Before Independent Hearing Commissioners
At Queenstown

I mua ngā Kaikōmihana Whakawā Motuhake
Ki Tahuna

In the matter of **the hearing of submissions and further submissions on Variation to Queenstown-Lakes District Council's Proposed District Plan**

Inclusionary Housing Variation Council's Casebook

28 March 2024

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Inclusionary Housing Variation
Council's Casebook

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2020-404-1880
[2021] NZHC 2596

UNDER	The Resource Management Act 1991
BETWEEN	CABLE BAY WINE LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

CIV 2020-404-2456

UNDER	The Judicial Review Procedure Act 2016, the Judicature Amendment Act 1972 and Parts 5 and 30 of the High Court Rules 2016
BETWEEN	CABLE BAY WINE LIMITED Applicant
AND	THE ENVIRONMENT COURT First Respondent

Continued…

Hearing:	28 April 2021
Appearances:	A G Webb for Cable Bay Wine Ltd S F Quinn and K H Rogers for Auckland Council S J Simons and O C Manning for the Third Respondents: J Loranger, L Niemann, M Poland and C Poland
Judgment:	30 September 2021

JUDGMENT OF CAMPBELL J

This judgment was delivered by me on 30 September 2021 at 12:30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

AUCKLAND COUNCIL
Second Respondent

JULIE LORANGER, LINDSAY NIEMANN, MICHAEL POLAND, CHRISTINE POLAND, STEPHEN EDWARDS and SUZANNE EDWARDS
Third Respondents

Introduction

[1] Cable Bay Wine Limited (**Cable Bay**) operates a winery and hospitality business from a property on Waiheke Island, Auckland. It sought a retrospective resource consent for certain activities that it was carrying out on the property. Auckland Council refused consent. Cable Bay appealed to the Environment Court. The Court granted consent for some of the activities, subject to conditions.

[2] Cable Bay appeals against, and seeks judicial review of, the Environment Court's decision. Cable Bay says the conditions imposed by the Environment Court are unlawful. It does not challenge the grant of the consent itself or the Court's refusal of consent for some activities.

[3] Cable Bay's challenge to the lawfulness of the conditions imposed by the Environment Court is wide-ranging. It says some of the conditions control activities that Cable Bay was already authorised (under an earlier consent granted in 2006) to undertake. Those activities were outside the scope of Cable Bay's application for resource consent. Accordingly, the Court had no jurisdiction to impose conditions to control those activities. Cable Bay says that, even if the Court had jurisdiction, the conditions are ones that no reasonable consent authority would impose. For some conditions, Cable Bay says the Court erred in treating a neighbouring leasehold property as if it was a separate site from the Cable Bay property (and therefore entitled to the benefit of conditions imposed to mitigate noise). Finally, Cable Bay says the Court adopted an iterative and mediation-style process that breached Cable Bay's right to natural justice.

[4] The first respondent on the review is the Environment Court. It abides the decision of this Court. The second respondent on the review and sole respondent on the appeal is Auckland Council. It opposes the appeal and the judicial review. The third respondents on the review are neighbours of Cable Bay. Two of the neighbours (the Edwards) abide the decision of this Court. The other neighbours (Ms Loranger,

Ms Niemann and Mr and Mrs Poland) oppose the judicial review and the appeal.[1] For convenience, I will refer to those neighbours as the third respondents.

Background

The property and the lease

[5] Cable Bay has, since 2012, operated a winery and hospitality business from a property at 12 Nick Johnstone Drive, Oneroa (**the property**). The property is situated at the western end of Waiheke Island, in a rural-residential environment. It enjoys coastal views and is only one kilometre from the ferry terminal at Matiatia Bay.

[6] The property is some 4.5566 hectares. Much of the property is covered in vines, grapes having been grown at the property since the 1990s. As well as three buildings and a car parking area, there is a gently sloping lawn of about 7,000 square metres.

[7] Part of the property (just under 4,000 square metres) is subject to a lease to Julie Loranger and Lindsay Niemann, who are two of the third respondents. The lease was granted in 2002. The leasehold property is at 85 Church Bay Road.

[8] A separate record of title has been issued for the leasehold property. The lease is for a term less than 35 years, which meant the grant of the lease did not constitute a subdivision under the Resource Management Act 1991 (**the RMA**).[2]

The 2006 Consent

[9] In 2004 the then owner of the property applied for resource consent to erect and operate a winery and to operate associated ancillary activities including a function room and restaurant seating up to 120. The operative plan governing that application was the City of Auckland District Plan – Hauraki Gulf Islands 1996 (**the Legacy Plan**). The property is located within an area that was referred to as "Land Unit 22 (Western Landscape)" in the Legacy Plan.

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1 Those neighbours filed a notice of intention to appear on the appeal under s 301 of the Resource Management Act 1991.

2 Resource Management Act 1991, s 218.

[10] In 2004 the relevant territorial authority was the Auckland City Council. For convenience I will refer to that authority by the name of its successor, Auckland Council.

[11] The Legacy Plan was permissive in nature in relation to Land Unit 22 (Western Landscape). Rule 6.22.4.1 provided that "Any activity shall be a permitted activity … except where it has otherwise been provided for in the rules for this land unit as a controlled, discretionary or prohibited activity."

[12] The 2004 application said the proposed development required resource consent for four matters: the erection of a new building; the location of that building close to a ridgeline; earthworks; and exceeding permitted lot coverage. It said the ancillary activities that were proposed to take place (such as the restaurant) were otherwise within r 6.22.4.1 and did not require separate consent.

[13] Nonetheless, the application addressed those ancillary activities. It said the restaurant was to have a maximum seating capacity of 120. The application included plans showing that a lawn in front of the restaurant was to be used by guests. The application was supported by several reports from consultants. These included an assessment of noise effects by Hegley Acoustic Consultants dated July 2004. This report said that up to 40 restaurant patrons would be able to dine on the outside deck at any one time, and that patrons would be free to enter the vineyard, though it was not proposed to use the vineyard for functions.[3]

[14] Ms Loranger and Ms Niemann gave written approval to the resource consent application. Their approval said they were doing this in accordance with the provisions of their lease.

[15] The application was notified. In August 2005, independent commissioners granted the application subject to conditions. The commissioners noted resource consent was required only for the four matters specified in the application. Nonetheless, the conditions included post-development conditions "that relate to the

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[3] The same comments were made in a further report produced by Hegley Acoustic Consultants in March 2005. That report was a response to a request by Auckland Council for further information on noise effects.

implementation and operation of the activity for which consent has been granted". These included conditions regulating the hours of operation of the restaurant, noise levels arising from any activity on the site and the seating capacity of the restaurant.

[16] The owner of the property appealed to the Environment Court. The appeal was resolved by consent. On 22 May 2006 the Environment Court issued a consent order confirming the grant of resource consent subject to amended conditions of consent (**the 2006 Consent**). There were (amended) post-development conditions regulating the hours during which the restaurant and other "facilities" would be open to the public, noise levels arising from any activity on the site and restaurant capacity.

[17] The owner of the property then undertook the development and commenced the ancillary activities.

The 2017 application for resource consent

[18] As noted, Cable Bay began operating the winery and hospitality business from the property in 2012. By 2014, an additional lightweight veranda structure had been constructed on the property. This contained a pizza kitchen, bar and seating for guests. This was constructed and operated without any building or resource consent. By 2017, Cable Bay was using three seating bays (with umbrellas) to the south of the veranda for outdoor dining. It was also using the lawn in front of the restaurant and veranda for informal dining, with guests typically using bean bags.

[19] In April 2017, Cable Bay applied for:

(a) Retrospective resource consent to establish the veranda and operate a restaurant and function facility within it.

(b) Resource consent to "formalise" outdoor seating for restaurant guests in the outdoor seating bays and consent to use the lawn area for informal dining and drinking.[4]

[4] The application described the proposed activities on the lawn in slightly different ways. Section 3.1.2 said the lawn area would be used for "informal dining". Section 4.0 said the outdoor area (which included the lawn) would be used for "casual dining and drinking purposes".

(c) Resource consent to construct a noise barrier fence close to the leasehold property at 85 Church Bay Road.

[20] By the time this application was made, a new Hauraki Gulf Islands District Plan was operative in part. It became operative in full in 2018 and is the relevant plan for the purpose of the application and subsequent proceedings (**the Operative Plan**).

[21] Auckland Council appointed independent commissioners to hear and consider Cable Bay's application for resource consent. On 30 January 2018, the commissioners refused the application in its entirety. I outline the commissioners' reasons below.

The proceedings before the Environment Court

[22] On 2 February 2018, Cable Bay appealed the commissioners' decision to the Environment Court (**the Veranda Appeal**). Cable Bay asked that the decision be set aside and that resource consent be granted in terms of its application or subject to such conditions as the Environment Court might consider appropriate.

[23] On 28 February 2018, Auckland Council commenced a proceeding in the Environment Court applying for enforcement orders against Cable Bay to require compliance with the 2006 Consent and the Operative Plan (**the Enforcement Proceeding**). The enforcement orders included that Cable Bay cease use of the veranda as a restaurant and function facility, cease use of the outdoor seating bays for restaurant and function guests and cease use of the lawn area for informal dining. Cable Bay opposed the Enforcement Proceeding.

[24] The Veranda Appeal and the Enforcement Proceeding were case managed and set down for hearing together.

The process used by the Environment Court

[25] To determine the two proceedings the Environment Court used a process known (in that Court) as the *Erskine* approach.[5] This is an approach in which the

[5] The approach is named after an Environment Court proceeding in which it was first used: *The Wellington Company Ltd v Save Erskine College Trust* [2018] NZEnvC 6, [2018] NZEnvC 35, [2018] NZEnvC 59, [2018] NZEnvC 106 and [2018] NZEnvC 126.

Court issues interim decisions as a means of guiding the parties to resolution of the dispute. Specifically, the Environment Court stated in its first interim decision on the Veranda Appeal dated 26 November 2018:[6]

> It is our intention concerning the present case and the enforcement proceeding to move through a series of interim decisions to assist the parties to get appropriate controls in place and make sure they work …

[26] In these two proceedings the hearings and decisions spanned two years. I outline the key events here (I address the reasons for the decisions in the Veranda Appeal below):

(a) A first hearing on the Veranda Appeal from 7 to 14 November 2018, followed by a first hearing on the Enforcement Proceeding on 15 November 2018.

(b) A first interim decision on the Veranda Appeal dated 21 November 2018.[7]

(c) An interim decision in the Enforcement Proceeding dated 28 November 2018.[8] Interim enforcement orders were made against Cable Bay. The orders significantly limited outdoor dining and drinking at the property.

(d) A second interim decision on the Veranda Appeal dated 22 February 2019.[9]

(e) A second hearing on the Veranda Appeal and the Enforcement Proceeding on 29 and 30 August 2019.

(f) Two further interim decisions on the Veranda Appeal dated 15 October 2019 and 10 June 2020.[10]

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6 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226.
7 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226.
8 *Auckland Council v Cable Bay Wine Ltd* [2020] NZEnvC 228.
9 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 29.
10 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 170 and [2020] NZEnvC 75.

(g) A final decision on the Veranda Appeal dated 17 September 2020.[11] The final decision granted consent and imposed conditions. There are 71 conditions.

(h) A final decision on the Enforcement Proceeding dated 30 October 2020.[12] The Environment Court cancelled the interim enforcement orders and declined Auckland Council's substantive application. The Court did so because the regulatory situation was by then covered by the conditions of consent imposed in the Final Decision in the Veranda Appeal. The Court made clear Auckland Council's application was not being declined because it lacked merit.

Cable Bay's appeal and application for judicial review

[27] On 8 October 2020, Cable Bay appealed against the Environment Court's final decision on the Veranda Appeal. Its appeal is only against the conditions imposed by the Environment Court – it does not appeal against the grant of the resource consent. Cable Bay says the conditions severely restrict activities at the property. Cable Bay submits 41 of the conditions are, because of alleged errors of law by the Environment Court, unlawful.

[28] The third respondents contended Cable Bay's appeal was out of time in respect of some of the matters Cable Bay challenged (essentially on the ground those matters had been decided in interim decisions, which Cable Bay could and should have appealed earlier). Cable Bay did not accept it was out of time. However, in case it was out of time, Cable Bay filed, out of an abundance of caution, an application for judicial review of the imposition of the conditions in the Final Decision. The application for judicial review alleges the same errors of law as those in the appeal.

[29] Before turning to Cable Bay's grounds of appeal and review, it is necessary to outline the legal framework for the decisions of the commissioners and of the Environment Court, and the reasons for those decisions.

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11 *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC 154.
12 *Auckland Council v Cable Bay Wine Ltd* [2020] NZEnvC 182.

An outline of the legal framework for the decisions below

[30] The RMA categorises activities along a spectrum: permitted, controlled, restricted discretionary, discretionary, non-complying or prohibited. Permitted activities can be undertaken as of right. They do not require a resource consent. A resource consent is required for a controlled, restricted discretionary, discretionary or non-complying activity (with the hurdle to obtain consent rising as one moves along the spectrum). No application for a resource consent can be made (let alone granted) for a prohibited activity.[13]

[31] Cable Bay's 2017 application sought resource consent for activities that, under the Operative Plan, are non-complying:[14] the operation of a restaurant and function facility in the veranda and the use of the outdoor areas (seating and lawn) for informal dining and drinking. This meant that its application was governed by the following provisions of the RMA: ss 104, 104B, 104D, and 108.

[32] Section 104 applies to all applications for a resource consent. Section 104(1) provides that when considering an application for a resource consent the consent authority must have regard to (relevantly):

> (a) Any actual and potential effects on the environment of allowing the activity; and
>
> (b) Any relevant provisions of any district plan; and
>
> (c) Any other matter that is relevant and reasonably necessary to determine the application.

[33] In order to assess the first of these matters (actual and potential effects on the environment), the consent authority first has to determine the existing environment.

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13 Resource Management Act 1991, s 87A.

14 There were other activities that were not non-complying, but they are not relevant to this appeal and review.

[34] An application for a resource consent for a non-complying activity must additionally pass through one of the two gateways in s 104D. Section 104D(1) provides that a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either:

(a) The adverse effects of the activity on the environment will be minor; or

(b) The application is for an activity that will not be contrary to the objectives and policies of the relevant plan (if, as is the case here, there is a plan (but no proposed plan) in respect of the activity).

[35] Section 104B provides that, after considering an application for a resource consent for a non-complying activity, the consent authority may grant or refuse the application. If it grants the application, by s 104B(b) it may impose conditions under s 108.

[36] Section 108(1), as it applies to Cable Bay's application,[15] provides that a resource consent may be granted on any condition that the consent authority considers appropriate. This broadly expressed discretion to impose conditions is subject to general administrative law requirements that control the exercise of public powers. Conditions must be imposed for a planning purpose, must fairly and reasonably relate (that is, have a logical connection) to the proposed activities, and may not be so unreasonable that no reasonable consent authority could have imposed them.[16]

The commissioners' refusal of consent

[37] The commissioners refused consent because they found the proposed activities would not pass through either of the gateways in s 104D. As to the first gateway, they found the proposal would have more than minor adverse effects on the amenity values

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15 From 18 October 2017, s 108(1) was amended so that the consent authority's power to impose conditions is also subject to s 108AA. Cable Bay's application was made before that amendment came into force. The application and subsequent appeals and review remain governed by s 108(1) in its pre-amendment form and are not subject to s 108AA. I address this further below under issue 1, at [93] to [98].

16 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [61] and [66].

that could reasonably be expected in the environment.[17] At the heart of this concern were the adverse effects of the daily outdoor use of the property by those people visiting and dining, together with the use of the outdoor areas for functions.[18] The commissioners were not convinced that conditions could reduce the adverse effects to minor or less than minor.[19]

[38] As to the second gateway, the commissioners found the proposal to be contrary to objective 10a.20.3 of the Operative Plan and the policies supporting that objective.[20] Objective 10a.20.3 provides that the objective for the land unit in which the property is located is:

> To provide for and protect the rural-residential style of living while avoiding the adverse effects of activities and buildings on the natural character and landscape values of the land unit.

[39] Having found that neither s 104D gateway was met, the commissioners were prevented from granting consent. For completeness they added that the proposal did not merit the grant of consent under s 104 (for much the same reasons it did not pass through s 104D).

[40] The commissioners noted that there was a dispute as to whether the leasehold property at 85 Church Bay Road was part of the application "site". They said that, given their refusal of consent, they did not need to resolve that dispute. They nonetheless said that they found that the application site "relates to the entire site, including 85 Church Bay Road".[21]

The Environment Court's decisions on the Veranda Appeal

[41] Cable Bay makes wide-ranging challenges to the reasoning of, and process adopted by, the Environment Court on the Veranda Appeal. It is therefore necessary to set out in some detail the interim and final decisions of the Court.

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17 At [85].
18 At [82].
19 At [85].
20 At [104].
21 At [26] and [28].

The Environment Court's first interim decision

[42] The Environment Court delivered its first interim decision on 21 November 2018, one week after the first hearing. The Court said the purpose of the interim decision was to convey to the parties the Court's refusal of part of Cable Bay's application and to make further directions about refining conditions on the aspects of the application for which consent might be granted. The Court said it would provide detailed reasoning in another interim decision.[22]

[43] The Court said Cable Bay was seeking retrospective consent for two broad activities: (i) the restaurant in the veranda and (ii) outdoor facilities, including a bar, tables and chairs and umbrellas, with open-air dining and drinking on the lawn.[23] The Court held that this proposal as a package would fail the gateway test in s 104D: the effects on the environment (which could not be adequately managed) would be more than minor and the activities would be contrary to a key objective and key policy in the Operative Plan.[24]

[44] The Court refused consent for the second part of the proposal, which it variously described as the "use of the lawn for restaurant and outdoor dining purposes" and "the outdoor hospitality activities".[25] The Court said it was continuing the indication (given during the first hearing) of possible consent to the first part of the proposal, which it described as "Veranda restaurant and kitchen", subject to "satisfactory conditions of consent being finalised".[26] The Court directed preparation of a plan for its consideration and possible inclusion in any consent, showing (among other things) (i) removal of outdoor bar, tables, seating and umbrellas and (ii) an area on the lawn where wedding ceremonies could take place in approved terms.[27]

[45] Finally, the Court said it was its intention to "move through a series of interim decisions to assist the parties to get appropriate controls in place and make sure they work, an approach taken in … *Erskine*".[28]

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22 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226 at [1].
23 At [3] and [4].
24 At [9], [18] and [19].
25 At [4] and [23].
26 At [24].
27 At [24].
28 At [26].

The Environment Court's second interim decision

[46] The Court's second interim decision was delivered on 22 February 2019. This decision maintained the possibility of granting consent to part of Cable Bay's application and recorded the Court's reasoning "on matters that were in contention".[29] The Court said that delays in work on conditions of consent on acoustic matters and disputes among the parties about the detail of other conditions "presently prevent us from moving in the direction of granting consent. Consent remains no more than a possibility; not a probability, let alone a certainty."[30]

[47] The Court said Cable Bay had sought retrospective consent for the veranda (for restaurant and function use) and for outdoor seating and use of about 7,000 square metres of lawn for informal dining on removable seating including beanbags and blankets.[31]

[48] The Court began by addressing the existing environment and in particular the scope of the 2006 Consent. This was necessary because the assessment of the effects of the activities for which consent was sought related to effects beyond those already consented or permitted by the Operative Plan.[32]

[49] Cable Bay had submitted that the 2006 Consent did not place any constraint on the number of people at the site at any one time, whether in a building or not, or where they may go within the site. The Court said an examination of the material accompanying the application for that consent established that a maximum of 40 people dining al fresco would have to be observed to comply with the District Plan noise controls in place at that time. The Court said any additional existing use of the outdoor area of the site was largely confined to the "benign activity of walking around to take in the view and take photographs".[33]

[50] The Court recorded submissions from the neighbours and from Auckland Council that the activities taking place at the site were fundamentally different from

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29 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 29 at [2].
30 At [5].
31 At [7]-[9].
32 At [17].
33 At [20].

those authorised by the 2006 Consent and that the application for retrospective consents to cover "outdoor dining, drinking and functions" was an acknowledgement those activities were not consented and not part of the existing environment for effects evaluation.[34] The Court said the "end position" as submitted by counsel for Cable Bay was generally consistent with the submissions of other counsel and the advice of the parties' respective expert planners. The Court concluded:

> [23] … As it finally transpired that no contest was evident on this issue, we see no need for a detailed evaluation, and accept the planners' joint advice as to what constitutes the existing environment in this case. It comprises the winery and ancillary buildings authorized by the 2006 consents, including the extensions to the building authorized by the 2011 consent and its subsequent variations as described earlier.[35] Outdoor hospitality is confined to limited al fresco dining in described areas adjacent to the building.

[51] The Court turned to effects of the proposed activities, considering first the outdoor use (including seated and casual dining, bar service and wedding ceremonies or other similar gatherings on the lawn). The Court said the biggest issue arising from the application was the effective management of noise from the veranda restaurant and bar area and from activities on the lawn. The Court found that the then consented noise environment limited outside patrons to 40 (who must be in the defined al fresco dining area) and limited functions to inside the restaurant building with no provision for outside functions.[36] The Court considered the evidence from the neighbours of noise effects from the activities since 2014. It concluded that those noise effects were significant and contrary to objective 10a.20.3 and related policies of the Operative Plan.[37] It is clear from this analysis that the Court regarded the noise effects on Ms Loranger and Ms Niemann at 85 Church Bay Road to be relevant to its consideration of Cable Bay's application.

[52] The Court considered what noise limits were appropriate for the proposed activity in order to satisfy the relevant Operative Plan policies and objectives. The Court specified particular noise limits, which it said would apply if consent were granted. The Court added, for the avoidance of doubt, that the noise limits would

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34 At [21] and [22].

35 The 2011 consent and its variation merely extended the allowed building coverage. It is not relevant to this appeal and review.

36 At [36], [44] and [47].

37 At [48]-[53].

apply at the notional boundaries of the neighbours' properties, including 85 Church Bay Road.[38]

[53] The Court addressed noise specifically from the "outside activities". The Court had no hesitation in concluding the current level of such activities was having a significant adverse effect on the neighbours.[39] It then considered the activities in two parts. The first was outdoor dining in the designated al fresco dining area adjacent to the existing restaurant. The Court said it was likely this could continue without causing unreasonable noise effects.[40]

[54] The second part was other functions on the lawn. The Court found that, subject to preparing conditions that were manageable and capable of reasonable monitoring and enforcement, limited functions could occur on the lawn with no more than minor effects on the neighbours. The limits would be: functions would be limited to wedding ceremonies in a delineated area adjacent to the al fresco dining area (**the designated wedding area**); eating and drinking in the designated wedding area would not be permitted except for 30 minutes after the ceremony; patrons would be able to access the designated wedding area for "taking in the view, photography and the like" when a function was not occurring; patrons would not be allowed on the lawn outside the designated wedding area; and a physical barrier preventing this would be required.[41]

[55] The Court then evaluated Cable Bay's application in terms of ss 104 and 104D. In relation to the "extensive use of the lawn area for functions, informal dining, drinking and associated activities" the Court found the adverse effects on neighbours would be significant and that the activities were of a scale and intensity outside those anticipated in the Operative Plan.[42] This meant that Cable Bay's application "without excision of wide use of the lawn would not meet either of the s 104D RMA gateway tests".[43]

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38 At [72].
39 At [78].
40 At [81].
41 At [82]-[85].
42 At [93].
43 At [96].

[56] The Court recorded that during the first hearing it had indicated to the parties it was likely to make this finding. The Court said the acoustic experts subsequently focused on appropriate noise standards to meet Cable Bay's duty (under s 16 of the RMA) to avoid unreasonable noise. The expert planners had then focused on drafting a suite of conditions of consent "limiting outdoor activity on the site to meet the consent noise limits and the controls on outdoor activities set out earlier in our decision".[44] The Court said the "revised parameters for consent" that now fell to be determined was a much more limited consent than that applied for. The Court described it as:[45]

> [T]he establishment of the Verandah kitchen and dining facility, including enclosure by glazed windows and sound absorbent roof, amplified sound management, outdoor dining restricted to 40 patrons immediately adjacent to the existing restaurant and provision for limited wedding functions in a designated area.

[57] The Court said that, subject to appropriate noise mitigation measures, both s 104D tests could be met by this "revised proposal".[46] Similarly, the Court tentatively indicated that, subject to the effectiveness of proposed conditions, the "revised proposal" would be favourably considered under s 104. The Court noted one reason for this was that "[r]estricting the use of the lawn to a small designated area should also avoid any landscape and general amenity effects from large numbers of people on the site".[47]

[58] The Court concluded by noting that conditions of consent were at the formative stage. The Court urged parties to reach agreement where possible, though expressed the realistic (as it turned out) sense that a further hearing might be needed.[48]

The Environment Court's third interim decision

[59] A further hearing was held on 29 and 30 August 2019 to address matters still in issue. The parties filed and exchanged further evidence in advance of the hearing.

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44 At [97].
45 At [98].
46 At [99].
47 At [100]-[103].
48 At [104]-[106].

[60] The third interim decision was delivered on 15 October 2019.[49] The Court addressed numerous issues. Only three are relevant to this appeal and review.

[61] First, the Court held the maximum width of the designated wedding area was to be 15 metres. To ensure the area would be physically contained and used only for wedding ceremonies or to allow patrons to take in the view, conditions of consent were to achieve several detailed objectives. These objectives included a physical barrier and clearly-visible signage in at least five locations advising patrons that access to the wider lawn area was not permitted.

[62] Secondly, the Court addressed noise limits and controls. The Court confirmed that the noise limits stated in its second interim decision would enable the relevant objectives and policies of the Operative Plan to be met and satisfy the duty to avoid unreasonable noise in s 16 of the RMA.[50] The Court set several specific noise controls, such as the times that certain facades on the veranda could be open. In relation to the designated wedding area, the Court found the noise limits could be met without the need to restrict access to that area by patrons taking in the view during the day. However, such access was to be subject to a "total restriction on eating or drinking by such patrons" in the area and "strict management control to prevent enthusiastic behaviour and to discourage patrons from congregating and spending unduly long periods in the area".[51]

[63] The third issue was whether Cable Bay needed to "surrender"[52] its 2006 Consent,[53] or part of it, in order to provide certainty as to what activities were authorised and on what conditions. A particular concern was how to address the noise conditions in the 2006 Consent. Cable Bay had concerns about the surrender of those conditions because "they represent the existing consented environment" and were (in Cable Bay's view) based on a determination that the "site" included the leasehold

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49 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 170.
50 At [19]-[20].
51 At [42].
52 "Surrender" is an inapt term (as I return to below at [130]), but was the term used by Cable Bay and the Court.
53 The Court also addressed whether it was necessary for Cable Bay to surrender other consents, but that is not in issue on this appeal and review.

property at 85 Church Bay Road.[54] Auckland Council submitted the monitoring and enforcement of twin and potentially conflicting conditions would be impossible, and that Cable Bay should surrender the 2006 Consent noise conditions. The Court's view was that s 138 of the RMA (which deals with the surrender of consents) had a "voluntary flavour about it" and it could not direct a surrender.[55] The Court found the answer lay somewhere between the parties' positions:

> [59] … The noise levels in the present matter have been designed by us to reflect the objectives and policies of the plan, and the environment as we have found it to be (including the presence of the occupants of No. 85 as well as the other adjoining parties). Our ability to grant consent in the present proceedings might be hindered by Cable Bay deciding against surrender of the somewhat less restrictive 2006 noise conditions. …
>
> [60] Cable Bay is going to have to make an election. …
>
> [61] An election should be made by Cable Bay as just discussed, and if the imbroglio can be resolved to make consenting, monitoring and enforcement clear-cut, additional and/or revised conditions are to be agreed by the parties; or if they cannot be agreed, the Council is to present a set of proposed conditions showing where differences occur. The conditions must reflect the situation that currently exists, be consistent with the findings of this decision and may include other changes agreed by the parties within the parameters of this decision. The Court will then determine what future process should be used to finalise the conditions. …

The Environment Court's fourth interim decision

[64] After the third interim decision Cable Bay filed a memorandum with the Court dated 13 December 2019 attaching draft conditions of consent with the other parties' comments. Cable Bay said it agreed with almost all of Auckland Council's comments. Cable Bay's memorandum also recorded:

> Cable Bay confirms that in the circumstances, it makes an election to surrender the noise conditions contained in the 2006 consent on the understanding that the noise conditions in the proposed conditions (which are now agreed by all the parties) will be imposed instead.

[65] Despite this promising memorandum, the parties continued to debate the conditions of consent and other issues. The Court's fourth interim decision, delivered

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54 At [56](d).
55 At [58].

on 10 June 2020, recorded the Court had received numerous memoranda and versions of conditions through to 4 June 2020.[56]

[66] The Court held that consent was likely to be granted in part, subject to finalisation of conditions. The Court said that in determining what were appropriate conditions it had factored in all matters addressed in its earlier interim decisions. The Court said the conditions as proposed by Auckland Council and Cable Bay did not address "a number of matters that we noted through the hearing process as needing to be addressed through conditions" and "fall well short of adequately addressing [those] matters".[57]

[67] Accordingly, the Court attached to its decision "revised final draft conditions" to provide "an indication of the standard of conditions expected by the Court".[58] The Court required Auckland Council, in consultation with the other parties, to undertake a thorough edit of those draft conditions to ensure a high standard of consistency and clarity and to provide an updated version to the Court by 30 June 2020.[59]

[68] The Court also said that in view of Cable Bay's "election to surrender the noise conditions in the 2006 resource consent, that consent in its entirety will be superseded by the conditions attached to this decision".[60]

The Environment Court's final decision

[69] The Court's final decision was delivered on 17 September 2020. The Court recorded that, on 1 July 2020, Auckland Council had submitted redrafted conditions of consent. Cable Bay had no substantive comments on Council's draft. The neighbours made many substantive comments. The neighbours filed further memoranda seeking additional changes.

[70] The Court held that Auckland Council's redrafted conditions were appropriate. The Court granted Cable Bay's application "to the extent described in our Fourth

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56 *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC 75.
57 At [12](h) and [30].
58 At [30].
59 At [30] and [32].
60 At [8].

Interim Decision and shown on the plans annexed to this decision and as indicated in the conditions of consent which are also attached".[61]

Cable Bay's appeal

[71] Cable Bay appeals against the Environment Court's final decision. It also seeks judicial review of the process adopted by the Environment Court and therefore of the conditions imposed by the Court. Because Cable Bay relies on essentially the same grounds for the appeal and the review, I will begin with the appeal.

[72] As noted earlier, Cable Bay appeals only against the Environment Court's imposition of certain conditions. Cable Bay challenges 41 of the 71 conditions: conditions 2, 9, 12 to 20, 23 to 26, 28 to 31, 36 to 56 and 68 (**the Conditions**). To give some broad context to the appeal, Cable Bay complains the Conditions have two key consequences:

(a) The Environment Court placed a complete prohibition on patrons using the lawn even to walk on or take in the views (except for the very small designated wedding area).

(b) In respect of noise, the Environment Court (by using the *Erskine* approach) "dangled the prospect of granting retrospective resource consent for the Veranda before Cable Bay, but only if Cable Bay agreed to forgo its right to rely on the 2006 Consent noise controls for all activities, including those authorised by the 2006 Consent".

[73] The appeal is not a general appeal. Under s 299 of the RMA, a party may appeal on a question of law to this Court against any decision of the Environment Court. This Court will intervene on an appeal only where the Environment Court:[62]

(a) Applied a wrong legal test;

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61 *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC at [11].
62 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

(b) Came to a conclusion without evidence or one to which, on the evidence, it could not reasonably come;

(c) Took into account matters that it should not have taken into account; or

(d) Failed to take into account matters that it should have taken into account.

[74] The weight to be afforded to relevant considerations is a question for the Environment Court. Any error of law must have a material effect on the Environment Court's decision before this Court will grant relief.[63]

[75] A failure to meet natural justice requirements can also give rise to an error of law capable of consideration on an appeal under s 299.[64]

The grounds of appeal

[76] Mr Webb, counsel for Cable Bay, submitted that in imposing the Conditions the Environment Court exceeded its jurisdiction in two ways:

(a) By imposing conditions that sought to control activities for which Cable Bay had obtained consent in the 2006 Consent, and for which Cable Bay was not seeking consent in its 2017 application. This was Mr Webb's principal submission.

(b) By imposing conditions that treated the leasehold property at 85 Church Bay Road as a separate "site" from Cable Bay's property. This was a subsidiary (and independent) submission.

[77] As developed at the hearing, Mr Webb's principal submission involved the following propositions:

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63 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.
64 *Kawarau Jet Services Holding Ltd v Queenstown Lakes District Council* [2015] NZHC 2343.

(a) The Environment Court's jurisdiction to impose conditions was limited to controlling the effects of the activities for which Cable Bay sought resource consent.

(b) The 2006 Consent authorised, among other activities, (i) the operation of the original restaurant subject to the noise limits in that consent and (ii) patrons using the lawn to walk and take in the views. The Court had failed to determine that the second of those activities was authorised by the 2006 Consent.

(c) Once the Environment Court had (in its first interim decision) refused consent for the outdoor hospitality activities, the only activities for which consent was still sought were the construction of the veranda and its use as a restaurant and function facility.

(d) Because of either or both of (b) or (c) the Court had no jurisdiction to impose conditions on (i) the operation of the original restaurant or (ii) patrons using the lawn to walk and take in the views. The Court therefore exceeded its jurisdiction by (i) imposing on the operation of the original restaurant noise conditions that were stricter than the noise conditions in the 2006 Consent and (ii) imposing conditions that controlled where patrons could walk on the lawn to take in the views.

(e) Although Cable Bay had elected to surrender the noise conditions contained in the 2006 Consent on the understanding that new (and stricter) noise conditions would be imposed, this did not give the Court jurisdiction to impose or otherwise validate those new noise conditions. This was because Cable Bay's agreement to the new noise conditions had been forced on it by the Court acting in breach of natural justice (primarily by adopting the *Erskine* approach).

(f) Indeed, the imposition of the Conditions as a whole, following the adoption of the *Erskine* approach and resulting in the curtailing of lawfully established activities, amounted to a breach of natural justice.

[78] The subsidiary submission concerning 85 Church Bay Road was more straightforward. Mr Webb submitted that, in terms of the Operative Plan, 85 Church Bay Road was not a separate "site" from Cable Bay's property. He said it followed that the Environment Court could not impose conditions to control effects at the boundary of 85 Church Bay Road. He submitted the Environment Court had erred by treating 85 Church Bay Road as a separate site when imposing noise conditions. He also said the Court had done this without expressly determining whether 85 Church Bay Road was a separate site.

[79] For the most part, Mr Webb did not explicitly address how the Environment Court's alleged errors were linked to each particular Condition under challenge.

[80] The alleged errors are ones that fall within the scope of an appeal under s 299. None of the respondents suggested otherwise.

Preliminary issue

[81] As noted above, the third respondents contended Cable Bay's appeal was out of time in respect of some of its grounds of appeal. Ms Simons, counsel for the third respondents, submitted some of these grounds were evident from the Environment Court's interim decisions. In the first interim decision the Court stated it would adopt the *Erskine* approach. In the second interim decision the Court made a finding as to the "existing environment". Ms Simons noted Cable Bay challenges both of those matters. She submitted the time for appealing those matters ran from the dates of those interim decisions.

[82] Mr Webb accepted that an interim decision can be appealed. He submitted, however, that for such a decision to be appealed it must finally decide a substantive issue for which the parties do not have to return to the Court.[65] He said in this case no decision was made in the interim decisions on the substantive issues on the appeal: whether the consent would be granted, and if so on what conditions.

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[65] *Mawhinney v Auckland Council* [2011] 16 ELRNZ 608 (HC) at [97].

[83] Auckland Council considered Cable Bay appealed in time, though it abided my decision on this issue.

[84] In my view Cable Bay's appeal was in time. Its appeal is merely against the Conditions. The Environment Court did not finally decide on the Conditions until its final decision. It is true that some of the grounds on which Cable Bay challenges those Conditions arise out of the interim decisions. But those decisions did not at that time decide what the Conditions would be.

Issues on appeal

[85] The appeal is solely against the imposition of the Conditions, not against the partial grant and partial refusal of consent. The ultimate issue, therefore, is whether the Environment Court acted unlawfully (in any of the ways alleged by Cable Bay) in imposing any of the Conditions. Eight issues arise:[66]

(a) What are the limits on the Environment Court's jurisdiction to impose conditions when granting consent?

(b) Did the Court fail to determine correctly the activities authorised by the 2006 Consent?

(c) Once the Court had (in its first interim decision) refused consent for the outdoor hospitality activities, for what activities was consent still being sought?

(d) Given the answers to (a), (b) and (c), did the Court exceed its jurisdiction by imposing conditions on (i) the operation of the original restaurant or (ii) patrons using the lawn to walk and take in the views?

(e) Did Cable Bay's election to surrender the noise conditions contained in the 2006 Consent on the understanding that new (and stricter) noise

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[66] These do not precisely reflect the way in which they were variously articulated by counsel, nor the order in which they were addressed in written or oral submissions.

conditions would be imposed give the Court jurisdiction to impose those new noise conditions?

(f) Did the imposition of the Conditions as a whole, following the adoption of the *Erskine* approach and resulting in the curtailing of lawfully established activities, amount to a breach of natural justice?

(g) Did the Court err by treating 85 Church Bay Road as a separate site in some of the Conditions?

(h) If any errors by the Court are established, were they material to the Court's decision to impose any particular Conditions (and, if so, which Conditions)?

Issue 1: What are the limits on the Environment Court's jurisdiction to impose conditions when granting consent?

[86] Section 290 of the RMA provides that the Environment Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. The Court therefore had the same power or discretion to impose conditions as did the commissioners who were acting on behalf of Auckland Council.

[87] I earlier provided an outline of the commissioners' power to impose conditions. I now need to expand on that. The commissioners' power derived from s 108(1) of the RMA. This provides that a resource consent may be granted on any condition the consent authority considers appropriate.

[88] This broadly expressed discretion is subject to general administrative law limits on the exercise of public powers. In respect of the imposition of resource consent conditions, there are three limits:[67]

(a) Conditions must be imposed for a planning purpose;

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[67] *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL); *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [61] and [66].

(b) Conditions must fairly and reasonably relate to the proposed activities; and

(c) Conditions may not be so unreasonable that no reasonable consent authority could have imposed them.

[89] The Supreme Court considered the second of these limits in *Waitakere City Council v Estate Homes Ltd*.[68] A consent authority, when granting a subdivision consent, imposed a condition requiring the developer to construct an arterial road. A majority of the Court of Appeal decided that s 104 of the RMA (which requires the consent authority to have regard to the effects of the activities for which consent is sought) and common law principles required there be a causal link between conditions that might be imposed and effects of the proposed subdivision. The Supreme Court disagreed:[69]

> We see nothing, however, in the requirement under s 104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they would ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s 108(2)(c) to impose conditions is expressed.

[90] The Supreme Court concluded that (leaving aside questions of reasonableness):[70]

> [T]he application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development. This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision.

[91] It follows that the second limit – that the condition must fairly and reasonably relate to the proposed activities – will be satisfied if the conditions are *logically*

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68 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149. The Supreme Court referred to the "proposed development" rather than the "proposed activities" but that was merely because the Court was considering a subdivision consent.

69 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [64].

70 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [66] (footnote omitted).

connected to the proposed activities. The Supreme Court explicitly rejected the proposition that the conditions must ameliorate *the effects of* the proposed activities.

[92] Mr Webb submitted the Environment Court only had jurisdiction to impose conditions to control effects arising from the activities proposed in Cable Bay's application. I disagree. That is the very proposition the Supreme Court rejected in *Estate Homes*.

[93] Mr Webb's submission relied on s 108AA(1) of the RMA. This provides:

> **108AA Requirements for conditions of resource consents**
>
> (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.

[94] Section 108AA(1) provides four different grounds on which a consent authority may include a condition. Where the only available ground is that in s 108AA(1)(b)(i), the section imposes a test similar to the one that the Supreme Court rejected in *Estate Homes*: the condition must be directly connected to an adverse effect of the activity.

[95] The submissions of Mr Quinn, counsel for Auckland Council, were also premised on s 108AA(1) limiting the jurisdiction of the Environment Court in this case. Ms Simons submitted that the jurisdiction was limited merely by the three general administrative law limits set out above at [88].

[96] Section 108AA was inserted by s 147 of the Resource Legislation Amendment Act 2017.[71] Section 147 (and therefore s 108AA) came into force on 18 October 2017.[72] The Resource Legislation Amendment Act made additions to the transitional provisions found in sch 12 of the RMA. The additions included:

> **12 Specified matters subject to transitional arrangements**
>
> (1) An amendment made by [the Resource Legislation Amendment Act 2017] does not apply in respect of a matter specified in subclause (2) if, immediately before the commencement of the amendment, the matter—
>
> (a) has been lodged with a local authority, the EPA, or a Minister, or called in by the Minister; but
>
> (b) has not proceeded to the stage at which no further appeal is possible.
>
> (2) The matters referred in subclause (1) are—
>
> (a) an application for a resource consent (or anything treated by this Act as if it were an application for a resource consent):
>
> (b) any other matter in relation to a resource consent (or in relation to anything treated by this Act as if it were a resource consent):
>
> …

[97] Cable Bay lodged its application for resource consent in April 2017. This was before the commencement of s 147 (and s 108AA).[73] On that commencement date Cable Bay's application had not proceeded to the stage at which no further appeal was possible. It follows that s 108AA does not apply in respect of the application.

[98] Section 108AA therefore did not apply to the commissioners' decision on the application or to the Environment Court's decision on the appeal (that appeal being in respect of the application).[74] Nor does it apply on this appeal and review.

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71 Section 146 of the Resource Legislation Amendment Act 2017 amended s 108 of the RMA, making s 108 subject to s 108AA.

72 Resource Legislation Amendment Act 2017, s 2(1).

73 "Commencement" means the date the provision came into force: Resource Management Act 1991, sch 12, cl 11.

74 Neither the commissioners nor the Court referred to s 108AA. In the mammoth common bundle prepared for the hearing before me, the only reference I have found to s 108AA was an oral submission made by Mr Quinn at the Court's second hearing on 29 August 2019 that, given the timing of Cable Bay's application, s 108AA did not apply: transcript page 41 line 26.

Issue 2: Did the Court fail to determine correctly the activities authorised by the 2006 Consent?

[99] Mr Webb submitted that the Environment Court, before imposing any conditions, first had to determine what the existing environment was at the property. Among other things, this required the Court to determine the "consented environment", which included those activities authorised by the 2006 Consent. He submitted the 2006 Consent authorised, among other activities, (i) the operation of the original restaurant subject to the noise limits in that consent and (ii) patrons using the lawn to walk and take in the views.

[100] Mr Webb submitted the Court had failed to determine correctly what activities had been authorised by the 2006 consent. He said the Court's determination was found in the second interim decision, in which the Court found the activities authorised by the 2006 consent were the operation of the winery and restaurant, with outdoor hospitality confined to limited al fresco dining in prescribed areas adjacent to the restaurant.[75] He submitted the Court erred in failing to find that the authorised activities also included patrons using the lawn to walk and take in the views.

[101] To give some context to this submission, I note two matters. First, patrons using the lawn to walk and take in the views was a permitted activity under the Legacy Plan (operative when the 2006 Consent was granted) but is not a permitted activity under the Operative Plan that governs the 2017 application. Secondly, Cable Bay did not rely on existing use rights for using the lawn for that activity.[76] It was for these reasons that Mr Webb argued that Cable Bay's authority to use the lawn for that activity derived from the 2006 Consent.

[102] It was common ground that the Environment Court did not find that the activities authorised by the 2006 Consent included patrons using the lawn to walk and take in the views. The issue is whether that was an error. In turn, that depends on whether that lawn activity was authorised by the 2006 Consent.

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75 Mr Webb referred to [23] and [47] of the second interim decision.

76 Before the Environment Court, at the first hearing on 7 November 2018, Cable Bay explicitly eschewed reliance on existing use rights: transcript pages 39-43. Before me, Mr Webb did not suggest Cable Bay had any existing use right for the lawn activity.

[103] Mr Webb submitted it was. He said the application that led to the 2006 Consent included plans that described the lawn as an "amphitheatre" and showed view shafts that could be used only if patrons were using the lawn. He said there was no restriction on such use in the 2006 Consent. He submitted that, although the 2006 Consent did not expressly authorise the lawn activity, the lawn activity had been a permitted activity under the Legacy Plan, and any permitted activities "also formed part of the activities authorised by the 2006 Consent notwithstanding that resource consent was not specifically required for those activities". Mr Webb relied on *Arapata Trust Ltd v Auckland Council*[77] and *Marlborough District Council v Zindia Ltd*[78] in support of that proposition.

[104] I do not accept these submissions. I accept the plans accompanying the resource consent application indicated patrons would be using the lawn. But the application did not seek consent for that lawn activity. Nor did the 2006 Consent grant consent for that activity. That is because such activity was permitted under the Legacy Plan and so no consent was required.

[105] In those circumstances the permitted activity of using the lawn did not form part of the activities authorised by the 2006 Consent. The authorities on which Mr Webb relied do not support his submission. *Arapata* is authority for the proposition that a resource consent authorises an activity rather than a breach of a rule. That is not on point because, in this case, the question is what activity the 2006 Consent authorised. *Zindia*, a judgment of Doogue J, includes a discussion of the concept of "bundling", which provides that where a particular land use comprises multiple activities each of which requires resource consent, the least favourable activity classification applies to all of the activities.[79] The concept of bundling is used for the purposes of notification decisions and effects assessments.[80] The concept does not mean that, where resource consent is granted for a proposal that includes both permitted and non-permitted activities, consent is granted for the permitted activities.

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77 *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.
78 *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [67].
79 *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [41].
80 All of the authorities on bundling considered by Doogue J were concerned with such decisions or assessments: *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765 at [43]-[63].

A resource consent cannot be issued for a permitted activity. The point was well put by the Environment Court in *Housing New Zealand Ltd v Auckland City Council*:[81]

> [8] What may obscure the issue behind this question is that where a proposal contains a hybrid of permitted and non-permitted activities, the consent authority must, as part of its overall assessment of effects, have regard to the effects of both. … That is not to say that, at the end of the assessment exercise, it grants a consent to the permitted portions of the proposal. There is nothing to grant a consent for.

[106] For those reasons, which reflect the submissions of Mr Quinn, the Environment Court did not err in finding that patrons using the lawn to walk and take in the views was not authorised by the 2006 Consent.

[107] For completeness, I note two related matters. First, as part of his submission on this issue Mr Webb criticised the Environment Court for saying that it accepted "the planners' joint advice as to what constitutes the existing environment in this case".[82] Mr Webb said there was no such joint advice and the planners in their joint witness statement recorded there was disagreement between them on the existing environment. Mr Quinn and Ms Simons were not able to point me to any clear statement by the planners of a joint position on the existing environment. In my view, however, the Court's comment needs to be put in context: the Court also referred to the submissions of counsel and in particular to concessions made by counsel for Cable Bay (not Mr Webb at that point). And, in any event, what matters is the Court's conclusion on the existing environment. I have found no error in the Court's conclusion.

[108] Secondly, at one point in his submissions Mr Webb said the Environment Court expressly acknowledged, in the second interim decision, that patrons walking on the lawn to take in the views was a consented activity. I do not accept that. In the passage to which Mr Webb referred,[83] the Court had just recorded an acknowledgement by Cable Bay's then counsel of the activities provided for in the 2006 Consent. In contrast to that acknowledgement of *consented* activities, the Court

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81 *Housing New Zealand Ltd v Auckland City Council* (2007) 14 ELRNZ 52 (EnvC). To the same effect is *Brice v Wellington City Council* EnvC Wellington W38/2003, 5 June 2003.

82 Second interim decision, [2019] NZEnvC 29 at [23].

83 Second interim decision, [2019] NZEnvC 29 at [20].

then described patrons walking on the lawn as an "additional existing use" (not consented use) of the outdoor area.[84]

Issue 3: Once the Court had refused consent for the outdoor hospitality activities, for what activities was consent still being sought?

[109] Mr Webb submitted that in the first interim decision the Environment Court refused consent for the outdoor hospitality activities. Once the Court had done so, he said the only activities for which consent was still sought were the construction of the veranda and its use as a restaurant and function facility.

[110] Mr Quinn disagreed. He accepted the first interim decision had narrowed the application that was before the Court. But he said once Cable Bay agreed to surrender the 2006 Consent the application had widened again.

[111] I find the position is somewhere in between. Cable Bay applied for retrospective resource consent for two relevant activities:[85]

(a) To establish the veranda and operate a restaurant and function facility within it.

(b) To "formalise" outdoor seating for restaurant guests in the outdoor seating bays and consent to use the lawn area for informal dining and drinking.[86]

[112] In its first interim decision the Environment Court said Cable Bay was seeking retrospective consent for: (i) the restaurant in the veranda and (ii) outdoor facilities including a bar, tables and chairs, umbrellas, and open-air dining and drinking on the lawn.[87] The Court refused consent for the second part of the proposal, which it

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84 This was not an acknowledgement of an existing use right. The Court had just recorded, at [19], that Cable Bay was not running an existing use argument.

85 Cable Bay also applied for resource consent to construct a noise barrier fence. Cable Bay eventually decided not to pursue that in the Environment Court, and it has no bearing on this appeal and review.

86 Section 3.1.2 of the application said the lawn area would be used for "informal dining". Section 4.0 said the outdoor area (which included the lawn) would be used for "casual dining and drinking purposes".

87 At [3] and [4].

variously described as the "use of the lawn for restaurant and outdoor dining purposes" and "the outdoor hospitality activities".[88] The Court indicated possible consent to the first part of the proposal, which it described as "Veranda restaurant and kitchen", subject to "satisfactory conditions of consent being finalised".[89]

[113] The parts of the decision to which I have just referred support Mr Webb's submission. But the decision did not stop there. The Court directed a plan be prepared for its consideration and possible inclusion in any consent, showing (among other things) (i) removal of outdoor bar, tables, seating and umbrellas and (ii) an area on the lawn where wedding ceremonies could take place in approved terms.[90]

[114] By directing that a plan show an area on the lawn where wedding ceremonies could take place, the Court was leaving open the possibility of consent for some activities on the lawn. The Court's refusal of consent for "the outdoor hospitality activities" was therefore not a refusal of consent for all outdoor activities.

[115] It follows that Mr Webb's submission does not quite capture what activities remained on the table after the first interim decision. Consent was still being sought both (i) to establish the veranda and operate a restaurant and function facility within it and (ii) to use an area on the lawn for wedding ceremonies. This is reflected in what subsequently happened. Further submissions were made to the Environment Court about the size of and conditions relating to the designated wedding area. The Court in due course granted consent for it.

[116] Nor do I accept Mr Quinn's submission that the scope of the resource consent application expanded once Cable Bay agreed to surrender the 2006 Consent. Indeed, as I explain under issue 5, I think it is inaccurate to say Cable Bay agreed to surrender the 2006 Consent. It merely agreed that new noise conditions would supersede the (less strict) noise conditions in the 2006 Consent.

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88 At [4] and [23].
89 At [24].
90 At [24].

Issue 4: Given the answers to issues 1, 2 and 3, did the Court exceed its jurisdiction by imposing conditions on (i) the operation of the original restaurant or (ii) patrons using the lawn to walk and take in the views?

[117] Under issue 1, I have found there were three limits on the Environment Court's jurisdiction to impose conditions:

(a) The conditions had to be imposed for a planning purpose;

(b) The conditions had to fairly and reasonably relate to the proposed activities; and

(c) The conditions could not be so unreasonable that no reasonable consent authority could have imposed them.

[118] Mr Webb did not suggest the first limit had been exceeded.

[119] Mr Webb did not address the second limit. That is because, as set in my decision on issue 1, he relied on a narrower version of that limit found in s 108AA. That section does not apply. Cable Bay has not satisfied me that any of the Conditions fail the second limit (nor even that they fail s 108AA). The challenged Conditions generally fall into two categories:

(a) Some Conditions restrict the area of the lawn on which patrons can walk and take in the view. These Conditions have a fair and reasonable relation to Cable Bay's proposed activities. The Court was understandably concerned about the noise effects of the use of the veranda as a restaurant and function facility and of the use of the lawn for wedding ceremonies. The Court was also concerned about the general effect on amenity of the latter activity in a rural-residential area. Restricting the area of the lawn on which patrons could walk therefore has a logical connection to those activities. Indeed, it has a direct connection to *the effects* of those activities, and so would even pass the s 108AA(1)(b)(i) test.

(b) Some Conditions impose on the operation of the original restaurant noise limits that are stricter than those in the 2006 Consent. This is again connected to the Court's concern with the noise effects of the use of the veranda. It was impractical to have one noise condition for the use of the veranda and another less strict condition for the use of the adjoining existing restaurant. The imposition of the stricter condition over both activities therefore had a logical connection to the proposed use of the veranda. Indeed, it again has a direct connection to the effects of the proposed use of the veranda, and so would satisfy even s 108AA(1)(b)(i).

[120] As to the third limit, Mr Webb submitted the Conditions effectively prohibited activities "already authorised by the 2006 Consent". He said this was akin to prohibiting activities that are permitted, which has been found to be unreasonable (in the sense no reasonable consent authority could have imposed them).[91] He submitted prohibiting already authorised activities was likewise unreasonable.

[121] I do not accept this submission. For reasons set out under issue 2, use of the lawn for patrons to walk and take in the views was not authorised by the 2006 Consent. Operation of the original restaurant subject to the noise conditions in the 2006 Consent was of course authorised by that consent. That an activity is already authorised is relevant to determining whether a condition restricting that activity is unreasonable, but there is no general rule that a condition restricting such an activity is unreasonable. It was not unreasonable (in the relevant sense) for the Court to impose stricter noise conditions on that authorised activity, for two independent reasons. First, it was impractical to have two sets of noise conditions. Secondly, Cable Bay agreed to the stricter conditions replacing the 2006 Consent conditions (and, as I explain next, I do not accept Cable Bay had that agreement "forced" upon it).

[122] In summary, I conclude the Court did not exceed its jurisdiction in imposing the Conditions.

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[91] Mr Webb relied on *Haines House Haulage Northland Ltd v Whangarei District Council* [2020] NZHC 25 at [126].

Issue 5: Did Cable Bay's election to surrender the noise conditions contained in the 2006 Consent on the understanding that new (and stricter) noise conditions would be imposed give the Court jurisdiction to impose those new noise conditions?

[123] The issue arose because Mr Webb rightly anticipated that, if I found the Court otherwise exceeded its jurisdiction by imposing stricter noise conditions on the operation of the original restaurant, he would be faced with an argument the Court obtained such jurisdiction from Cable Bay's election to surrender the noise conditions in the 2006 Consent.

[124] I have found the Court did not exceed its jurisdiction in imposing the stricter noise conditions. However, one of the two independent reasons for my conclusion is that Cable Bay agreed to those conditions. That agreement came from its election to surrender the noise conditions in the 2006 Consent. I will therefore address issue 5.

[125] Mr Webb's key submission on this issue was that the election to surrender the earlier noise conditions was "forced" upon Cable Bay by the Court. In its third interim decision the Court said its ability to grant consent might be hindered by Cable Bay deciding not to surrender the less restrictive 2006 Consent noise conditions. The Court said Cable Bay was going to have to make an election. Mr Webb said this presented Cable Bay with Hobson's choice. Cable Bay was thus forced, in breach of natural justice,[92] to elect to surrender the earlier noise conditions. Its election was not truly voluntary.

[126] I do not accept there was any breach of natural justice by the Court or that Cable Bay's election was not voluntary. During the second hearing the Court raised the need for Cable Bay to consider whether any of its existing consents might need to be surrendered or modified.[93] At the Court's direction, Mr Webb then filed a memorandum addressing those matters, including what to do with the noise conditions in the 2006 Consent. Mr Webb's memorandum expressed uncertainty as to what to do with those noise conditions.[94] In response, the Court, in its third interim decision, said

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92 This was a subset of Cable Bay's natural justice argument. I assess the broader natural justice argument under issue 6.

93 Transcript pages 217-218. It appears from this part of the transcript that the same matter had been raised by the Court at the first hearing.

94 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 170 at [58].

if Cable Bay decided not to surrender those conditions, that might hinder the Court's ability to grant consent. The Court then gave Cable Bay the opportunity (and time) to elect whether to surrender the earlier noise conditions.

[127] Far from being a breach of natural justice, this approach was the embodiment of it. Cable Bay was given an opportunity to be heard, and was heard, on what aspects of the prior consents might need to be surrendered. When Cable Bay said it was uncertain what to do with the earlier noise conditions, the Court indicated possible outcomes and gave Cable Bay a further opportunity to decide whether to surrender those noise conditions.

[128] Cable Bay was not forced by the Environment Court to surrender the noise conditions. The Court was simply being transparent about the possible consequences of Cable Bay's election. If Cable Bay elected not to surrender the noise conditions, it risked refusal of consent but the 2006 Consent would be untouched. If Cable Bay elected to surrender, grant of consent appeared more likely but the original restaurant would be subject to stricter noise conditions. Cable Bay was free to choose. It may not have liked either possibility.[95] But that was simply the position Cable Bay found itself in. It was not a situation created by the Environment Court.

[129] I therefore find that Cable Bay agreed the noise conditions in the 2006 Consent would be replaced by new and stricter noise conditions. Its agreement was not the result of any breach of natural justice by the Court. If I had found the Court otherwise exceeded its jurisdiction in imposing the stricter noise conditions on the original restaurant activities, I would have found this agreement prevented Cable Bay from challenging the validity of those conditions.[96]

[130] For completeness, I note that during oral submissions I queried whether it was accurate to say Cable Bay had "surrendered" conditions. Section 138 of the RMA allows a consent holder to surrender a consent. But a consent holder has no power to

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95 And, for what it is worth, this was not Hobson's choice (which refers to an illusion of choice, rather than a choice between unpalatable alternatives).

96 *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QB); *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202 (HC). This principle is now reflected in s 108AA(1)(a).

"surrender" the conditions on which a consent has been granted. I have used the term "surrender" in this part of the judgment merely because that is the term that was used for the most part in submissions and in the Environment Court decisions.

[131] "Surrender" is a term best avoided in these circumstances, as it can suggest that the consent itself is being surrendered. Indeed, the Environment Court at times made statements that were open to that interpretation (and, somewhat surprisingly, Mr Quinn submitted to me that Cable Bay had surrendered the entirety of the 2006 Consent). But the Court's final decision was simply to impose a condition that stated that the new noise limits "supersede those in the 2006 Consent". I accept Mr Webb's submission that Cable Bay agreed only to that step.[97] It did not agree to surrender the 2006 Consent.

Issue 6: Did the imposition of the Conditions as a whole, following the adoption of the *Erskine* approach and resulting in the curtailing of lawfully established activities, amount to a breach of natural justice?

[132] Mr Webb submitted the Environment Court should have issued only one interim decision in which the Court determined key legal questions on matters such as the consented environment, with conditions to be prepared in accordance with those findings. By instead adopting the *Erskine* approach – which Mr Webb described as "consent by negotiation" – he said the following problems occurred:

(a) The parties were not provided with answers to key legal questions.

(b) By issuing a series of interim decisions indicating consent could be granted provided Cable Bay continued to make concessions, Cable Bay was faced with little other option than to forego its right to rely on the 2006 Consent and effectively to give up its right to object to the proposed Conditions "just so that the proceedings would be brought to an end".

(c) Cable Bay did not have the opportunity to make reply submissions to highlight the legal issues now raised in this appeal.

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[97] That is essentially what Cable Bay said in its memorandum stating its election.

(d) All the parties were put to enormous cost and significant delay.

[133] Mr Webb accepted the Environment Court has a discretion to regulate its own proceedings (a point emphasised by Auckland Council and the third respondents).[98] But he said this had to result in a fair process and that had not happened here.

[134] I reject this challenge to the Environment Court's approach. The two key principles of natural justice are that a party be given adequate notice and opportunity to be heard and that the decision-maker be impartial. Only the former principle could possibly be in issue here.

[135] Other than submitting that Cable Bay did not have the opportunity to make reply submissions, Mr Webb did not explain how his various complaints amounted to a failure by the Court to give Cable Bay adequate notice and opportunity to be heard. I reject any suggestion there was such a failure. Having read the interim decisions and the final decision and the multitude of memoranda filed by the parties in the course of the Environment Court proceeding, my view is the Court went out of its way to provide Cable Bay (and the other parties) with opportunities to be heard.

[136] I do not accept Cable Bay did not have the opportunity to make reply submissions to highlight the legal issues it has raised in this appeal. The two key legal issues Cable Bay has pursued on this appeal are the extent of the consented environment and whether the leasehold property at 85 Church Bay Road was a separate site. The Environment Court's views on those issues were evident from its second interim decision. Cable Bay had many opportunities thereafter to raise with the Court the points it raised before me.

[137] I also do not accept Cable Bay effectively gave up its right to object to the proposed Conditions. Cable Bay and its experts were provided with several opportunities to propose conditions and to comment on conditions proposed by other parties. After the Environment Court proposed a set of conditions in the fourth interim decision Cable Bay was again given the opportunity to comment. It could have raised objections then. It chose not to.

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[98] Resource Management Act 1991, s 269.

[138] Finally, even if I had found the *Erskine* approach fell short of natural justice principles, I would have rejected this ground of Cable Bay's appeal. That is because the Environment Court suggested the *Erskine* approach during the first hearing. Cable Bay did not object to that approach. The Court confirmed in its first interim decision that it would take the *Erskine* approach.[99] Cable Bay continued to participate in the proceeding on that basis for almost two years, without ever objecting to the approach. Throughout the Environment Court proceeding Cable Bay was represented by highly experienced and expert counsel and assisted by a range of planning and other experts. It can be inferred Cable Bay chose to participate subject to an *Erskine* approach because it perceived that to be better than the alternative. In those circumstances Cable Bay cannot now complain about alleged natural justice issues with that approach.

