

Notification Decision Report

Sections 92 & 95 – Resource Management Act 1991 (amended 2009, 2013, 2017)

Details of the Application	
Resource Consent Number	195191 & 195192
Applicant (Consent Holder)	William & Andrea Vincent
Property to which the consent relates	205 Lud Valley Road, Nelson
Rules and Activity Status	RUr.78 Subdivision (operative rule) – discretionary; RUr.78 Subdivision (rule proposed under PC05/01, which has legal effect) – non-complying activity ¹ ; FWr.29 Establishment of, and discharges to, effluent disposal field on Proposed Lot 2: discretionary; Overall activity status: non-complying
Activity Description	Subdivision of Lot 1 DP18871 to create two rural allotments

Background & Description

The applicant proposes to subdivide 205 Lud Valley (Lot 1 DP18871) to create two rural allotments (RM195191). The application site has a size of 3.34ha and it is proposed to subdivide this into two lots of 2.14ha and 1.2ha respectively (refer to Figure 1 below). An associated discharge permit to discharge domestic wastewater to an on-site disposal field on proposed Lot 2 has also been applied for (RM195192).

The applicant has submitted the following information with the application:

- Application and Assessment of Environmental Effects (prepared by Isherwood Consultants, dated August 2019);
- A scheme plan (prepared by Heaphy Surveying, dated 23/08/2019);
- A site suitability assessment (prepared by Cameron Gibson & Wells Ltd (CGW), dated 25 October 2018);
- Written approvals from 68 Frost Road, 201 Lud Valley Road, 203 Lud Valley Road, and 207 Lud Valley Road.

Further information was requested on 19 September 2019, seeking information regarding earthworks and proposed building area, access, stormwater disposal, wastewater discharge and geotechnical aspects (amongst other things).

A partial further information response was received on 1 November 2019, consisting of:

- A response from Isherwood Consultants;
- A response from CGW;
- A response from Flow Environments Ltd (FEL), including a new proposed waste disposal field location.

A follow up letter was sent on 5 November 2019, detailing the outstanding information, which primarily relate to access, wastewater disposal and associated geotechnical aspects.

¹ Of the rules which have legal effect, the most stringent activity status applies (refer *Aley v North Shore CC* [1999] NZLR 365, (1998) 4 ELRNZ 227, [1998] NZRMA 361)

Further information was submitted on 5 March 2020, consisting of:

- A response from Isherwood Consultants, including comments from CGW;
- A response from FEL (dated 09/01/2020);
- A site plan with contours and cross sections (dated 03/03/2020);
- Photos of the ROW; and
- A letter from Kevin Andrews (owner/ occupier of 207 Lud Valley).

This information was circulated to Council's Senior Engineer – Land Development and Council's consultant geotechnical advisor.

Further information and clarification were provided on 11 March, 13 March and 16 March 2020 as follows:

- Confirmation from FEL (received 11 March 2020) that the proposed peak disposal rate is acceptable for the slope (as per the contours provided on 5 March 2020);
- Response from CGW (received 13 March 2020); and
- Updated site plan with contours and cross sections (dated 16/03/2020).



Figure 1: Proposed two lot subdivision (source: scheme plan provided with the application)

Draft Notification Report

Following Council's letter on 5 November 2019, detailing the items still outstanding from Council's original request for further information, the applicant requested a draft copy of the s95 report. Whilst Council does not usually proceed to a draft s95 stage until all outstanding information has been provided, it was acknowledged that the applicant would like to get a steer on the notification decision before incurring further expenses for providing the (technical) details required to fully address Council's information request.

The draft notification report, which considered the proposed subdivision only, recommended public notification as a result of more than minor environmental effects. For the sake of completeness, the draft notification report also included a consideration of public notification in special circumstances and concluded that public notification due to unusual, and therefore, special circumstances, is also warranted. The draft notification report was circulated to the applicant on 12 December 2019 and a meeting was held on 19 December 2019. At the meeting, the applicant's counsel stated that he thinks it is not appropriate to publicly notify the application and that special circumstances do not apply. The applicant was invited to provide their comments in writing and letters were received from Isherwood Consultants (dated 30 January 2020) and Nigel McFadden (dated 31 January 2020). Council's legal advisor, Kate Mitchell, responded to Mr McFadden on 11 March 2020.

Site Description

The site is located in the Rural Zone – Lower Density Small Holdings Area. The minimum lot size in this area is 3ha. The application site is 3.34ha in area and it is proposed to subdivide this into two lots of 2.14 ha and 1.2ha respectively.

The site is accessed via an approx. 270m long Right of Way (ROW) off Lud Valley Road. The applicant has confirmed that the existing ROW (i.e. the lower section up to the current access to 205 Lud Valley Road) has four users: the applicant and the owners/ occupiers of 201, 203 and 207 Lud Valley Road. The upper section of the ROW (i.e. proposed ROW A on the scheme plan, refer to Figure 1 above) currently has two users: 201 and 207 Lud Valley Road.

The proposed subdivision will add one user to the ROW, i.e. increase the number of users from 4 to 5 (in the lower section of the ROW) and from 2 to 3 in the upper section of the ROW (proposed ROW A). The existing ROW does not comply with the passing bay requirements set out in sections 4.3.7 e) to g) of Council's Land Development Manual 2010 (LDM 2010) and Table 4-13 of the Nelson Tasman Land Development Manual (NTLDM 2019). An assessment of this non-compliance is contained in Section 3 of this report.

The existing ROW slopes uphill from Lud Valley Road to the western property corner. From there, proposed ROW A (refer to Figure 1 above) turns south, following a ridge, which runs roughly from south to north. The application site does not currently have rights of way over Proposed ROW A (owned by 207 Lud Valley Road). On 5 March 2020 the applicant provided a letter from Kevin Andrews, owner/ occupier of 207 Lud Valley Road to demonstrate that legal access to Proposed Lot 2 can be provided via Proposed ROW A. In this letter Mr Andrews agrees to the proposed subdivision and creation of a ROW easement over his property.

The application site itself has a north east aspect and is sloping steeply downhill, towards an unnamed stream. The stream runs north and generally follows the eastern boundary of Proposed Lot 2, before heading through the middle of Proposed Lot 1, exiting at the northern most point of the site (refer to Figure 1 above).

