MINUTES

TITLE:	**Environment & Planning Subcommittee - Commissioner Hearing**
DATE:	**Wednesday 23 June 2010**
TIME:	**10.00 am**
VENUE:	**Council Chamber, 189 Queen Street, Richmond.**
PRESENT:	Cr T B King (RMA Commissioner)
IN ATTENDANCE:	Resource Consents Manager (P Doole), Senior Consent Planner, Subdivision (M Morris).and Executive Assistant (V M Gribble) assisting the Commissioner.

1. J P BEST ESTATE, IWA STREET, MAPUA - APPLICATION No. RM071219

The hearing of an objection pursuant to Section 357 of the Resource Management Act to Council's delegated decision on the Subdivision Application RM071219

The Committee proceeded to hear the application, presentation of submissions and staff reports as detailed in the following report and decision

THAT pursuant to Section 104B of the Resource Management Act, the Commissioner GRANTS consent to J P Best Estate as detailed in the following report and decision.

Decision of the Tasman District Council through a Hearing Commissioner

Meeting held in the Richmond Office on 23 June 2010, commencing at 10.00 am
Hearing closed by the Commissioner on 23 June.

The hearing of an objection pursuant to Section 357 of the Resource Management Act 1991 to Council's delegated decision on the Subdivision Application RM071219

PRESENT:	**Hearing Commissioner** Cr Tim King
APPLICANT:	Mr Tony Quickfall (Resource Management Consultant) Mr Shane Stephen (Applicant/Objector)
CONSENT AUTHORITY:	**Tasman District Council** Mr Mark Morris (Consents Coordinator, Subdivisions)
IN ATTENDANCE:	Resource Consents Manager (Mr Phil Doole), Executive Assistant (Mrs Valerie Gribble) assisting the Commissioner.

1. BACKGROUND TO THE OBJECTION

Consent RM071219 was granted in March 2008 to allow the subdivision of Lots 1 and 2 DP 367812, being 31 and 33 Iwa Street Mapua, to create four allotments. There were two existing dwellings on both properties; hence the proposed subdivision would effectively allow each of the four dwellings to have its own separate allotment.

Building consents had been issued for the two second dwellings during the year 2000. At that time second dwellings could be constructed in a residential zone as a permitted activity provided that they complied with the overall site coverage (33%) and other applicable standards.

Financial contributions would also have been payable in accordance with the provisions of Section 16.5 of the Tasman Resource Management Plan (TRMP). It appears from the Council's records that no financial contributions were paid for either of the second dwellings - although the amount payable would have been very small because the value of each of the dwellings was just over $50,000 and the financial contribution was based on 0.5% of the value of the building work over $50,000.

Financial contributions for reserves and community services are payable on subdivision and building development as provided for in Section 16.5 of the TRMP.

2. THE OBJECTION

A Section 357 Objection was received from the applicant on 14 April 2008. The Applicant objected to the imposition of Conditions 2 and 4 on the subdivision consent.

Condition 2 states that: *"Financial contributions are required on two allotments. The following shall apply… Payment of a reserves and community services levy assessed at 5.5% of the value of each of the two allotments…"*

Condition 4 states that *"Lot 1's right to the existing right-of-way EC 7280414.5 shall be extinguished."*

The applicant asked that consideration of the Objection be deferred, and it was put on hold. The two properties were subsequently sold to S and S Stephen who have taken over the subdivision application. The Stephens advised in May 2010 that they wished to proceed with the Objection relating to Condition 2 only.

3. PROCEDURAL MATTERS

Mr Quickfall confirmed that the second part of the objection relating to condition 4 is withdrawn.

4. REPORT AND EVIDENCE HEARD

A report on the matter of objection, being the financial contribution, by the Council's Subdivision Consents Co-ordinator Mr Mark Morris had been circulated prior to the hearing. The Commissioner heard evidence for the applicant, and a response from Mr Morris. The following is a summary of the information presented.