Issue 7: Did the Court err by treating 85 Church Bay Road as a separate site in some of the Conditions?

[139] Mr Webb submitted the leasehold property at 85 Church Bay Road was, in terms of noise controls in the Operative Plan, not a separate "site" from Cable Bay's property. It followed the Environment Court could not impose conditions to control noise effects at the boundary of 85 Church Bay Road.

[140] General Rule 4.7 of the Operative Plan stipulates a methodology for the measurement of noise for all noise controls in the Plan. Step 1 in the methodology is:

> All noise levels must be measured at or within 20m of any building where people may reside overnight on a permanent or temporary basis (on another site from the noise source) or within the legal boundary, when this is closer to the building. This may be referred to as the notional boundary.

[141] The Operative Plan defines "site" as:

> … either:
>
> 1. An area of land which is:
>
> a. Contained in a single certificate of title; or
>
> b. Contained in a single lot on an approved survey plan or subdivision for which a separate certificate of title could be issued without further consent of the council;

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[99] *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226 at [26].

being in any case the smaller land area of (a) or (b); or

2. An area of land which is composed of two or more contiguous lots held in two or more certificates of title where such titles are:

   a. Subject to a condition imposed under section 75 of the Building Act 2004 (or previously bound by section 37 of the Building Act 1991 (repealed)); or

   b. Held together in such a way that they cannot be dealt with separately without the prior consent of the council, such as a covenant imposed under section 220(2)(a) and section 240 of the Resource Management Act 1991, or any covenant previously bound by section 643 (repealed) of the Local Government Act 1974.

Except that in the case of land subdivided under the Unit Titles Act 1972 or the cross lease system, 'site' will be considered to be the whole of the land subject to the unit development or cross lease.

[142] The area of land shown in the certificate (now record) of title for the Cable Bay property is the entire freehold land, including the area known as 85 Church Bay Road. There is no record of title showing only the part of the land that is not subject to that lease. There is a separate record of title for 85 Church Bay Road, which of course shows only the area of land over which the lease is enjoyed.

[143] Mr Webb submitted that in these circumstances 85 Church Bay Road was not a separate "site" from the Cable Bay "site". He said that the "site" that was the subject of the application for resource consent was the entire area of freehold land, including 85 Church Bay Road. He referred to this as the "Cable Bay Site". He showed me documents in the resource consent application where the "site" was described as the entire area of freehold land. He submitted the leasehold property could not be a separate "site", as it would then be part of two "sites". This, he submitted, would not make practical sense in applying the provisions of the Operative Plan. He also said the leasehold estate was specifically for a term less than that which would have required a subdivision under s 218 of the RMA. For the lease then to be considered to have created a separate site would be illogical when the lease term was chosen "to specifically avoid that outcome".

[144] Mr Webb submitted the Environment Court had erred by treating 85 Church Bay Road as a separate site when imposing noise conditions. For instance, condition

43 set a noise limit with noise to be measured "at or within the notional boundary of any dwelling or visitor accommodation unit … on an adjacent property, including the dwelling at 85 Church Bay Road".[100] He also said the Court had done this without expressly determining whether 85 Church Bay Road was a separate site.

[145] The respondents disagreed. Mr Quinn submitted the Environment Court was not required to determine whether 85 Church Bay Road was a separate site, since that determination was not necessary for the Court to make its effects assessment. Alternatively, if a determination was required, Mr Quinn submitted 85 Church Bay Road was a separate site. Ms Simons agreed it was a separate site. She also said the Court had taken this matter into account, referring me to an exchange between the Court and counsel for Cable Bay at the first hearing.

[146] The key words are those in General Rule 4.7: "on another site from the noise source". Three questions arise in the application of those words in this case:

(a) Is 85 Church Bay Road a "site"?

(b) If it is:

(i) What is the "noise source"?

(ii) Is 85 Church Bay Road "another" site from that noise source?

[147] As to the first question, the area of land known as 85 Church Bay Road is contained in a single record of title – the record of title issued for the leasehold estate. It is therefore a "site".

[148] As to the second question, General Rule 4.7 refers to the "noise source" rather than to "the site of the noise source". However, in my view it is implicit that the rule is referring to "the site of the noise source", since otherwise it would make little sense to contemplate, as the rule does, "another" site. In this case the "site" of the noise source is what Mr Webb referred to as the Cable Bay Site: the entire area of freehold

[100] The conditions challenged on this ground were conditions 9 and 43 to 56.

land (including 85 Church Bay Road), notwithstanding that the activities are not occurring on 85 Church Bay Road. This is because it is that entire area of land that is contained in the relevant record of title. There is no record of title containing only the area of freehold land not subject to the lease.

[149] The third question is whether the 85 Church Bay Road site is "another" site from the Cable Bay Site. In this context "another" must mean a site that is not the same as or has a separate identity from the site of the noise source. The area of land that constitutes the 85 Church Bay Road site is plainly not the same as the area of land that constitutes the Cable Bay Site. It is therefore "another" site from the Cable Bay Site.

[150] I accept this means the area of land that constitutes 85 Church Bay Road is its own site as well as being part of the larger Cable Bay Site. As noted, Mr Webb submitted this would not make practical sense in applying the provisions of the Operative Plan. He did not explain why it would not make practical sense. General Rule 4.7 applies only to the measurement of noise for noise controls. It is equally practical to measure noise at the notional boundary of 85 Church Bay Road as it is to measure noise at the notional boundary of any other neighbouring site.

[151] I do not accept Mr Webb's argument that finding 85 Church Bay Road to be a separate site is illogical when the lease term was chosen to avoid creating a subdivision under the RMA. That there was no subdivision is irrelevant. The definition of "site" in the Operative Plan turns (in this case) on the area of land at 85 Church Bay Road being contained in a single record of title. It does not turn on whether the grant of the lease constituted a subdivision under the RMA.[101]

[152] For all these reasons, in my view the Environment Court was correct to treat 85 Church Bay Road as a separate site for the purpose of measuring noise in the noise conditions it imposed.[102]

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[101] I also observe that Mr Webb's key submission (that 85 Church Bay Road could not be a separate site as it would then be part of two "sites") would, if correct, have applied even if the lease had been for a term of 999 years and had constituted a subdivision.

[102] This means it is not necessary to address Mr Webb's submission that the Environment Court erred in having regard to s 16 of the RMA. As developed at the hearing, that submission depended on my finding 85 Church Bay Road was not a separate site.

[153] It is true the Environment Court did not make an express determination to that effect. But the Court is not to be criticised for not doing so. At the first hearing counsel for Cable Bay (not then Mr Webb) told the Court that Cable Bay was not running a "dry as dust" argument on "site" and that he would be pursuing the effects on "these people" (meaning the residents of 85 Church Bay Road) rather than "effect on the notional boundary".[103]

[154] It is apparent the Court treated this as an acknowledgement that 85 Church Bay Road could be treated as a separate site without any need to make a specific determination on that point. That is what the Court did in its first interim decision, which treated 85 Church Bay Road in the same way as the other neighbouring properties.[104] A week after that decision the Court issued an interim decision in the enforcement proceeding. In that decision the Court made directions for noise testing that likewise treated 85 Church Bay Road in the same way as the other neighbouring properties.[105] In its second interim decision in the Veranda Appeal the Court said that if consent were granted, any noise limits would apply at or within the notional boundaries of the three neighbouring properties, including 85 Church Bay Road.[106]

[155] All this made it clear from an early stage in the proceeding that the Environment Court was treating 85 Church Bay Road as "another site" for the purpose of noise conditions and did not see the need for an express determination of the point. Cable Bay does not appear to have taken issue with the Court's approach at any stage. In these circumstances, it can hardly criticise the Court for not having made an express determination.

Issue 8: If any errors by the Court are established, were they material to the Court's decision to impose any particular Conditions (and, if so, which Conditions)?

[156] This issue does not need to be addressed, given my conclusions on the earlier issues. I merely observe that, even if I had accepted all of the alleged errors in the

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103 Transcript of first hearing page 439.
104 *Cable Bay Wine Ltd v Auckland Council* [2018] NZEnvC 226 at [21].
105 *Auckland Council v Cable Bay Wine Ltd* [2018] NZEnvC 228.
106 *Cable Bay Wine Ltd v Auckland Council* [2019] NZEnvC 29 at [72].

Environment Court's decisions, there were several Conditions where there was no apparent linkage between the alleged errors and the conditions.[107]

Application for judicial review

[157] Cable Bay's application for judicial review alleged the same errors of law as in its appeal. I have found there were no errors. Cable Bay's application fails.

Costs

[158] Auckland Council and the third respondents are entitled to costs from Cable Bay. I expect counsel can agree costs. If not, memoranda are to be filed and served:

(a) Auckland Council and the third respondents by 22 October 2021.

(b) Cable Bay by 1 November 2021.

[159] Each memorandum is not to exceed three pages (excluding relevant schedules or annexures). I will then determine costs on the papers.

Result

[160] The appeal is dismissed. The application for judicial review is declined.

[161] Auckland Council and the third respondents are entitled to costs from Cable Bay.

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Campbell J

[107] These are conditions 16 (overflow parking), 20 (security gate), 23 (painting containers in a recessive colour), 24 (removal of plastic glazing), 25 (screening of containers by fencing), 28 (opening hours), 29 (location of patron access to premises), 30 (patrons in restaurant, veranda and al fresco dining area to be seated and served at tables), 39 (record keeping) and 68 (ingress to and egress from the property by trucks).

ORIGINAL

Decision No. C 204 /2004

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of appeals pursuant to section 120 of the Act
BETWEEN	CENTRAL OTAGO DISTRICT COUNCIL
	(RMA 800/03)
AND	HAWEA COMMUNITY ASSOCIATION
	(RMA 801/03)
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	(RMA 803/03)
	Appellants
AND	OTAGO REGIONAL COUNCIL
	Respondent
AND	CONTACT ENERGY LIMITED
	Applicant

BEFORE THE ENVIRONMENT COURT
Environment Judge J R Jackson (alone under section 279 of the Act)

Hearing at Christchurch on 30 September 2004 and at Queenstown on 1 December 2004

Appearances:
Mr K G Smith and Mr T P Robinson for Contact Energy Limited
Mr G M Todd for Central Otago District Council, Hawea Community Association and Queenstown Lakes District Council
Mr A J Logan for the Otago Regional Council (abiding the decision of the Court)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

FOURTH PROCEDURAL DECISION

Summary of Contents *Para*

[A] Introduction

[1] The appellants each seek financial contributions of $3,000,000 or more from the applicant in relation to resource consents for the Clutha River issued by the Otago Regional Council. The applicant, Contact Energy Limited (called "Contact") has applied under section 279(4) of the Resource Management Act 1991 ("the Act" or "the RMA") to strike out the passages in the three notices of appeal where the financial contributions are sought.

[2] In summary, the issues to be decided are:

(1) whether the notices of appeal go beyond the submissions they are based on;
(2) whether it is illegal to require a financial contribution to be paid to, or used by, anyone other than a consent authority; and
(3) whether any part of the appeal, if beyond jurisdiction, may be severed, and if so what orders I should make.

[3] The Court decided in the First Procedural Decision[1] – which relates to these and other related appeals – that the law for the purposes of these appeals is the RMA prior to the coming into force of the Resource Management Amendment Act 2003 on 1 August 2003.

Background

[4] The background to the strike-out application is that in 2001 Contact applied to the Otago Regional Council for a number of water and discharge permits in order to continue operation of its three dammed lakes in the Clutha catchment – Lake Hawea, Lake Dunstan and Lake Roxburgh. The Hawea Community Association ("HCA") and the Central Otago District Council ("CODC") made submissions on the applications. The Queenstown Lakes District Council ("QLDC") never made a submission in its own name. Instead the submission now relied on by the QLDC was lodged by the Wanaka Community Board. However, Contact has raised no issue about the QLDC stepping into the Board's shoes.

[5] After a hearing by independent commissioners, the Otago Regional Council issued its decision on about 16 September 2003. Among the appeals lodged in this Court against that decision were three by the appellants as submitters[2]. The first issue raised by Contact is that it claims each of the appeals goes further than its original submission. The second broad issue is that Contact alleges that the financial contributions sought are illegal because they require payment to one of the appellants rather than to the Otago Regional Council.

[6] The submissions by HCA and the Wanaka Community Board both seek relief as follows:

> ...
>
> (k) The consent holder shall pay a financial contribution of $3,000,000.00 (exclusive of Goods and Services Tax). A financial contribution is appropriate in this instance to recognise the ongoing and adverse effects on amenities associated with the proposed activity. In particular it is noted that:

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1 Decision C99/04 under the name *Nut Producers of New Zealand Limited et ors v Otago Regional Council*. Decision C121/04 is identified as the second procedural decision. Decision C167/2004 is the third procedural decision (although not identified as such).

2 Under section 120 of the Act.

(a) Minimal amenity works, grants, or similar financial contributions have been paid by the applicant or its predecessors to the Hawea community over the years, to compensate for the significant adverse environmental effects, loss of amenity, degradation of the foreshore and other adverse effects that the applicant's operations have caused since Lake Hawea was raised.

(b) Erosion and other adverse effects resulting from the raising of the lake and fluctuation of lake and river levels has permanently scarred the landscape and visually impaired the southern shore of the lake and these adverse effects will be ongoing.

(c) Adverse effects resulting from poor management of land and buildings owned by or used by the applicant to facilitate the proposed activity creates a visual eyesore in some localities.

(d) The increased frequency of raising and lowering the lake level over recent years is leaving layers of silt and sedimentation exposed on the shoreline. In northwest wind conditions currents take this sediment to the lake outlet where the intake for the Lake Hawea township water supply is located.

(e) The applicant has acknowledged in its application the permanent significant adverse environmental effects arising from past lake draw downs to extreme low levels – ie below 336 metres. We assert that these effects start to become evidence once the lake level is drawn down below 341 metres.

(f) The applicant is the only major consumer of the natural water resource, yet it pays nothing for such consumption.

(g) The applicant's use of the waters of Lake Hawea and the Hawea River has very significant adverse effects on the landscape and the community in the Hawea area, yet the applicant makes very little financial contribution to the Queenstown Lakes District Council ("QLDC") in the form of Council rates for the freehold land and improvements it owns in the QLDC area ($8709.00 in 1999).

Note: This financial contribution, and income earned from it, will be available for and able to be utilised only by the HCA, for constructing community facilities, improving amenities, enhancing reserves etc. around the shores of Lake Hawea and the Hawea River. It will not be available for use by any other parties that may be adversely affected by the operations of the applicant.

[7] The QLDC and HCA Notices of Appeal are in identical terms in that they each include a request for relief as follows:

3. That a financial contribution of Three Million Dollars ($3,000,000.00) plus Goods and Services Tax be paid to the Appellant or to the Otago Regional Council to be held on behalf of the Appellant and applied to works, projects, schemes or facilities to off-set and

provide compensation to the community of the Appellant for adverse effects caused or contributed to by the activities contemplated by the consents and not otherwise avoided, remedied or mitigated by conditions imposed on the grant of consents.

[8] In contrast the CODC's submission increased the stakes by seeking that:

The consent holder shall pay a financial contribution of $5,000,000.00 (exclusive of Goods and Services Tax) to the Central Otago District Council.

Note: a financial contribution is appropriate in this instance to recognise the ongoing and adverse effects on amenities associated with the proposed activity ... The financial contribution paid in terms of this condition could be utilised as a fund to meet the ongoing cost of maintaining lake shore amenities.

[9] The notice of appeal filed by the CODC sought the following relief:

That a financial contribution of Five Million Dollars ($5,000,000.00) plus Goods and Services Tax be paid to the appellant [i.e. to CODC] or to the Otago Regional Council to be held on behalf of the appellant and applied to works, projects, schemes or facilities to offset and provide compensation to the community of the appellant for adverse effects caused or contributed to by the activities contemplated by the contents and not otherwise avoided, remedied or mitigated by conditions imposed on the grant of consents.

The power to require financial contributions

[10] The power to require financial contributions is given in section 108(2)(a) of the Act which states that a resource consent may include:

Subject to subsection (10), a condition requiring that a financial contribution be made.

[11] The power is qualified by subsection (10) which reads[3]:

A consent authority must not include a condition in a resource consent requiring a financial contribution unless –

(a) The condition is imposed in accordance with the purposes specified in the Plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(b) The level of contribution is determined in the manner described in the Plan.

[3] As it stood prior to the 2003 amendment.

In *Nicoll Management Limited v Manukau City Council*[4] the Principal Environment Judge Sheppard held that the "purposes" specified in a Plan refer to the purposes to which the contributions are to be applied.

[12] It is also important that the use of a financial contribution is controlled by sections 110 and 111 of the Act. These state:

> **110 Refund of money and return of land where activity does not proceed**
>
> (1) Subject to subsection (2), where –
>
> (a) A resource consent includes a condition under section [108(2)(a)] …; and
>
> (b) That resource consent lapses under section 125 or is cancelled under section 126 or is surrendered under section 138; and
>
> (c) The activity in respect of which the resource consent was granted does not proceed –
>
> The consent authority shall refund or return to the consent holder … any financial contribution or land set aside under section 108(2)(a) …
>
> (2) A consent authority may retain any portion of a financial contribution or land referred to in subsection (1) of a value equivalent to the costs incurred by the consent authority in relation to the activity and its discontinuance.
>
> **111 Use of financial contributions**
>
> Where a consent authority has received a cash contribution under section [108(2)(a)] …, the authority shall deal with that money in [accordance with the requirements of section 223F of the Local Government Act 1974 and in] reasonable accordance with the purposes for which the money was received.

I note that the words in square brackets are now omitted[5] from section 111 as from 1 July 2003 and the amended version is likely to be applicable to any financial contributions received under the conditions requested. I hold that it is implicit from the use of the words "receive" in section 111 and "retain" in section 110 that payment is to be made to the consent authority.

[4] Decision A62/94 at page 18.
[5] Section 262 Local Government Act 2002 (2002 No. 84).

Financial contributions in the Regional Plan

[13] The Otago Regional Council now has an operative regional plan for all water-related issues, called appropriately 'The Regional Plan: Water for Otago'. I will call it simply "the Regional Plan".

[14] The purposes for which a financial contribution may be imposed in the Otago Regional Plan and the method for determining the contribution amount are set out in its section 17(2). Six of its eight sub-paragraphs require consideration. The appellants have disclaimed any reliance on the purposes in the other two (relating to historic/cultural sites and wetlands).

[15] Each of the relevant sub-paragraphs of section 17.2 contains three parts. They describe respectively:

(1) 'circumstances' – Mr Smith described these as roughly equating to the motivation for imposing a financial contribution;

(2) 'purposes' – setting out what any financial contribution will be expended on. In each sub-paragraph the formula begins along these lines[6]:

> To offset the adverse effects of the activity by providing money, land or a combination of both ...; and

(3) the 'method' for determining the contribution amount. This reads:

> The amount of the contribution will be determined having regard to the criteria set out in 17.3 but will reflect the actual costs of works and of providing land sufficient to offset such effects.

[16] For example, section 17.2.1 relates to restrictions on public access to or along lake and river margins. The purpose is stated to be to offset such effects by providing money, land or a combination of both "for alternative legal public access". The method of determining the contribution amount is the actual cost of providing public access "sufficient to offset adverse effects on such access".

[17] The other relevant purposes are as follows:

[6] The actual wording quoted is from para 17.2.1 [Otago Regional Plan: Water p. 247].

- Section 17.2.2 has a purpose of providing public open space or public facilities in an alternative location within the lake or river margin.
- Section 17.2.3 has a purpose of enabling planting, transplanting or maintenance of new or existing vegetation.
- Section 17.2.4 has a purpose of providing for landscaping or planting elsewhere from the site of the activity.
- Section 17.2.5 has a purpose of providing for works which protect the bed or the margin of a lake or river including maintenance and planting of vegetation, such as riparian protection and erosion protection works in the same general locality.

  ...

- Finally, section 17.2.7 has a purpose of providing protection for ecosystem values or habitats beyond the area occupied by or immediately affected by the activity.

[18] A puzzling aspect of the Regional Plan is that most, perhaps even all, of the circumstances where financial contributions may be imposed, are not taxing provisions for Council utilities or services (roads, reserves etc). Rather they are circumstances where direct reliance on section 5(2)(c) – the duty to remedy or mitigate adverse effects – would appear to lead to a similar result in an effort to achieve a net conservation benefit: *Baker Boys Limited v Christchurch City Council*[7]; *Remarkables Park Limited v Queenstown Lakes District Council*[8]. This factor may be relevant at the substantive hearing.

[B] Do the appeals exceed the scope of the related submissions?

[19] A preliminary question that may arise in almost any appeal by a submitter under the RMA is what that submitter sought in their original submission. That is relevant because an appellant cannot enlarge the scope of the proceedings to argue matters which go beyond those signalled in the relevant originating document.

7 [1998] NZRMA 433 at para (61); [1998] 4 ELRNZ 297 at para (61).
8 Decision C161/2003 at [34] to [37].

[20] The submissions[9] by HCA and the QLDC both seek payment of a financial contribution of three million dollars plus GST. They are initially silent as to whom the financial contribution should be paid, but later a "note" explains that the financial contribution will be utilised only by the HCA.

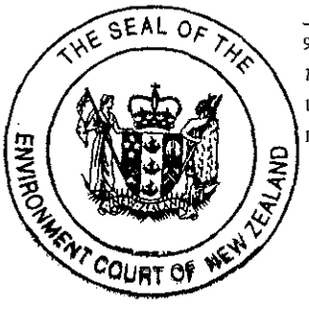
[21] The appeals by the HCA and the QLDC seek relief that the financial contribution be paid to the appellant or to the Otago Regional Council "on behalf of the appellant". Mr Smith's argument is that the notice of appeal extends the relief sought by asking for payment to the appellant or to the Otago Regional Council when that was not requested originally, and thus these parts of the appeals are invalid.

[22] The High Court has stated two principles that are applicable to this question:

(1) that an appeal cannot seek more than the original submission: *Transit New Zealand v Pearson*[10];

(2) that procedures under Part 6 of the RMA should not be bound by undue formality: *Countdown Properties (Northlands Limited v Dunedin City Council*[11]*; Royal Forest and Bird Protection Society Incorporated v Southland District Council*[12].

[23] I doubt if the QLDC and HCA need recourse to the second principle here because their submissions do not state that payment of the financial contributions will be to the HCA. They merely note that the contributions will be utilised by the HCA. Whether that is permissible is the question I decide in part [C] of this decision. Even on a literal interpretation there is no statement in the submissions as to whom the payments are to be made. It must be implicit in the submission that payments are to be made to whomever they may lawfully be paid.



9 Quoted in paragraph [6] above.
10 [2003] NZRMA 318.
11 [1994] NZRMA 145 at 167.
12 [1997] NZRMA 408 at 413.

[24] Do the **appeals** therefore extend the submissions when they request that the financial contributions are to be paid "to the Appellant or the Otago Regional Council"? I have already held that Part 6 of the Act requires that payment of a financial contribution must be to the consent authority. To that extent the relief sought in the notice of appeal that payment should be to the Otago Regional Council is simply a statement of the requirement of the Act, and therefore cannot be beyond jurisdiction.

[25] Contact's complaint is more fairly made of the relief that payment be made in the alternative "to the Appellant". It seems to me that this issue is more clearly analysed under the heading of jurisdiction which is dealt with in the next part of this decision.

[C] Do the appeals request relief beyond jurisdiction?

[26] There are three aspects of the relief sought that Mr Smith, counsel for Contact, argues are beyond jurisdiction: first that payment of financial contributions should be made to the appellant in each case rather than to the consent authority; secondly that even if payment is made to the consent authority it cannot be "on behalf of" a third person or "available for/utilised by" a third person; and finally Contact questions some of the uses proposed for the financial contributions as not being for purposes identified in the Regional Plan.

Can a financial contribution be paid directly to a submitter?

[27] The answer is simply "no". Mr Smith is correct about the first point: it is clear that financial contributions must be paid to the consent authority because it must deal with them in compliance with sections 110 and 111 of the Act[13]. I hold that to the extent that the notices of appeal seek payment to the appellant they exceed jurisdiction. What can be done about that is the subject of part [D] of this decision.

[13] These obligations have not changed under the 2003 amendment to the RMA.

Can a financial contribution be subject to stipulations as to who uses it?

[28] The second question in this part is more difficult – may financial contributions be paid to the consent authority "on behalf of" or with a stipulation that they only be used by a certain person or association? Counsel for Contact attacked this at two levels of generality. First he submitted that the RMA does not provide for compensation for persons affected; secondly he submitted more specifically that the ORP does not provide for payment of financial contributions to particular individuals.

[29] In his first argument, Mr Smith submitted that:

> ... the decision of the (then) Planning Tribunal in *Colonial Homes Limited v Queenstown Lakes District Council*[14] addresses a related point. There the appellant offered to subject itself to a condition of consent fixing compensation payable to the submitter opposing the consent application. The Tribunal expressed the view that the RMA:
>
> > is not designed to place the Planning Tribunal in the role of assessing compensation but rather to prevent adverse effects for the purpose of advancing the concept of sustainable management.

[30] While I accept, for present purposes, that the RMA does not provide for monetary compensation to any party (except possibly to a consent authority as a financial contribution which meets the requirements of the Act) I do not accept that environmental compensation is impermissible. In my view the argument about "compensation" is a semantic one only. The word "compensation" does not occur in the RMA. The term "mitigation" does, and it is clear that mitigation of adverse effects is very important: section 5(2)(c) of the Act. Further, mitigation appears to be the purpose of the Regional Plan's financial contributions.

[31] More directly relevant to Contact's application is that section 111 of the Act states that a consent authority receiving a cash contribution shall deal with that money "in reasonable accordance with the purposes for which it was received". Mr Smith submitted that the fact that Parliament saw the need to provide such assurance for cash contributions paid to the consent authority implies that it was never envisaged that a financial contribution could be paid to any other party. I agree that financial contributions cannot legally be directed to be paid straight to another party. What

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[14] Decision W104/95.

happens when they are in a consent authority's hands is up to it, subject to the constraints in section 110 are 111 of the Act.

[32] Mr Smith's second, more specific, argument is that financial contributions may only be imposed for a purpose stated in a plan[15]. He then analysed the Regional Plan in an attempt to show that payment "to" or "on behalf of" the HCA or other community was not part of any purpose set out in that plan.

[33] The financial contribution provisions in the Regional Plan identify or, at least, point to "when, why and what" in relation to proposed financial contributions. They do not state for whose benefit the contributions shall be used. It is implicit – again from and subject to sections 110 and 111 of the Act – that a consent authority will use contributions for the benefit of the district and for the purposes stated in the plan, and (preferably) specified in the resource consent. More direction as to payment to, say the HCA, is not required by the rules in the Regional Plan or by the Act; indeed to give more direction is illegal because it would be fettering the Council's discretion. The only possible exception I can think of is if there is a condition that the HCA is responsible for carrying out the work required by the condition and nobody else can (e.g. if the work contemplated is on HCA land so no one else has access). The appeals are far too vague for me to infer that is the case, or that such a condition is contemplated.

[34] I conclude that the words stating for whom financial contributions are to be spent in the Note to each submission and in the relief in the Notice of Appeal are *ultra vires*. I am not asked to take any action in respect of the submissions but I consider the words in the Notice of Appeal which read:

> ... [to be] held on behalf of the Appellant and ...

are illegal.

[15] Section 108(10)(a) of the RMA.

Are the proposed financial contributions for purposes specified in the Regional Plan?

[35] Contact is not concerned only with the question of to whom any financial contributions are paid, but also with what the money is for. It has complained in lengthy memoranda and argument about the lack of particularity of the purpose for which contributions are sought. That issue was the subject of the Second Procedural Decision[16] of the Court as to provision of further particulars about financial contributions, and of previous directions – as to the prior service by these three appellants of their evidence as to financial contributions. Due to the split hearing, and my inadequate notes, I am not sure how far Mr Smith wanted me to decide this issue. For the avoidance of doubt I record my views.

[36] Where the Court has considered there is real strength in Contact's complaints it has attempted to remedy the problem. From other memoranda on the Court file I understand that Contact now has the appellants' evidence on financial contributions so it knows the actual case it has to meet.

[37] With one exception I am reluctant to go further and strike out the relief sought in the notices of appeal for irrelevancy because it seems to me that the relief essentially raises questions of fact which can only be resolved after a hearing as to applicable law and a thorough testing of the facts. I am also conscious that at least in the South Island this is a relatively novel case raising issues as to what are the permitted baselines for existing dam structures and what past effects may be taken into account.

[38] There is one exception. All three appeals contain an unquantified claim for financial contribution for:

> The appellants' costs of involvement in consultation, negotiation and preparation of any management and option plans (including landscaping plans) or flood rules or any monitoring required in any reviews of such conditions of consent[17].

I cannot see how this proposed financial contribution bears any relationship to any of the purposes identified in the Regional Plan. It should be struck out of each appeal.

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[16] Decision C121/04.
[17] Paragraph 5 of the CODC notice of appeal, paragraph 4 of the QLDC and HCA notice of appeal.

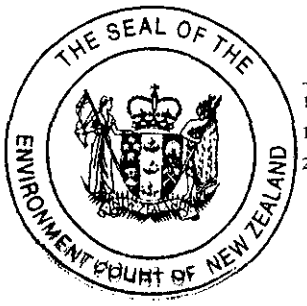
[39] I do not see an incontrovertible case for striking out any more of the notice of appeal so I decline to do so.

[D] Outcome

[40] I have held that parts of the notices of appeal are invalid. Mr Smith submits that is the end of the matter and that the whole of the financial contributions relief sought by the three appellants should be struck out. With respect to Mr Smith, his approach is inconsistent. If one part (the financial contributions) of an appeal can be struck out then why can a smaller part not be struck out – the offending words only?

[41] Mr Smith referred to *Potts v Invercargill City Council*[18]. I have checked this decision. The passage on severance[19] is about severing words in a Council resolution. I doubt therefore if statutory severance cases are of much use except for the obvious point that the primary issue on any suggested severance is whether the words left can "independently survive" – see *Attorney-General for Alberta v Attorney-General for Canada*[20]. How many words (metaphorical fingers, legs, arms) can be lopped off a body (of prose) before it is no longer a body?

[42] That sensible (and obvious) point aside, I consider that any power to sever should come from within the RMA itself. In fact the power comes from the very section on which Contact relies in its application to strike-out. Section 279(4) of the RMA empowers an Environment Judge to order that "the whole or <u>any part of</u> [a] person's case be struck out" (my emphasis) if certain preconditions are met. The statutory authority is plain: part of a notice of appeal can be struck out. If a few words exceed the jurisdiction of the Court to grant, then it is a simple and proper exercise of the Court's jurisdiction to strike them out provided that the words which remain make sense or can be given effect to if, after a hearing, that is the better way of achieving the purpose of sustainable management under the Act.



18 [1985] 1 NZLR 609 (CA).
19 [1985] 1 NZLR 609 at 620.
20 [1947] AC 503, 518.

[43] I direct that under section 279(4) of the RMA the following words are struck out of the relief sought in respect of financial contributions in each Notice of Appeal:

(1) the words "the Appellant or";

(2) the words "... [to be] held on behalf of the Appellant and ...";

(3) para 5 of the relief in the CODC appeal;

(4) para 4 of the relief in the QLDC and HCA appeals.

[44] The remainder of the relief sought in respect of financial contributions in each notice of appeal of course remains extant, although the word 'compensation' should be read as qualified to mean environmental compensation and/or mitigation for the reasons given earlier.

[45] Costs are reserved.

DATED at CHRISTCHURCH 23 December 2004.

J R Jackson
Environment Judge

Issued[21]: 24 DEC 2004

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[21] Jacksoj/Jud_Rule/D/RMA 800-03.doc.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-007655

IN THE MATTER OF	the Resource Management Act 1991
AND IN THE MATTER OF	an appeal under section 299 of the Resource Management Act
BETWEEN	CONTACT ENERGY LIMITED Appellant
AND	WAIKATO REGIONAL COUNCIL Respondent

Hearing: 17-19 September 2007

Appearances: T P Robinson and H R Dixon for Appellant
J Milne for Respondent
P D Green and A F S Vane for Taupo District Council

Judgment: 20 December 2007

JUDGMENT OF WOODHOUSE J

This judgment was delivered by Justice Woodhouse on 20 December 2007 at 12:05 pm pursuant to r540(4) of the High Court Rules 198.

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CONTENTS

Introduction

[1] This is an appeal against a decision of the Environment Court dated 17 November 2006. The decision relates to a rule in the regional plan of the Waikato Regional Council governing discharges of geothermal water onto land or into surface water.

[2] The rule, combined with another rule, provides, in summary:

a) Any discharge of geothermal water onto land or into surface water not exceeding 15,000 tonnes per day ("tpd") and not exceeding 2.5 million tonnes per year ("tpy") is a discretionary activity.

b) Any discharges of geothermal water onto land or into surface water above those thresholds is a non-complying activity.

[3] The appellant ("Contact") objects to the non-complying classification for discharges over the daily and annual limits. This classification means that it will be more difficult for Contact to obtain a resource consent for discharges above these limits, as it will need to satisfy more onerous requirements. Contact contends that in four respects there were errors of law by the Environment Court in fixing the thresholds. Its written summary of the four grounds was as follows:

Ground 1

"The thresholds adopted by the Environment Court are arbitrary and inherently unreasonable. In particular, there was no evidential basis which would justify those thresholds by reference to effects on the [receiving] environment. In the absence of any evidential basis for those thresholds, the Environment Court's conclusion, approving them, was an error of law. [The word "receiving" was added orally.]"

Ground 2

"Having rejected the alternative rule formulation proffered by [Contact] as equally arbitrary, the Count was bound to reconsider its approach, either to identify a rule framework which was less arbitrary, or alternatively, which did not involve a threshold above which discharges of geothermal water would be non-complying. The Environment Court did not do either of those things, again constituting an error of law."

Ground 3

"The Court incorrectly found that it was in a position to make a balanced and informed judgment having regard, inter alia, to s 32 of the Resource Management Act 1991 ("the Act"). In the absence of any quantification in the evidence before the Court of the benefits and costs of the discretionary rule thresholds adopted by the Court and therefore in the absence of any basis for determining whether the benefits of that threshold outweighed the costs, the Environment Court could not comply with s 32 of the Act, and its failure to do so amounted to an error of law."

Ground 4

"The Court determined the need for an additional annual threshold of 2.5 million tonnes per year (cumulative on the alternative limit of 15,000 tonnes per day) without having regard to the implications that additional threshold would have for activities where reinjection or injection is impracticable, notwithstanding that it had identified the need to provide for such activities. On the Court's own reasoning, this was a relevant consideration. Failure to have regard to it amounted to an error of law."

[4] As to the particular error or errors of law relied on, Contact said in its principal written submission:

> This appeal is principally based on the contention that the Environment Court, in this case, came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come.

Because these contentions are central to the appeal, and because of the principles governing appeals on points of law and additional principles governing appeals from a tribunal with specialised expertise, it is necessary to set out in some detail the planning history and findings of the Environment Court.

The Regional Council planning processes and Environment Court hearings

[5] This appeal, directed to a single rule in the regional plan dealing with the entire Waikato geothermal resource, is the only issue remaining from the process of notifications, reviews, hearings and appeals in relation to the Waikato Regional Council's geothermal policy and plan. This process commenced in October 1993. It ended at the Environment Court stage 13 years later with the delivery of the decision under appeal in November 2006.

[6] The Waikato Regional Policy Statement was publicly notified in October 1993. It became fully operative in October 2003. A proposed Waikato Regional Plan was notified in September 1998. Decisions were released in October 2001. The plan had what was a called a "geothermal module". There were challenges to the consistency between the plan and the policy statement by, in particular, Contact and Mighty River Power Limited. As a result, the Regional Council undertook a comprehensive review of its policy statement and plan in relation to the geothermal policy. The Regional Council decided "to provide an integrated framework for the management of geothermal resources in the region". This led to notification on 23 August 2003 of the Regional Council's proposed Change No. 1: Geothermal Section to the Waikato Regional Policy Statement and proposed Variation No. 2: Geothermal Module to the Proposed Waikato Regional Plan.

[7] The process leading to decisions on the proposed policy change and plan variation extended over almost 10 months from notification in August 2003 until decisions were released on 12 June 2004. Submissions were sought on two occasions, in September and October 2003. Regional Council staff

recommendations on submissions were notified to submitters on 24 November 2003. There were hearings in December 2003 and January and February 2004. The decisions were released on 12 June 2004.

[8] Before the Regional Council's decisions on the proposed policy and plan changes were released, hearings had commenced for applications to the Regional Council for consents to discharge geothermal water. This included applications by Contact to discharge 60,000 tpd of geothermal water and 35,000 tpd of geothermal condensate (included in the definition of geothermal water) into streams running into the Waikato River. The overlap between the processing of decisions on the proposed policy and plan changes and detailed consent applications was accepted as relevant by the parties involved in both proceedings and, subsequently, in the appeals to the Environment Court. The consents hearings before Commissioners appointed by the Regional Council were over 32 days between 1 March and 24 June 2004. Contact was granted the consents it sought. They are effective to 2026.

[9] Five parties appealed to the Environment Court from the Regional Council's June 2004 decisions on the geothermal policy statement and the geothermal plan. Two of the appellants are parties to this appeal, Contact Energy and Taupo District Council. The Regional Council was, of course, respondent before the Environment Court as it is in this Court.

[10] The decision now under appeal was the second decision of the Environment Court on those appeals. The first decision, described by the Environment Court as an "interim decision", is dated 13 April 2006. I will refer to the hearing leading to the interim decision as the first hearing and to the hearing leading to the decision under appeal as the second hearing. The decision directly under appeal in this Court is referred to as the final decision. It will be necessary to refer to the interim decision. It was accepted by all parties to this appeal that the interim decision is relevant, and that is undoubtedly correct. Although there were two hearings with two decisions, they relate to one set of appeals. This is discussed more fully below.

[11] The first hearing took place over 42 sitting days between September and December 2005. The Court heard from 46 witnesses, many of them experts with

worldwide recognition in their respective fields. Most witnesses were cross-examined. There were 2,582 pages of transcript. The interim decision was released on 13 April 2006. It is 105 pages.

[12] The second hearing took place over seven days between 7 and 16 August 2006. The final decision was released on 17 November 2006.

[13] Because the second hearing was a continuation of the first hearing, the Court panel was unchanged. The panel consisted of an Environment Court Judge with three Commissioners – a planner, an ecologist, and an engineer.

[14] The same Environment Court panel was convened to hear and determine appeals from the Regional Council's consents decisions. The hearing on the consents appeals commenced on 4 December 2006 and extended over 52 hearing days to February 2007. 35 days of the consents appeal hearing occurred before delivery of the final decision on 17 November 2006. The consents appeal decision was released on 18 May 2007. The consents granted to Contact were upheld with modification of conditions as sought by Contact.

The first hearing and the interim decision

[15] The two main issues before the Court at the first hearing were whether regional policy should:

(i) require reinjection of the extracted geothermal water back into the same geothermal system; and

(ii) provide for a single operator (or single tapper) for each geothermal system.

A subsidiary issue was whether discharges of geothermal water to ground or surface water should be prescribed in the Geothermal Module or the Water Module of the proposed plan.

"Reinjection" was defined in the interim decision as meaning "the discharge of available geothermal water, with or without make up water, through a well bore into subterranean formations in the same system from which the geothermal water was produced". Another means of disposing of geothermal water is "injection". This was defined as "the discharge of water, regardless of where this water originated, through a well bore into subterranean formations inside or outside a geothermal system".

[16] Although the main focus of the Environment Court was on these issues, the hearing ranged more widely. The Court said:

> [3] While these issues were the focus of attention during a lengthy hearing, they could not be isolated from the other provisions of the Change and Variation. Accordingly the evidence addressed other provisions of the Change and Variation, although not as comprehensively as the specific policies on reinjection and single tapper. Also, because of the linkages and overlaps between the various provisions, we in the course of this decision, will of necessity comment at times on other provisions. This is also necessary for contextual reasons.
>
> …
>
> [59] The main focus of the hearing was accordingly on the broad policy matters critical to the two issues of reinjection and single operator. Needless to say the policy matters could not be considered in isolation, but needed to be considered in the context of the flow down effects through the objectives, policies, and rules of the proposed plan.

As to its decision making and recording the Court said:

> [5] … It is not possible, in the interests of brevity and efficiency, to discuss in detail all of the evidence or even refer to all of the witnesses. However, we have regard to the totality of the evidence.
>
> [6] Further, much of the detail, particularly in relation to specific geothermal systems and the effects of abstraction, while helpful as background, is not specifically required to be determined for the purposes of the broad policy issues which are the focus of these proceedings. Accordingly, if specific parts of the evidence are not averred [sic] to in this decision we mean no disrespect to the parties or their witnesses. We reiterate we have taken into account all of the evidence.
>
> [7] In this regard we note the observations of Cooper J in *Rodney District Council v K F Gould and F Y P Gillain* where he said:
>
> > … it is axiomatic that no Court is obliged to make a finding of fact (unless the issue concerns a jurisdictional fact) and a failure to do so will not generally give rise to an error of law: *Auckland City*

> *Council v Wotherspoon* (1990) 1 NZLR 76, at 88-89. Secondly, and partly as a consequence, it is not possible to conclude that the Court did not consider evidence it has not referred to in its decision. It might have considered the evidence but has not thought it worthy of mention; there is no general duty of a Court to recite all the evidence it has heard, and give reasons for accepting or rejecting each statement made to it by a witness.

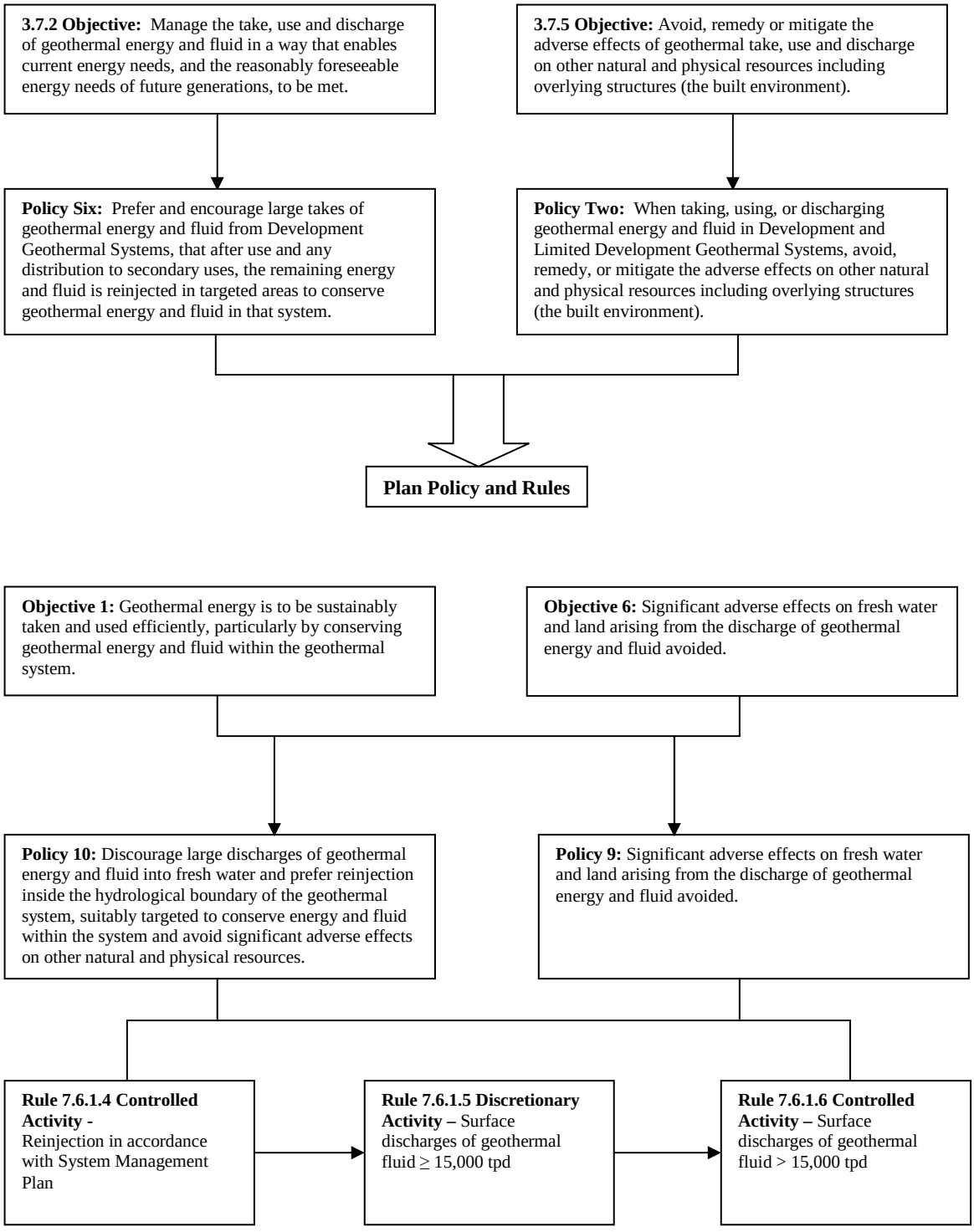
[17] Of the three issues identified by the Environment Court those of importance on the present appeal are the first and the third. In relation to the first – the reinjection policy – the Court said:

> The policy framework of the Change and Variation recognises reinjection as a preferred course of action directed at achieving two primary objectives:
>
> (i) Managing the take, use and discharge of geothermal energy and fluid in a way that enables current energy needs, and the reasonably foreseeable energy needs of future generations, to be met; and
>
> (ii) Avoiding, remedying or mitigating the adverse effects of geothermal take, use and discharge on other natural and physical resources including overlying structures (the built environment).

[18] The linkage between these broad objectives and more detailed policies and rules was set out in a diagram produced by a planning consultant called by the Regional Council. This was adopted by the Court and is conveniently reproduced for the purposes of this decision. The rule in contention (although now with different numbering) is rule 7.6.1.6 recorded at the foot of the diagram.

RPS Policy – Reinjection

Figure 1: Reinjection Policy Framework



[19] The Environment Court described the essence of Contact's case on the reinjection issue as follows:

> [93] Contact seeks amendments to provide greater recognition of potential effects of reinjection of geothermal water - for example reservoir cooling. It supports a policy regime which prefers and encourages reinjection of geothermal water, **but which also recognises the need for effects-based assessment** as to whether, in a particular case, reinjection is the most appropriate way to achieve the relevant objective of providing for existing and future energy needs. (emphasis added)

The Court recorded the policy wording sought by Contact for an effects-based assessment, and continued:

> [95] Contact's relief also seeks … flow-on amendments to the implementation methods in the proposed Change to the policy statement, and the policy and rules to the proposed plan, to give effect to its sought after change to Policy Six. **The culmination of these proposed amendments would be to reduce the status of discharges of geothermal water over 15,000 tons per day, other than by reinjection, from a non-complying status to a discretionary status.** (emphasis added)

[20] Although the Environment Court was not required in its in interim decision to determine the appropriateness of the specific measurement of 15,000 tpd, issues relating to it of concern to Contact were squarely before the Court at the first hearing. What is recorded in the Environment Court's interim decision in [93] and [95], quoted above, is in considerable measure the foundation for the first ground of appeal to this Court, albeit directed in the Environment Court to broader questions of Regional Council objectives and policies. The analysis undertaken by the Environment Court included effects-based assessments, and assessments of costs and benefits under s 32 of the Resource Management Act (RMA) relating to a wide range of issues concerning disposal of geothermal water.

[21] The interim decision covering the first main issue – reinjection – covered 50 of the 105 pages. After setting out the positions of the parties, including that of Contact summarised above, five sub-issues were carefully considered: (1) the effects of reinjection on the geothermal resource; (2) reinjection: subsidence effects of exploitation and their mitigation by reinjection; (3) effects of exploitation on geothermal features and hydrothermal eruptions and mitigation by reinjection; (4)

the use of reinjection to avoid surface contamination by discharge to land and waterways; and (5) cost of reinjection.

[22] One general feature that emerges from the Environment Court's analysis and findings, and again bearing on the present appeal, is that the assessment of effects and of costs and benefits of a particular means of disposing of geothermal water involves a good deal more than such assessments focused only on the receiving environment from the particular means of disposal. For example, disposal into a river requires consideration not only of the effects on the river – the receiving environment – against the costs of disposal into a river compared with other means of disposal. There is also need to consider amongst other things effects and costs and benefits of *not* putting the geothermal water back into the ground, either by reinjection or by injection.

[23] The analysis undertaken by the Environment Court in its interim decision needs to be noted in relation to four of the five sub-issues identified for consideration under the first main issue of reinjection. The sub-headings that follow in this judgment are taken from the Environment Court's sub-headings encapsulating the sub-issues.

Sub-issue 1 : the effects of reinjection on the geothermal resource

[24] Following an extended discussion under this heading, the Court summarised its conclusions at paras [137]-[139]. Paragraphs [137]-[138] were so central to the final decision that they were reproduced in the final decision. They are set out below, with the first sentence of [139]:

> [137] We find that a variety of effects are likely to a geothermal system and its productive capacity as a result of a reinjection regime. Some would be beneficial to the system and productive capacity while others would have potential risks. The recognised and accepted benefits include:
>
> (i) The avoidance of surface discharge of wastewater, eliminating the risk of environmental pollution;
>
> (ii) Reservoir pressure support and the consequent lessening of well productivity decline;

(iii) Extraction of heat from reservoir rocks; and

(iv) Minimising new risks of ground subsidence (which we discuss later).

[138] The potential risks include:

(i) The premature cooling of the geothermal water in some wells (if a reinjection well is sited unduly close to a production well);

(ii) Quenching of the steam cap (if the unwise step of reinjection into a steam cap is taken) with the consequent collapse of production from some wells;

(iii) Reduction in the natural recharge of hot water into the reservoir due to increased reservoir pressure; and

(iv) Causing small-scale seismic activity.

[139] We are satisfied on the evidence, that the potential adverse effects of reinjection are manageable provided an adaptive management reinjection strategy is carried out. …

Sub-issue 2 : reinjection : subsidence effects of exploitation and then mitigation by reinjection

[25] This was the subject of a major difference between witnesses called for Contact and those called for Taupo District Council, with the latter particularly concerned about subsidence affecting Taupo township. The consideration of the issues by the Environment Court led to several findings, including this:

> [205] We find that both infield reinjection and targeted injection is more than likely to be beneficial to the mitigation of subsidence. However, it is clear from the evidence of the experts, that any such reinjection needs to be carefully managed and carefully monitored, and should be entirely flexible. We have also noted that reinjection may in certain circumstances have adverse effects. Further, there is a certain cost in reinjecting the fluid back into the system, particularly targeted reinjection, which we discuss later in this decision.

Sub-issue 4 : the use of reinjection to avoid surface contamination by discharge to land and waterways

[26] The immediate purpose of the Court's inquiry under this heading was in respect of the broad policy issue concerning reinjection. However, the subject is also

of direct relevance to Contact's argument at the second hearing that all surface discharges (onto the ground or into surface water) should be discretionary activities with no volumetric limit beyond which the activity would be non-complying. For this reason it is convenient to set out the Court's evaluation following its discussion of the evidence on this topic:

> ***Evaluation of avoidance of contamination of freshwater by reinjection***
>
> [238] The avoidance of contamination of freshwater by reinjection is accepted as best practice by a number of the expert witnesses that were called. Such a practice is accepted even by Third World countries. As Dr Home stated:
>
> > Reinjection of all the water remaining after the power plant is a normal practice in most geothermal developments worldwide. Reinjection of all the remaining water, except for a small and occasional exclusion for testing purposes, is usually an environmental necessity.
>
> [239] Dr Stefansson stated that:
>
> > In the review paper on geothermal reinjection experience published in 1997 (Stefansson, 1997) it is concluded that disposal of geothermal wastewater is the most common reason for applying reinjection in geothermal operations.
>
> And:
>
> > It should be realized that most of the reinjection taking place in the world at present is done for the purpose of getting rid of the effluent fluid.
>
> [240] In the Regional Policy Statement, Objective 3.4.5 Water Quality states:
>
> > Net improvement of water quality across the region.
>
> That provision has been operative since 1 October 2000 and is beyond challenge. Clearly geothermal discharges to freshwater do not achieve that objective.
>
> [241] Much of the evidence focused on effects on the Waikato River but the policy covers all waterbodies in the region that can be affected by geothermal discharges. Of importance the following exchange took place between Mr Milne [counsel for the Regional Council] and Dr Timperly [an aquatic chemist called by Contact] during cross-examination.
>
> > Q. There is absolutely no good environmental purpose served by discharge [sic] arsenic, boron, sulphide or mercury into surface water in the Waikato Region, is there?
> >
> > A. There is no environmental benefit correct.
> >
> > …
> >
> > Q. Now, given that we have those contaminants I have just listed to you already in a geothermal system, beneath the ground, would it not be

> preferable from even an environmental point of view to reinject those contaminants back into the ground from whence they came so that you are not then contaminating either the surface water that I've put to you or the air that you put to me as an alternative receiving environment?
>
> A. Yes in terms of the water environment that would be quite correct and any increase in concentration of any of those substances, is a step in the wrong direction environmentally speaking. The extent of that step, and how serious it is of course is dependent on the magnitude of step.
>
> [242] We agree with the conclusions of Dr Timperly. Having regard to Objective 3.4.5 Water Quality of the Operative Regional Policy Statement and the evidence of the composition of geothermal water and its possible effects on groundwater, we consider that best practice is to reinject the fluid into the geothermal system from whence it came.

Sub-issue 5 : costs of reinjection

[27] The evidence here related in particular to the cost to Contact if required to retrofit its Wairakei plant and the cost of reinjection to downstream (cascade) users of geothermal water from Contact's Wairakei plant. The present appeal raises questions relating to three cascade users, The Wairakei Prawn Farm, The Wairakei Terraces Facility operated by a company called Netcor, and an artificial steam flow down the Te Kiriohineki Stream. The appellant now argues the Environment Court failed to have regard to relevant evidence concerning these cascade users. After reference to evidence concerning the cost of retrofitting the Wairakei plant and the cost to cascade users of reinjecting geothermal water, the Environment Court said:

> [253] We treat the costs as indicative and find that the cost of retrofitting the power plant and requiring reinjection is going to be high **and may result in the demise of one or more cascade user**. This is one of the factors which we must have regard to, and put into the crucible, to weigh with the other factors we have discussed, including our finding that costs resulting from subsidence may also be potentially high. We also recognise the heavy burden that would be imposed on any person or body, during the resource consent process or enforcement process, required to establish the cause and mitigation of future subsidence and damage that may arise therefrom. (emphasis added)

The Environment Court's interim decision evaluation of the reinjection issue

[28] The Court's evaluation commenced with a summary of some, but not all, of the factual findings, and addressed alternative considerations, and concluded:

> [263] In order to signal the importance of a discharge strategy, that has at its focus the avoidance or mitigation of adverse effects, we consider that any discharge by way of reinjection and/or injection in accordance with Policy Six as amended should be a discretionary activity. Any other discharge by way of reinjection and/or injection not in accordance with Policy Six should be a non-complying activity.

The second main issue

[29] The second main policy issue concerned management of the geothermal system and whether there should be provision for more than one large-scale operator for each system. It is unnecessary to consider this part of the interim decision.

The interim decision : subsidiary issue

[30] The subsidiary issue is relevant. The issue as formulated by the Court was

> … whether the regional policy should provide for discharges of geothermal water to ground or surface water to be prescribed in the geothermal module or the water module of the proposed plan.

[31] The Court's discussion commenced:

> [328] We have already discussed the accepted fact that geothermal water contains heat and contaminants and the effects of discharging geothermal water to ground and surface water. We found that it is best practice to reinject the geothermal water left over after production.
>
> [329] Contact and Mighty River Power endeavoured to persuade us that the discharge of geothermal water to ground or surface water should be treated no different from other discharges. Other discharges are provided for in the Water Module of the plan and require consent as discretionary activities.

[32] The Court referred to a further part of Contact's argument and the position advanced for Waikato Regional Council. It then expressed conclusions which come to the heart of the second hearing, final decision, and this appeal:

> [332] The essence of the argument for Contact was that discharges to surface waters should be treated as a discretionary activity rather than non-complying, in that the effect of having the non-complying rule with the current policies is effectively making such discharges prohibited. Mr Robinson had this to say:

> In my submission Policy 10 is not currently written in a way which gives a consent applicant for a non-complying activity any leeway because it...does not make clear that the policy of discouragement is not intended to operate when the preferred option of in-system reinjection is not appropriate.

> [333] **We consider that in this case the non-complying status is appropriate for large surface discharges of geothermal water, both because of the nature and size of the discharges involved, and because of the interlocked nature of the effects of the take and the discharge. Simply the effects of the take, the effect of discharging and the effect of not reinjecting are all relevant and inter-linked.** This is further complicated where the applicant for discharge may be different from the person extracting the fluid. For these reasons we consider that the discharge of geothermal water to ground or surface water should be treated differently from other discharges and should remain in the Geothermal Module. (emphasis added)

> [334] An **allied matter is the threshold** for non-complying surface discharges. We were not convinced that the level of 15000 t/day discharge to surface water as the threshold level where an activity changed from discretionary to non-complying, as proposed by Environment Waikato, in the Variation, had any compelling basis. Nor were we convinced by Taupo District Council's proposed 1000 t/day (albeit for the Wairakei/Tauhara System). Both of these **figures** appeared to us to be somewhat arbitrary, and an appropriate threshold should be established by the application of relevant resource management principles. While this is not a matter for determination in this decision we consider that these preliminary views may be helpful. (emphasis added)

[33] Having regard, in particular, to the emphasised passages above, what remained in essence for the second hearing and final decision was fixing the figures for the threshold; the dividing line between discharges treated as a discretionary activity and "large" discharges required to be assessed under the more onerous non-complying classification. The policy mandate that "large surface discharges of geothermal water" be non-complying activities has not been challenged.

The second hearing and final decision

[34] At the commencement of the final decision the Court, after noting the two main issues determined in the interim decision, repeated an observation from the interim decision of importance on this appeal:

> [3] While these issues were the focus of attention during a lengthy hearing, they could not and were not isolated from the other provisions of the Change and Variation. Accordingly the evidence at times addressed the other provisions to enable the issues of focus to be seen in context.

> Likewise, in our interim decision we of necessity addressed some of those outstanding issues in the context of the issues we had to determine.

[35] The Court noted that, following mediation between the parties after the interim decision, only two issues remained for determination. One of those was the 15,000 tpd threshold between discretionary and non-complying status. The rule as it then stood in the regional plan remained with that volumetric threshold of 15,000 tpd, and without any annual cap.

[36] In its preliminary discussion of this issue the Environment Court referred to the interim decision and said:

> [7] We observed that in our view the 15,000 tpd limit appeared arbitrary. We also commented that the Taupo District Council proposal of 1,000 tpd also seemed arbitrary. **As we did not hear direct evidence on the matter**, and it was not one of the matters that we had to rule on, we did not make a definitive ruling. We did observe that an appropriate threshold limit should be established by the application of relevant resource management principles. **Having now heard detailed evidence** on the matter we are in a position to make a determination. (emphasis added)

[37] Based on the arguments for the parties at the second hearing, the Court was faced with three options in relation to the threshold:

a) A threshold based on the daily volume of discharge. The non-complying activity threshold of 15,000 tonnes per day proposed by Waikato Regional Council, was ultimately accepted by Taupo District Council and was supported by Mighty River Power.

b) A threshold based on the daily volume of discharge with an annual cap. The main proponent of an annual cap was Taupo District Council which sought an annual cap of 350,000 tonnes, as against 5.5 million tonnes if the daily limit of 15,000 was simply converted to an annual figure.

c) A threshold based on the quality of the receiving water. This was Contact's argument.

[38] The Court discussed the further evidence and submissions under four headings. Those headings are adopted for the purpose of the summary of the Court's discussion and findings which follows.

The need to regulate and accommodate in an appropriate way activities for which it is impracticable to require reinjection/injection

[39] The Environment Court's discussion under this heading in considerable measure addressed what are now the first and fourth grounds of Contact's appeal.

[40] The Court firstly recorded the position of the parties and the evidence in support of their contentions. The position adopted at that stage by the Regional Council was, in the event, accepted by the Court (see [50] below). For this reason it is appropriate to set out the Regional Council's position as summarised by the Court:

> [18] Environment Waikato sought that the plan reflect the now strengthened reinjection/injection policy of the Change to the regional policy statement, by having a non-complying activity rule for activities contrary to that policy. This is a direct result of our interim decision, where we considered that the 12 June 2004 policy did not sufficiently signal the importance or significance of reinjection/injection as a means of avoiding surface contamination or avoiding or mitigating subsidence. We wanted the policy strengthened. This has now been done, says Environment Waikato, and the plan Variation supports this.
>
> [19] Environment Waikato has also taken a pragmatic view in setting the rule framework for minor and medium takes and discharges in which:
>
> (i) Minor takes and discharges of geothermal water up to 30 tonnes per day are permitted activities provided the discharge does not enter any fresh surface water body (rule 7.6.1.2).
>
> (ii) Medium sized takes and discharges up to 6,000 tonnes per day are restricted discretionary activities, again provided there is no discharge into any fresh water body (rule 7.6.1.3).
>
> (iii) All other takes of geothermal water are discretionary activities (rule 7.6.1.4).
>
> (iv) All other discharges of geothermal water up to 15,000 tpd are discretionary (rule 7.6.1.7).
>
> (v) Anything else is non-complying (rule 7.6.1.8).
>
> Only the discretionary activity rule is in contention.