The applicant provided a site plan with contours and ten cross sections (at 10m intervals) through the proposed waste disposal field on Proposed Lot 2. The average slope derived from the ten cross sections is 18.9 degrees (34%)

Figure 2 below shows the application site and surrounds, including lot sizes of all adjoining sites.

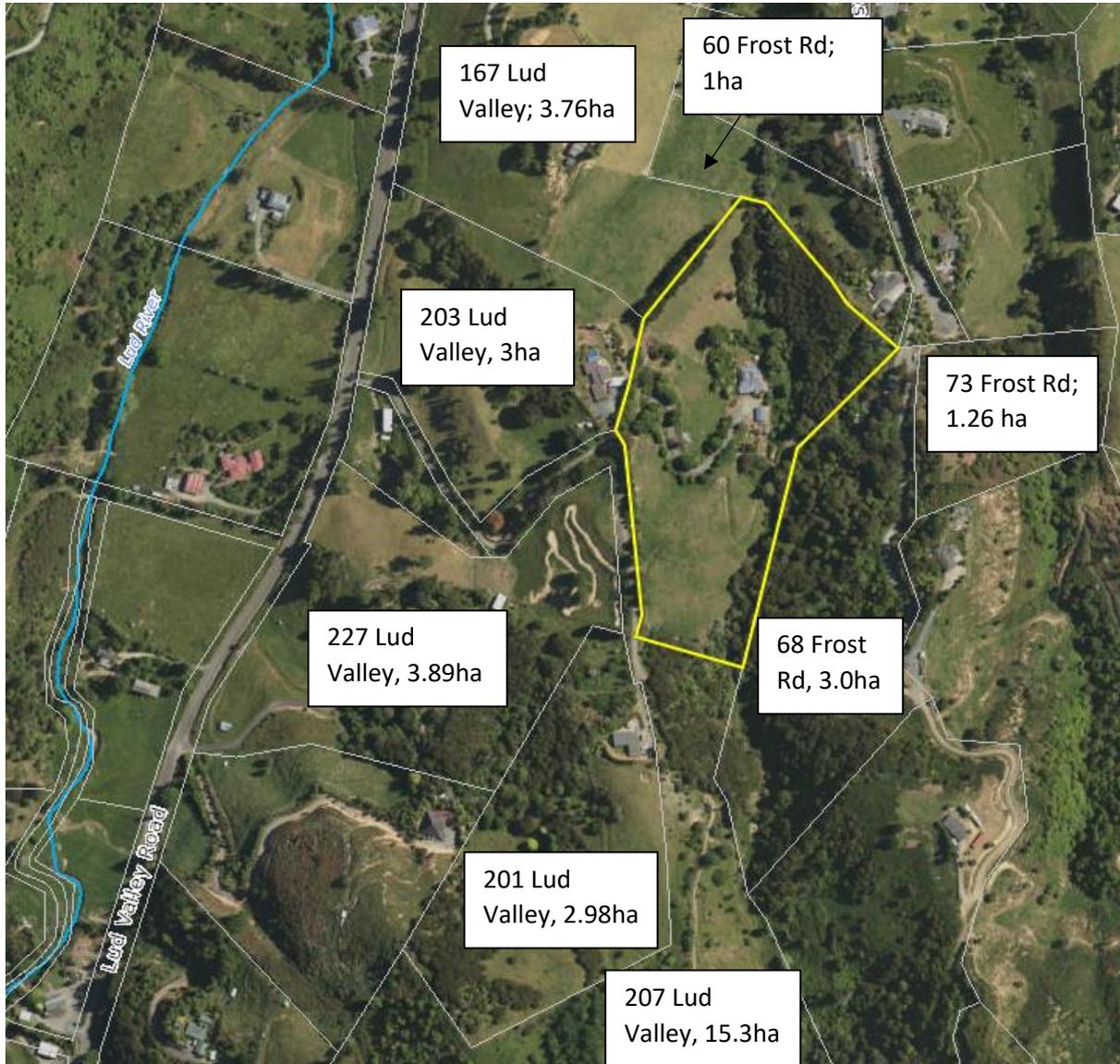


Figure 2: application site and adjoining sites with lots sizes

Plan Change 05/01

To protect the character of Nelson North, Council sought to restrict further subdivision by way of Plan Change 05/01 Nelson North. The plan change had immediate effect on notification (5 March 2005), with any subdivision application received after that date being subject to the new rules.

Under the current version of the RMA, s 86(B) (introduced by the Resource Management (Simplifying and Streamlining) Act 2009 (Simplifying Act)) provides that, except in specified circumstances), a rule in a proposed plan has legal effect only once a decision on submissions is made and publicly notified under clause 10(4) of the First Schedule to the RMA. This means that under the current version of the RMA, amended rule RUr.78 would

not yet have legal effect. However, under s151 of the Simplifying Act, if a rule was introduced by a plan change notified before 1 October 2009, then the legal effect of the rule must be determined as if the Simplifying Act did not apply (emphasis added).

Plan Change 05/01 was notified on 5 March 2005 and so s151 of the Simplifying Act applies to it. As such, any subdivision application received after Plan Change 05/01 was notified is subject to the amended rule RUr.78, which is to be applied as a proposed plan rule.

Plan Change 05/01 increased the minimum lot size in the Small Holdings Area in Nelson North (i.e. the area between The Glen Road (including all areas east of The Glen Road) and Whangamoia Saddle) from 2ha to 3ha. The rule amended by Plan Change 05/01 has legal effect. As noted above, the activity status under the operative rule is discretionary, while the activity status under the proposed rule is non-complying. Of the rules which have legal effect, the most stringent activity status applies. Therefore, the proposed subdivision is a non-complying activity under RUr.78.

Submissions and further submissions on Plan Change 05/01 have been sought, but no Plan Change hearing was held. It is important to acknowledge that PC05/01 attracted a large volume of submissions, the majority of which supported PC05/01 as it related to RUr.78 and sought to prevent land fragmentation and retain the rural character of the Lud Valley. Plan Change 05/01 was placed on hold. Nevertheless, the 3ha controlled activity minimum lot size introduced by PC05/01 does currently have legal effect and any subdivision in the Rural Zone or Low Density Small Holdings area in Nelson North that does not meet the minimum lot size is a non-complying activity.