4.1 Officer's Report - Mr Mark Morris

In his report Mr Morris stated that it is usual practice to impose the reserves and community services levy (as a financial contribution) at the subdivision stage, rather than the building stage because the levy is based on land value which can be determined for each of the proposed allotments. His view is that it is exactly the same development with associated effects that is being considered.

Mr Morris stated that it is becoming more common for two dwellings to be built on a residential property, and then be subdivided later. In all cases the reserves levy has been imposed (and paid) on the additional allotments, even though the same argument could have arisen as with the current Objection; viz. the "effects [of residential development] already exist" at time of subdivision.

Mr Morris stated that that there is a link between subdivisions/residential development and demand on Council services; and it should not matter how long the dwelling was built before the subdivision. He recommended that the Objection be dismissed and that Condition 2 on the consent be upheld.

4.2 Applicant's Evidence - Mr Tony Quickfall

Mr Quickfall tabled a statement of evidence. He first sought clarification as to which "two allotments" the financial contribution in Condition 2 applies to. Normal practice is for levies to be applied to the new allotments that are to be created by subdivision.

Mr Quickfall stated that the basis of the Objection to the financial contribution being imposed is very simple: there is an existing dwelling on each of the four allotments that will result from the subdivision, hence there is no additional development proposed and there will be no additional demand on any services or reserves arising, therefore the 5.5% levy is not justified.

Mr Quickfall considered that the timing of the second dwellings being built is a key factor that supports a waiver of the levy in this case. It is unreasonable to say that there will be additional demands on services now 10 years after those dwellings were built. If the TRMP rules allow for dwellings to be erected prior to subdivision without paying reserve contributions, the Council should address that possible "loophole" through a plan change.

Mr Quickfall considered that the provisions for waivers or reductions in TRMP rule 16.5.2.3(c) could apply to any subdivision depending on the circumstances; and he considered that the second of the listed circumstances (16.5.2.3(c)(ii)) is applicable in this case, because there will be no adverse impacts arising from this subdivision 10 years after the dwellings were built.

With reference to case law, Mr Quickfall accepted that the Council can impose financial contributions where there are no additional effects on infrastructure or reserves, but with the proviso that the absence of effects is a relevant factor in determining the amount of the contribution.

While stating that it is unreasonable to require any payment of a levy in this case, Mr Quickfall suggested that if a levy was to remain then a reduced contribution of 1.5% (rather than 5.5%) should apply for each of the additional two allotments taking into account the small size of the dwellings.

I asked, in terms of dwellings being constructed prior to subdivision and drawing the conclusion that later subdivision has no particular effect, is not that the case whether dwellings are built prior to or following subdivision? In your scenario, is the actual time of building the only time it would be reasonable?

Mr Quickfall replied that in this case timing is important because we have different owners - a different owner did the buildings and the Stephens have inherited the subdivision proposal. In his opinion the timing of ten years has relevance, as it is harder to draw a direct correlation between the effects of a subdivision and a reserve contribution ten years later.

In relation to the second preferred option, a reduction in the amount of the levy, I asked whether the size of the dwelling is a common way to assess the reserve levy, higher for five bedroom houses and lower for two bedroom houses, or is it a flat rate.

Mr Quickfall said typically Councils would apply 5.5% as a flat rate. That was a maximum but there is provision to reduce it.

4.3 Reporting Officer

With regard to the question as to "which two allotments" Mr Morris explained that with financial contributions for reserves you get a credit for the existing allotments and the contribution is imposed on additional allotments only. In this case each allotment had an existing dwelling. Generally it would be the rear lots. In terms of clarification, he accepted that in this case it was appropriate for the levy to be assessed on the land value of the two proposed rear allotments.

Mr Morris said that it is often argued that subdivisions themselves are lines on the ground, but generally they are associated with residential development. The issue is that it is the same residential development that has happened before subdivision. Because of that, should they not have to pay a reserve fund contribution? His opinion was that it should not matter whether residential development happens before or after subdivision as it is the same effects that we deal with. The TRMP prescribes that at subdivision stage the Council takes a contribution.