[41] The Court referred to evidence in support of the Regional Council's position. This included evidence in respect of activities for which it was said to be impracticable **or** inappropriate to require reinjection or injection. These included the Te Keriohineki Stream (which in turn incorporates the Netcor facility) and the Wairakei Prawn Farm whose position had already been considered in the interim decision (see [27] above). The evidence as to current discharge for these Cascade users was under 15,000 tpd but in excess of 2.5 million tpy. Evidence relating to well testing was discussed. The Court's summary was as follows:

> [22] In addition, at this resumed hearing, Dr Malcolm Grant identified well testing as an activity for which reinjection will not always be a practicable option and which is of a temporary nature. Dr Grant also identified that well testing will have a typical discharge rate of approximately 8,040 tpd and could be accommodated within a discharge rate of 15,000 tpd. Dr Grant also considered that a limit of 1,000 tpd would be inadequate for well testing. Dr Grant was supported by Mr Bloomer, a geotechnical engineering specialist called by Might River Power.

[42] There was reference to contrary evidence given by a consultant planner called by Contact, Mr Chrisp. From the summary in the final decision it is clear that the Court was there expressly turning its mind to matters that are now raised on this appeal. For example:

> [23] Mr Marshall's and the Environment Waikato's view was criticised by Mr Chrisp, a consultant planner called by Contact, who considered that any numerical threshold was arbitrary and that the 15,000 tpd threshold was *"picking winners and is not effects based"*.
>
> …
>
> [25] Mr Chrisp's evidence was that any volumetric discharge threshold was arbitrary and could not be justified on the basis of either resource management principles, or the requirements of section 32.

[43] The Court stated its conclusion under this first heading as follows:

> [30] In setting the discretionary activity limit for surface discharge of geothermal water, we see some merit in the practical approach taken by Environment Waikato. While there is a degree of arbitrariness, it does appropriately accommodate activities, such as well drilling, for which it is impracticable to require reinjection/injection. We also see some merit in the idea of imposing a cap as put forward by Mr Lawless and supported by Mr Tremaine. In this regard, Mr Tremaine accepted in response to questions from the Court, that there was a logical inconsistency between the restricted discretionary rule for discharges to land which allowed for discharge to land of up to 6,000 tpd with no capped limit.

It is relevant to note in relation to Contact's fourth ground of appeal that the conclusion here was solely in respect of activities in respect of which the Environment Court concluded it was impracticable to require reinjection or injection, not also activities for which reinjection or injection might be considered inappropriate. The evidence referred to at [41] above covered both.

The effect on the reservoir

[44] The Court noted that it had heard a considerable amount of evidence on this topic at the first hearing and that it did not intend to repeat it. Further evidence at the second hearing was discussed with the following conclusion:

> [35] We accept, that while the possibility of subsidence is not of itself a sufficient basis for determining the threshold or activity status, it is nevertheless an important factor for us to bear in mind, along with the other possible benefits and detriments of reinjection/injection.

The quality of the receiving waters and the effects on receiving waters and the Maori culture

[45] On the question of the quality of the receiving waters the Court noted the evidence and the complexity of the issue. Its overall finding was that the evidence of two water quality scientists, one called for the Waikato Regional Council and the other for Contact, "did not provide any assistance in choosing between the Contact proposal for a threshold based on the quality of the receiving waters and the alternatives".

[46] In respect of Maori culture and other interests the Court referred to the evidence from two witnesses. It noted in particular their evidence that "… geothermal water extracted for large scale energy projects should be returned to the same system from where it came".

The adequacy of a s 32 analysis

[47] The Environment Court's discussion under this heading was directed to what is now, in large measure, Contact's third ground of appeal.

[48] The Environment Court noted the evidence of an economist called for Contact, Mr Donnelly, to the effect that the reference in s 32 to efficiency requires an economic analysis and that the references to costs and benefits require quantification – a marginal cost and benefit analysis is required to determine economic efficiency. The evidence of Mr Donnelly was questioned by evidence from Professor Meister, an economist called on behalf of the Waikato Regional Council.

[49] The Court noted that "the differences of opinion between the two economists stems from the respective boundaries of each applied to the discipline of economics". There was reference to two Environment Court decisions expressing different views on the scope of s 32: *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 (proposing an approach based on strict economic theory of efficiency) and *St Lukes Group Ltd v North Shore District Council* [2001] NZRMA 412 (advocating a "more holistic approach").

[50] Importantly, the Court also said, following its summary of the evidence of the economists and reference to those cases:

> In any event, we accept Environment Waikato's proposition that the rule reflects the strong reinjection/injection policy (among others) that we directed in our interim decision. During that hearing we heard an exhaustive amount of evidence on the benefits and costs of reinjection/injection**.**

The proposition of the Regional Council accepted by the Court is the proposition set out above at [40]. The Court then set out paras [137] and [138] of the interim decision. These paragraphs, which deal with the principal benefits and risks identified by the Court are reproduced above at [24].

[51] The final decision continued:

> [47] We heard exhaustive evidence on many related matters including such matters as: the potential economic costs of reinjection; the estimated

economic costs of subsidence; the potential costs to cascade users; estimates of future differential subsidence; and social costs. We are satisfied that we are able to make a balanced and informed judgment having regard to the provisions of the Act including section 32.

[48] While acknowledging the usefulness of a marginal cost benefit analysis, we also consider that a section 32 analysis requires a wider exercise of judgment in determining whether or not a rule is the most appropriate method of achieving the objectives of the plan and the purpose of the Act. We have regard to the economic evidence in this context.

Environment Court conclusions

[52] The Court's conclusions, so far as material, were as follows:

[50] To an extent we agree with Mr Chrisp's evidence to the effect that any volumetric cap is going to be arbitrary and is not going to recognise the relative volumes and conditions of either the discharge or the receiving waters. However we do not find that a threshold based on the quality of the receiving water, as proposed by Contact, is any less arbitrary. It may be that due to this arbitrariness, the evidence of the two water quality scientists who gave evidence, Dr Kim and Dr Timperley, did not provide any assistance in choosing between the three options.

[51] We do not consider that the receiving water quality threshold is appropriate. …

[52] The approach proposed by Taupo District Council of setting an annual volumetric cap has the advantage of allowing the volumes of discharge to land that are required for the short-term activities such as well drilling and testing where it would be unduly restrictive to require reinjection of the waste. However, we consider that the 350,000 tpy threshold is both too restrictive and is inconsistent with rule 7.6.1.3. For this reason we consider that a threshold of 2.5 million tpy for discharge to land is an appropriate and consistent threshold.

[53] … [This dealt with assessment criteria, which are not relevant.].

[54] With the addition of that ninth assessment criterion we consider that most discharges to surface water can be adequately assessed under the discretionary activity rule framework. We also have regard to the strengthened policies. [sic] We also have regard to the strengthened policies favouring reinjection/injection of geothermal fluid. We do find however, that large volume discharge(s) do have the potential to create adverse effects on the receiving environments and should be considered within the restricted decision framework of non-complying activities.

The Environment Court consents decision

[53] As recorded at [14] above, the same Environment Court panel upheld the grant to Contact of consent to discharge 60,000 tpd of geothermal water and 35,000 tpd of geothermal condensate into streams running into the Waikato River. The following may be noted, in addition to what is discussed at [8]:

a) The assessment of Contact's consent application was as a non-complying activity.

b) The consent covers the cascade users: the Wairakei Prawn Farm, the Te Kiriohineki Stream and the Netcor facility.

c) In its original written submission, Contact emphasised that the non-complying status for discharges over 15,000 tpd was of material significance for Contact and for Contact's cascade users. The submission was advanced before the consents were confirmed by the Environment Court. As a consequence Contact acknowledged that it could no longer make the point in respect of its existing operations. Although the non-complying status will apply to any new operation, the practical significance of the rule would appear to be considerably diminished.

d) The consents now held are effective until 2026. The Regional Council is required to review its regional plan no later than every 10 years. This means that despite any decision reached on the discharge thresholds, Contact will retain the right to discharge at this higher volume until the consents expire.

Principles on appeals from the Environment Court

[54] An appeal to this Court from the Environment Court is limited to an appeal on a point of law: Resource Management Act 1991, s 299(1). In his submissions for

Contact, Mr Robinson referred to well known authorities as to the limits this should place on appellants and does place on this Court. I will come to these. But there are additional constraints on this Court on an appeal from the Environment Court because of its specialist expertise and experience. These require emphasis. There is also need to note relevant principles as to the extent to which a specialist court in its decision needs to record factual findings and other decision making processes when dealing with complex subjects and very large volumes of evidence.

Question of law

[55] The limits of an appeal from the then Planning Tribunal on a point of law were stated by a full bench of the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) NZRMA 145 at 153 as follows:

> [T]his Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> • applied a wrong legal test; or
>
> • came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
>
> • took into account matters which it should not have taken into account; or
>
> • failed to take into account matters which it should have taken into account.
>
> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

[56] To determine whether a point of law arises in one or more of these ways requires an assessment of what underlies the decision under appeal. It also requires an assessment of the methods adopted in reaching the decision, indicated by express statements of the Tribunal, or reasonable inferences as to how this occurred, and consideration of the specialist expertise of the Tribunal.

[57] An appeal, such as the present one, based in considerable measure on the contention that the Environment Court's conclusion is one it could not reasonably have come to on the evidence, requires careful scrutiny. The question of whether the

Tribunal's conclusion is one to which it could not reasonably have come is not determined by asking whether it is a reasonable outcome. "Reasonable" refers to the quality of the reasoning, not the quality of the result. The task of this Court is to decide whether the decision "was one that could be arrived at by rational process": *Stark v Auckland Regional Council* [1994] 3 NZLR 614 at 617 per Blanchard J.

[58] The careful scrutiny required of points of law of this nature was discussed by Fisher J in *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426 as follows:

> [T]he Court should resist attempts by litigants disappointed before the … Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law: *Sean Investments v Mackellar* (1981) 38 ALR 363; *Parkinson v Waimairi District Council* (1988) 13 NZTPA 244 at 245. This includes attempts to re-examine the mere weight which the Tribunal gave to various conflicting considerations before it: *Manukau City Council v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.

[59] If an error of law is detected it will not warrant relief on appeal unless this Court is satisfied that the error materially affected the decision of the Environment Court: *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82; *Countdown Properties* at 153.

The Environment Court's expertise and experience

[60] Section 248 of the RMA provides that the members of the Environment Court shall be Environment Judges and Environment Commissioners. Section 253 deals with eligibility for appointment as an Environment Commissioner. Regard must be had "to the need to ensure that the Court possesses a mix of knowledge and experience in matters coming before the Court, including knowledge and experience" in a wide range of relevant disciplines and interests. The expertise of the Court in this case was noted at [13] above.

[61] Section 265 of the RMA, so far as material, provides that "the quorum for the Environment Court is one Environment Judge and one Environment Commissioner

sitting together". In this case, the quorum was one Environment Judge and three Environment Commissioners.

[62] These provisions are the statutory underpinning for the deference required to be shown by this Court to the expertise and experience of the members of the Environment Court. In *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 556, Fisher J said at 562, [17]:

> In these matters the Environment Court should be treated with special respect in its approach to matters lying within its particular areas of expertise: see *Environmental Defence Society Inc v Mangonui County Council* (1987) 12 NZTPA 349 at 353. As Harrison J recently pointed out in *McGregor v Rodney District Council*, Parliament has circumscribed rights of appeal from the Environment Court for the obvious reason that the Judges of that Court are better equipped to address the merits of their determinations on subjects within their particular sphere of expertise.

[63] In *Green and McCahill Properties Ltd v Auckland Regional Council* [1997] NZRMA 519, Salmon J said at 528:

> No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise: *J Rattray & Son Ltd v Christchurch City Council* (1983) 9 NZTPA 385. The Environment Court's special expertise and experience enable it to reach conclusions based on the sound judgment of its members, without needing or being able to relate them to specific findings of fact. This is particularly so in cases of planning discretion: *Lynley Buildings Ltd v Auckland City Council* (1984) 10 NZTPA 145 and EDS v Mangonui County Council (1987) 12 NZTPA 349.
>
> Mr Bartlett for the appellants warned against the danger of accepting an Environment Court decision just because it was an expert Tribunal. It would, of course, be inappropriate to do so. Its expertise cannot save decisions which do not meet the principles set out above. However, it is important to bear in mind that the Court is required constantly to make decisions relating to planning practice, it is constantly required to assess and make decisions relating to conflicting expert opinion. Members of the Court are able to contribute to the formation of a judgment as a result of experience gained in other professional disciplines. These considerations and the fact that the Court is constantly exposed to litigation arising from the application of the Resource Management Act, justifies the respect which this Court and the Court of Appeal has customarily accorded its decisions.

Recording factual findings and other decision making processes

[64] Appeals purportedly on points of law not infrequently turn into a contention that the Tribunal did not refer in its decision to a matter of fact or of law in issue in the hearing. That, of itself, is not an error of law. This includes, for example, an absence of reference in the decision to evidence which may be in direct conflict with a conclusion expressly recorded, or evidence given at the hearing which might arguably indicate a conclusion different from that recorded by the Tribunal.

[65] There is no obligation to record every finding on every piece of evidence. There is no obligation to make a finding of fact on every fact in issue, and generally speaking there is no obligation to make a finding of fact at all: see *Rodney District Council v Gould and Anor* (2006) NZRMA 217; *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 at 82-89. There is also no obligation on a Tribunal to record every part of its reasoning process on the facts or on the law, and notwithstanding the fact that the conclusions reached may involve unarticulated rejections of contentions of witnesses or submissions for parties on the law.

[66] Considerations of this nature are of general application and, at least in some respects, were expressly acknowledged by the Environment Court. These considerations have added emphasis when an expert Tribunal such as the Environment Court in this case had to deal with a complex subject, a large volume of evidence, a large number of witnesses, and many of those witnesses being experts in a range of fields, with a range of diverse opinions expressed in each field.

[67] These considerations overlap with the appeal principles considered above in relation to the expertise and experience of the Environment Court. There are two other and also overlapping considerations. The first is that the Environment Court may "receive anything in evidence that it considers appropriate to receive": RMA s 276(1)(a). The second is that, although an appeal to the Environment Court involves a hearing de novo, the Environment Court is entitled to have regard to, and to give such weight as it considers appropriate to, the evidence accumulated and

conclusions reached in the formulation and settlement of the scheme and plan by the territorial authority.

First appeal ground : daily and annual volume thresholds arbitrary

[68] Contact's summary of its first ground is at [3] above. In my judgment there was no error of law by the Court as contended for.

A need for an "effects-based rationale"?

[69] An essential premise of the submission for Contact is that the single rule – stipulating the volumetric limits – in the Regional Council's entire regional plan for the geothermal system, had to have an effects-based rationale. This is based on the RMA's general focus on the management of the effects of activities on the environment rather than the management of activities per se. It was put on this basis in written submission:

> In the absence of any effects-based rationale for the rule threshold adopted it is submitted that the Court's conclusion may accurately be characterised as "arbitrary" as indeed the Court appeared to accept.

[70] The RMA does not stipulate that every rule must have an effects-based rationale. For this reason alone much of the thrust of the first ground of appeal is lost. The directly relevant provisions of the RMA, moving from the most specific to the most general, are discussed in the following paragraphs.

[71] Section 68(3):

> In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect.

The Regional Council, and therefore the Environment Court on an appeal, must have regard to effects on the environment, and any adverse effects in particular. This does not mean the rule must have an effects-based rationale.

[72] Section 68(3) is in any event part only of the statutory direction to Regional Councils as to how they should go about formulating regional plans. Section 63(1) provides:

> The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act.

[73] If a rule can be said to have an underlying rationale, it is what is stipulated in s 63(1). This takes the analysis to its most general – s 5 which sets out the purpose of the RMA:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> > (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> >
> > (b) Safeguarding the life-supporting capacity of air, water, soil, and ecocystems; and
> >
> > (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Plainly this requires consideration of a great deal more than effects on the environment, let alone effects on "the receiving environment" as it was put in submissions for Contact.

Environment Court consideration of effects

[74] In my judgment, the Environment Court was not required to identify an "effects-based rationale" for the rule, and it did meet the statutory obligation to the extent required by s 68(3). As the final decision itself indicates, this had been done in considerable measure in the interim decision. This may be seen in the extracts from the interim decision set out above. Central to this is the conclusion at paragraph [333] of the interim decision, recorded at [32] above. The Court had

already decided, as a matter of policy, that "the non-complying status is appropriate for large surface discharges of geothermal water". The primary task of the Court in the final decision was to determine the figures for the daily and annual limits (as well as reconsidering and rejecting Contact's renewed argument that all surface discharges should be treated as discretionary activities).

[75] Contact, in its submissions, did not contend that the Court ignored the statutory provisions; it was acknowledged that the Court "was of course well aware of all of these matters". Contact referred to "categories of effects on the environment" that the Court did consider in its final submission. The submission, based on Contact's interpretation of the Court's conclusions, was that "the Court identified no evidential basis for the discretionary rule threshold which it adopted based on effects on the [receiving] environment". Hence, it was submitted, the conclusion was arbitrary. This submission is not borne out by consideration of the points made for Contact in support of it.

[76] It was submitted that the Court impliedly accepted - or at least there was "no clear finding" against - Contact's contention that the alternatives to discharge to ground or to surface water were, in terms of effects, either adverse or neutral. The alternatives were reinjection, where the effects were said to be "negative from a production perspective", or injection, where the effects were said to be neutral. This submission cannot stand on its merits as to the broad thrust of the Court's conclusions in the interim decision: see for example the passages quoted at [24]. Nor would the submission assist Contact if there was some basis for the proposition that the Court "impliedly accepted" Contact's contentions. The Court could have, for example, concluded that the effects of reinjection were negative from a production perspective, but nevertheless concluded overall that reinjection was, in general, preferable to discharge to land or surface waters. This is neither irrational nor unreasonable.

[77] Contact submitted that the Court appeared to have accepted Contact's argument that the relationship between subsidence and reinjection meant that these considerations could not assist in setting the volumetric threshold. This does not assist Contact because it is not an accurate summary of the Court's conclusion: see

para [35] of the final decision recorded at [44] above. The conclusion was that subsidence was an important but was not, on its own, a sufficient, basis for determining a threshold.

[78] Contact further submitted that the conclusion in the final decision on effects on water quality meant that the Court was unable to draw any effects-based conclusions in this regard. The submission here was founded on a single sentence – the first sentence in para [50] of the final decision. Paragraph [50] of the final decision is fully set out at [52] above. The Court there referred to both the Regional Council's and Contact's approaches having, in effect, degrees of arbitrariness. Contact sought to argue from this that the Court itself was effectively concluding that both approaches were equally arbitrary. A reading of the full paragraph indicates that this is not so. A reading of both the interim and the final decisions makes clear beyond any reasonable argument that, once the Court had concluded the second hearing, it was quite satisfied that the relative "arbitrariness" of the volumetric cap was not a problem. Against that, no assistance was available, in determining the scope of the rule, by looking at the water quality effects.

[79] In respect of evidence on Maori cultural issues, the submission was that the Court did not draw any evidential support from it on the threshold issue. That is no more than a submission that the Court did not expressly refer back to the evidence it clearly recorded in the body of the final decision when expressing its final conclusion. It cannot support an argument of an error of law.

[80] Mr Robinson did acknowledge that a numerical limit adopted as "a reasonable compromise" from a range of limits might not be open to attack as an unreasoned conclusion, if "technically supportable on the basis of adverse environment effects". The concluding proviso relating to environmental effects has already been dealt with. The development of the submission directed to a reasoned conclusion was in part an argument that there was no adequate explanation for the Court's adoption of the 15,000 tpd limit. Standing alone, that would not indicate an error of law. A consideration of the final decision in its entirety, and set against the interim decision, makes it clear there was no error of law.

[81] The final aspect of this ground of appeal was an absence of evidence for the particular figure of 15,000 tpd. This is not borne out by consideration of the final decision and the evidence at the second hearing as itemised in submissions for the Taupo District Council, in particular, and for the Regional Council. The whole point of the second hearing was to deal directly with the numbers – a volumetric threshold on a daily basis and an annual basis if appropriate – or the alternative advanced by Contact (as well as the second issue on which there has been no appeal). The Court in its final decision at [21]-[25] summarised a body of evidence dealing with different arguments about 15,000 tonnes per day and other figures, including annual figures. The Environment Court said it was satisfied that it could come to a conclusion based on detailed evidence. There is nothing to indicate that the expressed confidence of the Court was in any way misplaced, let alone misplaced to an extent indicating an error of law. This is sufficiently borne out by the passages from the final decision recorded in the earlier section of this judgment. Some further points may nevertheless be noted in respect of Contact's first, and one of its principle, grounds of appeal.

[82] The first is that, in a practical sense, what the Environment Court had to decide in its final decision was how large is "large". The Court had already concluded, as a matter of policy, that any "large surface discharges of geothermal water" should be non-complying activities. When the second hearing commenced, there was no longer any argument concerning any of the rules apart from the 15,000 tpd rule. Amongst other things, there was no challenge in the Environment Court to rule 7.6.1.3 which, in effect, treated 6,000 tpd as a "medium sized" discharge. Standing alone, this would have provided a rational starting point from which the Environment Court could conclude that 15,000 tpd was a large discharge.

[83] In any event there was evidence. Mr Green, counsel for the Taupo District Council, produced in an appendix to his submission, copies of the pages from the second hearing transcript of evidence and submissions from counsel dealing with the range of evidence and arguments over both the daily and the annual figures. It was for the Environment Court to weigh this and come to a conclusion. It is not open to review on an appeal on a point of law.

Second appeal ground : an alternative rule threshold should have been considered

[84] The Court in its final decision rejected Contact's argument that the rule threshold should be based on the quality of the receiving water. Contact's notice of appeal included an appeal against that finding, but this was abandoned.

[85] This led to an argument on appeal presented as a composite ground, but which contains two strands. The first strand is that the Court's rejection of the Contact approach did not give any "greater cogency or appropriateness" to the alternative approach advanced by the Regional Council (and supported by Taupo District Council and Mighty River Power). It was submitted that to hold otherwise would have put an onus on Contact to persuade the Environment Court not to accept the approach propounded by the other parties. It is correct that there was no particular onus on Contact, or any other party, except in relation to the propositions it was seeking to advance. But there is no indication of an error of law by the Environment Court in this regard. And in relation to the approach contended for by the Regional Council and others, the Court preferred that approach on its own merits, for reasons already discussed.

[86] The second strand of this ground turns on whether Contact's first ground is sustained. The point was made for Contact as follows:

> If the High Court confirms the Appellant's principal contention, it is submitted that there must now be a real question as to whether it is even possible to come up with a valid and reasonable basis for volumetric rule threshold. That would clearly be a question the Environment Court would have to consider.

It was submitted that because the Environment Court did "not go down this track". this also represents an error of law.

[87] Because the appeal on the first ground has not been upheld, this related submission must also fail. But it would have failed even if the first ground of appeal had been upheld. The only error of law that could arise on this hypothesis would be an error in the reasoning of the Environment Court. There is no appealable error of

reasoning by failing to explore possible options not before a Court when one of the options before the Court is accepted.

Third appeal ground : failure to assess costs and benefits under s 32

[88] Section 32 of the Act relevantly provides:

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified … an evaluation must be carried out by—
>
> …
>
> (c) the local authority, for a policy statement or a plan …
>
> …
>
> (2) …
>
> (3) An evaluation must examine—
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
>
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
>
> (3A) …
>
> (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account—
>
> (a) the benefits and costs of policies, rules, or other methods; and
>
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[89] Contact submitted that:

a) Section 32(4)(a) required the Regional Council, and therefore the Environment Court, to take into account the benefits and costs of the proposed rule in respect of the daily limit and the annual cap.

b) There was no evidence, at the first hearing or the second hearing, to enable the Environment Court to undertake this assessment.

c) There was, in consequence, an error of law.

[90] Contact did not argue that the Environment Court failed to have regard to s 32(4)(a), or any other provision of s 32. Nor could it: as recorded above there was a whole section of the final decision under the heading "the adequacy of a s 32 analysis" ([47]-[51] above).

[91] As to the second consideration – was there any evidence on benefits and costs relating to the thresholds – Mr Robinson acknowledged in the course of his oral submissions to me that the evidence was there. But, he submitted, there was an error of law because the Environment Court did not articulate its analysis. It simply said it was relying on the great body of evidence of costs and benefits without articulating a process of reasoning leading to acceptance of the Regional Council's threshold of 15,000 tonnes per day and the annual cap of 2.5 tonnes.

[92] With the submission refined in this way, it becomes clear that there is no error of law. There is no error of law by failing to articulate all of the reasoning provided it is clear that the Court turned its mind to the relevant statutory provisions and had evidence to justify a conclusion: *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, 513-514. The depth of reasoning that must be expressed will vary depending on the subject matter, but here it is clear that the Court, faced with conflicting expert opinions, made its decision based on the evidence it heard and its own expertise. The survey earlier in this judgment of relevant parts of both decisions and in particular [47]-[48] makes this abundantly clear. And there was no error of law by the Environment Court's not setting out in its final decision a detailed analysis, as might be undertaken by an economist, carefully recording and weighing costs and benefits of a rule stipulating a threshold of 15,000 tpd as opposed to a rule stipulating some other figure. Analysis at that level of detail is not required by s 32; it was certainly not required in this case having regard to the full extent of the entire inquiry and decision making process.

Fourth appeal ground : annual cap: "arbitrary" and relevant matters ignored

[93] As indicated in the heading there were, in essence, alternative grounds for Contact's submission that there was an error of law in fixing the annual cap of 2.5 million tonnes.

Annual cap: "arbitrary"

[94] Contact submitted that there was "no evidential basis" for the figure of 2.5 million tpy, and that the Court "provided no logical reason why it was appropriate". No error of law, in either respect, is apparent.

[95] The selection of an annual cap figure of 2.5 million tonnes can be seen from the final decision to be not merely a "reasonable" conclusion, but an entirely logical one. The Court had made a decision to allow for short term surface discharges such as well drilling and testing. Those could be accommodated within the daily cap of 15,000 tonnes, but required an annual cap less than that figure multiplied by 365 days. An annual cap less than 365 x 15,000 was required because the primary objective was to limit the volume of larger discharges to land or surface water, and the activities to be accommodated, such as well testing, generally did not have to be carried out continuously over a full year. The unchallenged rule 7.6.1.3 permitted daily discharges of 6,000 tonnes as a (less onerous) restricted discretionary activity (see [19] of the final decision recorded at [40] above). The lower threshold of 6,000 tpd, and one defined in the rule as "medium" equates to 2.19 million tpy. A rounding up to 2.5 million tonnes to accommodate short term surface discharges such as well drilling, and a rounding up by an expert tribunal such as this, is a perfectly logical approach.

[96] In addition, as noted in the submissions for the Taupo District Council, there was evidence directed to various calculations for an annual cap. There was no need for the Environment Court to set this out in its decision. For present purposes it is necessary for me to refer only to evidence from Mr Bloomer, a geotechnical engineer called by Mighty River Power (and whose evidence on the daily threshold was

expressly referred to in the decision). Mr Bloomer referred to a range of possibilities depending upon a range of variables. None of this requires elaboration save that his figures, translated to an annual discharge from well testing, ranged from substantially below 2.5 million tonnes per annum to 8,000 tonnes per day "for the best part of a year". The "best part of a year" was not defined by Mr Bloomer, but output at 8,000 tonnes per day for 312 days would fit the Environment Court's cap of 2.5 million tonnes per annum.

Annual cap : failure to have regard to relevant considerations

[97] An annual cap of 2.5 million tonnes converts to a daily limit of 6,850 tonnes. There was evidence in the second hearing that three cascade users of the discharge from Contact's Wairakei power plant in turn discharged daily volumes in excess of 6,850 tonnes. In relation to this evidence Contact submitted:

a) The Environment Court failed to consider that the annual cap of 2.5 million tonnes would not accommodate these cascade users.

b) The Court, it was argued, had "impliedly agreed" with a submission for the Regional Council that provision should be made for the activities of the cascade users, but there was a failure to do so.

[98] This ground must also fail because of the essential premise on which the Court's decision on the daily threshold and annual cap was based. The part of the final decision most relevant to the present question is the first part dealt with under the heading: "The need to regulate and accommodate in an appropriate way activities for which it is impracticable to require reinjection/injection" (see paras [39]-[43] above). The activities identified by the Court for which it was *impracticable* to require reinjection/injection were well drilling and testing. The activities of the cascade users were identified but were not recorded as within this category of "impracticability".

[99] It is correct, as Contact submitted, that there was evidence (called by the Regional Council) that cascade users were in a category where it was "impracticable

or inappropriate to require reinjection/injection" (see para [41] above). It was entirely open to the Environment Court to decide that those users for whom it was inappropriate to require reinjection or injection were nevertheless not to be accommodated and that the downstream users fell within that category. But an omission in the final decision to record these conclusions is not an error of law. What is more, it seems possible that the Environment Court was satisfied that it was not inappropriate to require one or more of the cascade users to reinject or inject. In the interim decision, the Court recognised that reinjection "may result in the demise of one or more cascade user" (see [27] above). This is sufficient to demonstrate that there was no error of law by the Court.

[100] A further point was made for Contact relating to specific evidence as to the daily discharge from some of the cascade users. In particular, there was reference to evidence that the discharge from the Wairakei Prawn Farm might be in the region of 14,400-21,000 tpd. There was a fair amount of debate on this topic in the submissions before me. With respect to counsel, this debate simply served to highlight that in reality the argument was one relating to a point of fact, not a point of law. I was taken to passages in the transcript of proceedings before the Environment Court indicating that the Court was well aware of the range of figures. And it is not to be overlooked that, before the final decision was made, the Environment Court in dealing with the rule, and its onerous non-complying classification, was aware that Contact and its downstream users already had consents. In any event, the rate of daily discharge for all of the Cascade users which the Court did record, was in excess of 2.5 million tonnes if converted to an annual figure. The simple arithmetical consequence of the Court's decision to fix the cap at 2.5tpa was to put the cascade users in excess of it. There was no error of law.

Result

[101] The appeal is dismissed.

[102] The respondent and Taupo District Council are entitled to costs. If the parties are unable to agree on costs, memoranda for the respondent and Taupo District

Council should be filed by 15 February 2008 and a memorandum for Contact by 14 March 2008.

_____

Peter Woodhouse J

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11253
[2015] NZHC 1991

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 149V(1) of the Act against the Report and Decision of the Board of Inquiry into the Basin Bridge Proposal dated 29 August 2014
BETWEEN	NEW ZEALAND TRANSPORT AGENCY Appellant
AND	ARCHITECTURAL CENTRE INCORPORATED & ORS Parties to the appeal under s 302(1) of the Act

Hearing: 20-24, 27-31 July 2015

Counsel: M Casey QC, A F D Cameron, F Wedde and A Cameron for Appellant
K M Anderson and E Manohar for Wellington City Council (Interested Party)
P Milne for Architectural Centre Incorporated (Interested Party)
T Bennion for Mount Victoria Historical Society (Interested Party)
M S R Palmer QC for Save the Basin Campaign (Interested Party) and Mount Victoria Residents Association (Interested Party)

Judgment: 21 August 2015

JUDGMENT OF BROWN J

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Overview

[1] On 17 June 2013 the appellant (NZTA) lodged a Notice of Requirement (NoR) and applications for incidental resource consents for what is commonly referred to as the Basin Bridge Project (Project). The Project was to construct, operate and maintain a two lane one-way bridge on the north side of the Basin Reserve in Wellington City as part of State Highway 1 between Paterson Street and Taranaki Street.

[2] The key aspects of the Project were summarised in NZTA's submissions in this way:

> (a) The Basin Reserve is a key transport node within the Wellington network. [NZTA's] assessment is that the Project area is subject to congestion, delay and journey time variability, particularly during peak periods and weekends, and also has a high accident rate. These problems are predicted to get worse in the future as travel demand grows in the area for all transport modes, and changes in land use occur in the immediate vicinity (Adelaide Road) and the wider Wellington area (Wellington airport and the southern/eastern suburbs).
>
> (b) The Project provides essential infrastructure by grade separating the westbound traffic movements at the Basin Reserve. Grade separation would be provided by way of a bridge (the Basin Bridge), located in the north of the Basin Reserve. The Basin Bridge would carry westbound traffic from the Mt Victoria tunnel to Buckle Street/Arras Tunnel. This would remove that traffic from the roads around the Basin Reserve, which frees up capacity on those roads for public transport improvements and north-south local traffic.
>
> (c) The Project also includes a dedicated pedestrian/cycling path and enables improvements for those transportation modes around the Basin Reserve by reducing conflict between those modes and vehicular traffic.

[3] On 7 July 2013 the Minister for the Environment referred the Proposal to a Board of Inquiry appointed under s 149J of the Resource Management Act 1991 (RMA) to hear and determine the merits of the application. The Minister's reasons for directing the Proposal to a Board of Inquiry were as follows:

National significance

I consider the matters are a proposal of national significance because:

- The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

- The proposal is likely to result in significant and irreversible changes to the urban environment around the Basin Reserve. In particular, the proposed elevating of westbound traffic on SH1 [State Highway 1] is likely to compete with the open space aspect that exists for the current ground level layout of the Basin Reserve roundabout.

- The proposal has aroused widespread public interest regarding its actual or likely effects on the environment, including on heritage values and experiential values associated with the Basin Reserve. This includes on-going media and public attention on the options for traffic improvement around the Basin Reserve, including local, national and international coverage.

- The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

- The proposal relates to a network utility operation (road) that, although physically contained within the boundaries of Wellington City, as a section of the Wellington Northern Corridor Road of National Significance will affect and extend to more than one district and region in its entirety.

[4] Section 149P(1) provides that the Board of Inquiry must have regard to the Minister's reasons for making a direction to refer the Proposal to the Board for decision.

[5] The scope of the hearing was described by the Board in its Final Report in this way:

> [79] The hearing took place in Wellington. It commenced on 3 February 2014 and finished on 4 June 2014. The hearing took 72 sitting days over four months. The length of the hearing was occasioned by the

> volume of material and the strength and perseverance of the opposition to the Project. No stone was left unturned. We make no apology for the length of the hearing. It was necessary to give the Applicant and the Parties the opportunity to fully present their cases.

[6] Having released a Draft Decision on 22 July 2014 in accordance with s 149Q(1) of the RMA, the Board released its Final Report and Decision on 29 August 2014 (Decision). The essence of the determination of the majority of the Board[1] is captured in the final few paragraphs:

> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.
>
> [1325] This tension between the anticipated benefits and the anticipated adverse effects is the crux of the issues that have been debated before us. It reflects the tensions in Part 2. It reflects the tensions inherent in the statutory documents.
>
> [1326] We are conscious of our findings as to the manner in which the Project would be consistent with the integrated planning instruments and documents relating to transportation. We are also conscious of our findings on adverse effects, which are contrary to the themes in the planning instruments on heritage, landscape, visual amenity, open space and amenity. As the planners agreed, the statutory instruments give no guidance on how this conflict should be resolved.
>
> [1327] While the RMA does not require that an (sic) NoR must set out to achieve the best quality outcome, in our view, there are compelling landscape, amenity and heritage reasons why this Project should not be confirmed. The Basin Bridge would be around for over 100 years. It would thus have enduring, and significant permanent adverse effects on this sensitive urban landscape and the surrounding streets. It would have adverse effects on the important symbol of Government House and the other historical and cultural values of the area.
>
> [1328] Government House, like the Basin Reserve, has the important quality of rarity (there is only one such main residence of the Crown in New Zealand). The sensitivity of the area derives not just from Government House and the Basin Reserve but the overall national significance of the whole area from Taranaki Street to Government House.
>
> [1329] The adverse effects are occasioned by the dominance of the Basin Bridge, resulting from its bulk and scale in relation to the present environment, and the future environment, which does not anticipate such a

[1] Retired Environment Judge G Whiting, D Collins and J Baynes: an alternate view was provided by D J McMahon.

> substantial elevated structure in this significant open space. The carefully crafted design of the Basin Bridge, together with the meticulously crafted landscape and amenity measures, while offering some offset, do not mitigate the bulk and scale of the Basin Bridge, exacerbated by the Northern Gateway Building.
>
> [1330] The ultimate criterion is whether confirming the NoR for the Project would promote the sustainable management purpose of the RMA. On that criterion, we judge that, even with its transportation and economic benefits, confirming the NoR would not promote the sustainable management purpose described in Section 5. It follows that the requirement should be cancelled. The resource consents, being ancillary to the requirement, are declined.

Scope of appeal

[7] A right of appeal to the High Court against the Board's decision is provided in s 149V "but only on a question of law".

[8] NZTA filed an appeal on 24 September 2014 and the following parties (the respondents) gave notice under s 301 of the RMA of their wish to appear on the appeal:

(a) the Architectural Centre Inc (TAC);

(b) Mt Victoria Historical Society Inc (MVHS);

(c) Mt Victoria Residents' Association Inc (MVRA);

(d) Save the Basin Campaign Inc (STBC); and

(e) Wellington City Council (WCC).

[9] As noted in a Minute of MacKenzie J dated 12 November 2014, some of the respondents contended that aspects of the appeal were not focused on questions of law but related to factual conclusions or the weight which the Board had placed on certain evidence. Although NZTA did not accept those criticisms, it elected to review its notice of appeal in the light of the matters raised. MacKenzie J directed:

> [9] … The appellant should be given an opportunity to consider the issues raised by the respondents and, if thought appropriate, to amend the notice of appeal. If the parties are then still at odds over whether the issues

> raise (sic) in the appeal do all involve questions of law, a hearing on that question might assist in focusing the issues on appeal, in a way which could potentially save considerable time at the hearing itself.

Timetable directions were made for the filing of an amended notice of appeal and an interlocutory application challenging the scope of the notice of appeal.

[10] On 27 November 2014 NZTA filed an amended notice of appeal together with a memorandum summarising the changes in tabular form. Although the respondents continued to have concerns about the appropriateness of what they described as the "extensive factual related grounds", they advised that they would not be pursuing an interlocutory application because of their limited resources as local community groups.

[11] The scope of the appeal is conveyed in the first paragraph of the amended notice of appeal which divides the appeal into eight issues:

> Issue 1: Misapplication of s 171(1)(b) of the Act (adequacy of consideration given to alternatives);
>
> Issue 2: Inquiring as to the outcome rather than the process of considering alternatives;
>
> Issue 3: Misapplication of s 171(1) of the Act (requirement to have particular regard to matters in paragraphs (a) to (d));
>
> Issue 4: Incorrect approach to the assessment of enabling benefits;
>
> Issue 5: Incorrect approach to the assessment of transportation benefits;
>
> Issue 6: Failure to have particular regard to s 171(1)(a) and (d) matters in assessing heritage and amenity effects;
>
> Issue 7: Incorrect approach to the assessment of the environment; and

> Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects of the Northern Gateway Building.

Issue 1 is divided into seven subissues and Issue 5 is divided into three subissues. In total 34 questions of law were specified in the amended notice of appeal. However each specified question of law was preceded by alleged "errors of law" and followed by "grounds of appeal". As a consequence of cross-references to those other parts, the number of questions of law expanded.

"A question of law"

[12] As noted above, the right of appeal provided by s 149V is "only on a question of law". Hence this appeal is not a general appeal. It is not the role of the High Court to conduct a rehearing of the application to the Board or to undertake an "on the merits" consideration of whether the Board's conclusion was correct. Nor is it the role of the High Court to determine whether or not the Project would be the best outcome to address the congestion problem at the Basin Reserve.

[13] To adapt the observation of Blanchard J in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* the questions for this Court are the more limited ones of:[2]

> (a) has the Board misinterpreted what was required of it by the RMA and in particular under s 171?
>
> (b) if not, are the Board's conclusions nevertheless so misconceived that they are unlawful conclusions?

[14] The nature of that more limited role was explained by the Supreme Court in *Bryson v Three Foot Six Ltd*:[3]

> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect

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2 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50].

3 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court …

[25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test …

[27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate Court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:

> "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the Industrial Tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option …"

[28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence". It could nonetheless lead or contribute to an outcome which is insupportable.

[15] In *Vodafone*, after reference to *Bryson*, Blanchard J elaborated on the point with particular reference to the nature of the interpretative problem:[4]

> [54] The nature of the interpretative problem in the present circumstances and the caution which must be exercised before it can be said that an interpretation is in error, or before it can be said that a statutory provision has been misapplied, is well illustrated in the judgment of Lord Mustill, speaking for the House of Lords in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*. What was in issue was much less complicated than "net cost" in the present case. It was the construction of the words "a substantial part of the United Kingdom" in statutory criteria applying to the investigation of mergers of transport services. Lord Mustill drew attention to the "protean nature" of the word "substantial", ranging from "not trifling" to "nearly complete". He cautioned against taking an inherently imprecise word and "by redefining it thrusting on it a spurious degree of precision". Accordingly, he concluded that the area referred to as "a substantial part" must only be "of such dimensions as to make it worthy of consideration for the purposes of the Act". Applying that test (the criterion) to the facts involved asking, first, whether the Monopolies Commission had misdirected itself, and, second, whether its decision could be overturned on the facts.
>
> [55] His Lordship said that it was quite clear that the Commission had reached an appreciation of "substantial" which was "broadly correct". Speaking generally about how a question of the nature of the second question should be approached, his Lordship said:
>
> > Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14.
>
> Lord Mustill said that *South Yorkshire* was such a case:
>
> > Even after eliminating inappropriate senses of "substantial" one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment.

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4 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, above n 2.

> [56] The issue about "net cost" involves an imprecise criterion where "different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case".
>
> [57] Some guidance is also to be obtained from this Court's decision in *Unison Networks Ltd v Commerce Commission*. That case was about a statutory regime for controlling electricity line companies. The Commission's task was to set thresholds for declarations of control. It differs from the present case because it involved the use of a broadly expressed power designed to achieve economic objectives, rather than, as here, the calculation of an amount of net cost. But it was alleged in *Unison* that the Commission had misconstrued the requirements of Part 4A of the Commerce Act 1986 and applied the wrong legal test when exercising its power. As to that, this Court said that the statute contemplated that the Commission, as a specialist body, would exercise judgment in constructing the thresholds. That requirement, the Court said, could have been lawfully tackled in one of two ways. Both approaches were within the terms of the provisions in the relevant subpart of Part 4A. The Commission chose one of them and that was lawful. Importantly, it can be added that if the Commission had chosen the other, it too would have been lawful.
>
> [58] So there are two stages. First, whether the Commission has misinterpreted the language of the statute. This in part turns on its appreciation of the function of the word "unavoidable". And, secondly, whether, if its interpretation was correct, it has nonetheless exercised its judgment about what was "net cost" in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.

[16] Several of the questions of law in the amended notice of appeal utilise the formulation whether the Board made findings to which "it could reasonably have come on the evidence".[5]

[17] I recognise that in identifying the circumstances in which it is permissible to interfere with a tribunal's decision a number of High Court judgments have included the formula "a conclusion [the tribunal] could not reasonably have come to".[6] However I consider that there is significant potential for confusion when such a formulation is reframed without the inclusion of a negative with the consequence that the question becomes: is the conclusion one to which a tribunal could reasonably have come on the evidence?

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5 For example, the questions of law listed as 4(b), 7(b)(i)–(iii), 19(a) and (d), 22 and 36(b).

6 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC); *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [34].

[18] The potential for confusion is compounded when the ground of appeal is expressed as was ground 5(d) in the amended notice of appeal:

> … the finding that sufficiently careful consideration had not been given to alternatives was not a reasonable finding on the evidence.

In similar vein in NZTA's written reply it was contended that:

> A question of law can arise where a decision-maker has reached a finding without any reasonable evidential foundation.

[19] It is useful, I suggest, to recall why Lord Radcliffe preferred his third description in *Edwards v Bairstow*, namely one in which the true and only reasonable conclusion contradicts the determination:[7]

> … Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

[20] In my view paraphrasing the established tests by reference to "not a reasonable finding on the evidence" or "without any reasonable evidential foundation" does not advance the analysis and has the potential to extend the inquiry beyond the proper boundary of what constitutes a question of law.

[21] In the context of an appeal against the exercise of a discretion (which the present appeal is not) it has long been recognised that on the same evidence two different minds might reach widely different decisions without either being appealable.[8] The same point has been made employing the word "reasonably":[9]

> The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong.

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7 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
8 *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA) at 345.
9 *G v G* [1985] 2 All ER 225 (HL) at 228.

[22] However in the third of Lord Radcliffe's descriptions in *Edwards v Bairstow* where "reasonable" appears, it is quite clear that only one possible conclusion was in contemplation as being reasonable:

> one in which the true and only reasonable conclusion contradicts the determination.

[23] Consequently, in the interests of clarity, when addressing those questions of law in NZTA's amended notice of appeal which adopt the "could reasonably have come to on the evidence" formula, I propose to reframe the question to align precisely with Lord Radcliffe's third description.

[24] From time to time there was reference in the course of NZTA's submissions to another formula, namely a conclusion "where there is no reliable, probative evidence to support the determination". Authority for that formula as demonstrating an error of law was said to be found in *Chorus Ltd v Commerce Commission*.[10] Kós J there remarked:

> [177] Thirdly, I find the Commission did not fail to determine what inferences could reliably be drawn from the benchmark data about the likely cost of providing the UBA service in New Zealand. This was very much a tertiary argument to the two primary arguments. Had the Commission had reason to believe that the benchmark evidence was not reliable, probative evidence or that the proposed IPP outcome, based on the benchmark evidence and allowing for consideration of s 18, was irrational and likely to produce an outcome substantially removed from the likely ISLRIC found under the FPP, the Commission would have had a duty to inquire further. But those were not the circumstances here. The benchmark evidence was reliable and probative. The IPP outcome was not evidently irrational, however unpalatable it may have been to Chorus. The mechanism to correct the IPP price lay not in further protracted analysis to produce a more perfect IPP price. It lay in the statutory mechanism, under s 42, to obtain a full pricing review using the FPP.

[25] On appeal the Court of Appeal[11] endorsed the High Court's finding that there was no reason to believe that the benchmark evidence that the Commission obtained through its questionnaire was not reliable, probative evidence.[12] However I do not consider that the Court of Appeal's judgment is to be read as extending the grounds

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10 *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [154] and [177].
11 *Chorus Ltd v Commerce Commission* [2014] NZCA 440. References omitted.
12 At [121].

upon which a judgment may be challenged as wrong in law. Indeed it is apparent that the Court of Appeal was reiterating the traditional approach.

[26] The introductory paragraphs bear repeating. Having noted that the appeal was not a general appeal against the merits of the Commission's determination and that Chorus did not challenge the Commission's interpretation of any of the relevant statutory provisions, the Court said:

> [109] Instead Chorus challenges the Commission's determination on the basis that the proper application of the law required a different answer. Chorus does this by alleging, in the first five questions of law, that the Commission made factual errors and thereby erred in law.
>
> [110] It is well-established, however, that to succeed on the basis of allegations of this nature Chorus must show that the Commission has exercised its judgment about the application of the IPP:
>
> > … in a way that contradicts the true and only reasonable conclusion available on the facts and has thereby committed an error of law in terms of *Edwards v Bairstow*.
>
> [111] This is a high hurdle for Chorus to surmount. It is well-established that unless the Commission's application of the statutory provisions is factually "unsupportable" it will not have erred in law. It is for the Commission, as a specialist body, to exercise judgment in carrying out the requisite "benchmarking" exercise and in weighing up the relevant facts in that context. It will therefore having erred only if there is no evidence to support the factual findings it made in reaching its determination.
>
> [112] In the absence of a right of general appeal, it is not the role of the Court in an appeal on a question of law to undertake a broad reappraisal of the Commission's factual findings or the exercise of its evaluative judgments. Care should also be taken to avoid a technical and overly semantic analysis of the Commission's determination in an endeavour to create a question of law. In making factual findings it is for the Commission, and not the Court, to decide what weight should be given to the relevant evidence and what inferences, if any, should be drawn from the evidence. An inference must be logically drawn from proven facts and not be mere speculation or guesswork. At the same time, as counsel for the Commission acknowledged, if the Commission has made a factual error that makes its application of the statutory provisions "unsupportable" it will have erred in law.

Section 171

[27] The Board was required to consider the NoR under s 149P(4) which provides:

(4) A board of inquiry considering a matter that is a notice of requirement for a designation or to alter a designation—

(a) must have regard to the matters set out in section 171(1) and comply with section 171(1A) as if it were a territorial authority; and

(b) may—

(i) cancel the requirement; or

(ii) confirm the requirement; or

(iii) confirm the requirement, but modify it or impose conditions on it as the board thinks fit; and

(c) may waive the requirement for an outline plan to be submitted under section 176A.

[28] Consequently the Board was required to make its decision on the NoR by applying s 171(1) which provides:

(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—

(a) any relevant provisions of—

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if—

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.

[29] Issues relating to the interpretation of s 171(1) comprised a significant part of the appeal. In this portion of the judgment I briefly traverse the legislative history of s 171 together with some relevant authorities. In the course of doing so I identify a number of the primary interpretation issues in contest. However it is convenient first to draw attention to s 171(1)(c), relating as it does to the objectives of a requirement.

Section 171(1)(c)

[30] NZTA's objectives for the Project were:[13]

> **Objective 1**: To improve the resilience, efficiency and reliability of the State network:
>
> (i) By providing relief from congestion on SH1 between Paterson Street and Tory Street;
>
> (ii) By improving the safety for traffic and persons using this part of the SH1 corridor; and
>
> (iii) By increasing the capacity of the SH1 corridor between Paterson Street and Tory Street.
>
> **Objective 2**: To support regional economic growth and productivity:
>
> (i) By contributing to the enhanced movement of people and freight through Wellington City; and
>
> (ii) By, in particular, improving access to Wellington's CBD employment centres, airport and hospital.
>
> **Objective 3**: To support mobility and modal choices within Wellington City:
>
> (i) By providing opportunities for improved public transport, cycling and walking; and
>
> (ii) By not constraining opportunities for future transport developments.
>
> **Objective 4**: To facilitate improvement to the local road transport network in Wellington City in the vicinity of the Basin Reserve.

[31] The Board found that the works were reasonably necessary to achieve those objectives.[14] The Board also recorded that there was no real dispute that the NoR (i.e. designation) was reasonably necessary for achieving the objectives.[15]

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13 Final Decision, at [1225].
14 At [1230].

Original form of s 171(1)

[32] Section 171 as originally enacted in 1991 included Part 2 of the RMA as one of five matters to which a territorial authority was required to have particular regard:

> **171 Recommendation by territorial authority**–
>
> (1) When considering a requirement made under section 168, a territorial authority shall have regard to the matters set out in the notice given under section 168 (together with any further information supplied under section 169), and all submissions, and shall also have particular regard to–
>
> (a) Whether the designation is reasonably necessary for achieving the objectives of the public work or project or work for which the designation is sought; and
>
> (b) Whether adequate consideration has been given to alternative sites, routes, or methods of achieving the public work or project or work; and
>
> (c) Whether the nature of the public work or project or work means that it would be unreasonable to expect the requiring authority to use an alternative site, route, or method; and
>
> (d) All relevant provisions of national policy statements, New Zealand coastal policy statements, regional policy statements, regional plans, and district plans; and
>
> (e) Part II.

Section 104 concerning resource consent applications and s 191 concerning requirements for heritage orders had a similar structure.

1993 Amendment

[33] The reference to Part 2 was relocated in 1993[16] when the words "Subject to Part II" were placed at the commencement of the subsection. An equivalent amendment was made to both ss 104 and 191.

[34] The 1993 Amendment also introduced s 168A providing for the public notification of requirements. Under s 168A(3) a territorial authority was to have regard to the matters set out in s 171.

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15 At [1218] –[1219].

16 Resource Management Amendment Act 1993, s 87.

[35] The speech of the Minister of the Environment on the second reading of the bill explained the motivation for the amendments. Having noted that the RMA seeks to provide certainty to all parties and that the law must provide a clear framework for the courts and others to work with, the Hon Rob Storey said:[17]

> The Bill, therefore, addresses those sections of the Resource Management Act in which at present there is a lack of clarity. There are some who believe that the Act should be left untouched until case law demonstrates that, because of ambiguous wording, Parliament's intent has not been exactly converted into the law.
>
> If Parliament intends a particular policy direction, I think that direction has to be clearly expressed. To do otherwise would be a dereliction of the trust placed in us as members of Parliament. It is one thing to use language that allows a flexibility of outcomes, when Parliament probably knows what it intends as the result; it is quite another matter to have language that allows a variety of outcomes, when there is meant to be only one.
>
> Sorting out the ambiguities in a legal setting also puts a very large cost on everybody – citizens, local government, central government, and potentially on the environment itself. I think that the House would want to do better than that, and therefore it has to remove the necessary ambiguities and costs.

[36] Specifically in relation to references within the RMA to Part 2, the Minister said:

> As I said, the Bill makes a number of technical amendments and I certainly do not intend to go through all of them. Part II of the Resource Management Act sets out the purpose of the Act. The current references in the Act to Part II have been in danger of being interpreted as downgrading the status of Part II. Amendments in the Bill restore Part II to its proper overarching position.

[37] The significance of the "subject to" drafting method had been the subject of direct consideration some four years earlier in *Environmental Defence Society Inc v Mangonui County Council*.[18] Section 3 of the Town and Country Planning Act 1977, the predecessor of the RMA, related to matters of national importance which were in particular to be recognised and provided for in the implementation and administration of district schemes. Section 36, which related to the contents of district schemes, included the phrase "subject to section 3".

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17 (17 June 1993) 535 NZPD 15920.

18 *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260.

[38] With reference to the significance of the inclusion of that phrase Cooke P said:

> The decision of the Tribunal now in question contains no discussion of the relationship between s 3 and the other sections, but Chilwell J observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s 3 does no more than make explicit what was previously implicit and that the *Waimea* decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss 3 and 4 on the lines approved in the *Waimea* judgment.
>
> With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K A Palmer in his *Planning and Development Law in New Zealand* (2nd ed, 1984) vol 1 at p 202 that the 1977 change was significant. **The qualification "Subject to" is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict.** This Court had occasion to say so expressly in a reported case the year before the 1977 Act: *Harding v Coburn* [1976] 2 NZLR 577, 582. **There was no need nor reason to insert those words in ss 4 and 36 of the 1977 Act if the legislature had intended that the s 3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme.** The explanation of the insertion of the words that leap to the eye, as it seems to me, is that the argument for the Minister of Works rejected in *Waimea* was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1988] 1 NZLR 78, 87-88; see also per Bisson J at pp 94–95 and per Chilwell J at pp 97–99.
>
> (emphasis added)

[39] Section 171 in its 1993–amended form was considered in a number of noteworthy judgments. Delivering the advice of the Privy Council in *McGuire v Hastings District Council* Lord Cooke of Thorndon said:[19]

> [22] … By s 171 particular regard is to be had to various matters, including (b) whether adequate consideration has been given to alternative routes and (c) whether it would be unreasonable to expect the authority to use an alternative route. …; but, by s 6(e), which their Lordships have mentioned earlier, [Hastings] is under a general duty to recognise and provide for the relationship of Maori with their ancestral lands. So, too, Hastings must have particular regard to kaitiakitanga (s 7) and it must take into account the principles of the Treaty (s 8). **Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that**

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19 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.

> **the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.**
>
> (emphasis added)

[40] While strictly speaking those observations in relation to the operation of s 171 were obiter dicta, as *Auckland Volcanic Cones Society Inc v Transit New Zealand* recognised, they were "very strong obiter dicta".[20] The High Court there added:

> [59] … The specific considerations in s 171 (alternative methods or routes in particular) are subject to Part II of the RMA. Parties involved in the administration and application of the RMA are very familiar with the requirement to have regard to other considerations subject to Part II. On an application for resource consent, consent authorities and on appeal the Environment Court must have regard to the considerations in s 104 of the RMA. The s 104 considerations are expressed to be subject to Part II. There is a well-established body of case law confirming the primacy of Part II and how that is applied in relation to the s 104 considerations. The drafting technique used in s 171 to provide the considerations in that section are subject to Part II is not unique to s 171.
>
> [60] In the present case the effect of ss 171 and 174 is to require Transit and the Environment Court on appeal to have particular regard to the matters at s 171(1)(a), (b), (c) and (d) but always subject to Part II of the RMA.

2003 Amendment

[41] Section 171 was substantially redrafted in the 2003 Amendment.[21] One change was the relocation of the reference to "subject to Part II" from its location at the commencement of the subsection:

> 171 **Recommendation by territorial authority**
>
> (1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having particular regard to–
>
> …

Although a similar change was made to s 104(1), there was no equivalent amendment to s 191(1) and consequently the phrase "Subject to Part 2" remains at the commencement of that subsection.

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[20] *Auckland Volcanic Cones Society Inc v Transit New Zealand* [2003] NZRMA 316 (HC).

[21] Resource Management Amendment Act 2003, s 63.

[42] Section 186A(3) was substantially redrafted in terms identical to s 171(1).

[43] One of the contested points of interpretation turns on the fact of that relocation of the phrase within s 171(1). Whereas TAC contended that the phrase continued to render the totality of the consideration of effects as being subject to Part 2, NZTA argued that the relocation had the consequence that the phrase related to the consideration of effects rather than to the (a) to (d) matters.

[44] Most recently s 171 was considered in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council*.[22] Citing *McGuire*, Whata J said:

> [68] It will be seen that the focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. **The import of this is that the purpose, policies and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Indeed, in the event of conflict with the directions in s 171, Part 2 matters override them.** Paramount in this regard is s 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.
>
> [69] Part 2 also requires that in achieving the sustainable management purpose, all persons exercising functions shall recognise and provide for identified matters of national importance; shall have regard to other matters specified in s 7 and shall take into account the principles of the Treaty of Waitangi.
>
> [70] The reference at s 171(1)(d) to "any other matter" is qualified by the words "reasonably necessary". Given the Act's overarching purpose, however, the scope of the matters that may legitimately be considered as part of the effects assessment must be broad and consistent with securing the attainment of that purpose.
>
> (emphasis added)

Sections 171(1) and 104(1) compared

[45] It is convenient at this juncture to note the different structure of s 104 following the 2003 Amendment:[23]

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[22] *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2013] NZHC 2347 [*Queenstown Airport*]. References omitted.

[23] Section 104(1)(b) was replaced on 1 October 2009 by s 83(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

104 **Consideration of applications**

(1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part II, have regard to–

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of–

(i) a national policy statement:

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

[46] Two points of difference between ss 104 and 171 material to the statutory interpretation arguments in this case are:

(a) in s 104 the effects on the environment comprises one of the matters to which regard is to be had whereas in s 171 it is the focus of consideration;

(b) s 171 requires that the matters listed are to be the subject of "particular" regard.

[47] Having noted what it described as the "subtly different language" in the two sections, the Board concluded that the difference in wording did not require a substantively different approach to considering effects on the environment arising from NoRs from that for determining consent applications.[24] That conclusion is also in issue in contest on this appeal.[25]

[24] At [194] of the Final Decision.
[25] Question 28A: see [72] below.

The relevance of King Salmon

[48] The Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[26] was released on 17 April 2014 part way through the hearing before the Board.[27] *King Salmon* involved an application for a change to the Marlborough Sounds Resource Management Plan under s 66 of the RMA. It did not concern s 171. The relevance of *King Salmon* to the present appeal arises from the Court's discussion of Part 2[28] and the decision-making process known as the "overall judgment" approach.

[49] NZTA's submissions stated that *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular the meaning of "subject to Part 2". The respondents rejoined that the ratio of *King Salmon* was confined to plan changes and that the decision was of little moment in relation to designations.

Sequence of consideration of the Issues

[50] As earlier noted[29] the amended notice of appeal grouped the questions of law under eight broad issues by reference to subject matter.

[51] In its written submissions NZTA stated that it had "further refined" the questions of law comprised in Issues 3 and 6. Although these submissions were presented as filed, the redefinition provoked some debate which led to NZTA filing a memorandum on the fourth day of the hearing formally recording the intended "restatement" of the questions of law relevant to Issues 3 and 6 and summarising the principles relating to the Court's power to amend a notice of appeal.[30]

[52] The Issue 3 questions, being Q 28(a), (b) and (c), were refined as five questions which I will refer to as Q 28A to 28E. The Issue 6 question, being Q 45

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[26] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

[27] At [91] of the Final Decision.

[28] A change to a regional plan under s 66 must be "in accordance with [inter alia] the provisions of Part 2": s 66(1)(b).

[29] At [11] above.

[30] Memorandum of counsel for the Appellant in relation to questions of scope and the Court's power to amend (if necessary) dated 23 July 2015.

(albeit with the cross-reference to the errors of law listed in para 44 of the amended notice of appeal), was refined as five questions which I will refer to as Q 45A to 45E.

[53] It is convenient to set out the refined Issue 3 questions of law:

> 28A Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?
>
> 28B Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a)–(d)?
>
> 28C When considering a requirement under s 171(1) RMA, how are the words 'having particular regard' to be interpreted?
>
> 28D When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in King Salmon)?
>
> 28E As a consequence of those errors, did the Board make findings of fact that it could not otherwise have come to on the evidence?

[54] That "refinement" of the Issue 3 questions of law was particularly significant as it introduced in an explicit way as Q 28C and 28D[31] fundamental questions concerning the interpretation of s 171(1). The answers to, or more accurately the discussion of, those two questions has significance for a number of the other specified questions of law.

[55] Consequently, although the structure of the parties' submissions helpfully tracked the sequence of the Issues in the amended notice of appeal, I propose to first address the key issues of statutory interpretation and the arguments concerning the implications of *King Salmon*. Having done so, the judgment will then traverse the remaining questions of law in the sequence of the identified Issues.

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[31] Q 28(a), (b) and (c) in the amended notice of appeal remained as Q 28A, 28B and 28E.

The meaning of "having particular regard to" in s 171

[56] NZTA's intention to call into question the interpretation of the phrase "having particular regard to" was arguably implicit in Q 28(a) and Q 28(b) in Issue 3. However the issue was squarely raised in the restated Q 28C:

> When considering a requirement under s 171(1) RMA, how are the words "having particular regard" to be interpreted?

