

BEFORE THE NAPIER CITY COUNCIL

UNDER

The Resource Management Act 1991

AND

IN THE MATTER OF

a resource consent application by Bupa Care Services NZ Limited to the Napier City Council for a retirement village complex at 25 and 35 Ulyatt Road, Napier

LEGAL SUBMISSIONS ON BEHALF OF BUPA CARE SERVICES NZ LIMITED


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Introduction

1. I appear on behalf of Bupa Care Services NZ Limited (**Bupa**) in connection with its resource consent application to establish a retirement village complex at 25 and 35 Ulyatt Road, Napier.
2. In broad terms, the proposal before the Council involves the construction and operation of an aged care complex comprising:
 - (a) 49 care home rooms;
 - (b) 19 retirement apartments; and
 - (c) 99 retirement villas.
3. The key factor which drives and supports the proposal which is before the Commissioner today is the clear need for additional retirement and aged care capacity to meet the expected growth in Hawke's Bay's, and New Zealand's, ageing population. This sentiment comes through strongly in some of the 7 submissions in support of the application, with some of those submissions noting the waiting lists on retirement homes and the need for new retirement facilities.¹
4. To address this demand, it is important that every opportunity to provide for additional intensification is carefully considered. The site's location and topography offer scope for additional retirement accommodation, which integrates well with the existing City of Napier, and is located on land which has been considered for residential development.
5. Resource consent is required, as the proposal is a discretionary activity in the Main Rural Zone.
6. The Main Rural Zone is stated in the City of Napier District Plan (**District Plan**) to apply to the most productive and versatile soils of Napier as follows:²

¹ Jackie Raikes, Alice Cranshaw, Ashton Currie, John Raikes, Lisa Currie.

² City of Napier District Plan, Chapter 33 (Rural Environments), 33.9 (Zone Descriptions), 2 (Main Rural Zone) at p 22.

This zone applies to the most productive and versatile soils of the City which are northwest of Bay View, pockets of the Western Hills, and the area to the south of the urban areas of the City known as Awatoto/Meeanee. These are characterised by agricultural, horticultural, and viticultural land uses. Bird scaring devices, movement of stock, application of chemicals, noise from machinery (eg: trucks, tractors, harvesters, cultivators, etc.) chemical applicators (eg: helicopters) and stock are examples of the types of activities that are associated with these land uses that may generated adverse effects which are often part of typical rural land use practices.”

7. Under the Main Rural Zone provisions applying to this particular proposal, the key issue in my submission relates to the effects of the proposal on the productive rural land resource.

Preliminary matters

8. As a preliminary matter I note that the applicant presents for resource consent a slightly revised design in terms of finished floor levels. The design submitted with the resource consent application was based on minimum floor levels advised to Bupa by the Napier City Council, but it has transpired that those related to urban Napier and that the Council applies a higher minimum floor level in the Main Rural Zone.³ Accordingly, Bupa has revised, and elevated where applicable, the minimum floor level to meet the Napier City Council’s requirements.⁴
9. These changes largely relate to villas on the outer bounds of the site, and have been assessed by Bupa’s expert landscape architect Mr Paul Murphy,⁵ who considers that the increase in height will be difficult to distinguish.⁶
10. The Environment Court has, in the decision *Coull v Christchurch City Council*⁷, set out three tests for considering whether changes are within the scope of a resource consent application as follows:

³ Discussed in the Statement of Evidence of Boyd Wilson at paragraphs 38-42.

⁴ Proposed Site Plan (P02 RC02, Resource Consent RC2 06.08 18) within the architectural plan set attached to the Statement of Evidence of Marc Barron.

⁵ Statement of Evidence of Paul Murphy, paragraphs 44-47.

⁶ Statement of Evidence of Paul Murphy at paragraph 45.

⁷ C77/06.