I noted that currently reserve fund contributions are done under the Resource Management Act 1991 ("the Act"), and asked if under those provisions there is any flexibility to collect at time of building or can it only be collected at time of subdivision? Mr Morris said that it could be changed so it is done at building consent stage. It can be up to 7.5% of the land value per additional allotment, but the difficulty would be in working out the land area if there is no subdivision proposal at that stage.

I asked when it is not a subdivision, do you use a notional plot of land? Mr Morris was not sure how it is done, but it is possible under both the Resource Management Act and also the Local Government Act (refer Neal Construction v North Shore decision). The Waitakere decision was under transitional provisions and he understood there was an appeal to the High Court on that decision, but was not sure of the outcome. A previous objection by Hockaday (2005) was upheld, but the objection by Lee and Hart (2001) was not.

I asked, would you not consider that the actual time of effects is when the dwellings are built, not when they are subdivided? Given that it is not uncommon for people to build, should the Council consider having its Plan cover that eventuality?

Mr Morris said that the Council has set out that financial contributions are imposed at subdivision stage. Subdivision is associated with residential development and he did not see whether it happens before or after as being an issue.

4.4 Applicant's Right of Reply

Mr Quickfall asked for clarification of wording to say it is only two lots for which the financial contribution will apply.

Mr Quickfall reiterated his view that there is no association between this subdivision and development that occurred ten years ago. His understanding of the Plan is, if a plan is a permitted activity you can not impose conditions. If it is below minimum site area it triggers land use consent so you may be able to take a financial contribution. The Waitakere case was a declaration by the Environment Court (A10/2000) on the lawfulness of imposing financial contributions, with the Court declaring the quantum of application is a matter to be considered. The key point is the circumstance that differentiates this application - the timing between building and subdivision. This subdivision is not associated with any development, there is no actual demand from subdivision and it comes down to fairness and reasonableness and whether it is waived completely or partially.

5. PRINCIPAL ISSUES AND FINDINGS

The principal issues that were in contention were:

a) Which allotments does Condition 2 apply to?

The hearing established that Condition 2 should apply to the two rear allotments (i.e. Lots 2 and 4 as shown on the Plan of Subdivision attached to consent RM071219, annotated as Plan A). I envisage that this matter could have been resolved at staff level without need for a hearing if it was the only point at issue.

b) Is Rule 16.5.2.3(c) restricted in its application?

Rule 16.5.2.3(c) sets out circumstances when financial contributions may be waived or reduced. Clause 16.5.3.2(c)(ii) states the circumstance:

ii) where an activity is to be established that will have no adverse impact on the environment, particularly the infrastructure, reserves or community services of the District;

I prefer Mr Quickfall's interpretation of this clause, in that it could be relevant to any type of subdivision, and is not restricted to network utility sites or the like. Rule 16.5.2.3(b) specifically excludes network utility sites from payment of a reserves levy, so I agree with Mr Quickfall that Sub-clause 16.5.3.2(c)(ii) can have wider relevance depending on the circumstances.

Sub-clause (ii) refers to an activity that is to be established as part of, or as an outcome of a subdivision process, and that activity will have no adverse impact. In this case, we are considering the situation where the second dwellings have already been established, so I conclude that Clause (ii) itself does not apply to these situations. However, Rule 16.5.3.2(c) does provide a more general authority to allow waivers or reductions where the Council considers it fair and reasonable having regard to the particular circumstances.

c) Is it reasonable to impose a reserves and community services levy 10 years after the second dwellings were built?

Mr Quickfall accepted that the Council can impose the levy, but he argued that it is unreasonable to impose an impact levy so long after the residential development occurred - that the passage of time and change in ownership of the subject properties justify a waiver of the levy or a substantial reduction of it.

The counter argument from Mr Morris was essentially that the variable time periods between building a dwelling and applying to subdivide later do not alter the basis for charging the reserves levy at time of subdivision, and that practice has been applied consistently within the District.