The 23 July 2015 memorandum[32] explained that it was necessary to address Q 28C when determining the Q 28 questions in the amended notice of appeal.

[57] The phrase is used not only in s 171(1) (and relatedly in s 168A(3)) but it also appears in 191(1) and notably in s 7 in Part 2. By contrast what is usually viewed as the lesser obligation of "have regard to" is employed in s 104(1) and in a variety of other sections.[33]

[58] A curious interface between the two phrases is highlighted in s 149P which concerns the matters to be considered by a board of inquiry. As noted earlier a board is required to "have regard to" the Minister's reasons.[34] In the case of a notice of requirement for a designation or for a heritage order a board is required to "have regard to" the matters set out in s 171(1)[35] and s 191(1)[36] respectively. However both ss 171(1) and 191(1) direct that such matters are to be the subject of "particular regard". I raised with counsel the possibility that, given the terms of s 149P, the obligation on a board might be only to "have regard" to the matters in s 171(1). That would have the consequence of equality of treatment between the s 171(1) matters and the Minister's reasons. However neither side was attracted to that interpretation.

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32 At [51] above.
33 Resource Management Act 1991, ss 131(1), 138A and 142.
34 At [4] above.
35 Section 149P(4)(a).
36 Section 149B(5)(a).

"have regard to"

[59] Taking the phrase "have regard to" as the starting point, in *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* Wylie J (sitting with Mr R G Blunt) said:[37]

> We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function[.]

[60] It follows that the phrase "have regard to" does not mean "to give effect to". In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* Cooke P agreed with and adopted the following analysis of McGechan J at first instance:[38]

> … He is directed by s 107G(7) to 'have regard' to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is 'have regard to' not 'give effect to'. They may in the end be rejected, or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.
>
> Section 107G(7) in its direction that the Minister 'have regard' to five stated criteria does not direct that any one or more be given greater weight than others. In particular it does not direct that (a) value of ITQ is to have greater or lesser regard paid than (b) net returns and likely net returns. Weight, in the end and provided he observes recognised principles of administrative law, is for the Minister.

[61] Specifically in an RMA context John Hansen J took a similar approach in *Foodstuffs (South Island) Ltd v Christchurch City Council*:[39]

> I do not consider the term "shall have regard to" in s 104 RMA should be given any different meaning from the cases referred to above. In my view, the appellant is seeking to elevate the term from "shall have regard to" to

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37 *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 612.

38 *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551. Similarly see *R v Police Complaints Board, ex parte Madden* [1983] 2 All ER 353 (QBD) at 369–370 where a number of English decisions are discussed.

39 *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308, [1999] NZRMA 481 (HC) at 487.

> "shall give effect to". The requirement for the decision-maker is to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted.

[62] One of the authorities cited by John Hansen J was *R v CD*,[40] a judgment of Somers J who expressed the view in the context of the Costs in Criminal Cases Act 1967 that the expression "shall have regard to" is not synonymous with "shall take into account". However I note that in a number of subsequent decisions in Australia the two phrases have been treated as equivalent.[41]

[63] In my view the expression "to take into account" is susceptible of different shades of meaning. I consider that the two phrases can be viewed as synonymous if the phrase "to take into account" is used in the sense referred to by Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* "of paying attention to a matter in the course of an intellectual process".[42] The key point is that the decision-maker is free to attribute such weight as it thinks fit to the specified matter but can ultimately choose to reject the matter.

"having particular regard to"

[64] Plainly the phrase "shall have particular regard to" conveys a stronger direction than merely "to have regard to". Section 7 (which includes the phrase) is one of the four sections in Part 2 which *McGuire* described as being "strong directions".[43]

[65] The issue is most recently informed by the discussion of Part 2 in *King Salmon*.[44] Having observed that s 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA, which is given further elaboration by the remaining sections in Part 2 (ss 6, 7 and 8), Arnold J writing for the majority of the Supreme Court said:

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40 *R v CD* [1976] 1 NZLR 436 (SC) at 437.

41 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 25 ALR 497 (HCA); *Queensland Medical Laboratory Ltd v Blewett* (1988) 84 ALR 615 (FCA) at 623; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 45 ALD 136 (FCA) at 142; *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608 (FCA) at 627.

42 *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* [1923] 1 KB 86 (CA) at 99.

43 At [39] above.

44 *King Salmon*, above n 26.

> [26] Section 5 sets out the core purpose of the RMA – the promotion of sustainable management of natural and physical resources. Sections 6, 7 and 8 supplement that by stating the particular obligations of those administering the RMA in relation to the various matters identified. **As between ss 6 and 7, the stronger direction is given by s 6 – decision-makers "shall recognise and provide for" what are described as "matters of national importance", whereas s 7 requires decision-makers to "have particular regard to" the specified matters.** The matters set out in s 6 fall naturally within the concept of sustainable management in a New Zealand context. The requirement to "recognise and provide for" the specified matters as "matters of national importance" identifies the nature of the obligation that decision-makers have in relation to those matters when implementing the principle of sustainable management. **The matters referred to in s 7 tend to be more abstract and more evaluative than the matters set out in s 6. This may explain why the requirement in s 7 is to "have particular regard to" them (rather than being in similar terms to s 6).**
>
> [27] Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision again, in the sense that the principles of the Treaty may have an additional relevance to decision-makers.
>
> (emphasis added)

[66] While NZTA submitted that the (a) to (d) matters in s 171(1) were to be carefully weighed in coming to a conclusion, no submission was advanced in the course of argument on the interpretation issue to the effect that the matters to which particular regard was to be had were required to be the subject of extra weight.[45] On that issue I share the view of Sir Andrew Morritt V-C in *Ashdown v Telegraph Group Ltd*:[46]

> It was submitted that the phrase 'must have particular regard to' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations.

[67] In the event NZTA and the respondents appeared to be on the same page on the interpretation of the phrase. Both sides cited the decision of the Planning

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[45] However NZTA's submissions argued that the Project's enabling effect for future projects was a highly relevant effect that ought to have been considered and "given sufficient weight" by reason of the requirement to have particular regard in s 171(1).

[46] *Ashdown v Telegraph Group Ltd* [2001] 2 All ER 370 (Ch) at [34] where the phrase "must have particular regard to" in s 12 of the Copyright Act 1988 with reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms was considered.

Tribunal in *Marlborough District Council v Southern Ocean Seafoods Ltd* where the following view was expressed:[47]

> The duty to have particular regard to these matters has been described in one case as "a duty to be on inquiry" *Gill v Rotorua District Council* (1993) 2 NZRMA 604, 2 NZPTD Part 5. With respect in our view it goes further than the need to merely be on inquiry. To have particular regard to something in our view is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

[68] I agree that that is an appropriate interpretation provided that the reference to "take the matter into account" is understood in the sense explained at [63] above.

Did the Board adopt the correct approach?

[69] NZTA's real complaint was that the Board failed to adhere to the identified standard. It placed particular reliance on the Board's comments at [175]:[48]

> [175] What is required (subject to consideration of the *King Salmon* decision, which we address next) is a consideration of the effects on the environment of allowing the requirement having particular regard to the matters set out in sub-sections (a)–(d). This means that the matters in (a)–(d) need to be considered to the extent that our finding on these matters are to be heeded (or borne in mind) when considering our findings on the effects on the environment.

[70] I would agree with NZTA that merely to heed or bear in mind matters would fall below the requisite level of attention which the phrase "have particular regard to" imports. However I do not consider that the comments at [175], which were introductory in character, accurately reflect the Board's approach which is more evident at [181]–[182]:

> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.
>
> [182] The phrase have *particular regard to* has been interpreted as requiring that we specifically turn our mind to each of the listed matters, and give them some greater weight than those to which we are only required to have *regard*. This is a different and lesser test than the requirement to *give effect to*, as was being considered in *King Salmon*. The Supreme Court interpreted *give effect to* as simply meaning *implement*, and considered that this requirement was *intended to constrain decision makers*.

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47 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228.

48 Attention was also drawn to the use of the verb "informed" in [196].

[71] That such turning of their minds was required separately in respect of each of the listed matters was acknowledged in the Board's subsequent endorsement at [194] of a passage from the Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project (NIGUP).[49]

[72] It is convenient at this point to address Q 28A which states:

> Does the difference in wording between s 104 and s 171 require a substantively different approach to considering effects on the environment arising from notices of requirement as that for determining consent applications?

[73] This ground of appeal was directed to the Board's statements at [193]–[194]:

> [193] … We acknowledge (as [NZTA] noted) that the obligation to assess effects with respect to NoRs under Section 171(1) is expressed in subtly different language from the equivalent obligation arising with respect to resource consents under Section 104(1). Specifically, Section 171(1) requires consideration of the effects on the environment having particular regard to the matters in sub-sections (a)–(d). Whereas under Section 104(1), the activity's actual and potential effects are instead listed as one of the matters to which a decision maker must *have regard*, alongside those in Section 104(1)(b) and (c). Both Sections 104(1) and 171(1) though, are subject to Part 2.
>
> [194] However, we do not consider that difference in wording requires a substantively different approach to considering effects on the environment arising from NoRs as that for determining consent applications, as counsel for [NZTA] claimed. Indeed in our experience, it does not. To the contrary, we adopt the findings of the *Report and Decision of the Board of Inquiry into the Upper North Island Grid Upgrade Project*, that Section 171(1) is to be applied as follows:
>
> [a] The language … *consider the effects … having particular regard to …* expresses a duty to do both together, without necessarily giving one primacy over, or making one subordinate to, the other;
>
> [b] The language *having particular regard* expresses a duty for us to turn our mind separately to each of the matters listed, to consider and carefully weigh each one. The words do not carry a meaning that the matters listed in (a)–(d) are necessarily more or less important than the effects on the environment of allowing the requirement; and

[49] At [73] below.

> [c] We must make our own judgment, based on the evidence and in the circumstances of the case, about the effects on the environment, about the matters listed in (a)–(d), and about the relative importance of each in all the circumstances.

[74] NZTA's objection to that analysis was directed both to the equivalence of treatment of the two sections and to the issue of "subject to Part 2". That latter issue is addressed below in the context of my consideration of Part 2.

[75] NZTA's argument was that the Board misapplied s 171(1) by in effect inserting the word "and" into the subsection (presumably before the phrase "having particular regard to") so that it read to the same effect as s 104(1). As its written submissions stated:

> 28.7 … By inserting 'and' into s 171(1), the Majority has given it a different meaning. On the Majority's interpretation of s 171(1) a decision-maker is required to:
>
> a Make its own judgment, through Part 2, concerning the effects on the environment of allowing the requirement; and
>
> b Make a separate judgment concerning the matters listed in paragraphs (a)–(d); and
>
> c Make its own overall judgment, subject to Part 2, regarding the relative importance of each in all the circumstances.
>
> 28.8 This is not what s 171(1) requires. The correct approach to s 171(1) is to consider the effects of the proposed requirement 'having particular regard to' (in the sense of 'through the lens' of) the (a) to (d) matters and then come to a decision on the basis of that assessment of effects. Where there is a conflict in the (a) to (d) matters, the decision-maker will have recourse to Part 2 (we return to the meaning of 'subject to Part 2' in the section below).

[76] I accept the respondents' submission that, while there is a difference in wording between ss 104 and 171, in its analysis of those sections at [193]–[194] the Board has not misinterpreted s 171 in the manner suggested by NZTA. As noted above, in discharging the obligation to have "particular" regard to the specified matters the Board has recognised that each specified matter is to be the subject of separate attention.

[77] The Board transparently stated its intended decision-making process at [199]:

> [199] We therefore propose to structure this part of our decision (appropriately applying the guidance from *King Salmon*, as just identified) as follows:
>
> [a] To identify and set out the relevant provisions of the main RMA statutory instruments that **we must have particular regard to under Section 171(1)(a)**, and the relevant provisions of the main non-RMA statutory instruments and non-statutory documents that **we must have particular regard to under Section 171(1)(d)**;
>
> [b] To consider and evaluate the adverse and beneficial effects on the environment informed by the relevant provisions of Part 2; the relevant statutory instruments; and other relevant matters being the relevant conditions and the relevant non-statutory documents;
>
> [c] **To consider and evaluate the directions given in Section 171(1)(b)** as to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work;
>
> [d] **To consider and evaluate the directions given in Section 171(1)(c)** as to whether the work and designation are reasonably necessary for achieving the objectives for which the designation is sought; and
>
> [e] In making our overall judgment subject to Part 2, to consider and evaluate our findings in (a) to (d) above, and to determine whether the requirement achieves the RMA's purpose of sustainability.

[78] I do not consider that that formulation is susceptible to challenge so far as the appropriate consideration of the 171(1)(a) to (d) matters is concerned.

[79] It is convenient at this point to address the contention at ground of appeal 29(b) that the matters listed in s 171(1)(a) to (d) ought to have been determined prior to the Board's substantive consideration of the Proposal's effects. This complaint is directed to the observation in the Decision at [197]:

> [197] In applying Section 171(1) of the RMA, there is also no explicit obligation that our determination regarding the matters in Section 171(1)(b) must be made in advance of our substantive consideration of effects.

[80] The Board proceeded to note that the Wiri Prison Board[50] had undertaken a substantive effects assessment, and determined that that project would result in some significant effects, before moving on to consider the s 171(1)(b) matters. The Board favoured that approach:

> [198] We adopt the same approach, as we consider it:
>
> [a] Allows us to fully consider all mitigation being offered by [NZTA], and whether there actually will be significant adverse effects remaining once that mitigation is taken into account;
>
> [b] Would be consistent with the High Court's comments in *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* that the greater the impact on private land (or similarly, the more significant the project's adverse effects), the more careful the assessment of alternative sites, routes and methods will need to be. We will have a better understanding of the significance of the Project's adverse effects (and therefore the robustness of the alternatives assessment required), if we undertake our substantive effects assessment before considering the adequacy of the [NZTA's] alternatives assessment; and
>
> [c] Would appropriately reflect the fact that as Section 171(1) is subject to Part 2, some consideration of the relevant matters from that Part is required in terms of forming a view on potential effects. As such, we consider we need to have some understanding of the evidence/effects assessments to reach a view on whether effects are in fact likely to be significant.

[81] Having made the argument at [75] above, on this issue NZTA's submission was:

> 28.21 The Majority was required to assess the effects having particular regard to the (a) to (d) matters as something important to be considered and carefully weighed in coming to a conclusion, rather than simply as matters that needed to be borne in mind. It was therefore necessary (inter alia) to have addressed the (a) to (d) matters before then considering the effects 'having particular regard to' those matters.

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[50] Final Report and Decision of the Board of Inquiry into the Proposed Men's Correctional Facility at Wiri, September 2011.

[82] I do not accept that the sequence of consideration is required to be as NZTA maintains. The Board's reasoning in [198] appears to me to be sound. As Burchett J remarked in *Friends of Hinchinbrook Society Inc v Minister for the Environment*:[51]

> … What is the effect of a requirement that "[i]n determining whether or not to give a consent … the Minister shall have regard only to the protection, conservation and presentation … of the property"? An instant's reflection shows that these words just cannot be applied mechanically. The minister must consider the application made to him and ascertain what it involves before he can have regard to the protection, conversation and presentation of the property in relation to it.

The effect of the phrase "subject to Part 2" in s 171

[83] The only question of law in the amended notice of appeal which specifically raised Part 2 was Q 13 [subissue 1D] which states:

> Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria.

[84] However the fundamental nature of NZTA's Part 2 argument emerged more clearly in the further refinement of the Issue 3 questions, in particular restated Q 28D:

> When considering a requirement under s 171(1) RMA, how are the words 'subject to Part 2' to be applied (in particular, following the recent Supreme Court decision in *King Salmon*)?

The issue of the capacity for the Board to "resort to Part 2" was also implicit in restated Q 45E:

> What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[85] As noted in the brief discussion of legislative history,[52] two primary arguments were advanced by NZTA concerning the role played by Part 2 in the s 171(1) consideration:

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51 *Friends of Hinchinbrook Society Inc v Minister for the Environment*, above n 41, at 627.

52 At [43] and [49] above.

(a) did the relocation of the phrase within s 171(1) have the consequence contended by NZTA that the phrase related to the consideration of effects rather than to the (a) to (d) matters?

(b) did *King Salmon* change the approach to the application of this phrase in s 171(1)?

The relocation of the phrase within s 171(1)

[86] It was not apparent either from NZTA's submissions to the Board or in the Board's Decision whether this line of argument had prominence. However the argument as developed before me is conveniently summarised in NZTA's written reply as follows:

> 11.22 The 2003 amendment separates the (a)–(d) matters from the overriding 'subject to Part 2' direction that was clear in the previous drafting. It is well established that differences in wording between repealed provisions and those enacted is an aid to statutory interpretation and may throw light on the intended meaning. It is submitted that if Parliament intended the whole of the s 171(1) assessment still to be 'subject to Part 2', it would have retained more of the previous wording, such as follows:
>
> > *(1) Subject to Part 2, when considering a requirement and any submissions received, a territorial authority must consider the effects on the environment of allowing the requirement and shall also have particular regard to–*
>
> 11.23 Parliament did not do this. Instead, it moved the position of the 'subject to Part 2' direction to relate to the assessment of effects and used the words 'having particular regard to' to qualify the consideration of effects such that the (a)–(d) matters are not directly made subject to Part 2.

[87] There appears to have been no judicial consideration of the implications of the relocation. Nor do the *travaux preparatoires* throw any express light on the question. If the implications of the movement of the phrase were as significant as NZTA's argument suggests, then one would have expected that there would have been some sign on the legislative trail. One would also expect that the same change as made to ss 104(1), 168A(3) and 171(1) would also have appeared in s 191(1).

[88] The first manifestation of the relocation was in the Resource Management Amendment Bill[53] which was the culmination of a review of the RMA which started in August 1997. The bill had its first reading on 13 July 1999 and was referred to the Local Government and Environment Committee. The bill made changes to ss 104, 168A and 171 but not to s 191 which may account for the fact of the current point of difference.

[89] Because the form of s 171 proposed in 1999 was different from the section in its ultimate form in 2003, I set out its original terms:

> 171(1) When considering a requirement and any submissions received, a territorial authority must, subject to Part II, consider the effects on the environment of allowing the requirement, having regard to–
>
> (a) Any relevant provisions of the plan or proposed plan; and
>
> (b) If the requiring authority does not own the land or it is likely that the designation will have a significant adverse effect on the environment, whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work; and
>
> (c) Whether the designation is reasonably necessary for achieving the objectives of the requiring authority; and
>
> (d) Any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement.
>
> (2) A requirement must not conflict with any relevant provisions of a national policy statement or a New Zealand coastal policy statement.

An equivalent amendment was proposed as s 168A(3) and (4).

[90] However the structure of s 104 was substantially different, particularly inasmuch that a distinction was made in relation to the consideration of resource consents for controlled activities, restricted discretionary activities and discretionary activities. Only in relation to discretionary activities was there a reference to "Part II": that reference appeared in the first subparagraph:

> 104(3) When considering an application for a resource consent for a discretionary activity and any submissions received, a consent authority–

[53] Resource Management Amendment Bill 1999 (313–2) (Select Committee Report).

(a) Must, subject to Part II, consider the effects on the environment of allowing the application, having regard to–

(i) Any relevant provision in a plan or proposed plan:

(ii) Any other matter the consent authority considers reasonably necessary to decide the application; and

(b) May grant or refuse the application; and

(c) If it grants the application, may impose conditions.

[91] The fact and the implications of the different activities were usefully explored in the judgment of Randerson J in *Auckland City Council v John Woolley Trust*.[54]

[92] The Committee's report to the House on 8 May 2001[55] did not support the proposal that Part 2 of the Act would not be required to be considered in respect of controlled and restricted discretionary activities. While agreeing that s 104 should be simplified, the Committee said:

> … However, we are not prepared to remove explicit reference to Part II and significant planning documents such as national and regional policy statements and relevant or proposed plans. We recommend that a new, overarching subsection be added to new section 104, requiring consent authorities to consider all applications subject to Part II and to have regard to matters that include the above planning documents.

The amendment proposed as s 104(1A) was identical to s 104(1) in the 2003 Amendment.

[93] With reference to ss 168A and 171 the Committee's report said:

> Section 168A specifies the matters a territorial authority must consider on a notice of requirement for a designation in its own district for a work for which that territorial authority itself has financial responsibility. Section 171 specifies the matters a territorial authority is required to consider when assessing a notice of requirement for designation by another requiring authority. Proposed amendments to these two sections are set out in clauses 56 and 58 respectively. As introduced, the new provisions place greater emphasis on environmental effects when considering a requirement, and the need to consider alternatives is reduced. **These clauses also make sections 168A and 171 more consistent with the proposed new wording for the consideration of resource consents**. Finally, the emphasis is shifted

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54 *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106, [2008] NZRMA 260 (HC) at [24]–[29].

55 Above n 52.

> from considering whether a designation is necessary, to whether or not the work is necessary in achieving the objectives of the requiring authority.
>
> (emphasis added)

[94] No further progress was made on the 1999 bill in the House after the Committee had reported and the report was not debated by the House. The order of the day for consideration of the report was discharged on 24 March 2003. The Resource Management Amendment Bill (No 2) was introduced on 17 March 2003 and referred to the Committee on 20 March 2003. An instruction from the House stated that the Bill was referred to the Committee for the purpose only of the Committee receiving a briefing from officials and the Committee was required to report to the House by 28 April 2003.[56]

[95] With reference to s 171 the report stated:

> [it] requires a territorial authority to consider environmental effects when considering a requirement and to have particular regard to various other matters. Alternative sites, routes, or methods will now only need to be considered if the requiring authority does not have a legal interest in the land or it is likely that the designation will have a significant adverse effect on the environment. The application of the "reasonable necessity" test is clarified. This amendment complements the amendment to section 168A.

[96] A consideration of that history leads me to infer that:

(a) the catalyst for the relocation of the phrase was the proposed s 104(3),[57] the structure of which precluded the phrase being located at the commencement of the subsection;

(b) sections 168A(1) and 171(1) were amended for consistency with s 104;

(c) section 191(1) was left unchanged because it was not addressed in the 2003 Amendment.

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[56] Resource Management Amendment Bill 1999 (No 2) (39–2) (Select Committee Report).

[57] At [90] above.

[97] However there is nothing to suggest that the relocation of the phrase within s 171(1) (and similarly within s 168A) was for the significant purpose contended for by NZTA, namely to change the focus of application of Part 2 within s 171. I also note that such an argument could not logically be mounted in relation to s 104(1) given its structure (with effects on the environment being only one of the matters to which regard is to be had). Yet the phrase was also relocated within that subsection.

[98] For these reasons I do not accept that the relocation within s 171(1) of the phrase "subject to Part 2" had the purpose or effect of making any material change to the application of that section. I reject NZTA's contention at [86] above that the consequence of that amendment was that the phrase "subject to Part 2" related only to the assessment of effects and that the (a) to (d) matters were no longer directly subject to Part 2.

The implications of King Salmon

[99] It is fair to say that NZTA's approach to the role of Part 2 with reference to the NoR evolved not only throughout the course of the hearing before the Board but also on the appeal in this Court.

[100] Its opening position was recorded in the Decision in this way:

> [190] In opening, [NZTA] submitted that when considering its NoR, we must (*among other things*):
>
> > [a] Consider the effects on the environment of allowing the NoR; and
> >
> > [b] Have particular regard to the matters in Sections (sic) 171(1) as if we were a territorial authority, namely:
> >
> > > [i] The relevant provisions of planning instruments;
> > >
> > > [ii] Whether adequate consideration has been given to alternative sites, routes and methods of undertaking the work;
> > >
> > > [iii] Whether the work and designation are reasonably necessary for achieving [NZTA's] project objectives, as set out in the NoR;
> > >
> > > [iv] Any other matters we consider reasonably necessary to determine the NoR; and

[v] Above all, consider Part 2 matters.

[101] In closing before the Board NZTA submitted that, notwithstanding *King Salmon*, an "overall judgment" approach remained relevant in the consenting and designation context. It submitted that Part 2 was relevant to the Board primarily because of the presence in s 171 of the phrase "subject to Part 2", drawing attention to that part of *McGuire* highlighted in [39] above. It said:

> 16.12 It is submitted that the position as expressed in *McGuire* above, has not been upset by *King Salmon*. The Supreme Court did not consider sections 104 and 171 of the RMA, or the way in which Part 2 matters are approached in a consenting context.
>
> 16.13 Nonetheless, the Supreme Court's conclusions may in certain respects be taken as impacting on the approach taken to RMA decision-making more broadly. For instance, paragraph 151 of the Court's decision quoted above is noticeably broad in its language (it refers to "*planning decisions*" generally).
>
> …
>
> 16.16 It is submitted that, in the context of … the applications for this Project, and adopting the reasoning of the Supreme Court:
>
> a Sections 104 and 171 are expressly subject to Part 2, and the provisions in Part 2 remain relevant;
>
> b Section 6 elaborates on the guiding principle in section 5. It does not 'trump' it in the way suggested for TAC and NRA;
>
> c Section 5 supports the approval of this Project, but [NZTA] is not relying on this section alone;
>
> d The following discussion of effects will allow the Board to conclude as to each of the elements of Part 2, before undertaking an overall judgment.

[102] In the section of its Decision headed "Overview of the statutory and legal context" the Board recorded its understanding of the established framework for considering s 171(1) before addressing whether that framework had been modified by *King Salmon*. Its analysis commenced in this way:

> [169] We are required to consider the matters set out in Section 171(1) *subject to Part 2*. This has been interpreted as meaning that the directions in Part 2 are therefore paramount, and are overriding in the event of conflict. The relevant Part 2 directions therefore apply to:

[a] Our evaluation of specific effects on the environment; and

[b] Our evaluation in the final analysis.

> [170] The focal point of the assessment is, subject to Part 2, consideration of the effects of allowing the requirement having particular regard to the stated matters. The import of this is that the purpose, policy and directions in Part 2 set the frame for the consideration of the effects on the environment of allowing the requirement. Paramount in this regard is Section 5 dealing with the purpose of the Act, namely to promote sustainable management of natural and physical resources.

[103] Having set out key passages from *McGuire*, the Decision stated:

> [174] The reference being *subject to Part 2* does not entitle us to ask whether some other project alignment or design better meets the requirements of Part 2, as the Act does not direct a particular use or require the best use of resources. All that is required is a careful assessment of the Project in and of itself to determine whether it achieves the RMA's purpose. A matter that we will consider in detail at the time of our overall judgment.

There then followed [175] previously quoted.[58]

[104] Having recorded its view that, where an evaluation under Part 2 (and in particular s 5) was required or permitted, that should continue to involve an overall broad judgment as held in *NZ Rail Ltd v Marlborough District Council*,[59] the Board stated its understanding of the *King Salmon* decision:

> [177] While the Supreme Court reviewed the previous *overall broad judgment* and *environmental bottom line* jurisprudence around the correct application of Section 5 (where required), it did not go on to substantively consider or evaluate that issue. We accordingly understand that where an evaluation under Part 2 (and in particular Section 5) is required (or permitted), this should continue to involve an *overall broad judgment* as held in *NZ Rail* and outlined above.
>
> [178] The majority of the Supreme Court in *King Salmon* found that the plan change at issue … *did not comply with [Section] 67(3)(b) … in that it did not give effect to the NZCPS.* In doing so, it found that in considering whether the New Zealand Coastal Policy Statement had *been given effect to*, and finally determining the plan change before it, that Board was not entitled by reference to the principles in Part 2, to carry out a balancing of all relevant interests in order to reach a decision. Rather, the plan change should have been dealt with in terms of the New Zealand Coastal Policy Statement, without reference back to Part 2. This was primarily because of what the Court considered to be *strongly worded directives* in two of the New Zealand Coastal Policy Statement policies that were particularly

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58 At [69] above.

59 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).

relevant in that case, which the Board found would not be *given effect to* if the plan change was granted.

[105] The Board then said:

> [179] Again, we consider that properly construed, this aspect of *King Salmon* does not directly affect our determination of [NZTA's] NoR, for the following reasons. *King Salmon* involved consideration of a plan change, and therefore different statutory tests from those applying to [NZTA's] NoR. Importantly, the Supreme Court observed that Section 67(3)(b) provides a *strong directive, creating a firm obligation on the part of those subject to it*, to give effect to the New Zealand Coastal Policy Statement.
>
> [180] Reading the majority decision as a whole, we consider that this specific statutory context was clearly central to the Supreme Court's decision. …
>
> [181] By contrast, in considering the NoR we are required to have *particular regard to* the relevant instruments.

There then followed [182] previously quoted.[60]

[106] NZTA disagreed with the Board's analysis of *King Salmon* and with its reliance on *McGuire*. Its principal written submissions on appeal stated:

> 29.7 *King Salmon* has significantly modified the approach to decision-making under the RMA and in particular, what 'subject to Part 2' means. In other words, when is recourse to be had to Part 2?
>
> …
>
> 29.11 While the decision was in the context of a plan change, the Supreme Court's findings in relation to the planning framework, and the application of Part 2 to decision-making generally, have wider application.
>
> …
>
> 29.13 We submit that the Supreme Court has given a clear direction that it is the planning documents that generally form the basis for decision-making under the RMA. Parliament has provided for a hierarchy of planning documents, relevant to planning decisions under the RMA. These documents are drafted 'in accordance with Part 2' and 'flesh out' the provisions of Part 2 in a manner that is increasingly detailed both as to content and location.

[107] Then, under a heading "Application of *King Salmon* to s 171(1)", NZTA contended:

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[60] At [70] above.

29.16 For the reasons summarised in para 29.13, the planning documents give effect to Part 2. Decisions made in reliance on those documents therefore achieve the sustainable management purpose of the Act, as provided for in Part 2.

29.17 The Supreme Court held that s 5 (the purpose of the Act) is not an operative provision. Nor therefore is Part 2 as a whole given that ss 6, 7 and 8 are a further elaboration of that purpose. Part 2 provisions are particularised (both as to substantive content and locality) by the planning documents, from national policy statements down to district plans.

…

29.22 Section 171(1) directs that when considering a notice of requirement, a decision-maker's assessment of effects on the environment is 'subject to Part 2'. However, on the basis of the principles established by the Supreme Court in *King Salmon*, and consistent with *McGuire*, Part 2 will be relevant if one of the three caveats is established or there is a conflict in the exercise of the statutory duty under s 171(1)(a) to (d). In this case the planning framework did contemplate the Project and therefore there was no conflict so as to bring Part 2 into play.

[108] In response TAC maintained the primacy of Part 2 and criticised NZTA's submission for failing to address how the "subject to Part 2" direction is to be complied with. NZTA's reply submissions were interesting on both those points:

11.15 … We agree with the submissions of TAC to the effect that Part 2 retains primacy.

11.16 The approach by the Appellant to the application of Part 2, assumes primacy, but the question remains as to how that primacy is to be provided for. How it is provided for is cogently summarised at [30] of *King Salmon*. The crucial point is that the Supreme Court has determined that it is the planning documents which give effect to s 5 and Part 2 more generally unless one of the three caveats apply or there is a conflict. Following *King Salmon*, the primacy of Part 2 is maintained and applied through the planning documents; both as to substantive content and the locality to which those documents apply.

11.17 It follows that the phrase 'subject to Part 2' in s 171(1) (or in s 104 for that matter) does not imply the re-litigation of previously settled planning provisions where no caveats or conflict arise. This is why at [151] the Supreme Court determined that s 5 is not intended to be an operative provision in the sense that it is not a section under which particular planning decisions are made. It is the hierarchy (cascade) of planning documents which flesh out the principles in s 5 and the remainder of Part 2, and it is those documents which form the basis of decision-making; in this case being the framework in which effects are to be considered.

[109] It is only proper that I record that, when in the course of his oral reply I explored with Mr Casey QC the issue of the scope of NZTA's argument before the Board on the implications of *King Salmon*, Mr Casey acknowledged that the submission relating to caveats and conflicts had not been developed before the Board to the extent that it had on appeal. In particular para 16.16(a)[61] did not indicate how primacy was to be given whereas NZTA's current stance is that such primacy is via the plan in the absence of any conflict.

[110] While the provisions in Part 2 are not operative provisions (in the sense of being sections under which particular planning decisions are made),[62] they nevertheless comprise a guide for the performance of the specific legislative functions. As *King Salmon* said with reference to s 5:

> (a) [it] states a guiding principle which is intended to be applied by those performing functions under the RMA rather than a specifically worded purpose intended more as an aid to interpretation;[63]
>
> (b) [it] is a carefully formulated statement of principle intended to guide those who make decisions under the RMA.[64]

The other three sections supplement the core purpose in s 5 by stating the particular obligations of those administering the RMA in relation to the various matters identified.[65]

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61 At [101] above.
62 *King Salmon*, above n 26, at [151]; see also [129].
63 At [24(a)].
64 At [25].
65 At [26].

[111] Consistent with that view, in *John Woolley Trust* Randerson J observed:[66]

> [47] … Given the primacy of Part 2 in setting out the purpose and principles of the RMA, I do not accept the general proposition mentioned at para [94] of the decision in *Auckland City Council v Auckland Regional Council*, that the words "subject to Part 2" in s 104 mean that Part 2 matters only become engaged when there is a conflict between any of the matters in Part 2 and the matters in s 104. **Part 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA**.
>
> (emphasis added)

[112] The role of Part 2 is reinforced and reiterated in certain sections (specifically s 104(1), 168A(3), 171(1) and 191(1)) by the presence of the phrase "subject to Part 2". As the Privy Council stated in *McGuire*:[67]

> [22] … Note that s 171 is expressly made subject to Part II, which includes ss 6, 7 and 8. This means that the directions in the latter sections have to be considered as well as those in s 171 and indeed override them in the event of conflict.

The meaning of the "subject to" drafting method had been previously explained by Cooke P in *Mangonui County Council*.[68]

[113] However the provisions with which *King Salmon* was concerned did not contain that phrase. Furthermore the role of Part 2 in s 66(1) had to be viewed in the light of the direction in s 67(3) which the Supreme Court described as follows:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare and change any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

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66 *Auckland City Council v John Woolley Trust*, above n 53, at [47]; the highlighted words were referred to in *Ayrburn Farms Estate Ltd v Queenstown Lakes District Council*, above n 6, at [99] and in *Man O'War Station Ltd v Auckland Regional Council* (2011) 16 ELRNZ 475, [2011] NZRMA 235 (HC) at [20].

67 *McGuire*, above n 19.

68 At [38] above.

[114] In a sense *King Salmon* might be viewed as a case where, to adopt the phrase of Randerson J in *John Woolley Trust*, Part 2 was limited in application by other specific provisions of the RMA although I consider that it would be more accurate to say that its application was provided for in a particular way.

[115] The Board's error in *King Salmon* lay in considering that it was entitled, by reference to the principles in Part 2, to carry out a balancing exercise of all relevant interests in order to reach a decision whereas it was obliged to deal with the plan change application in terms of the NZCPS and failed to do so.[69] The Supreme Court summarised the Board's approach in this way:

> [83] On the Board's approach, whether the NZCPS has been given effect to in determining a regional plan change application depends on an "overall judgment" reached after consideration of all relevant circumstances. The direction to "give effect to" the NZCPS is, then, essentially a requirement that the decision-maker consider the factors that are relevant in the particular case (given the objectives and policies stated in the NZCPS) before making a decision. While the weight given to particular factors may vary, no one factor has the capacity to create a veto – there is no bottom line, environmental or otherwise. The effect of the Board's view is that the NZCPS is essentially a listing of potentially relevant considerations, which will have varying weight in different fact situations …

[116] I consider that the Decision in the present case demonstrates that the Board correctly analysed and well understood the ratio of the *King Salmon* decision.[70]

[117] However the Board's task in the present matter was different, as reflected in Mr Palmer QC's submission:

> 8.10 Rather, the Board is required by s 171, "subject to Part 2, to consider the effects on the environment of allowing the requirement", "having particular regard" to various factors including the adequacy of alternatives and the relevant provisions of the planning documents. So consideration of the effects, subject to Part 2, having particular regard to the stated matters is (as the Board said, at [170]) the "focal point of the assessment". Planning documents do not determine the outcome of a s 171 decision, unlike the NZCPS which can determine a plan change decision under s 67.

[118] It is apparent that the Board understood not only the different nature of its task in considering an application under s 171[71] but also the implications of the "subject to Part 2" component:

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69 *King Salmon*, above n 26, at [153]–[154].

70 [179]–[180] of the Final Decision at [105] above.

> [183] Further and perhaps more importantly, as we have already noted, Section 171(1) and the considerations it prescribes are expressed as being *subject to Part 2*. We accordingly have a *specific statutory direction* to appropriately consider and apply that part of the Act in making our determination. The closest corresponding requirement with respect to statutory planning documents is that those must be prepared and changed *in accordance with … the provisions of Part 2*.
>
> [184] For the above reasons, the statutory framework and expectation of Section 171(1) relevant to our current decision can be contrasted with the situation in *King Salmon*. The plan change being considered in that case was required to *give effect to* a higher order planning document which the Supreme Court considered should already *give substance to pt 2's provisions in relation to … [the] coastal environment*. By contrast, here we are required to consider the environmental effects of the NoR, *subject to Part 2* and having *particular regard to* the relevant statutory planning documents.

Consideration of alternative options – an overview

[119] The Decision recorded that NZTA acknowledged that both prerequisites in s 171(1)(b) applied with respect to the Project. In any event the Board concluded that the Project would have significant adverse effects, including heritage, amenity and landscape matters.[72]

[120] Consequently the Board was required in considering the effects on the environment under s 171(1) to have particular regard to whether adequate consideration had been given by NZTA to alternative sites, routes or methods of undertaking the work.

[121] As the Board noted in its introduction to the s 171(1)(b) issue,[73] a feature of the hearing process was the strong assertions by some of the parties that there had not been adequate consideration of alternative options. The Board recorded that an enormous amount of information had been put before it about the methodology of the option selection process and how that process took into account the significant effects of the Project.

[122] Opponents of the application presented alternative options to the Board in order to establish that such options were not suppositious and should have been

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71 [181]–[182] at [70] above.
72 At [1084(c)].
73 At [1082]–[1083].

explored as part of the option evaluation process. The Board's conclusion that there had been a failure to adequately assess non-suppositious options is the focus of Issue 1B.

Chronology

[123] In what the Board described as a "somewhat complex chronology"[74] the Decision provides a thorough review of the historical background and the chronology of the option process spanning [1097] to [1164] under the following headings:

(a) March 2001: Scheme assessment report by Meritec;

(b) 2006 to 2008: Ngauranga to Wellington Airport strategic study and the Corridor Plan;

(c) 2008 to 2009: Basin Reserve Inquiry-By-Design workshop;

(d) January 2011: Feasible Options Report;

(e) July and August 2011: Public engagement and refinement of the preferred option;

(f) Tunnel options;

(g) BRREO option.

[124] At the Inquiry-By-Design workshop five options were selected for further consideration comprising one at-grade option (with a variation) and four grade-separated bridge options. In order that the discussion below of the several Issue 1 questions may be comprehensible to those who may not read the Decision, I set out certain key passages from the Board's chronology:

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74 At [1165].

[1118] Between 2009 and 2010, the five options were subjected to further detailed analysis, which resulted in one of the at-grade variants being discarded. During this process, one more option was uncovered and added. During 2010, as a result of the government signalling a possibility of contributing financially to a tunnel under the proposed NWM Park, a tunnel option (Option F) was added, making six options in all.

…

[1122] The Feasible Options Report on page 67 sets out the conclusions and recommendations:

> Our team recommended options A and B as preferred options if more weight is given to urban design, social impacts, and long term strategic fit. Of those two options, option A is the better of the two when giving more weight to these criteria. Option A requires the relocation of the [former Home of Compassion] Crèche. We acknowledge that while relocating heritage buildings is not favoured, this may be mitigated to some extent by being able to relocate the Crèche building to provide improved connections to Buckle Street or to relocated the Crèche to a larger historic precinct closer to the War Memorial.

[1123] Following development of the options and before the evaluation of the options, the tunnel option (Option F) was removed and the explanation given was:

> Following development of the options the specialists received a data-pack containing a description of Options A to E together with sufficient information to enable them to undertake peer assessment. It is important to note that the specialists are only comparing the options which permit SH1 to be at-grade in front of the War Memorial: Options A to E. **Once the government makes a decision on whether to fund the War Memorial Tunnel, Option F will be assessed with other options which permit SH1 to be located in a tunnel in front of the War Memorial.**
>
> [*our emphasis*]

…

[1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.

…

[1138] In mid-2012, the government was exploring whether it would construct the NWM Park in time for the 100th Gallipoli Remembrance in 2015, including the idea of locating Buckle Street under the park. [NZTA] asked the Project team to reappraise the cost of Option F. This review was carried out with respect to both Options F and X. By letter dated

3 July 2012, Opus set out what it termed an *alternate review*. The letter concluded:

> **Conclusions**
>
> 1. NZTA has previously determined that Option F was unaffordable. A decision by the government to underground Buckle Street will not change this decision.
>
> 2. Option X is likely to be more expensive than Option A while having no more (possibly less) transportation benefits. It is unlikely that Option X would prove to be preferable to Option A.
>
> 3. A decision by the government to underground Buckle Street will not change the outcomes of the option evaluation process used to compare alternatives at the Basin Reserve.
>
> 4. Option A remains the preferred option even if the government decides to underground Buckle Street.

[1139] On 7 August 2012, the government announced that the NWM Park would be completed by April 2015 and that empowering legislation would be enacted and that it would be contributing $50m towards the costs of undergrounding Buckle Street.

…

[1132] On 17 August 2012, [NZTA] confirmed and announced Option A as the preferred option. They also confirmed that a pedestrian and cycling facility would be added to the Basin Bridge to provide a link between Mt Victoria Tunnel and Buckle Street.

…

[1151] In January 2013, Richard Reid and Associates supplied to the City Council conceptual drawings for improving the lane configuration around the Basin Reserve roundabout. Before us, Mr Reid produced an enhanced proposal he called the Basin Reserve Roundabout Enhancement Option (**the BRREO Option**). …

[1152] Essentially, but somewhat simplistically, the BRREO Option proposes an upgrading of the existing roundabout by widening Paterson Street westbound up to the Dufferin Street stop line and widening Dufferin Street to between Paterson Street and Rugby Street, in each case to three lanes. This would provide three continuous lanes westbound around the roundabout from the exit from the Mt Victoria Tunnel to Buckle Street. It also proposes to add a third lane on Paterson Street for westbound traffic in the event of the duplication of the Mt Victoria Tunnel.

The Board's general approach

[125] In a section of the Decision spanning [1085] to [1096] the Board directed itself on the proper approach to and the application of s 171(1)(b). After a discussion of aspects of *Queenstown Airport*[75] (which is the focus of the questions in Issues 1A and 1B) and after considering the meaning of adequate consideration, the Board described its task as follows:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[126] The Board's findings on the consideration of alternatives stated:

> [1215] Clearly, the purpose of the statutory direction in Section 171(1)(b) of the RMA is to ensure that the decision to proceed with the preferred option is soundly based and other options (particularly those with reduced adverse environmental effects) have been dismissed for good reason. Adequate consideration becomes even more relevant when the Project, as here, involves significant adverse environmental effects.
>
> [1216] We find the consideration of alternatives has, in the circumstances of this case, been inadequate for the reasons set out above, which include:
>
> [a] A lack of transparency and replicability of the option evaluation; and
>
> [b] A failure to adequately assess non-suppositious options, particularly those with potentially reduced environmental effects.

[127] In Issues 1A to 1G addressed below NZTA challenges various aspects of the Board's approach in coming to the conclusion that NZTA had not given adequate consideration to alternatives to the proposed flyover. The questions of law which NZTA invites the Court to consider include several in the *Edwards v Bairstow* category.

[128] The respondents contend that most of NZTA's points of contention are dressed up in the legal language of "tests" and "thresholds" but are, in effect,

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[75] *Queenstown Airport*, above n 22.

challenges to the Board's view of the facts and hence beyond the proper ambit of this appeal.

Subissue 1A: Relating the measure of adequacy to the adversity of effects

[129] The general requirement in the original s 171[76] to have particular regard to whether adequate consideration had been given to alternative sites, routes or methods of achieving the work was confined in 2003 to two scenarios,[77] namely if:

(a) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(b) it is likely that the work will have a significant adverse effect on the environment.

[130] The former scenario was the subject of consideration in *Queenstown Airport.*[78] Queenstown Airport Corporation wished to provide for the expansion of Queenstown Airport and to achieve that objective it issued a notice of requirement seeking in effect to acquire approximately 19 hectares of land owned by Remarkables Park Ltd. The Environment Court rejected that part of the NoR seeking to provide for a precision instrument approach runway and a parallel taxiway and as a consequence the area of land subject to the NoR was reduced to 8.07 hectares.

[131] In the course of considering s 171(1)(b) on appeal Whata J said:

> [121] The section presupposes that where private land will be affected by a designation, adequate consideration of alternative sites not involving private land must be undertaken by the requiring authority. Furthermore, the measure of adequacy will depend on the extent of the land affected by the designation. The greater the impact on private land, the more careful the assessment of alternative sites not affecting private land will need to be.

[132] In its closing statement to the Board NZTA contended that *Queenstown Airport* was relevant for three purposes, the first of which was:

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76 At [32] above.
77 At [95] above.
78 *Queenstown Airport*, above n 22.

> … it establishes that the concept of adequacy in section 171(1)(b) is a sliding scale, with the measure of adequacy depending on the extent of private land affected by the designation. The extent of land required for the Basin Bridge Project is shown on the preliminary land requirement plans and schedule (sheets 2A.01–03). These show that, of the 46 titles affected by the NOR footprint, only 8 are privately owned. Expressed in land area, 0.3 ha of the 2 ha to which the NOR relates is privately owned. Applying the reasoning in the *Queenstown Airport Corporation Limited* decision, this would suggest that a less careful assessment of alternative sites is required. However, [NZTA] has not sought to undertake a less careful assessment of alternatives. Instead, it considers that the assessment it has undertaken is thorough and robust.

[133] After setting out para [121] of *Queenstown Airport*, the Board said:

> [1087] In this case, the extent of private land subject to the proposed designation is not significant. However, as we have said, [NZTA] acknowledged (and our assessment confirms) that the work would be likely to have a significant adverse effect on the environment. While Justice Whata's comments applied to the impact on private land, the same logic must apply to the extent of the Project's adverse effects. The measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects.
>
> [1088] Accordingly, we must be satisfied that the assessment of alternative sites was adequate, in light of our findings as to the Project's effects on the environment. The more significant the adverse effects (as we have found them to be), the more careful the assessment of alternatives that is required.

[134] On appeal NZTA seeks to resile from its stance before the Board, proposing to argue that the Board erred in law by adopting the logic of *Queenstown Airport* and extending it to s 171(1)(b)(ii). It seeks to argue first that different considerations apply according to whether the designation will impose restrictions on private land and secondly that there is no "sliding scale" according to the degree of adverse effect. NZTA accordingly invites the Court to consider the following question of law:

> Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[135] NZTA's change in stance was resisted by Mr Palmer who cited an impressive list of authorities deprecating reversals of position in lower courts.[79] While mindful

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[79] *Ihaka Te Rou v Love* (1891) 10 NZLR 529 (CA); *Grobbelaar v News Group Newspaper* [2002] 1 WLR 3024 (HL); *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC); *Wymondley against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162

of the reasons that have been advanced over time, I consider in the circumstances of this case where the issue involved is a question of law that it is in the broader interest to consider the argument which NZTA wishes to advance. In doing so I am particularly influenced by the approach of the Privy Council in *Foodstuffs (Auckland) Ltd v Commerce Commission*:[80]

> Their Lordships gave leave to do so on the basis of this lack of material prejudice and also because they considered it important, albeit the issue is now essentially spent, to determine the case on the correct legal footing. Not only does that accord with justice between the parties, but it also seemed appropriate from the point of view of ascertaining the true intention of Parliament when the amending legislation was enacted.

Q 4(a): Does s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

[136] NZTA's argument was structured as follows:

(a) the two scenarios in s 171(1)(b)(i) and (ii) are thresholds for any consideration of alternatives and do not give rise to a need for "closer" scrutiny;

(b) the RMA does not mandate any "hard-look" or "anxious scrutiny" concept such as have been considered in the context of judicial review and applied where fundamental human rights are at stake;

(c) Whata J erred in introducing the concept of a different measure of adequacy according to the level of impact of the designation on private land;

(d) the Board was equally, if not more, wrong to extend that logic to the degree of adverse effects;

(e) if *Queenstown Airport* was correct in importing a sliding scale of adequacy, then such should only apply to the first limb of s 171(1)(b).

(HC); *New Zealand Meat Board v Paramount Export Ltd (in liq)* [2005] 2 NZLR 447 (PC); *Patcroft Properties Ltd v Ingram* [2010] NZCA 275, [2010] 3 NZLR 681.

80 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 (PC) at [9].

[137] The section requires that where either scenario exists not only must there be consideration of alternative sites but that such consideration should be "adequate". It appeared to be common ground that the meaning of "adequate" was as stated by the Environment Court in *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council*:[81]

> … The word 'adequate' is a perfectly simple word and we have no doubt has been deliberately used in this context. It does not mean 'meticulous'. It does not mean '*exhaustive*'. It means 'sufficient' or 'satisfactory'.

No challenge was made to the Board's analysis of the meaning of adequate at [1089].

[138] It was the respondents' contention that the adequacy (or sufficiency) of consideration in any given case must be circumstances dependent and that that must be so for both scenarios, given that the phrase "adequate consideration" appears in the chapeau to subparagraphs (i) and (ii).

[139] Mr Palmer drew attention to the decision of the Supreme Court in *King Salmon*,[82] in particular to the highlighted part of the following passage:

> [170] This brings us back to the question when consideration of alternative sites may be necessary. This will be determined by the nature and circumstances of the particular site-specific plan change application. For example, an applicant may claim that that (sic) a particular activity needs to occur in part of the coast environment. If that activity would adversely affect the preservation of natural character in the coast environment, the decision-maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will involve the consideration of alternative localities. Similarly, even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially suitable for the activity, the decision-maker will be obliged to test that claim; that may well involve consideration of alternative sites, **particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site**. In short, the need to consider alternatives will be determined by the nature and circumstances of the particular application relating to the coastal environment, and the justifications advanced in support of it, as Mr Nolan went some way to accepting in oral argument.

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81 *Te Runanga O Ati Awa Ki Whakarongotai Inc v Kapiti District Council* (2002) 8 ELRNZ 265 (EnvC) at [153].

82 *King Salmon*, above n 26.

[140] In my view the analysis in *Queenstown Airport* is correct. I consider that it must logically apply to both the scenarios described in s 171(1)(b). It is simply common sense that what will amount to sufficient consideration of alternative sites will be influenced to some degree by the extent of the consequences of the scenarios in s 171(1)(b)(i) and (ii). That said, I doubt the utility of the expression "sliding scale" as a description of the extent of the consequences because it conveys an unduly mechanical approach to the extent of consideration required.

[141] Accordingly I consider that the Board's approach at [1087] to [1088] is not vulnerable to criticism.

[142] So far as Q 4 is concerned, the word "require" is problematic. A more careful consideration of alternatives may or may not be required: it will be very much circumstances dependent. I would answer in the affirmative either of the following rephrased questions of law:[83]

(a) *May* s 171(1)(b) of the Act require a more careful consideration of alternatives where there are more significant adverse effects of allowing the requirement?

(b) Does s 171(1)(b) of the Act *permit* a more careful consideration of alternatives when there are more significant adverse effects of allowing the requirement?

[143] In the context of Subissue 1A NZTA poses a second and alternative question of law:

> Q 4(b) In the alternative, was the finding that [NZTA] had not given sufficient careful consideration to alternatives a finding to what the Board could reasonably have come on the evidence?

[144] Mr Casey addressed this question in conjunction with the similarly expressed Q 22 in Subissue 1G. I adopt the same approach.

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[83] Although I have retained the word "careful", because that word is employed in *Queenstown Airport* and hence in the question posed, I suggest that it may be preferable to avoid the notion of degrees of "care". My preference would be a phrase such as "greater scrutiny".

Subissue 1B: The requirement to consider all non-suppositious options with potentially less adverse effects

[145] Following paragraph [121] addressed in Subissue 1A above, Whata J further said:

> [122] It is beyond doubt that the extent of private land subject to the proposed designation is significant. As notified 19 ha would be affected. The modified version still encompasses 8 ha. The Court had to be satisfied that the assessment of alternative sites was adequate having regard to this impact. There is authority however that a suppositious or hypothetical alternative need not be considered. But given the statutory requirement to have particular regard to the adequacy of the consideration given to alternatives, it is not sufficient to rely on the absence of a merits assessment of an alternative or on the assertion of the requiring authority. Provided there is some evidence that the alternative is not merely suppositious or hypothetical, then the Court must have particular regard to whether it was adequately considered.

[146] The third respect in which NZTA contended before the Board that *Queenstown Airport* was relevant concerned this issue:

> 11.2(c) Third, should the Board find that any alternative suggested by a submitter (such as BRREO) is not hypothetical or suppositious, then the Board must have particular regard to whether it was adequately considered.

[147] Specifically in the context of the assessment of alternatives NZTA recorded that the parties were in agreement that:

> Speculative, suppositious or hypothetical alternatives need not be considered. However, provided there is some evidence that an alternative is not merely suppositious or hypothetical, then the Board must have particular regard to whether it was adequately considered.

NZTA's case was that all relevant alternatives had been adequately considered.

[148] Under the heading "Non-Suppositious Options, with Potentially Reduced Environmental Effects" the Board said:

> [1182] Because of the Project's significant adverse environmental effects (as we have found them to be) it was necessary for [NZTA] to give adequate consideration to alternatives, particularly those options with reduced environmental effects. As we have said, the measure of that adequacy would depend on how significant the adverse effects would be. In this case, we have found that there would be significant adverse effects.

> [1183] A number of options were referred to in the evidence. The option evaluation team considered some of them at various stages of the process. The Architectural Centre and Richard Reid and Associates, on behalf of the Mt Victoria Residents Association, put options before us. This was not for the purpose of persuading us that their options were better, but to establish that these options were not suppositious, would potentially have reduced environmental effects than the Project before us, and should have been explored as part of the option evaluation process.
>
> [1184] The evaluation teams considered both tunnel and at-grade options. The tunnel options were synthesised down to a tunnel option known as Option F. The Architectural Centre's Option X, proffered during 2011, was another variant of a tunnel option.
>
> …
>
> [1186] The BRREO Option consisted of improving the lane configuration around the Basin Reserve. When introducing his concept, Mr Reid told us:
>
> > 19. The existing network has sustained NZTA's many attempts to engineer a motorway 'solution' over the past 50 years. These 'solutions' have almost always diverted highway traffic northwards from its current route around the Basin Reserve roundabout and involve a flyover or tunnel structure which invariably destroys the amenity of the Basin Reserve and the urban structure of the city.
> >
> > 20. I believe the existing network will continue to have sufficient flexibility, tolerance and resilience to serve the city well into the future. The objectives to the project can be met without the need for the Basin Bridge proposal.
>
> [1187] We heard a considerable amount of evidence on these options. The evidence reached the threshold of requiring our careful consideration. We propose to consider first the tunnel options and secondly the at-grade options.

[149] In concluding its discussion of certain options the Board then said:

> [1213] As we have said, it is not for us to determine which is the best option. The statutory requirement directs us to have particular regard to the adequacy of consideration of alternatives. Mr Justice Whata said in the *Queenstown* case that, where there is evidence that the alternative is not merely suppositious or hypothetical, then the Court (or in this case this Board) must have particular regard to whether it was adequately considered.

The Board concluded that NZTA's consideration of alternatives had been inadequate for reasons which included a failure to adequately assess non-suppositious options, particularly those with potentially reduced environment effects.[84]

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[84] At [126] above.

[150] NZTA acknowledged that before the Board it had accepted the proposition which is reflected in [1213]. However it submitted that on reflection the proposition at [122] of *Queenstown Airport* goes too far or should be limited to the first limb of s 171(1)(b). NZTA again sought on appeal to reverse its stance before the Board and it proposed for consideration the following question of law:

> Q 7(a) Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[151] On this issue also I am prepared to consider the question of law, thereby permitting NZTA to reverse its stance below, for the same reasons as stated in the context of Subissue 1A at [135] above.

Q 7(a): Does s 171(1)(b) require the requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environmental effects?

[152] As is apparent from ground of appeal 8(b), NZTA's contention is that the Board had required NZTA to demonstrate that it had considered every non-suppositious option with potentially less adverse effects. NZTA's argument was that in so doing the Board had elevated the standard of consideration beyond "adequacy".

[153] Referring to what it described as the classic approach, namely that a requiring authority is not required to eliminate speculative alternatives or suppositious outcomes, NZTA submitted:

> 16.7 In *Queenstown Airport* and the Majority's decision, this test has been inverted to require *every* non-suppositious option to have been considered. Indeed, the Majority's decision takes the test a step further and requires other options with potentially less adverse effects to have been dismissed only for good reason.
>
> 16.8 This takes the test of adequacy too far. In any significant project there are likely to be any number of options and variations of options that could be considered. It is unreasonable to expect a requiring authority to give detailed consideration to every permutation of the non-suppositious. That is, there may be any number of permutations of the (for example) at-grade option; [NZTA] does not have to show that it specifically addressed each and every one.

[154] I do not accept that the Board approached its task in the manner suggested by NZTA. On the contrary (as NZTA acknowledged) the Board said:

> [1090] Subsection 1(b) requires a judgement on whether an adequate process has been followed, including an assessment of what consideration has been adopted. The enquiry is not into whether the best alternative has been chosen. It is not incumbent on a requiring authority to demonstrate that it has considered all possible alternatives or that it has selected the best of all available alternatives. Rather, it is for the requiring authority to establish an appropriate range of alternatives and properly consider them.

[155] Mr Palmer neatly captured the point here when he submitted:

> NZTA appears to wish to elide the point that witnesses identified non-suppositious options with reduced environmental effects with the point that NZTA's consideration of alternatives was not adequate, to create a straw man that the Board required NZTA to examine every possible alternative. It certainly did not.

[156] The answer to Q 7(a) is, therefore, in the negative.

[157] While not accepting that s 171(1)(b) creates a duty to consider all non-suppositious options, in section 17 of its primary submissions NZTA mounted a reasonably extensive argument that it had in fact considered the options identified by the Board as non-suppositious and that its consideration had been adequate.

[158] The respondents attacked this argument as being blatantly a disagreement with the Board's assessment of the facts and not a question of law as required by s 149V(1).

[159] As noted in the discussion of "a question of law"[85] the Board's conclusions on fact can only be challenged on an *Edwards v Bairstow* basis. NZTA recognises that reality by the formulation of the questions comprising Q 7(b)(i), (ii) and (iii). I proceed to address them, albeit reframed to align precisely with Lord Radcliffe's third description for the reasons explained at [16] to [23] above.

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[85] At [12]–[15] above.

Q 7(b)(i): Is the case one in which the true and only reasonable conclusion contradicts the determination that BRREO was a non-suppositious option?

[160] With reference to at-grade options (including BRREO) NZTA first submitted that the Board's finding, that such options had not been adequately considered, "was not a finding that it could reasonably have come to on the evidence". That, of course, was not the nature of the *Edwards v Bairstow* question framed in relation to BRREO.

[161] The argument was then developed in this way:

(a) the Majority failed to evaluate the evidence of the independent peer reviewers and to determine whether an at-grade solution, such as BRREO, could meet the Project objectives;

(b) in the absence of a finding from the Majority to the contrary, the Minority's finding that an at-grade option could not meet the Project objectives must stand;

(c) an option that does not meet the Project objectives should be considered to be a suppositious option.

[162] However the issue which I am required to determine is not whether BRREO was or was not a suppositious option but whether the true and only reasonable conclusion contradicts the Board's conclusion. In addressing the reframed question I remind myself of the Supreme Court's direction in *Bryson* that appellate judges must keep firmly in mind that on a challenge of this nature an appellant faces a very high hurdle.[86]

[163] The nature of the Board's consideration of and conclusion on the BRREO option is apparent from the following paragraphs:[87]

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[86] At [14] above.

[87] The issue is also touched on at [1210] and [1214].

> [1162] We do not propose to resolve the apparent conflicts in the evidence relating to BRREO. It is not for us to determine the best option. The question is whether this less-harmful option is hypothetical or suppositious. We bear in mind that BRREO is still at an indicative stage and could be subject to more detailed analysis, such as to geometry and intersection control phasing, by an option evaluation process.
>
> [1163] At its worst, Mr Dunlop acknowledged that general traffic and freight would receive some benefit from the BRREO Option, now and following duplication of the Mt Victoria Tunnel, but he quantifies that the transport benefits (over 40 years) would be approximately 40% less than the benefits the Project can achieve. However, following a detailed assessment, he noted that both the Project and BRREO displayed significant journey time savings over the do-minimum scenario, which includes improvements to the Vivian Street/Pirie Street and Taranaki Street/Buckle Street intersections.
>
> [1164] We are satisfied the BRREO Option, particularly having regard to the adverse effects we have identified with regard to the Project, is not so suppositional that it is not worthy of consideration as an option to be evaluated.

[164] Given the preliminary nature of the Board's appraisal and the material to which it referred I do not consider that it could fairly be said that the Board's finding on the BRREO option was insupportable. The answer to Q 7(b)(i) is No.

Q 7(b)(ii): Is the case one in which the true and only reasonable conclusion contradicts the determination that Option X was an option with potentially less adverse effects?

[165] NZTA's submissions on Option X echoed its BRREO submission in combining different points of complaint:

(a) in the absence of an explicit finding by the Majority, the Minority's finding that Option X had been adequately considered must stand;

(b) a finding that Option X had not been adequately considered was not a finding that could reasonably be reached on the evidence;

(c) there was no evidence to support a finding that Option X was an option with potentially less adverse effects.