As proposed rule RUr.78 is not fully operative, the operative discretionary activity rule and supporting objectives and policies also apply. In other words, both the operative and the proposed rule RUr.78 and supporting objectives and policies need to be considered. Council's legal advisor, Kate Mitchell, states in her letter to Mr McFadden (dated 11 March 2020): *"It is not appropriate or necessary as part of the s95A notification decision to undertake the weighing exercise of the relevant plan provisions. This is an exercise which needs to take lace at the time of the substantive decision under s104 RMA."* I adopt this advice.

Plan Change 27 (Nelson Tasman Land Development Manual 2019)

In conjunction with Tasman District Council (TDC), the Nelson City Council Land Development Manual (LDM 2010) was reviewed to incorporate TDC's 2013 Engineering Standards, and thus allow both Councils to present a consistent approach across the region.

The Nelson/Tasman Land Development Manual (NTLDM 2019) came into force on 1 July 2019. An associated amendment to the NRMP was undertaken as Plan Change 27, which was publicly notified on 15 July 2019. Whilst the RMA as it was in 2005 adopted a presumption of immediate legal effect for notified rules (as per Plan Change 05/01 above), the Simplifying Act takes the opposite approach. Sections 86A-86G, introduced by the Simplifying Act in 2009, effectively reversed the previous situation so that new plan rules only have legal effect once decisions on submissions are made. With regards to Plan Change 27, all submissions were withdrawn on 9 September 2019, i.e. as of this date the NTLDM 2019 (and the relevant rules in the NRMP referring to the NTLDM) must be treated as operative in accordance with section 86F of the RMA.

Any resource consent applications received by Council prior to 9 September 2019, must be assessed against the LDM 2010, as the NTLDM 2019 did not yet have legal effect via the NRMP rules. This application was received on 3 September 2019 and as such, must be

assessed in accordance with the NRMP prior to NTLDM 2019 amendments. The applicant also assessed the activity against the NTLDM 2019.

Matters for Consideration – 95A Public Notification

1. S.95A (1) (2) (3) Public notification of consent application(s)

a. Has the applicant requested that the application be notified? – 95A (3)(a)

- No **Go to** Question 1b
- Yes Application to be **publicly notified**. State below how applicant advised Council, then **go to** Question 9

Comment:

b. Has a request for further information (92(1)) or commissioning of a report (92(2)(b)) been made and there has been no decision to publicly notify or limited notify the application? – 95C(1)(a)

- No **Go to** Question 1d
- Yes **Go to** Question 1c

c. Has the applicant failed to respond by the deadline specified or refused to provide the information or refused to agree to the commissioning of a report? – 95C(1)(b)

- No **Go to** Question 1d – *however, it is noted that a complete response to Council’s request for further information has not yet been received*
- Yes Application to be **publicly notified** in accordance with section 95A(3)(b). **Go to** Question 9

d. Has the application been made jointly with an application to exchange recreation reserve land under section 15AA of the Reserves Act 1997? – 95A(3)(c)

- No **Go to** Question 2a
- Yes Application to be **publicly notified**. **Go to** Question 9

2. S.95A (4) (5) Public notification precluded in certain circumstances

a. Is the application for a resource consent for 1 or more activity and each activity is subject to a rule or National Environmental Standard (NES) that **precludes notification?** - 95A(5)(a)

No **Go to** Question 2b

Yes Provide details below. **Go to** Question 4

Rule / NES:

b. Is the application for a resource consent for 1 or more of the following activities (but no other activities) – 95A (5)(b):

(i) A Controlled activity; or

(ii) A restricted discretionary activity or discretionary activity and the activity is a **subdivision** (see 87(b)) or a **residential activity** (see 95A(6)); or

(iii) A restricted discretionary activity, discretionary activity or non-complying activity and the activity is a **boundary activity** (see 87AAB); or

(iv) A prescribed activity (see 360H (1)(a)(i)).

No Provide details and then **Go to** question 3

Yes Provide details and then **Go to** Question 4

3. S.95A (7) (8) Public notification required in certain circumstances

a. Is the application for a resource consent for 1 or more activity and any of those activities is subject to a rule or NES that requires public notification – 95A(8)(a)

No **Go to** question 3b

Yes Provide details below. Application to be **publicly notified**. **Go to** Question 9

Rule / NES:

b. Will the activity have adverse effects on the environment that will be, or are likely to be, more than minor in accordance with section 95D – 95A(8)(b)

No State reasons below, then **go to** Question 4

Yes State reasons below. Application to be **publicly notified**. **Go to** Question 9

Reasons:

Existing environment

The Rural Zone Lower Density Small Holdings Area comprises mainly valley floors, along with the lower and mid slopes of a number of valleys including the Wakapuaka, Teal, and Lud Valley. The zoning recognises the limited productive potential of these areas due to their topography and small size. According to operative objective RU2 rural character, RU2.ii b), the density of development in the Small Holdings Area is higher than that of the Rural Zone (which has a 15ha minimum lot size), "*with structures at more regular intervals, but still at a low level of density with significant area of land in between. Small holdings are not rural residential areas but are large enough to provide the opportunity for a range of rural activities*" (emphasis added).

Objective RU2.ii(b) was added to by PC05/01 and the addition (i.e. the proposed objective) states:

"Since the plan was notified in 1996, there has been a trend of undersize subdivisions in the North Nelson Rural Zone and Rural Small Holdings area. A plan change was notified in 2005 to make undersize subdivisions between The Glen Road and Whangamoia Saddle non-complying activities. This is an interim measure to halt this trend and avoid further adverse effects on rural character, until such time as a more structured and coordinated framework for subdivision is in place."

These objectives can be read together, and both need to be considered as part of the assessing whether there will be adverse effects from the proposal which may be more than minor.

The existing site is rural in nature and contains an existing dwelling and garage. The existing dwelling is located in the northern half of the property. The southern half of the property (i.e. Proposed Lot 2) is dominated by open pasture, which is currently used for grazing.