My finding is that I accept Mr Morris's approach to this matter. The TRMP rules for reserves levies have not substantially changed since the year 2000 when the two second dwellings were built, at which time it would have been known and expected that a reserves levy would be imposed on any later subdivision of these residential properties. In my view the time that elapsed from construction and use of the dwellings to when the subdivision application was lodged in 2007 does not materially alter the reasons for the Council imposing the full reserves levy. Furthermore, the change in applicant and/or property ownership along the way is not, in my view, a relevant factor in determining the quantum of the levy.

6. RELEVANT STATUTORY PROVISIONS

6.1 Policy Statements and Plan Provisions

In considering this objection, I have had regard to Section 108 of the Act and the relevant provisions of the following planning documents:

a) Tasman Regional Policy Statement (TRPS); and
b) the Tasman Resource Management Plan (TRMP).

6.2 Part II Matters

In considering this objection, I have taken into account the relevant principles outlined in Sections 6, 7 and 8 of the Act, as well as the overall purpose of the Act as presented in Section 5.

7. DECISION

Pursuant to Section 357D(1) of the Act, I hereby:

DISMISS the substantial objection to Condition 2 of Consent RM071219; and

UPHOLD the objection in part with regard to clarifying that the financial contribution imposed on Condition 2 applies to the two rear allotments to be created by the proposed subdivision.

8. REASONS FOR THE DECISION

a) The financial contribution condition has been lawfully imposed on two additional allotments.

b) Requiring a reserves and community services levy on additional allotments that have existing dwellings at time of subdivision is consistent with Council practice and implementation of the TRMP rules.

c) Requiring the maximum reserves and community services levy (being 5.5% of the land value of the additional allotments) is consistent with Council practice and implementation of the TRMP rules.

d) The requirement to pay the reserves and community services levy at time of subdivision did not change between the years 2000 and 2007.

e) It is reasonable and equitable to impose the full levy as defined by the 5.5% of land value quantum because the on-going impact of the dwellings, with regard to reserves and other community services, is the same now as it was when they were built.

9. AMENDED CONDITIONS OF CONSENT

Condition 2
"Financial contributions are required on the two rear allotments to be created (i.e. Lots 2 and 4 as shown on Plan A attached to this consent).

Issued this 9th day of July 2010

Cr T King
Hearings Commissioner

RESOURCE CONSENT DECISION

Resource Consent Number: RM071219

Pursuant to Section 104B of the Resource Management Act 1991 ("the Act"), the Tasman District Council ("the Council") hereby grants resource consent to:

J P Best Estate
(hereinafter referred to as "the Consent Holder")

Activity authorised by this consent: Subdivision consent to subdivide Lots 1 and 2 DP 367812 to create four allotments with net areas between 400 square metres and 525 square metres. Each of the allotments contains an existing dwelling.

Location Details:

Address of property:	31-31A and 33-33A Iwa Street, Mapua
Legal description:	Lots 1 and 2 DP 367812
Certificates of title:	275494 and 275493
Valuation number:	1938041300

Pursuant to Section 108 of the Act, this consent is issued subject to the following conditions:

CONDITIONS

General Accordance

1. That the proposal shall be in accordance with the Cotton & Light Surveyors Plan dated 18 March 2008 (shown as "Plan A" attached to this consent) as amended by the following conditions of consent.

Financial Contributions

2. Financial contributions are required on the two rear allotments to be created (i.e. Lots 2 and 4 as shown on Plan A attached to this consent). The following shall apply:

   Reserves and Community Services
   Payment of a reserves and community services levy assessed at 5.5% of the value of each of the two allotments. The valuation will be undertaken by the Council's valuation provider within one calendar month of the Council receiving a request for valuation from the Consent Holder. The request for valuation should be directed to the Consents Administration Officer at the Council's Richmond office. The cost of the valuation will be paid by the Council.

If payment of the financial contribution is not made within two years of the date of this consent, a revised valuation will be required and the cost of the revised valuation shall be paid by the Consent Holder.

Easements

3. Easements are to be created over any services located outside the boundary of the allotment that they serve. Reference to easements is to be included in the Council resolution on the title plan and endorsed as a Memorandum of Easements.

4. Lot 1's right to the existing right-of-way EC 7280414.5 shall be extinguished.

Consent Notices

5. The following consent notice shall be registered on the titles of Lots 1-4:

   (a) All vehicle access to Lot 1 shall be via the existing access crossing on to Iwa Street.