Only the third of those points of criticism engages with Q 7(b)(ii).

[166] The genesis of Option X was described at [1135]:[88]

> [1135] During the period from 2007–2009, the Architectural Centre developed a concept that later became known as Option X. It provided for westbound State Highway 1 traffic to travel at grade in front of the Basin Reserve northern entrance. All vehicles travelling between Adelaide Road and Kent and Cambridge Terraces would be diverted around the western sides of the Basin Reserve along Sussex Street. Local traffic would pass over a War Memorial Tunnel providing grade separation. The removal of circulatory traffic on the eastern side of the Basin Reserve would enable the Dufferin/Rugby Street corner to be developed into a park area.

[167] In the course of its conclusions the Board at [1319][89] stated that it was satisfied on the evidence that similar transportation benefits as those from the Project could be achieved by a tunnel option or variant similar to Option X and that such should have been included in a robust option evaluation process.

[168] Mr Palmer contended that the Board did not make a finding that Option X was an option with potentially less adverse effects. Neither the amended notice of appeal nor NZTA's submissions indicated where in the Decision such a finding was made.

[169] While I was unable to identify a specific finding to that effect, I inferred that the basis for the allegation was the second of the two overarching themes which the Board at [1171] described as being worthy of careful consideration, namely "the consideration given to non-suppositious options, with potentially reduced environmental effects".[90] As Option X was discussed in the section which followed, then it could fairly be assumed that it met that description.

[170] It was Mr Milne's submission by reference to several items in the transcript that there was evidence from which it could have been found that Option X or a variant of it, if it had been properly considered within the context of the National War Memorial Tunnel, might have less adverse effects. He also made the point that NZTA had found Option X to have sufficient merit to warrant preliminary and later more detailed consideration, as had WCC. He submitted that that of itself was

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88 It is then discussed at several points in the Board's analysis: [1136]–[1138], [1143]–[1146], [1191], [1195]–[1196], [1199]–[1200].

89 At [234] below.

90 At [178] below. Essentially the same statement was made at [1183].

indicative that both entities accepted that an Option X variant could potentially have lesser environmental effects.

[171] On the basis of that material I consider that there was evidence which warranted the Board including Option X within the category of options which had "potentially" reduced environmental effects. NZTA has not demonstrated that a different view was the true and only reasonable conclusion.

Q 7(b)(iii): Is the case one in which the true and only reasonable conclusion contradicts the determination that a long tunnel option was a non-suppositious option?

[172] Ground of appeal 8(a)(iii) asserted that the evidence showed that NZTA considered the long tunnel option to be unaffordable, that the Board acknowledged at [1206] that affordability is properly a matter for the requiring authority and that consequently the Board could not reasonably conclude that the long tunnel option was non-suppositious.

[173] While cost can be exclusionary, it was apparent the Board had reservations about the consistency in the assessment of cost among the options and the omission to undertake a reassessment subsequent to the government's decision to underground Buckle Street. Under the heading "Affordability" the Board observed with reference to Option F:[91]

> [1204] As we have said, notwithstanding that Option F provided better overall outcomes than Option A in respect of the simplified evaluation criteria, Option F was dismissed on the basis of being unaffordable. Mr Durdin pointed out in the Abey Peer Review Report that the additional weighting given to economic efficiency, when comparing Option A to Option F, was inconsistent with the approach used to identify Options A and B as being preferred to Options C and D, in the evaluation of the initial options. In that instance, the assessment concluded that a difference in Benefit-Cost Ratio of approximately 0.5 was insignificant for a project of this scale, yet the difference in BCR between Option A and Option F is of a similar magnitude given the additional costs of Option F and the similar level of benefits generated by each option. He concluded:

[91] At [1184] the Board noted that the tunnel options were synthesised down to a tunnel option known as Option F.

> The apparent inconsistency and lack of transparency in the underlying process by which options have been compared in different stages of the project is a significant concern of the reviewers.

[1205] In his concise summary of evidence, Mr Durdin again said:

> My concern is that Technical Report 19 provides its recommendation on preferring Option A over Option F on the basis of affordability. The lack of transparency around this process has led me to question the extent to which this can be considered a substantive assessment of alternatives.

[1206] We agree with Mr Cameron that the question of affordability is a matter for [NZTA]. As pointed out by Mr Cameron, the cost of an option could make the option unrealistic. However, affordability is a relative term. In the context of this case, where we have found that there would be significant adverse effects, there is a greater need to test the cost against the adverse effects in a transparent and comparative evaluation against other options. This should have been done at the Feasible Options Report stage. It was not.

[1207] Option F was removed from that process on the grounds of affordability. At the time it was removed there was a clear statement of intent in the Feasible Options Report to assess Option F once the Government made a decision whether to fund the NWM Park and Buckle Street Underpass. This was not done once that decision was made by the Government. Rather, an ex post facto comparison of Options A, F and X was appended as Appendix B to Technical Report 19. At this stage [NZTA] had indicated a preference for the Basin Bridge (Option A) and were preparing to lodge the application documents.

[174] Although a number of items of evidence were cited by the respondents in their opposition on this issue, in my view those observations of the Board suffice to repel the argument that a different determination on the non-suppositious nature of Option F was the true and only reasonable conclusion.

Subissue 1C: Interpreting adequacy as requiring transparency and replicability

Context

[175] To comprehend the nature of NZTA's complaint it will assist to refer in a little more detail to aspects of the chronology of events and the Board's discussion.

[176] With reference to the suite of five options referred to in [1125][92] the Board said:

> [1125] This suite of five options was assessed against evaluation criteria as reported in Section 5.3 of Technical Report 19. Using a pair-wise comparison and a weighting process, the workshop participants recommended Option A and Option B – both grade-separated bridge options. Option A eventually evolved into the Project.
>
> [1126] The option evaluation did not identify whether certain evaluation criteria were given more weight than others until the end of the process. This made following the process to arrive at the preferred option difficult to follow.
>
> [1127] Mr Milne's cross-examination of Dr Stewart focused on this apparent lack of transparency at some length. While it became apparent that weighting was applied at different stages of the process, just how those weightings were applied was not explained. A clear expression of the weighting factors would have made it much easier to follow and would have enabled a replication of the selection process.
>
> [1128] Abley Transportation Consultants, instructed by the Board to peer review aspects of the transportation issues including alternatives, attempted to replicate the selection process used to arrive at the preferred options. Several scoring systems were applied to the negative and positive effects ratings presented in Technical Report 19. By assuming equal weighting for each criteria, their analysis concluded that the at-grade Option D should receive the highest ranking. This highlights the sensitivity of the outcome to the relative weightings of the criteria.
>
> [1129] Of note also are the following comments from page 65 of the Feasible Options Report:
>
> 3. If we give more weight to the built heritage then we should select Options C, D or B but not A.
>
> 4. If we give more weight to social impacts and urban design then we should select Options A or B and not C or D.

[177] After discussing the March 2013 option evaluation recorded in Technical Report 19, the Board referred to the Traffic and Transportation Effects Peer Review of 25 November 2013 by Abley Transport Consultants which concluded with the observation:

> The apparent inconsistency and a lack of transparency in the underlying process by which options have been compared at different stages of the project is a significant concern of the reviewers.

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92 At [124] above.

[178] In turning to address the many criticisms levelled at the process and its underlying methodology, the Board reminded itself of the limitation on its function:

> [1167] At this stage, it is important to remind ourselves that Parliament has stopped short of giving this Board the jurisdiction to direct that any other alternative must be selected. It would thus become an exercise in futility if we were required to examine, in detail, and adjudicate upon, in detail, the merits of the various alternatives.
>
> [1168] While there were numerous criticisms made, we propose to identify those that we consider cogent to an overall appraisal of the process …
>
> [1171] From these criticisms, we distil two overarching themes that we consider worthy of our careful consideration:
>
> [a] The transparency and replicability of the option evaluation; and
>
> [b] The consideration given to non-suppositious options, with potentially reduced environmental effects.

The transparency and replicability of the option evaluation

[179] While [1172] is the primary focus of NZTA's complaint, NZTA's submissions analysed the Board's observations in several subsequent paragraphs. It is useful to record them:

> [1172] It was accepted that any evaluation process needed to be transparent. Dr Stewart acknowledged the need for this during his cross-examination by Mr Milne. Mr Durdin was also of the same view. This is necessary in order that what occurred during the option evaluation process can be fully understood, particularly if weightings are given to evaluation criteria. Mr Durdin also considered it is important that any process be replicable so that its robustness can be tested. Thus, transparency and replicability go hand in hand.
>
> [1173] It was clear from the questioning of Mr Stewart and other witnesses that each specialist applied weighting at various stages of the process. However, this was not explicit and was not documented. We have already expressed our concern about how the option evaluation, particularly as summarised in Technical Report 19, did not identify whether certain evaluation criteria were given more weight than others. This made it difficult to follow.
>
> [1174] The problem manifested itself by the fact that Mr Durdin was unable to replicate the selection process used to arrive at the preferred options in the Feasible Options Report. The November 2013 Peer Review (Report 1) included a test of the decision-making process using a non-weighted multi-criteria analysis approach. As Mr Durdin pointed out in his evidence-in-chief, the test was completed to check the robustness of identifying Option A as the preferred option. That process showed that

> Option A could have been selected, but equally Options B, C or D could have been selected using that approach.
>
> [1175] Dr Stewart has accepted, both in the Joint Witness Statement – Transportation, February 2014 and in cross-examination that:
>
> > Put simply, if a different process was used, a different recommendation may have resulted.
>
> [1176] All of the experts at that conference agreed.
>
> [1177] As Mr Durdin pointed out, this demonstrated the selection is highly reliant on the assessment technique used. He said:
>
> > Ideally, the preferred option would be identified independent of the assessment technique thereby providing greater confidence in the robustness of selecting one option over another. That is not the case in this instance, as Option A was selected using the pair-wise analysis method, Option D would be selected using the NZTA incremental BCR method and Option A, B, C or D could have been selected using multi-criteria analysis.
>
> [1178] This emphasises, or highlights, the need for transparency in explicitly setting out the weightings that are used, and the reason why they have been used, in any multi-criteria analysis. This would enable a decision-maker, in this case this Board, to adequately carry out its statutory functions under Section 171(1)(b). Parliament has directed decision makers to have particular regard to whether adequate consideration has been given to alternative sites, routes or methods of undertaking the work. We take that explicit direction seriously.

The issue

[180] NZTA contended that the Board erred in law in finding that, in order to be adequate under s 171(1)(b), the consideration of alternatives must also be "transparent and replicable". It framed the following question of law:

> Q 10 Does the inquiry into adequacy under s 171(1)(b) require that the consideration of alternatives be transparent and replicable; or is it sufficient that the consideration is apparent?

[181] NZTA contended that the paragraphs quoted above demonstrated that the Board descended into a level of enquiry that is neither permitted nor appropriate under s 171(1)(b). It argued that, by requiring "replicability", the Board sought to audit NZTA's consideration of alternatives and in doing so engaged with the outcome as opposed to the process, which is not its role. In its primary submissions NZTA said:

> 18.7 While the consideration of alternatives must be apparent in order for the adequacy of the consideration to be assessed, the Majority erred in law by requiring that the consideration be 'transparent and replicable'. The Majority heard detailed and lengthy evidence regarding the consideration of alternatives, such that the consideration given was readily apparent.
>
> 18.8 The Act does not require that the consideration given to alternatives be replicable, or mandate the Board to conduct an audit of the requiring authority's selection process. It clearly contemplates that the requiring authority will have exercised judgement in selecting the preferred option.
>
> …
>
> 18.11 … the correct approach under s 171(1)(b) … recognises that it is for the requiring authority to exercise judgement and make a policy decision as to which option to pursue. The decision-maker should not seek to ensure that the 'best' option has been selected by auditing the consideration of alternatives, in particular, by seeking to replicate the selection process.

[182] As with some of NZTA's other specified questions of law, I consider that the inclusion of the verb "require" misdirects the inquiry. Certainly the Board did not suggest that in all cases a conclusion on the adequacy of consideration of alternatives will necessitate demonstrating replicability. If the question is viewed as importing such a general requirement the answer would be No.

[183] The issue of replicability has arisen in this case because of the fact that weightings were applied to various evaluation criteria at various stages of the process.[93] The Board's complaint was that the selection process is in effect opaque in the absence of information about the different weightings applied. Given the Board's perception that NZTA's preference for Option A had become entrenched,[94] the Board was not satisfied that the consideration of other non-suppositious options had been adequate. It felt the need to state that it viewed its obligation "seriously".

[184] NZTA's complaint is that the Board took its role too seriously. Both the form of the question and its submissions emphasised that the inquiry is whether the requiring authority's consideration of alternatives is "apparent". Mr Milne's submissions for TAC construed that approach as being:

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93 At [176] above.
94 At [1200].

> trust us … measure adequacy by the volume of paper we produce not the quality of the process.

[185] I do not accept NZTA's submission[95] that the Board was seeking to ensure that the "best" option had been selected by auditing the consideration of alternatives. I consider that the Board had a clear understanding of the confined nature of its role: see [1090][96] and [1167].[97] While I can understand how NZTA might perceive the Board's concern about weightings as approximating to an audit, it is clear in my view that that was not the Board's objective. The Board's concern as expressed at [1181] was that, absent an understanding of the weightings applied, it was not possible to determine that adequate consideration had been given to relevant alternative options.

[186] In my view in some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives. The cases will inevitably be circumstances dependent. I do not consider that that is an unreasonable approach given the context of s 171(1)(b) where:

(a) as I have held with reference to Issue 1A above, the measure of adequacy of the consideration of alternatives will depend on the impact on the environment of adverse effects; and

(b) the subject of s 171(1)(b) is one of the matters to which particular regard is to be had.

[187] I am unable to discern an error of law in the Board's approach to this question. Indeed I perceive that this is another instance where NZTA is in effect inviting the Court, under the guise of a question of law, to second-guess the Board's conclusions. There is force in Mr Palmer's submission that NZTA's argument at para 18.9 of its primary submissions, that the Board placed "too much weight on the opinion evidence of Mr Durdin", serves to illustrate that NZTA's real complaint amounts to a disagreement about a matter of factual inference and assessment.

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95 At para 18.11 in [181] above.
96 At [125] above.
97 At [178] above.

Subissue 1D: Requiring the assessment methodology to incorporate Part 2 weightings

[188] NZTA's challenge on this issue is directed at the Board's concluding observations following those considered in Issue 1C above, in particular the emphasised words:

> [1180] A failure to explain the reasons for any weighting (if any) can create difficulty for us in exercising our statutory function by making it difficult for us to assess any such weightings against Part 2 and the objectives of the Project. **While we accept that each alternative does not need to be assessed against Part 2, nevertheless, Part 2 considerations should be reflected in any weight given to a particular evaluation criteria (sic) over another, as is clear from the North Island Grid Upgrade Project Board of Inquiry decision, quoted earlier.** Furthermore, as was pointed out in the Feasible Options Report, a key focus of the evaluation process was that the preferred option can be considered as that option that best meets the Project objectives with the least overall social, community and environmental impacts.
>
> [1181] The failure for either the evidence or the reports to explicitly explain what weightings were given at each of the option evaluation stages makes it difficult, if not impossible, to determine if adequate consideration was given to alternative options.
>
> (emphasis added)

[189] The amended notice of appeal at paragraph 12 contended that the Board erred in law by finding at [1180] that considerations under Part 2 of the Act should be reflected in the weight given to particular evaluation criteria, and consequently in finding at [1181] that the failure explicitly to explain the weightings given to criteria made it difficult, if not impossible, to determine if adequate consideration was given to alternative options.

[190] NZTA posed the following question of law:

> Q 13 Does s 171(1)(b) require the requiring authority's consideration of alternatives to incorporate Part 2 considerations; including (in particular) the weight given to particular evaluation criteria?

[191] NZTA criticised the highlighted passage on two counts. First it contended that the second sentence contained inconsistent findings. Secondly it said that the NIGUP decision was not authority for the proposition that Part 2 considerations must

be reflected in any weight given to a particular evaluation criterion over another during the consideration of alternatives.

[192] NZTA submitted that each alternative does not have to be tested against Part 2, citing *Volcanic Cones Society*[98] and *Queenstown Airport*.[99] The Board acknowledged that that is so. Indeed the Board had emphasised that point in the quotation from the NIGUP decision at [1094].

[193] NZTA developed the argument in this way:

> 19.3 The only purpose of requiring Part 2 to be reflected in weightings could be to ensure that the alternative met the requirements of Part 2 – in other words, to test the alternative against Part 2. Thus, by finding that Part 2 considerations should be reflected in any weight given to a particular evaluation criteria over another, the Majority effectively required alternatives to be tested against Part 2 (which the Majority was obliged to acknowledge is not the legal test). These findings are inconsistent.

[194] NZTA's argument was that, by recognising a requirement for evaluation criteria weightings to reflect Part 2 considerations, the Board was in effect requiring each individual alternative to be assessed against Part 2 despite the Board disclaiming such an intention.

[195] The issue is a subtle one. The Board's statement needs to be read in context, namely its consideration of the transparency and replicability of the option evaluation. The passage at [1180] follows the discussion at [1173] to [1177][100] of the significance for the outcome of the weighting of the evaluation criteria and the fact that it was not known whether certain evaluation criteria had been given more weight than others.

[196] That discussion had prompted the Board's observation at [1178] about the need for transparency in explicitly setting out the weightings used in any multi-criteria analysis. All of that had been preceded by the chronology which had

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98 *Volcanic Cones Society*, above n 20, at [61].
99 *Queenstown Airport*, above n 22, at [50].
100 At [179] above.

included the significant paragraphs [1128] and [1129][101] where the sensitivity of the outcome to the relative weightings of the criteria had been noted.

[197] I do not consider that the Board's intention was to subvert the established position, which it clearly recognised, that each alternative does not have to be tested against Part 2. My impression is that the Board was saying that, if a range of alternatives are to be the subject of evaluation by criteria which are to be variably weighted, then the selection of the different weightings should "reflect" Part 2 considerations.

[198] In view of the discussion of the role of Part 2 in both *McGuire* and *King Salmon* I do not view that suggestion as controversial. While each alternative does not need to be measured against Part 2, it is not unreasonable that a mechanism which provides the basis for the comparison of alternatives *inter se* should not be subject to the infusion of Part 2. Consequently I do not consider that the second ("nevertheless") part of the highlighted sentence of paragraph [1180] is erroneous in law.

[199] NZTA's second point was that the Board misapplied the NIGUP decision. The answer to this criticism is simpler. As Mr Palmer acknowledged, the sentence structure is a little puzzling. I agree that the NIGUP decision is not authority for the "nevertheless" proposition. However, as the Board had already recognised at [1094], it is clear authority for the first statement that each alternative does not need to be assessed against Part 2. In my view the Board was intending to say no more than that. Although located at the end of the sentence, its reference to the NIGUP decision was not intended as support for the observation about weightings reflecting Part 2 considerations.

[200] Reverting to Q 13, I do not consider that the question as framed is sufficiently precise to permit an answer reflecting my reasons above. An affirmative answer could be construed as departing from the established position that individual alternatives do not have to be separately tested against Part 2. I consider that a more accurate way of encapsulating my view of this aspect of the Board's decision is to

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[101] At [176] above.

say that, in circumstances where the requiring authority's consideration of alternatives involves the application of evaluation criteria which are variably weighted, the decision to allocate the variable weightings should be subject to Part 2.

Subissue 1E: Conflation of s 171(1)(b) and (c) considerations

[201] The question of law posed under this heading is:

> Q16 Does the test of adequacy under s 171(1)(b) require a requiring authority to select the option that best meets the transportation objectives while minimising environment effects?

[202] In relation to that question the amended notice of appeal at paragraph 15 states that the Board erred:

> (a) By inferring at [1180] that the assessment of alternatives must result in selecting the alternative ("the preferred option") that best meets the project objectives with the least overall social, community and environmental impacts.
>
> (b) By inferring at [961] that the project objectives ought to have included an environmental objective so that the Proposal could be tested against transportation effects and adverse environmental effects.

[203] Paragraph [961] appears in a discussion of the marked conflict of evidence between NZTA's expert witnesses and the witnesses called by the opposing parties. It states:

> [961] Both at the Feasible Options Report stage and at the hearing before us, there appeared to have been an overemphasis on transport and related benefits (which reflects the Project's objectives) rather than an assessment of the relevant amenity and environmental effects of the Project (which are absent from the objectives), assessed by reference to what is sought to be protected, maintained or enhanced in the statutory instruments.

[204] With reference to that paragraph NZTA submitted:

> 20.2 This comment is provided against the context of the Majority's assessment that the urban design and landscape evidence called by [NZTA] was influenced by the transportation objectives of the Project and the acceptance that grade separation by way of a bridge

> is the only way of achieving those objectives. However, it is submitted that this criticism has also permeated the Majority's assessment of the Appellant's consideration of alternatives.

[205] Then, after referring to [1180][102] and [1198], NZTA submitted that, while NZTA's aim throughout the process of considering alternatives was to select the option that best met the project objectives with the least environmental effects, NZTA did not accept that s 171(1)(b) required that test to be applied or met. NZTA argued that the Board's approach unnecessarily conflated ss 171(1)(b) and (c).

[206] I do not consider that the Board made any error of law as suggested. I agree with Mr Palmer that [961], read in the context of the relevant discussion, is simply designed to explain why there might have been a conflict of evidence between the witnesses on the opposing sides. I also accept his submission that the final sentence of [1180] on what NZTA relies is an attribution to NZTA's own Feasible Options Report. I am unable to discern a conflation error of the nature advanced.

[207] While in those circumstances I consider that Q 16 is inapt, the answer is in the negative.

Subissue 1F: Finding that adequate consideration was not given to alternatives following the Government's decision to underground Buckle Street

Context

[208] The short chronology in the overview of the consideration of alternative options referred to the letter from Opus to NZTA dated 3 July 2012.[103] The Decision continued in this way:

> [1196] The five-page document was essentially a brief summary or overview of Option F and Option X. It briefly referred to the decision being made that Option A was preferred over Option B. It touched on other options. It was not a careful evaluation of options in light of the decision by the government to underground Buckle Street. It could not be compared to the rigour of the Feasible Options Report stage. At most it could be called nothing but a cursory review of the situation.

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102 At [188] above.
103 In [1138] at [124] above.

[1197] Following its public announcement on 17 August 2012 that Option A was the preferred option, [NZTA] then proceeded to prepare its documentation for lodging its application with the EPA. The application was lodged on 17 June 2013.

[1198] Our concern is that the playing field changed with the likelihood of the Buckle Street Underpass and the bringing forward of Mt Victoria Tunnel duplication options. These should have resulted in re-evaluation of the options, including Option F, against the Project objectives. The Feasible Options Report, as we have said, itself specifically states the need to reconsider the ability of options to work in with a possible underpass. This was not done. There was no proper reconsideration of options once the underpass became a certainty.

[1199] Nothing further was done until the City Council decided on 19 December 2012 to order an assessment of Option RR (the precursor of the BRREO Option), Option X and Option A. An Option X transportation assessment was prepared by Opus for the City Council and was published on 20 February 2013. The overall assessment was completed on 28 March 2013. It concluded:

> **Overall Conclusions**
>
> From an urban design perspective, the preference would be for an at-grade solution – that is, a solution that does not require any elevated structures. However, it may not be possible to achieve the required transport benefits with an at-grade option.
>
> In that case, the preference is for the simplest structure – one does not make this part of the city harder for people to find their way around, or compromise access to neighbouring facilities.

[1200] It was not until late March that [NZTA] acted. In late March 2013, the Project team carried out an option evaluation of Options A, F and X. According to the introduction of the Comparison of Options, the evaluation was undertaken to confirm the decision previously made by [NZTA] that Option A was the preferred option. The document is dated June 2013, and by this time, the application documents for Option A would have been well advanced, as they would have been in late March when the evaluation commenced. Furthermore, it would appear from the letter dated 19 December from Mr Dangerfield, the CEO of [NZTA], to the CEO of the City Council that [NZTA] had become entrenched with Option A well before November 2012. It had, as we have said, made its decision, making Option A its preferred option on 17 August 2012.

[1201] We were not provided with any documentation or evidence as to why the Project team was asked to do its assessment in March 2013. Nor was any reason given for the failure to carry out a feasible option type assessment soon after the Government's decision to underground Buckle Street, as was foreshadowed in the Feasible Options Report.

> [1202] The chronology of events and the failure to carry out the clear statement of intent to reassess options in the event of the undergrounding of Buckle Street raises doubts as to the adequacy of consideration of alternatives. This is particularly so having regard to Mr Durdin's comments on the March 2013 comparison of options:
>
> > 37. The simplified decision matrix for the comparison between Options A and F consolidates down to four evaluation criteria, mainly Built Heritage, CPTED, Transportation and Visual. That process shows Option A as considered positive against two criteria (CPTED and Transportation) and negative against the other two. In comparison, Option F is considered positive against all four criteria.
> >
> > 38. Given that the decision-making process is premised around selecting the option "… with the least social, community and environmental impacts" it would follow that Option F should have been selected.

Issues

[209] NZTA asserted that in those paragraphs the Board made three errors of law:

(a) By finding at [1196] that the review of alternatives carried out in July 2012 was "cursory".

(b) By inferring at [1200] that NZTA's consideration of alternatives in March 2013 was too late because the application documentation would have been well advanced, and NZTA appeared to have been entrenched with its preferred option by that time.

(c) By finding at [1201] that NZTA was required to carry out a "feasible option type assessment" following the Government's decision.

[210] Those errors translated into four different questions of law:

> 19(a) Was the Board's finding that the review of alternatives carried out in July 2012 was 'cursory' a finding to which it could reasonably have come on the evidence, including in relation to suppositious options (refer Subissue 1B)?
>
> 19(b) In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

19(c) Is a requiring authority required to prepare a 'feasible option type assessment' when the environment changes? Or is it entitled to rely on earlier work?

19(d) Was the Board's finding that adequate consideration was not given to alternatives following the Government's decision a finding to which it could reasonably have come on the evidence?

Q 19(a) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that the review of alternatives carried out in July 2012 was cursory?

[211] Referring to the Opus letter and an undated cost estimate for Option F of 19 July 2012, NZTA's short submission was that, while those documents were not a "feasible options type assessment", they reflected a level of consideration appropriate to the circumstances. In particular it was said that the two documents provided expert advice that:

(a) Option F remained significantly more expensive than the Project; and

(b) Option X remained a less desirable option due to cost and other concerns.

[212] The question whether the 3 July 2012 review of alternatives was cursory is to be viewed, as NZTA says, in the context of the circumstances. Those circumstances included the stance earlier taken that Option F was to be assessed with other options which permitted SH1 to be located in a tunnel in front of the War Memorial once the government had made a decision on whether to fund the War Memorial Tunnel.[104]

[213] The Opus letter set out what it termed an alternate review.[105] The Board did not view it as a careful evaluation of options in light of the government's decision to underground Buckle Street, observing that it could not be compared with the vigour of the Feasible Options Report stage. It is apparent that the Board regarded the letter as superficial.

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[104] [1123] at [124] above.
[105] [1138] at [124] above.

[214] It may be that an alternative view was available. However, on the facts as recited in the Decision such an alternative view could not be said to be compelling. There was ample basis for the Board's assessment of the situation. Consequently it cannot be concluded that the true and only reasonable conclusion contradicted the Board's view.

Q 19(b): In order for the consideration of alternatives to be relevant must the consideration be completed before the application documentation is well advanced?

[215] NZTA submitted that s 171(1)(b) does not set a deadline by which alternatives must have been considered in order for that consideration to have been adequate. I agree. However, whether the consideration of alternatives, which occurs comparatively late in the process, will be adequate or not is a matter of fact.

[216] That point is illustrated by the authority cited by NZTA, *Nelson Intermediate School v Transit New Zealand*.[106] As NZTA notes, the Environment Court there did not find that alternatives needed to have been considered prior to a particular date. However it found that Transit's development and consideration of alternatives during an appeal hearing was not adequate.

[217] That was not a finding of law. Nor was the view reached by the Board in the present case, that NZTA had become entrenched with Option A well before November 2012, a finding which contains an error of law. For that reason I do not answer the question which, in any event, is inappropriately vague.

[218] Any attack on the Board's view would need to resort to an *Edwards v Bairstow* type challenge. That is the nature of NZTA's fourth question in Issue 1F to which I now turn.

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106 *Nelson Intermediate School v Transit New Zealand* (2010) 10 ELRNZ 369 (EnvC).

Q19(d) [recast]: Is this a case in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives following the Government's decision?

[219] NZTA's primary submissions stated:

> 22.1 … on 20 February 2013, Opus briefed [NZTA's] specialists to assess Options A, F and X for the purposes of Technical Report 19: Alternative Options Omnibus. The results of that exercise are summarised in Technical Report 19: Alternative Options Omnibus at Appendix B.
>
> 22.2 The Majority gave this exercise little or no weight in its assessment of [NZTA's] consideration of alternatives. No explicit reason for this is given. However, at [1200] the Majority stated that it would appear that [NZTA] was "entrenched with Option A well before November 2012".
>
> 22.3 Absent an explicit finding of bias or predetermination, there was no reasonable basis on the evidence for the Majority to find or infer that [NZTA's] consideration of alternatives in March 2013 was too late.

[220] In my view NZTA falls well short of the high hurdle of establishing that the Board's view was insupportable. Indeed, with reference to NZTA's submission at para 22.3, I consider that there were ample grounds for the Board's view on the basis of the 19 December 2012 letter alone.

[221] Accordingly the answer to Q 19(d) is No.

Q 19(c): Is a requiring authority required to prepare a "feasible option type assessment" when the environment changes? Or is it entitled to rely on earlier work?

[222] In the heading to this issue in its primary submissions NZTA posed the question: was NZTA required to "start again" following the Government's decision? It acknowledged that the Opus letter and the updated cost estimate[107] were not a feasible option type assessment but submitted:

> 21.6 It is appropriate (and economically responsible) for a requiring authority to rely on its earlier consideration of alternatives when the environment for a project changes. It is not required to carry out a new 'feasible option type assessment' whenever the environment for receiving the project changes.

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[107] At [211] above.

[223] The response (it is obviously not an "answer") to this question is: it depends. It is dependent on the nature and extent of the change to the environment and the extent of the reconsideration that such change necessitates. A comparatively minor change would be unlikely to require a requiring authority to "start again". The earlier work could no doubt be relied upon in large part. However a significant change to the environment might require a substantial revisiting of the prior work.

[224] The relevant event here was the government's decision concerning funding of the War Memorial Tunnel. Whether that event was of such significance as to require a more thorough-going reconsideration than was reflected in the 3 July 2012 letter is essentially a question of fact. There is no question of law to be answered.

Subissue 1G: Adequacy of the consideration

[225] In support of an alleged error of law in finding that adequate consideration was not given to alternatives, NZTA advances the following grounds of appeal:

(a) The evidence was of a lengthy, detailed and thorough consideration of a range of alternatives.

(b) For the reasons set out under Issues 1A to 1F, the Board applied the wrong legal tests to what was required of NZTA in its consideration of alternatives. Had the Board applied the correct test it should have found on the evidence before it that the consideration was adequate.

(c) Further, the Board allowed itself to be distracted by the merits of alternatives preferred by submitters (including BRREO, Option X and the long tunnel option) and failed to properly consider the evidence of the consideration given by NZTA to alternatives. Section 171(1)(b) requires decision-makers to inquire as to the process, rather than the outcome of the consideration given to alternatives.

[226] From that footing NZTA proposed the following question of law:

> Q 22 Is the Board's finding that adequate consideration was not given to alternatives a finding that it could reasonably have come to on the evidence?

[227] For the reasons explained at [16] to [23] that question is reframed in this way:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that adequate consideration was not given to alternatives?

As earlier noted[108] that question effectively subsumes the alternative question in Issue 1A which reframed is:

> Is the case one in which the true and only reasonable conclusion contradicts the determination that NZTA had not given sufficiently careful consideration to alternatives?

[228] NZTA's argument relied on Annexure A to its primary submissions which traversed the history of events from the Meritec Scheme Assessment Report in March 2001 to the lodgement of the NoR in June 2013.

[229] Clearly there was a large volume of evidence before the Board which it appears to have diligently considered. Further, given that Mr McMahon, in his alternate view at Part 2 of the Report, accepted that adequate consideration had been given to alternative sites, routes and methods of undertaking the work, it may well be that this is a case where different decision-makers, each acting rationally, might reach differing conclusions.[109]

[230] However the issue for me is whether the Board's decision is within the category of rare cases where its conclusion is so clearly untenable as to amount to an error of law because the proper application of the law requires a different answer.[110]

[231] If the law is as I have found in the course of my consideration of the earlier parts of Issue 1, then I consider that, on the basis of the Board's consideration of the

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108 At [144] above.
109 *Vodafone*, above n 2, at [56].
110 At [52].

dual issues of transparency/replicability and assessment of non-suppositious options, the answer to the questions in their reframed form can only be in the negative.

Issue 2: Inquiring as to the outcome rather than the process of considering alternatives

[232] In the course of considering Issue 1C reference was made to NZTA's contention that the Board had engaged inappropriately with the outcome rather than the process.[111] That theme is developed in Issue 2 where two errors of law are alleged:

> (a) When exercising its overall judgement in accordance with s 5, applying *McGuire v Hastings District Council* [2001] NZRMA 557 to hold that if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that (at [1324]. See also [1319] and [1182]–[1187]).
>
> (b) By assessing the effects of the Proposal by reference to alternatives that the Board considered would have less adverse effects on the environment (in particular, BRREO, Option X and tunnel options). (See [403], [510], [643], [1241], [1319]).

[233] Those dual errors give rise to a single question of law, Q 25, which incorporates two alternatives:

> Q 25 Is a decision-maker (in this case the Board) permitted to compare an option against other alternatives that it considers would have less adverse effects on the environment, either in assessing the effects of the Proposal under s 171(1), or in exercising its overall judgment in accordance with s 5?

[234] In Issue 1B reference was made to the circumstances in which and the reason why various options were put before the Board.[112] Those paragraphs, together with the following two paragraphs from that part of the Decision headed "Exercise of judgment in accordance with Section 5", are referred to in the first of the alleged errors of law:

> [1319] Having said that, we are satisfied on the evidence that similar transportation benefits that would give effect to such integrated management could be achieved by a tunnel option or variant similar to Option X. We are also satisfied on the evidence that an at-grade option, along the lines of the

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111 At [181] above.
112 [1182]–[1187] at [148] above.

> BRREO Option, could facilitate some benefits, albeit not as well as the Project, at least until the Mt Victoria Tunnel duplication and possibly well beyond. We consider such options should have been included as part of a robust option evaluation process.
>
> …
>
> [1324] In the final outcome, we are required to evaluate the significant adverse effects taken together with the significance of the national and regional need for and benefit of the Project. In carrying out this evaluation, we are conscious of the dicta of the Privy Council in *McGuire* that relevantly Sections 6 and 7 are strong directions to be borne in mind, and if an alternative is available that is reasonably acceptable, though not ideal, it would accord with the spirit of the legislation to prefer that.

[235] NZTA noted that *McGuire* was focused on Māori land rights and jurisprudence around the Treaty of Waitangi, including the processes in ss 6(e), 7(a) and 8 of the RMA. It said that the Privy Council's reference to "the spirit of the legislation" can only be read as referring to the particular discussion of Treaty jurisprudence and its place in the RMA. It argued that the Board was wrong in [1324] to extend those observations more generally.

[236] NZTA also relied on *Quay Property Management Ltd v Transit NZ*[113] in support of the proposition that a decision-maker should not cross the line into adjudication of the merits of the options and by that measure determine whether the chosen route was reasonable.[114] Hence it submitted:

> 23.6 The Majority therefore erred by comparing the Project to alternatives when assessing the Proposal's effects under s 171(1) or exercising its overall judgement in accordance with s 5. (See [403], [510], [643], [1241], [1319] and [1324].

[237] I do not consider that the Board was purporting or attempting to "cross the line" as described in *Quay Property*. The Board's understanding of the nature of its task is readily apparent from paragraphs to which reference has already been made. I consider that the respondents are correct when they say that a comparison of the relative effects of various aspects of the Project with those of alternatives was a natural corollary of the Board's considering whether NZTA had given adequate consideration to those alternatives.

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113 *Quay Property Management Ltd v Transit NZ* EnvC Wellington W28/00, 29 May 2000 at [152] applied in *Queenstown Airport*, above n 22, at [50].

114 [1090] at [125] above and [1167] at [178] above.

[238] I consider that the analysis of Mr Milne for TAC fairly responds to NZTA's complaint:

> 156. The Board did not assess the overall merits or effects of the alternatives. The Board did not draw a conclusion as to whether the alternatives referred to would have been *better* options overall. Rather, it considered whether Option X-type options, tunnel options and BRREO-type options were non-suppositious and whether it was likely that they might have less impact on heritage and amenity values. It reached the inevitable conclusion that such options would potentially have fewer adverse effects on amenity values and heritage values. It was necessary for the Board to understand the extent to which the various alternatives which submitters claimed had not been properly considered, had the potential to address project objectives with lesser environmental effects; so that it could reach a conclusion as to whether those alternatives should have been adequately considered.

[239] Consequently for these reasons I answer Q 25 in the affirmative.

Issue 3: Misapplication of s 171(1) of the Act

[240] The refined Issue 3 questions of law are recorded at [53] above. Three of those questions have been addressed in the course of the analysis of the statutory interpretation issues, namely:

- Q 28A at [72] to [76];
- Q 28C at [64] to [68];
- Q 28D at [99] to [118].

[241] It remains to address Q 28B which states:

> Was the Board in error by considering the effects of the environment of allowing the requirement without having particular regard to the matters listed in s 171(1)(a) to (d)?

[242] No light is shone on that very general question by reference to the error of law pleaded at paragraph 27(c) of the amended notice of appeal which simply alleges a failure by the Board to assess the effects of the environment of allowing the requirement having particular regard to the matters in s 171(1)(a) to (d).

[243] However some clarification is derived from the following grounds of appeal at paragraph 29:

> (c) In terms of the matters in s 171(1)(a) and (d), the Board failed to have particular regard to the following relevant matters when assessing the Proposal's effects:
>
> (i) the Proposal's consistency with regional/city transportation strategies, as discussed by the Board at [520]–[526], in particular, when considering what weight to give to the Proposal's 'enabling benefits' for future transportation developments (see below under Issue 3); and
>
> (ii) relevant matters in the District Plan when assessing the Proposal's effects on historic heritage and amenity values (see below under Issue 6).
>
> (d) In terms of s 171(1)(b), for the reasons set out above under Issue 1, the Board ought to have found that adequate consideration had been given to alternatives and assessed the Proposal's effects having particular regard to this finding.
>
> (e) In terms of s 171(1)(c), when assessing the Proposal's effects, the Board failed to have particular regard to its finding at [1230] that the work is reasonably necessary to achieve the objectives of the requiring authority.

[244] With reference to the s 171(1)(a), (b) and (d) matters, it will be observed that the grounds of appeal incorporate cross-references to other issues, namely Issues 1, 4[115] and 6. I did not receive discrete argument on these matters in the context of Issue 3 and consequently, like counsel, I treat these matters as addressed in the context of those other Issues. The point concerning s 171(1)(c) is addressed in the context of Q 45B at [356] below.

Issue 4: Incorrect approach to assessment of enabling benefits

A stand-alone project

[245] The Decision notes that a consistent issue during the hearing was the implications of NZTA's having sought approvals for the project separately from those for related parts of the network, particularly the Mt Victoria Tunnel

[115] The reference to Issue 3 in para 29(c)(i) should be a reference to Issue 4 which relates to enabling benefits.

duplication, and in advance of details of the Public Transport Spine Study and its outcomes being finalised.[116]

[246] NZTA's closing statement to the Board of 3 June 2014 explained its reasons for the Project being pursued on a stand-alone basis:[117]

> 12.9 It is for [NZTA], together with WCC and GWRC, to decide when applications for its various projects are lodged, and the make-up of each project. It would be ridiculous to suggest that, in Auckland for example, applications for all Auckland State highway and local roading improvements should be lodged at the same time, so that their inter-relationships can be explored. For Wellington, the Ngauranga to Wellington Airport Corridor Plan signalled in 2008 that the Basin Bridge Project is to be implemented before 2018, whereas the Mt Victoria and Terrace Tunnel duplication projects are described as "*measures that may be implemented (beyond 10 years)*". [NZTA] has structured the Project (and sought approvals for that Project) in a manner which is entirely consistent with that description.
>
> 12.10 Mr Blackmore's evidence is that one of the reasons for separating the Basin Bridge and Mt Victoria Tunnel Duplication Projects was [NZTA's] wish to improve the Basin Reserve road network and thereby facilitate public transport improvements (and increased use) prior to the duplication of the Mt Victoria and Terrace Tunnels. This is supported by the GWRC. In addition, [NZTA's] view was that the environmental and social aspects of both Projects were sufficiently different in nature that there was no need to combine the two Projects for consenting purposes. Mr Blackmore's evidence was that the Basin Bridge Project is a standalone project which is not dependent on the Mt Victoria Tunnel Project proceeding, and will have benefits for north-south traffic regardless of what happens at Mt Victoria. By comparison, the Mt Victoria and Terrace Tunnel Duplication Projects, and the Bus Rapid Transport Project, are reliant on the Basin Bridge Project being in place.

[247] The Board said:

> [232] We accept [NZTA's] submission that this is not a case where the Project itself requires further consents or authorisations under the RMA which are not currently before us. Rather, the issue is the extent to which the Project and its effects, can be properly understood and assessed having regard to the current status of the Public Transport Spine Study, and in isolation from the Mt Victoria Tunnel duplication project in particular.

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116 At [225].
117 Noted at [230].

> [233] The power to defer a matter lodged with the EPA under Part 6AA while other related applications are made lies with the Minister, not the Board. Further, this power is to be exercised before notification of the original applications. The matter now having been referred in accordance with Section 147(1)(a), we are required to make a determination on the Project before us, having regard to the effects of the Project (both positive and negative), and that Project alone. We address the scope of the relevant future state of the environment and effects (including additive and cumulative effects) we can consider (particularly with respect to the Mt Victoria Tunnel duplication) elsewhere in our decision.

[248] The Board accepted TAC's submission that it must take the position "as it is". It said:

> [234] … we must determine whether the project before us meets the Act's sustainable management purpose as a stand-alone Project (i.e. in the absence of the Mt Victoria Tunnel duplication), and on the basis of the information regarding the outcomes of the Public Transport Spine Study available to us. That is the key consequence of [NZTA's] decision to seek approval for the Project as a stand-alone project separate from that of the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised.

Effects and benefits – terminology and meaning

[249] The fact of the stand-alone nature of the Project was the catalyst for a significant debate about the benefits which could fairly be attributed to the Project, including contingent benefits and enabling effects. As Mr Cameron observed in the course of closing arguments before the Board, these are elusive concepts.[118]

[250] "Effects" are defined in s 3 of the RMA:

> In this Act, unless the context otherwise requires, the term **effect** includes–
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects–

[118] Transcript page 8146 line 27, 4 June 2014.

> regardless of the scale, intensity, duration, or frequency of the effect, and also includes–
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[251] In its written closing statement to the Board NZTA stated that future effects, cumulative effects arising over time or in combination with other effects, and uncertain effects, are all relevant effects. Challenging the opposing contention that contingent benefits (being those benefits reliant on another consenting process or event in order to materialise) should not be taken into account by the Board, NZTA contended that the cumulative and in-combination effects to be considered by the Board included the Project's effects in combination with contingent benefits of works which are yet to receive RMA or another type of approval, citing as examples the Mt Victoria and Terrace Tunnel duplications.

[252] TAC's submissions on appeal argued that NZTA had shifted its emphasis on appeal from "strategic fit" with objectives to "enabling benefits". Although NZTA's closing statement used the phrase "facilitate/enable", as the Decision recognises, in oral submissions NZTA had submitted that "enabling effects" were a separate and identifiable benefit of the Project and that the Board should treat them as such.[119]

[253] In its written reply submissions NZTA maintained that there is a difference between the strategic fit of a project and its enabling benefits. It explained:

> 22.12 To be clear, in response to the submissions of TAC, [NZTA] considers that there is a difference between 'strategic fit' of a project and 'enabling benefits'. An 'enabling benefit' is an effect of a proposal that facilitates or creates an opportunity for the achievement of an outcome. Such an effect is an identifiable positive benefit of a project. Of course, what that might be is dependent on context.
>
> 22.13 In the context of this Project, the positive enabling effect is how the Project facilitates (will not frustrate) the development and potential implementation of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study ('PTTS'). [NZTA] is not referring to the benefits from the actual implementation of the wider Roads of National Significance

[119] At [507] in [256] below.

> ('RoNS') programme or the PTSS. Rather, it is the fact that this Project enables/facilitates/provides the opportunity for those other projects to be implemented.

The Board's Decision

[254] The Board accepted as correct NZTA's final analysis of the existing or future state of the environment.[120] In addition it stated that the approved sections of the Wellington Northern Corridor RoNS should appropriately be considered as part of the environment for assessment of the Project, being the Transmission Gully and the Mackays to Peka Peka and Peka Peka to Otaki (Kapiti Expressway) sections of the Wellington Northern Corridor.

[255] At [343] to [346] the Board considered the issue whether contingent benefits, (benefits flowing from related projects which are intended but not consented) should be attributed as flowing from the Project. It recorded that at the end of the hearing it was agreed that the benefits from a second Mt Victoria Tunnel and a third lane as part of the Buckle Street Underpass should not be attributed to the Project because the tunnel duplication had yet to be consented to and the Buckle Street Underpass was part of the existing environment.

[256] At [506] to [519] the Board proceeded to address the issue of "enabling effects", namely the consequence that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study. The following paragraphs provide the context for and are referred to in the discussion of the several questions of law posed in Issue 4:

> [506] One of the issues raised before us was whether (and if so, how) we are able to take into account the *enabling effect* of the Project. That is, how should we deal with [NZTA's] argument that the Project facilitates (or at least does not frustrate) the development of related projects, particularly the Mt Victoria tunnel duplication and Public Transport Spine Study.
>
> [507] In closing, Mr Cameron submitted that such effects are a separate and identifiable benefit of the Project, and we should treat them as such. We were not provided with any case law authority to support this submission. Nor are we aware of any.

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120 At [336].

[508] We acknowledge that the Project *enabling* element may arguably be viewed as a potential positive future effect which arises from the NoR before us, and thus is within the scope of what we are tasked to consider under Sections 149P(4) and 171(1). The RMA's definition of effects in Section 3 may also be wide enough to encapsulate or incorporate such effects. In particular, it includes any positive effects – although notably, unless the context otherwise requires. As the High Court held in *Elderslie* in the context of a resource consent application:

> … To ignore **real** benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity.
>
> [*our emphasis*]

[509] However, even if we accept (without finally determining the matter) that we can treat the project's enabling element as a separate and identifiable positive benefit, we consider this is largely a moot point. That is because in our view, any such *benefit* can be given little (if any) weight, primarily for the reasons set out below.

[510] Even if we assume that some modifications to the Basin Reserve gyratory are required in order for the Mt Victoria Tunnel duplication and Public Transport Study to proceed, the Basin Bridge Project is only one of potentially several solutions that might be put in place for that purpose. Such solutions could equally (or to a greater or lesser degree) facilitate (or not frustrate) the progression of those projects.

[511] We do not consider the evidence before us sufficiently establishes that the *enabling* element of the Project is something unique to, or which can only be achieved by, [NZTA's] current NoR.

[512] Perhaps more importantly, we have no guarantee that either (or both) of those projects would in fact go ahead. Indeed, as outlined elsewhere in our decision, we are required to make our determination on the basis that the Mt Victoria Tunnel duplication does *not* form part of the future state of the environment, and on the basis of the limited information currently available to us regarding the Public Transport Spine Study outcomes.

[513] That is the key result of [NZTA's] election to seek approval for the Project separately from that for the Mt Victoria Tunnel duplication, and in advance of the Public Transport Spine Study and its outcomes being finalised. In having made that strategic decision, [NZTA] must now accept the consequences of doing so. Put simply, and using the wording from *Elderslie*, we cannot place any significant weight on a supposed (but not quantified) Project benefit which is not real – in that we have no certainty or assurance it would actually materialise.

…

[516] As we have already found, the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project. Further, we do not see our approach in this regard as inconsistent (nor do we in any way disagree) with the Environment Court's observations in *Cammack* (cited to us by [NZTA] in opening) that the RMA's:

> … concept of sustainable management does not require the status quo to simply continue. Provided the imperatives contained in s 5(a)–(c) can be justified, RMA contemplates management of use, development and protection, not just retention of the status quo.

[517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[518] Accordingly, we consider the most appropriate way to take into account the Project's facilitating or enabling element is not as an identifiable benefit in and of itself, but in the context of Section 171(1), and particular sub-sections (a) and (d). That is, the extent to which the Project is consistent with the strategies identified and in the context of the other RoNS related projects.

[257] In that part of the Decision headed "Exercise of Judgment in accordance with Section 5" the Board said:

> [1318] The Project would have an enabling element to the extent that it would fit well with the proposed works planned to implement the City Council's Growth Spine form Ngauranga to the Airport. To this extent, it would be consistent with the transportation theme identified by the planning caucus and the integration of land use and transport planning.

There followed [1319][121] which has been discussed already in the context of Issue 2.

[258] On this aspect of the appeal it is appropriate to also note the distinctly different view of Mr McMahon:

> [1510] In my consideration, the Project's *enabling effect* is of considerable importance and should be acknowledged as an important and determinative transportation benefit of the Project.
>
> [1511] For the record, I should clarify that I am not referring to the other benefits that may result from the actual implementation of the wider RoNS programme or Public Transport Spine Study that are not part of this Project. Those are contingent benefits and I wholly accept that these should not form part of the Board's substantive consideration of this Project. Rather, what I am referring to is how the Project facilitates (or at least does not frustrate) the development and potential implementation of related Projects, particularly the Mt Victoria Tunnel duplication and the Public Transport Spine Study.

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[121] At [234] above.

The parties' positions

[259] NZTA mounted a comprehensive attack on this aspect of the Decision which is encapsulated in the following extract from its primary written submissions:

> 31.7 There are significant errors of law in this aspect of the Majority's decision, including:
>
> a It has failed to treat enabling benefits as separate and identifiable positive effects of the Project that properly fall within the scope of 'effect' as defined by s 3 RMA.
>
> b It has failed to assess the effects of the Project 'having particular regard to' the fact that the Project is part of a programme of works set out in the relevant statutory and non-statutory documents under s 171(1)(a) and (d).
>
> c It has failed to access the effects of the Project 'having particular regard to' the requiring authority's objectives, which explicitly include 'not constraining opportunities for future transport developments'.
>
> d By requiring that a project's enable effects be 'unique' to the project (and to the particular option), it has failed to assess the effects of allowing the requirement and has instead engaged in a comparative exercise with other alternatives.
>
> e It has required the Appellant to demonstrate the certainty of benefits, when the RMA does not require this standard.
>
> f It has conflated the concepts of 'environment' and 'effects'.
>
> g Although it claims to have taken into account the enabling elements of the Project as a relevant factor under s 7(b) when exercising its overall judgment, the rest of the Majority's decision shows that this effect has been given little, if any, weight.
>
> 31.8 As a result of these errors of law, the Board wrongly attributed little, if any, weight to this highly relevant positive effect of the Project.

Seven questions of law were posed with reference to the Board's consideration of enabling benefits.

[260] While the burden of the opposition on this topic was carried by Mr Milne, Mr Palmer took the fundamental point that the seven different instances of alleged error all suffered from the same difficulty that the Board did treat enabling effects as relevant. He maintained that NZTA's real objection was that the Board did not give those enabling effects sufficient weight, a point which he reinforced by listing the

repeated references to weight in the relevant part of NZTA's primary written submissions.

Q 31(a): Is a project's enabling benefit an effect in terms of s 3 that can and should be taken into account under s 171(1) and/or s 5?

[261] There is no doubt that the Board took into account and gave at least some weight to the enabling element of the Project. NZTA's complaint concerns the manner in which the Board did so, as explained in ground of appeal 30(a):

> (a) At [506]–[519], by failing to treat and/or give weight to the enabling benefits of the Proposal as a positive effect in terms of s 3 and/or s 171(1) of the Act; and instead finding:
>
> (i) at [518] that the most appropriate way to take into account the Proposal's enabling element is by considering the extent to which the Proposal is consistent with the strategies identified in relevant documents identified under s 171(1)(a) and (d);
>
> (ii) at [519] that the enabling component is a matter which could be taken into account under s 7(b) (noting that this did not appear in the Board's reasoning in its draft Decision).

[262] It is apparent that the approach which the Board should adopt was traversed in oral closing submissions before the Board. NZTA's written reply submissions on appeal explained:

> 22.3 TAC submits that [NZTA] has shifted its emphasis from 'strategic fit' with objectives and transport plans, to 'enabling benefits'. This is incorrect. [NZTA's] closing submissions before the Board asked the Board to count the contingent benefits of the Project as relevant effects. This was the subject of some discussion between counsel and the Board. Counsel accepted that the Board may choose to consider the enabling aspect of the project as a relevant matter under s 171(1)(a) and (d), however, in doing so, it was anticipated that this aspect of the Project would be given appropriate weight. However, the effect of the Board's approach is to relegate the enabling benefit to an almost irrelevant 'other matter'.
>
> 22.4 It is of considerable importance that this issue is corrected as a matter of law. As discussed in [NZTA's] Primary Submissions, the Majority has made findings in relation to the 'enabling element' of the Project that [NZTA] says are wrong in law. The Minority has not. This appeal seeks to address those errors.[122]

[122] The reference to the Minority was to [1511] at [258] above.

[263] Both ground of appeal 30(a) and that extract from NZTA's reply submission provide traction for Mr Palmer's criticism that NZTA's real objection concerns the weight which the Board accorded to enabling benefits, a view with which I agree.

[264] However Q 31(a) as framed does appear to raise a question of law, at least with reference to the "can" rather than the "should" component. That said, I do not consider that the Board made an error of law of the nature implied. It did not reject the contention that an enabling benefit could be a potential positive future effect in terms of s 3.[123] In fact, it did not actually determine the point as it expressly acknowledges at [509]. Instead, it proceeded to take the enabling element into account at [518] in the manner which counsel had agreed was acceptable.[124]

[265] The enabling effect or benefits of a project will inevitably be circumstances specific. As the Board recognised in relation to this particular Project, in some cases the enabling element may properly be viewed as a potential positive future effect. In that sense I consider that an affirmative answer can be given to the question whether a project's enabling element "can" constitute an effect to be taken into account under s 171(1) and/or s 5.

[266] However, whether it will be appropriate to do so or instead to proceed as the Board did in this case at [518] will turn on the particular circumstances. The "should" component of Q 31(a) does not raise a question of law and is not susceptible of answer in abstract terms.

Q 31(b): Where a project's enabling benefits are consistent with a programme of infrastructure development that is recognised in relevant documents under s 171(1)(a) and (d), should those enabling benefits be given considerable weight as an effect of the project under s 171(1) and/or s 5?

[267] This question, which is directed to the weight to be given to a project's enabling benefits, does not involve a question of law. In any event a question framed in terms of "considerable" weight is too imprecise to sound in a useful answer.

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123 At [508].

124 In paragraph 22.3 at [262] above.

Q 31(c): In order to be taken into account, must a project's enabling benefits be unique to that project, guaranteed to go ahead, and able to be quantified?

[268] In my view the answer to this question is No. Nor do I consider that the Board made the erroneous finding alleged, namely that in order to be given weight, enabling benefits must be unique to a project, guaranteed to go ahead and able to be quantified.

[269] The Board certainly observed at [511]–[512] that the Project did not incorporate those characteristics. However I do not construe the Board's decision as stipulating that such characteristics were prerequisites to enabling elements being taken into account. If it had viewed such features as necessary pre-conditions, then the Board would not have taken the enabling element into account at all. Yet the Board did so. In my view the Board referred to those matters as bearing on the weight to be attributed to the enabling effects. Because those features were not present, the weight which the Board allocated to enabling elements was correspondingly less.

Q 31(d): Does the definition of the future environment constrain the ability of a decision-maker to consider the enabling benefits of a project?

[270] The concern which prompted this question is revealed in the relevant ground of appeal:

> 30(c) At [512] by wrongly conflating the environment with effects, and thereby finding that because the Mt Victoria Tunnel duplication and Public Transport Spine Study outcomes do not form part of the future state of the environment, the Board is prevented from giving weight to the enabling benefits of the Proposal for those future projects.

[271] Noting that s 171(1) directs a decision-maker to "consider the effects on the environment of allowing the requirement", NZTA drew attention to the direction of the Court of Appeal in *Royal Forest and Bird Protection Society of New Zealand v Buller District Council*[125] that decision-makers are required to distinguish the environment from the effects of a proposal:

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[125] *Royal Forest and Bird Protection Society of New Zealand v Buller District Council* [2013] NZCA 496, (2013) 17 ELRNZ 616 at [23].

> [W]e cannot see how s 3(f) comes into play at all in determining what is the "environment" against which the actual and potential effects of allowing the activity for which consent is sought are to be considered. In determining what the "environment" is, the attention of the consent authority or a court on appeal is directed toward the physical environment as it exists at the relevant time, modified by those considerations required to be taken into account by the Act and applying *Hawthorn*, treating any permitted activity or any activity for which resource consent has been granted and which is likely to be implemented as included in the "environment". None of this has anything to do with the definition of "effect" in s 3. The definition of "environment" is a prior question to consideration of the effects of the proposed activity on the environment.

[272] Submitting that the two exercises must be kept separate, NZTA contended:

> 31.32 The Majority has wrongly conflated the concept of 'environment' with the meaning of 'effect' by determining that the enabling benefit of the Project should not be considered to be/or attributed any weight as an 'effect' because the Mt Victoria Tunnel duplication is not considered to be part of the future state of the environment. In doing so, the Board unduly limited the meaning of 'effect' to the Board's assessment of what constitutes the environment, rather than ensuring that effects of the Project are properly identified and considered. This is a fundamental error of law.
>
> 31.33 With respect, what is considered to be part of the future state of the environment (whether that includes the Mt Victoria Tunnel Duplication or the Public Transport Spine outcomes) has nothing to do with the identification of the effects of the Project. What is important is that the evidence shows that the enabling benefit of the Project (being what this infrastructure project facilitates) is an effect attributable to the Project. As we have submitted, the evidence established that the Project will facilitate planned developments (whatever their final form may take) and that without this Project, future development will be frustrated/not enabled.

[273] Mr Milne observed that NZTA did not take issue with the Board's conclusion that the tunnel duplication process did not form part of the future state of the environment while at the same time it suggested that the Board should have treated the facilitation of such a project as a positive effect on the environment. In his submission the fatal flaw in NZTA's argument was that s 171 is concerned with effects on the environment, and an effect which does not affect the environment is not a relevant effect.

[274] I agree with Mr Milne that the Board decided as a first step what the environment was by resolving the contest about the existing, permitted and reasonably foreseeable future environment and concluding that the Mt Victoria

Tunnel duplication was not part of that environment. I do not consider that it is fair to say, as NZTA contends, that the Board conflated the environment with effects.

[275] The Board recognised the Project's enabling element.[126] However it considered that the most appropriate way to take that enabling benefit into account was in the manner explained at [518].

[276] Reverting to the content of Q 31(d), if "constrain" is given the same meaning as "prevent" (in ground of appeal 30(c)), then, as the Board's Decision demonstrates, a decision-maker is not precluded by the definition of the future environment from considering the enabling effect of a project. However, again as the Board's Decision demonstrates, the decision-maker's conclusion on the state of the future environment may influence the manner in which the decision-maker chooses to take an enabling benefit into account.

[277] Consequently I do not consider that Q 31(d) is susceptible of a simple Yes or No answer. As the explanation above indicates, the finding as to the state of the future environment is likely to be material to, and even influential on, the way in which a decision-maker considers and weighs a project's enabling elements.

Q 31(e): In order for the positive effects of a future development to be taken into account must the approvals for that development be sought at the same time as (or in advance of) the project?

[278] The answer to that question (which refers to the positive effects "of" a future development) must be in the affirmative. On that point I apprehend the Board was unanimous.[127]

[279] The error of law alleged in the amended notice of appeal read:

> 30(d) By finding at [513] that in order for the positive effects of a future development to be taken into account the approvals for that development must be sought at the same time or in advance of a project.

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126 [1318] at [257] above.

127 The majority at [233] at [247] above; Mr McMahon at [1511] at [258] above.

[280] However in the course of presentation of NZTA's submissions Mr Casey indicated that the preposition "of" should in fact have read "on". The consequence of that amendment was to significantly change the meaning of the question. Indeed, to make sense I consider that the question needs to be redrafted to introduce a reference to the project into the subject of the sentence.

[281] In my view a negative answer applies to the following reframed question:

> In order for a prior project's enabling effects on a future development to be taken into account on the prior project, must the approvals for the future development be sought at the same time or in advance of the project?

[282] In any event I do not discern any error in the Board's approach. It clearly did take into account the Project's facilitating or enabling element.[128]

Q 31(f): Is it consistent with sustainable management (in terms of s 5) to approve an infrastructure project because it is necessary to facilitate future developments; and does it make a difference if the project is primarily necessary to facilitate those future infrastructure developments?

[283] This question reflected what was said to be the Board's error in allegedly finding at [517] that it was not sustainable management to approve a project primarily because the project is necessary to facilitate future developments.

[284] Neither this question, nor Q 31(g) below, received attention in NZTA's presentation of its case. It was not a matter included in the list of significant errors of law listed in paragraph 31.7 at [259] above.