The proposed building site on Lot 2 is located on a north-east facing spur that slopes downhill from Proposed ROW A. No to-scale plan has been provided, but the area proposed for the dwelling (shown in yellow on CGW drawing 18360/03, see Figure 3 below) is set back approx. 27m from the ROW/ western property boundary.

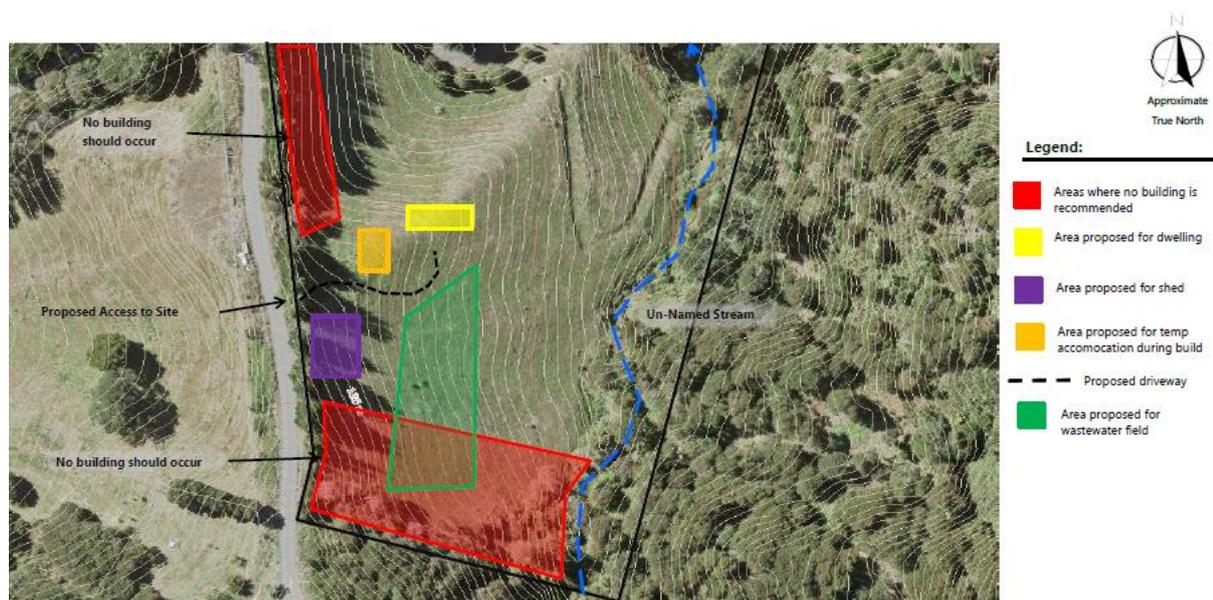


Figure 3: Proposed Conceptual Site Plan (source: CGW drawing 18360/03); note: the RFI response from FEL proposes a different wastewater field location than shown here

The actual and potential effects of this proposal relate to:

- Adequacy of the access and effects on other ROW users;
- Ability to provide on-site services;
- Effects of the proposed on-site waste water disposal;
- Effects on rural amenity and character;
- Effects on density and land use patterns;
- Cumulative effects; and
- Precedent effects.

These are considered below. It is noted that site the suitability assessment prepared by Cameron Gibson & Wells Ltd, dated 25 October 2018, envisages that major earthworks will be required to construct the access and proposed development and recommends that a slope stability analysis is undertaken. It is considered likely that the proposal would also require a resource consent under rule RUr.27 Earthworks to form the driveway and building platform. No earthworks consent has been applied for and the applicant advised that they wish to obtain a separate earthworks consent (if required) at a later date as the actual design layout and cut/fill details are not yet defined. This is accepted.

Council's consultant geotechnical advisor has reviewed the application and information provided and confirmed that sufficient geotechnical information has been provided for the subdivision consent. He recommends that a detailed geotechnical assessment of the site, including slope stability analysis for all proposed building areas and waste disposal fields shall be undertaken prior to Building Consent being applied for.

1. Adequacy of the access and effects on other ROW users

As detailed in the Site Description on page 3 above, the proposed subdivision will add one user to the existing ROW. The Isherwood response (dated 5 March 2020) states: "*Jody Postles, Licenced Cadastral Surveyor, has confirmed that at its narrowest point at the road frontage the minimum legal width of the ROW is 8.41m.*" Given this, and the carriage width of 3.5m, the existing ROW complies with the relevant LDM 2010 (and NTLDM 2019) formation standards for legal and carriage way width. The applicant advised that "*the average gradient of the ROW is approximately 11.5% and at its steepest will not exceed the maximum of 1 in 5.*"

However, the existing ROW does not comply with the passing bay requirements set out in sections 4.3.7 e) to g) of the LDM 2010 (and equally Table 4-13 of the NTLDM 2019), which requires the provision of passing bays every 50m, constructed to a minimum width of 5.5m. The applicant considers the effects arising from this non-compliance as less than minor. Council's Senior Engineer – Development has reviewed the application and information provided and advised: "*Provided the grass berms are kept in good condition and mowed then I agree that the existing formation does provide adequate ability for passing along the length of the ROW.*" I adopt this assessment. It is noted that the other ROW users provided written approval to the application as lodged.

2. Ability to provide on-site services

a) Water & Firefighting

It is proposed that potable and firefighting water will be sourced from appropriately sized roof tanks. The applicant has volunteered appropriate conditions of consent, i.e. a Consent Notice requiring any future buildings on Proposed Lot 2 to comply with the provisions of rules RUr.28.1.f) and g) and the New Zealand Fire Service Firefighting Code of Practice. This is considered adequate.

b) Telecommunications and Power

The applicant advised the connections to power and telecommunication services are available at the boundary, however, the applicant is not proposing to connect to these services but source power off the grid and telecommunications via rural broadband and cellular service.

c) Stormwater

It was initially proposed to direct runoff from the development area on Proposed Lot 2 into a 5,000L detainment tank and then into the stream via a pipe. This would have necessitated the need for an additional discharge permit under rule FWr.22 Point Source stormwater discharges to water. The FEL response received 1 November 2019 stated that it is not necessary nor recommended to pipe directly to the stream as originally proposed. The FEL response dated 9 January 2020 notes that *"the point of discharge will be determined at detailed design, however based on the presently understood site layout, it is possible to install a discharge point more than 25m from the stream."* FEL advised that compliance with the permitted activity requirements of rule FWr.25.1.f) General discharges to land where they may enter water, can be achieved. This is accepted.

d) Wastewater

The proposed on-site disposal of waste water is assessed in the section below.