   (b) No filling shall occur or buildings be erected in the existing stormwater drainage swale covered by easement EI 7280414.5, unless written consent is obtained from the Tasman District Council Engineering Manager.

   (c) Stormwater servicing in the Iwa Street area is very limited. Any stormwater run-off from new building or extensions to existing buildings will be required to comply with the permitted activity discharge Rule 36.4.2 of the Proposed Tasman Resource Management Plan, unless authorised by a discharge consent.

The applicant's solicitor shall submit a copy of the consent notice for signing and approval by the Council's Co-ordinator Subdivision Consents.

ADVICE NOTES

Proposed Tasman Resource Management Plan

1. Any matters not referred to in this application for resource consent or are otherwise covered in the consent conditions must comply with the Tasman Resource Management Plan or subsequent planning document, or authorised by another resource consent.

Other Council Requirements

2. The Consent Holder shall meet the requirements of the Council with regard to all Building and Health Bylaws, Regulations and Acts.

REASONS FOR THE DECISION

Background to Proposed Activity

The proposal is to subdivide two existing certificates of title (275494 and 275493) that are 820 square metres and 1,002 square metres in area. Each of the titles has two small existing dwellings on them that have previously been approved by the Council. The

subdivision will enable a separate certificate of title to be issued for each of the dwelling sites.

The allotments gain access via an existing right-of-way that was constructed under a previous subdivision consent (RM040352, Tasman District Council Engineering Plan 6044/2s1).

Proposed Tasman Resource Management Plan ("PTRMP") Zoning, Area, and Rules Affected

According to the PTRMP the following apply to the subject property:

Zoning: Residential
Area(s): Land Disturbance Area 1

No person may subdivide land within Tasman District as a permitted activity according to the PTRMP. The activity authorised by this resource consent is deemed to be a discretionary activity in accordance with Rule 16.3.4 of the PTRMP.

Principal Issues (Actual and Potential Effects on the Environment)

The principal issue(s) associated with the proposed activity involve the actual and potential effects on the environment. For this application these were:

(a) servicing;
(b) access;
(c) allotment area.

The Council considers that the adverse effects of the activity on the environment will be no more than minor for the following reasons:

(a) all the allotments are already fully serviced for water and sewer. The existing dwellings have existing stormwater servicing by way of soakage, which was installed as part of the approved building consents for the dwellings;

(b) all allotments already have existing access created under the previous subdivision consent RM040352;

(c) while the proposed allotments are smaller than what is required for a controlled activity subdivision in the PTRMP, they simply reflect the existing site area of each of the approved dwellings on site. Therefore, there should be little change in amenity effects resulting from the subdivision.

Relevant Statutory Provisions

In considering this application, the Council has had regard to the matters outlined in Section 104 of the Act. In particular, the Council has had regard to the relevant provisions of the following planning documents:

(a) the Tasman Regional Policy Statement (TRPS);
(b) the Transitional District Plan;
(c) the proposed Tasman Resource Management Plan (PTRMP).

Most of the objectives and policies contained within the TRPS are mirrored in the PTRMP. The activity is considered to be consistent with the relevant objectives and policies contained in Chapters 5 and 6 of the PTRMP in particular 6.1.1, which is to allow for infill development of existing allotments in existing serviced townships as a means of minimising encroachment on the most versatile land in the District.

Part II Matters

The Council has taken into account the relevant principles outlined in Sections 6, 7 and 8 of the Act and it is considered that granting this resource consent achieves the purpose of the Act as presented in Section 5.