[285] The Board's statement at [517] was by way of explanation for its previously expressed view that the Mt Victoria Tunnel duplication should not be assumed to occur for the purposes of evaluating the Project,[129] which also appeared to be the view of Mr McMahon.[130] In [517] the Board stated that that approach was "a reflection" of the view criticised in the current question.

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128 At [518].
129 [234] at [248] above.
130 [1511] at [258] above.

[286] I do not consider that at [517] the Board was purporting to formulate any statement of general principle. It was an expression of view about a particular category of projects, namely those necessary to facilitate future developments which may or may not proceed. I do not discern an error of law in the Board's observation.

[287] In any event I do not consider that Q 31(f) aligns with, and hence is responsive to, the Board's statement at [517]. The question does not incorporate the component that the future development may or may not proceed.

Q 31(g): In the alternative, given its conclusion that the Proposal was necessary primarily to enable future roading projects, did the Board err in law by failing to consider conditions to address this concern?

[288] Although an error of law was alleged at para 30(f) in essentially the same terms as Q 31(g), there was no suggestion in NZTA's submission either that relevant conditions had been proposed to the Board or that the Board had failed to consider conditions which had been proposed. Indeed it is not apparent to me how a condition could be crafted which would address the issues the subject of Issue 4. In those circumstances I do not consider that Q 31(g) requires a response.

Issue 5: Assessment of transportation benefits – an overview

[289] It will be recalled that improvements in transportation featured prominently in the Project Objectives recorded at [30] above.

[290] The subject of transportation is addressed at length in the Decision from [260] to [505]. The breadth and structure of that consideration is conveyed in the opening paragraph:

> [260] The Project is a transport infrastructure project and the transportation effects are central to our consideration. In this part of our decision we set out the central transportation issues, briefly identify the key provisions of relevant statutory and other documents which provide guidance for our consideration of transport effects, then discuss the existing situation and appropriate baseline against which to assess the transport effects. We then discuss those transport effects, and assess them in terms of the stated objectives of the Project and the intended outcomes of the relevant statutory instruments and non-statutory documents, and the purpose of the RMA set out in Part 2 of the Act.

[291] The Board noted that regard had also been had to the fourth matter in the Minister's reasons for referring the Project to the Board:[131]

> The proposal is intended to reduce journey time and variability for people and freight, thereby facilitating economic development. The proposal is also likely to provide for public transport, walking and cycling opportunities; reduce congestion and accident rates in the area; and improve emergency access to the Wellington Regional Hospital. If realised, these benefits will assist the Crown in fulfilling its public health, welfare, security, and safety functions.

[292] NZTA's challenge to this part of the Decision was presented as three subissues:

(a) standard of proof required to demonstrate transportation benefits: subissue 5A;

(b) assessment of immediate transportation benefits: subissue 5B;

(c) requiring the proposal to demonstrate benefits that go beyond NZTA's objectives: subissue 5C.

Subissue 5A: Standard of proof required to demonstrate transportation benefits

[293] The focus of this aspect of the appeal was on two paragraphs in that part of the Decision which addressed underlying assumptions about traffic growth:

> [484] We have no doubt that the assumptions fed into the traffic models are the best estimates of competent and experienced people. The point rightly made by critics however is that these assumptions largely determine the outcomes of the complex modelling exercise. Any errors in the assumptions compound when they are used to project traffic flows beyond the immediate future.
>
> [485] The issue would not be important if we were considering infrastructure improvements with minimal adverse environmental effects. In that situation it would not be important from an RMA perspective if the works proved to be premature or not needed at all. The situation here is that, as discussed later in this decision, the Basin Bridge would have significant adverse effects, so the level of confidence we can have in the modelled need and benefits, which depend on the underlying assumptions, is important.

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131 At [3] above.

[294] NZTA asserted that the Board had erred in law in two respects:

- By inferring at [485] that a higher standard of proof (in relation to transportation modelling) is required if the adverse effects of a project are more than minimal.

- By requiring a higher standard of proof to demonstrate the transportation benefits of the Proposal.

[295] It was apparent from the grounds of appeal that NZTA maintained that the Board had effectively required it to demonstrate the transportation benefits of the Proposal beyond reasonable doubt.

[296] Two questions of law were proposed:

> Q 36(a) Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?
>
> Q 36(b) If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

Q 36(a): Is a higher standard of proof required to demonstrate the transportation benefits of a project where it will have adverse effects that are more than minimal?

[297] In support of its contention that the Board erred in law by effectively requiring NZTA to demonstrate the transportation benefits of the Project beyond reasonable doubt, NZTA first referred to the following decisions:

- *Genesis Power Ltd v Manawatu-Wanganui Regional Council*;[132]

- *Shirley Primary School v Telecom Mobile Communications Ltd*;[133]

- *McIntyre v Christchurch City Council*.[134]

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132 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

133 *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 (EnvC).

134 *McIntyre v Christchurch City Council* (1996) 2 ELRNZ 84, [1996] NZRMA 289 (Planning Tribunal).

[298] It will suffice to refer to the decision of the Court of Appeal in *Ngati Rangi Trust v Genesis Power Ltd*[135] which was an appeal from *Genesis Power* above. Although dissenting in the result, the following statement of Ellen France J reflected the view of the Court:

> [23] On [the question of the onus of proof], it need only be noted I see no difficulty with the statement in *Shirley Primary School v Telecom Mobile Communications Ltd* [1999] NZRMA 66 at para [121] that "[i]n a basic way there is always a persuasive burden" on an applicant for a resource consent. As the Environment Court said in *Shirley*, that approach reflects the requirement that a person who wants the Court to take action must prove his or her case. In addition, as the Court observed, there are also statutory reasons for speaking of a legal burden on an applicant:
>
> > [122] Since the ultimate issue in each case is always whether granting the consent will meet the single purpose of sustainable management, even if the Court hears no evidence from anyone other than the applicant it would still be entitled to decline consent.

[299] It is clear, and I did not understand the respondents to suggest otherwise, that the criminal standard of proof does not apply in RMA matters. The answer to Q 36(a) is plainly No.

[300] I do not accept NZTA's submission that an inference can be drawn that at [485] the Board was applying a standard of proof higher than the recognised standard. I find myself in agreement with Mr Palmer's submission on this point:

> 7.17 The Board simply said the level of confidence it could have in the assumptions of the model is important. So it focussed on them. Witnesses cast doubt on the assumptions (e.g. at [497]) and NZTA kept revising them (e.g. [386]) and the Board commissioned its own review by Abley. The Board simply made its own fair assessment of the assumptions and modelling outcomes. This was an important element of discharging its obligation to consider the effects of the proposed flyover requirement.

[301] In the course of its submission NZTA drew attention to a number of places in the Board's reasons which it said showed that the Board had required NZTA to demonstrate certain matters to a higher standard or to a level of "certainty". However none of those matters suggested to me that the Board was applying anything other than a conventional civil standard of proof.

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135 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222, (2009) 15 ELRNZ 164.

Q 36(b): If the Board applied the wrong standard of proof, were the Board's findings regarding the transportation benefits of the Proposal ones that the Board could reasonably have come to on the evidence?

[302] Given my view that the Board did not apply the wrong standard of proof, this question is otiose.

Subissue 5B: Assessment of immediate transportation benefits

[303] Under this heading the amended notice of appeal asserted a single error of law:

> The Board erred in law by finding at [517] that the Proposal is *primarily* necessary to facilitate future developments, and thereby failing to have regard to the immediate transportation benefits of the Proposal as a stand-alone project. (See also [466]).

[304] Paragraph [466], which was located in the Board's summary of transportation effects,[136] stated:

> [466] The Project has been put forward on the basis that it is a multi-modal, long term, integrated solution and is part of a sequence of road improvements along the Wellington Northern Corridor, most of which are consented and some of which are under construction. The evidence was that much or even most of the transport benefits from the Basin Bridge Project depend on completion of that sequence of road improvements and can be regarded as *contingent benefits*.

[305] Although paragraph [517] has already been noted in the consideration of enabling benefits it will be convenient to set it out again:

> [517] Rather, it is a reflection of our view that it would not be sustainable, or provide for sustainable management, to approve projects such as this, primarily because they were necessary to facilitate future developments, which may (or may not) proceed.

[306] The question of law framed under this heading contained two limbs:

> Q39 Did the Board fail to have regard to immediate transportation benefits of the Proposal, such that:

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136 [464]–[476].

(a) it failed to take into account relevant matters; and/or

(b) its decision regarding the immediate transportation benefits of the Proposal is not a decision that it could reasonably have come to on the evidence?

Q 39(a): Did the Board fail to take into account a relevant matter in failing to have regard to the immediate transportation benefits of the Proposal?

[307] NZTA submitted that the passages at [466] and [517] showed that the Board decided that the Project did not offer "any significant or worthwhile immediate benefit". It argued that that finding stemmed from the Board's "reductive approach" to the transportation benefits of the Project, which failed to have regard to the following matters said to be relevant under s 171(1)(a) to (d):

– a planning framework that recognises the importance of the Basin Reserve transportation node;

– a planning framework that provides for the immediate implementation of bus priority; and

– NZTA's objectives for the Project.

[308] NZTA advanced this aspect of its case by reference to three matters to which it contended the Board had failed to have regard or given any weight:

– the failure to resolve the critical issue of congestion;

– bus priority; and

– economic criteria.

[309] Each of these matters was addressed succinctly but comprehensively by Mr Palmer. Rather than attempting to paraphrase his responses I believe it is useful to recite them in full:

7.8 First, NZTA says (at 32.7) the Board gave no weight to the relief of congestion from Paterson St to Tory St but "analysed the time travel savings only". But the Board was explicit (at [329]) that is

considered congestion in terms of indicators that the consensus of experts agreed on, including "difficulties getting through controlled intersections in a single phase and major variability in travel times". It considered these benefits extensively, in particular at [305]–[316] and [359]–[381] and in its overall summary at [1242], [1244]–[1247] (noting the time savings were substantially less than originally put forward when the third lane at Buckle Street and the effect of the Mt Victoria tunnel duplication are accounted for). It noted that the proposed flyover requirement would provide a time saving for the west-bound journey of 90 seconds in 2021 (at [330], [365], [1244]).

7.9 Second, NZTA says (at 32.15) the Board failed to have regard to the immediate benefit of providing for bus priority. But one of the paragraphs NZTA cites (at 32.12) in the Board's report ([405]) demonstrates the opposite:

> We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.

…

7.11 Finally NZTA says (at 32.16, 32.19) that the Board failed to reference the quantification of economic benefits. The Board did (at [536], [539], [543], [545]–[550] and [552]), noting (at [543]) that "[a] number of Benefit-Cost Ratio figures were presented to us in the application documents and in the evidence". If the Board hadn't referenced specific evidence that would not justify NZTA's complaint. But it did even that, citing (at [542] the evidence of NZTA's expert, Mr Copeland, whose economic assessment of the project relied upon the BCRs developed by Mr Dunlop upon which NZTA now seeks to rely. The Board's conclusion (at [550]) is reached after seeing how contested were the BCR assumptions. Again the objection is to weight.

[310] I accept the respondents' argument on these three points. Mr Palmer made the further point that much of NZTA's complaint concerned the weight accorded to the relevant factors, drawing attention for example to NZTA's submission in the context of bus priority that it was a matter to which the Board should have given "considerable weight". I agree that the Board did not err in the manner asserted. The answer to Q 39(a) is in the negative.

The meaning of Q 39(b)?

[311] Question 39(b) attempts to combine an error in failing to have regard to a matter (immediate transportation benefits) with an *Edwards v Bairstow* type question directed to the conclusion on that same matter. As such, it does not make sense. That can be demonstrated by my attempt to reframe the *Edwards v Bairstow* question by reference to Lord Radcliffe's third formulation:

> Is this case one in which the true and only reasonable conclusion contradicts the determination that there were no immediate transportation benefits of the Proposal?

[312] Once it is accepted, as I have found in relation to Q 39(a), that the Board did not fail to have regard to the immediate transportation benefits of the Proposal, I have difficulty seeing how an *Edwards v Bairstow* type question can be appropriately framed.

Subissue 5C: Requiring the Proposal to demonstrate benefits that go beyond the requiring authority's objections

[313] The question of law posed under this heading is:

> 42 Did the Board err in requiring [NZTA] to demonstrate that the Proposal would achieve specific benefits that were not part of the project objectives (namely, mode shift and providing a long-term solution for eastbound State Highway traffic)?

Mode shift

[314] It will be recalled that Project Objective 3 stated:

> To support mobility and modal choices within Wellington City:
>
> (i) by providing opportunities for improved public transport, cycling and walking; …

[315] With reference to that objective, NZTA's grounds of appeal stated that the project objectives did not include an objective "actually to achieve mode shift" and that the Board erred in requiring NZTA to demonstrate that the Proposal would achieve mode shift/mode share. Two errors of law were alleged:

(a) By finding at [405] that [NZTA] was required to establish (and quantify) the extent and benefits of mode share (or mode shift) that would be achieved by the Proposal when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved public transport.

(b) By finding at [441] that the Proposal is not a truly multi-modal, integrated long-term solution for cycling and walking in the project area, when the project objectives were to support modal choices, inter alia, by providing *opportunities* for improved cycling and walking.

[316] The two paragraphs to which reference was made stated:

> [405] We are satisfied the improved journey times discussed earlier would improve journey times for buses passing through the Basin Reserve area. [NZTA's] modelling shows that the partial bus lanes proposed as part of the Project would not prevent other vehicular traffic also gaining similar time savings. We can accept that the increased priority for public transport provided by the Project could be viewed as a precursor to BRT promoted by the Regional Council, but we have no evidence about the effect of what is proposed here on mode share, which is an objective of the planning documents.
>
> …
>
> [441] In summary, the Project would make some improvements for circulation of cyclists and pedestrians in the Basin Reserve area, but as these are mostly in the form of shared paths they would introduce potential conflicts between these modes, especially if these modes continue to increase in popularity. We do not see this package of proposals as a truly multi-modal, integrated, long term solution for cycling and walking in the project area. …

[317] Specifically with reference to the provision of "opportunities" in Objective 3(i) NZTA argued:

> 33.7 It is submitted that framing its objectives in this way is appropriate. In this context, [NZTA] has requiring authority status under s 167 RMA for the construction and operation of any State highway or motorway. While [NZTA] has a significant role under the LTMA investing in outcomes for public transport, cycling and walking; in its capacity as requiring authority its role is to provide infrastructure which assists or facilitates such outcomes rather than providing them directly.

[318] To my mind the distinction which NZTA seeks to draw is excessively fine. I consider that the sense of the word "opportunities" (which is the plural) in Objective 3(i) means a state of affairs favourable for a particular action or aim. It was in that sense that I consider that the Board considered the implications for

improved cycling and walking. It noted that, like the shared pathway on the bridge itself, all of the proposed facilities for pedestrians and cyclists were shared paths[137] in relation to which the Board had a general concern about safety.[138]

[319] I do not consider that the Board can be criticised for its consideration (and rejection) at [441] of the package of proposals as amounting to a truly multi-modal, integrated long term solution for cycling and walking in the area when, as recorded in [418], it was NZTA's own case that the proposed pedestrian and cycling facilities would have significant benefits, with the phrase "multi-modal solution" featuring often in submissions and cross-examination.

[320] Finally there is the point made by Mr Milne that the Board was obliged to consider certain RMA and non-RMA documents under s 171(1)(a) and (d). By way of example he pointed to the Wellington RLTS's key outcomes which include increased mode share for pedestrians and cyclists. Mr Milne submitted, and I accept, that consideration of the extent to which the Project would contribute to mode shift was therefore necessary in order for the Board to consider the Project against those documents.

[321] For these reasons I do not consider that the Board erred in law in its consideration of mode shift.

The issue of a long-term solution

[322] The Board's lengthy discussion of transportation issues[139] concluded with the following comments:

> **A Long Term Solution?**
>
> [498] Counsel for [NZTA] made frequent reference to the Project being a *long term* and *enduring* solution. The first objective for the Project is: *To improve the* ***resilience****, efficiency and reliability of the State Highway network*. [our emphasis], although the methods then listed for achieving this refer only to the section of the westbound part of State Highway 1 from Paterson Street to Tory Street. We have a concern about the longer term

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137 At [433].
138 At [1252].
139 At [290] above.

resilience (ability to cope with change) of the eastbound part of State Highway 1 through the central city.

…

[502] The City Council's report: *Basin Reserve – Assessment of Alternative Options for Transport Improvements* notes that if the Project proceeds, in addition to the mitigation measures proposed by [NZTA] there should be:

> Commitment to consolidating state highway traffic away from Vivian Street and into a single east-west corridor.
>
> and:
>
> Consideration of how consolidating state highway traffic away from Vivian Street can be accommodated.

[503] This raises the question of whether the Basin Bridge would facilitate or impede that long term option. Only Mr Reid commented on this and his view was that a bridge in the position proposed would make it more difficult to bring the State Highway one-way pair together into a single corridor.

[504] There is of course no obligation for [NZTA] to convince us otherwise. The evidence is that Vivian Street would have to be revisited in about five years time (to allow time for planning another upgrade), and that the creation of additional eastbound capacity, especially at intersections, can be expected to have significant environmental implications.

[505] Thus we do not consider the Project can be credited with being a long term solution.

[323] With reference to those observations NZTA's ground of appeal stated:

> c The project objectives included 'to improve the resilience, efficiency and reliability of the State Highway network' inter alia, 'by providing relief from congestion on State Highway 1 between Paterson Street and Tory Street'.
>
> d The project objectives clearly related to the westbound section of the State Highway in this location.
>
> e The project objectives did not include providing a long-term solution for eastbound State Highway traffic in this location. The Board erred in requiring [NZTA] to demonstrate that the Proposal would address this issue.

[324] Mr Milne suggested a different interpretation of the relevant objectives. Noting that the identified section of SH1 did not specify a direction of travel, he contended that the objectives identified two roads (Paterson Street and Tory Street) between which two sections of SH1 lie, one eastbound and the other westbound. I

do not accept that interpretation. I note that at [498] the Board construed the objective as referring to the section of the westbound part of SH1 "from Paterson Street to Tory Street".

[325] Consequently I accept NZTA's submission that the project objectives clearly related to the westbound section of SH1 in this location. That view is reinforced by the reference to westbound traffic in the Minister's direction.

[326] However, if the Board had considered the eastbound part of SH1 through the central city to be part of its brief, then I am sure that the topic would have received much greater attention than in the closing paragraphs of the transportation discussion. In my view that very limited discussion was in the nature of a postscript which was responsive to what the Board referred to at [498] as NZTA's frequent references to the project being a long term and enduring solution. At [505] the Board rejected that proposition for the reasons given in that short discussion.

[327] While it may be thought to have been unnecessary for the Board to engage at all with NZTA's "solution" proposition, the fact that it did so does not suggest to me that the Board was requiring NZTA to demonstrate such a "solution" as a prerequisite for the approval of the NoR. Consequently I do not consider that the Board made the error alleged of wrongly interpreting the objective as applying to the eastbound part of SH1.

[328] For these reasons I answer Q 42 in the negative.

Issues 6, 7 and 8: Questions of law relevant to heritage and amenity

The refinement of the questions of law

[329] Issue 6 in the amended notice of appeal contained a single question:

> Q 45 For all or some of the reasons outlined above under paragraph 44, did the Board fail to have particular regard to relevant matters under s 171(1)(a) and (d) in assessing the effects of the Proposal on historic heritage and amenity?

[330] Paragraph 44 recited a series of alleged errors of law and para 46 listed 16 quite detailed grounds of appeal, including the contention at 46(e) that:

> The Board's finding at [782]–[783] that the Proposal constitutes an inappropriate development of historic heritage in terms of s 6(f) of the Act is based on the Board's finding that the environment constitutes a heritage area.

[331] Issue 7 posed questions Q 48(a) and Q 48(b) while Issue 8 specified a single question, Q 51.

[332] Although the amended notice of appeal contained distinct Issues 6, 7 and 8, NZTA's principal written submissions stated at para 35.2 that the questions of law relevant to heritage and amenity identified in those three issues had been refined to six questions which were set out and addressed in the submissions. Those refined questions were revised still further in the memorandum of 23 July 2015[140] as follows:

> In relation to Issue 6, we seek to refine the questions of law as outlined at para 35.2 of [NZTA's] Primary Submissions:
>
> [45A] When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?
>
> [45B] Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?
>
> [45C] When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?
>
> [45D] Did the Board correctly apply the definition of 'historic heritage' under s 2?
>
> [45E] What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

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[140] At [51] above.

Q 45A: When assessing the heritage or amenity effects on the environment under s 171(1), must the decision-maker do so 'through the lens' of the relevant plans under s 171(1)(a) and, if relevant, s 171(1)(d) documents? That is, should the effects be assessed 'through the lens' of the recognition and protection provided by those plans and/or documents?

[333] This question invokes NZTA's *King Salmon* argument. NZTA contends that the effects on the Project of heritage and amenity must be assessed having particular regard to the recognition and protection provided for in the Regional Policy Statement and the District Plan because those documents were prepared in accordance with and to give effect to Part 2. Consequently it argues that the correct approach to the assessment of heritage and amenity effects was:

> not within the framework of Part 2, rather it is through the lens of s 171.

The nub of the respondents' rejoinder is that planning documents do not determine the outcome of a s 171 decision.[141]

The planning framework

[334] The current Regional Policy Statement became operative in 2013 and the District Plan has been the subject of two plan changes in the last decade. Within that process new heritage items were added and the District Plan's objectives, policies and rules were amended in response to heritage becoming a matter of national importance under the RMA.

[335] The heritage items within the vicinity of the Basin Reserve and the wider bounds of the Project listed in the District Plan are:

(a) The Museum Stand;

(b) The Memorial Fountain;

(c) Government House;

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[141] At [117] above.

(d) Former Home of Compassion Crèche; and

(e) The Carillon.

As Mr McMahon noted,[142] neither the Basin Reserve generally nor its surrounds have been recognised in the planning documents as a listed heritage item or area.

[336] The District Plan recognises and provides for the protection of historic heritage in particular ways. Policy 20.2.1.4 is to ensure that the effects of subdivision and development on the same site as any listed building or object are avoided, remedied or mitigated. Other policies are to discourage demolition or relocation and to promote conservation and sustainable use (policies 20.2.1.1 and 20.2.1.3).

The Board's decision

[337] The Board suggested that in terms of heritage issues the case was somewhat unusual in that the Project did not result in the actual loss of any listed heritage fabric. However it considered that the geographical and historical context for the Project contained an unusual concentration of buildings, structures and places of heritage interest.[143]

[338] It recognised that the primary means for giving effect to the recognition of historic heritage is to include items of historic heritage in the District Plan under Schedule 1. However it stated that even if a place or area is not so scheduled, the requirement in s 6(f) would still apply.[144]

[339] The Board proceeded to recognise a "wider heritage area"[145] which it considered could be affected by the Project, which stretched from Taranaki Street in the west through the Basin Reserve and Council Reserve areas to Government House and the Town Belt in the east.[146]

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142 At [1603].
143 At [566].
144 At [556].
145 At [577].
146 At [588].

[340] In its summary of findings on heritage effects across the wider heritage area of interest it said:

> [757] Regarding adverse effects on historic heritage, we find that two issues stand out:
>
> (a) The risk to the status of the Basin Reserve as a venue for test cricket is confounded by the significance of the adverse effects on the heritage setting that arise from the mitigation required to address the risk to test-cricket status; and
>
> (b) The cumulative adverse effects of dominance and severance caused by the proposed transportation structure and associated mitigation structure in this sensitive heritage precinct, particularly on the northern and northeastern sectors of the Basin Reserve Historic Area setting.

[341] It is useful also to record Mr McMahon's different view on which NZTA placed emphasis:

> [1600] In respect of Section 6(f), I fully accept and support that the protection of historic heritage from inappropriate development is inextricably linked with sustainable management practice. In making an overall determination on any particular proposal's ability to fit with this strategic aim, I also find that the significance of the heritage resource(s) relevant in this case must also be factored in. In this respect, the settled provisions of the District Plan provide – for me – a critical filter through which significance is defined; and, in turn through which accordance with Section 6(f) can ultimately be determined.
>
> [1601] In this respect, I reiterate that there was agreement that there is no direct adverse effect arising from the Project on any heritage items currently identified (as significant and worthy of protection) in the operative District Plan. The evidence strongly suggests, therefore, that the Project is most certainly consistent with Section 6(f) as it relates to those listed items.

[342] After discussing the District Plan, the changes made to it and the non-inclusion of the Basin Reserve and its surrounds as a listed heritage item or area, Mr McMahon said:

> [1604] I am inclined, for this reason, not to afford the wider site the same significance that would otherwise be afforded to listed items. To do so would (in my view) undermine the integrity of the District Plan and the inherent effectiveness of the listing method as the primary tool to implement the District Plan's objectives and policies relating to the protection of historic heritage. This implementation role is important as it enables a process to test development against those policies and objectives which have already been deemed to be the most effective provisions to give effect to Section 6(f) and the Act's purpose.

He concluded that the Project did not represent inappropriate development in terms of s 6(f).

The parties' contentions

[343] NZTA submitted that, particularly in light of *King Salmon*, there was no mandate for a decision-maker on either a resource consent or designation to "re-write" the District Plan, citing the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd*:[147]

> The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed.

[344] NZTA developed that theme in this way:

> 36.15 There is a comprehensive suite of rules and criteria in Chapters 20 and 21 by which the District Plan recognises and provides for the protection of historic heritage from inappropriate use and development. This must be assumed to be a deliberate choice, tested and confirmed by the public participatory process. It is entirely appropriate in a built up, central city environment. Not only has the Majority failed to have particular regard to these provisions when considering the effects of the Project, it has imposed a wholly different regime for the recognition and protection of unlisted historic heritage well beyond what the Plan itself does.
>
> 36.16 Just as it would not have been permissible for the Board to find that any of the listed items was not a historic heritage value, nor is it open to the Board to substantially rewrite the Plan by adding items or, as in this case, whole 'precincts', which the Plan does not contemplate.
>
> …
>
> 36.19 [NZTA] submits that the Majority was wrong to undertake a sand-alone assessment of heritage within the Part 2 framework, as discussed above. Further, the Majority failed to have particular regard to the relevant planning documents when assessing the effects of the Project on historic heritage by finding heritage features in this location requiring protection under s 6(f); these being features

[147] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].

> beyond what the District Plan protects. This also led to the Majority finding that the Project was 'inappropriate' in relation to historic heritage without addressing that in the context of the District Plan and its regime for protection against inappropriate use and development.

[345] In his notes for oral reply Mr Casey emphasised that resort to Part 2 is only required in the case of conflict (or where a caveat applies, to which Q 45C relates). The point was made that there is no conflict between the planning documents and Part 2 and no conflict between the Project and the planning documents (including the derivative documents). It was submitted:

> The Board is required (before resorting to Part 2) to first assess effects having particular regard to the (a)–(d) matters and then consider whether a conflict exists that requires resolution. A 'thoroughgoing attempt' to resolve any apparent conflict must be made. If a conflict cannot be resolved, resort to Part 2 will be required.

[346] NZTA's position derived significant support from WCC on whose behalf Ms Anderson presented a thoughtful submission confined to the Issue 6 questions. Although aligned with NZTA's position on the historic heritage issue, WCC's submissions were not partisan in nature but reflected the fact that, as creator and regulator of the District Plan, WCC has a particular interest in how the District Plan is applied and interpreted.

[347] Key points made by WCC were:

- The effects of allowing the requirement must be considered "through the lens" or "in light of" the s 171(1)(a) to (d) matters. That means that the District Plan is a key "filter" of whether the effects that arise from a proposal are acceptable or appropriate;

- That analysis is supported by the requirement in s 171(1) to have "particular regard" to the listed matters which include the District Plan. That is to be contrasted with the lesser obligation to "have regard to" in s 104(1), albeit that both are subject to Part 2;

– Because of the lack of recognition of the Basin Reserve in the District Plan, the Board could not resort to Part 2 as justification for its elevated treatment of unlisted heritage items and views;

– The Board erred in recognising an extended important heritage area which was inconsistent with the significance the District Plan gives to the heritage values in the area.

[348] Although, like NZTA, WCC accepted that simply because the Basin Reserve or the view along Kent and Cambridge Terraces is not listed or specifically identified in the District Plan did not mean that they were not of any heritage value or importance, nevertheless the decision-maker cannot resort to Part 2 as justification for the elevated treatment of unlisted heritage items and views.

[349] WCC's position was that the District Plan is a key basis for decision-making under the RMA and its provisions "must be applied as written". In response to my question whether the District Plan is exhaustive on the topic of historic heritage, Ms Anderson replied in the affirmative.

[350] The respondents' submissions in response were no less comprehensive. In summary they submitted:

(a) NZTA's argument was based on an erroneous application of *King Salmon* to the present circumstances;[148]

(b) the adverse effects which the Board identified at [757][149] were directly relevant to the inquiry not only because they were environmental effects under s 171 but also under s 149P because concerns about them were an important part of the Minister's decision to refer the proposal to the Board;

(c) all that the Board was required to do was to have particular regard to the various plans, and it duly did so;

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148 See at [117] above.
149 At [340] above.

(d) the Board's concern about the adverse effects was consistent with the guidelines in Part 2 to which its s 171 consideration was subject.

Analysis

[351] The extensive argument which I heard convinced me that phrasing the question by reference to "through the lens" or by way of a "filter"[150] is more likely to confuse than to clarify.[151] The search for meaning inevitably invites elaboration of the theme, an example of which appeared in TAC's submissions:

> … Contrary to the Appellant's submissions, s 171 the (a–d) matters do not form themselves into a combined *lens* which magnify the benefit of a proposed designation and diminish or blur its adverse effects.

I prefer to focus on the words of the statute.

[352] It is plain that the Board was required to have particular regard to inter alia the District Plan including the heritage items listed in Schedule 1. As NZTA says, it would not have been permissible for the Board to purport to find that any of the listed items was not of historic heritage value. Nor would it have been permissible for the Board to ignore them. The Board was required to consider the s 171(1)(a) matters specifically and separately from other considerations.[152] That said, the obligation on the Board in a s 171(1) context is to have "particular regard to", not "to give effect to".

[353] How much weight the Board gives to an item to which it is required to have regard or particular regard is a matter solely for the Board in the context of an appeal that is confined to questions of law, subject of course to any *Edwards v Bairstow* challenge. The issue which I am required to decide is whether as a matter of law the Board was permitted to have regard to other areas or items of historic heritage beyond that specified by the District Plan. In other words: Is the Plan exhaustive on the topic?

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150 At [341] and [347] above.
151 Kim Lewison *Metaphors and Legal Reasoning*, The Chancery Bar Association Lecture 2015.
152 See [66] above.

[354] In my view the Board was not so confined. Its consideration of Part 2 considerations was not restricted to instances of unresolvable conflict. Provided it discharged the obligation to have particular regard to the specified matters, in pursuance of its Part 2 obligation the Board was not precluded from also taking into consideration as effects on the environment the adverse effects of the requirement on other items it identified as being of significant historic heritage. In doing so it did not inevitably fail to have particular regard to the Plan as a s 171(1)(a) matter.

[355] NZTA's submission was that the Board had imposed a wholly different regime for the recognition and protection of unlisted historic heritage that went "well beyond what the Plan itself does". However it is not the function of the Court on an appeal such as this to undertake a qualitative assessment. The question to be answered must be confined to whether the Board made an error of law in reaching its conclusion. In my view it did not do so.

Q 45B: Further, should the Board have assessed the effects having particular regard to its finding at [1230] that the works were reasonably necessary to achieve the objectives under s 171(1)(c)?

[356] This question was derived from ground of appeal 29(e) (in the context of Issue 3) which asserted that the Board had failed to have particular regard to the finding at [1230] that the work was reasonably necessary to achieve NZTA's objectives. The 23 July 2015 memorandum described Q 45B as a development of Q 28(b) in its application to the original Q 45.

[357] The answer to Q 45B is plainly in the affirmative. That is simply the statutory obligation.

[358] However the reality is that NZTA's contention is directed not to the nature of the obligation but to whether the obligation was in fact discharged. While such an inquiry could be pursued on a general right of appeal, I do not consider that it is properly the subject of an appeal limited to questions of law only. However, in the event that my analysis is incorrect, I make the following further observations.

[359] I apprehend that at least one of the reasons for the contention that the Board did not have "particular" regard to the finding at [1230] is that in its description of its proposed decision structure at [199][153] the Board did not include the word "particular" in its reference to s 171(1)(c) in subpara (d).[154] NZTA's submissions stated that one of three noteworthy aspects of [199] was:

> 28.5(b) The Majority explicitly separates the s 171(1)(b) and (c) considerations from the consideration of effects. That is, it says that it will consider the effects of the requirement; then consider the (b) and (c) matters separately. It does not say that it will consider the effects of the requirement, having particular regard to whether [NZTA] has adequately considered alternatives (s 171(1)(b)); or whether the designation and the work is reasonably necessary for [NZTA] to achieve its objectives (s 171(1)(c)).

[360] However it is quite apparent that the Board did have particular regard to the s 171(1)(c) consideration. In addition to the discussion spanning [1217] to [1230] under the heading "Reasonably necessary for achieving objectives (s 171(1)(c))", the Board touched again on the issue of [1277] to [1278] and implicitly in the course of its ultimate conclusion at [1317].

Q 45C: When there is no 'invalidity, incomplete coverage or uncertainty of meaning' in the relevant plans under s 171(1)(a), is it appropriate for a decision-maker to assess effects against s 6(f) (for historic heritage) and s 7(c) (for amenity values)?

[361] This question also invokes NZTA's *King Salmon* argument. In essence it asks whether it is appropriate to address Part 2 considerations in the absence of one of the three caveats explained in *King Salmon*,[155] namely:

(a) if the relevant plan is invalid;

(b) if the relevant plan does not "cover the field";

(c) if there are uncertainties as to the meaning of the particular policies in the plan.

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153 At [77] above.
154 The same is true in relation to the reference to s 171(1)(b) in subpara (c).
155 *King Salmon*, above n 26, at [88].

[362] WCC supported NZTA's case on this point, submitting that the key findings in *King Salmon* at [84]–[85] were as applicable to District Plans as to Regional Plans. It contended that *King Salmon* removed the ability for a decision-maker to have recourse to Part 2 when giving effect to or interpreting a plan unless one of the three specific caveats applied. This, it was said, was significantly different from the previous treatment of Part 2 as the "engine room"[156] of the RMA. Its submissions also explained why the second and third caveats were not of application in this case.

[363] I am unable to accept that submission. The role of the caveats identified in *King Salmon* was to address the situation where there was, what one might describe generically as, some inadequacy in the plan. The caveats accordingly qualified the obligation to give effect to such an inadequate plan and preserved the avenue of reference back to Part 2 which the "give effect to" formula had removed.

[364] As explained earlier, the manner of recourse to Part 2 in the context of s 171 (and other sections stated to be "subject to Part 2") is not limited in the manner described in *King Salmon*.[157] Of course the three caveats may still have application in relation to inadequate plans so far as concerns the obligation to have particular regard to them.

[365] I have some reservation about the formulation of the question so far as it incorporates the word "appropriate". As the Supreme Court remarked in *King Salmon*,[158] the scope of that word is heavily affected by context. I tend to think that the words "permissible" or "legitimate" would have been preferable.

[366] However, assuming that the consideration of an application under s 171 does in fact engage historic heritage or amenity values, for the reasons above the answer to Q 45C is in the affirmative.

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156 *Auckland City Council v John Woolley Trust*, above n 54; see also [111] above.
157 At [85] in [113] above.
158 *King Salmon*, above n 26, at [100].

Q 45D: Did the Board correctly apply the definition of 'historic heritage' under s 2?

[367] One of the matters of national importance listed in s 6 as (f) is the protection of historic heritage from inappropriate subdivision, use and development. "Historic heritage" is defined in s 2 of the RMA as follows:

> **historic heritage**–
> (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
> (i) archaeological:
> (ii) architectural:
> (iii) cultural:
> (iv) historic:
> (v) scientific:
> (vi) technological; and
> (b) includes–
> (i) historic sites, structures, places, and areas; and
> (ii) archaeological sites; and
> (iii) sites of significance to Māori, including wāhi tapu; and
> (iv) surroundings associated with the natural and physical resources.

[368] The nature of the Board's alleged error in its interpretation of s 2 was described in ground of appeal 40(c) as follows:

> The Board wrongly applied paragraph (b)(iv) of the definition of 'historic heritage' in s 2 of the Act and thereby extended its consideration beyond the surroundings associated with the natural and physical resources constituting the historic heritage within the project area (being the Basin Reserve and listed heritage items) to conclude that the wider setting to those resources was of itself a heritage area.

The parties' contentions

[369] NZTA's primary written submissions developed the argument in this way:

> 37.3 While the definition includes 'historic' places and areas it does not specifically provide for heritage precincts or landscapes. The fact that there may be a collection of heritage items within the locality does not make it an historic place or area, unless that locality is a place or area of historic significance in its own right. As a matter of law it was not open to the Majority to conclude that the wider Project area is a heritage precinct/landscape.
>
> 37.4 By establishing a heritage precinct at this location, the Majority has developed a heritage landscape construct which it found stretches from Taranaki Street in the west through the Basin Reserve and Canal Reserve areas to Government House and the Town Belt in the

> east and applied it to the wider Project site. It did so on the basis that there is an unusual concentration of heritage buildings, sites and places at this location, such that the Project is contained within what it describes as an important heritage area.
>
> 37.5 By establishing a heritage landscape of this scale in this location, the Majority has purported to confer s 6(f) protection over the entire landscape rather than the particular heritage items within it. This level of protection is not provided for in the District Plan which, as noted, protects scheduled sites and features while ensuring that the diversity of development provided for within the planning framework relevant to this location is not constrained.

[370] NZTA acknowledged that the Environment Court in *Waiareka Valley Preservation Society Inc v Waitaki District Council*[159] had been satisfied that a purposive interpretation of s 6(f) enabled that provision to describe a collection of historic sites, places or areas as a heritage landscape and had concluded that the nomenclature 'landscape' could easily be substituted by 'area' or 'surrounds', depending on the particular context.

[371] However NZTA noted that the Court has since expressed considerable caution regarding the extension of (b)(i) of the definition to include a collection of historic sites, places or areas as a "heritage landscape". In *Maniototo Environment Society Inc v Central Otago District Council*,[160] the Environment Court noted that such usage:

> … may be dangerous under the RMA where the word "landscape" is used only in s 6(b). Further, the concept of a landscape includes heritage values, so there is a danger of double-counting as well as of confusion if the word "landscape" is used generally in respect of section 6(f) of the Act.

Similarly in *Gavin H Wallace Ltd v Auckland Council*[161] the Court also expressed caution over the use of the term and its inclusion in the lexicon of the RMA.

[372] Consequently NZTA submitted, having regard to the definition of "historic heritage", the case law and the District Plan, that the RMA does not envisage protection being extended under s 6(f) to a central city urban landscape of the scale

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159 *Waiareka Valley Preservation Society Inc v Waitaki District Council* EnvC Christchurch C058/2009, 13 August 2009 at [230]–[231].

160 *Maniototo Environment Society Inc v Central Otago District Council* EnvC Christchurch 103/09, 28 October 2009 at [208].

161 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [66]–[67].

determined by the Board. To do so would result in all activities within that location being "effectively trapped" within a special heritage landscape thereby "locking up" future urban development contemplated by the planning framework.

[373] In brief summary the respondents submitted that:

(a) the definition of "historic heritage" is broad and explicitly "includes" historic sites, structures, place and areas as well as surroundings associated with physical resources;

(b) NZTA's interpretation is unduly narrow and at odds with the text and purpose of the RMA;

(c) the Board examined whether there was an area of historic heritage, as the definition permits, but NZTA wrongly suggests that the Board concluded that there was some formal heritage precinct or landscape.

Analysis

[374] The competing perspectives in the contest before the Board are captured in the following paragraphs:

> [614] Some heritage experts have chosen to focus their assessments on individual heritage items, particularly listed or registered items, while others give attention to considerations of heritage setting as well. With reference to terminology, this is partly a distinction between *built heritage* and *historic heritage*.
>
> …
>
> [616] The Assessment of Environmental Effects prepared by [NZTA] refers explicitly to *Built Heritage* as the title for Section 26 of the document, and Technical Report 12 is similarly entitled *Assessments of Effects on Built Heritage*. [NZTA's] closing submissions confirmed this thematic focus.
>
> …
>
> [617] … The City Council's closing submissions made no reference at all to section 6(f) of the RMA, nor to *historic heritage*, choosing rather to focus on issues related specifically to listed or registered heritage items.
>
> …

> [622] Mr Milne, in his closing submissions, made numerous references to *historic heritage* and argued explicitly that the focus of [NZTA's] case on heritage matters *was wrongly limited to built heritage*. Mr Bennion, in his closing submissions, having cited explicitly the relevant RMA sections, similarly made numerous references to *historic heritage* and argued for the proper recognition of *setting* when assessing effects on historic heritage.

[375] As earlier noted,[162] while the Board recognised the District Plan as the primary means of giving effect to the recognition of historic heritage, it proceeded on the basis that even if a place or area was not scheduled s 6(f) still applied.

[376] There are a number of reasons why it is not easy to attribute to the Board a particular interpretation of the definition of "historic heritage" in s 2. First, the Board's discussion under the heading "Heritage, Cultural and Archaeological" is extensive, spanning [535] to [783], and the evidence is exhaustively analysed. That said, within that thorough review there are certainly references to precincts and landscapes, which are the focus of NZTA's submission.

[377] Secondly, the protection of particular sites or areas is not confined to the District Plan. Although the Basin Reserve is not included in the schedule to the Plan, it is registered as an historic area under the Heritage New Zealand Pouhere Taonga Act 2014.[163] Similarly the Board viewed the fact of the creation of the National War Memorial Park under its own empowering legislation[164] as an indicator of its national significance.

[378] Thirdly, the mosaic which the Board was required to consider was augmented by the Minister's reasons for direction to which the Board was directed by s 149P(1)(a) to have regard. Relevant to the issue of historic heritage those reasons stated:

> • The proposal is adjacent to and partially within the Basin Reserve Historic Area and international test cricket ground; in the vicinity of other historic places including the former Home of Compassion Crèche, the former Mount Cook Police Station, Government House and the former National Art Gallery and Dominion Museum; and is adjacent to

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162 At [338] above.

163 At [562]. The definition of "historic area" in s 6 means an area of land that contains an inter-related group of historic places and forms part of the historical and cultural heritage of New Zealand.

164 National War Memorial Park (Pukeahu) Empowering Act 2012.

> the National War Memorial Park (Pukeahu). The proposal is likely to affect recreational, memorial, and heritage values associated with this area of national significance (including associated structures, features and places) which contribute to New Zealand's national identity.

[379] There is force in the respondents' submission that it is difficult to see how the Board could have complied with its obligation to have regard to the reasons of the Minister in referring the proposal to it without taking the approach it did to the "area" of historic heritage.

[380] Indeed one of the instances of the Board's use of "precinct" was with reference to three of those places of importance when, in relation to an anticipated Anzac Day centenary celebration, it said:[165]

> Such an event would clearly link the NWM Park, the Basin Reserve, and Government House – covering the entire precinct we have described.

[381] In seeking to identify from the Board's broad review the interpretation which the Board placed on s 2, there are three paragraphs which I consider are particularly instructive:

> [557] The protection given by Section 6(f) extends to the curtilage of the heritage item and the surrounding area that is significant for retaining and interpreting the heritage significance of the heritage item. This may include the land on which a heritage building is sited, its precincts and the relationship of the heritage item with its built context and other surroundings.
>
> …
>
> [615] In defining *historic heritage*, the RMA makes a clear distinction between historic sites and historic heritage. At their conferencing, the experts drew attention to *the definition of historic heritage in the RMA – which includes (b)(iv) surroundings associated with the natural and physical (historic heritage) resources.*
>
> …
>
> [623] We agree that we are obliged to consider the effects on historic heritage and that historic heritage includes not only built heritage but the surroundings and setting in which the built heritage exists. In our view, the explicit focus of [NZTA], Wellington City Council and Heritage NZ heritage assessments on *built heritage*, as distinct from *historic heritage*, unduly limited the scope of those assessments.

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165 At [589].

The third of those paragraphs represented the Board's conclusion on the competing contentions in the extracts at [374] above.

[382] While for the reasons in [376] to [379] above Q 45D has proved to be one of the more difficult issues in the case, my conclusion is that there was no error in the Board's interpretation of the definition of "historic heritage". I do not accept NZTA's submission that in its application of the definition the Board "went well beyond the surrounds and setting of historic heritage".[166]

[383] NZTA's submissions further argued that if s 6(f) protection as found by the Board was unobjectionable, then the Board had erred in law "by applying this concept to the Project area without any methodology being identified or followed on which to base such a significant finding". I do not address that submission because I do not consider that it involves either a question of law or an issue sufficiently connected to Q 45D.

Q 45E: What is the correct approach to the application of the test of 'inappropriateness' in s 6(f) [should the Court consider resort to Part 2 of the RMA was available to the Board in the circumstances of this case]?

[384] The bracketed words in the question reflect the fact that this question is conditional upon an affirmative answer to Q 45C and a rejection of NZTA's argument that it was not appropriate for the Board to assess historic heritage under Part 2.

[385] NZTA's argument in summary form was:

(a) prior to *King Salmon*, "inappropriate" in the context of s 6 was understood as having a wider meaning than "unnecessary" and was to be considered on a case by case basis;

(b) *King Salmon* held that the former approach did not accurately reflect the proper relationship between ss 5 and 6;

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[166] See [757] in [340] above.

(c) *King Salmon* held that "inappropriateness" is heavily affected by context and that the standard relates back to the attributes to be preserved or protected rather than the activity proposed;

(d) *King Salmon* also gave a clear direction that it is the relevant planning documents that provide the basis for decision-making under the RMA. This includes a decision-maker's evaluation of "inappropriateness" in the context of s 6.

[386] Consequently NZTA submitted:

> 38.6 … Therefore, in the absence of any allegation of invalidity, incomplete coverage or uncertainty of meaning; a decision-maker is required to assess s 6(f) matters as particularised by the relevant planning documents before them, from National Policy Statements down to district plans.
>
> 38.7 Even if the Majority was right to go beyond the District Plan in determining what constituted historic heritage, it should still have assessed what was appropriate by having particular regard to the scale and nature of the protection conferred by the District Plan. It did not do so.

[387] Mr Palmer raised the objection that this argument did not appear in the amended notice of appeal. However in my view the proposition advanced is in essence a variation on the theme reflected in Q 45A and Q 45C, in particular the "through the lens" argument.

[388] I first note that the Board explicitly recognised the guidance of *King Salmon* on the meaning of "inappropriate" in s 6(f):

> [558] Importantly, for this matter, we are guided by the Supreme Court in *King Salmon* as to the application of the word *inappropriate* as it is used in Section 6(f). Where the term inappropriate is used in the context of protecting historic heritage, the natural meaning is that inappropriateness should be assessed by reference to what it is that is being protected. That is, within the context of the heritage elements that exist within and around the Basin Reserve area, their value and the effects of the project on those values.

[389] In support of its conclusion at [783] that the Project was not consistent with s 6(f) the Board said:

> [780] Our overall evaluation is not simply a matter of considering effects on listed heritage items or confining our evaluation to a consideration only of the loss or restoration of heritage fabric, although such historic heritage

> effects are part of the cumulative picture. We must consider the character and significance of the whole wider heritage area and the appropriateness of such a structure within it.
>
> [781] We noted in our introduction to this section that the common theme in the relevant statutory documents – the RMA, Regional Policy Statement and District Plan – is to protect heritage from inappropriate use and development. We concluded in our findings from the sub-area analysis reported earlier in this decision two important issues: the inherent conflict in mitigating adverse effects, and the cumulative adverse effects of severance within the heritage setting. It appears to us that those conclusions align clearly with the final assessment of Mr Salmond on *appropriateness* and the findings of Ms Poff from her Part 2 assessment.
>
> [782] Consequently, we find that the evidence of historic heritage supports the conclusion that the Project before us constitutes an inappropriate development within this significant heritage area of the city.

[390] It is apparent in my view from [781] and a number of other paragraphs that the Board did have particular regard to the District Plan and other relevant documents. NZTA's complaint is with the Board's ultimate conclusion, as reflected in the submission:

> 38.8 … the Majority should have concluded that, because there was no direct adverse effect arising from the Project on any heritage items identified as significant and worthy of protection in the District Plan, the Project is consistent with s 6(f) as it relates to those listed items and therefore does not represent inappropriate development in terms of s 6(f).

[391] In effect NZTA's case is that the Board erred in not reaching a conclusion in accordance with (ie by giving effect to) the District Plan. As my earlier findings reflect, I do not agree that the Board's task under s 171(1) was so confined.

[392] I do not consider that there was any error of law in the Board's consideration of inappropriateness in s 6(f). In this context it is desirable to reiterate that this is not a general appeal by way rehearing and I am not sitting in judgment on the merits of the Board's conclusion.

Issue 8: Failure to consider options within the scope of the application to address amenity and heritage related effects to the Gateway Building

[393] Although this item was omitted from the memorandum of 23 July 2015[167] there was no issue that it remained live and the parties' written submissions addressed the following question:

> Q 51 Did the Board fail to have regard to a relevant matter, being options within the scope of the application that could balance the effects of the Proposal on the playing of cricket with other effects (heritage and amenity)?

[394] NZTA's grounds of appeal were:

> 52 The grounds of appeal in relation to this issue are:
>
> (a) The Board found at [965] that the cricketing experts were of the uncontested view that the 65m Northern Gateway Building was necessary to mitigate the effects on cricket when the evidence of Dr Sanderson was that a Northern Gateway Building of 45m would be sufficient to mitigate the risk of visual distraction to batters.
>
> (b) As a consequence, the Board found at [758] to [761] that there is an inherent conflict in mitigating the adverse effects on heritage. In particular, by finding that a Northern Gateway Building of 65m is required to mitigate the effects on cricket, but that mitigation has of itself other adverse heritage-related effects, including effects on views and amenity.
>
> (c) Consequently, the Board failed to consider as a relevant matter, options within the scope of the application to balance the needs of cricket with any other effects (historic heritage or amenity) of a longer structure, in particular by:
>
> (i) failing to consider a Northern Gateway Building of 45m or 55m;
>
> (ii) failing to consider a Northern Gateway Building of 65m together with conditions to ensure that the Building remain a sense of openness between 45 and 65 metres.
>
> (d) In the alternative, by rejecting the evidence of Dr Sanderson, the Board implicitly found that the evidence of the cricketers was more persuasive in assessing the Proposal's effects on the Basin Reserve. The Board therefore could only have reasonably found in accordance with the cricketers' evidence on amenity effects that the Northern Gateway

[167] At [332] above.

> Building would appropriately protect the ambience of the Basin Reserve (contrary to the Board's finding at [653]).

[395] It is quite apparent that the Board was cognisant of the options involving a Northern Gateway Building (NGB) of reduced length. At [36] the Board notes that the key elements of the Project included:

> (f) A new structure, known as the Northern Gateway Building, approximately 65m long and 13m high at or about the northern end of the Basin Reserve, adjacent and to the east of the R.A. Vance Stand. Shorter alternatives to the proposed structure within the same approximate 65m long and 13m high envelope/area are also proposed, together with landscaping;

[396] The primary function of the NGB was to screen the moving traffic on the Basin Bridge from views within the Basin Reserve so as to mitigate the effects of the Basin Bridge on cricket and amenity within the Basin Reserve. NZTA made it clear that it had no interest in developing the building, except as mitigation for the effects of the Basin Bridge.[168]

[397] Hence the longest option was naturally the focus of the Board's consideration because the cricketing experts were of the universal view that that option was necessary to mitigate the effects on cricket. So far as Dr Sanderson's evidence was concerned, Mr McMahon noted:[169]

> [1383] … The cricket evidence from the Basin Reserve Trust is preferred to the evidence of Dr Sanderson for the Applicant, who generously acknowledged that, despite his technical evidence in respect to ophthalmology, he should defer to cricket experts on the extent of the length of screening necessary to avoid distracting movement on the Basin Bridge for cricket players.

[398] I agree with Mr Palmer's submission that it is apparent from the Decision and from the Draft Decision (which included proposed conditions regarding design) that the Board did not fail to have regard to other options or conditions. I note the irony in his closing observation that NZTA appeared to be complaining that the Board did not consider options which would have had an even greater impact on historic heritage than the option it did focus on.

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168 [1424].
169 [1383].

Summary

[399] A decision on an appeal "only on a question of law" which raises more than 35 questions of law is not well-suited to a succinct summary. That is especially so when ten of the questions asked whether the Board's conclusions on various issues were findings to which it could reasonably have come on the evidence, that is, whether those conclusions were so insupportable that they amounted to errors of law.

The judgment finds that the Board's Decision does not contain any of the errors of law alleged. Although it is not practicable to recite each finding, attention is drawn to the following points of general application.

The meaning of s 171(1)

The provision in s 171(1) to have "particular regard to" the matters specified in (a) to (d) required the Board to consider these matters specifically and separately from other relevant considerations but did not indicate that extra weight should be placed on those matters.[170]

The relocation of "subject to Part 2" did not change the meaning of s 171(1).[171] The Board's role under s 171(1) was different from that in *King Salmon* where the obligation under s 67(3) was to give effect to the NZCPS. *King Salmon* did not change the import of Part 2 for the consideration under s 171(1) of the effects on the environment of a requirement.[172]

Adequate consideration of alternative options

Section 171(1)(b):

> (a) permits a more careful consideration of alternatives when there are more significant adverse effects of allowing a requirement;[173] and

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170 [64]–]68] above.
171 [86]–[98] above.
172 [99]–[118] above.
173 [140]–[142].

(b) does not require a requiring authority to fully evaluate every non-suppositious alternative with potentially reduced environment effects.[174]

In some, but by no means in all, cases it may be necessary for the decision-maker to gain access to the weightings in a multi-criteria analysis in order to be satisfied that adequate consideration has been given to alternatives.

Enabling effects

A project's enabling benefit can constitute an effect to be taken into account under s 171(1) and/or s 5.[175] In order to be given weight the enabling benefit need not be unique to a project, guaranteed to go ahead or able to be quantified.[176]

Transportation benefits

Where a project will have more than minimal adverse effects no higher standard of proof is required to demonstrate the project's transportation benefits.[177]

Heritage and amenity

On a s 171(1) application a District Plan is not exhaustive concerning items of historic heritage. The decision-maker's consideration of Part 2 considerations is neither restricted to instances of unresolvable conflict[178] nor confined to situations where one of the three *King Salmon* caveats is applicable.[179]

The Board did not err either in its interpretation of the definition of "historic heritage" in s 2[180] or in its approach to the application of "inappropriateness" in s 6(f).[181]

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174 [156].
175 [265]–[266].
176 [268].
177 [299].
178 [354].
179 [363]–[364].
180 [382].
181 [392].

Disposition

[400] For the reasons above, NZTA has not established that in its Decision the Board made any error of law of the nature reflected in the several questions of law in the amended notice of appeal, as revised by the 23 July 2015 memorandum. Consequently NZTA's appeal under s 149V(1) is dismissed.

[401] The parties requested the opportunity to make submissions on costs. In view of the outcome of the appeal:

(a) the respondents are to file any costs memoranda by 11 September 2015;

(b) NZTA is to file a costs memorandum by 2 October 2015; and

(c) the respondents may file any memoranda strictly in reply by 16 October 2015.

Leave is reserved to apply to amend that timetable if necessary.

[402] Finally I record my appreciation to all counsel for the quality of their submissions and the assistance which they provided to the Court in navigating a course through this complex matter.

_____

Brown J

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BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC051

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal under clause 14 of Schedule 1 to the Act
	BETWEEN	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
		(ENV-2016-AKL-000014)
		Appellant
	AND	WHAKATĀNE DISTRICT COUNCIL
		Respondent

Court:	Environment Judge DA Kirkpatrick Environment Commissioner RM Dunlop Environment Commissioner WR Howie
Hearing:	At Whakatāne on 9 March 2017 Respondent's submissions in reply filed on 24 March 2017
Appearances:	S Gepp for Royal Forest & Bird Protection Society Inc D Riley for Whakatāne District Council
Date of Decision:	6 April 2017
Date of Issue:	6 April 2017

DECISION OF THE ENVIRONMENT COURT

A: The appeal is refused.

B: The provisions of the proposed Whakatāne District Plan are amended in the terms set out in **Attachments A and B** to this decision.

C: There is no order as to costs.

REASONS

Introduction

[1] The review of the Whakatāne District Plan, notified on 28 June 2013, has now progressed to the point where the only remaining issue to be resolved is the status or classification of the activity of harvesting of mānuka and kānuka in Significant Indigenous Biodiversity Sites (**SIBS**) listed in the schedules to Chapter 15 – Indigenous Biodiversity.

[2] The relevant decisions of the Whakatāne District Council (**the Council**) on submissions were that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.1 Schedule A (Coastal and Wetland Sites) and a permitted activity in SIBS listed in Rule 15.7.3 Schedule C (Te Urewera-Whirinaki Sites).

[3] The appellant, Royal Forest & Bird Protection Society Inc (**the Society**) seeks in its appeal that such harvesting be a non-complying activity in SIBS in Schedule A and a restricted discretionary activity in SIBS in Schedule C.

[4] The parties agree that such harvesting should be a restricted discretionary activity in SIBS listed in Rule 15.7.2 Schedule B (Foothills).

Background

[5] As notified, the proposed Whakatāne District Plan included Rule 15.2.1.1(9) stating the activity status for the following activity:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal Zone, for commercial use provided that; a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; b. that no more that 10% of the **Significant Indigenous Biodiversity Site** is harvested in any one year; and c. that a sustainable management plan verifying the above is submitted to **Council**.	RD	C	P

[6] The Society, in its submissions on the proposed District Plan in relation to this

activity, submitted that there should be no permitted or controlled harvesting of mānuka and kānuka within scheduled SIBS, that the replanting conditions were not enforceable and that the ten per cent per year threshold was unsustainable. It sought to change the activity status or classifications in this part of the activity table to non-complying for SIBS in Schedule A and to discretionary for SIBS in Schedules B and C.

[7] The Council's decisions on submissions and further submissions on the plan in relation to Chapter 15 – Indigenous Biodiversity said this at paragraph 13.2.9 in relation to activity 9 in Rule 15.2.1:

> The committee heard evidence from several submitters including Mr Brosnahan about the status and threshold level for sustainable harvesting of mānuka and kānuka. Forest & Bird and P Fergusson asked for a more restrictive status for commercial harvesting of kānuka and mānuka within SIBS, while DoC requested clarification that the reference to ten per cent in the Rule applied to mānuka and kānuka rather than all indigenous vegetation. Federated Farmers and John Fairbrother for Nikau Farms sought provisions that allow the harvesting in a sustainable way as either a permitted or controlled activity in all SIBS.
>
> The committee notes that the rule is intended to provide for sustainable harvesting of mānuka and kānuka, recognising that in some SIB regenerating mānuka and kānuka can be managed sustainably to enable the economic benefits to be gained from the activity. However, the committee takes particular note that the rule does not apply to vulnerable coastal mānuka and kānuka in the Rural Coastal zone.
>
> The committee notes that commercial extraction of mānuka and kānuka have been managed sustainably for many years as mānuka and kānuka grows relatively fast and can be sustainably harvested while retaining significant values.
>
> The committee agrees with the submission by DoC that clearance of ten per cent of the total area of a SIB could amount to a large amount of clearance in any one year, particularly in the SIB extended over multiple titles and included other vegetation types. To address this issue the amended wording is accepted to clarify that the clearance relates to ten per cent of the total area of mānuka and kānuka as follows:
>
> > *"Harvesting of mānuka and kānuka excluding any kānuka in the rural coastal zone, for commercial use provided that:*
> >
> > *(a) an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate;*
> >
> > *(b) that no more than ten per cent of the <u>total area of kānuka and mānuka in a scheduled feature</u> **~~Significant Indigenous Biodiversity Site~~** <u>on any site</u> is harvested in any one year; and*
> >
> > *(c) that a sustainable management plan verifying the above is submitted to **Council**."*

[8] The decision made no change to the activity status in any of the Schedules.

[9] The Society's appeal against this decision is on the grounds that allowing commercial harvesting of mānuka and kānuka on a concessionary basis does not protect the habitat values of this vegetation type which may contain threatened species, and does not recognise the successional aspect of forest ecology, and that the

conditions are unenforceable. The relief sought in the appeal on this matter was the same as the submission, namely that the activity should be non-complying in Schedule A sites and discretionary in Schedules B and C sites.

[10] The Council and the Society, with other interested parties, participated in mediation of this and many other matters in the Indigenous Biodiversity chapter. The relevant outcomes for the purposes of this appeal were that the description of Activity 9 in (now) Rule 15.2.1.2 (including its requirements, conditions, and permissions) was reworded but the activity status for areas listed in Schedules A and C was not agreed, as follows:

	Activity Status	**Schedule A** <u>**Coastal and Wetlands**</u>	**Schedule B** <u>**Foothills**</u>	**Schedule C** <u>**Te Urewera - Whirinaki**</u>
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted in the same year in the same or similar indigenous species or allowed to naturally regenerate; <u>b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration</u>; and ~~b~~<u>c.</u> no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; ~~and~~ <u>d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover; and</u> ~~c. a sustainable management plan verifying the above is submitted to **Council.**~~	~~RD~~ D <u>**or**</u> NC	~~C~~ RD	P <u>**or**</u> RD

[11] The deletion of condition (c) (as notified) was addressed through mediation by the insertion of a new rule 15.2.6 – *Harvesting of kānuka and mānuka (Rule 15.2.1.2(9))*, which provides:

> *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements (in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[12] Also agreed through this mediation process was that the activity status for classification of such harvesting in SIBS listed in Schedule B should be restricted

discretionary.