3. Effects of the proposed on-site waste water disposal;

The applicant proposes to discharge domestic wastewater to an on-site disposal field and sought a discharge permit under FWr.29.3. Whilst no specific design/ system has been provided yet, the following parameters have been confirmed and/or volunteered by the applicant:

- Secondary treatment of effluent using a dripline;
- A treatment standard of 30mg/L BOD and 45mg/L TSS;
- A maximum design flow allowance of 1320L/ day (based on 8 occupants/ 4 bedrooms and water reduction fixtures being installed);
- An 880m² disposal field with a 38% reserve area;
- A maximum application rate of 1.5mm/day;
- A requirement for stormwater cut off drains above the disposal field to be installed;
- A visual and/or audible alarm to be installed;
- Maintenance requirements & frequency as per system requirements, but at least 12-monthly;
- A 15-year duration.

FEL concludes that: *"it is considered possible to design a wastewater treatment and disposal system for the proposed development in full compliance with AS/NZS1547:2012."* FEL confirmed that 38% reserve area is sufficient for the proposed drip irrigation of secondary treated effluent as the 100% reserve area requirement is normally applied to septic tank units followed by conventional trench land application systems. This is accepted.

It is noted that the wastewater field location shown on Figure 3 above has been amended by FEL. Given the steepness of the site, Council's geotechnical advisor requested an updated plan of the proposed location of the disposal field with regular cross-sections to demonstrate that the disposal field can be located on slopes that comply with CGW's

recommendation.² This has been provided and of the ten cross sections, four marginally exceed the recommended 35% (19.3°), being sections A1 (21.4°), A4 (19.6°), A8 (20.9°) and section A9 (20.3°). The average slope from the ten sections is 18.9°.

The applicant's geotechnical advisor (CGW) commented: "*from an instability perspective, the localised slightly steeper angles are negligible and the increased risk inconsequential.*" This has been accepted by Council's geotechnical advisor.

It is understood that the applicable disposal rate/ design irrigation rate (DIR) of 3mm/ day (for drip irrigation on Category 5 soil types as per ASNZS1547:2012) has been reduced by 50% to 1.5mm/ day in accordance with Table M2 of ASNZS1547:2012 (reduction of loading rate according to slope). However, for slopes over 30% Table M2 states that advice from a suitably qualified and experienced person is required. FEL confirmed that "*the proposed peak disposal rate of 1.5mm per day is acceptable for this slope, at this site. This conclusion is based on the soil conditions and my site observation that the proposed disposal area is well vegetated with no identified evidence of shallow failures at present.*"

Given the above, I am satisfied that on-site waste water discharge can be processed wholly within the application site. Appropriate conditions of consent have been volunteered to achieve compliance with AS/NZS1547:2012. The land application area will be set back approximately 10m from the closest property boundary (i.e. the southern property boundary with 207 Lud Valley Road) and 20m from the stream below. The wastewater will be treated to a high standard and the risk of overland runoff is considered minimal. I therefore consider the effects of the proposed on-site wastewater disposal to be no more than minor.

4. Effects on rural character and amenity of the wider Lud Valley area

The effects on the rural character and amenity have been considered in the context of the existing environment (as described above and shown on Figure 2), and the environment that the NRMP seeks for this area (as per the minimum lot size set in rule RUr.78 and described in the relevant objectives and policies quoted above). As noted above, it is appropriate to assess the effects of the application in the framework of both the relevant operative and proposed provisions.

Figure 2 shows that with the exception of 60 Frost Road (which was created by RM065371, a publicly notified subdivision, granted on 9 February 2007), all directly adjoining properties are >3ha in size.

It is noted that the properties to the west and east of Frost Road are smaller, with an average of approx. 1.4ha, while the properties on the southern end of Frost Road (68, 70 and 72 Frost Road are 3.0ha, 6.4ha and 3.7ha in area). The Frost Road area and allotments along this road were created through subdivision in 1999 (RM960717). At the time of approval of this subdivision, the NRMP had averaging provisions, i.e. 3ha average with a 2ha minimum lot size. The averaging provision enabled a density of development in the Frost Road area that was higher than might otherwise have resulted. In order to protect the integrity of the Plan, consent notices were imposed, restricting further subdivision for a 10-year period.

In summary, the rural character along Lud Valley Road and adjoining the application site is characterised by large open paddocks with small areas of native vegetation, interspersed by dwellings on approx. 3ha lots.

² The CGW letter dated 29 October 2019 and submitted with the 1 November 2019 RFI response recommends that steep portions of the slope (>35%) are avoided.

The proposed subdivision, in particular Proposed Lot 2 (1.2ha) is characteristic of a high-density rural landholding that is not consistent with the current (lower density small holdings) character of its immediate area. A proposed building site has been identified by the applicant, which is located below the existing ROW, thus reducing visual dominance. However, I disagree with the applicant's assessment of effects which states that "*the proposal is considered to retain the character of the surrounding area.*"

Whilst the proposed building site is not visually prominent from Lud Valley or the existing ROW, it can be seen from the southern Frost Road properties (68, 70 and 72 Frost Road). In terms of permitted baseline, the applicant could, as of right, erect a building up to 12m in height and cover up to 2,500sqm (less the area of existing buildings) of the site with impervious surfacing and structures. The applicant has argued that such a permitted activity "*has the potential to create much greater adverse environmental effects than this application.*" However, in my opinion, the effect generated by an additional residential occupation, land use and the creation of an additional title is considerably different, and it is therefore not appropriate to apply the 'permitted baseline.' Moreover, rule RUr.33 provides that each allotment can as of right have up to 2,500sqm of structures and paving. Therefore, subdividing this property into two lots would allow up to 5,000sqm of structures and paved areas.