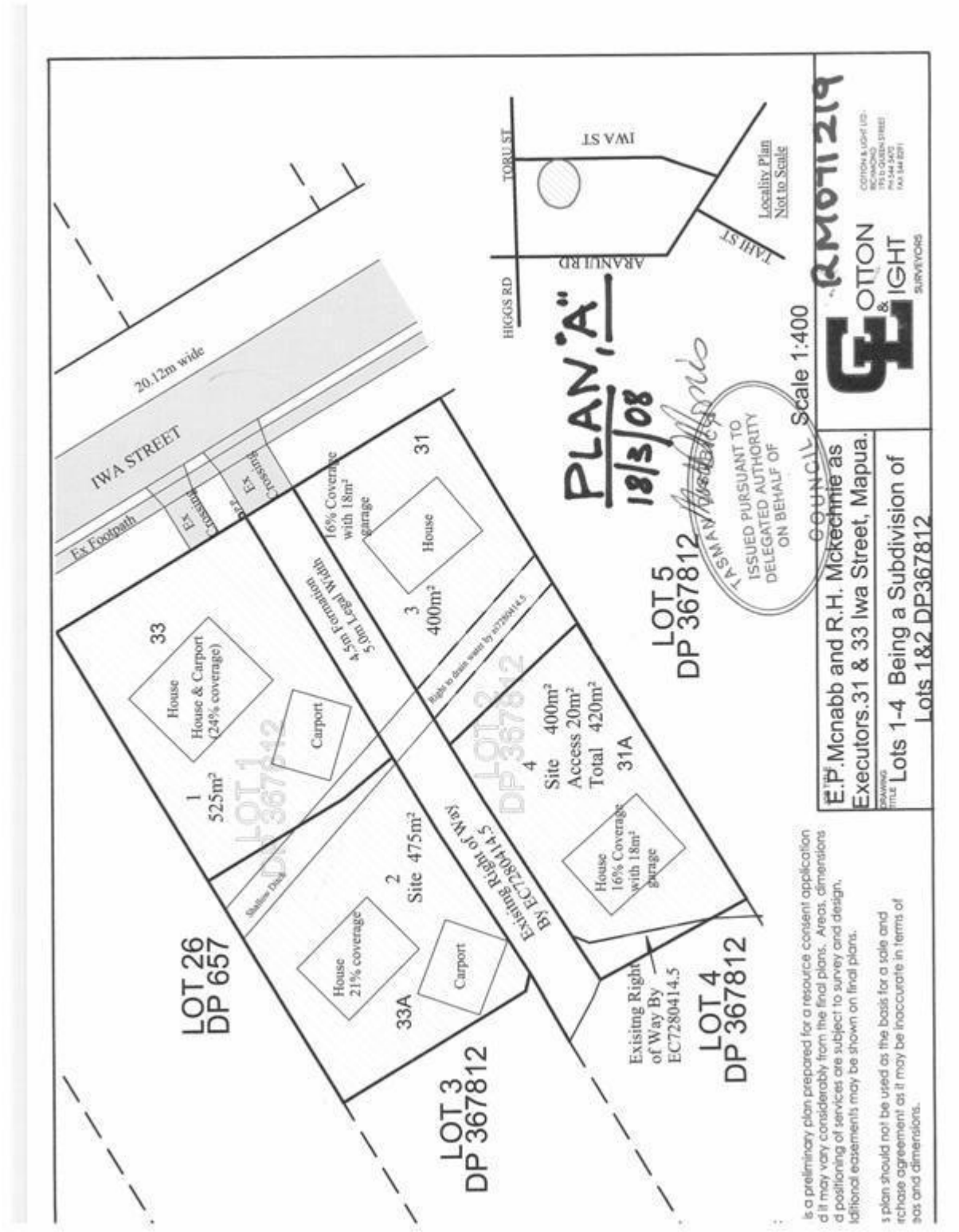
Notification and Affected Parties

The adverse environmental effects of the activity are considered to be no more than minor. In the context of what could be done in erecting a second dwelling as a controlled activity, no parties were deemed to be adversely affected by the proposal. The Council's Resource Consents Manager has, under the authority delegated to him, decided that the provisions of Section 94(2) of the Act have been met and therefore the application has been processed without notification.

This consent is granted on **18 March 2008** under delegated authority from the Tasman District Council by:

Mark Morris
Co-ordinator Subdivision Consents

Plan A
18 March 2008
RM071219, J P Best Estate



Date Confirmed: **Chair:**