[13] The remaining issues for the Society and the focus of the hearing of this appeal are the appropriate activity statuses or classifications for such harvesting as described in Activity 9 in SIBS listed in Schedules A and C.

Relevant planning provisions

[14] It was common ground between the Society and the Council that the following provisions of the operative Bay of Plenty Regional Policy Statement (**RPS**) concerning matters of national importance are relevant to this appeal:

> **Policy MN 1B: Recognise and provide for matters of national importance**
>
> *(a) Identify which natural and physical resources warrant recognition and provision for as matters of national importance under section 6 of the Act using criteria consistent with those contained in Appendix F of this Statement;*
>
> *...*
>
> *(c) Recognise and provide for the protection of areas of significant indigenous vegetation and habitats of indigenous fauna identified in accordance with (a); ...*
>
> **Policy MN 2B: Giving particular consideration to protecting significant indigenous habitats and ecosystems**
>
> *Based on the identification of significant indigenous habitats and ecosystems in accordance with Policy MN 1B:*
>
> *(a) Recognise and promote awareness of the life-supporting capacity and the intrinsic values of ecosystems and the importance of protecting significant indigenous biodiversity;*
>
> *(b) Ensure that intrinsic values of ecosystems are given particular regards to in resource management decisions and operations;*
>
> *(c) Protect the diversity of the region's significant indigenous ecosystems, habitats and species including both representative and unique elements;*
>
> *(d) Manage resources in a manner that will ensure recognition of, and provision for, significant indigenous habitats and ecosystems; and*
>
> *(e) Recognise indigenous marine, lowland forest, freshwater, wetland and geothermal habitats and ecosystems, in particular, as being underrepresented in the reserves network of the Bay of Plenty.*
>
> **Policy MN 3B: Using criteria to assess values and relationships in regard to section 6 of the Act**
>
> *Include in any assessment required under Policy MN 1B, an assessment of: ...*
>
> *(c) Whether areas of indigenous vegetation and habitats of indigenous fauna are significant, in relation to section 6(c) of the Act, on the extent to which criteria consistent with those in Appendix F set 3: Indigenous vegetation and habitats of indigenous fauna are met;*
>
> **Policy MN 7B: Using criteria to assist in assessing inappropriate development**
>
> *Assess, whether subdivision, use and development is inappropriate using criteria consistent with those in Appendix G, for areas considered to warrant protection under section 6 of the Act due to:*
>
> *(a) Natural character;*

(b) Outstanding natural features and landscapes;

(c) Significant indigenous vegetation and habitats of indigenous fauna;

(d) Public access;

(e) Māori culture and traditions; and

(f) Historic heritage.

Appendix G – Criteria applicable to Policy MN 7B

Policy MN 7B

Methods 1, 2, 3 and 11

1 Character and degree of modification, damage, loss or destruction;

2 Duration and frequency of effect (for example long-term or recurring effects);

3 Magnitude or scale of effect (for example number of sites affected, spatial distribution, landscape context);

4 Irreversibility of effect (for example loss of unique or rare features, limited opportunity for remediation, the costs and technical feasibility of remediation or mitigation);

5 Resilience of heritage value or place to change (for example ability of feature to assimilate change, vulnerability of feature to external effects);

6 Opportunities to remedy or mitigate pre-existing or potential adverse effects (for example restoration, enhancement), where avoidance is not practicable;

7 Probability of effect (for example likelihood of unforeseen effects, ability to take precautionary approach);

8 Cumulative effects (for example loss of multiple locally significant features).

Policy MN 8B: Managing effects of subdivision, use and development

Avoid and, where avoidance is not practicable, remedy or mitigate any adverse effects of subdivision, use and development on matters of national importance assessed in accordance with Policy MN 1B as warranting protection under section 6 of the Act.

[15] The proposed District Plan, as amended by decisions on submissions, is now past the point where any of its provisions (other than those which are the subject of this appeal) can be changed. We therefore treat the proposed provisions as having greater weight than any provisions in the operative District Plan.

[16] The following strategic provisions of the proposed District Plan were agreed to be relevant:

Strategic objective 7 (Our special places – Māori and iwi):

Subdivision, use and development are managed so that tāngata whenua, including kaitiaki maintain and enhance their culture, traditions, economy and society.

Strategic objective 8 (Our special places):

The natural, cultural and heritage resources that contribute to the character of the district are identified, retained and protected from inappropriate subdivision, use and development.

Policy 2 *To recognise the contribution that natural character, landscapes, biodiversity and heritage resources make to the social, cultural and economic wellbeing of people; and to provide for the* ***maintenance***

and enhancement of those resources in resource management decisions.

[17] The following objectives and policies of chapter 15 of the proposed District Plan on Indigenous Biodiversity[1] were agreed to be relevant:

Objective IB1: *Maintenance of the full range of the district's indigenous habitats and ecosystems, including through restoration and enhancement.*

Policy 2 *To recognise sustainable land management practices and cooperative industry arrangements that reflect the principles of stewardship and kaitiākitanga, and to take into account the range of alternative methods in the maintenance and protection of indigenous biodiversity, including Tasman Forest Accord, NZFOA Forest Accord, Iwi Management Plans, Bay of Plenty Regional Council biodiversity management plans and protective covenants with the QEII Trust and Nga Whenua Rāhui.*

Objective IB2: *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

Policy 1(b): *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*

(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.

Policy 5: *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[18] Section 15.4 of the proposed District Plan sets out the assessment criteria for restricted discretionary activities and Rule 15.4.4 provides:

15.4.4 ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***

15.4.4.1 *Council shall restrict its discretion to:*

a. *Timing to enhance the regeneration or establishment of mānuka and kānuka;*
b. *Stock type;*
c. *Grazing intensity;*
d. *Stock containment methods; and*
e. *Potential adverse effects on water bodies within the property.*

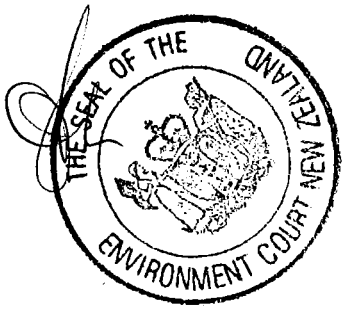
[19] In relation to activities which are classified as discretionary or non-complying, the relevant assessment criteria are set out in section 3.7 in Chapter 3 of the proposed District Plan. The introductory paragraph of this section states that the criteria are a guide to the matters that the Council can have regard to when assessing an application, but that they do not restrict the Council's discretionary powers under s 104(1)(a) of the Act to consider any actual or potential effects on the environment of allowing the

[1] As amended by a consent order dated 5 October 2016 in this proceeding and other related appeals.

activity.

[20] Section 3.7.13 sets out the criteria in respect of indigenous biodiversity effects as follows:

> *3.7.13.1* ***Council*** *shall have regard to;*
>
> *a.* *any adverse effect on* ***ecosystems*** *including;*
>
> *i.* *coastal* ***ecosystems****;*
>
> *ii.* *estuarine margins;*
>
> *iii.* *rivers and streams, wetlands and their margins;*
>
> *iv.* *habitats of* ***indigenous fauna*** *or flora;*
>
> *v.* *the cumulative effects of the activity on habitat of* ***indigenous vegetation*** *and fauna;*
>
> *vi.* *the degree to which the activity will result in the fragmentation of indigenous habitat and adversely impact on the sustainability of remaining vegetation;*
>
> *vii.* *the impact on ecological linkages and connectivity between significant natural areas;*
>
> *viii.* *the degree to which the effects are reversible and the resilience of the feature to change;*
>
> *ix.* *the long-term sustainability of an affected coastal* ***ecosystem****, waterway, estuarine margin, wetlands and their margins, indigenous vegetation or habitat;*
>
> *x.* *the indigenous vegetation to be retained and the degree to which the proposal will protect, restore or enhance indigenous vegetation and the net ecological gain as a consequence of the activity; and*
>
> *xi.* *the means to protect fish habitats by maintaining riparian vegetation;*
>
> *b.* *the effect on Significant Biodiversity areas identified in Appendix 15.7.1, 15.7.2 and 15.7.3, or other sites considered significant according to criteria in the Bay of Plenty Regional Policy Statement;*
>
> *c.* *the location of* ***buildings****, structures and services (such as* ***accessways****) in relation to how that may adversely affect ecological features;*
>
> *d.* *specifically, the management of existing kānuka stands in the Rural Coastal Zone, and means of restoring or rehabilitating this regionally significant feature;*
>
> *e.* *whether there is a reasonable alternative siting for the proposed activity or any alternative subdivision layout that will avoid, remedy or mitigate a significant adverse effect on the environment;*
>
> *f.* *location of the activity relative to any indigenous area and its vulnerability to the pest species; method of containing the pest plant or animal; other barriers to the spread of the plant or animal pest; method of identifying animals (for example, branding); method of dealing with escapes;*
>
> *g.* *plant and animal pest management;*
>
> *h.* *the means to manage the adverse effects of pets, for example, cats, dogs, ferrets and rabbits on wildlife and vegetation;*
>
> *i.* *whether there will be adverse effects on* ***ecosystems****, including effects that;*



i. may deplete the abundance, diversity or distribution of native species; or

ii. disrupt natural successional processes; or

iii. disrupt the long term ecological sustainability of Significant Biodiversity sites, including through increased fragmentation and vulnerability to pests; or

iv. obstruct the recovery of native species and the reversal of extinction trends, or the restoration of representative native biodiversity within an ecological district, ecological region, or nationally, or

v. reduce representative biological values within an ecological district, ecological region, or nationally, or

vi. reduce the area, or degrade the habitat value of an area set aside by statute or covenant for the protection and preservation of native species and their habitat, or

vii. degrade landscape values provided by native vegetation, or

viii. degrade soil or water values protected by native vegetation, or

ix. degrade a freshwater fishery, or

x. degrade aquatic ***ecosystems****.*

j. the degree of clearance in relation to the area retained or protected property.

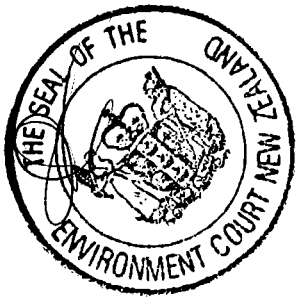
The evidence

[21] Mr Shaw, an expert ecologist called by the Council, has extensive knowledge of the natural environment in the district. He gave essentially unchallenged evidence of primary facts about the circumstances in which mānuka and kānuka are present in the district as follows:

(a) The three types of scheduled SIBS in Chapter 15 of the proposed Plan and the table in Rule 15.2.1.2 have been identified based on Land Environment New Zealand Classifications.

(b) There are six sites listed in Schedule A containing kānuka forest (that is, where more than 80 per cent of the cover consists of kānuka) and one further site of mixed kānuka-kamahi forest that could potentially contain more than 80 per cent cover in kānuka. They are located in the Te Teko, Taneātua and Ōtānewainuku Ecological Districts. They are smaller in size than the sites in Schedules B and C and are located in much modified environments.

(c) The sites listed in Schedule C are much larger and fall largely within the Whirinaki, Ikawhenua and Waimana Ecological Districts with some also present in the Taneātua and Waioeka Ecological Districts. Large



proportions of these districts, other than Taneātua, have a cover of indigenous vegetation: from Waimana at 98 per cent to Whirinaki at 78 per cent. Most of these districts also have very high levels of formal protection as reserves under the Reserves Act or by way of covenants, of the order of 76-89 per cent.

(d) Commercial harvesting of kānuka for firewood is a longstanding (over many decades) activity in various parts of Whakatāne district. Typically, trees are harvested and the areas are left to regenerate naturally, often in the presence of grazing. Currently, most of this activity occurs on sites listed in Schedule B, with little or none presently occurring on sites listed in Schedules A and C.

(e) The areas in Schedule C with significant extensive kānuka dominant forest which are unprotected either as reserves or by way of covenants are all physically inaccessible and therefore are not subject to harvesting.

(f) The value of mānuka as firewood appears to be diminishing, with much higher values being placed on it for the harvesting of foliage for use in skin and hair care products and as a resource for bee keeping and honey production.

[22] Against this factual background, Mr Shaw expressed the following principal opinions:

(a) The small size and limited number of the sites listed in Schedule A means that assessment of the effects of harvesting in these areas can be done effectively.

(b) An activity status of discretionary is sufficient in the Schedule A areas, given the clear requirements in the objectives, policies and assessment criteria for promoting sustainable management in terms of the conditions on the activity for regeneration and the scope of the general discretion to decline consent.

(c) While the sites listed in Schedule C are substantially larger, other methods of protection and limited accessibility means that including rules in the plan to require resource consents to be obtained for harvesting in these areas would be of little benefit.

[23] The Council also called Mr McGhie, its principal planner, to outline the Council's planning approach. Mr McGhie relied on the evidence of Mr Shaw as the basis for his planning assessment. Mr McGhie also outlined the views that had been expressed to the Council by Māori, who own much of the land in the areas where the Schedule C sites are located, during consultation and the submission process.

[24] Mr McGhie characterized the issue before the Court as one of balancing the protection of indigenous biodiversity with management responses that would be appropriate to each type of SIBS. In that regard, he observed that the Council had originally proposed only two types of SIBS, but had created Schedule C for two main reasons:

(i) Māori had objected to large tracts of land being controlled in ways that would unnecessarily restrict their development opportunities; and

(ii) the list in Schedule B would otherwise have consisted of sites varying significantly in size.

[25] Mr McGhie set out in his statement of evidence numerous amendments that had been made to Rule 15.2.1.2(9) and in other plan provisions through the process of mediation as summarised above. As well as the Rules referred to earlier in this decision, he also explained that a new definition of "naturally regenerate" had been inserted in chapter 21 of the proposed Plan and that the definition of "indigenous vegetation" had been amended to ensure that regenerated kānuka or mānuka was not covered by the exclusion for vegetation established for commercial purposes. These amendments were not in issue before us.

[26] Mr McGhie also set out his analysis of the activity rule in terms of s 32 of the Act and in the context of the relevant objectives and policies of the Regional Policy Statement and the proposed District Plan. In his opinion, a non-complying activity status for harvesting in Schedule A sites would be out of proportion with those objectives and policies given the degree of protection that the rule has been drafted to provide and the extent to which the process of considering an application for resource consent should include an assessment of sustainable practice to address the relevant assessment criteria in section 3.7.13 of the proposed District Plan. Given those considerations, he opined that a discretionary status was more appropriate.

[27] In relation to a permitted activity status for the Schedule C sites, he also expressed the opinion that this would be consistent with the relevant objectives and

policies and would better address landowner concerns, subject to a restricted discretionary activity status applying where grazing is proposed during the natural regeneration phase.

[28] The Society called Ms Myers as an expert ecologist. In her evidence, Ms Myers set out the ecological context for the harvesting of mānuka and kānuka. She noted the extent of ongoing loss of indigenous biodiversity nationally and emphasised the ecological values of kānuka and mānuka forest in Whakatāne District and, especially, the national importance of Te Urewera for its range of ecological diversity. She stressed the successional role of kānuka and mānuka and the benefits that these species provide in the form of buffers for other forest species and corridor functions between stands of bush and forest. She noted that there was a lack of specific survey information to enable the extent of harvesting and regeneration to be quantified.

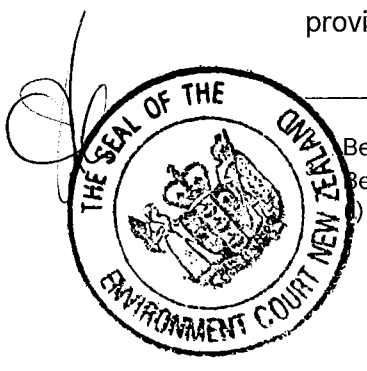
[29] In her opinion, rules for vegetation clearance should be based on the ecological values of that vegetation, as the degree of threat to an ecosystem may be unknown or can change over time. On that basis, she expressed the opinion that harvesting in areas listed in Schedule A should be non-complying because those areas are small and vulnerable and that resource consent as a restricted discretionary activity should be required for harvesting in sites in Schedule C in order to provide a basis for understanding the extent of that activity and its effects.

[30] Ms Myers agreed with the changes to these plan provisions that had been achieved through mediation.

Relevant considerations for a district plan

[31] Under s 290 of the Act, the Court has the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. We must accordingly proceed to consider the issues on appeal on the same statutory basis as they were considered by the Council.

[32] The Council was required to prepare its the proposed District Plan in accordance with ss 74 and 75 of the Act,[2] and the Court must now consider the provisions still in issue in this appeal under those sections.[3] Those sections now



[2] Being s 74 in the form it was when the proposed District Plan was notified on 28 June 2013.
[3] Being s 74 in the form inserted by s 78 Resource Management Amendment Act 2013, given:
(a) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013; and

relevantly provide:

> ***74 Matters to be considered by territorial authority***
>
> *(1) A territorial authority must prepare and change its district plan in accordance with—*
>
> *(a) its functions under section 31; and*
>
> *(b) the provisions of Part 2; and ...*
>
> *(d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and*
>
> *(e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; ...*
>
> *(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to— ...*
>
> *(b) any—*
>
> *(i) management plans and strategies prepared under other Acts; ...*
>
> *(2A)A territorial authority, when preparing or changing a district plan, must take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on the resource management issues of the district. ...*
>
> ***75 Contents of district plans***
>
> *(3) A district plan must give effect to— ...*
>
> *(c) any regional policy statement.*

[33] The Council plainly has a function of the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the maintenance of indigenous biological diversity under s 31(1)(b)(iii).

[34] In relation to the consideration of Part 2 of the Act, counsel for the Council referred us to the Court's decision in *Appealing Wanaka Inc v Queenstown-Lakes District Council*[4] and submitted that because the relevant objectives and policies of the proposed Plan for indigenous biodiversity are beyond challenge, there is no need to look past them to Part 2 of the Act.

[35] That decision is based on the reasoning of the Supreme Court in *Environmental Defence Society v NZ King Salmon*.[5] The Supreme Court held that there is a hierarchy of statutory planning instruments under the Act in order to achieve the purpose of the Act. The purpose of these instruments is to give substance to the principles in Part 2 of the Act. Where an instrument has been prepared to give effect to a higher instrument,

(ii) there appears to be no transitional provision in the Amendment Act which would require the application of s 74 of the Act as it stood when the proposed District Plan was notified.

4 *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

5 *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.

there is no need to refer back to that higher instrument, or to Part 2 of the Act, to interpret and apply the lower instrument unless there was a challenge based on invalidity, incompleteness or uncertainty in relation to the lower instrument.[6]

[36] In the present case, there is no issue before us of invalidity, incompleteness or uncertainty in the relevant objectives and policies of the proposed District Plan. Accordingly, our consideration of the most appropriate activity status for the harvesting or mānuka and kānuka in SIBS listed in Schedules A and C to the District Plan should be in terms of those relevant objectives and policies.

[37] We address matters concerning the obligation to prepare and have particular regard to an evaluation report in accordance with s 32 of the Act under a separate heading below.

[38] In relation to management plans and strategies prepared under other Acts, Counsel for the Council referred us to Te Urewera Act 2014. The purpose of that Act is:[7]

> *... to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—*
>
> *(a) strengthen and maintain the connection between Tūhoe and Te Urewera; and*
>
> *(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and*
>
> *(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.*

[39] The principles for achieving that purpose are:[8]

> *(1) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that, as far as possible,—*
>
> *(a) Te Urewera is preserved in its natural state:*
>
> *(b) the indigenous ecological systems and biodiversity of Te Urewera are preserved, and introduced plants and animals are exterminated:*
>
> *(c) Tūhoetanga, which gives expression to Te Urewera, is valued and respected:*
>
> *(d) the relationship of other iwi and hapū with parts of Te Urewera is recognised, valued, and respected:*
>
> *(e) the historical and cultural heritage of Te Urewera is preserved:*
>
> *(f) the value of Te Urewera for soil, water, and forest conservation is*

6 Ibid at [85] and [88].
7 Te Urewera Act 2014, s 4.
8 Te Urewera Act 2014, s 5.

maintained:

(g) the contribution that Te Urewera can make to conservation nationally is recognised.

(2) In achieving the purpose of this Act, all persons performing functions and exercising powers under this Act must act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of this Act or for public safety.

[40] This Act declares Te Urewera to be a legal entity and establishes a board for its governance and management. That board is under an obligation to prepare a management plan to identify how the purpose of the Act is to be achieved and to set objectives and policies for Te Urewera, but we understand that such a plan has not yet been prepared.

[41] We were also referred to an integrated planning protocol between Tuhoe Te Uru Taumatua, the Council and other local authorities in which Te Urewera is situated, but that is not a statutory document and did not appear to contain any objectives or policies.

[42] We have set out above the policies of the RPS of most relevance to this appeal.

Evaluation under section 32 of the Act

[43] The necessary evaluation of a proposed rule under s 32 of the Act[9] involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives of the Plan by:

(a) identifying other reasonably practicable options for achieving those objectives;

(b) assessing the efficiency and effectiveness of the rule in achieving those objectives, including:

i) identifying, assessing and, if practicable, quantifying the benefits and

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[9] Being s 32 in the form inserted by s 70 Resource Management Amendment Act 2013, given:
(i) the commencement of those sections under s 2(2)(b) of the Amendment Act on 3 December 2013;
(ii) the transitional provision in cl 2 of Schedule 2 to the Amendment Act (inserting a new Schedule 12 in the principal Act) which requires the further evaluation under s 32 to be undertaken as if s 70 of the Amendment Act had not come into force only if it came into force on or after the last day for making further submissions on the proposed District Plan; and
(iii) the last day for making further submissions on the proposed District Plan being 19 December 2013.

costs of all the effects that are anticipated to be provided or reduced from the implementation of the rule; and

ii) assessing the risk of acting or not acting if there is uncertain or insufficient information; and

(c) summarising the reasons for deciding on that rule.

[44] Section 32 of the Act has been through several amendments since the Act first came into force. It is not necessary to rehearse the whole evolution of the section for the purposes of this case, but in light of the focus of this appeal and the wording of the relevant objectives and policies of the proposed District Plan it is appropriate to address one particular aspect of s 32 which has recently been inserted.

[45] The requirement to identify other means or options for achieving the purpose of the Act and the objectives of the plan which is being evaluated has been a central element of s 32 of the Act in all its versions. The current version appears to be the first time that the options have been qualified by the words *reasonably practicable*. The potential importance of this qualification is emphasised in this case given the centrality of Policy MN 8B in the RPS and Policy IB2(1)(b) in the proposed District Plan in argument before us and their wording which calls for consideration of whether avoiding adverse effects on significant indigenous vegetation and SIBS is or is not "practicable."

[46] Neither the word "practicable" nor the phrase "reasonably practicable" is defined in the Act. There is a definition of "best practicable option" in s 2 where it is defined to mean, unless the context otherwise requires:

> *in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to—*
>
> *(a) the nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and*
>
> *(b) the financial implications, and the effects on the environment, of that option when compared with other options; and*
>
> *(c) the current state of technical knowledge and the likelihood that the option can be successfully applied.*

[47] While acknowledging that this case is not concerned with the discharge of a contaminant or the emission of noise, we consider that this definition is helpful in understanding what the word "practicable" may mean in the context of the Act and how the practicability of an option should be analysed.

[48] The word "reasonably" is often used to qualify other words both in legislation and in case law. It has been held in relation to the predecessor provision to s 6(a) of the Act that it may be an implied qualification of the word "necessary."[10] Similarly in relation to s 341(2)(a) of the Act, the same qualification has been implied on the basis that it is unlikely that the legislature envisaged the unreasonable.[11] In the context of an earlier version of s 171(1)(c) of the Act, it has been held to allow some tolerance to the meaning of "necessary" as falling between expedient or desirable on the one hand and essential on the other.[12] There does not appear to be any reason why it should be interpreted differently when used (whether expressly or by implication) in the phrase "reasonably practicable."

[49] Examining other legislation which may be of assistance in this context, we also note that there is a definition of "reasonably practicable" in the Health and Safety at Work Act 2015, as follows:

> *In this Act, unless the context otherwise requires,* reasonably practicable, *in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—*
>
> *(a) the likelihood of the hazard or the risk concerned occurring; and*
>
> *(b) the degree of harm that might result from the hazard or risk; and*
>
> *(c) what the person concerned knows, or ought reasonably to know, about—*
>
> *(i) the hazard or risk; and*
>
> *(ii) ways of eliminating or minimising the risk; and*
>
> *(d) the availability and suitability of ways to eliminate or minimise the risk; and*
>
> *(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

[50] Similar definitions are to be found in other legislation concerned with matters of health and safety and the protection of property, including in s 2 Electricity Act 1992, s 2 Gas Act 1992, s 69H Health Act 1956 and s 5 Railways Act 2005. The phrase is also used in many statutes without definition.

[51] These legislative examples are, perhaps unsurprisingly, consistent with well-established case law interpreting the meaning of "reasonably practicable." It has been

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[10] *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 260; (1989) 13 NZTPA 197 at 203 (CA) per Cooke P in relation to s 3(c) of the Town and Country Planning Act 1977, citing *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423, 430; and *Commissioner of Stamp Duties v International Packers Ltd and Delsintco Ltd* [1954] NZLR 25, 54.

[11] *Hugle v Cowie* [1998] 1 NZLR 104 at 109-110; [1997] NZRMA 395 at 400-401; (1997) 3 ELRNZ 261 at 268 (HC).

[12] *Bungalo Holdings Ltd v North Shore City Council* A137/2002 at [94].

held that the phrase is a narrower term than "physically possible" and implies a computation of the quantum of risk against the measures involved in averting the risk (in money, time or trouble), so that if there is a gross disproportion between them, then extensive measures are not required to meet an insignificant risk.[13] Where lives may be at stake, a practicable precaution should not lightly be considered unreasonable, but if the risk is a very rare one and the trouble and expense involved in precautions against it would be considerable but would not afford anything like complete protection, then adoption of such precautions could have the disadvantage of giving a false sense of security.[14] "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.[15] Conversely, "not reasonably practicable" should not be equated with "virtually impossible" as the obligation to do something which is "reasonably practicable" is not absolute, but is an objective test which must be considered in relation to the purpose of the requirement and the problems involved in complying with it, such that a weighing exercise is involved with the weight of the considerations varying according to the circumstances; where human safety is involved, factors impinging on that must be given appropriate weight.[16]

[52] While acknowledging that this case is not governed by any of those other Acts referred to and that the case law summarised above was decided under other legislation, nonetheless we consider the approach consistently taken in other legislation and by other Courts to the assessment of the correct approach to or the boundaries of what is "practicable" in relation to a duty to ensure the health and safety of people and the protection of property could be analogous to the approach which may be taken to protecting, or otherwise dealing with adverse effects on, the environment under the Resource Management Act 1991.

[53] We consider that these statutory provisions and cases together illustrate a consistent approach to the meaning of "reasonably practicable" which we respectfully adopt in this case in considering the options before us. We accordingly proceed to consider RPS Policy MN 8B and District Plan Policy IB2(1)(b) and identify reasonably practicable options for achieving the objectives of the proposed District Plan by examining the options having regard to, among other things:

[13] *Edwards v National Coal Board* [1949] 1 KB 704; [1949] 1 All ER 743 (EWCA).
[14] *Marshall v Gotham Co Ltd* [1954] AC 360; [1954] 1 All ER 937 (UKHL).
[15] *Union Steam Ship Co of NZ Ltd v Wenlock* [1959] 1 NZLR 173 (CA).
[16] *Auckland City Council v NZ Fire Service & anor* [1996] 1 NZLR 330 (HC).

i) The nature of the activity and its effects;

ii) The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;

iii) The likelihood of adverse effects occurring;

iv) The financial implications and other effects on the environment of the option compared to other options;

v) The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;

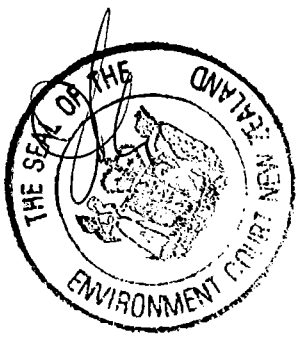
vi) The likelihood of success of the option; and

vii) An allowance of some tolerance in such considerations.

The extent to which adverse effects must be avoided

[54] A further consideration arising from the centrality of RPS Policy MN 8B and District Plan Policy IB2(1)(b) in the argument is the need expressed in those policies to avoid adverse effects on significant indigenous vegetation and scheduled SIBS or, where avoidance is not practicable, to remedy or mitigate adverse effects.

[55] The most obvious meaning of "avoid" in the context of the Act and in policy statements under it, as held by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[17] is "not allow" or "prevent the occurrence of." The Supreme Court then goes on to explore the contexts in which the word is used and, in particular, the importance of its meaning when used with the word "inappropriate" in relation to subdivision, use and development. That exploration is principally in the context of s 6(a) and (b) of the Act and against the framework of the New Zealand Coastal Policy Statement. It is clear, however, that the approach of the Supreme Court is equally applicable in other contexts where the extent of avoidance called for by a policy is to be considered.[18]



[17] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [92]-[97].

[18] See for example *R J Davidson Family Trust v Marlborough DC* [2017] NZHC 52 at [61]-[93] where the Supreme Court's approach in relation to a proposed plan change was held to be a lawful consideration in relation to an application for resource consents.

[56] Certainly, in relation to this case which involves a plan review and proposed provisions intended to recognise and provide for the protection of areas of significant indigenous vegetation as required by s 6(c) of that Act, it was common ground that the approach of the Supreme Court was applicable.

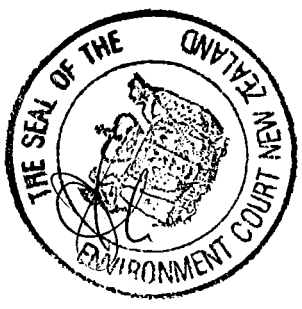
[57] The consideration of context is, as it usually is,[19] an essential part of the interpretation and application of policy provisions. It is generally insufficient to refer to the presence of the word "avoid" as a conclusion in itself: a policy to avoid adverse effects of activities on the environment, without any greater particularity, could be said to be a basis for not allowing any activity at all. As the Court of Appeal recently observed in *Man o'War Station Ltd v Auckland Council,*[20] much turns on what is sought to be protected.

[58] We bear this guidance respectfully in mind in considering not just whether the SIBS listed in Schedules A and C to Chapter 15 of the proposed District Plan should be protected, but the extent of such protection and the manner in which such protection is intended to be achieved.

[59] In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, we consider that notwithstanding the amendments that have been made to that section in the meantime, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*:[21] that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

Classes, categories or status of activities

[60] The power to categorise activities into one of six classes and to make rules and specify conditions for each class is conferred by s 77A of the Act. The six classes of



[19] *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622 (UKHL), 1636 per Lord Steyn; referred to in *McGuire v Hastings DC* [2001] NZRMA 557 (PC) at [9] per Lord Cooke.

[20] *Man o'War Station Ltd v Auckland Council* [2017] NZCA 24 at [65] as part of discussion in [59]-[66] and [70]-[73].

[21] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C153/2004 at [56].

activities are listed in s 77A(2) and described in s 87A. The class of an activity is often referred to as its "activity status."[22]

[61] The six classes may be seen as a spectrum of control from *permitted* through to *prohibited* in a progression of increasing levels of constraint:

(i) a permitted activity requires no resource consent and may be undertaken as of right if it complies with the requirements, conditions and permissions, if any, specified in the Act, regulations or relevant plan;

(ii) a controlled activity requires a resource consent but that consent must (with limited exceptions) be granted and may be subject to conditions within the scope of control specified in the relevant plan or national environmental standard;

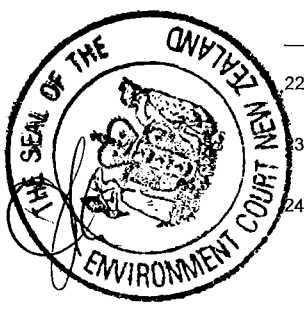
(iii) a restricted discretionary activity requires a resource consent but the consent authority's power to decline an application for such an activity or to grant consent and impose conditions is restricted to the matters specified for that purpose in the plan or national environmental standard;

(iv) a discretionary activity requires a resource consent and the consent authority's discretion to decline consent or to grant consent with or without conditions is, within the scope of the Act itself, unlimited;

(v) a non-complying activity must be assessed against the threshold tests in s 104D of the Act and may be granted only if it passes one of those threshold tests; and

(vi) a prohibited activity is one for which no application for resource consent may be made.

[62] Counsel for the Council referred us to well-known decisions in *New Zealand Mineral Industry Association v Thames-Coromandel District Council*[23] and *Mighty River Power Limited v Porirua District Council*[24] in support of her argument that the harvesting of trees from sites listed in Schedule A should be discretionary rather than non-



[22] The phrase "activity status" appears only in s 149G of the Act, inserted on 1 October 2009, but the usage among practitioners is considerably older than that.

[23] *New Zealand Mineral Industry Association v Thames-Coromandel District Council* (2005) 11 ELRNZ 105.

[24] *Mighty River Power Limited v Porirua District Council* [2012] NZEnvC 213.

complying. She did acknowledge, however, in response to a question from the Court that the statements in those decisions on which she relied were conditioned by the factual circumstances before the Court in those two cases. We consider that acknowledgement to be properly made and, with respect to those decisions and others of a similar nature,[25] we think that caution must be exercised in applying the reasoning in those decisions to other cases. Without doubting the correctness of the statements in the context of the cases in which they were made, the complexity of plan making means that the classification of activities in other circumstances is likely to require specific analysis of the effects of the activity against the particular objectives and policies which relate to the activity being assessed.

[63] It is important to note that the statutory framework for the classification of activities contains no provisions which address the application of these categories or classes to any particular activities or in terms of the nature of the effects of any activity. Instead, the scheme of the Act is that the categorization or classification of an activity is to be done by rules under s 77A. Such rules, like all others in a district plan, must be examined and assessed in accordance with the requirements of s 32 of the Act and consistent with the requirement under s 76(3) of the Act to have regard to the actual or potential effect on the environment of the activity under consideration including, in particular, any adverse effect.

Evaluating the most appropriate activity status

[64] In terms of achieving the objectives of the proposed District Plan, both parties pointed to Objective IB2 as being the most relevant:

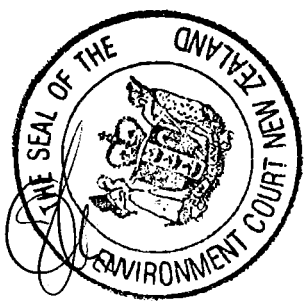
> ***Objective IB2:*** *Areas of indigenous vegetation and habitats of indigenous fauna identified as significant in Schedules 15.7.1, 15.7.2 and 15.7.3 are protected.*

The focus of the argument was then on the issue of the most relevant policy, with the focus of the case being on policies IB2(1)(b) and IB2(5).

[65] Counsel for the Council, in addressing the extent of protection that is appropriate in the circumstances, placed the most weight on Policy IB2(5):

> ***Policy 5:*** *To provide for the sustainable use of indigenous vegetation including scheduled significant indigenous biodiversity sites where the adverse effects of this use are minor.*

[66] She submitted, based on Mr Shaw's evidence, that classifying harvesting in



[25] In relation to permitted activities, see *Twisted World Limited v Wellington City Council* W024/2002 at [62]-[64]; in relation to restricted discretionary activities see *Auckland City Council v John Woolley Trust* (2007) 14 ELRNZ 106 at [49] (HC); and in relation to discretionary activities, see *Lakes District Rural Landowners Society Inc v Wakatipu Environmental Society Inc* C75/2001 at [43]-[44].

Schedule A sites as non-complying would go too far, given the extent to which the plan provided for the assessment of effects in terms of specific criteria and the status of discretionary left open the ability of the Council to decline an application.

[67] In relation to classifying harvesting in Schedule C sites as permitted, she submitted, on the basis of Mr Shaw's evidence that the effects would be no more than minor, that it was unnecessary to impose the costs of the consenting process on landowners except where grazing was proposed during the regeneration phase.

[68] It was common ground that grazing generally slows the regeneration of indigenous species, but that as kānuka and mānuka are relatively unpalatable to stock they are able to regenerate in the presence of managed grazing. On that basis, the parties were agreed that the activity status in Schedule C sites should be restricted discretionary where grazing is proposed during the regeneration phase, which amounts to a partial allowance of the Society's appeal.

[69] The Council proposed that, should the Court confirm the status of Activity 9 in Schedule C sites as otherwise permitted, this outcome could be provided for in the rules by inserting a footnote to that activity status stating that restricted discretionary status applies where grazing is proposed during the natural regeneration phase. The assessment of an application for consent for that activity would not be against the assessment criteria for clearance of indigenous vegetation and so the heading of Rule 15.4.1 would explicitly exclude Activity 9. Instead, such assessment was proposed to be dealt with by a new rule 15.4.4 setting out the restrictions on the Council's discretion, as follows:

> ***15.4.4*** ***Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.4.4.1* *Council shall restrict its discretion to:*
>
> *a. Timing to enhance the regeneration or establishment of mānuka and kānuka;*
> *b. Stock type;*
> *c. Grazing intensity;*
> *d. Stock containment methods; and*
> *e. Potential adverse effects on water bodies within the property.*

[70] Counsel for the Council also addressed the relocation and expansion of condition (c) in Activity 15.2.1.2(9) (as notified) to become a new rule 15.2.6, in the following terms:

> ***15.2.6*** ***Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))***
>
> *15.2.6.1* *An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is*

> *submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.*

[71] Counsel submitted that this rule would apply to Activity 15.2.1.2(9) regardless of its activity status because it forms part of the rules for indigenous biodiversity generally. We note the statement at the beginning of section 15.2 of the District Plan:

> The following standards and terms apply to Permitted, Controlled, and Restricted Discretionary activities and will be used as a guide for Discretionary and Non-Complying activities.

[72] Should any harvesting of kānuka and mānuka not meet the standards and terms[26] of Rule 15.2.1.2(9) or Rule 15.2.6, counsel noted that then it would be subject to Rule 15.2.1.2(14), the catch-all activity rule which makes activities involving indigenous vegetation clearance or modification or habitat disturbance not otherwise provided for in the activity table a non-complying activity in sites listed in Schedule A and a discretionary activity in sites listed in Schedules B and C.

[73] The Court expressed a doubt about the likelihood of compliance with Rule 15.2.6.1, particularly at years five and 15 and especially where the subject property may have been transferred. In reply, counsel for the Council submitted that much of the land listed in Schedule C is Māori land and unlikely to be transferred to third parties. She said that monitoring of sites that had been subject to harvesting would occur whether the activity was the subject of a consent or not and whether the costs of monitoring were the subject of an administrative charge under s 36(1)(c) or not.

[74] In response, counsel for the Society placed the most weight on Policy IB2(1)(b):

> ***Policy 1(b):*** *To ensure that subdivision, use and development, is undertaken in a manner that protects scheduled* ***significant indigenous biodiversity sites*** *by: …*
>
> *(b) outside the coastal environment, avoiding and where avoidance is not practicable, remedying or mitigating adverse effects including the loss, fragmentation or degradation of those sites and the cumulative effects on ecosystems.*

[75] Counsel for the Society approached the issue of the appropriate activity status for harvesting kānuka and mānuka by referring us to the decision in *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council*.[27] There the Court was concerned with the level of protection of significant natural areas required in terms

[26] Being the "requirements, conditions, and permissions" referred to in s 87A of the Act.
[27] *Royal Forest and Bird Protection Society of NZ Inc v New Plymouth District Council* [2015] NZEnvC 219.

of s 6(c) of the Act. By analogy with the consideration of the requirements of s 6(a) and (b) of the Act taken by the Supreme Court in *Environmental Defence Society v NZ King Salmon*,[28] the Environment Court held that there was a requirement to implement the protective element of sustainable management in those circumstances.

[76] While recognising that counsel for the Society referred to the *New Plymouth* case for its clarification of the meaning of the word "protection" which is not defined in the Act, we note that the case concerned an application for declarations and enforcement orders based on claims that the Council had not appropriately recognised and provided for protection of areas of significant indigenous vegetation, among other things. Those circumstances clearly come within the exception of incompleteness to the hierarchical approach as explained by the Supreme Court.

[77] In the present case there is a clear relationship between Policy IB2(1)(b) in the District Plan and Policy MN 8B in the RPS where the former gives effect to the latter, providing local and regional substance in terms of the principles in s 6(c) of the Act. On that basis, and consistent with the approach described in the *Appealing Wanaka* decision[29] discussed above, we should not go back to Part 2 of the Act in a more general assessment of what is appropriate.

[78] Counsel for the Society stressed the character of the adverse effects of the harvesting activity and relied on the evidence of Ms Myers in relation to the disruption of forest succession, loss of habitat, hedge effects and the particular threat to Schedule A sites given their small size. She also submitted that the evidence that little or no harvesting was presently occurring in the Schedule A and C sites meant that there was no economic incentive to undertake harvesting and therefore it would be unnecessary to provide for that activity so as to enable reasonable use of the land. With respect, we think that latter submission is not supported by the scheme of the Act or other authority. In our view, the Act is not drafted on the basis that activities are only allowed where they are justified: rather, the Act proceeds on the basis that land use activities are only restricted where that is necessary.

[79] Another point raised in the argument before us was the notion that the classification of an activity as non-complying tended to indicate that it ought not to occur, while the classification as discretionary usually means that the activity will be

[28] *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38; [2014] 1 NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442 at [24]-[28].

[29] *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139.

acceptable if it is made subject to appropriate conditions.

[80] With respect, cognisant of the degree to which some earlier decisions of the Court noted above[30] may give that impression, we consider it better to approach these two classifications in their statutory context. In particular, they share the same consenting provision in s 104B of the Act, which is expressed simply as a general discretion. While a non-complying activity must first pass one of the thresholds set out in s 104D, if it does so then in terms of s 104B it is to be considered on the same statutory basis as a discretionary activity. At that stage, both types of activities must be considered in terms of the matters set out in s 104 of the Act, including having regard to any effects on the environment of allowing that activity and any relevant provisions of any of the planning documents listed in s 104(1)(b). Typically, the most relevant provisions will be the objectives and policies which bear most directly on the activity or others of like nature and on the environmental context in which the activity is proposed to be established.

[81] In relation to the Schedule A sites, we conclude that a discretionary activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka. We consider that this activity status responds to the policy framework in the District Plan by providing suitable protection of SIBS through an assessment and consenting process for sustainable use of the resource. The detailed assessment criteria for this activity should ensure a thorough analysis of all likely effects, including effects on wider ecosystems. Given those provisions in the District Plan, we do not see any reason to require a prior threshold assessment under s 104D of the Act: that would amount to a further restriction which would add little if anything to the assessment under s 104.

[82] In relation to the Schedule C sites, we conclude that a permitted activity classification is the most appropriate for the activity of harvesting of mānuka and kānuka where grazing will not occur during the regeneration phase. We consider that the requirements, conditions, and permissions for this activity appropriately delimit the extent to which it could occur without a resource consent being required and provide a reasonably clear boundary to the activity for the purposes of monitoring and enforcement. We also have regard to the fact that harvesting of mānuka and kānuka has been occurring in the district for a long time without evidence of more than minor adverse effects on the environment. We also note the fact that currently little or no such

[30] At fn 23 and fn 24.

harvesting activity is occurring in the Schedule C sites and see no evidence that a requirement to obtain resource consent should be imposed on any sort of pre-emptive basis. We acknowledge the relationship of the Māori owners with much of the land listed in Schedule C and take into account the principles of the Treaty of Waitangi / Te Tiriti o Waitangi and the purpose and principles of Te Urewera Act 2014 in reaching our conclusion.

[83] We are grateful to the parties for the constructive way in which they have worked together to improve the related provisions of the District Plan, including since mediation. In particular:

(a) We endorse the suggested amendment of the activity description to replace the words "in the same year" with "within one year." This amendment effectively addresses the potential problem of treating the activity as occurring within a calendar year when it is much more likely to be seasonal.

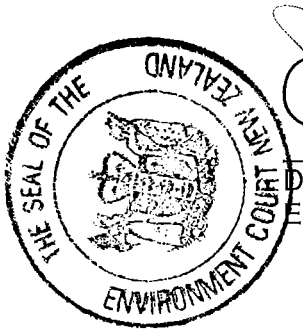
(b) We endorse the agreed position that if harvesting in the Schedule C sites is to be generally a permitted activity, nonetheless it should be a restricted discretionary activity if grazing is proposed in the harvested area during the regeneration phase, given the effect of grazing to delay such regeneration.

(c) As a consequence of that adjustment to the activity status in the Schedule C sites, we also confirm the appropriateness of the amendments to the headings of Rules 15.2.6, 15.4.1 and 15.4.4 to make that distinction clear.

[84] We attach to this decision as **Attachment A** the relevant provisions of the District Plan, amended in accordance with our decision. We attach as **Attachment B** the same provisions with those amendments shown with deletions struck through and additions underlined.

[85] In accordance with the Court's usual practice on appeals under clause 14 of Schedule 1 to the Act, there is no order as to costs.

For the Court:



D A Kirkpatrick
Environment Judge

Attachment A

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover.	D	RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

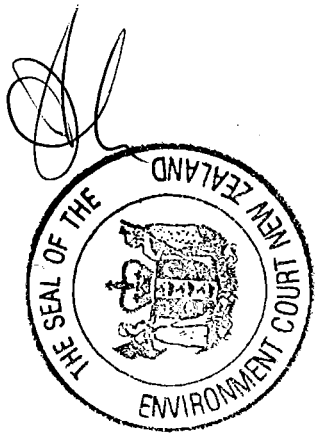
a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
d. Stock containment methods; and
e. Potential adverse effects on water bodies within the property.

5. New and Amended Definitions

Indigenous Vegetation means any native naturally occurring plant community containing a complement of habitats and native species normally associated with that vegetation type or having the potential to develop these characteristics. It includes vegetation with these characteristics that has regenerated following disturbance or has been restored or planted. It excludes plantations and vegetation that have been established for commercial purposes.

Where indigenous vegetation naturally regenerates or is replanted within a SIB in accordance with Rule 15.2.1.2(9), it is not a "plantation or vegetation established for commercial purposes" as described in the definition of indigenous vegetation.

Naturally regenerate means the harvested area is retired from other active land uses (including grazing) and indigenous vegetation is allowed to regenerate through natural processes. For kānuka and mānuka dominant stands this will typically take ten to twenty years.



Attachment B

Relevant provisions of the Whakatāne District Plan, amended in accordance with this decision

Amendments are shown with deletions ~~struck through~~ and additions underlined

1. In Rule 15.2.1 Activity Status Table:

	Activity Status	Schedule A	Schedule B	Schedule C
9.	Harvesting of mānuka and kānuka, excluding any kānuka in the Rural Coastal zone, for commercial use provided that: a. an area equal to that harvested annually is replanted ~~in the same~~ within one year in the same or similar indigenous species or allowed to naturally regenerate; b. the replanted or regenerating area is not subject to any further harvesting operation until at least twenty years has elapsed from the commencement of replanting or regeneration; ~~b~~c. no more than 10% of the total area of kānuka and mānuka in a scheduled feature on any **site** is harvested in any one year; and d. kānuka and mānuka is harvested only from identified areas where kānuka and mānuka represent at least 80% of the vegetation canopy cover. ~~c. a sustainable management plan verifying the above is submitted to Council.~~	~~RD~~ D	~~C~~ RD	P[1]

[1] RD activity status applies where grazing is proposed during the natural regeneration phase

2. New rule 15.2.6.1

15.2.6 Harvesting of kānuka and mānuka in Schedule C sites (Rule 15.2.1.2(9))

15.2.6.1 An initial plan prepared by a suitably qualified professional identifying that the areas to be harvested meet the requirements in (c) and (d) of 15.2.1.2(9)) is submitted to Council prior to the activity being carried out, and two further plans verifying that replanting and/or regeneration is occurring in accordance with (a) and (b) of 15.2.1.2(9) are submitted to Council at five and 15 year intervals after the clearance has occurred.

3. Amended heading of Rule 15.4.1

15.4.1 Clearance of Indigenous Vegetation (Activity Status 15.2.1), including placement or construction of a building (excluding 15.2.1.2(9) in Schedule C sites where restricted discretionary activity status is due to grazing during regeneration)

4. New Rule 15.4.4

15.4.4 Harvesting of kānuka and mānuka where restricted discretionary activity status is due to grazing during regeneration in Schedule C sites (Rule 15.2.1.2(9))

15.4.4.1 Council shall restrict its discretion to:

a. Timing to enhance the regeneration or establishment of mānuka and kānuka;
b. Stock type;
c. Grazing intensity;
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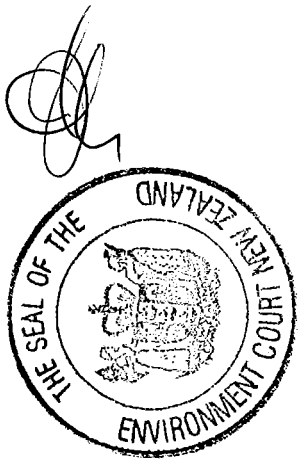

IN THE SUPREME COURT OF NEW ZEALAND

SC 73/2005
[2006] NZSC 112

	BETWEEN	WAITAKERE CITY COUNCIL Appellant
	AND	ESTATE HOMES LIMITED Respondent

Hearing: 11 and 12 July 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: M E Casey and R B Enright for Appellant
D J Neutze and N D Wright for Respondent

Judgment: 19 December 2006

JUDGMENT OF THE COURT

A The appeal is allowed. The judgment of the Court of Appeal is set aside. The appeal is referred back to the Environment Court to be determined in accordance with this judgment.

B Estate Homes must pay the Council costs in the sum of $10,000 plus reasonable disbursements. Costs in the other Courts are to be fixed by those Courts.

REASONS

(Given by McGrath J)

Table of Contents **Para No**

Introduction

[1] This appeal raises issues concerning requirements for new public facilities that are sometimes imposed by planning consent authorities when granting consent to the subdivision of land. At times local authorities treat the consent process as an opportunity to secure the construction by developers of additional infrastructure that will serve future community needs, even though it may go beyond what is required to serve the immediate needs of the development concerned. The present case involves the Waitakere City Council's requirement that a developer design, form and construct, as part of its subdivision, an arterial road over its land along the path of a longstanding designation. The Council accepted that it should compensate the developer to the extent that the requirement involved additional road width and more land for road reserve than would otherwise have been required in the subdivision. Differences, however, arose between the Council and the developer concerning the basis on which such compensation should be assessed and paid. These differences have given rise to this litigation.

Background

[2] In September 1999 Estate Homes Limited purchased a 3.1 hectare block of land in Waitakere City for the purposes of subdivision and medium density residential development. The land had a frontage to its south onto Ranui Station Road, which runs east to west. Since 1989 the land had been subject to the designation of an arterial road, the course of which ran through the land from Ranui Station Road in the south to the point where the road entered adjoining private land to the north. The road eventually linked up further north with Marinich Drive. The purpose of the designation was to provide for the extension of Marinich Drive so that eventually it would become a district arterial road running from Ranui Station Road in the south through to Swanson Road in the north.

[3] It was clear at all times to Estate Homes that in planning its subdivision of the property it would have to take account of the designation.

[4] The Council has never had plans to give effect to the designation by itself building an arterial road. It anticipated that the land alongside the designated road, up to where it joined Marinich Drive, would eventually be subdivided by developers. At all times the Council has envisaged that, as the adjacent land was subdivided, developers would be required to complete the sections of the arterial road that fronted onto their subdivided land, until the arterial road was complete.

[5] A director of Estate Homes, Mr O'Halloran, had discussions with Council officers concerning subdivision of the land prior to acquiring it and seeking subdivision consent. He gave evidence in the Environment Court that he was told that it was the Council's normal practice to require applicants for subdivision consent to undertake the construction of designated roads at the time when the Council gave consent to subdivision of the adjacent land. He said he was also told that the Council's policy was to pay compensation to the developer for road construction to the extent that it was not necessary for the development. He took this to be an assurance that Estate Homes would be paid for any roading not required by the subdivision. In response to what he had been told, he structured the application

and layout of associated roading in a manner that met the Council officers' indication of their requirements.

[6] On 25 February 2000 consultants employed by Estate Homes applied on its behalf for subdivision and land use consents under s 88 of the Resource Management Act 1991. It was a premise of the application that Estate Homes would construct all roads in the subdivision, including that shown as Lot 71 in its subdivisional plan, which comprised the portion of the designated road that Estate Homes would form as an arterial road. Mr Cuthers, a traffic engineer with the Council, gave evidence concerning the functions of different types of major roads in a hierarchy provided for in the Council's Code of Practice for Infrastructure and Land Development. District arterial roads come below strategic arterial and regional arterial roads. They cater mainly for traffic between major nodes or suburbs of the city, and carry a high proportion of through traffic. Collector roads collect traffic from local roads and distribute traffic from arterial roads. They also act as local main roads supplementary to the primary network. The main function of local roads is to give access to abutting land. They have limited, if any, through traffic. Carriageway and road reserve width varies for each type of road.

[7] The application addressed the question of compensation as follows:

> **Compensation**
>
> Our client has requested compensation for the construction of the arterial road for:
>
> - Additional road reserve width from 17m to 23m (180 x 6 = 1080m²); and
> - Additional carriageway width from 8m to 13m (184 x 5 = 920m²)

[8] The Council did not require notification of Estate Homes' application and on 26 June 2000 it consented to it, subject to a number of conditions. These included condition (2)(o) which, together with a relevant note concerning compensation, provided:

> (o) Design, form and completely construct the proposed new roads (Lots 71-75) in accordance to the Code of Practice for City Infrastructure and Land Development to the satisfaction of the Council. Notes:
>
> …

(vi) Compensation for the extra 2m width of carriageway will be paid by Council when the arterial road, (Lot 71) is vested in Council as legal road. Provide an estimate of this cost for approval prior to construction of the road to enable funds to be budgeted.

[9] Note (vi) indicated that the Council would pay compensation for the cost of construction of 2 metres of the 13 metre width of carriageway for the district arterial road, rather than for 5 metres of "additional carriageway" width as Estate Homes had requested. This indicated the Council's willingness to pay costs of construction of the arterial road to the extent that they were additional to the cost of construction of a collector road rather than a local road. No reference was made in the consent to Estate Homes' request for compensation for additional road reserve width of 6 metres, again reflecting the difference between arterial and local road standard.

[10] Estate Homes gave notice of its objection to the Council's decision and subsequently, on 2 April 2002, it appealed to the Environment Court against a number of conditions imposed in the grant of consent including that in condition 2(o)(vi). Prior to the Environment Court hearing, Estate Homes and the Council agreed, and the Environment Court ordered by consent under s 116 of the Resource Management Act, that the subdivision consent should become operative. Estate Homes was then able to and did proceed with the subdivision works, including those for the section of arterial road. It had completed those works by the time the Environment Court heard its appeal in late August 2003. By that time all issues raised in the appeal, other than the adequacy of the compensation specified in condition 2(o)(vi), had been resolved between the Council and Estate Homes, and the appeal proceeded solely against the provision that note (vi) to the condition made for compensation.

Environment Court decision

[11] In its notice of appeal Estate Homes contended that the Council had wrongly required it to vest in the Council that part of its land which fell within the designated area, and to pay the cost of what was a public work. We are satisfied that Estate Homes sufficiently indicated in its notice of appeal that it wished to seek compensation for the entire cost of forming the arterial road and for the full value of

the land which would become road reserve. At the commencement of the hearing of the appeal in the Environment Court, the Council submitted that it was not open to Estate Homes to seek compensation on that basis, and that it should be confined in its appeal to what it had originally sought in its consent application. This submission was rejected by the Environment Court for two reasons. First, the Court took the view that Estate Homes' statement concerning requested compensation did not go to the substance of its application for consent and, being incidental, should not confine the scope of its appeal. Secondly, the Council had made plain to Estate Homes, before it lodged its application, that there was no prospect of the Council granting it a subdivision consent unless the application was made in terms that met the Council's wishes concerning the construction of the road. The Environment Court decided it would be "repugnant to equity" in those circumstances to allow the Council to rely on the wording of Estate Homes' application for consent as restricting what it could seek on appeal. The appeal hearing in the Environment Court accordingly proceeded on the basis that Estate Homes was able to seek compensation for the entire cost of the arterial road and the value of all land in Lot 71, which would be vested in the Council as arterial road.

[12] In its reserved judgment on the appeal,[1] the Environment Court observed that the designated arterial road was being developed in a piecemeal fashion as and when affected pieces of adjacent land were developed, and that it might be many years before it became a continuous road. The judgment said that Estate Homes' main argument for further compensation was that there was no causative link between the proposed subdivision and the Council's requirement for construction of a road on Lot 71. Accordingly, Estate Homes had argued that it should be compensated for the cost of all the land forming the road and for all construction costs. Alternatively, if the Environment Court were to find that a road was required by the subdivision, Estate Homes sought compensation for land value and construction costs in excess of those for the standard of road that was required. In the Court's view, the subdivision did not give rise to the need for any road in Lot 71.

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1 Decision A153/2003, 16 September 2003, Judge C J Thompson, Commissioners P A Catchpole and R M Priest.

[13] The Environment Court also said that condition 2(o)(vi) had been imposed by the Council under its powers to require payment by a developer of a fair and reasonable contribution to the cost of forming a new road which was required by new or increased traffic, attributable to the subdivision, and to take land for the purposes of forming such a new road.[2] In its view, for condition 2(o)(vi) to be valid, such new or increased traffic not only had to be attributable to the subdivision, but also had to be the reason for the new road. As well, the condition imposed by the Council had to fairly and reasonably relate to the development. The Court decided that these requirements were not satisfied in the present case. Its judgment concluded:

> Insofar as its decision of 26 June 2000, granting the appellant Land Use and Subdivision consents, required the appellant to form and construct a road on Lot 71 of the plan of subdivision without compensation for the whole cost of formation and construction, and for the value of the land on which it was constructed, the respondent acted unlawfully.

[14] The Environment Court left it to the parties to resolve the amount of compensation to be paid to Estate Homes by agreement or, if necessary, in a separate civil proceeding.

Appeals to High Court and Court of Appeal

[15] The Council appealed to the High Court against the Environment Court's decision on questions of law. The High Court's judgment was then the subject of a further appeal by Estate Homes to the Court of Appeal. The substantive legal issues in both appeals centred around the statutory source and the scope of the Council's power to impose the condition concerning roading within the subdivision and whether the particular condition had been lawfully imposed. It was common ground that Estate Homes, as promoter of the subdivision, was effectively required by the Council's officers to provide roading of a higher standard than was necessary to service the immediate needs of the subdivision. Indeed Council witnesses accepted that an application for consent which did not provide for an arterial road would

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[2] The Environment Court decided that the source of these powers was ss 321A and 322 of the Local Government Act 1974. Although ss 321A and 322 were repealed by the Resource Management Act 1991, recourse to them was available under s 407 of that Act.

inevitably have been declined. The parties were in dispute, however, over what entitlement to compensation Estate Homes had in these circumstances.

[16] In the High Court, Venning J allowed the Council's appeal.[3] He held that the Council's roading requirements were made under the power to impose conditions concerning "services or works" conferred by s 108(2) of the Resource Management Act rather than under the power to require financial contributions under s 321A of the Local Government Act, as the Environment Court had decided. Venning J found that the condition was valid but, because an additional strip of 2 metres of land was required for the arterial road, the Council was required to pay compensation for that land under s 322(2)(a) of the Local Government Act.

[17] Estate Homes appealed, with leave, to the Court of Appeal against the High Court judgment. A majority of the Court of Appeal, Baragwanath and Goddard JJ, allowed the appeal.[4] Chambers J dissented and it is convenient to outline his reasons first. Chambers J agreed with the High Court Judge that condition 2(o)(vi) had been imposed under s 108(2)(c) of the Resource Management Act, rather than under s 321A or s 322 of the Local Government Act. It followed, according to Chambers J, that there was no right to statutory compensation. No taking of land was involved as, on deposit of the plan, the road would automatically vest in the Council. Compensation became an issue because of an administrative law challenge to the reasonableness of what the Council proposed to pay Estate Homes for the additional works it would be required to undertake in constructing the arterial road. This came down to whether, absent the designation, a subdivision of the kind applied for by Estate Homes would have required a collector road, as the Council had decided, or a local road, as Estate Homes submitted. Chambers J would have referred this question back to the Environment Court for decision rather than have it decided in the High Court.

[18] The majority of the Court of Appeal took a completely different approach to Estate Homes' right to be compensated. Baragwanath and Goddard JJ decided that they should ascertain the meaning and application of the relevant statutory

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3 *Waitakere City Council v Estate Homes Ltd* [2005] NZRMA 128.
4 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619.

provisions by reference to the principle, having effect as a rule of statutory interpretation, that where there was a taking of private property under legislative authority, there was a presumption that the legislation would be read as providing for compensation. The majority decided that in the circumstances there had been a taking.

[19] Applying this approach, the majority felt able to read s 322(2) of the Local Government Act as a provision unqualified by its immediate context. It was an independent source of authority for taking of land for the purposes of forming a new road. So read, s 322(2) empowered the Council to acquire Lot 71 for the purposes of forming the arterial road, subject to the requirement for compensation in accordance with s 247F, which invoked provisions of the Public Works Act 1981. The fact that Estate Homes had made in its application to the Council only a limited claim to be compensated was not an impediment to its right to claim full compensation on appeal. The basis on which compensation was to be paid was referred back to the Environment Court for decision. The majority accordingly rejected the view of Chambers J that, when read in its context, s 322(2) gave a power to take land only where the Council itself was to perform the work involved.

Issues in this Court

[20] This Court has given the Council leave to appeal against the Court of Appeal's judgment.[5] The main issues in the appeal are conveniently summarised in the grounds approved by this Court:

> (1) Whether compensation should be assessed as if the land had been taken by the Council, or as an ingredient of a condition imposed on the granting of a resource consent, or otherwise; and with what consequential effect.
>
> (2) Whether condition 2(o)(vi) satisfied the requirements of the *Newbury* test.[6]

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5 [2006] NZSC 22.