- (a) Does it increase the scale or intensity of the activity relative to the original proposal?
 - (b) Does it exacerbate or mitigate the effects of the activity, both in terms of adverse effects and in terms of the relevant planning documents?
 - (c) Would parties who have not made submissions have done so if they were aware of the change?
11. These tests are addressed in the evidence of Mr Knell and with reference to that evidence⁸ it is submitted that the design changes are within the scope of the original application.
12. As a second preliminary matter, I note that as a result of discussions which Bupa undertook directly with New Zealand Transport Agency (**NZTA**) and the resulting action taken by Bupa,⁹ NZTA has confirmed that their submission has been resolved. In addition, Hawke's Bay Regional Council (**HBRC**) has confirmed its support of the proposal and no longer wishes to be heard at the hearing.

Evidence for the applicant

13. In preparing and assessing the proposal against the relevant statutory and planning frameworks, and considering the associated effects, Bupa has sought advice from a range of experienced consultants, who are specialists in their disciplines.
14. The following witnesses give evidence on behalf of the applicant:
- (a) Marc Barron, registered architect and director of Jerram Tocker Barron Architects Limited (**JTB**), discusses the design of the proposal.

⁸ Statement of Evidence of Greg Knell, paragraphs 9.22-9.23.

⁹ Bupa's acoustic consultant confirmed that the proposal can meet the District Plan noise standards specific to the proximity of the adjacent expressway and added in Condition 32 requiring the proposal to comply with the permitted noise standards of the District Plan.

- (b) Paul Murphy, registered landscape architect at wsp-opus, provides evidence regarding the landscape and visual effects of the proposal.
- (c) Ian Constable, a traffic engineer (Traffic Solutions Ltd) gives traffic engineering evidence regarding his assessment, and responding to issues raised in submissions and the officer's report.
- (d) Richard Stephenson, Director of Property Australia and New Zealand for Bupa, provides evidence regarding Bupa's operations and philosophy of care, gives an overview of the demand for aged care services, and discusses how the proposal will satisfy that demand.
- (e) Greg Knell, a director of Wasley Knell Consultants Limited, provides planning evidence, which concludes that the proposal should be granted on the basis that the environmental outcomes anticipated by the relevant policies of the District Plan are met by the proposal.

Key issues

15. In my submission the key issues for the Commissioner's consideration are relatively discrete and comprise:
- (a) The appropriateness of the activity in terms of the Main Rural Zone and effects on its soil resources; and
 - (b) The issues raised by submissions in opposition to the application. Related to the location of the proposal on rural land, these include:
 - (i) The Heretaunga Plains Urban Development Strategy (**HPUDS**);
 - (ii) Reverse sensitivity; and
 - (iii) Rural character and amenity.

Main Rural Zone

16. The site is zoned Main Rural under the District Plan and the proposal falls to be considered as a discretionary activity. The trigger for discretionary activity status is that Retirement Complexes are specifically listed as a discretionary activity within the Main Rural Zone under Rule 34.14(g) of the District Plan. To that extent, Retirement Complexes are expressly anticipated in the Main Rural Zone.
17. The proposal also does not comply with the permitted and controlled activity conditions of the District Plan for dwelling density, boundary setbacks, height, site coverage and for the volume of earthworks, which are relevant for consideration.
18. The site and its surrounds are shown as follows:



19. In my submission, the key issue in terms of being located in the Main Rural Zone is the effects of the proposal on the productive rural land resource. On this issue, the District Plan embeds HPUDS within its objectives and policies, with Policy 33.2.8 stating:

Establish defined urban limits to retain and protect the versatile and productive soils from ad hoc urban subdivision and development in accordance with the recommendations of the adopted Heretaunga Plains Urban Development Strategy (HPUDS).

20. A key principle of the HPUDS is to ensure that settlement avoids versatile soils. A report from John Wilton of AgFirst Consultants HB Ltd concluded that the soils on the site are one of the least versatile on the Heretaunga Plains and that losing the site to urban development would have a minimum impact on the life supporting capacity of the wider plains soil resource.¹⁰
21. In light of this report, and the subject site being located within the “South Pirimai Greenfield Growth Area” under HPUDS, granting resource consent to this proposal does not compromise the versatile soils of the Main Rural Zone. Furthermore, the development does not represent ‘ad hoc’ development in the sense that Bupa did spend some time in investigating other greenfield options before settling on the Ulyatt Road site, as canvassed in the evidence of Boyd Wilson and Greg Knell.