I consider that an additional residential occupation and associated activities is more than the community could reasonably expect to be established on this site. The proposed lot size(s) ultimately creates a site more akin to a rural residential site, which is neither consistent with the existing character of the area nor that anticipated by the operative and proposed Plan (PC05/01) for the Lower Density Small Holdings Area. In my opinion, the proposal therefore results in more than minor effects on the rural character and will alter the amenity anticipated for this area through its significant non-compliance with the anticipated standards of the Plan as provided for by the minimum lot size.

As noted above, a draft notification report was provided to the applicant for comment. The applicant has provided density plans and states that the pattern of development in the surrounding area is not as described above and thus "*we do not accept the Officer's conclusion that it follows that the proposal results in more than minor effects on the character and amenity.*" I have therefore undertaken a detailed review of the lot sizes in the surrounding area, i.e. along Lud Valley Road (from the intersection with Frost Road, approx. 700m north of the ROW to the application site, to 29A Macs Road, approx. 700m south of the ROW) and along Frost Road. These are summarised in the Table below.

Address	DP	Lot size (in ha)	Comment
6 Frost Road	19559	0.24	NCC Reserve
25 Frost Road		1.67	As noted above, this area was created through a 15 Lot subdivision in 1999 (RM960717). At the time of approval of this subdivision, the NRMP had averaging provisions, which enabled a density of development that was higher than might otherwise have resulted. The average lot size created by RM960717 was 2.1ha , including former Lot 9 DP19559 (13.1 ha) and Lot 10 DP 19559 (2.06 ha), which were subsequently subdivided
135 Lud Valley Road		0.49	
18 Frost Road		1.12	
27 Frost Road		1.83	
28 Frost Road		1.88	
35 Frost Road		1.73	
42 Frost Road		1.25	
45 Frost Road		2.00	
55 Frost Road		1.19	
65 Frost Road		1.34	
73 Frost Road		1.27	
Lot 21 DP 19559		0.46	
70 Frost Road	432247	6.41	
68 Frost Road		3.00	

72 Frost Road		3.67	notice restricting subdivision for a 10-year period expired
58 Frost Road	387214	1.03	Subdivision of former Lot 10 DP19559, created by RM065371 (publicly notified). This is the only consent granted following notification of PC05/01 that authorised lots smaller than the minimum lot size
60 Frost Road		1.03	
126 Lud Valley Road	369080	2.38	Created by RM045040, granted 23.11.2004. Publicly notified, 9 out of 10 submissions in opposition
134 Lud Valley Road		1.92	
160 Lud Valley Road	NA	3.20	
161 Lud Valley Road		1.78	Created by RM940634 granted in 1994
167 Lud Valley Road		3.76	
180 Lud Valley Road		2.44	
190 Lud Valley Road		2.32	
203 Lud Valley Road		3.01	
205 Lud Valley Road		3.34	Application site
201 Lud Valley Road		2.98	
207 Lud Valley Road		15.34	
210 Lud Valley Road		3.31	
227 Lud Valley Road		3.89	
224 Lud Valley Road	16475	2.78	Created by RM922101, a controlled activity 6 Lot subdivision, granted in 1992 .
250 Lud Valley Road		1.80	
264 Lud Valley Road		1.97	
229 Lud Valley Road		2.76	
239 Lud Valley Road		2.16	
265 Lud Valley Road		1.00	
312 Lud Valley Road		15.46	
29A Macs		3.18	

This table illustrates that all lots smaller than 3ha (with the exception of 58 & 60 Frost Road) were created by subdivisions prior to Plan Change 05/01 being notified and in some instances prior to the operative Plan being notified in 1996. All subdivision consents were granted well over 10 years ago and are therefore of very limited relevance to this proposal.

The average lot size of the Lud Valley properties from 126 Lud Valley Road/ Frost Road intersection south is 3.72 ha and, as noted above, with the exception of 60 Frost Road, all properties that directly adjoining the application site are more than 3ha in size.

I therefore consider that the proposal has more than minor adverse effects on the rural character and amenity of the wider Lud Valley area, both in terms of the existing environment and the environment that the NRMP seeks for this area. While it is accepted that the existing rural character along Frost Road has been compromised by previous - albeit very old - subdivisions and the proposal may not be out of character with the allotment sizes along upper (northern) Frost Road, the rural character along Lud Valley and adjoining the application site is consistent with that anticipated by the Plan for this area. The Lot sizes proposed by this subdivision are significantly smaller than the standards of both the operative and proposed Plan and are considered to detrimentally affect the character and amenity of the wider environment by a more than minor degree.

5. Density and Land Use Pattern

As noted above, the majority of properties adjoining the application site are >3ha in area, which is consistent with the intentions of the policy for low-density rural landholdings. Any

further subdivision in this immediate area, in particular a subdivision resulting in two lots that are well below the 3ha minimum lot size, will erode the Plan provisions, which were set to provide for a low-density land use pattern. I consider that the effects of the proposed subdivision will be more than minor, in that the subdivision will not achieve the intentions of the low density small holdings area and will result in a higher density than anticipated.

Rule RUr.78 in the Plan as made operative contained controlled activity standards of a 3ha average lot size with a 2ha minimum lot size in the Lower Density Small Holdings Area. The proposed subdivision would result in an average lot size of 1.67ha only and Proposed Lot 2 is well below the 2ha minimum. Thus, the proposal will result in a higher density than the community has anticipated and deemed acceptable for this area. The provisions introduced by PC05/01 to "avoid further adverse effects on rural character" have not yet been tested in a Plan Change hearing, but the rule setting a 3ha minimum lot size has legal effect and I consider that the proposal is inconsistent with the density and land use pattern the Plan – both operative and proposed - seeks for rural small holdings.

Furthermore, the ability of a future owner of Proposed Lot 2 to undertake a 'range of rural activities' will be constrained by its small size. The lot will potentially comprise a large residential dwelling, an 880sqm wastewater field plus reserve area for the wastewater field.³ This is not the pattern of rural land use that is anticipated for this area, but rather creates a character more consistent with large residential or high density small holdings.