6 The *Newbury* test is a reference to common law requirements that planning consent conditions must be imposed for the purposes of the Resource Management Act 1991, fairly and reasonably relate to the permitted development and not be unreasonable. They were expressed in this way in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

(3) Whether the formation and vesting of Marinich Drive constituted "services or works" under s 108(2)(c) of the Resource Management Act 1991.

(4) Whether the High Court was empowered under Rule 718A to determine the nature of the road which, but for the designation, would have been appropriate; or whether it should have referred that matter back to the Environment Court.

The scope of the Environment Court's jurisdiction

Permitting an increase in the amount of compensation claimed

[21] Estate Homes had prepared its application to the Council on the premise that it would construct an arterial road along the route shown in the designation. The application recorded that it had requested from the Council compensation in the amount of the extra costs associated with a road of that kind. Estate Homes' application also indicated that it considered costs associated with a local road rather than a collector road were the appropriate comparison. The extra costs sought comprised the difference between the cost of constructing a local road, with a carriageway width of 8 metres, and that incurred in constructing the arterial road, with a 13 metre carriageway. Estate Homes had also requested compensation in its application for the additional width of road reserve it would provide, which would be 23 metres for the arterial road compared with 17 metres for a local road. Although compensation for additional land was not addressed in the Council decision, the Council subsequently accepted that compensation had been requested for the value of the additional strip of land, and that this should form part of the compensation package.

[22] In granting its consent to the subdivision application, the Council stipulated in condition 2(o) that the proposed new roads should be constituted in accordance with the relevant Code of Practice and to the satisfaction of the Council. It addressed the request for compensation in its note (vi) which effectively said that compensation for construction costs of an extra 2 metres width of carriageway would be paid by the Council. This indicated that the Council would pay compensation based on the difference between construction costs for an arterial road and a collector road. Estate Homes, of course, had sought to be reimbursed a greater sum based on the difference

in costs of constructing a local road. The second point of difference was whether the extra strip of land required for road reserve would also be the subject of compensation. As indicated, the Council eventually accepted that there should be compensation for taking additional land but based on additional requirements for a collector road.

[23] The majority of the Court of Appeal decided that it had been open to the Environment Court to vary conditions of consent to the subdivision, even if this resulted in conditions about compensation more favourable to the applicant than those it had originally sought, as long as no prejudice arose to other affected parties, such as the Council, or to the public. Subject only to these considerations, the original consent application could properly be amended in the course of the hearing of an appeal concerning the validity of the Council's original condition.

[24] Before us Mr Neutze, for Estate Homes, argued that a further factor supporting the Court of Appeal's decision on this point was that the hearing was "de novo". He reminded us that the Court of Appeal had seen the applicant's statement concerning the compensation it was seeking as incidental to the application for consent. The Court had also decided that it would be unfair to Estate Homes not to let it claim full compensation on appeal, when the form of its application had been heavily influenced by what Council officers had indicated would be acceptable.

[25] Mr Neutze further argued that there were sound policy reasons favouring a flexible approach to the terms of applications for consent at the appeal stage. The Environment Court could, and should, reasonably accommodate changing requirements of the parties in relation to proposed developments. Counsel said that this would not lead to the subject matter of an appeal "mutating" into something that was quite different to what was before the consent authority. He supported his submission by reference to the Court of Appeal's decision in *Body Corporate 97010 v Auckland City Council*.[7]

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[7] [2000] 3 NZLR 513.

[26] Estate Homes' application for resource consent was made under s 88 of the Resource Management Act. Under s 88(2), applications for consent must be made in the prescribed form and manner and must include an assessment of environmental effects. There is provision for the local authority to treat as incomplete and return an application which does not include an adequate assessment of effects, or information required by regulation. Under ss 93 and 94 of the Act, a consent authority must give public notification of the application unless satisfied that those adverse effects will be minor. The Council decided not to notify Estate Homes' application in this case. Its decision granting consent records that it considered the application under ss 104 and 108 of the Act, which respectively stipulate matters for consideration in granting consent and provide for conditions that may be imposed.

[27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.

[28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal.[8] The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.

[29] We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do

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[8] *Shotover Gorge Jetboats Ltd v Jamieson* [1987] 1 NZLR 437 at p 440 (CA) Cooke P; *Wellington Club Inc v Carson* [1972] NZLR 698 (SC) Woodhouse J.

not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision to the extent that it is in issue on appeal.[9] Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal.[10] In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.[11]

[30] The approach that must be followed where it is said that a tribunal has allowed an application on a different basis to that on which it was originally made is consistent with this principle. As the Court of Appeal has recently said:[12]

> We think it plain that jurisdiction to consider an amendment to an application is reasonably constrained by the ambit of an application in the sense that there will be permissible amendments to detail which are reasonably and fairly contemplatable as being within the ambit, but there may be proposed amendments which go beyond such scope. Whether details of an amendment fall within the ambit or outside it will depend on the facts of any particular case, including such environmental impacts as may be rationally perceived by an authority.

[31] In the present case we are satisfied that Estate Homes should, on appeal, have been constrained by what it had recorded in its application to the Council as the basis on which it sought compensation if it was to construct an arterial road. The Council, as respondent in the Environment Court, was prejudiced by the course that was taken concerning the amount of compensation that could be sought for the arterial road. In stating in its consent decision the basis on which it was prepared to pay compensation, the Council exposed itself to an appeal to the Environment Court on the ground that its intended provision of compensation was insufficient to make its requirement of construction of the road to an arterial standard a reasonable one. The

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9 *Body Corporate 97010* at p 525.

10 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 at para [4] (CA) Gault J.

11 Section 290A, which was enacted by s 106 of the Resource Management Amendment Act 2005, now requires the Environment Court in determining an appeal to have regard to the decision that is the subject of appeal.

12 *Shell New Zealand Ltd v Porirua City Council* (CA 57/05, 19 May 2005) at para [7] per Anderson P.

risk that the Council assumed was that the Environment Court would decide that additional compensation on the basis originally sought by Estate Homes was necessary for the condition to meet common law requirements which limit the generality of broadly expressed powers to impose conditions. But the Council did not thereby put itself at risk of the amount of compensation becoming at large before the Environment Court. The Council was entitled to assume that the maximum payment that the Court might determine to be necessary to make the condition reasonable would be no greater than one set on the basis reflected in Estate Homes' application for consent.

[32] The Environment Court should also have recognised that local authorities are in general not subject to the jurisdiction of the Environment Court in relation to their functions as a roading authority. These functions include determining when they will fund work on designated roads.[13] While the Council had a policy of having developers build designated arterial roads running through their land at the time of its development, it might have wished to reconsider the application of the policy to this particular subdivision if an appeal against its terms of consent were to put the Council at risk of having to pay the total costs associated with the arterial road.

[33] For these reasons we are satisfied that the Environment Court should not have permitted Estate Homes to present its appeal on a basis departing so significantly from the compensation that it was seeking at the time of its original application. The decision to do so made the issues considered on appeal substantially different from those raised in the application and addressed by the Council.

[34] The Council consented to an application by Estate Homes, under s 116 of the Resource Management Act, for the subdivision consent to commence prior to the hearing of the appeal. At that stage the Council did not complain that its consent had been granted on a false premise. We do not, however, accept the Council thereby

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13 *Coleman v Tasman District Council* [1999] NZRMA 39 at p 45 (HC) Doogue J.

compromised its right to object to Estate Homes proceeding at the appeal hearing on a wider basis than advanced in its original application. We shall return to the significance of s 116 on another point later in these reasons.

[35] When, on appeal to the Environment Court, an applicant seeks to have an application granted on a materially different basis from that put forward to the Council, considerable care is required before the Environment Court permits the matter to proceed on that different basis. Not every alteration in approach would require an applicant to make a fresh application to the Council, rather than to proceed by way of appeal. It is a question of degree. Furthermore, as the majority of the Court of Appeal recognised, the question of any prejudice to other parties, and the general public, is always relevant. Where, as in the present case, the Environment Court came to be considering the matter on a materially different basis from that to which the Council exposed itself, the matter could proceed on the wider basis only with the Council's consent and then only if the Court was satisfied that other persons and the public were not prejudiced. In the present case, the Council had good reason to oppose the wider basis for the appeal and the matter should not have proceeded in those terms at all. In consequence, the decision of the Environment Court was on a materially different basis which prejudiced the Council and cannot stand.

[36] We accordingly uphold the threshold argument of the Council and will consider its appeal on the basis that the matter truly at issue before the Environment Court should have been simply the question of whether the appropriate compensation was to be based on a local road or a collector road.

Permitting a challenge to the Council's actions before application submitted

[37] By allowing Estate Homes to present its appeal on a broader basis, the Environment Court also allowed the appellate proceeding to develop into a challenge to the lawfulness of the earlier actions of the Council officers, who had sought to persuade Estate Homes to submit an application for subdivision that accommodated the designated arterial road and provided for Estate Homes to build it. The appeal thereby became a collateral challenge to the validity of administrative action

involving the proposed exercise by the Council of a statutory power to refuse any application for consent which did not provide in this way for the arterial road on the subdivided land. The Council did not in the end exercise its power, because Estate Homes submitted its application in terms of what it understood to be the requirements if it were to be approved.

[38] There are difficulties in what occurred. The appeal to the Environment Court was an inappropriate proceeding in which to bring a challenge to administrative actions that did not form part of the Council's decision-making process in respect of the application which was actually submitted. Any challenge to the lawfulness of the prior actions of Council officers should have been brought by way of judicial review in the High Court, thereby meeting the requirement that "the right remedy is sought by the right person in the right proceedings".[14] The appellate authority of the Environment Court under s 290 of the Resource Management Act was confined to the decision against which Estate Homes was appealing, and the Environment Court did not have authority to go behind the application which was the subject of that decision in order to determine the appeal.[15] In the present case the proceedings in the Environment Court were the wrong proceedings. That Court did not have statutory jurisdiction to determine the lawfulness of the prior actions of Council officials because its appellate jurisdiction was confined to the Council's decision on the application. The Environment Court, accordingly, could not go behind the application in hearing and deciding the appeal, let alone decide the appeal on a basis more favourable to Estate Homes than it had sought in its application.

[39] New Zealand law has largely avoided jurisdictional complexities in relation to the manner in which administrative action can be challenged.[16] But the authority of the Environment Court to decide collateral matters depends on whether the issues are squarely raised by the proceeding that is directly before it. In the present case the

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14 Wade and Forsyth, *Administrative Law* (9ed, 2004), p 281; Knight, "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 117, pp 119 – 120.

15 The bar under s 296 of the Resource Management Act to bringing judicial review proceedings until the right of appeal to the Environment Court is exercised, and the appeal determined, does not apply to a challenge to irregularities in actions of Council officials prior to the submission of an application for planning consent: *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 at para [22] (CA).

16 See *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 at paras [47] – [49] (CA).

evidence concerning the prior discussions with Council officers was relevant in the appeal only to the extent that it threw light on the nature of the condition imposed concerning the arterial road.

The Council's requirement for an arterial road

[40] Condition 2(o) of the Council's consent is expressed as a requirement which Estate Homes had to meet to the satisfaction of the Council before it was entitled to a certificate of compliance with the consent for the subdivision enabling deposit of the subdivisional plan.[17] On its terms, the condition requires that the roads proposed in the application, including the arterial road shown in Lot 71, are to be designed, formed and constructed in accordance with the Council's Code of Practice. There is, however, undisputed evidence concerning the advice given to Mr O'Halloran by Council officers concerning the nature of the subdivision and the framing of the application for consent. Read in that context, it is clear that Estate Homes made provision for the arterial road in its subdivision because it was informed that the Council would require that amenity to be provided or it would not consent to the proposed subdivision. In those circumstances, it is not appropriate to treat the condition simply as a stipulation of the standards to be met in relation to roading provided for in the application.

[41] This should not be taken as endorsing the approach taken by Estate Homes in the present case. It will usually be preferable for an applicant for a subdivision consent to apply for that consent in terms that the applicant considers suitable. If the Council then grants the consent on conditions, and the applicant wishes to take issue with those conditions, the appeal process can be invoked. Matters will become needlessly complicated if, as in the present case, an applicant attempts to challenge conditions of consent on the basis of what it would have applied for, had it not been concerned to comply with stipulations stated by Council officers. While the problem of delay may tempt applicants to act in a strategic way in order to expedite the process, this will not provide a justification for seeking to re-open the terms of the consent application at the appeal stage.

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[17] Under s 224C of the Resource Management Act.

[42] The reality in the present case is that the application was expressed in terms that reflected a Council policy of requiring developers to provide for and build an arterial road along the path of the designated road running through their properties. In this context condition 2(o) is to be read as a requirement that Estate Homes construct the road shown on Lot 71 of its plan to arterial road standards, making appropriate provision from its land for road reserve. The note concerning compensation incorporates the Council's recognition that its requirement of an arterial road for that subdivision, without Council compensation for the additional element in construction costs, would breach common law requirements of reasonableness. In stipulating, as it did in the note, that it would pay compensation for "the extra 2m of carriageway", the Council sought to bring the condition within those requirements by making it reasonable.

Was there a taking?

[43] Before addressing the various statutory provisions identified as providing authority for the Council's requirement that Estate Homes construct an arterial road on Lot 71, it is necessary to consider the approach taken in the Court of Appeal to interpretation of the legislation. As indicated, the majority identified what it saw as two conflicting principles which needed to be reconciled in interpreting the legislation. The first was a general principle of statutory interpretation that:[18]

> Subject to inconsistent legislation and compliance with the general law it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes.

[44] The other principle, reflected in resource management legislation, was that land development required "principled, systematic and sensitive controls" without any expectation of or right to compensation.[19] Following an extensive discussion in their reasons, taking both principles into account, the majority proceeded to construe the statutory provisions in light of the presumption of compensation for public taking.

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[18] At para [128].
[19] At para [136].

[45] New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation. The principal general measure of constitutional protection is under the Magna Carta which requires that no one "shall be dispossessed of his freehold … but by … the law of the land".[20] One of the effects of this measure is to require that the power to expropriate is conferred by statute, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, the courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid.[21] It was no doubt in this spirit that the majority of the Court of Appeal invoked s 322(2) of the Local Government Act, which is a provision which authorises the taking of land subject to compensation in stipulated circumstances.

[46] The common law presumption of interpretation applies, however, only if there is actually a taking. It is necessary in the present appeal accordingly to inquire whether the Council's requirement, as a condition of its subdivision consent, that Estate Homes construct an arterial road over Lot 71 of its subdivision and cause the land to be vested in the Council as road reserve amounts to a taking.

[47] In general, where permission to develop land is refused, with the consequence that it is greatly reduced in value, the courts have not applied the statutory presumption and have treated what has happened as a form of regulation rather than a taking of property.[22] This explains why New Zealand planning legislation restricts, without compensation, the right to develop land and requires

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20 Chapter 29 of Magna Carta, which remains part of New Zealand law under s 3(1) and the First Schedule of the Imperial Laws Application Act 1988.

21 Taggart, "Expropriation, Public Purpose and the Constitution" in Forsyth (ed), *The Golden Metwand and the Crooked Cord* (1998), pp 104 – 105.

22 Wade and Forsyth, p 805, citing *Belfast Corporation v O D Cars Ltd* [1960] AC 490 (HL).

approval of all subdivisions.[23] The legislation, of course, also enables landowners to apply for consent to subdivide, which they may obtain if they comply with conditions that are lawfully imposed in accordance with purposes for which the consent authority was entrusted with the relevant discretion.

[48] If a lawful condition to a subdivision consent requires the giving up of land in exchange for the right to subdivide, no expropriation or taking will be involved and the common law presumption of interpretation will not apply to the empowering legislation. If a condition is unlawfully imposed, for example for a purpose outside of those for which power to impose conditions of subdivision consent is given, that will not convert a regulatory requirement into a taking of property. The remedy for the landowner is to seek invalidation of the condition in the courts or, if the legislation permits, the substitution of a different outcome on appeal.

[49] Consistent with the view that conditions of consent to subdivision of land do not amount to a taking is the characterisation by the Court of Appeal of the scheme of the Water and Soil Conservation Act 1967. The Court has said that the Act did not deprive landowners whose applications for water rights were refused of anything: it simply denied them privileges. It followed, in the Court of Appeal's view, that there could be no claim to an expectation of compensation in consequence of the refusal.[24]

[50] The Court of Appeal held in *Waitakere City Council v Khouri*[25] that compensation was not payable in respect of the vesting of any road in a council under s 316 of the Local Government Act. That was, of course, a different question from that in the present case, which deals with the compensation payable by the Council for any extra width of road required by it to comply with what it calls its "connectivity" policy.

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23 Sections 11 and 218 – 220 of the Resource Management Act.
24 *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94.
25 [1999] 1 NZLR 415.

[51] Professor Stoebuck, writing in relation to the constitutional position in the United States, observes that a distinguishing characteristic of eminent domain transfer is that it involves the transfer of rights which "may be compelled over the transferor's immediate, personal protest".[26] The notion is that there is a forced acquisition of a landowner's rights under a power belonging to the state which allows the landowner no choice. In our view, that absence of choice must be present in a taking of property before the principle of statutory interpretation applied by the Court of Appeal in this case can be invoked.

[52] Such absence of choice is a far cry from the facts of the present case, where the provision of roading to be vested in the Council was part of the terms on which consent to subdivision was given. If the requirements were unacceptable, Estate Homes was not required to transfer its land. On the general principles we have discussed, the requirements placed on it by condition 2(o)(vi) accordingly do not amount to a taking of its land. This was recognised by the High Court of Australia in *Lloyd v Robinson* where, speaking of giving approval to subdivisions conditional on the applicant giving up land for purposes including roads, the Court referred to the presumption of interpretation and said:[27]

> Given the necessary relevance of the conditions to the particular step which the Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: … If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a *quid pro quo* is received, namely the restored right to subdivide the first.

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[26] Stoebuck, "A General Theory of Eminent Domain" (1972) 47 Wash LR 553, p 557.
[27] (1962) 107 CLR 142 at p 154.

[53] From time to time developers will consider that requirements have been imposed by a consent authority, in approving a proposed subdivision, which are excessive and subject the developer to unfair pressure to submit to them because of the economic imperative of acting promptly on the consent. The risks to developers associated with challenges to the requirements by way of appeal, including those associated with delays, may be significant and we are not unsympathetic to the problems they face with regulatory processes. These circumstances, however, provide no sound basis for reading legislative stipulations of the powers of consent authorities as involving takings of property, for which the presumption is that there is provision for compensation. The owner of the land has recourse to judicial remedies, which include challenging the lawfulness of requirements imposed and, where the statute permits it, a fresh assessment of the merits of the requirement on appeal. If the landowner does not wish to take advantage himself of these procedures, then, as the High Court of Australia observed in *Lloyd v Robinson*, "the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions".[28]

[54] For these reasons we are satisfied that, in imposing the condition concerning the arterial road, the Council was not taking property so as to be required to pay compensation. The legislative provisions are to be construed without regard to that principle of interpretation.

The statutory basis for the arterial road requirement

[55] The Environment Court concluded that, insofar as the condition related to construction of the arterial road, s 321A of the Local Government Act applied and, insofar as the condition concerned vesting of land for road reserve in the Council, the applicable provision was s 322(2). Section 321A(1)(a) provides for a Council, as a condition of approval of a scheme plan, to require the owner of land to pay a reasonable contribution towards the cost of forming new roads required because of new or increased traffic owing to a subdivision. The difficulty with its application, however, is that the present case involved no requirement for a payment to the

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[28] At p 154.

Council by Estate Homes. Nor did it require dedication of a strip of road for any purpose in terms of s 321A(1)(b). Section 321A simply does not apply.

[56] Section 322(1) of the Local Government Act is concerned with situations where the Council agrees with the owner of land that, instead of the owner making provision for new roads and doing the necessary work, the Council itself will construct roads in a subdivision in return for the owner transferring land to the Council. Councils are also given power by s 322(2)(a) to take, purchase or otherwise acquire land for forming a new road. As previously noted, when they do so provisions for compensation in the Local Government Act will apply. Sections 247F and 247G provide for such compensation to be assessed under the Public Works Act.

[57] We accept, as the majority of the Court of Appeal and Venning J concluded, that s 322(2) is a source of statutory authority for the taking of land that covers wider ground than the narrow circumstances provided for in s 322(1). The context in which s 322(2)(a) appears is, however, important and indicates that the power which it confers only covers situations in which formation, diversion or upgrading work is to be undertaken by the Council. If the Council wishes to take land for any purpose in that context, s 322 gives the necessary power. But in the present case, where the applicant itself was to do the works, and the land would vest in the Council by operation of law on deposit of the plan, on its terms s 322 has no application. The contrary view of the Court of Appeal majority was of course based on its conclusion that there had been a taking of land, which invoked a presumption that there would be compensation. We have rejected the view that the presumption applies and we do not accept that s 322 has any application.

[58] In his judgment in the High Court, Venning J concluded that the condition was one requiring Estate Homes to perform "works" and was authorised by s 108(2)(c) of the Resource Management Act, which is the successor provision to s 321A. In the Court of Appeal, Chambers J agreed with this analysis.

[59] A statutory power to impose conditions on the grant of a planning consent is provided for in s 108 of the Resource Management Act. Insofar as it is relevant, s 108 provides:

> **108 Conditions of resource consents**
>
> (1) Except as expressly provided in this section and subject to any regulations, a resource consent may be granted on any condition that the consent authority considers appropriate, including any condition of a kind referred to in subsection (2).
>
> (2) A resource consent may include any one or more of the following conditions:
>
> …
>
> (c) A condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:

[60] The majority of the Court of Appeal did not accept that the phrase "services or works" was apt to cover construction of roading which was not reasonably required as a consequence of the subdivision, but which would serve regional purposes. On the terms of s 108(2)(c), however, the question of whether a condition requiring roading be constructed to a stipulated standard is in the nature of a requirement to provide "services or works" should be determined by reference to whether the roading provided for under the subdivision plan, which forms part of the consent application, fits with the phrase "services or works". In our view, plainly it does. The language of s 108(1)(c) accordingly directly empowers imposition of a condition requiring that the roading stipulated in the application be carried out as a condition of the consent, and provides the statutory authority for the Council's requirements concerning the arterial road.

Was the Council's requirement lawful?

[61] In imposing the requirement that Estate Homes design, form and construct an arterial road along the course of the designated road, the Council was acting under s 108(2)(c). In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law, conditions must be imposed for a planning purpose, rather than one outside of the purposes of the empowering legislation, however desirable it may

be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.[29]

[62] The Environment Court decided that Estate Homes' subdivision could have been designed to operate perfectly well without roading along the Marinich Drive axis. The Court added that, while the road might be used because it was there, it could not be said that subdivision-generated traffic had caused the need to construct that road. The Court was, however, proceeding on the basis that s 321A applied, which was common ground at the hearing.

[63] Venning J, on appeal, correctly decided that s 108(2)(c) was the empowering provision rather than s 321A. He did not accept that administrative law principles required that there be a cause and effect link between the subdivision and a condition such as the arterial road requirement. It was sufficient that Estate Homes had chosen to incorporate a road along the designated path in its application. In these circumstances, requiring Estate Homes to construct an arterial road and contribute an extra 2 metres of land was a condition that fairly and reasonably related to the development plan and the subdivision and was also a reasonable requirement. What was not relevant was that a hypothetical subdivision could have been designed to operate effectively without construction of Marinich Drive.

[64] The majority in the Court of Appeal appears to have decided that, in combination, s 104 and common law principles required that there be a causal link between conditions that might be imposed and effects of the proposed subdivision.[30] We see nothing, however, in the requirement under s 104 to have regard to effects on the environment that would restrict imposition of conditions of consent to circumstances where they would ameliorate the effects of the proposed development. Such a narrow approach would be contrary to the breadth with which the power under s 108(2)(c) to impose conditions is expressed.

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[29] Footnote 5 above: see also *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 at p 572 (CA).

[30] At para [161].

[65] In *Tesco Stores Ltd v Secretary of State for the Environment*[31] the House of Lords considered the United States' approach concerning when the imposition of a planning condition amounts to an unreasonable exercise of planning power. Under that approach, which has been developed in the context of the eminent domain provision in the Fifth Amendment, United States courts apply a "rational nexus" test.[32] This requires a planning authority imposing a condition which obliges a contribution to infrastructure to demonstrate that the development will cause a need for new public facilities.[33] The House of Lords rejected that standard as appropriate for judicial review of planning conditions because it would necessarily involve an investigation of the merits of planning decisions. Lord Hoffmann said:[34]

> No English court would countenance having the merits of a planning decision judicially examined in this way. The result may be some lack of transparency, but that is a price which the English planning system, based upon central and local political responsibility, has been willing to pay for its relative freedom from judicial interference.

[66] In New Zealand, the planning system interpolates a right of appeal on the merits to specialist tribunals, but this does not diminish the force of Lord Hoffmann's dictum as a reminder of the distinction between whether a consideration is material to a decision and the weight to be given to it. We consider that the application of common law principles to New Zealand's statutory planning law does not require a greater connection between the proposed development and conditions of consent than that they are logically connected to the development.[35] This limit on the scope of the broadly expressed discretion to impose conditions under s 108 is simply that the Council must ensure that conditions it imposes are not unrelated to the subdivision. They must not for example relate to external or ulterior concerns. The limit does not require that the condition be required for the purpose of the subdivision. Such a relationship of causal connection may, of course, be required by the statute conferring the power to impose conditions, but s 108(2) does not do so.

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31 [1995] 1 WLR 759.

32 The test was laid down by the Supreme Court of the United States in *Nollan v California Coastal Commission* 483 US 825 (1987).

33 As well, the authority must show that the contribution required is proportionate to that need and will be used to provide the facilities.

34 At pp 781 – 782.

35 *Housing New Zealand Ltd v Waitakere City Council* [2001] 1 NZLR 340 at para [24] (HC, Full Court, Fisher and Glazebrook JJ).

[67] It was for the Environment Court, in the exercise of its appellate role, to decide whether the conditions were appropriate. In addition to the matters mentioned, the Court was required to take into account the policy of the Council as reflected in its plan. As Venning J emphasised, Estate Homes chose to apply for subdivision consent incorporating a road along the path of the designation. The Council's requirement that it be constructed to the standard of an arterial road cannot be said in these circumstances to lack the necessary degree of relationship to the subdivision proposed. It is beside the point that approval for the subdivision could have been sought with a different roading format which did not include a road along the designated path. The requirement to construct an arterial road clearly related to the subdivision for which Estate Homes was prepared to, and did, seek consent.

[68] That leaves the question of whether the requirement was reasonable. From the Council's point of view, it presumably made economic sense for it to have the road constructed to the standard required for an arterial road in the course of the development, with all land required for road reserve vested in the Council, so that it did not later have to acquire further land and widen the road to arterial standard. Whether it was reasonable to impose that preference on Estate Homes comes down to whether the basis the Council proposed for compensation for the road and required land was reasonable. Its proposal was to reimburse the additional costs of construction over and above those for a collector road. Subsequently it has agreed to pay for the extra strip of land required for the road reserve of an arterial road on the same basis.[36] Estate Homes argues that to make the Council's requirement reasonable it should have based its proposal on cost and land requirements for a local road.

Reference of appeal back to Environment Court

[69] Mr Casey, on behalf of the Council, urged us to resolve this issue, as

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[36] We have been advised that the Council has paid and Estate Homes has accepted, without prejudice pending the determination of this appeal, compensation for additional construction costs and the value of an extra 3 metre strip of land. The payments have been calculated on the basis that a collector road is the appropriate comparator.

Venning J was prepared to do in the High Court, by acting under r 718A of the High Court Rules. That rule gives the High Court power to make any decision it thinks should have been made. Alternatively, the Court may direct the decision-maker to reconsider the matter.

[70] In order to decide that it was appropriate to decide outstanding issues in this Court, we would need to be satisfied that they would not turn on questions of specialist judgement concerning facts which the legislature contemplated would be determined on appeal from a local authority by an expert tribunal. That is not the case here. Specifically, we are not satisfied that the question of whether a collector road or a local road was the appropriate basis for assessing the extra costs associated with an arterial road turns solely on Council documents concerning the thresholds set for individual types of road. In our view the ultimate questions may well turn on planning judgement. Accordingly, we propose to refer the question of what compensation would make the Council's requirement to construct an arterial road reasonable at common law to the Environment Court for determination.

[71] The appeal is accordingly referred back, under s 26 of the Supreme Court Act 2003, to the Environment Court for determination.

Approach to be taken in determining the appeal

[72] Under s 290 of the Resource Management Act, the Environment Court has the same powers, duties and discretions as did the Council in respect of its decision granting consent. The Court will be able to confirm, amend or cancel the condition which is in issue in the appeal if it concludes that is appropriate. This Court has, however, decided that the requirement to build an arterial road was authorised under s 108(2)(c) of the Resource Management Act and that the requirement was sufficiently related to the subdivision for which consent was sought to meet common law requirements. The remaining important question for the Environment Court, and the reason why the matter is referred back to it, will be the determination of whether it was reasonable for the Council to impose the condition on the proposed basis for payment towards costs of the road.

[73] On the argument we have heard, that will turn on whether, in the absence of a designation, it would have been appropriate for the road shown as Lot 71 of the subdivision plan to be built to the standard of a collector road or a local road. Other ways in which Estate Homes could have organised the subdivision, so as not to include a road on Lot 71, will not be relevant. We have concluded that this specific decision is a matter of planning judgement which is appropriately taken by the specialist appellate Court whose members, of course, have already heard evidence that was directed to the central issue.

[74] At all stages the focus of the successive appeals has been on the condition's requirement for construction of an arterial road, including the proposed compensation. The Council was not, of course, required to address compensation in a note to its condition in relation to roading. It could have addressed compensation by agreement with Estate Homes. It chose instead to stipulate the basis for compensating Estate Homes in a note to the condition it was imposing requiring an arterial road. The note was thereby incorporated in both the condition and the Council's decision. As a result it forms part of what may be addressed by the Environment Court in the appeal under s 290.

[75] We are conscious of the fact that the road has now been built by Estate Homes. We state first, however, what the position would have been if that had not occurred, as that will be the normal situation. If the Environment Court decides that the Council's basis for compensation was unsound and the condition was unreasonable, in the normal course it would be able to invalidate the condition. It should then allow the Council to decide whether it wishes to maintain its requirement for an arterial road. If it does, the Council could agree to substitution by the Environment Court of a condition requiring additional compensation sufficient to make the requirement reasonable. If, however, the Council is unwilling to accept the additional financial burden, the Court would have to address other options for determining the appeal. In general it is not for the Court to decide what financial allocations are to be made for particular roads from a local authority's planning budget. The Council's discretion in this must be respected when considering remedies. For that reason, in a normal case it will usually not be open to the

Environment Court to amend the condition in a way that increases the Council's financial contribution to the road.

[76] The present case, however, is exceptional. The road has been built by Estate Homes and the Council has obtained what it sought to achieve in imposing the condition. That followed the Environment Court's order under s 116 that the consent should commence, despite the outstanding appeal. That order was made on Estate Homes' application but with the consent of the Council, which was expressed to be subject to condition 2(o)(vi). Mr Casey submitted that if the condition were found to breach administrative law requirements, this Court should not require the Council to meet any additional costs of roading found to be payable to make the requirement of an arterial road reasonable. He rightly emphasised, and we have already recognised, that it is not part of the Environment Court's general role to supervise the Council's decisions on the allocation of roading funds. Mr Casey also emphasised that Estate Homes had been prepared to build the arterial road knowing that it might not be paid more than what the Council had decided was appropriate. On the other hand, as Mr Neutze argued, the Council consented to the application for an order that the consent commence, knowing that this would lead to the road being constructed, as it desired, and fully aware that the Council would still face an appeal over the appropriateness of the condition in relation to compensation for Estate Homes.

[77] We have concluded that in this case the Council's commitment to pay compensation formed part of the consent decision of the Court. It is therefore part of what the Council can "confirm, amend or cancel" under its statutory powers. The Council is no longer able to abandon its requirement for an arterial road. It has achieved that result through a process involving a Court order to which it consented. Whatever the Council meant by making its consent subject to the condition, it did not give a clear indication that its consent to the works being undertaken was on the basis that it would not have to meet extra costs if the Environment Court found its proposal for compensation was inadequate. In those circumstances we do not consider the Council is now able to raise its right to determine roading expenditure as a factor that should preclude the Environment Court from exercising its statutory jurisdiction to amend the condition, if it decides that it is unreasonable, so that there

is an increase in the sum that the Council is presently committed to pay towards the cost of the road. Within the limits of what was sought in the original application, the Environment Court will, in these circumstances, have jurisdiction to amend the condition accordingly if it finds that compensation on the basis of note (vi) to condition 2(o) is unreasonable. The Court should indicate what adjustments would have to be made to the condition to make it reasonable, covering the basis of compensation for additional costs of construction and for any additional land required for an arterial road.

Conclusion

[78] There is an obvious alternative to the approach taken by the Council in this case of using the statutory planning consent process to secure construction of additional infrastructure to meet the long term needs of the city. It would be open, although not necessarily as advantageous to local authorities, for them to proceed by way of side agreements with developers to undertake certain work, and provide where necessary additional land, for an agreed amount of compensation. Such side agreements could be reached prior to consent decisions being taken by the local authorities. This approach would dispense with the need for councils to impose conditions requiring additional services and works, while at the same time committing themselves to payments for the additional element.

[79] In proceeding in the way that the Council did in this case, local authorities take the risk that their requirements are invalid, in terms of administrative law standards, if the compensation stipulated in the conditions that impose the infrastructure requirements is inadequate. If local authorities choose to proceed in this manner, they also leave themselves open to challenges on appeal concerning the adequacy of additional payments they offer. If, as well, they co-operate in allowing development works to proceed, while the reasonableness of their requirements for extra infrastructure remains in issue in an appeal, local authorities risk being required to pay what the Environment Court decides is appropriate for the completed infrastructure they wanted to have done within the limits of what was sought in a developer's application. This is what has happened in the present case.

[80] Developers do not of course have to reach agreements with local authorities and have rights of appeal against conditions they impose in their capacity as consent authorities. The decisions developers take will, however, no doubt continue to be strongly influenced by economic considerations, including the cost of delay in proceeding with developments. In the end, developers will always have to decide which way of proceeding best serves their interests overall.

Result

[81] For the reasons given, the appeal is allowed. The judgment of the Court of Appeal is set aside. In its place there will be an order referring the appeal back to the Environment Court to be determined in accordance with this judgment.

[82] The Council has been partially successful in this appeal and is entitled to costs in the sum of $10,000 plus reasonable disbursements. Costs in the other Courts are to be fixed by those Courts.

Solicitors:
Kensington Swan, Auckland for Appellant
Brookfields, Auckland for Respondent

ORIGINAL

Decision No. C 133 /2004

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of applications pursuant to section 116 of the Act for a resource consent to commence
BETWEEN	WENSLEY DEVELOPMENTS LIMITED (ENV C 13/04)
AND	WOODLOT PROPERTIES LIMITED (ENV C 22/04) Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (sitting alone under section 279 of the act)

In Chambers at Christchurch

PROCEDURAL DECISION

Introduction

[1] This is an application by the Queenstown Lakes District Council for review of orders made by this Court on 7 April 2004 in Queenstown. The application relies on rule 287 of the District Court Rules 1992.

[2] The order made by the Court was that resource consents for two different subdivisions – one by each of the appellants – could commence under section 116 of the Resource Management Act 1991 ("the Act" or "the RMA") on condition that a bond be entered into prior to certification pursuant to section 224(c) of the Act. The purpose of the section 116 orders was to allow work to commence on each site before the issue as to the proper quantum of financial contributions was resolved. The purpose of each

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

bond was to ensure payment to the Council. Therefore each bond was guaranteed by an institutional guarantor and registered against the titles to the lots in the subdivisions. After a hearing by the Court any overpayment was to be refunded by the respondent.

Background

[3] At the hearing on 7 April Ms Macdonald put the Council's case as being that the respondent, as a condition of consenting to the applications, sought payment of the contributions at the section 224(c) certificate stage in preference to a bond. That submission was not accepted.

[4] The grounds for the application now before the Court are:

> (1) there was not a full argument or opportunity for the respondent to make submissions and/or present evidence as to the appropriateness of the conditions imposed on the orders made, in particular conditions as to payment at section 224(c) stage versus a bond;
>
> (2) it is appropriate in the circumstances that the Court exercise its discretion to review the orders made in light of submissions made and evidence to be presented to the Court by the respondent with respect to the appropriateness of the conditions imposed.

[5] I note that the Council is not applying to set aside the orders that the resource consents commence, only seeking to amend the conditions. Specifically the Council is seeking payment of the financial contributions, rather than provision of a security for payment. While there is no formal application by the appellants to vary the orders I record that in his submissions for them Mr Goldsmith has also applied to amend the conditions on which the orders are made.

[6] The parties have agreed this application may be considered on the papers lodged by each party. The Council has lodged a memorandum of counsel and an affidavit by Mr D C Field, the Chief Executive Officer of the Council, dated 22 April 2004; the appellants rely on Mr Goldsmith's written submissions; and finally there is a reply for the Council.

Wensley Developments Limited (ENV C 13/04)

[7] This application involves a significant development at 327 Frankton Road. It proposes both visitor accommodation and some residential dwellings – essentially in a

single large development. Wensley applied for both land use consent to construct the development and for subdivision consent to unit title development under the Unit Titles Act 1972 following completion of construction.

[8] The Council levied financial contributions as follows:

(a) a land use consent development levy of $109,872;

(b) subdivision consent – reserve contributions totalling $1,180,687.98 comprising separate amounts of $1,070,815.98 plus $109,872.00. There is a note relating to the second (smaller) sum that, if already paid pursuant to the land use consent, it does not have to be paid again pursuant to the subdivision consent.

[9] Wensley has not appealed the land use consent's development levy of $109,872.00, but only the subdivision consent's financial contribution of $1,070,815.98. The grounds include:

- that the quantum of the contribution is wrong;
- that the method of calculation is wrong; and
- that it is inconsistent with the relevant Council policy documents.

[10] Mr Goldsmith advises me that the Wensley development is currently under construction, and he submits that means that the Council has certainty of receiving the $109,872.00 land use consent development levy.

[11] Upon completion of construction the unit title plan will be prepared, which is when section 224(c) certification will be required. That will trigger the financial contribution payment of $1,070,815.98, the subject of the substantive proceedings.

[12] The circumstances in which Wensley also seeks to vary the 7 April 2004 order are that I then (on Mr Goldsmith's application) directed that Wensley register a bond to secure payment of the financial contribution. However, as Mr Goldsmith now explains it:

Wensley's position is now that a registered bond in relation to that contribution – to be paid upon final determination or upon earlier sale of the units – does not address its concerns. This is because the units are likely to be pre-sold. Section [224(c)] certification will probably precede deposit of plan and issue of titles only by a matter of three or four weeks, and settlement of sales will take place upon issue of titles. As a consequence, bonding the payment upon the basis determined previously by the Court would only delay payment to the Council by a matter of weeks and would likely still result in payment to the Council prior to determination of the legal challenges (a situation I was unaware of at the time of the oral hearing).

Wensley requests that the disputed sum be bonded and that bond be secured by guarantee from a registered bank or other substantial financial institution rather than be secured by registration against titles. I submit that this procedure is appropriate because:

(a) Payment to the Council should properly be linked to final determination of the amount payable rather than being linked to sale of units which could happen before or after final determination of the amount payable.
(b) It is administratively far more efficient for both parties to deal with the matter by way of a single bond guaranteed by a bank rather than have to deal with registered bonds which will come down on 80 plus titles and will result in a significant amount of unnecessary paperwork to discharge the bond individually from those titles on sale.
(c) A bank guarantee of payment at a specified point in time (five working days after final determination of the legal challenges) provides the Council with more than adequate security for payment.

[13] Wensley now requests that the following conditions be attached to the section 116 Order already made by the Court:

(a) The disputed sum of $1,070,815.98 be bonded on the basis that the correct amount be paid within five working days after the date that the decision determining the correct amount to be paid becomes final;
(b) The bond must be guaranteed by a registered bank or other substantial financial institution.

I assume the phrase 'becomes final' refers to the exhaustion of appeal rights by either party.

Woodlot Properties Limited (ENV C 22/04)

[14] The Woodlot situation relates to a subdivision consent only – at Goldfields Heights – so there will be no prior payment of any undisputed financial contribution. However, Mr Goldsmith advises me that the Woodlot situation is the same as the Wensley situation to the extent that:

(a) Pre-sales of residential sections are likely.

(b) Section 224(c) certification is likely to proceed deposit of plan and sale of sections by a matter of weeks only.

(c) Woodlot proposes that the disputed amount be bonded and that the bond be secured by bank guarantee rather than by registration against the title to the land.

[15] The Woodlot appeal relates to a challenged sum of $275,625, although Woodlot accepts that an appropriate financial contribution will be payable. Mr Goldsmith advised me that Woodlot estimates that appropriate contribution may be in the order of $175,000. Woodlot is prepared to pay that sum of $175,000 when a section 224(c) certificate is requested, leaving the balance of $100,625 to be bonded, on the basis that a refund is made if it transpires that the $175,000 is an overpayment (to the extent of that overpayment).

[16] Accordingly Woodlot has requested that the following conditions be attached to the section 116 Order already made by the Court:

(a) The sum of $175,000 be paid to the Council prior to section 224C certification.

(b) The balance disputed sum of $100,625 be bonded on the basis that the correct amount be paid within five working days after the date that the decision determining the correct amount to be paid becomes final.

(c) The bond must be guaranteed by a registered bank or other substantial financial institution.

(d) If the amount finally determined as required to be paid to the Council is less than the $175,000 previously paid, the amount of overpayment shall be

refunded by the Council to Woodlot within five working days after the date that the decision becomes final.

The arguments for when a financial contribution should be paid

[17] Mr Goldsmith summarised – fairly in my view – the Council's concerns outlined in Mr Field's affidavit as being:

(1) An Order allowing the consents to commence upon the basis that the reserve contribution payments are bonded would be "... prejudicial to the source of and ultimate funding of 'the Council's] reserve programme ..."[1]

(2) Uncertainty as to the timing of payment of financial contributions would require Mr Field to recommend to the Council that the programme of reserve development works be deferred indefinitely[2].

(3) Delay in payment of the contributions will result in a financial advantage to the developers and a corresponding detriment to the respondent resulting from the diminution in the purchasing power of the money over the period[3].

(4) If a precedent is set, other developers may seek to delay their payments in the same manner[4].

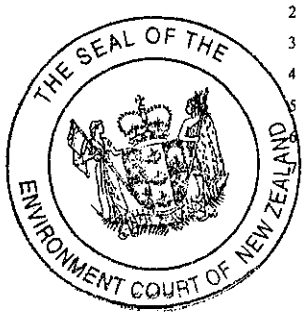
(5) It is important to the respondent that funds be paid at the time that the "effect" giving rise to the need for the contribution arises[5].

(6) Council concern over uncertainty as to timing of payments due to the developer's ability to control the sale process[6].

(7) Potential concern about request for bonds to be replaced with bank guarantees[7].

[18] The appellants did not lodge an affidavit in reply, but instead I have very full submissions of counsel. Mr Goldsmith has trespassed on matters of fact but I am prepared to read the evidence in his submissions on those matters for two reasons – first because the factual circumstances surrounding the obtaining of section 224 certificates are particularly within solicitors' knowledge; and secondly Mr Goldsmith is known to the Court as a solicitor with extensive experience in this district in acting for subdividers and developers. In addition some of the matters raised by Mr Goldsmith are contained

1 Mr Field's affidavit paragraph 3.
2 Mr Field's affidavit paragraph 6.
3 Mr Field's affidavit paragraph 7.
4 Mr Field's affidavit paragraph 7.
5 Mr Field's affidavit paragraphs 8 and 9.
6 Mr Field's affidavit paragraph 9.
7 Mr Field's affidavit paragraph 10.



in the affidavit of Mr D B Broomfield dated 19 March 2004 in support of Woodlot's original application under section 116 of the Act.

[19] As to (1) in the preceding paragraph, Mr Goldsmith submitted this was wrong because:

(a) The fact that a consent becomes operative cannot give the Council any certainty, let alone any comfort, that the approved development will actually be carried out and that the financial contribution will consequently be paid. A resource consent is valid for five years. In the case of a subdivision consent that five year period is followed by a further three year period provided S223 approval is obtained. Many consents are delayed, and many consents are never carried out. The Council cannot credibly argue that it bases its budgets and reserve development programme on the basis of issued consents when there is no certainty that the consents will be implemented and no knowledge of timing if they are implemented.

(b) Assuming a subdivision consent (for example) does get to S224C certificate stage, indicating almost certainty of implementation, payment of a financial contribution which is under challenge cannot give the Council any certainty, or even any comfort, as to retaining the financial contribution under challenge, because of the fact that the contribution is under challenge. It is the challenge to the contribution which creates uncertainty as to source and funding of the financial contribution – not the bonding of that payment. Until the challenge is resolved, the uncertainty cannot be resolved. Payment of the amount to the Council prior to resolution of the legal challenge will not advance the Council's position on this point in any way.

(c) What Mr Field is essentially saying is that the Council's reserve development programme is based upon funding which the Council has no certainty of receiving, and that the reserve development programme will be prejudiced or undermined if the Council does not receive funds which it has no certainty of receiving. I submit that clearly expressed position does not provide grounds for payment to the Council rather than bonding. On the contrary, that expressed position by the Council would suggest bonding is more appropriate than payment – to prevent the Council from spending money it has no certainty of receiving [*query* – should this read 'keeping'?].

[20] Ms Macdonald conceded that Mr Goldsmith's argument is generally correct, but pointed out that the two sets of consents – i.e. by Wensley and Woodlot respectively – are in fact proceeding and thus the Council has some certainty that financial contributions will be paid.

[21] As to (2): that uncertainty as the timing of payment of financial contributions would require a recommendation to the Council that the programme of reserve development works be deferred indefinitely, Mr Goldsmith submitted that:

> The schedule of proposed works annexed to Mr Field's affidavit covers a three year period. It is self evident that the implementation of those works must depend upon the Council receiving funds it anticipates it may receive but cannot be certain that it will receive. That uncertainty arises in at least two fundamental respects:
>
> (a) Uncertainty as to the outcome of the financial contribution references which will determine the extent of financial contributions the Council can levy and may receive (although this point is offset by the point made in paragraph 12 below).
>
> (b) Uncertainty as to how much development will actually take place. Developments depend upon market conditions. Another SARS epidemic – a world wide stock market downwards correction – could significantly impact upon the extent of development carried out in Queenstown which would in turn significantly impact upon the extent of development financial contributions received by the Council.
>
> Given the above factors, then there can be no basis for a submission that payment to the Council of a financial contribution which is under legal challenge can or should impact on the implementation of reserve works intended to be implemented over a three year period.

[22] Ms Macdonald's argument became obscure (at least to me) at this point because she stated that the Council primarily relies on the provisions of the Local Government Act 2002 ('the LGA 2002') for levying development contributions. Those are not appealable to the Environment Court. She points out that the LGA 2002 empowers refunds if a development does not proceed. But as I understand them, such refunds are of development contributions under the LGA 2002, not of financial contributions under the RMA.

[23] As to (3): that a delay in payment of the contributions will result in a financial advantage to the developers and a corresponding detriment to the respondent resulting from the diminution in the purchasing power of the money over the period, Mr Goldsmith submitted that:

> It is inherent in this submission that the Council intends to spend the money upon receipt while the financial contribution is under challenge. That conclusion must flow from the comment in

Mr Field's paragraph 7 about "... the purchasing power of that money ...". That raises two particular concerns (at least):

(a) Why should the Council incur the benefit – and the developer incur the financial disadvantage – in a situation which would enable the Council to spend money that it is not yet entitled to receive and which it may have to refund if the legal challenge to the contribution is successful.

(b) The Council is not providing any security for repayment. It is somewhat ironic that the Council raises concerns about the appropriateness of relying on a bank guarantee[8] when the Council wants to spend money which it may have to repay under circumstances where it is not offering any security or guarantee to the developer that the funds can be repaid if and when required.

Mr Goldsmith submitted that there is nothing in this ground which would justify order for payment of the contribution upon 224(c) certification rather than bonding – and that in fact the contrary is the case.

[24] As to (4): that a precedent would be set so that other developers may seek to delay their payments in the same manner, Mr Goldsmith submitted that:

(a) ... there is nothing new in this situation. It has always been open to consent applications to challenge financial contributions and seek orders under Section 116;

(b) ... this situation has only arisen due to Council's recent (apparently) policy decision to levy the arbitrary maximums permitted under the Local Government Act provisions without any reference to particular circumstances arising under the consent application in question. It is that policy decision, coupled with the new regime that the Council is seeking to achieve through the reference process in relation to financial contributions, that has led to this situation arising. It is difficult to avoid a suspicion that the Council is simply levying the maximum possible in the hope that it can subsequently justify those financial contributions under a regime which has yet to be determined by the Environment Court. In my submission the Court should be careful about countenancing what may be a cynical use of Court procedure to maximise financial contributions;

(c) ... of most significance on this point is that Mr Field has failed to reveal in his affidavit the fact that the Council intends imposing a new financial contribution regime commencing on 1 July 2004. The Council's draft Long Term Council Community Plan ("LTCCP") has just been publicly notified for public comment so that it can be finalised

[8] Mr Field's affidavit paragraph 10.

and put in place before the end of June 2004. It appears clear that the Council intends levying financial development contributions under the Local Government Act as from 1 July 2004 as well as (i.e. as an alternative to) under the Resource Management Act. Development contributions levied under the LGA are not subject to appeal to the Environment Court. Any concern about "precedent" needs to be balanced against the fact that the Council intends implementing a regime which will avoid (at least in part) that precedent.

[25] As to (5): the argument that it is important to the respondent that funds be paid at the time that the "effect" giving rise to the need for the contribution arises, Mr Goldsmith submitted that this argument is invalid because:

(a) It does not necessarily follow that the "effect" arises at 224C stage. This is particularly the case in relation to a subdivision of bare land. S224C stage can precede issue of titles by a number of months. Building of houses does not normally commence until titles issue. It is rarely the case that houses are built on every residential lot at the same time. Uptake of subdivided bare land happens over a period. Given that, in the case of the two matters subject to these proceedings, the delay in receipt of funds by the Council would probably be a year at most (assuming the financial contribution references are resolved within the next year), there can be little substance to the Council's expressed concern that "effects" will arise (to any significant degree) prior to receipt of the financial contributions once the legal challenges are resolved.

(b) A study of the Schedule of Works annexed to Mr Field's affidavit shows quite clearly that many of them are works which will be carried out over a period of time regardless of "effects" arising. An example is the Wakatipu Trails Strategy. A direct link between the "effects" arising from the particular developments subject to these proceedings, and the need to implement a long term Trails Strategy, can only be described as tenuous at best.

(c) Possibly of greater concern is the indication given in Mr Field's affidavit – and the annexed Schedule of Works – that certain projects are to be funded entirely from reserve contributions. For example: the community desire for public walking trails which has led to the development of the Wakatipu Trails Trust strategy cannot properly be characterised as a demand only arising from new development. It is an existing demand. It should be funded, at least in part, from rates paid by existing residents. Mr Field's affidavit would indicate that the Council is not seeking financial contributions to cater for "effects" arising from future developments, but is actually seeking to make future developments pay for facilities needed because of existing unmet demand. This point not only undermines the submission being addressed in this and the preceding paragraph 13, but also raises a question about the validity and appropriateness of the financial contributions which had been levied in these two cases.

[26] As to (6): Council concern over uncertainty as to timing of payment due to the developer's ability to control the sale process, he submitted that:

(a) It was not the intention of the applicants when making the applications under Section 116 that liability to pay the sums under challenge should extend beyond determination of the substantive appeals by the Court.

(b) I acknowledge that the Court's Orders under Section 116 should appropriately include a requirement that the full amount of the financial contribution, as finally determined by the Court through the substantive appeal, be paid promptly thereafter. I suggest an appropriate time period would be five working days following the date that the Court's decision becomes final and beyond appeal.

[27] As to (7): the potential concern about request for bonds to be replaced with bank guarantees, he submitted that:

(a) The provision of bank guarantees to secure payment of bonded sums is very common. Construction bonds are an example.

(b) If this Council is going to suggest that a bank guarantee does not provide adequate security for payment, then it should provide affidavit evidence in support of such an assertion, rather than just making that assertion (or implication) on a unsubstantiated basis.

(c) As stated above, it is somewhat ironic that the Council is indicating that a bank guarantee may not be considered adequate security for payment when the Council wants to take the financial contribution which is under challenge, and spend it, without providing any security for repayment to the applicant in the event that the legal challenge is successful.

Consideration

[28] The first point I should bear in mind is that whatever I decide now is a temporary decision only, and may be substituted after full argument and evidence at the substantive hearing of the appeal. Emphasising the one-off nature of this particular decision is that the Council is promoting another method of collecting financial contributions under the Act in the form of a new Part 15 to the proposed plan. Mr Broomfield in his affidavit suggests that the maximum reserve contributions sought from Woodlot are inconsistent with the proposed new Part 15 of the proposed plan. Thirdly, and further emphasising the transience of this decision is that the Council now has a completely separate and alternative regime open to it for collecting development contributions under the Local Government Act 2002, so that this (temporary) decision is likely to have few long-term effects for the Council in relation to other cases.

[29] The Council's power to impose reserve contributions appears (I did not receive submissions on this) to arise out of a transitional provision in the RMA. Section 407 of the Act states:

> **407. Subdivision consent conditions** – (1) Where an application for a subdivision consent is made in respect of land for which there is no district plan, or where the district plan does not include relevant provisions of the kind contemplated by section 108(2)(a) or 220(1)(a), the territorial authority may impose, as a condition of the subdivision consent, any condition that could have been imposed under sections 283, 285, 286, 291, 321A, or 322, as the case may be, of the Local Government Act 1974 if those sections had not been repealed by this Act.

[30] The relevant provision in the Local Government Act 1974 – now repealed but relied on by the RMA as a method of calculating financial contributions: *Far East Investments Limited v Auckland City Council*[9] – is section 285 which states (relevantly):

> **285. Reserves contributions in case of residential subdivisions –**
>
> (1) Where the council is of the opinion that all or any of the allotments shown on the scheme plan submitted to it for its approval are intended to be used solely or principally for residential purposes, the council may require that provision shall be made to the satisfaction of the council for public reserves under the Reserves Act 1977 within the land on the scheme plan amounting to not more than 130 square metres for each allotment on the scheme plan which in the opinion of the council will be used for such purposes.
>
> (2) Subject to subsections (3) and (4) of this section, where the council is satisfied that the subdivision is adequately served by reserves or it is impracticable to provide such reserves, or where the area of the proposed reserves is less than 1,000 square metres, –
>
> (a) The council may, in lieu thereof, make it a condition of approval of the scheme plan that the owner shall pay to the council, within such time as it may specify, an amount of money specified by the council; or
>
> (b) The council and the owner may agree that instead of making such a payment the owner shall set aside within the subdivision an area of land to be vested in the council; or
>
> (c) The council and the owner may agree that a combination of the provisions of subsection (1) of this section and of paragraphs (a) and (b) of this subsection, or any of those provisions, shall apply.

[9] HC Auckland AP 404/87/01 Paterson and Chambers JJ. 28 March 2002 at para [27].

> (3) The value of the total contribution that the owner may be required to make under subsection (2) of this section (whether in money or land or both) shall not exceed 7.5 percent of the value of the allotments shown on the scheme plan that in the opinion of the council are intended to be used solely or principally for residential purposes.
> [My underlining]

[31] Thus the Council has power to make it a condition of approval of the subdivision plan that a financial contribution be paid, within a time specified by the Council. However there is a right, under section 358 of the RMA, to appeal against a condition imposed on a resource consent, e.g. under section 407 of the RMA. That power includes, I infer, an appeal about any question of when the financial contribution should be paid.

[32] I have considered the arguments outlined in the earlier paragraphs of this decision. As to non-payment of the financial contribution at the section 224 certificate stage creating uncertainty I do not understand that point. The financial contributions are subject to appeal to this Court – therefore whether or not they are ultimately to be paid is subject to the uncertainty of knowing what the Environment Court will do. It may be that the Court will find a maximum contribution is proper in both cases; but it is also possible that the Court will reduce the contributions.

[33] On the effects of this decision on the Council's funds, it seems to be slightly reckless financial planning for Mr Field to base the financing of reserve development on an assumption that:

- every application for subdivision will go ahead in the short term; and
- the full possible financial contribution will be recovered by the subdivider.

Indeed if that is truly the Council's approach, it may lead to allegations that the Council is fettering its judicial discretion when considering financial conditions on subdivision consents.

[34] As to the Council's concerns about uncertainty and insecurity as to payment if financial contributions are paid later than when a section 224 certificate is issued, there

is more merit in that. Dealing first with the uncertainty issue, that is simply resolved by Mr Goldsmith's suggestion that the financial contributions (when finalised by the Court) should be paid 5 working days after the Environment Court's determination on the merits becomes final and beyond appeal.

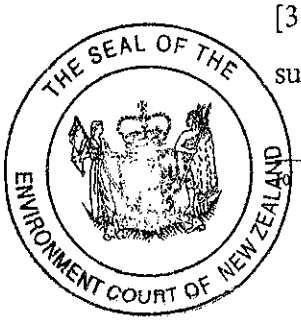
[35] Ensuring that the Council will be paid is simply a question of an appropriate guarantee from a registered bank or other substantial financial institution. If the Council is concerned about what is being offered it may apply to the Court on notice for further directions.

[36] The Council is also concerned that the effects of subdivision will start to occur before the financial contributions are paid. I have significant doubts about that. Most of the more direct effects of a subdivision (or any resource) consent are, or at least should be, controlled by more direct conditions which avoid, remedy or mitigate (sometimes as environmental compensation) the more-or-less likely adverse effects.

[37] As I understand the place of financial contributions in the RMA they are to compensate for remoter effects where the exact degree of causation and effect is not known. Accordingly the Act empowers[10] a contribution determined in the manner described in the plan so that difficult questions of proof of the relationship between the proposal and the (potential) actual effects, and of the scale of the effects, do not have to be assessed with impossible accuracy.

[38] It follows that in most cases, the indirect effects for which a local authority collects financial contributions are likely not immediately to follow the issue of a section 224 certificate, but to result from the subsequent development of the land, especially when buildings have to be built. In the latter case the indirect effects (e.g. the need for reserves, schools, roads) are usually far more likely to arise after occupation of the buildings.

[39] On all those factual issues I provisionally prefer Mr Goldsmith's fuller submissions to the rather brief evidence of Mr Field.



[10] Section 108(2)(a), (9) and (10).

[40] Therefore my temporary view is that no subdivisional reserve contribution need be paid as a financial contribution until after the substantive hearing and decision. Full evidence will need to be given by both sides on these issues at that time.

Outcome

[41] Under rule 287 of the District Court Rules 1992 I cancel the directions given on 7 April 2004 and I direct that:

(1) in relation to Wensley Developments Limited –

(a) the disputed sum of $1,070,815.98 be bonded on the basis that the correct amount be paid within five working days after the date that the decision determining the correct amount to be paid becomes final;

(b) the bond must be guaranteed by a registered bank or other substantial financial institution; but

(c) for the avoidance of doubt – no consent notice needs to be registered against any new title in relation to financial contributions.

(2) in relation to Woodlot Properties Limited –

(a) the sum of $175,000 be paid to the Council prior to section 224C certification;

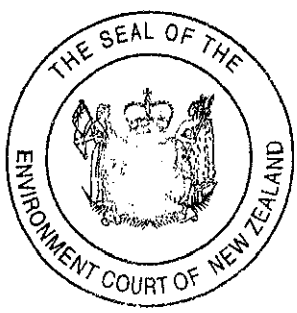
(b) the balance disputed sum of $100,625 must be bonded on the basis that the correct amount be paid within five working days after the date that the decision determining the correct amount to be paid becomes final;

(c) the bond must be guaranteed by a registered bank or other substantial financial institution; but

(d) for the avoidance of doubt – no consent notice needs to be registered against any new title in relation to financial contributions;

(e) if the amount finally determined as required to be paid to the Council is less than the $175,000 previously paid, the amount of overpayment shall be refunded by the Council to Woodlot within five working days after the date that the decision becomes final.

(3) In both proceedings leave is reserved to the Council to apply to the Court on notice if the Council considers the bank or financial institution whose

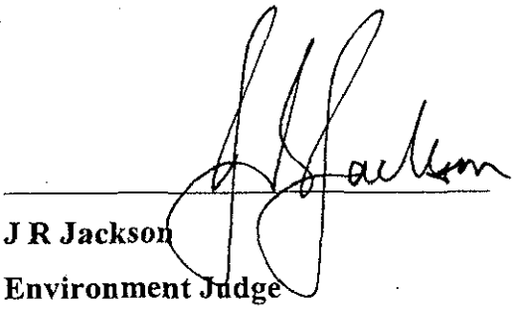


guarantee is offered is insufficiently secure, or indeed if the guarantee is not sufficiently tight.

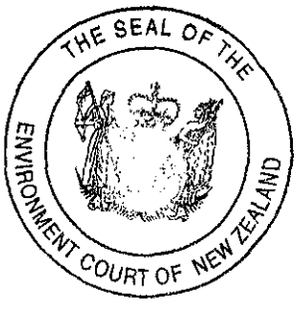
(4) Costs are reserved to become costs in the substantive hearing.

(5) Both proceedings are to be set down for a pre-hearing conference in the week of 29 November 2004. (A tight timetable for the exchange of evidence is likely to be set then with a view to a hearing in late January 2005).

DATED at CHRISTCHURCH 27 September 2004.



J R Jackson
Environment Judge



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