HPUDS

22. The applicant has further considered HPUDS in detail. The site is located within a ‘reserve residential growth area’ (“South Pirimai Greenfield Growth Area”). These are described in s 2.1.7 of HPUDS as:

Reserve areas will act as replacements if any greenfield growth areas identified in HPUDS are deemed unviable for residential development, or in circumstances where the area is not able to be progressed in a timely fashion when required, or when other issues become insurmountable. These reserve areas may also be advanced if there is a rapid and significant change in growth demand.

23. However Section 2.5 of HPUDS (Areas where Greenfield Growth is Deemed Inappropriate) does not include the South Pirimai Reserve Residential Growth Area. Further, Section 3.2.1 discusses (and therefore anticipates) the process for introducing additional greenfield growth areas. It notes that a land holder might choose to promote a residential development through a subdivision consent or land use consent application on land not identified in HPUDS, rather than via a plan change. In such circumstances, consent authorities are required to have particular regard to

¹⁰ Appendix B to the s 42A report.

the same criteria to which a rezoning assessment would consider.¹¹ In my submission, those criteria have been considered through this resource consent process.

24. HPUDS also takes some time to explain the likely impacts of an ageing population on retirement sector living. HPUDS recognises that the vast majority of future retirement village development will occur on greenfield land.
25. Finally on the topic of HPUDS and provision for urban growth, it is worth recognising on a related note that the submissions in support of the proposal also recognise that the development of Bupa's retirement complex will release more housing into the local Napier market, thus assisting with housing shortages.¹²
26. The section 42A report from Council's reporting planner recommends that the application is approved. The report concludes that while the proposal will remove soils from production the soils are of low versatility and the effects of the proposal are relatively minor and it is appropriate for resource consent to be granted.

¹¹ a) Must form an extension contiguous with existing urban areas and settlements.
b) Land is identified as having low versatility, and/or productive capacity has been compromised by:
i. Size and shape of land parcels that mitigates against productive use
ii. Surrounding land uses and reverse sensitivity
iii. Lack of water and/or poor drainage.
c) Clear natural boundaries exist, or logical greenbelts could be created to establish a defined urban edge.
d) Supports compact urban form.
e) Can be serviced at reasonable cost.
f) Can be integrated with existing development.
g) Can be integrated with the provision of strategic and other infrastructure (particularly strategic transport networks in order to limit network congestion, reduce dependency on private motor vehicles and promote the use of active transport modes).
h) An appropriate separation distance from electricity transmission infrastructure should be maintained in order to ensure the continued safe and efficient operation and development of the electricity transmission network.
i) Promotes, and does not compromise, social infrastructure including community, education, sport and recreation facilities and public open space.
j) Avoids or mitigates the following locational constraints:
i. projected sea level rise as a result of climatic changes
ii. active coastal erosion and inundation
iii. stormwater infrastructure that is unable to mitigate identified flooding risk
iv. flood control and drainage schemes that are at or over capacity
v. active earthquake faults
vi. high liquefaction potential
vii. nearby sensitive waterbodies that are susceptible to potential contamination from on-site wastewater systems or stormwater discharges
viii. no current wastewater reticulation and the land is poor draining
ix. identified water short areas with the potential to affect the provision of an adequate water supply.

¹² Jackie Raikes, Alice Cranshaw, Ashton Currie, John Raikes, Lisa Currie.

Reverse sensitivity

27. The submission by the Hawke's Bay Regional Council raised reverse sensitivity, as did the submission of Susan Rogerson. The Regional Council has confirmed that it is satisfied with the applicant's proposals to address this, which comprise:
- (a) A separation distance of 6m from the eaves of the villas to adjoining Rural land, secured by a covenant which restricts agricultural or fruit growing purposes (the land can still be used for growing turf for sale).
 - (b) A 'no complaints' covenant on the site itself.
28. The wording of both covenants is set out in the relevant conditions (30 and 31) and the Regional Council has confirmed that it seeks in particular the inclusion of condition 31.

