing "the extent of the swales at our shared entrance during heavy rainfall". She describes the flood risk as "unnecessary" in that the applicant would be able to minimize it by putting their dwelling outside of the swale area on their land.[35]

[44] Mr Hallett's Exhibit LH2 is an orthorectified aerial photograph depicting the Appeal Proposal, the scheduled drain and relevant portions of the applicants' and appellants' properties. It shows relevant contour lines as to ground levels, generated from the Council's 'Lidar contours', at 0.2m intervals, and in terms of Dunedin Vertical Datum 1958[36]. It depicts a floor level for the Appeal Proposal (16.96) that is higher than land between it and the drain (generally ranging between 16.8 and 16.4). It shows generally, albeit marginally, lower levels for the appellants' property (generally ranging from around 16.2 – 16.8).

[45] The 2GP includes mapped swale overlays that are depicted as thick stripes across the applicants' site (including crossing part of the location for the Appeal Proposal) and surrounding properties. As noted this mapping would trigger a rule requiring notification of consent applications to ORC but that rule is not yet in force. The same 2GP zoning map overlays both the applicants' and appellants' properties with the notation 'Hazard 3 – Flood'. The 2GP includes residential activities amongst its described 'sensitive activities' class for hazards. It assigns a 'low risk' classification to land notated 'Hazard 3 – Flood' according to a 'high', moderate' and 'low' scale. That is calculated on a system that considers relative likelihoods and consequences. It specifies a related Policy 11.2.1.8 as follows:

> In the hazard 1 and 2 (flood) and hazard 3 (coastal or flood) overlay zones, require new buildings intended for sensitive activities to have a floor level that mitigates risk from flooding (including coastal flooding) and rising groundwater so that risk is no more than low.

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34 Evidence of Conrad Anderson for the appellants, dated 16 June 2017, at [87]-[91].
35 Evidence of Stacey Hood, dated 16 June 2017, at [39].
36 Stated to have been converted from NZVD 2016 using the LINZ online conversion tool.

[46] As noted, related rules are not yet in effect. We record that these would propose a minimum floor level for new buildings for sensitive activities as shown on an associated map or if not so shown, at least 500mm above ground level.[37]

[47] We also take judicial notice of the ORC written approval given under s 178 RMA and the bylaw, insofar as ORC has related flood risk management responsibilities. We note that, amongst other things, the approval requires the authorised boundary fence to have a clearance of at least 0.1 metres above the ground (presumably) to facilitate the passage of flood water.[38]

[48] The appellants submit that the application is flawed for the fact that the applicant did not lead flood risk evidence in order for the court to be able to determine the flood risk probability.[39] There is no legal requirement for evidence to be led as described. The question is one of whether, in all the circumstances, we find we have sufficient evidence to allow us to make a properly informed decision concerning the implications of flood risk.

[49] As accepted by the appellants, the flooding risk is for the applicants' dwelling not for the appellants themselves.[40] From all of the evidence before us, and as informed by our site visit, we find that there is some risk that the Appeal Proposal could be impacted by flooding from time to time. In addition to the scheduled drain, we observed landscaped bunds on the western side of the Appeal Proposal. From that, and the known flooding history of the Taieri, and the 2GP overlay maps, we infer that flood risk could also be associated with water coming from that side of the site.

[50] However, our focus is confined here to the implications of the side yard incursion. The evidence satisfies us that this incursion does not materially change the flood risk. As to that risk, we find there is a sufficient degree of mitigation against flood risk for anyone living within the dwelling. The nature of the risk is one of temporary ponding. We are satisfied that the side yard incursion will not elevate any flood risk for either the appellants or any other person.

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37 For all 2GP provisions, referred to relevant planning instruments Tab 6.
38 Common bundle Tab 3, ORC, s 178 RMA approval dated 7 April 2017.
39 Transcript p 94 l 19-31.
40 Transcript 94 l 1-12, p 96 l 7-13.

Matters as to conditions

[51] The appealed resource consent specifies the following landscaping conditions:

> 2. A landscaping plan for screening plantings along the boundary adjoining 482 Riccarton Road shall be submitted to rcmonitoring@dcc.govt.nz for approval by the resource consents manager. This plan shall detail the landscaping proposed, including numbers, maturity and species of plants. Trees shall not be included in the proposed plantings.
> 3. The landscaping plan and associated plantings required by condition 2 above shall be implemented within twelve months of the commencement of this consent, and maintained on an ongoing basis thereafter.

[52] Ms Shipman recommends "tightening" (although as an effective rewrite). However, the Council also confirms that it does not oppose the applicants' request in closing that they be given the option of simply constructing a close-boarded 1.9m boundary fence. Our site visit revealed they have started on this, having dug post holes, put in a post or two, and strung out the line. The applicants also accept that it would be appropriate for any RMA condition to express an intention to achieve material consistency with the ORC's s 178 and bylaw approval (or any replacement thereof).[41]

[53] Given our evidential findings, and on the basis of our site visit, we are also satisfied that it is appropriate to replace the present condition with a simple condition for construction of a wooden fence as specified in paragraph [57] of this decision. It modifies the relevant part of the applicants' proposed condition by requiring that the fence be maintained (as per Ms Shipman's intention) and materially consistent with the ORC approval.

The Appeal Proposal is properly consistent with relevant objectives and policies

[54] The related Plan and 2GP objectives and policies are framed such that consistency or inconsistency with them follows from our evidential findings. It follows that, having considered the various objectives and policies referred to us, we agree with Ms Shipman in finding the Appeal Proposal is properly consistent with them. We are satisfied that the Plan already gives effect to the RPS. We simply record that we have considered Mr Anderson's evidence and are satisfied, in view of our evidential findings,

41 Transcript p 116, l 1-13.

that our decision is properly consistent with those instruments (including on the matter of flooding hazard).

Part 2 and other matters

[55] Being satisfied of all of those matters, we also find there are no cumulative effect matters against the confirmation of consent. In essence, the sum total of all effects would remain comfortably within acceptable limits as measured by the Plan's expectations. Although Mr Anderson traversed his opinion that granting consent posed a precedent risk, Mr Thomsen correctly conceded this was not an issue given the Appeal Proposal is a restricted discretionary activity. Neither of the planning witnesses consider any pt 2 RMA issues to be determinative. We agree.

[56] While we have not so far referred to the various allegations made in the evidence of Ms Hood concerning what the consent applicants knew or were motivated by when they purchased and how they have behaved towards the appellants, we have considered her evidence fully. It is simply that those matters do not have material weight in our consideration of this restricted discretionary activity. That is also the case for various statements and allegations in evidence about any application made to ORC for works under its bylaws. Those matters are not before us.

Outcome

[57] The appeal is declined and the consent is confirmed subject to the replacement of the landscape conditions with the following new condition 2 (and consequential renumbering):

2. The consent holder must:
   (a) within 6 months of the date of commencement of this consent, construct along the boundary between 480 and 482 Riccarton Road a closed-boarded wooden fence:
      (i) no less than 1.9m in height; and.
      (ii) in material accordance with the Otago Regional Council's Flood Protection Bylaw and Designation Approval (ref A985269) dated 7 April 2017 (or any replacement thereof); and
   (b) continue to maintain that fence in good condition.

[58] Costs are reserved. Any applications are to be made and served within ten working days of the date of this decision, and replies are to be made and served within a further five working days.

For the court:

J J M Hassan
Environment Judge