Following circulation of the draft notification report, the applicant's agent commented: "*the operative objectives and policies remain unchanged from those which provided for RUr.78.3 b) with a minimum lot size of 1ha in the Small Holdings Area.*" However, as detailed above, the controlled activity minimum lot size under the operative rule is 2ha and the size of Proposed Lot 2 (1.2ha) is well below that. The 1ha referred to by the agent is the discretionary standard, below which subdivisions (under the operative rule) are non-compliant. There should not be an expectation that a proposal is acceptable and does not result in more than minor effect simply because it meets a discretionary standard (of the operative rule). Under the proposed rule the proposal is a non-complying activity and as noted earlier, of the rules which have legal effect, the most stringent activity status applies. The applicant's lawyer, Mr McFadden, confirms: "*indeed it has "legal effect" but that must be weighted.*" However, weighting of the operative and proposed objectives and policies needs to be undertaken at decision making stage, as part of the substantive decision under s104(1)(b)(iv) RMA – not as part of the s95A notification decision. This has been confirmed by Council's legal advisor. It is also noted that relevant objectives and policies of the operative and proposed plan are not in conflict – PC05/01 has merely added to the existing objectives and policies in order to strengthen them and to halt under-sized subdivisions "*as they are changing the character of the area to one not anticipated in the Plan*" (proposed Policy RU2.5).

Mr McFadden also notes that "*PC05/01 has not been through a submission hearing or decision process.*" This is incorrect. PC05/01 attracted a large volume of submissions, the majority of which supported PC05/01 as it related to RUr.78 and sought to prevent land fragmentation.

6. Cumulative effects

³ As proposed in the discharge permit (RM195192)

As per s3 RMA, effect includes any cumulative effect which arises over time or in combination with other effects, regardless of the scale, intensity, duration, or frequency of the effect. A cumulative effect is therefore concerned with something that *will* occur.

It is considered that the grant of this application, i.e. a subdivision (considerably) below the minimum lot size, has the potential to result in more than minor adverse cumulative effects as the further fragmentation of the Lower Density Small Holdings Area would add to existing fragmentation effects. As detailed in the Table above, the existing rural character along Frost Road has already been compromised while the rural character along Lud Valley Road and adjoining the application site is still largely intact and consistent with that anticipated by the Plan. A further subdivision will change the amenity in addition to the already changed amenity in the upper (northern) Frost Road area. Moreover, it would allow the existing fragmentation, which extends to approximately the cul-de-sac head of Frost Road, to "spill" into the wider Lud Valley area and an area that is still predominantly rural. Therefore, the cumulative effects of the proposal will lead to more land fragmentation and will diminish the rural character and amenities in the wider area. Given the number of undersized lots already in the area (i.e. along upper Frost Road, with 60 Frost Road bordering the application site to the north), I consider the cumulative effects on the fragmentation of the Low Density Small Holdings area, rural character and amenity of the wider Lud Valley and its community to be more than minor.

7. Precedent effects

A precedent effect is a potential effect which may or may not happen and levels of probability of occurrence and potential impact therefore need to be considered. While every application is required to be assessed on its merits on a case by case basis, the application site does not contain any particular site-specific details or particular topographical features. Council needs to treat applications consistently, and if subdivision is appropriate on the subject site, then it may also be appropriate on the adjoining sites as there is little difference between the application site and surrounding sites. This would ultimately result in the creation of lots of a rural-residential scale, which would fundamentally change the character of the lower-density area to one of smaller lots, with more dense development, less open space and less area for rural activities. While it is acknowledged that the application site is not productive land, the Plan does not provide an opportunity to subdivide less productive land for rural-residential use.

The community have a right to expect consistent administration of the Plan and any decision made in this application will strongly impact future applications and decisions reached on the development in Lud Valley. Given that there are no unique features that distinguish this application or application site, I consider the probability of occurrence as high to very high.

With regards to the potential impact, RM045040, a 2 Lot subdivision of a 4.3ha title into two allotments of 1.92ha (134 Lud Valley Road) and 2.38ha (126 Lud Valley Road) notes that *"an approximate assessment has been undertaken of the existing dwellings in the valley area and any controlled activity subdivision occurring, resulting in an approximate total of 119 dwellings in the valley. Were however the land in the valley to be subdivided into areas of similar sizes to these currently under consideration, there is the potential for 180 dwellings in the same valley."*

Whilst RM045040 is a 2004 consent (prior to PC05/01 being notified), only two more subdivision consents have been granted in the area surrounding the application site, i.e. RM055082 (3 Lot subdivision, all lots >3ha) and RM065371 (2 Lot subdivision), as detailed in the Table above. Furthermore, the lot sizes proposed in this application are much smaller than those considered under RM045040 and thus, the potential number of

dwellings based on the current proposal would be more than the potential for 61 additional dwellings identified above (i.e. 180 minus 119). I consider that the approximate figures of the assessment are still useful (and conservative when compared to the current proposal) and can be adopted for the purposes of this assessment. In my opinion, an additional 60 dwellings, being the potential impact should this subdivision be approved and other owners in the area also apply, is significant. In summary, the precedent effects of the proposal have a high probability of occurrence and potentially significant impacts in that they would lead to irreversible land fragmentation and diminish the rural character and amenities in the wider Lud Valley area.

4. S.95A (9) Public notification in special circumstances

a. Is it considered that special circumstances exist in relation to the application that warrant the application be publicly notified? – s95A(9)

No State reasons below. **Go to** Question 5

Yes State reasons below. Application to be **publicly notified**. **Go to** Question 9

Reasons:

For the sake of completeness, I have also included a consideration of public notification in special circumstances. It does not form the basis for the notification decision.

In the context of decisions on public notification of resource consent applications, 'special circumstances' are those outside the common run of things which are exceptional, abnormal or unusual, but they may be less than extraordinary or unique⁴. In this case, the following circumstance may be relevant:

a) 'Outside of the common run of things':

PC05/01 has been on hold for 14 years. The rule introduced by PC05/01 has legal effect and the Plan Change has not been withdrawn. This in itself is an unusual situation and 'outside the common run of things.'

Objective RU2.ii b), which was added to by PC05/01 states:

Since the plan was notified in 1996, there has been a trend of undersize subdivisions in the North Nelson Rural Zone and Rural Small Holdings area. A plan change was notified in 2005 to make undersize subdivisions between the Glen Road and Whangamoia Saddle non-complying activities. This is an interim measure to halt this trend and avoid further adverse effects on rural character, until such time as a more structured and coordinated framework for subdivision is in place.