Rural character and amenity

29. The question of rural character and amenity has formed part of the applicant's consideration of the site, and Mr Murphy has assessed the amenity impacts of the proposal on both residential and rural character and amenity. As he notes in his evidence, the site is at the confluence of rural and urban land uses, bordered by the infrastructural landscapes of SH50, the stormwater drainage system and public walkway, and power supply on Ulyatt Road.¹³
30. Mr Murphy considers that the site has a limited visual catchment due to the flat nature of the surrounding topography and density of built form.¹⁴ He has devised a landscape treatment on Ulyatt Road which uses large trees and hedge type forms similar in character to the surrounding rural landscape.¹⁵ Mr Murphy definitively concludes that the location of the proposal means it has no adverse effects on rural character.¹⁶

¹³ Statement of Evidence of Paul Murphy, paragraph 16.

¹⁴ Statement of Evidence of Paul Murphy, paragraph 20.

¹⁵ Statement of Evidence of Paul Murphy, paragraph 26.

¹⁶ Statement of Evidence of Paul Murphy, paragraph 54.

31. In light of this assessment, the Commissioner can be satisfied that effects on rural character and amenity have been thoroughly assessed, and are appropriate.

Statutory considerations

32. The primary consideration is whether it is appropriate to grant resource consent. The relevant considerations under s 104 of the RMA are addressed in the evidence of the witnesses and the s 42A report I do not propose to repeat those. The applicant contends that it is appropriate for consent to be granted.

Section 108AA

33. The application was received by the Napier City Council on 26 October 2017. The amendments to the RMA from the Resource Legislation Amendment Act 2017 which affected resource consent processes came into force on 18 October 2017 and accordingly apply to this application. Section 108AA provides:

(1) A consent authority must not include a condition in a resource consent for an activity unless—

(a) the applicant for the resource consent agrees to the condition; or

(b) the condition is directly connected to 1 or both of the following:

(i) an adverse effect of the activity on the environment:

(ii) an applicable district or regional rule, or a national environmental standard; or

(c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.

34. For the avoidance of doubt, Bupa agrees to the conditions which contain an *Augier* advice note (conditions 30 and 31).

Part 2 RMA

35. In light of the *Davidson* decisions,¹⁷ it appears that it is not necessary to consider Part 2 of the RMA barring any concern about invalidity, lack of coverage or uncertainty with the relevant planning document (in this case the District Plan).
36. That said, it is prudent to consider Part 2 from a completeness perspective. In terms of Part 2 RMA, it is submitted that the following aspects are relevant and important:
- (a) This proposal is enabling in that it enables the provision of additional accommodation for the elderly while appropriately mitigating adverse effects on its surrounding residential environment (s 5(2) RMA). The development will cater for *at least* 167 of Hawke's Bay's elderly at different levels of care.
 - (b) The proposal meets ss 7(c) and (f) because it at least maintains amenity values and the quality of the environment.¹⁸

Conditions

37. Should the Commissioner agree that the grant of resource consent is appropriate, Bupa and the reporting officer are in agreement on the conditions which should be imposed on the resource consent.

Conclusion

38. In my submission this application should be granted for the following reasons:
- (a) The proposal represents an efficient and sustainable use of the site.

¹⁷ *R J Davidson Family Trust v Malborough District Council* [2016] NZEnvC 81; *R J Davidson Family Trust v Malborough District Council* [2017] NZHC 52.

¹⁸ Section 7(c) does not require a proposal to both maintain and enhance amenity values: *Shell NZ Limited v Auckland City Council* [1996] NZRMA 189; (1996) 2 ELRNZ 173.

- (b) The actual and potential effects on the environment of the proposal, including particularly effects on residential and rural character and amenity, are acceptable.
 - (c) The proposal provides the community with a needed component of specialised accommodation for the elderly which fulfils a valuable need for the community.
39. In short, the proposal is appropriate for the site given the existing environment, the nature of the proposal, the mitigation measures proposed, and the positive effects of the proposal.
40. On behalf of the applicant I urge the Commissioner to make a decision which grants consent to the proposal.

DATED at Napier this 21st day of August 2018



Vanessa Jane Hamm

Counsel for Bupa Care Services NZ Limited