The s32 Assessment accompanying PC05/01 noted that rural fragmentation is an issue in Nelson North and concluded that the existing plan provisions "are not effectively achieving the anticipated environmental results of the Plan" as evident in a clear trend of undersize subdivisions. This trend was somewhat 'halted' by the introduction of the non-complying activity status for subdivisions below the 3ha minimum lot size introduced by PC05/01. It is important to acknowledge that PC05/01 attracted a large volume of submissions, the

⁴ Thompson v Invercargill City Council [2020] NZHC 174, per Gendall J, at [20]

majority of which supported PC05/01 as it related to RUr.78 and sought to prevent land fragmentation and retain the rural character of the Lud Valley.

In November 2013 Council resolved to undertake a full review of the NRMP, with the reviewed document to be called the Whakamahere Whakatū Nelson Plan. The Nelson Plan has been drafted and internal testing and review of the Draft Plan has been undertaken. Council's Planning Team advised that engagement on the Draft Plan with statutory stakeholders and key local stakeholders will begin in early 2020.⁵

Given that the operative NRMP was notified in 1996, PC05/01 is 14 years old and stakeholder engagement on the Nelson Plan is about the commence, it is considered important not to make an 'ad hoc' decision on an individual consent. Instead, the public needs to have an opportunity to have a say and provide input into what it wants the character of the area in question to be. For the reasons outlined above, public notification due to unusual, and therefore, special circumstances, is warranted.

In summary, I consider that special circumstances exist due to the particular anomalies of the planning context for this application, and the desirability of allowing for input from the public to help inform the Council's decision where the planning context is not settled or certain. However, it is acknowledged that the planning context arises out of the Council's processes and thus is within Council's control. Given this, whether or not special circumstances exist is a finely balanced question.

Given my discussions and conclusions under section 3b above, I consider that it is appropriate to make a decision to publicly notify this application without the need to rely on special circumstances as justification for a notification decision.

Matters for Consideration – 95B Limited Notification

5. S.95B (1-4) Limited notification of consent applications

a. Are there any affected protected customary rights groups or customary marine title groups - 95B (2)(a)(b)

Yes details:

Serve notice on affected groups even if a rule or NES precludes public or limited notification

No **Go to** Question 5b

b. Is the proposed activity on or adjacent to, or may affect land that is the subject of a statutory acknowledgement made in accordance with an Act specified in Schedule 11 – 95B (3)(a)

Yes Provide details below. **Go to** question 5c

No **Go to** Question 6

Details:

c. Is the person to whom the statutory acknowledgment is made an affected person under section 95E – 95B(3)(b)

⁵ <http://www.nelson.govt.nz/environment/nelson-plan/overview/> - accessed 17 March 2020

Yes Provide details below. **Serve notice on affected persons even if a rule or NES precludes public or limited notification**

No **Go to** Question 6

Details:

6. S.95B (5) (6) Limited notification precluded in certain circumstances

a. Is the application for a resource consent for 1 or more activity and each activity is subject to a rule or national environmental standard that precludes limited notification – 95B (6)(a)

Yes details: _____ **Go to** Question 8

No **Go to** Question 6b

b. Is the application for a resource consent for either or both of the following (but no other activities) – 95B(6)(b)

(i) A controlled activity that requires consent under a district plan (other than a subdivision)

Yes..... details _____ **Go to** question 8

No **Go to (ii)**

(ii) a prescribed activity (see section 360H (1)(a)(ii))

Yes details _____ **Go to** Question 8

No **Go to** Question 7

7. S.95B (7)(8)(9) Certain other affected persons must be notified

a. A person is not affected if the person has given written approval and has not withdrawn the approval before the notification decision is made – 95E(3)(a). Has any person provided written approval?

Yes Complete the table below, then **Go to** Question 7b

No **Go to** Question 7b

Person:	Address:

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b. Are the following persons affected persons – 95B(7)

(i) In the case of a **boundary activity**, an owner of an allotment with an infringed boundary **AND** affected under s95E

Yes Provide reasons below. **Serve notice on those persons**

No **Go to** Question **(ii)**

N/A **Go to** Question **(ii)**

Reasons:

(ii) In the case of an activity prescribed under section 360H(1)(b), a prescribed person in respect of the proposed activity **AND** affected under s95E

Yes Provide details below. **Serve notice on those persons**

No **Go to** Question 7c

N/A **Go to** Question 7c

Details:

c. For the purpose of giving limited notification of an application for a resource consent under section 95B(4) and (9) a person is an affected person if the adverse effects of the activity on the person are minor or more than minor but not less than minor – 95E(1).

Are any persons (other than those who have given written approval) affected?

Yes Provide reasons and complete table below. **Serve notice on those persons**

No Provide reasons below then **go to** Question 9

Reasons:

Person:	Address:

8. S.95B (10) Further notification in special circumstances

a. Do special circumstances exist in relation to the application that warrant notification of the application to any persons not already determined to be eligible for limited notification (excluding persons assessed under section 95E as not being affected persons) – 95B(10)

Yes..... State reasons below and **serve notice those persons**

No..... State reasons why below then **go to** Question 9

Reasons:

9. Advice to Third Parties

a. Is the site/building on the New Zealand Heritage List?

No.....**Go to** Question 9b

Yes.....advise Heritage New Zealand

b. Is this site/building within a Pre-1900 settlement area of Nelson?

No.....**Go to** Question 9c

Yes.....advise Heritage New Zealand

c. Does the proposal involve removing a Heritage Building or Protected Tree?

No.....**Go to** Question 9d

Yes.....Ensure the Planning Advisor is advised

d. Is the site designated in the NRMP?

No.....**Go to** Question 9f

Yes.....**Go to** Question 9e

e. Is the Requiring Authority the applicant?

No – has the Requiring Authority given written consent?

Yes – has an amended outline plan been supplied?

f. Is it a cross-lease site?

No

Yes – all registered owners need to be the applicant, or should provide written approval

Decision

It is decided that this application be processed on a Publicly Notified basis

Reporting Officer: Susi B. Solly Position: Consultant Planner

Signed  Date: 23 March 2020

Authorised by: Adrian Ramage____ Position: Team Leader Resource Consent



Signed _____ Date: 23 March 2020